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

Report of the Panel

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US – Zeroing (EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, modified by Appellate Body Report, WT/DS294/AB/R
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("*US – Zeroing (Japan)*"), WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report, WT/DS322/AB/R.

GATT DISPUTE SETTLEMENT AND WORKING PARTY REPORTS CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Canada – Manufacturing Beef CVD	GATT Panel Report, *Canada – Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC*, SCM/85, 13 October 1987, unadopted
US – Wine and Grape Products	GATT Panel Report, *Panel on United States Definition of Industry Concerning Wine and Grape Products*, adopted 28 April 1992, BISD 39S/436

I. INTRODUCTION

A. COMPLAINT OF NORWAY

1.1 At issue in this dispute is Council Regulation (EC) No. 85/2006 of 17 January 2006 ("Definitive Regulation") imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of farmed salmon originating in Norway. Norway challenges the WTO-consistency of several aspects of this Regulation, in particular: (i) the identification of the product under consideration; (ii) the definition of the domestic industry; (iii) the calculation of the margin of dumping (including certain adjustments made to the cost of production when calculating constructed normal value); (iv) the findings of injury and causation; (v) the remedies imposed on dumped imports; and (vi) certain procedural aspects of the investigation.

1.2 On 17 March 2006, Norway requested consultations with the European Communities ("EC") with respect to the Definitive Regulation.[1] On 27 March 2006, Norway submitted an addendum to its request for consultations[2]. Consultations were held on 12 May 2006, but failed to resolve the dispute.

1.3 Norway requested the establishment of this Panel on 29 May 2006.[3]

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 At its meeting on 22 June 2006, the Dispute Settlement Body established a Panel pursuant to the request by Norway in document WT/DS337/2, in accordance with Article 6 of the Dispute Settlement Understanding (DSU).[4]

1.5 At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Norway in document WT/DS337/2, the matter referred to the DSB by Norway in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.6 On 27 July 2006, Norway requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.7 On 2 August 2006, the Director-General accordingly composed the Panel as follows:

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[1] WT/DS337/1.
[2] WT/DS337/1/Add.1.
[3] WT/DS337/2.
[4] WT/DS337/3.

Chairman:	Mr. José Graça Lima
Members:	Ms. Luz Elena Reyes de la Torre
	Mr. Donald Greenfield

1.8 Canada; China; Hong Kong, China; Japan; Korea; and the United States reserved their third-party rights.

C. PANEL PROCEEDINGS

1.9 The Panel met with the parties on 12-13 December 2006 and 6-7 February 2007. The Panel met with third parties on 13 December 2006.

1.10 On 4 August 2006, Norway submitted a letter to the Panel requesting it to establish special procedures to protect business confidential information ("BCI") and to use its powers under Article 13 of the DSU to seek certain information on the record of the EC's anti-dumping proceeding. In this latter regard, Norway requested that the Panel seek confirmation from the EC regarding the contents of the non-confidential record of the investigation, and a copy of any non-confidential record documents that Norway did not possess, as well as disclosure of the entire confidential record or at least that part of the confidential record relevant to Norway's claims described in the letter of 4 August 2006.

1.11 The Panel rejected Norway's request for it to seek information on 1 September 2006, deciding, after careful consideration, that, for the time being, it was not "necessary and appropriate" to seek the information requested by Norway. The Panel indicated it would consider any such requests in the future, to the extent expressly made by Norway, after it had at least reviewed the first written submissions of the parties. No such request to seek information pursuant to Article 13 of the DSU was subsequently received by the Panel. The Panel adopted additional working procedures concerning business confidential information on 20 September 2006.

1.12 By fax of 25 October 2006, the Panel received an unsolicited submission from Dr. Martin Jaffa of Callander McDowell, a UK consulting group involved in "Strategic Planning and Marketing for the Acquaculture Industry". A previous unsolicited submission from Dr. Jaffa had been received on 6 July 2006, before this Panel was composed, and a third unsolicited submission was received on 12 February 2007, after the second meeting of the Panel with the parties.

1.13 On 4 December 2006, the Panel transmitted copies of the first two unsolicited submissions to the parties and third parties, and provided them with an opportunity to comment, during the course of the first meeting of the Panel with the parties and third party session, on how the Panel should deal with these submissions. Having considered the views expressed by the parties and third parties, the Panel concluded that it would consider views expressed in the unsolicited submissions to the extent that parties decided to adopt the views expressed therein in their own submissions and arguments to the Panel.

II. FACTUAL ASPECTS

2.1 The anti-dumping investigation underlying this dispute was initiated on 23 October 2004 on the basis of a complaint lodged by the EU Salmon Producers' Group. The investigation of dumping and injury covered the period from 1 October 2003 to 30 September 2004 ("investigation period").[5] With respect to trends relevant for the injury assessment, data for the period from 1 January 2001 to

[5] Commission Regulation (EC) No. 628/2005 of 22 April 2005 imposing a provisional anti-dumping duty on imports of farmed salmon originating in Norway (Official Journal, L104/5, published 23 April 2005) (hereinafter "Provisional Regulation"), Exhibit NOR-9, para.5.

30 September 2004 was analyzed ("period considered").[6] The product concerned was defined as "farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen. The definition excludes other similar farmed fish products such as large (salmon) trout, biomass (live salmon) as well as wild salmon and further processed types such as smoked salmon".[7] Farmed salmon produced and sold on the domestic market of Norway, as well as farmed salmon produced and sold in the EC by the EC industry, were concluded to have the same basic physical characteristics and uses and therefore considered to be alike.[8]

2.2 The Commission, the investigating authority in the EC, based its analysis of dumping on a sample of companies stated to comprise the ten largest Norwegian exporting producers, and to represent almost 80 per cent of the export volume to the EC of all co-operating exporting producers.[9] The complaining EC producers, whose production was stated to represent around 90 per cent of total EC production of the product concerned, constituting a major proportion of EC production, were deemed to constitute the domestic industry.[10] A sample of domestic producers was selected, based on the largest representative volume of production that could reasonably be investigated within the time available, and the analysis of injury was based on data verified for the sample with respect to some indicators, and data collected for the EC industry as a whole for other indicators.[11]

2.3 Following preliminary affirmative determinations of dumping, injury, and causal link, provisional anti-dumping measures, in the form of *ad valorem* duties based on a non-injurious price, ranging from 6.8 per cent to 24.5 per cent, were imposed on imports of farmed salmon from Norway on 22 April 2005.[12] These measures were modified by an amendment dated 30 June 2005, which replaced the *ad valorem* duties with minimum import prices ("MIPs") for five presentations of farmed salmon.[13]

2.4 Following the Provisional Regulation and the amendment, disclosures were made to interested parties, comments were submitted, and parties so requesting were given opportunity to be heard. Further information was sought, and verification was undertaken of certain information. Following affirmative determinations of dumping, injury and causal link, definitive anti-dumping measures were imposed on 17 January 2006. The conclusions in the Provisional Regulation concerning product concerned and like product were confirmed.[14] Other findings in the Provisional Regulation were further examined and either modified or confirmed based on the information and arguments considered. The definitive measures took the form of a system of MIPs and fixed duties, both calculated based on non-injurious prices, for six presentations of farmed salmon.[15]

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[6] *Id.*
[7] *Id.* at para. 10.
[8] *Id.* at para. 14.
[9] *Id.* at para. 17.
[10] *Id.* at para. 45.
[11] *Id.* at para. 49.
[12] *Id.* at para. 139 and Article 1.
[13] The five presentations were: "Whole fish, fresh, chilled or frozen"; "Gutted, head-on, fresh chilled or frozen"; "Other (including gutted, head-off,) fresh, chilled or frozen"; "Whole fish fillets and fillets cut in pieces, weighing more than 300 g per fillet, fresh, chilled or frozen"; and "Other whole fish fillets and fillets cut in pieces, weighing 300 g or less per fillet, fresh, chilled or frozen." Commission Regulation (EC) No. 1010/2005 of 1 July 2005 (Official Journal, L170/32, published 1 July 2005), amending Provisional Regulation, Exhibit NOR-10, para. 7 and Article 1.
[14] Council Regulation (EC) No. 85/2006 of 17 January 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of farmed salmon originating in Norway (Official Journal of the European Union, L15/1, published 20 January 2006) (hereinafter "Definitive Regulation"), Exhibit NOR-11, para. 8
[15] *Id.*, paras. 128, 129, 136, and Article 1.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. NORWAY

3.1 In its first written submission, Norway requested the Panel to find that:

(i) in its definition of the product under consideration, the EC violated:

(a) Articles 2.1 and 2.6 of the *Anti-Dumping Agreement*, because it defined the product under consideration to include a range of products that are not all "like"; in consequence, the EC also violated:

- Articles 5.1 and 5.4 of the Anti-Dumping Agreement by initiating an investigation on the basis of a flawed "product" determination;
- Article 2.1 of the Anti-Dumping Agreement by making dumping determinations on the basis of a flawed product determination; and,
- Articles 3.1, 3.2, 3.4, 3.5 and 3.6 of the Anti-Dumping Agreement, because it examined injury to a domestic industry defined on the basis of a flawed product determination;

(ii) in its definition of the domestic industry, the EC violated:

(a) Article 4.1 of the *Anti-Dumping Agreement*, because it impermissibly excluded several categories of domestic producers from the definition of the domestic industry; in consequence, the EC also violated:

- Article 5.4 of the Anti-Dumping Agreement because it initiated an investigation without establishing that an application for initiation was made by or on behalf of a properly defined domestic industry; and
- Articles 3.1, 3.4 and 3.5 of the Anti-Dumping Agreement because it failed to make an objective examination of injury with respect to a properly defined domestic industry and because it improperly engaged in sampling of the domestic industry;

(iii) in its dumping determination, the EC violated:

(a) Article 6.10 of the *Anti-Dumping Agreement*, because it failed to include in the sample the Norwegian producers and exporters with the largest percentage volume of exports to the EC;

(b) Articles 2.2 and 2.2.1 of the *Anti-Dumping Agreement*, because it failed to determine that below cost sales were made at prices that did not permit the recovery of costs within a reasonable period of time;

(c) Articles 2.2 and 2.2.1.1 of the *Anti-Dumping Agreement*, because it made a number of improper adjustments to the costs of production and SG&A costs of a number of investigated producers;

(d) Article 2.2.2 of the *Anti-Dumping Agreement*, because it failed to base the amounts for SG&A costs and for profits on actual data pertaining to sales in the ordinary course of trade because of the low volume of the sales;

(e) Article 6.8 and Annex II(3) and II(6) of the *Anti-Dumping Agreement*, because it improperly used facts available to determine normal value for one sampled company; and,

(f) Articles 6.8 and 9.4, and Annex II(1), of the *Anti-Dumping Agreement*, because it failed correctly to determine margins of dumping for non-sampled companies; in particular:

- Article 9.4, because, for "cooperating" non-sampled companies, it failed to base its determination of the weighted average dumping margin on the definitive dumping margins determined for the sampled producers;

- Article 9.4, because, for "cooperating" non-sampled companies, it failed to exclude a margin established using facts available in its determination of the weighted average dumping margin;

- Article 9.4, because it incorrectly assigned to non-sampled companies that allegedly "did not cooperate or did not make themselves known" the highest dumping margin established for a sampled producer;

- Article 6.8 and Annex II(1) because it had inappropriate recourse to "facts available" in establishing the dumping margin for non-sampled companies that "did not cooperate or did not make themselves known";

(iv) in its injury determination, the EC violated:

(a) Articles 3.1, 3.2 and, in consequence, 3.5 of the *Anti-Dumping Agreement* in its examination of the volume of dumped imports;

(b) Articles 3.1, 3.2 and, in consequence, 3.5 of the *Anti-Dumping Agreement* in its examination of price undercutting; and,

(c) Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*, in its evaluation of price trends affecting EC producers;

(v) in its causation determination, the EC violated:

(a) Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*, because it failed properly to assess the injurious effects of the EC industry's increased cost of production; and,

(b) Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*, because it failed properly to assess the injurious effects of imports of salmon from Canada and the United States;

(vi) in its determination of the form of the anti-dumping measures, the EC violated:

(a) Article VI:2 of the GATT 1994, and Articles 9.1, 9.2, 9.3 and 9.4(ii) of the *Anti-Dumping Agreement*, by imposing minimum import prices that exceed normal value and that are not limited to the margin of dumping; and,

(b) Article VI:2 of the GATT 1994, and Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement* by imposing fixed duties that exceed the margin of dumping for certain producers;

(vii) in its conduct of the anti-dumping investigation, the EC violated:

(a) Articles 6.4 and 6.2 of the *Anti-Dumping Agreement*, because it failed to ensure an adequate opportunity for interested parties to see all non-confidential information in the record of the investigation;

(b) Articles 6.9 and 6.2 of the *Anti-Dumping Agreement*, because it failed to inform the interested parties of the essential facts that formed the basis for the decision to impose definitive anti-dumping measures; and,

(c) Articles 12.2 and 12.2.2 of the *Anti-Dumping Agreement*, because it failed to provide a reasoned and adequate explanation in support of its findings and conclusions.

3.2 Norway requested that the Panel recommend that the Dispute Settlement Body request the EC to bring the contested measure into conformity with its obligations under the *Anti-Dumping Agreement* and the GATT 1994.

3.3 In addition, Norway requested the Panel to make use of its discretion under the second sentence of Article 19.1 of the DSU by suggesting ways in which the EC could implement the recommendations and rulings of the DSB. Given the nature and scope of the EC's violations of the *Anti-Dumping Agreement* and of the GATT 1994, Norway believes that the EC's initiation of the investigation, and the measures resulting from it, are vitiated and deprived of legal basis. Consequently, Norway requested the Panel to suggest that the EC implement the recommendations and rulings of the DSB by withdrawing the contested measures.

B. EUROPEAN COMMUNITIES

3.4 In its first written submission, the European Communities requested the Panel to:

(a) reject all of Norway's claims and arguments, finding instead that, with respect to each of them, the EC acted consistently with all its obligations under the Anti-Dumping Agreement, the GATT 1994 and the covered agreements, including (non-exhaustively) as set out in the following paragraphs.

(b) reject Norway's claims that the EC acted inconsistently with Articles 2.1, 2.6 and (consequently) Articles 2.1, 3 and 5 of the Anti-Dumping Agreement when selecting the product concerned.

(c) reject Norway's claims that the EC acted inconsistently with Article 4.1 and (consequently) Articles 3 and 5 of the Anti-Dumping Agreement when determining the domestic industry.

(d) reject Norway's claims that the EC acted inconsistently with Articles 5.1 and 5.4 of the Anti-Dumping Agreement when initiating the original investigation.

(e) reject Norway's claims that the EC acted inconsistently with the following provisions of the Anti-Dumping Agreement:

- Article 6.10 in its selection of Norwegian producers and exporters for examination;

- Articles 2.2 and 2.2.1 in regard to the determination of below-cost sales;

- Article 2.2.2 in its determination of SG&A and profits in regard to sales made in low volumes;

- Article 6.8 and Annex II, paragraphs 3 and 6 in regard to the determination of normal value of one investigated company; and

- Articles 6.8 and 9.4, and Annex II, paragraph 1, in regard to the margins of dumping calculated for non-sampled companies.

(f) reject Norway's claims that, in its injury determination, the EC acted inconsistently with :

- Articles 3.1, 3.2 and, in consequence, Article 3.5 of the Anti-Dumping Agreement in its examination of the volume of dumped imports;

- Articles 3.1, 3.2 and, in consequence, Article 3.5 of the Anti-Dumping Agreement in its examination of price undercutting; and

- Articles 3.1 and 3.4 of the Anti-Dumping Agreement in its evaluation of price trends affecting EC producers.

(g) reject Norway's claims that, in its causation determination, the EC acted inconsistently with :

- Articles 3.1 and 3.5 of the Anti-Dumping Agreement because the EC did not fail to properly assess the injurious effects of the EC industry's increased cost of production; and

- Articles 3.1 and 3.5 of the Anti-Dumping Agreement because the EC did not fail to properly assess the injurious effects of imports of salmon from Canada and the United States.

(h) reject Norway's claims that its anti-dumping measures violated Article VI:2 of GATT 1994 and Articles 9.1, 9.2, 9.3 and 9.4(ii) of the Anti-Dumping Agreement by imposing minimum import prices exceeding the normal value and not limited to the dumping margin.

(i) reject Norway's claims that its anti-dumping measures violated Article VI:2 of GATT 1994 and Articles 9.1, 9.2, and 9.3 of the Anti-Dumping Agreement by imposing fixed duties that exceeded the dumping margin.

(j) reject Norway's claims that the EC acted inconsistently with Articles 6 and 12 of the Anti-Dumping Agreement.

(k) reject Norway's claims that it infringed Article 2, and in particular Article 2.2.1.1 of the Anti-Dumping Agreement when calculating the costs of the investigated companies for the purpose of determining their normal values.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written and oral submissions to the Panel, and in their answers to questions. The parties' arguments, as summarised by them pursuant to paragraph 12 of the Panel's working procedures, are set forth in this section. The full non-confidential text of Norway's submissions can be downloaded from the Government's web site.[16] The full non-confidential text of the submissions of the European Communities can be downloaded from the EC's web site.[17]

A. FIRST WRITTEN SUBMISSION OF NORWAY

4.2 The following summarizes Norway's arguments in its first written submission.

1. Introduction

4.3 Adjusting to increased international competition is part of the day-to-day challenges faced by enterprises throughout the world in a system of liberalised international trade. However, it has long been evident that a small part of Irish and UK producers of salmon has been unwilling or unable to adapt to the competitive environment of salmon farming, and has not responded to the need for structural changes. Instead, these producers have preferred to hide behind trade remedy measures that unjustly penalize imports from more efficient foreign producers. The contested anti-dumping measures have been imposed on the basis of an investigation by the EC authorities that falls far short of the standards set out in WTO law.

4.4 What the EC mistakenly calls "the domestic industry" supporting and cooperating in the anti-dumping investigation in this case produced as little as 18 000 tonnes of salmon during the IP, less than 3 per cent of annual consumption on the EC market. By contrast, the entire salmon industry in UK and Ireland produced 190 903 tonnes in 2003[18]. In essence, the "domestic industry" as defined by the EC for this particular case represents, in real terms, around 10 per cent of the total production in the UK and Ireland. The share of these producers has been steadily declining, as most other EC producers have adapted to market realities and have become more competitive. Rather than adapt to competition, a minority of EC producers has preferred to clamour for restrictions on trade.

4.5 The European Communities have repeatedly imposed restrictions on imports of Norwegian Salmon in one form or another (including anti-dumping and countervailing duty measures, as well as safeguards). For the past 17 years, hardly a year has gone by without some kind of restriction in place.

4.6 The previous anti-dumping and countervailing measures were revoked in May 2003.[19] For the first time since 1989, Norway's trade with the EC in salmon products was free of all forms of trade protection or threats of protection. However, free trade was short-lived. Only a few months later, in February of 2004, the Governments of Ireland and the United Kingdom petitioned the EC to introduce safeguard measures against imports of salmon. In August 2004, the EC imposed provisional

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[16] *See,* http://www.regjeringen.no/nb/dep/ud/tema/Handelspolotikk/WTO/WTO---Laksesaken/Norges-innleg-i-laksesaken-mot-EU-i-WTO.html?id=457526&epslanguage=NO.

[17] *See,* http://trade.ec.europa.eu/wtodispute/search.cfm?code=2.

[18] In the Definitive Safeguard Regulation, para. 51, the EC gives total EC production of 190,903 tonnes in 2003. In contrast, the Definitive Regulation, para. 40, gives the total production by the EC domestic industry, as defined by the EC in this dispute, as just 18,000 tonnes during the IP.

[19] Council Regulation (EC) No. 930/2003 of 26 May 2003 terminating the anti-dumping and anti-subsidy proceeding on imports of farmed Atlantic salmon originating in Norway and the anti-dumping proceeding concerning imports of farmed Atlantic salmon originating in Chile and the Faeroe Islands ("Termination Regulation"). Exhibit NOR-5

safeguard measures[20] that were confirmed by definitive measures in February 2005.[21] Chile and Norway immediately sought consultations with the EC regarding the definitive safeguard measures.[22] These unjustifiable measures were withdrawn by the EC on 23 April 2005 – just 2 months after their adoption.[23] However, on the very same day, the EC seamlessly transitioned from safeguard to provisional anti-dumping measures, which were imposed only on imports from Norway with an average rate of 22.5 per cent.[24] A leading official in the Commission had on 19 November 2004, prior to the reception of the questionnaires from Norwegian producers, predicted this finding.[25] This dispute concerns the definitive version of those measures, which were imposed on 17 January 2006.[26]

4.7 Thus, constant protection for domestic producers, and constant restrictions on international trade, has been the norm. Norwegian producers have had to face those restrictions, and have adapted to them by becoming increasingly more efficient producers over the years: today, the Norwegian industry produces five times more per employee than the Scottish complainants, and has cost of production levels far below those of the sampled Scottish companies in this case.

4.8 To be able to justify the imposition of anti-dumping measures in this case, the EC has disregarded, misrepresented or refused to take into account the facts and resorted to flawed constructed values, and it has failed to provide reasoned and adequate explanations of its determinations. The EC has thereby published a regulation that is so thin on facts that a reader has no basis to understand how the EC arrived at the determinations therein.

4.9 Virtually every aspect of the Definitive Regulation involves an inconsistency with WTO rules. To begin, the EC did not even properly establish a right to initiate the investigation consistently with the Anti-Dumping Agreement. The investigation should, therefore, never have been opened. Further, two of the fundamental building blocks for the entire investigation – the "product" and the "domestic industry" – are flawed, and defined in mutually inconsistent terms. Moreover, the determinations of dumping, injury and causation are tainted by numerous WTO-inconsistencies. The EC, therefore, failed to establish a right to impose the contested anti-dumping measures. Additionally, the anti-dumping measures it imposed do not respect the WTO rules regarding the maximum level of duties.

4.10 On top of these substantive violations, the EC also paid scant regard to the requirements of transparency set out in the Anti-Dumping Agreement. The EC provided Norway with an incomplete copy of the non-confidential record of the investigation. It also failed to disclose the essential facts

[20] Commission Regulation (EC) No 1447/2004 of 13 August 2004 imposing provisional safeguard measures against imports of farmed salmon and Corrigendum to Commission Regulation (EC) No 1447/2004. Exhibit NOR-6.

[21] Commission Regulation (EC) No 206/2005 imposing definitive safeguard measures against imports of farmed salmon and Commission Regulation (EC) No 580/2005 of 14 April 2005 amending Regulation EC No 206/2005 ("Definitive Safeguard Regulation"). Exhibit NOR-7.

[22] WT/DS326/1 (Chile) and WT/DS328/1 (Norway).

[23] Commission Regulation (EC) No 627/2005 of 22 April 2005 revoking Regulation (EC) No 206/2005 imposing definitive safeguards measures against imports of farmed salmon. Exhibit NOR-8.

[24] Commission Regulation (EC) No. 628/2005 of 22 April 2005 imposing a provisional anti-dumping duty on imports of farmed salmon originating in Norway ("Provisional Regulation") (Official Journal, L104/5, published 23 April 2005), as amended by Commission Regulation (EC) No. 1010/2005 of 1 July 2005 (Official Journal, L170/32, published 1 July 2005). Exhibits NOR-9 and NOR-10.

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

[26] Council Regulation (EC) No. 85/2006 of 17 January 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of farmed salmon originating in Norway. ("Definitive Regulation") (Official Journal of the European Union, L15/1, published 20 January 2006). Exhibit NOR-11. The Definitive Regulation confirms, and incorporates reasoning from, the Provisional Regulation.

that formed the basis for its decision to impose definitive measures. In essence, the EC's disclosure of the essential facts involved the provision of a preparatory draft of the Definitive Regulation. In principle, that draft should have disclosed the essential facts because these must be addressed and explained in published determinations. However, contrary to the requirements of the Anti-Dumping Agreement, the Definitive Regulation is characterized by a complete failure to explain "the evidentiary path" that led the EC to its findings and conclusions.[27] In short, the EC does not explain how the evidence in the record supports its determinations. As a result, it is extremely difficult – often impossible – for Norway to understand on what basis the EC reached its conclusions.

4.11 Norway regrets that it has been compelled to bring so many claims in this dispute. However, although many in number, each of Norway's claims is an important stepping-stone to ensure that the EC affords WTO-consistent treatment to Norway's trade in salmon products. Given the chronic character of the EC's protection of its salmon industry, Norway wishes to avoid a situation where issues are left unresolved prior to implementation of the Panel's findings and recommendations. Were the Panel to exercise judicial economy with respect to certain claims, this could have important repercussions for the course of EC's implementation. Norway, therefore, respectfully requests the Panel to make findings on each and every claim made. Norway believes that the nature and number of the EC's violations vitiate the entire investigation and the measures resulting from it. As a result, Norway believes that the EC must withdraw the measure.

2. Summary of Norway's Claims

4.12 Broadly speaking, Norway's claims can be grouped under the headings below. However, for the full extent of claims and arguments we refer to the brief:

(a) Improper definition of the product under consideration, and improper initiation of the investigation (Section III of the brief)

4.13 The EC improperly defined the scope of the product under consideration. The EC determined that a group of different salmon products – including everything from whole fish to small skinned fillets – constitute a single product. However, the EC's determination fails to demonstrate, in view of the differences between these products, that they constitute a single product. There are no facts in the regulation supporting any of the assertions therein, just as there are no facts in the record in support of EC's determinations.

4.14 The EC, concluded, quite correctly, that these different products are produced by two different industries, namely, on the one hand, the "salmon growers" and, on the other hand, the "downstream processing industry" producing fillets for which the product of the salmon growers is the input product. Importantly, the EC found that the EC fish farming industry and the EC processing industry have conflicting interests.[28] Two GATT panel reports, the panels in *US – Wine and Grapes*[29] and *Canada – Beef*[30], dealt with the distinction between raw and processed agricultural products, and both concluded that the different production processes meant that they were different products. Furthermore, in *US – Lamb*, the Appellate Body confirmed that, in determining whether "two Articles are separate products", the authorities should examine the production process used to manufacture the two articles.[31] Thus, the fact that two products result from separate production

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

[28] Definitive Regulation, para. 114. This statement identifies the EC salmon processing industry as a "users industry", which is distinguished from the EC domestic industry.

[29] GATT panel report, *US – Wine and Grapes*, para. 4.2.

[30] GATT panel report, *Canada – Beef*, para. 5.3.

[31] Appellate Body Report, *US – Lamb*, footnote 55.

processes indicates that those products are *not* produced by a single industry and are not a single product.[32]

4.15 The product scope is of fundamental importance to the investigation because it determines: which domestic industry must support the initiation of an investigation; which products are compared in making a dumping determination; and which domestic industry must be examined in an injury determination. Improper determination of the product scope, therefore, has profound consequences for an investigation.

4.16 By improperly defining the "product", the EC violated Articles 2.1 and 2.6 of the *Anti-Dumping Agreement*, because it defined the product under consideration to include a range of products that are not all "like". In consequence, the EC also violated Articles 5.1 and 5.4 of the *Anti-Dumping Agreement* by initiating an investigation on the basis of a flawed "product" determination; Article 2.1 of the *Anti-Dumping Agreement* by making dumping determinations on the basis of a flawed product determination; and Articles 3.1, 3.2, 3.4, 3.5 and 3.6 of the *Anti-Dumping Agreement*, because it examined injury to a domestic industry defined on the basis of a flawed product determination – with a mismatch between the product produced by the domestic industry (as defined by the EC) and the "product under consideration".

(b) Flawed definition of domestic industry and incorrect use of sampling for injury purposes (Section IV of the brief)

4.17 Having defined the "product" – albeit improperly – to include a range of products from whole fish to small filleted products, the EC was obliged to include the producers of *all* these products in the domestic industry. The EC did not do so. Instead, it defined the industry to include the *growers* of farmed salmon that produce whole/gutted fish. It excluded the entire EC processing industry that produces filleted products, but does not grow salmon. There is, therefore, a fatal mismatch between the determinations of the "product" and the "domestic industry".

4.18 The EC has a large processing industry that transforms "*several hundred thousand tonnes*" of farmed salmon annually.[33] This industry has been excluded from the domestic industry, even though the filleted products it produces are part of the investigated product. In addition, the EC improperly excluded several other entire categories of salmon growers. The EC excluded entirely the following categories of producer from the industry:

- related producers;
- producers of filleted products that do not grow salmon;
- producers that did not expressly support the Complaint (i.e. silents);
- producers that exclusively produced certain types of salmon;[34]
- producers that fell into receivership during the IP;[35]
- producers/production of organic salmon;[36] and,
- producers that did not provide data in the format requested or were otherwise deemed not to have cooperated fully.[37]

[32] *See*, in particular, paragraphs 148 – 155 of Norway's First Written Submission.
[33] Letter from Syndicat Saumon et Truite Fumés to the EC, 26 May 2005. Exhibit NOR-17. Unofficial translation from French original.
[34] Definitive Regulation, para. 39.
[35] Definitive Regulation, para. 39.
[36] Definitive Regulation, para. 43.
[37] Definitive Regulation, para. 39.

4.19 After all these exclusions, the entire EC industry comprised just 15 small salmon growers (employing 221 persons), all of which petitioned for the initiation of an investigation. The EC thereby defined the domestic industry incorrectly and in a manner that skewed the investigation. In consequence, the EC failed to establish that the proper domestic industry supported the initiation of the investigation; and it failed to make an injury determination for the proper industry.

4.20 Assuming that the "product" scope of the investigation is properly defined (*quod non*), the EC has violated Article 4.1 in its definition of the "domestic industry".

4.21 The comprehensive character of an injury determination is consistent with the fact that it is one of the pre-conditions for the imposition of anti-dumping duties, which protect all domestic producers. An authority cannot impose duties unless that is warranted by the need to protect these producers, as a whole, and not just a select group of them.

4.22 The Appellate Body reached the same conclusion in *US – Hot-Rolled Steel*. In that dispute, the USITC divided the domestic industry into two parts: production for the merchant market and production that is captively consumed. The USITC examined aggregate data for both parts of the industry. It also conducted a "selective examination" of the merchant market, but made no equivalent examination of the captive market.[38] The Appellate Body held that, under Article 3, "[t]he investigation and examination must focus on the *totality* of the 'domestic industry' and *not simply on one part, sector or segment of the domestic industry*."[39] It found that the "*selective*" examination of just "one part" of an industry is not "objective" because the authority could choose the worst performing part of the industry for examination, thereby making an injury determination "more likely".[40] Thus, an investigating authority cannot single out particular parts of the domestic industry for investigation, to the exclusion of other parts. However, this is precisely what the EC did.

4.23 The EC moreover did not even conduct an injury analysis of its improperly defined domestic industry. Instead, it selected a very small, non-representative sample. Article 3 of the *Anti-Dumping Agreement* does not allow an investigating authority to use sampling for injury analysis purposes. In any event, even if sampling were permitted – *quod non* -- an authority cannot, purposefully, structure its sample of the domestic industry in such a way that it fails to examine the situation of identifiable categories of producers and segments of the industry.

4.24 The EC thus violated Article 4.1 of the *Anti-Dumping Agreement*, because it impermissibly excluded several categories of domestic producers from the definition of the domestic industry. In consequence, the EC also violated: Article 5.4 of the *Anti-Dumping Agreement* because it initiated an investigation without establishing that an application for initiation was made by or on behalf of a properly defined domestic industry; and Articles 3.1, 3.4 and 3.5 of the *Anti-Dumping Agreement* because it failed to make an objective examination of injury with respect to a properly defined domestic industry and because it improperly engaged in sampling of the domestic industry.

(c) The EC's dumping determinations violate the Anti-Dumping Agreement in numerous respects (Sections V and XI of the brief)

4.25 *First*, the EC's sample of ten Norwegian producers does not cover the largest percentage of the volume of exports to the EC, because the EC excluded from the sample all non-producing exporters as well as two large producers. The sample, therefore, covers a far smaller volume of exports than it should have pursuant to Article 6.10 of the *Anti-Dumping Agreement*.

[38] Appellate Body Report, *US – Hot-Rolled Steel*, para. 214.
[39] Appellate Body Report, *US – Hot-Rolled Steel*, para. 190. Emphasis added.
[40] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

4.26 *Second*, in deciding that normal value should be constructed, the EC failed to determine that below-cost sales were made at prices that did not permit the recovery of all costs within a reasonable period of time, as required by Article 2.2.1 of the *Anti-Dumping Agreement*.

4.27 *Third*, in constructing normal value, the EC failed to calculate amounts for SG&A costs and for profits on the basis of actual data pertaining to sales in the ordinary course of trade. The Appellate Body in *EC – Tube or Pipe Fittings* addressed squarely whether actual data can be rejected under Article 2.2.2 because it pertains to a low volume of domestic sales. It ruled that an investigating authority must use "actual SG&A and profit data for sales in the ordinary course of trade" if such sales exist, *irrespective of the volume of the sales*.[41] In other words, it rejected the view that actual data from a low volume of domestic sales is not a reliable basis for calculating SG&A costs and profits, provided, of course, that the low volume involves sales in the ordinary course of trade. Contrary to the Appellate Body's interpretation of Article 2.2.2 in *EC – Tube or Pipe Fittings*, and the EC's own arguments in that dispute, the EC wrongly rejected actual sales data because of the low volume of those sales.

4.28 *Fourth*, the EC acted inconsistently with Article 6.8 and Annex II of the *Anti-Dumping Agreement* because it had recourse to facts available in constructing normal value for one of the sampled producers, without respecting the conditions in those provisions.

4.29 *Fifth*, the EC incorrectly determined both a weighted average, and a "residual", margin of dumping for non-sampled producers and exporters in a manner that violates Article 9.4 of the *Anti-Dumping Agreement*.

4.30 In determining the weighted average margin, the EC failed to base its determination on the definitive dumping margins determined for the sampled producers. In the General Definitive Disclosure document[42], the EC determined a margin of dumping of 14.8 per cent for "cooperative non-sampled companies". After the Definitive Disclosure, the EC made downward revisions to the individual margins of dumping for three sampled producers.[43] These revisions logically imply a decrease in the weighted average margin, given that the other seven individual margins remained unchanged. However, the EC did not alter the weighted average margin, leaving it at 14.8 per cent in the Definitive Regulation. The EC also included a margin calculated with "Facts Available" in the calculation of the weighted average, although expressly prohibited by Article 9.4. This margin is, therefore, higher than it should be.

4.31 In determining the "residual" margin for so-called "non-cooperative or unknown companies", the EC improperly had recourse to facts available under Article 6.8 and Annex II of the *Anti-Dumping Agreement*. The EC also, incorrectly, assigned to non-sampled companies that allegedly "did not cooperate or did not make themselves known" the highest dumping margin established for a sampled producer instead of the weighted average dumping margin. Instead, the EC should have assigned to those producers also the (correct) weighted average dumping margin.

4.32 *Sixth*, the EC improperly constructed normal value for six producers. In virtually all cases, the EC constructed normal value on the basis of costs of production plus an amount for SG&A costs and for profits. However, in determining normal value, the EC made numerous improper and unexplained adjustments to the sampled producers' reported costs, thereby artificially inflating them. These adjustments have a significant effect on the individual margins of dumping; in one case, removing the unjustified cost adjustment eliminates the margin of dumping entirely.

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[41] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 97.

[42] General disclosure document containing Definitive findings in the AD proceeding concerning farmed salmon from Norway. Investigation AD-487. Dated 28 October 2005. Exhibit NOR-67.

[43] *See* para. 461 of Norway's First Written Submission.

4.33 Taken together, these inconsistencies amount to numerous violations of Articles 2.2, 2.2.1.1, 2.2.2, 6.8, 6.10, 9.4 and Annex II of the *Anti-Dumping Agreement*.

(d) The EC's injury determination violates the Anti-Dumping Agreement

4.34 *First*, the EC treated all imports from Norway as dumped, even though it had found that one of the sampled producers was not dumping. Moreover, the EC's sample consisted exclusively of *producers* of salmon, to the deliberate exclusion of independent *exporters* of salmon. The EC itself acknowledged that the sample consisted of six producers that do not themselves export salmon and four integrated producer-exporters.[44] On the basis of a sample that included only *producers*, the EC assumed that imports from all non-producing exporters were dumped. However, the EC's dumping determinations regarding sampled *producers* do not provide "positive evidence" that imports from non-sampled *exporters* are also dumped, as required by Article 3 and also emphasized by the Appellate Body.

4.35 As explained in Section V.A of Norway's first written submission, the Norwegian salmon industry includes, besides producers and integrated producer-exporters, a third major category of companies: independent traders that do not produce salmon but purchase it for sale on domestic and export markets.[45] Independent exporters are a key constituent of the Norwegian salmon industry, with considerable exports from Norway to the EC. Producers and exporters are engaged in different activities and have different cost structures. Even if some producers were dumping. that does not necessarily mean that exporters were also dumping.

4.36 *Second*, the EC concluded that dumped imports were undercutting the EC industry's prices by 12 per cent. However, in reaching this conclusion, the EC ignored the fact that EC salmon products generally enjoy a price premium in the marketplace of 12 per cent – a price premium recognized by the EC on numerous occasions[46] and evidenced by documents on the record. The EC itself even acknowledged this fact in its draft definitive determination, but then deleted the relevant finding at the last moment without any explanation. Taking account of this price premium, there was no price undercutting.

4.37 *Third*, the EC examined the prices of a sample of five Scottish producers in euros, and concluded that prices had dropped by 9 per cent. However, this price "decrease" is a mathematical construct and stems entirely from an appreciation in the value of the euro in comparison to the pound sterling over the period considered. Measured in pound sterling, prices remained *constant* and did *not* fall. For these Scottish producers, the evaluation of prices must be made in pounds sterling because their costs are incurred in that currency, as are the vast majority of their sales. The use of euros, therefore, distorted the injury determination.

4.38 *In consequence,* the EC violated Articles 3.1, 3.2, 3.4 and 3.5 of the *Anti-Dumping Agreement.*

[44] *See* letter from the EC to FHL and NSL, 22 November 2004. Exhibit NOR-39.

[45] *See* para. 297 of Norway's First Written Submission and the references therein, for instance, Regulation (EC) No. 1890/1997, para. 12 and Termination Regulation, para. 35. Exhibits NOR-2 and NOR-5.

[46] This fact was expressly acknowledged by the EC in its General Disclosure document, which stated that the usual price premium for domestic salmon products is 12 per cent. (General Disclosure, para. 122. Exhibit NOR-67.)

(e) The EC's causation determination violates Articles 3.1 and 3.5

4.39 The EC failed to ensure that injury caused by two other known factors – (1) the EC producers' increased costs of production, and (2) surging imports from Canada and the United States – were not improperly attributed to dumped imports.

4.40 *First*, the EC's analysis masked the fact that the domestic industry's costs of production rose significantly during the period considered. The EC masked this fact by examining price trends in euros, instead of pounds sterling, the relevant currency for the sampled Scottish salmon growers. Because unit sales prices were constant in pounds sterling[47] and because sales volumes increased by 7 per cent, the sampled producers' revenues must have increased during the period considered. But during that same period, the profitability of the EC producers turned from positive to negative. This suggests that losses sustained by the EC industry during the IP were caused by an increase in costs of production that outstripped the industry's increased revenues. Since three of the five Scottish companies were engaged in, or in transition to, organic farming during the IP, it seems likely that their increased costs are partly due to organic farming.[48] In pounds sterling, their costs increased with an average for all five producers of 14.9 per cent. In essence, the producers' increased costs more than eliminated their higher sales revenues. The complete absence of analysis by the EC on this point violates Articles 3.1 and 3.5 of the *Anti-Dumping Agreement.*

4.41 *Second*, the EC dismissed the significance of a 560 per cent increase in imports from Canada and the United States on the grounds that these imports consisted mostly of wild salmon, which, the EC found, did not compete with farmed salmon. Unfortunately, the EC offers no facts in support of these conclusions and even admits that its import statistics do *not* separate farmed and wild salmon. There was, therefore, no basis for the EC to conclude that the surge in imports consisted of wild salmon. The evidence in the record also directly contradicts the EC's unsubstantiated conclusion that farmed and wild salmon do not compete.

(f) The EC's use of minimum import prices and fixed duties violates the Anti-Dumping Agreement

4.42 The EC imposed the definitive anti-dumping measure in the form of minimum import prices (MIPs). MIPs are a form of variable anti-dumping duty imposed on the basis of a reference price. In establishing these MIPs the EC violated Article VI:2 of the GATT 1994, and Articles 9.1, 9.2, 9.3 and 9.4(ii) of the *Anti-Dumping Agreement*.

4.43 *First*, under WTO rules, the reference price may not exceed normal value. Normal value constitutes the dividing line between fair and unfair trade, delineating when duties can and cannot be imposed. Accordingly, if variable anti-dumping duties are imposed on the basis of a reference price, the reference price cannot exceed normal value. This was recognized by the panel in *US – Zeroing (Japan)*, which stated that "[in a prospective normal value system] an importer who imports a product the export price of which is equal to or higher than the prospective normal value cannot incur liability for payment of anti-dumping duties".[49] The EC itself recognized as much in its Definitive Regulation,

[47] The price in 2001 and in the IP was constant at GBP 1,88 per kilo. The assertion by the EC of a 9 per cent drop is due to the appreciation of the Euro in comparison to the GBP, which is unrelated to the prices in Scotland.

[48] It appears from the companies' public statements that Loch Duart, West Minch and Wester Ross Salmon were exclusively or almost exclusively producing organic salmon during the Investigation Period (See paras. 248-252 of Norway's First Written Submission.)

[49] Panel report, *US – Zeroing (Japan)*, para. 7.201. See also para. 7.205 of that panel report.

when it emphasized that their so-called "non-injurious" MIPs were *lower* than "non-dumped" MIPs, which it said were "calculated on the basis of normal value".[50]

4.44 However, for many investigated producers, for some or all of the MIP product categories, the MIPs do exceed the individually determined normal values, as shown in Norway's First Written Submission, table 9 (page 183).

4.45 *Second*, the MIPs, consequently, also exceed the weighted average normal value, applied to the non-sampled producers and exporters, for all MIP product categories.

4.46 *Third*, any anti-dumping duty, in whichever form, cannot exceed the margin of dumping. The Appellate Body in *US – Zeroing (EC)* found that:

> … the *margin of dumping* established for an exporter or foreign producer *operates as a ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) … .[51]

4.47 The Appellate Body has also stated that, under Article 9.3, the amount of the anti-dumping duty must "correspond to" or be "less than" the individually determined dumping margin.[52]

4.48 In this case, the amount of duties imposed by reference to the MIPs is not limited to the margin of dumping for individual producers. This is because, in the case of the contested MIPs, the duty imposed is the full amount by which the net free-at-Community-frontier price is below the MIP. This duty can also be expressed as an *ad valorem* equivalent - namely, as the ratio of the amount of duty collected on a shipment to the price of the imported product. Where the actual price of a shipment decreases, the *ad valorem* equivalent of the duty increases and may well go above the margin of dumping (per cent rate) determined for the examined producers. Contrary to Article VI:2, and Articles 9.1 and 9.3, there is no mechanism in the EC measure to ensure that the amount of duties imposed does not exceed the margins of dumping determined for the examined producers.

4.49 *Furthermore*, the EC additionally imposes fixed duties – which are distinct from the MIPs – as a punitive tariff in cases of alleged "circumvention". The fixed duties do in certain circumstances elevate the entry price *above* the relevant MIP. These situations arise where the amount of the fixed duty exceeds the difference between actual price and the MIP. As is the case for the MIPs, the EC has failed to adopt a "ceiling" or "cap" to ensure that the fixed duties, expressed as an *ad valorem* equivalent of the export price, do not exceed a producer's margin of dumping. As a result, in the case of five producers (see Table 10 in Norway's First Written Submission), the fixed duty for each of the six products exceeds the dumping margin for some or all export prices.

(g) The EC violated its procedural obligations under Articles 6 and 12 of the Anti-Dumping Agreement

4.50 The EC's investigation and its published determinations are characterized by a lack of transparency. *First*, the EC acted inconsistently with Article 6.4 because it failed to disclose non-confidential information contained in the record of the investigation. Norway has already submitted a list of document that it knows, or has good reason to believe, were missing from the non-confidential record when Norway inspected it.[53] *Second*, the EC failed to disclose the essential facts that formed the basis for the EC's decision to impose duties, as required by Article 6.9. The EC's purported

[50] Definitive Regulation, para. 129.
[51] Appellate Body Report, *US – Zeroing (EC)*, para. 130. Original emphasis.
[52] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, footnote 156 to para. 125.
[53] Letter from Norway to the Panel, 4 August 2006, Annex 3-A. Exhibit NOR-13.

disclosure of essential facts amounted to a draft of the Definitive Regulation that, very largely, fails to refer to any facts forming the basis for the EC's determination. *Third*, the EC violated Article 12 because it failed to provide a reasoned and adequate explanation for a number of its findings and conclusions.

3. Conclusion

4.51 Norway respectfully requests that the Panel recommend that the Dispute Settlement Body request the EC to bring the contested measures into conformity with its obligations under the *Anti-Dumping Agreement* and the GATT 1994.

4.52 In addition, Norway respectfully requests the Panel to make use of its discretion under the second sentence of Article 19.1 of the DSU by suggesting ways in which the EC could implement the recommendations and rulings of the DSB. Given the nature and scope of the EC's violations of the *Anti-Dumping Agreement* and of the GATT 1994, Norway believes that the EC's initiation of the investigation, and the measures resulting from it, are vitiated and deprived of legal basis. Consequently, Norway respectfully requests the Panel to suggest that the EC implement the recommendations and rulings of the DSB by withdrawing the contested measures.

B. FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

4.53 The following summarizes the European Communities' arguments in its first written submission.

1. Introduction

2. Standard of Review

4.54 The Panel must not conduct a *de novo* review.

3. Product Concerned

4.55 Article 2.6 contains a definition, not obligations. Article 2.1 contains no obligations regarding the selection of the product concerned. The EC's selection of the product concerned cannot therefore be found inconsistent with those provisions. Norway's consequential claims must also therefore fail.

4.56 Norway confuses the concepts of product concerned and "like product". Furthermore, Norway fails to demonstrate, on the basis of admissible facts and evidence or otherwise, that the product concerned could not include farmed salmon, presented as fillets. In any event, farmed salmon, however presented, is a like product.

4. Domestic Industry

4.57 Article 4.1 contains a definition, not an obligation. Norway's consequential claims must also fail. According to Norway, because of the situation of EC filleting-only undertakings, an anti-dumping proceeding was by definition impossible. Norway considers that all change is production, which would result in double counting. The position of industrial users is expressly provided for in Article 6.12, with which the EC complied. "Produce" includes : "Bring (a thing) into existence; …". The EC filleting-only undertakings are not concerned with bringing the product concerned (farmed salmon) into existence, or *producing* it. Rather, they are concerned with the process of *consuming* it. In a fisheries context the term "produce" particularly has this meaning. This is confirmed by the preparatory work and past GATT and WTO reports.

4.58 In this case the measure at issue states clearly that during the investigation period the estimated total EC production was 22,000 tonnes; that the 15 cooperating EC producers produced around 18,000 tonnes; and that they therefore represent around 82 per cent (i.e. a major proportion) of EC production. Norway does not contest the factual accuracy of either of the numbers used to make this calculation. The measure is thus consistent with the requirements of Article 4.1.

4.59 The EC sample of EC producers complied with the requirements of the *Anti-Dumping Agreement*. The EC did not conduct an injury analysis for only part of the EC industry. It correctly defined that industry, and then analysed it as a whole, on the basis of permissible sampling techniques.

5. Initiation

4.60 Norway's consequential claims should be rejected for the reasons already given above.

6. Dumping

(a) Limiting the examination under Article 6.10

4.61 The EC has always preferred to base dumping margins on producers rather than exporters, and in the salmon case it reverted to this traditional practice. This was possible because of structural changes in the Norwegian industry.

4.62 The same preference is reflected in the text of the *Anti-Dumping Agreement*, which assumes that normal values are determined for parties that 'produce'. This interpretation also follows from Article 2.5, and has the advantage of discouraging producers from evading duties by selling to traders.

4.63 The choice of companies made by the EC satisfies the criterion in Article 6.10 of the 'largest percentage by volume of exports from the country in question that can reasonably be investigated.' Furthermore, by consulting and seeking agreement with the Norwegian fish producers association the EC sought to meet the goal set in Article 6.10.1, and to satisfy the criterion of reasonableness. The ten companies selected by the EC constituted a satisfactory choice, bearing in mind the information available to the EC at the time.

(b) Below cost sales and Articles 2.2 and 2.2.1

4.64 In calculating normal value the EC correctly applied Articles 2.2 and 2.2.1 of the *Anti-Dumping Agreement*. In particular, in applying the notion of sales below cost 'made within an extended period of time in substantial quantities and … at prices which do not provide for the recovery of all costs within a reasonable period of time' the EC was entirely justified in using the investigation period as both the 'extended period of time' and the 'reasonable period of time'.

4.65 The EC's practice of disregarding all domestic sales prices where less than 10 per cent are sold below cost is based on the general 'not in the ordinary course of trade' criterion, and not on the specific rule in Article 2.2.1. The inclusion of such sales would risk distorting the result of the calculation.

(c) SG&A and profits and Article 2.2.2

4.66 Norway attacks the EC under Article 2.2.2 in regard to its calculation of the 'reasonable amount for administrative, selling and general costs and for profits' when constructing normal values because it excluded data regarding sales whose prices were disregarded on grounds of low volume.

Norway argues that the sole ground for excluding such data is that the sales were not in the ordinary course of trade.

4.67 In part Norway's claim is misplaced because it does not appreciate that the disregard of sales under the 'less than 10 per cent profitable rule' (above) is based on the ordinary course of trade principle.

4.68 Norway is mistaken in assuming that the scope of the phrase 'ordinary course of trade' in Article 2.2.2 is intended to exclude low volume sales. As is shown by the example of the option of using sales prices to third countries, the phrase is not used in a uniform manner in Article 2.

4.69 Furthermore, if data from low volume sales is not excluded when constructing prices the result will be precisely to cancel out the effect of excluding such sales from the calculation of normal values in accordance with Article 2.2. Such a pointless procedure cannot have been intended by the drafters, and would result in a comparison being based on data from sales that are declared by the Agreement to 'not permit a proper comparison'.

(d) Use of facts available and Article 6.8 and Annex II

4.70 Norway criticizes the EC for failing to observe the rules on 'facts available' regarding its treatment of filleting costs of the Norwegian producer Grieg.

4.71 Although the information made available on this matter before and during the verification visit was unsatisfactory, the EC did not resort to the use of 'facts available', but used information from another company that was being investigated. Consequently the EC cannot be criticized for not following the rules relevant to 'facts available'.

4.72 The additional information sent to the EC by Grieg some months after the verification visit was unsatisfactory, and could not have been used without further verification, which was not possible at that stage. For this reason, contrary to Norway's contention, the EC's treatment of this information was not in breach of paragraph 3 of Annex II of the *Anti-Dumping Agreement*. Furthermore, the EC did not infringe paragraph 6 of Annex II since the company had given no 'further explanations' as that provision envisages.

4.73 Finally, the EC's treatment of Grieg's financing costs involved no element of 'facts available'. There was no rejection of factual data by the EC, rather the issue concerned the class of data that was required. The EC insisted on the use of a commercial rate of interest in determining Grieg's costs. Grieg disputed this principle, but did not challenge the accuracy of the rate used by the EC for this purpose. The use of a three-year average rate reflected the three-year basis that the EC used for assessing costs of salmon production (see Section XII, below).

(e) Treatment of non-investigated companies and Articles 6.8 and 9.4 and Annex II

4.74 The minimum import prices (MIPs) used by the EC as an anti-dumping measure on Norwegian salmon were calculated at a level that would prevent injury being caused to the EC domestic industry. They were in all cases below the 'non-dumped MIPs', that is the MIPs that corresponded to the examined producers' normal values (after adding transport costs, etc.), and to the weighted average of such values. They represented the application of the lesser-duty rule to a system where the 'liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value' (Article 9.4(ii)).

4.75 Contrary to Norway's complaint, there was no need to disregard Grieg's normal value in making the calculation since it was not calculated on the basis of 'facts available'. In any event, the exclusion rule does not apply to margins determined under Article 9.4(ii)

4.76 As regards the treatment of non-cooperating producers and exporters the EC has complied with the provisions in Article 6.8 and Annex II. The EC made elaborate efforts to bring information of the investigation to the notice of Norwegian firms, and Norway has given no instance of any firm that was unaware of the investigation or of the potential consequences of not cooperating with it.

7. Injury

4.77 Norway challenged three distinct aspects of the EC injury determination (determination of volume of dumped imports, price undercutting and the evaluation of price trends).

4.78 First, as regards the volume of dumped imports, it was determined by extrapolation from a sample in accordance with the *Anti-Dumping Agreement*. It follows from the *Anti-Dumping Agreement* that it is more than appropriate to focus the dumping determination on producers, rather than exporters.

4.79 When Norway cites to the *EC – Bed Linen (21.5)* case, it apparently ignores the fact that the legal conclusions in that case were based on the very specific facts and circumstances of that case, considerably different from the present dispute. The result which arose in *EC – Bed Linen (21.5)* was statistically impossible in the present case.

4.80 In any event, among the imports from the sampled companies, the EC also examined and included imports from those companies that exported to the Community *via* traders. These imports were found to be dumped.

4.81 Moreover, in the present case, the EC also had at its disposal other sources of information (besides sampling) to conclude that imports from the non-sampled companies were dumped. On the basis of Eurostat data, it has been found – and never challenged by Norway – that the imports from non-cooperating companies, accounting for approximately 20 per cent of all the imports, were dumped.

4.82 The fact that one of the companies included in the sample had a *de minimis* dumping margin does not change the correctness of the EC analysis. A *de minimis* dumping margin does not mean that a company is not dumping (quite to the contrary). Even if *de minimis* imports were excluded from the calculation of import volume, it would not have made any (significant) difference in the injury analysis.

4.83 Second, as regards price undercutting, the price premium enjoyed by EC salmon products does not play a role in a price undercutting analysis. Price undercutting is a "snapshot" of the market situation and reflects nothing else but the real price differential. The price premium (the amount a customer is willing to pay extra) only materialises under normal market conditions, in an undistorted market (that the MIPs tried to restore). In a market distorted by dumping the whole mechanics of the market no longer functions as normal (for instance, there is price manipulation, etc.). Hence, the producer of the salmon can no longer confidently rely on the price premium but will do anything to survive (depress prices, etc.). This is evidenced by the findings of the investigation. The EC took account of the price premium in the context of the determination of the level of MIP.

4.84 Third, Norway argues that the EC violated Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* because the EC examined the prices of the EC domestic industry in Euros and not in the alleged "operating currency" of the EC industry – in pounds sterling (GBP). Norway's legal test of

"operating currency" is entirely fabricated and does not have support in the *Anti-Dumping Agreement* or case law. As acknowledged by Norway, the EC investigating authority could have theoretically chosen any other currency, as long as that currency would have been used in a consistent manner for all purposes throughout the investigation. Currency is just a common denominator, which, as long as it is used consistently throughout the proceeding, serves the Appellate Body requirement of unbiased, even-handed and fair examination. The use of Euro by the EC investigating authority has been consistent throughout the examination. Even if the EC had used GBP, instead of Euro, as the common denominator, the results of the evaluation analysis under Article 3.4 if the *Anti-Dumping Agreement* would be exactly the same.

4.85 Even if Norway's argument were correct, there would be an overall price decline, since a significant part of the transactions of the Community industry indeed takes place directly in Euro. Finally, even if there were *no* price decline – and Norway actually never seems to suggest that there was no overall price decline – it would not mean that the assessment of the EC investigating authority violated Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*.

8. Causation

4.86 Norway argues that the EC failed to conduct a proper assessment of the injury caused to the EC industry by a couple of factors other than dumped imports (cost of production in the EC and imports of wild salmon from Canada and the United States).

4.87 The methods by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the *Anti-Dumping Agreement*. What matters in the present case is whether the EC made a proper assessment and evaluation of very specific factual issues by proper methods and approaches not specifically prescribed by the *Anti-Dumping Agreement* in accordance with that agreement.

4.88 With regard to the cost of production of EC producers, Norway grossly misquoted the EC Provisional Regulation. The EC never stated that there were two separate factors relating to the cost of production: one related to the cost of production of the Norwegian producers (which Norway is not challenging) and another factor related to the cost of production of the EC producers. Rather, what Norway portrays as separate factors were two separate arguments related to the same factor. Moreover, Norway has not made any *prima facie* case that the costs of production of the EC, and their "increase" over the years, have actually caused or contributed to the injury of the EC industry.

4.89 Second, with regard to imports of wild salmon from the Canada and United States, Norway actually does not adduce any evidence to make a *prima facie* case. Norway does not challenge the factual finding of the EC. Instead, Norway attacks the EC for the lack of explanation as to the source of evidence showing that the "majority" of imports from Canada and the United States are wild salmon. Norway argues that the absence of such explanation means that the EC finding "must be disregarded as a mere speculation". This legal theory is erroneous and is supported by neither Articles 3.5 and 3.1 of the *Anti-Dumping Agreement* nor by the case law.

4.90 On the inter-changeability between wild salmon and farmed salmon, Norway, being short of factual evidence, refers to WTO case law on like products (regarding factors such as taste and prices). Besides a dubious relevance of that case law for the present case, this reference clearly does not replace factual evidence.

4.91 Moreover, Norway discusses the inter-changeability of wild and farmed salmon when sold to a customer as a fresh product. This, however, is irrelevant to the case at hand. The US and Canadian wild salmon "is practically not offered in the market for sale as a fresh product". Only a small part is

sold as a fresh product to niche customers at high prices. The market for the product concerned and imports from the Canada and US is different and the wild and farmed salmon are not interchangeable.

9. Minimum Import Prices

4.92 The nature of the Minimum Import Prices (MIPs) imposed on imports of Norwegian salmon is described in Section VI.E, above. As mentioned there, the MIPs were in all cases at a level below the corresponding non-dumped MIPs. The use of three-year average exchange rates follows logically from the use of a three-year basis in calculating costs for the purpose of constructing normal values (see Section I).

4.93 Under the *Anti-Dumping Agreement* the imposition of anti-dumping duties by means of MIPs (involving 'prospective normal values' as envisaged in Article 9.4(ii)) is distinct from that based on a predetermined dumping margin, and such a margin does not act as a cap on the duty that may be imposed by means of a MIP.

10. Fixed Duties

4.94 The EC's system of fixed duties for Norwegian salmon imports is a system of customs enforcement that is justified under Article XX(d) of GATT 1994. It is designed to deter evasion of lawfully imposed anti-dumping duties through misdeclaration of the customs value of the goods. Such action is envisaged in footnote 24 of the *Anti-Dumping Agreement.*

4.95 The 'laws or regulations which are not inconsistent with the provisions of this Agreement' are the EC's anti-dumping measures against salmon as well as the obligations under ordinary customs law for importers to make truthful declarations regarding the value of goods that they are entering into the EC. The fixed level duty is necessary to secure compliance with such laws.

4.96 As regards the obligations in the opening paragraph of Article XX, the fixed duty can neither in its substance nor its application be characterized as amounting to an abuse or misuse of an exception, or to amount or lead to arbitrary or unjustifiable activity.

11. Procedural Requirements

4.97 Under Article 6.2 and 6.4 of the *Anti-Dumping Agreement* there is no obligation to operate a "record". Norway itself shared this interpretation when submitting proposals in the Doha Round to amend the agreement. Rather, these provisions provide for full access to all relevant non-confidential information during the investigation. The EC has fully complied with that obligation by providing Norway with ample opportunities to see all relevant information.

4.98 The duty of disclosure under Article 6.9 of the *Anti-Dumping Agreement* relates to facts. There is no duty to specifically identify in the disclosure document the source on which the assembled facts are based. Rather, the agreement requires the authority to provide information about the essential facts by a simple reference to them. The EC fully complied with this standard by having handed over to Norway on 28 October 2005 a draft regulation containing references to all relevant facts. Accordingly, there is no ancillary breach of Article 6.2 of the *Anti-Dumping Agreement.*

4.99 Under Article 12.2 of the *Anti-Dumping Agreement* an investigating authority is required to provide "in sufficient detail the findings and conclusions reached on all issues of fact and law". This "chapeau" is then further specified as regards findings in Article 12.2.2 of the *Anti-Dumping Agreement.* An investigating authority must provide the information that *it* considers relevant, and the reasons that *it* held to be decisive for its findings, paying due regard to the requirements for the protection of confidential information. Against that yardstick, the EC provided sufficient

explanations about its selection of the subject product, its domestic industry determination, its dumping determination, its causation determination and the minimum import price.

12. Normal Value and Producers' Costs

4.100 Norway makes a number of claims regarding the EC's allocation of costs vis-à-vis the Norwegian producers. Article 2.2.1.1 lays down the basic rules. These refer to 'generally accepted accounting principles' and the EC makes reference to a number of IASB standards and principles.

4.101 In keeping with the practice of the major Norwegian producers, the EC applied a system of three-year project accounting to the allocation of salmon production costs.

4.102 Norway misinterprets the Agreement to pretend that, as regards non-recurring costs, only those costs that benefit production need be taken into account. Such an interpretation is mistaken, and would lead to a major distortion in the appearance of a company's financial position.

4.103 Even as regards those costs that benefit production the Norwegian companies took an excessively narrow view of what should be included.

4.104 In order to present a true picture of the companies' financial situation the EC found it necessary to include costs falling into a number of important categories, such as discontinued operations (unless a whole business segment was involved), extraordinary charges, and accounting changes.

4.105 A number of specific issues arose with individual companies. In one instance the EC found it appropriate to allow a write-down for a loss in value of biomass caused by unfavourable expected market price evolution, but not that resulting from deformity of the biomass, which is an inherent risk of the business.

4.106 Contrary to Norway's allegation, the EC authorities applied the same standards to the ten investigated companies.

4.107 In applying the basic principles the EC rejected a series of demands from the companies regarding, for example, facility closures, restructuring costs, severance payments, costs of destruction of salmon fry, and bad debts. Overall, the EC rejects Norway's attempts to disregard any adverse event or a bad business decision that affects activity in a negative way.

4.108 In keeping with its overall strategy the EC investigated the salmon business of one firm as a business segment, regardless of whether the costs were a consequence of direct business transactions or alternatively of financial participations, or of whether the company in which it participated discontinued its activities. All these costs were considered non-recurring but being an integral part of the salmon activity were taken into account and depreciated over a three years period.

4.109 Norway attempts to create confusion between the use of a three-year basis for determining production costs, and the spreading of costs over the life-time of an asset. The latter process will lead to a costs being allocated to particular years. In the case of non-recurring costs it is these annual allocations that the EC averaged over three years because of the special nature of salmon production. However, normal accounting valuation rules do not apply when an asset is no longer used for its original purpose.

4.110 The EC applied the same three year period to the collection of finance costs. In several cases companies had wrongly attributed such costs to parent or group companies.

4.111 Regarding smolt costs, the EC agrees that for the purpose of determining the cost of production, quantities of smolt should be aligned to quantities of harvested salmon, taking into account mortality.

4.112 In the case of one company, although it had operated a project-accounting system, the relevant data could not be reconciled with the audited annual accounts. The latter were therefore used, and adjustments made as appropriate to simulate the three-year basis.

4.113 In the case of a company for which records were inadequate, but which was part of a group with audited accounts, the amount for selling, general and administrative costs was based on the 'other operating expenses' category at the consolidated group level.

4.114 Finally, the claims regarding the cost of purchased salmon in respect of another company were never verified, and could not be accepted by the EC.

13. Conclusion and Findings Requested

4.115 For the reasons set out in this First Written Submission, the EC requests the Panel to reject all of Norway's claims and arguments, finding instead that, with respect to each of them, the EC acted consistently with all its obligations under the *Anti-Dumping Agreement*, the GATT 1994 and the covered agreements, including (non-exhaustively) as set out in the following paragraphs.

4.116 For the reasons set out in Section III of this First Written Submission, the EC requests the Panel to reject Norway's claims that the EC acted inconsistently with Articles 2.1, 2.6 and (consequently) Articles 2.1, 3 and 5 of the *Anti-Dumping Agreement* when selecting the product concerned.

4.117 For the reasons set out in Section IV of this First Written Submission, the EC requests the Panel to reject Norway's claims that the EC acted inconsistently with Article 4.1 and (consequently) Articles 3 and 5 of the *Anti-Dumping Agreement* when determining the domestic industry.

4.118 For the reasons set out in Section V of this First Written Submission, the EC requests the Panel to reject Norway's claims that the EC acted inconsistently with Articles 5.1 and 5.4 of the *Anti-Dumping Agreement* when initiating the original investigation.

4.119 For the reasons set out in Section VI of this First Written Submission the EC requests the Panel to reject Norway's claims that the EC acted inconsistently with the following provisions of the *Anti-Dumping Agreement*:

- Article 6.10 in its selection of Norwegian producers and exporters for examination;

- Articles 2.2 and 2.2.1 in regard to the determination of below-cost sales;

- Article 2.2.2 in its determination of SG&A and profits in regard to sales made in low volumes;

- Article 6.8 and Annex II, paragraphs 3 and 6 in regard to the determination of normal value of one investigated company; and

- Articles 6.8 and 9.4, and Annex II, paragraph 1, in regard to the margins of dumping calculated for non-sampled companies.

4.120 For the reasons set out in Section VII of this First Written Submission the EC requests the Panel to reject Norway's claims that, in its injury determination, the EC acted inconsistently with :

- Articles 3.1, 3.2 and, in consequence, Article 3.5 of the Anti-Dumping Agreement in its examination of the volume of dumped imports;

- Articles 3.1, 3.2 and, in consequence, Article 3.5 of the Anti-Dumping Agreement in its examination of price undercutting; and

- Articles 3.1 and 3.4 of the Anti-Dumping Agreement in its evaluation of price trends affecting EC producers.

4.121 For the reasons set out in Section VIII of this First Written Submission the EC requests the Panel to reject the Norway's claims that, in its causation determination, the EC acted inconsistently with :

- Articles 3.1 and 3.5 of the Anti-Dumping Agreement because the EC did not fail to properly assess the injurious effects of the EC industry's increased cost of production; and

- Articles 3.1 and 3.5 of the Anti-Dumping Agreement because the EC did not fail to properly assess the injurious effects of imports of salmon from Canada and the United States.

4.122 For the reasons set out in Section IX of this First Written Submission the EC requests the Panel to reject the Norway's claims that its anti-dumping measures violated Article VI:2 of GATT 1994 and Articles 9.1, 9.2, 9.3 and 9.4(ii) of the *Anti-Dumping Agreement* by imposing minimum import prices exceeding the normal value and not limited to the dumping margin.

4.123 For the reasons set out in Section X of this First Written Submission the EC requests the Panel to reject the Norway's claims that its anti-dumping measures violated Article VI:2 of GATT 1994 and Articles 9.1, 9.2, and 9.3 of the *Anti-Dumping Agreement* by imposing fixed duties that exceeded the dumping margin.

4.124 For the reasons set out in Section XI of this First Written Submission the EC requests the Panel to reject Norway's claims that the EC acted inconsistently with Articles 6 and 12 of the *Anti-Dumping Agreement*.

4.125 For the reasons set out in Section XII of this First Written Submission the EC requests the Panel to reject Norway's claims that it infringed Article 2, and in particular Article 2.2.1.1 of the *Anti-Dumping Agreement* when calculating the costs of the investigated companies for the purpose of determining their normal values.

C. FIRST ORAL STATEMENT OF NORWAY

4.126 The following summarizes Norway's arguments in its first oral statement.

1. Introduction

4.127 The EC has failed to respect many of the substantive and procedural requirements of the GATT 1994 and the *Anti-Dumping Agreement.* Rather than addressing the substance of Norway's claims, the EC claims a very wide discretion for its authority to do as it wished, often in interpretive matters. The EC also tries to fill in the many holes in its determination by offering new evidence and

new reasons to justify its measure. This is inadmissible, and only serves to highlight the shortcomings in the EC's determination.

2. Inadmissible Evidence and *Ex Post* Rationalization

4.128 Norway states two objections to the EC's First Written Submission. *First*, Norway objects to seven exhibits submitted by the EC. Norway requests that the Panel reject Exhibits EC-2, EC-10, EC-12, EC-13, EC-14, EC-15 and 16 as inadmissible because they contain new information that is not part of the record of investigation.

4.129 *Second*, 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.

4.130 This litigation technique has been referred to by panels as "*ex post* rationalization".[54] A WTO Member may not justify an authority's determinations by providing reasons that the authority itself did not provide.[55] 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*. Examination of new evidence and explanations requires a panel "to perform a *de novo* review" of what the investigating authority should have done.[56] That is not the Panel's task.

3. The Product Under Consideration

4.131 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. Under Article 2.1, a "dumping" determination involves a *single aggregate comparison* of export price and normal value for the investigated product. Models are just a helpful, but temporary, tool that authorities may use to minimize the need for adjustments under Article 2.4.[57]

4.132 Furthermore, Norway argues that the investigating authorities must present a reasoned and adequate explanation of its determination of the product under consideration. The EC failed to determine the scope of the "product under consideration" consistently with Articles 2.1, read together with 2.6 of the *Anti-Dumping Agreement*. By so doing the EC initiated an investigation into the wrong product, in violation of Article 5.4; 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 made an injury determination under Article 3 premised on an incorrect product determination.

4. Domestic Industry

4.133 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

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

[55] 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.

[56] Panel Report, *US – Softwood Lumber V*, para. 7.40.

[57] Panel Report, *US – Softwood Lumber V*, para. 7.207.

consideration" includes fillets, the producers of these like products are excluded from the "domestic industry". The EC also improperly excluded numerous other categories of producer. As a result, there is a fatal mismatch between the scope of the product and the domestic industry.

4.134 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, in violation of Article 3. 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.

4.135 Furthermore, 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 dumping determination, the *Agreement* does not authorize sampling in an injury determination.

5. Dumping Determination

4.136 *First*, 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".[58] However, the EC included only *exporting producers* in the sample, and excluded all *independent exporters that did not themselves produce*. The EC thereby failed to examine the largest possible volume of exports from Norway that could have been examined, in violation of Article 6.10. Even assuming the EC could limit its sample only to producers, *quod non*, the EC still failed to sample the ten producers with the largest export volumes, as it excluded Salmar and Bremnes, again violating Article 6.10.

4.137 *Second*, 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 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 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.

4.138 *Third*, the EC rejected actual sales data to calculate profit margins for investigated producers.[59] This approach contradicts the approach of the panel, the Appellate Body as well as of the EC itself, in *EC – Tube or Pipe*, which required that "actual SG&A and profit data for sales in the ordinary course of trade" be used if such sales exist, *irrespective of the low volume of the sales*.[60] The EC thereby violated Article 2.2.2.

4.139 *Fourth*, in calculating Grieg's filleting and financing costs, the EC rejected valid and usable data supplied by Grieg and, instead, resorted to "facts available". Although the EC used information from a secondary source, it argues that it did not use facts available, and that it can thus bypass the obligations of Article 6.8 and Annex II of the *Anti-Dumping Agreement*. Norway disagrees.

[58] EC's FWS, para. 126.

[59] 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.

[60] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 97.

Article 6.8 and Annex II applies whenever an authority uses "*best* information available" "from a secondary source".[61]

4.140 *Fifth*, the EC violated Article 9.4 of the Anti-Dumping Agreement in its treatment of non-sampled companies because the EC: (a) incorrectly calculated that margin – something the EC now acknowledges[62] – and (b) failed to exclude from the calculation Grieg's margin, which was based on facts available.[63] Separately, Norway also claims that the "residual margin" of 20.9 per cent assigned to non-cooperating non-sampled producers violates the maximum weighted average margin under Article 9.4 and includes Grieg's normal value.[64]

4.141 *Sixth*, the EC violated Article 6.8 and Annex II in fixing a *residual margin* in respect of so-called "non-cooperative" non-sampled companies. 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)).[65] 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).

6. Injury

4.142 The EC simply assumed that a sample containing exclusively *producers* permitted it to draw conclusions regarding dumping by *exporters*. The EC composed a sample that was not statistically valid. In such a situation, the Appellate Body has 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.[66] There must, therefore, be *other* "positive evidence" to justify the determination made regarding dumped imports from non-examined companies. The EC provided none. The EC also improperly included Nordlaks' imports in the volume of dumped imports.

4.143 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 fully aware of this factor[67], but gave no reasons in the Definitive Regulation to explain why the price premium was not relevant to the price undercutting analysis and now only presents irrelevant *ex post* rationalization.

4.144 In the injury determination, the EC examined certain financial indicators for a sample of just five Scottish companies and found that the companies' sales prices declined by *9 per cent* when measured in euros. Norway claims that the material currency for examining price trends for these companies is pounds sterling, and not euros. During the period considered, the euro appreciated against the pound by almost exactly *9 per cent*. Thus, from the perspective of the examined companies, *no price decline* affected their financial performance because of the movement in currencies.

[61] Title of Annex II of the *Anti-Dumping Agreement* and Annex II(7).
[62] EC's FWS, para. 312.
[63] Norway's FWS, paras. 470 to 477.
[64] Norway's FWS, paras. 478 to 481.
[65] 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.
[66] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 138.
[67] Norway's FWS, paras. 528 and 531 to 538.

7. Causation

4.145 The EC recognizes that "it has been established that the *production costs did increase*."[68] If costs had not increased, the domestic industry would have remained profitable.[69] 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. Furthermore, the 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. Its new evidence is both inadmissible and irrelevant.

8. MIPs

4.146 Norway has 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. The EC has not even attempted to rebut Norway's calculations. Norway also claims that the EC's variable anti-dumping duties may not exceed the individual *dumping margins* determined for sampled companies. The EC measure does so, in violation of Articles 9.1, 9.2, 9.3 and Article VI:2 of the GATT 1994, because there is no cap in the EC's measure that limits the duty to the dumping margin. 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*."[70]

9. Fixed Duties

4.147 The EC does not contest that the *ad valorem* equivalent of the fixed duty exceeds the dumping margin for a number of the investigated companies. Instead, the EC argues that its fixed anti-dumping duties are *not* actually anti-dumping duties, but "a very specialized [duty] designed to deter evasion of lawfully imposed anti-dumping duties" through fraudulent customs declarations.[71] Therefore, according to the EC, the fixed duties do not represent "specific action against dumping".[72] Although creative, this argument is wrong. The proper characterization of the fixed duty as and anti-dumping measure is evident *inter alia* in the legal basis that the EC used to adopt the Definitive Regulation.

10. Procedural Requirements

4.148 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. The EC does *not* argue that it was not "*practicable*" to show the 68 missing documents to Norway; 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.

4.149 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.

4.150 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.

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[68] EC's FWS, para. 413. Original emphasis.
[69] Norway's FWS, para. 586.
[70] Appellate Body Report, *US – OCTG Sunset Reviews (Mexico)*, para. 115. Emphasis added.
[71] EC's FWS, para. 501.
[72] EC's FWS, para. 508.

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 decisive."[73] 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.

11. Cost Adjustments

4.151 Norway focuses in this opening statement 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.

4.152 Norway argues that the term "costs of production" in Article 2.2.1.1 of the *Anti-Dumping Agreement* measures *the value of the resources that are used to produce a good*.[74] Thus, for a cost to be a cost of production, there must be a relationship between the cost and production. The EC adopts an impermissibly expansive definition of cost of production. *First*, the EC considers that *any* cost item that benefits "future *profitability*" of a company or group is a "cost of production" for salmon.[75] *Second*, the EC also claims that any *reduction* in the equity or "wealth" of a company is a cost that benefits production.[76] The EC tries to rewrite 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.[77] The relationship required by the *Agreement* is between *costs* and *production*, not *costs* and *profitability*.

4.153 Norway has presented a number of company-specific challenges related to "Non-recurring costs" (e.g. cost of restructuring and closing facilities) and costs unrelated to salmon production (e.g. costs related to losses on investments in other activities), as well as challenges to what seems basic factual inaccuracies.

4.154 Norway also challenges the approach of the EC whereby the EC simply totalled up NRC for a three-year period and divided the total by three. There is no legal basis for using such a three-year period. The EC has also presented an *ex post* rationalization of its three-year averaging based on the "project accounting" methodology allegedly used by the authority. However, the EC did not use project accounting in its cost calculations. The EC's arguments also contain several other factual inaccuracies.

D. FIRST ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

4.155 The following summarizes the European Communities' arguments in its first oral statement.

1. Introduction

4.156 Mr Chairman, Members of the Panel, good morning. On behalf of the European Communities (EC) I would like to thank you for agreeing to serve on this Panel and to thank the Secretariat for all the work they have done, and will do in facilitating your task.

4.157 In this dispute Norway has launched a great many claims in respect of the EC's decision in the salmon anti-dumping proceedings, covering practically every aspect of the measure. The EC has responded fully and decisively to these claims in its First Written Submission. I do not intend to

[73] EC's FWS, para. 564.
[74] Norway's FWS, para. 798.
[75] EC's FWS, paras. 642, 658, 668 and 672.
[76] EC's FWS, para. 642.
[77] Article 2.2, 2.2.2 and 2.2.2(iii).

repeat today the points we have made in that Submission, although we of course remain ready to explain and elaborate any of those points. Rather in this Statement I intend to address the overall question of the proper role of the Panel in reviewing a national decision of this kind, as regards the establishment and evaluation of issues of fact.

4.158 However, in light of the scattergun style adopted by Norway in its First Written Submission [and in its First Oral Statement] I think it worth taking an early opportunity to emphasize a basic characteristic of the EC's investigation on salmon dumping and imposition of anti-dumping measures which are now challenged by Norway. This was an investigation based on, and carried out in accordance with, rules. In the first instance the rules are those of the EC's Anti-Dumping Regulation. But this Regulation is merely the application of the rules contained in GATT 1994 and the *Anti-Dumping Agreement*. In so far as Norway bases its claims on these rules the EC is ready and able to answer them, and demonstrate the complete consistency of its actions with those rules. But when Norway engages in loose criticisms of the EC's actions, without reference to WTO obligations, we will not be replying. And we trust that the panel will treat such statements with similar indifference.

4.159 As the Panel is well aware, uniquely among the WTO agreements, the *Anti-Dumping Agreement* contains a specific provision governing the standard of review to be adopted by Panels. Article 17.6(i) states that:

> "in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned …."

4.160 In the salmon investigation the EC authorities were frequently faced with the task of establishing and evaluating facts, and many such issues have been raised by Norway in its complaints. The EC believes that there is a particular need in the present case to emphasize this part of the Panel's responsibilities. Norway's contentions frequently appear to be encouraging the Panel to take upon itself the role of rehearing the matter – a *de novo* investigation.

4.161 I will devote the rest of this statement to examining how the proper standard should be applied to the various aspects of this case. For convenience I will continue our practice of following the order in which Norway has presented its claims, however illogical that might seem at times.

2. Standard of Review

(a) Domestic industry

4.162 The legal criterion to be applied regarding the identification of the 'domestic industry' to which injury is caused by dumping is set out clearly in Article 4 of the *Anti-Dumping Agreement*: 'the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.' In the salmon investigation the EC authority was faced with a complicated situation in which the product goes through one or more of a series of processes and, in some instances, operators, before it is sold. The facts relating to the various 'presentations' of salmon are not in doubt, but the way in which those facts should be evaluated in order to identify the 'producer' of the salmon has proved to be contentious.

4.163 The EC does not suggest that there is no law in the application of the notion of 'producer'. Thus, it may be apparent that the firms in question, although they are producers, are not producers of the like products, just as, for example, the cattle producers in the *Manufacturing Beef* case were not

producers of beef. However, once the legal rules have been applied and have not excluded the situation as one in which the firms in question qualify as producers of the like product, the authorities have the task of evaluating the facts to see whether this criterion is met. This evaluation is not a simple yes/no issue. Particularly in a complex situation such as that of salmon production, it involves weighing factors some of which may be positive and others negative.

4.164 It was following such a process of evaluation that the EC investigating authority arrived at the conclusion that filleting-only entities should not be included in the notion of the EC 'producers' of salmon. It's decisions should therefore be assessed in accordance with the criteria of Article 17.6(i).

4.165 The need to evaluate facts also arises in the use of sampling in the analysis of the condition of the domestic industry. That sampling is a satisfactory method of factual examination is reflected in its explicit endorsement by the *Anti-Dumping Agreement* as regards the determination of the degree of support for complaints and the level of dumping margins. Thus, the use of sampling is not inherently biased or unobjective. In fact, in some circumstances it may be the only method reasonably available to an investigating authority. Furthermore, it should not be overlooked that in the present case, the data established at the level of the sample have been verified, to the extent possible, with data generated from other sources.

(b) Dumping issues

4.166 The application of the correct standard of review is also an important consideration as regards several of the dumping issues raised by Norway in section V of its First Written Submission.

4.167 Firstly, the EC's decision (substantially in agreement with Norway) to examine dumping by focusing on those firms that produced the salmon which was exported to the EC involved elements of factual evaluation on the part of the investigating authority in deciding how best to achieve the goals of the *Anti-Dumping Agreement*. More especially, in the choice of firms as regards the criterion in Article 6.10 of the *Anti-Dumping Agreement* of the "largest percentage of the volume of the exports from the country in question that can reasonably be investigated" the EC authority had to make a difficult evaluation of the facts that it had available. Another investigating authority, or the Panel had it been in that position, might have chosen a slightly different list of companies for examination, but this is not a ground for condemning the EC decision, which was made objectively and without bias.

4.168 Secondly, in its handling of certain costs of the Norwegian producer Grieg, the EC was faced with particular problems regarding the establishment of the facts. Norway has attempted to present the situation as one where the EC authority invoked the rules on 'facts available'. The fallacies in Norway's arguments are explained in the EC's First Written Submission. The special rules of Annex II of the *Anti-Dumping Agreement* therefore do not apply. However, the actions of the EC authority continue to be subject to the standard laid down in Article 17.6(i) – the establishment of facts must be proper. The detailed account of the EC authority's dealings with Grieg that is given in the Submission show that the requirements of this standard were more than satisfied. The Panel should therefore not interfere with the authority's findings.

(c) Injury

4.169 The issue of the standard of review also arises in regard to Norway's attack on the EC for its conclusion that all Norwegian salmon exports were being dumped and were causing injury to the domestic industry. In its First Written Submission the EC gives the justification for treating all imports from Norway as being dumped. For present purposes the EC wishes only to identify the standard of review that the Panel should exercise in this regard.

4.170 The process in which the EC authority was engaged in reaching its conclusion was one of evaluation of facts. It had the unequivocal factual information gathered from the investigated companies. Additionally, it also had, for example, Eurostat data. The only question to be addressed by the Panel is whether Norway has established that the EC's evaluation was biased and/or unobjective. The EC contends that Norway has presented no evidence to support such a claim.

4.171 An even more straightforward situation for the operation of the basic standard of review is that concerning the evaluation of price premium and the price trends. The EC is not here concerned to repeat the justifications that it supplied in its First Written Submission for adopting this approach. Rather, it wants to emphasize that the issue is not one on which the Panel is expected to make its own decision. It is for Norway to establish that the decision made by the EC investigating authority was biased and unobjective.

(d) Causation

4.172 Norway has also made claims (under Article 3.5 of the *Anti-Dumping Agreement*) regarding the EC's analysis of causation in the salmon investigation. Here again the proper application of the standard of review is crucial for the correct exercise of the Panel's jurisdiction. The need to 'separate and distinguish' the injurious effects of the various factors has been firmly emphasized by the Appellate Body. The steps that the EC took in this respect must be assessed according to the 'unbiased and objective' criterion of Article 17.6(i). It is not for the Panel, still less for Norway, to reach alternative conclusions and claim that the EC was therefore wrong and in breach of Article 3.5.

4.173 Norway focuses on one particular aspect of causation – the effect of imports of salmon from Canada and the US – and criticizes the EC for failing to provide an explanation for its finding that 'on the basis of information gathered during the investigation, it appears that the vast part of imports from USA and Canada consists mostly of wild salmon, so that it is unlikely that imports from these two countries could have a significant impact on the situation of the Community industry.'[78] Here the issue is one of establishment of the facts, and Norway has provided no basis for concluding that the EC has fallen short of the 'proper' standard required by Article 17.6(i).

(e) Producers' costs

4.174 A series of complaints are made by Norway in Section XI of its First Written Submission regarding the determination of producing companies' costs. Such determinations were of crucial importance because the EC had in all cases to construct normal values from companies' costs and profits rather than rely on their sales prices. Rules governing allocation of costs are contained in Article 2.2.1.1 of the *Anti-Dumping Agreement*, but they are largely confined to broad statements of principle, whereas many of the questions that arose during the investigation, or that are now posed by Norway, are markedly factual in character.

4.175 Most of these questions concerned the *evaluation* of facts. In this investigation factual evaluations had to be carried out at various levels. On the one hand, the EC was faced with detailed issues regarding particular cost items, such as how in a particular company to account for severance pay or destruction of salmon fry. On the other hand, it had to make evaluations of a strategic character that would have implications in a whole range of individual circumstances.

4.176 Two such strategic issues can be identified. Firstly, because of the peculiar characteristic of the salmon industry that production takes several years, the EC (in line with the leading producers) decided to apply a system of project accounting, i.e. one that takes account of all the costs incurred

[78] Provisional Regulation, Recital 96. Also Definitive Regulation, para. 85.

over the whole period of time (three years) that it takes to produce salmon. The justification for adopting this approach is given in the EC's First Written Submission, and need not be repeated here.

4.177 Secondly, the EC found itself in disagreement with the companies regarding the treatment of 'non-recurring' costs. To some extent this disagreement is legal in character, and concerns the correct interpretation of Article 2.2.1.1. Thus, Norway's attempt to read this provision in order to prevent allocation of costs that do not benefit production is answered and refuted in the EC's First Written Submission. However, once this legal issue is determined there remain important decisions to be made regarding the allocation of non-benefiting, non-recurring costs. The EC explains in its Submission how it made these decisions.

4.178 For the present purposes it is not the substance of these issues that is important but their character as evaluations of fact. In accordance with Article 17.6(i) the decisions that the EC reached in regard to the use of project accounting and the allocation of non-recurring costs must be accepted by the Panel unless Norway can show them to have been biased or not objective. The EC contends that the explanations which it has given for these decisions amply satisfy these standards. In some respects it has the benefit not merely of the force of its own arguments, but also of the expert and objective guidance provided by standards of the International Accounting Standards Board.

4.179 In addition to these strategic decisions the EC investigating authority made numerous individual decisions about costs, often relating to the allocation of non-recurring costs. Norway has challenged many of these decisions in these proceedings. They are explained in various parts of Section XII of the EC's First Written Submission, and must also be assessed in accordance with the criteria of Article 17.6(i) of the *Anti-Dumping Agreement*. The Panel must not take on itself the task of deciding what would be the 'correct' rulings in such cases. Rather it is for Norway to prove that the steps taken by the EC failed to meet the criteria of objectivity and avoidance of bias.

3. Conclusion

4.180 Mr Chairman, Members of the Panel, I began this Statement by pointing to a particular risk that I believe accompanies these proceedings. This risk is that Panel would start to act as an appeal rather than as a review body. Of course, I do not suggest that it would deliberately take on itself such an improper role. Rather the danger is that with the kind of issues that have to be examined the most natural response of the Panel would be to express its own view as to how they should be, or should have been, decided. Frankly, given the manner in which it has presented the issues, that is an approach which the Complaining party would apparently like to encourage. The EC urges the Panel to resist this temptation. In particular, wherever the EC authority was called on to evaluate a factual situation, we should bear in mind that the issue is not whether it arrived at the 'correct' solution, but whether it behaved objectively and without bias. Furthermore, it is for Norway to prove that the EC did not meet these standards.

4.181 We remain confident that the Panel will respect this principle. I thank the Panel for its attention and look forward to answering any questions that you may have.

E. SECOND WRITTEN SUBMISSION OF NORWAY

4.182 The following summarizes Norway's arguments in its second written submission.

1. Introduction

4.183 This submission addresses arguments from the EC's First Written Submission that were not addressed in Norway's Opening Statement, and also counters arguments made by the EC in its Opening Statement, and Closing Statement of 13 December 2006 at the First Substantive Meeting

with the Parties ("Closing Statement"). To avoid repetition, Norway provides extensive cross-references to the arguments made in its earlier submissions and in today's responses to the Panel's questions.

2. Seven of the EC's New Exhibits are Inadmissible and Support Improper *Ex Post* Rationalizations

4.184 The Panel declined Norway's request, in its letter of 4 August 2006, to request from the EC a list of documents that form part of the record of the EC's investigation. Norway now finds itself in the same position that Brazil did in *EC – Tube or Pipe*, confronted by seven new exhibits that it has never seen before. In Norway's view, all seven of the contested Exhibits – EC-2, EC-10, EC-12, EC-13, EC-14, EC-15, and EC-16 – must be rejected as inadmissible because they contain information that the EC has been unable to demonstrate was before the investigating authority; that was not shown to interested parties under Article 6.4; that was not disclosed as essential facts under Article 6.9; and, that is nowhere identified or mentioned in the published determinations. Moreover, the new reasons that the EC advances on the basis of this new information are also inadmissible as *ex post* rationalizations not contained in the published determination.

3. Standard of Review

4.185 In the absence of substantive arguments to defend its flawed measure, the EC appears to believe that its best chance of prevailing in this dispute is to persuade the Panel not to undertake the "critical and searching" review that the Appellate Body requires.[79] However, in making these arguments[80], the EC misrepresents the standard of review in two important respects.

4.186 *First*, the EC misrepresents the scope of Article 17.6(i) of the *Anti-Dumping Agreement*. Although Article 17.6(i) confers discretion on an authority in the *establishment of the facts* and in their *evaluation*, a panel cannot simply to defer to the conclusions of the national authority, and must provide critical oversight of the authority.[81]

4.187 More importantly, the EC fails to recognize that, although an authority enjoys a certain discretion in its treatment of the facts, it must *always* provide *a reasoned and adequate explanation* to demonstrate that it has complied with the substantive requirements of the *Anti-Dumping Agreement* and Article VI of the GATT 1994.[82]

4.188 *Second*, the EC's Opening Statement misrepresents legal issues as factual issues. There are six examples of this: who are "producers" for purposes of Article 4.1; the interpretation of Article 6.10[83]; the interpretation of Article 6.8 and Annex II[84], whether Article 3 permits certain factors affecting price comparisons to be ignored; the legal requirement in Article 3.5 for an authority to demonstrate that it properly performed the non-attribution analysis; and legal interpretation of Articles 2.2 and 2.2.1.1 in deciding that certain costs were "costs of production" in the IP[85].

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[79] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93, citing Appellate Body Report, *US – Lamb*, para. 106.

[80] *See, for instance*, the EC's Opening Statement at the First Substantive Meeting with the Panel ("Opening Statement"), paras. 8 – 9, 12 – 13, 16, and 17.

[81] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

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

[83] EC's Opening Statement, para. 12.

[84] Surprisingly, the EC's Opening Statement contradicts the argument in its FWS, para. 307, that the dispute regarding finance costs is not one of evidence or fact, but concerns a point of law.

[85] EC's Opening Statement, para. 23.

4. The EC Incorrectly Defined the Product Under Consideration

4.189 The interpretive issue that faces the Panel is whether the EC is correct that a "dumping" determination requires solely that likeness be established for models of the product. According to the EC, an authority can bundle any products together for purposes of a dumping determination, even if they do not "resemble" each other at all,[86] so long as likeness is established at the level of "*models*" of the product.

4.190 Norway's claim is that the references to "*a product*", "*the product* under consideration" and "*the product* under investigation" in Article 2.1, 2.6 and 6.10 of the *Anti-Dumping Agreement*, and "*a product*", "*the product*", and "*any dumped product*" in Article VI of the GATT 1994 must be interpreted as referring to a product whose sub-parts or models are all "like" each other. This interpretation stems also from the definition of "dumping" in Article 2.1 and Article VI:1, in terms of which "dumping" involves a determination that the export price of "*a product*" is less than "*its*" normal value. Thus, even though an authority may conduct intermediate comparisons for models, the model-specific comparison results must be aggregated into a single, overall determination. [87]

4.191 Because the EC determined the product scope of the investigation inconsistently with Article 2.1, it violated: (1) Articles 5.1 and 5.4 in initiating an investigation into an incorrectly determined product; (2) Article 2.1, read together with 2.6, in making its dumping determinations into an incorrectly determined product; and (3) Articles 3.1, 3.2, 3.4, 3.5 and 3.6, in making its injury determination for a domestic industry that produces an incorrectly determined product.

5. The EC Incorrectly Defined the Domestic Industry

4.192 WTO case-law demonstrates that Article 4.1 imposes an obligation on the investigating authority to determine the "domestic industry" consistently with the definition in that provision.[88] The EC did not do so.

4.193 The EC included *only 15 complainants* in the domestic industry. The EC excluded *EC fillet producers* from the scope of the domestic industry. In contrast to the salmon growing industry, which has a minuscule production of 18,000 tons, the filleting industry produces "several hundred thousand tons". There is, therefore, *a profound mismatch between the product scope and the scope of the domestic industry* that is contrary to Article 4.1. The EC's suggestion that whole/HOG fish and fillets are the same product is also nonsense. The two products are produced by *different* industries using *different* production methods; they have *different* physical characteristics and *different* end uses; consumers perceive them *differently*; they command *very different* prices in the marketplace (*see* the EC's MIPs); and they are subject to *different* regulatory treatment (e.g. tariff classification).

4.194 Without adequate explanation, the EC also excluded *six other categories of EC salmon producer* from the scope of the domestic industry.[89] However, under Article 4.1, the domestic industry cannot be confined to producers from a particular sector or segment of the industry, especially the complainants.

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[86] EC's FWS, para. 37.

[87] Appellate Body Report, *US – Zeroing (Japan)*, para. 151, quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 104; Appellate Body Report, *US – Zeroing (EC)*, para. 126; and Appellate Body Report, *US – Softwood Lumber V*, para. 93.

[88] Norway's Opening Statement, paras. 45 – 47.

[89] *See* Norway's FWS, para. 225.

4.195 The EC also violated Article 5.4 in initiating the investigation, and Article 3.1 in making an injury determination, on the basis of a domestic industry that is determined inconsistently with the definition in Article 4.1.

4.196 Furthermore, Article 3 does not permit sampling of the domestic industry for purposes of the injury determination. *Even assuming* that sampling were permitted under Article 3 (*quod non*), such sampling must follow the rules under footnote 13.[90] This is the sole provision in the *Agreement* that addresses sampling of the domestic industry. The EC did not respect the rules in footnote 13 governing *when* and *how* sampling of the domestic industry can be undertaken. Furthermore, any sample must permit the authority to conduct an "objective examination" based on "positive evidence". The EC failed to respect those requirements because the EC's sample comprises solely a subset of the complainants, which are the producers most likely to be in an unhealthy economic condition. Thus, the EC's sample makes an injury finding more likely, thereby "favour[ing] the interests of [a particular] interested party or group of interested parties".[91]

4.197 Finally, in its Closing Statement, the EC contended that it must exclude EC fillet producers from the investigation because otherwise "the Scottish salmon growers in this case [would have] had no effective remedy, *since the EC filleting-only firms could forever block any anti-dumping proceeding*."[92] This astonishing statement is an admission that the EC deliberately tailored the scope of the industry to suit the needs of Scottish growers.

6. The EC's Dumping Determinations Are Flawed

(a) The EC's selection of the sample of Norwegian producers violated Article 6.10 of the Anti-Dumping Agreement

4.198 To recall, Norway argues that the EC violated Article 6.10 because it:

- Included only 3 out of the 10 largest exporters and producers in its sample. The sample therefore does not account for the "largest percentage of the volume of exports that can reasonably be investigated".
- Excluded from the scope of investigation all independent exporters, even though they account for the majority of exports from Norway.
- Excluded from its producers-only sample two producers, Salmar and Bremnes, that accounted for the 3rd and 7th largest export volumes to the EC during the IP.

4.199 The EC argues that the "or" in the first sentence of Article 6.10 is disjunctive,[93] and that an authority can choose to exclude all exporters from an investigation, instead calculating margins for producers only. Norway continues to assert that the "or" in Article 6.10 is *conjunctive* and refers the Panel to its answer to Question 76. Norway argues that there is no preference for producers in Article 6.10, and that exporters and producers are on an equal footing. The Appellate Body confirmed in *US – Zeroing (Japan)* that the focus of the *Agreement* is on *export* pricing behaviour. [94] Furthermore, existing case law contradicts the EC's interpretation of Article 6.10. The Panel in *Korea – Paper* clarified that:

[90] *See also* Norway's Opening Statement, para. 280.
[91] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[92] EC's Closing Statement, p. 1.
[93] EC's FWS, paras. 142 to 143.
[94] Appellate Body Report, *US – Zeroing (Japan)*, para. 165.

> … Article 6.10 mentions "exporters" *and* "producers" of the subject product and requires that an individual margin be calculated *for each of them*.[95]

4.200 Norway disagrees with EC's contention that practical problems arise from its interpretation, and refers the Panel to its response to Question 77. With respect to the non-inclusion of Salmar and Bremnes in the sample, the EC argues that FHL did not bring relevant facts about Salmar to the EC's attention[96] and that Bremnes was left out of the sample because FHL had not proposed Bremnes.[97] This is both factually incorrect, and substantively wrong. A merely facultative consultation process, in which the authority holds the power of decision, cannot relieve the authority of its substantive obligation to include the largest percentage of volume of exports in the sample.

(b) The EC violated Articles 2.2 and 2.2.1 of the Anti-Dumping Agreement by failing to determine that below cost sales were made at prices that did not permit the recovery of costs within a reasonable period of time

4.201 The essence of Norway's argument is, *first*, that the EC did not make the "determination" required by Article 2.2.1 to the effect that below-cost sales were made at prices that did not provide for cost recovery within a reasonable period of time. A "determination" must be set forth explicitly. However, the EC nowhere even mentioned a cost-recovery test. *Second*, even assuming the EC could make an implicit determination for cost recovery, the EC did not apply a test that would correctly test for cost recovery.

4.202 Norway refers the Panel to its response to Questions 82 and 83, where Norway explains why the "reasonable period of time" cannot be equated with the IP. Further, the last sentence of Article 2.2.1 does not establish an *exhaustive* test for determining whether below-cost prices provide for the recovery of costs within a reasonable period. It merely describes *one situation* in which an authority must conclude that prices *allow* for cost recovery in a reasonable period.

(c) The EC violated Article 2.2.2 by improperly rejecting actual sales data because of the low volume of sales

4.203 In determining amounts for SG&A costs and for profits, Article 2.2.2 allows the authority to disregard data solely from sales that are not in the ordinary course of trade. As the panel and Appellate Body held in *EC – Tube or Pipe Fittings*, the text of Article 2.2.2 does not permit data to be rejected on the basis of the low sales volume.

4.204 The EC improperly rejected actual profits and selling, general, and administrative ("SG&A") data when constructing normal value on the basis that the volume of the sales at issue was too low. *First*, the EC rejected domestic sales data if the domestic sales volume was less than 5 per cent of export sales either for the product as a whole or for a particular model. *Second*, the EC rejected domestic sales data if the volume of profitable sales was less than 10 per cent of total domestic sales by product model.

4.205 By applying the 10 per cent test, the EC improperly excluded domestic sales data by reason of the price and volume of the loss-making sales. In so doing, the EC acted inconsistently with Article 2.2 because, for the companies affected by this test, the EC was not permitted to construct

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[95] Panel Report, *Korea –Paper*, para. 7.157. *See, also,* Appellate Body Report, *US – Hot-Rolled Steel*, para. 118; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 186; Appellate Body Report, *US – Zeroing (EC)*, para. 129; Appellate Body Report *Mexico - Rice*, para. 216; Appellate Body Report, *US – Softwood Lumber V*, footnote 158; and Panel Report, *Mexico –Rice*, paras. 7.182 and 7.183.

[96] EC's FWS, paras. 189 - 190.

[97] EC's FWS, para. 191.

normal value for the models concerned. The EC also violated Article 2.2.2 because, once it had decided to construct normal value, it used the 10 per cent test again to discard actual profit data. Norway, therefore, requests that the Panel find that the EC acted inconsistently with Articles 2.2 and 2.2.2.

(d) The EC violated Article 6.8 and Annex II of the Anti-Dumping Agreement in its use of facts available to determine normal value for Grieg

4.206 For Grieg's filleting and finance costs, the EC used information from a secondary source, rejecting information submitted by the company. The EC's defence rests mainly on the contention that, in using information from a secondary source it did not actually use "facts available" within the meaning of Article 6.8 of the *Anti-Dumping Agreement*.[98] However, there is no *third category* of information under the *Anti-Dumping Agreement.* If secondary source information is used, Article 6.8 and Annex II apply. The EC rejected information that it was not entitled to reject under paragraph 3 of Annex II; and failed to take the procedural steps required by paragraph 6 of Annex II before resorting to facts available.

4.207 The EC also expressly states that it would only have accepted Grieg's information if it had been presented during the on-the-spot verification, and that it would never have contemplated a second verification visit.[99] The EC thereby deprives Grieg of its rights under Annex II because no deficiency letter was sent out prior to the verification visits, but only in March. Grieg then provided the necessary information in one week. By insisting on immediate production of documents as verification, the EC failed to give Grieg a "reasonable period" to submit information.

(e) The EC's treatment of non-sampled companies violates Articles 6.8 and 9.4 of the Anti-Dumping Agreement

4.208 The EC violated Article 9.4 because it (i) incorrectly calculated the "all others" rate; (ii) failed to exclude Grieg's margin from the calculation of the "all others" rate, even though it was based on facts available; and (iii) assigned to the allegedly non-cooperating, non-sampled producers a "residual margin" of 20.9 per cent, which exceeds the maximum weighted average margin under Article 9.4.

4.209 The EC expressly acknowledged that it incorrectly calculated the weighted average dumping margin,[100] but claims that it is without practical or legal effect due to the imposition of MIPs, is without merit. Norway has shown that the EC set the level of the fixed duty for all companies, including non-examined companies, by reference to the weighted average margin of dumping referred to in Article 9.4(i). The EC also originally imposed *ad valorem* duties and could revert to these duties at any time.

4.210 Norway rejects the EC's argument that it complied with Article 6.8 because it published a notice of initiation in the Official Journal and sent that notice to known companies and to industry associations.[101] Neither the publication of the Notice of Initiation in the Official Journal nor the provision of that Notice to industry associations constitutes the notice required by Article 6.8 and Annex II. In this respect, Norway respectfully refers the Panel to its detailed response to Question 88.

4.211 Similar to *Mexico – Rice*, sixty-seven of the companies that are subject to the residual rate received no notification, at all, from the EC, contrary to Annex II(1).[102] The EC not only failed to

[98] EC's FWS, paras. 290 and 307 – 308.
[99] EC's FWS, paras. 295 and 296.
[100] EC's FWS, para. 312.
[101] Norway's Opening Statement, paras. 105 – 106.
[102] *See* Exhibit NOR-152. This list was provided by FHL to the Commission on 9 May 2005.

provide any notice of initiation to those companies, it also failed to inform 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.

7. The EC's Injury Determination Violated Article 3 of the Anti-Dumping Agreement

(a) The EC violated Articles 3.1, 3.2 and 3.5 of the Anti-Dumping Agreement in its examination of the volume of dumped imports

4.212 Where the second sampling option is used, the Appellate Body has cautioned that evidence from the sample can be used as just one "*part* of the positive evidence" regarding the volume of dumped imports from non-sampled companies.[103] Thus, in this investigation, the scope for extrapolation was limited by the need for additional "positive" evidence. None was provided by the EC in its determination. Furthermore, the EC was not entitled to include Nordlaks' imports in the volume of dumped imports because this company was dumping at *de minimis* levels.

(b) The EC violated Articles 3.1, 3.2 and 3.5 of the Anti-Dumping Agreement in its examination of price undercutting

4.213 The EC ignored the fact that EC salmon products generally enjoy a price premium in the marketplace of 12 per cent – a price premium recognized by the EC on numerous occasions including in its Definitive Disclosure and First Written Submission[104], and taken into account for the establishment of its *injury margin* (and the level of the MIP). If this price premium is taken into account, there was no price undercutting.

(c) The EC violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement because it failed to evaluate objectively price trends affecting EC producers

4.214 In the injury determination, the EC examined certain financial indicators, including price trends, for a sample of just five Scottish companies. In so doing, the EC found that the companies' sales prices declined by *9 per cent* when measured in euros.

4.215 Norway claims that the material currency for examining the financial performance of these Scottish companies is pounds sterling, and not euros. During the period considered, the euro appreciated against the pound by almost exactly *9 per cent*. Thus, from the perspective of the examined companies, *no price decline* affected their financial performance because of the movement in the value of the currencies. Norway submitted graphs to depict the misleading impression created by using euros.

8. The EC Violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement in Concluding that Dumped Imports Caused Material Injury to the EC Domestic Industry

4.216 The EC failed to ensure that injury caused by factors other than dumped imports was not improperly attributed to dumped imports. It is an established fact that the costs of the sampled Scottish companies rose sharply from 2001 to 2002, and remained at a higher level throughout the period considered. In violation of Article 3.5, the EC failed to undertake any evaluation of this factor. Further, the EC concluded that salmon imports from Canada and the United States consist mostly of wild salmon that, it found, does not compete with farmed salmon. However, the EC failed to disclose any facts in support of these conclusions, far less set forth "an evidentiary path" leading from the

[103] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 138.
[104] EC's FWS, paras. 358 – 359.

evidence in the record to its determinations. As stated by the Appellate Body, a reasoned and adequate explanation "is not one where the conclusion does not even refer to the facts that may support that conclusion".[105]

9. The MIPs Imposed by the EC Violate Article VI:2 of the GATT 1994 and Article 9 of the Anti-Dumping Agreement

4.217 Norway and the EC agree[106] that any MIPs imposed may not exceed the individually determined normal values for the sampled companies, or the weighted average normal value in respect of non-sampled companies. Norway has made *a prima facie* case that the EC's MIPs exceed individual and weighted average normal values, in violation of Articles 9.2, 9.4 and VI:2. The EC has made no attempt to refute Norway's calculations.

4.218 Norway also claims that the EC may not impose variable anti-dumping duties, using MIPs, in excess of the *individual dumping margins* determined for sampled companies. The EC's measure violates these requirement because it contains no mechanism to limit the amount of duties initially imposed to the dumping margin. By so doing, the EC violates Articles 9.1, 9.2, 9.3 and Article VI:2 of the GATT 1994.

4.219 *Moreover*, Norway also claims that the EC acted inconsistently with Article 9.2 by calculating the MIPs using a three year average exchange rate to convert the constructed normal values from Norwegian kroner to euros. Norway has addressed this claim in reply to Question 69. By relying on historical exchange rates, the EC has overstated by 5.2 per cent the normal value that was determined during the investigation.

10. The EC's Fixed Duties Are in Violation of Articles 9.1, 9.2, and 9.3 of the Anti-Dumping Agreement

4.220 The EC violated Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement* because, in certain circumstances, it imposes fixed duties on examined producers that exceed the margins of dumping determined for these producers. For a number of the 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.[107]

4.221 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.[108] Therefore, according to the EC, the fixed duties do not represent "specific action against dumping".[109] Although creative, this argument is wrong. As set forth in Norway's Opening Statement, the EC regulation characterizes the fixed duties as a "fixed anti-dumping duty"; it adopted the fixed duty under the EC Basic Regulation that permits action against dumping; and the

[105] Appellate Body Report, *US – Steel Safeguards*, para. 326.

[106] The EC refers to a normal value "adjusted … to a CIF Community frontier level". (EC's FWS para. 463) To the extent that 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.

[107] Norway's FWS, para. 679.

[108] EC's FWS, para. 501.

[109] EC's FWS, para. 508.

EC has no legal authority to impose penalties for customs fraud because the EC member States enjoy this competence.[110]

11. The EC Violated the Procedural Requirements in Articles 6 and 12 of the Anti-Dumping Agreement

4.222 *First*, the EC violated Articles 6.4 and 6.2 by failing to disclose non-confidential information contained in the record of the investigation. Norway has pointed to 68 missing documents, for which the EC has provided no answer or merely incorrect and unsubstantiated assertions. 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 were not "*used*" by the authority. In principle, therefore, the EC accepts that it was obliged to show the 68 (or more) missing documents to Norway under Article 6.4.

4.223 Furthermore, the EC also failed to show Norway the information contained in the contested Exhibits EC-2, EC-10, EC-12, EC-13, EC-14, EC-15 and EC-16. If the Panel declines to reject them, and accepts that this information was before the authority, the EC violated Article 6.4 by failing to show Norway that information during the investigation.

4.224 *Second*, the EC violated Articles 6.9 and 6.2 by failing to disclose the essential facts that formed the basis for its decision to impose duties. Norway makes particular arguments relating to the disclosure regarding the dumping determination, the definition of the domestic industry, causation, and the remedy determination.

4.225 *Third*, the EC violated Articles 12.2 and 12.2.2 by failing to provide a reasoned and adequate explanation for its findings and conclusions. Norway considers that the EC's published determination – the Definitive Regulation – is characterized by a general failure to explain how the facts in the record support the factual and legal determinations. Typically, the EC presents bald conclusions that make no reference to the facts in the record that support the conclusion. Bald, unsubstantiated assertion is, however, simply not good enough to meet the requirements of the *Anti-Dumping Agreement*. As the Appellate Body held, "a 'reasoned conclusion' is not one *where the conclusion does not even refer to the facts that may support that conclusion*."[111] Moreover, a "reasoned and adequate explanation … must be *clear and unambiguous*. It must *not merely imply or suggest* an explanation. It must be a *straightforward explanation* in express terms."[112] Norway requests the Panel to follow the earlier case-law and find that the EC violated Article 12.2 and 12.2.2.

12. The EC's Determination of Normal Value Violated Article 2 of the Anti-Dumping Agreement because of Improper Adjustments to Individually Examined Producers' Cost Related Data

(a) Introduction

4.226 In constructing normal value for the sampled producers, the EC systematically revised the reported costs of production ("COP") and SG&A costs upwards by significant amounts – on average by 22 per cent.[113] As a result of the improper adjustments, the margin of dumping for seven of the producers was significantly elevated and, for one producer, dumping was found where there was none. Norway maintains that, in making these adjustments, the EC violated Articles 2.1, 2.2 and

[110] Norway's Opening Statement, paras. 157 - 163.
[111] Appellate Body Report, *US – Steel Safeguards*, para. 326. Emphasis added.
[112] Appellate Body Report, *US – Line Pipe*, para. 217.
[113] *See* Summary Table of the EC's Cost Adjustments. Exhibit NOR-99.

2.2.1.1 of the *Anti-Dumping Agreement* because it failed to determine the company's respective COP correctly and, as a result, improperly determined normal value.

(b) The EC's improper inclusion of NRC and operating losses in the costs of production

4.227 For the EC, any cost of running a business is a cost of producing salmon, as is any cost that either impacts profits or decreases the wealth of an enterprise that produces salmon as part of its business. Thus, for the EC, there is no enquiry as to whether a cost contributed to the *production and sale* of the like product during the IP.

4.228 The EC interpretation of the *Anti-Dumping Agreement* is wrong. Norway argues that the term "costs of production" in Article 2.2.1.1 of the *Anti-Dumping Agreement* measures *the value of the resources that are used to produce a good*.[114] For a cost to be a "cost of production", there must, therefore, be a relationship between the cost and production. The first sentence of Article 2.2.1.1. confirms this relationship, by providing that the relevant costs are those "*associated with* the production". Article 2.2.2 also speaks of costs "incurred" "*in respect of* production and sale". And, finally, Article 2.2.1.1 refers to costs that "*benefit*" production.

4.229 The authority's duty under Article 2.2.1.1 to consider evidence on cost allocation is also premised on the view that only those costs contributing to production during the IP can be included in normal value. Cost relating to other periods cannot be included.

4.230 In its First Written Submission, Norway explained in considerable detail why certain NRC and operating losses do not benefit production in the IP. To give but two examples: Regarding the costs [[XXX]] incurred on the closure of sales operations in [[XXX]][115], the EC now admits that it was incorrect to include these costs.[116] Furthermore, the EC was well aware that [[XXX]] investment loss on the fishing boat company, [[XXX]], was totally unrelated to salmon production. In its Opening Statement, the EC actually concedes that the disputed costs do not have a relationship with production because it refers to them as: "*non-benefiting*, non-recurring costs".[117] The Panel should, therefore, find that the EC violated Article 2.2.1.1 and in consequence also violated Articles 2.1 and 2.2.

(c) Averaging of NRC over a three year period for several companies

4.231 The EC has attempted to justify its use of a three year period for averaging NRC (which had the effect of increasing the COP for the companies), on the grounds that it calculated *all* costs for *all* sampled companies on the basis of project accounting (PA). Norway explained to the Panel at the first meeting that this is incorrect as a matter of fact and that the EC reliance on a PA approach could not in any case justify its recourse to three year averaging which was based on different reasons in the published determination. Finally, Norway also submits that the NRC concerned do not benefit current or future production. Accordingly, none of the costs subject to the three-year averaging approach may be included in the COP under Article 2.2 and 2.2.1.1 because they are not "costs of production".

[114] Norway's FWS, para. 798.
[115] This is explained in detail in Norway's First Written Submission, paras. 890 – 893.
[116] EC's FWS, para. 676.
[117] EC's Opening Statement, para. 22.

(d) The EC's improper adjustments relating to finance costs and smolt cost

4.232 Norway also contests the EC's use of a three-year average period to calculate the finance costs of [[XXX, XXX and XXX]]. The EC readily admits that its approach led to finance costs that were higher than would have been the case using the IP.[118]

4.233 The EC also made improper adjustments for smolt costs incurred by [[XXX]], [[XXX]] and [[XXX]]. The EC now asserts that it remedied the situation for [[XXX]] and for [[XXX]][119] between definitive disclosure and the Definitive Regulation. Although this assertion may be correct, Norway has no basis for confirming its correctness. The EC's did not disclose the "essential facts" underlying the revised dumping determinations for the two companies, implying a breach of Article 6.9. Nor did the EC's published determination provide any explanation, as required by Article 12.2.2, regarding "the acceptance or rejection of relevant arguments or claims made by the exporters" on this issue.

(e) The EC's improper adjustments relating to SG&A costs for [[XXX]]

4.234 *First*, the EC violated Article 2.2.2 of the *Anti-Dumping Agreement* because it failed to determine [[XXX]] SG&A costs based on amounts actually incurred by the company during the IP and reported to the EC. *Second*, the EC did not establish an adequate reason for its rejection of [[XXX]] actual SG&A costs and therefore failed to properly establish that it was entitled to have recourse to the alternative calculation method under Article 2.2.2. *Third*, the EC further violated Article 2.2.2 because it failed to adopt a "reasonable method" when recalculating [[XXX]] SG&A costs. As Norway has demonstrated, the SG&A calculation methodology relied upon by the EC resulted in a substantial double counting of [[XXX]] costs. As a result, under its unreasonable methodology, the EC *increased the company's costs by nearly 20 per cent*.

(f) The EC's improper adjustments relating to costs of purchased salmon for [[XXX]]

4.235 The EC overstated the costs of the purchased salmon to [[XXX]] by [[XXX]] NOK. Without the overstatement of these costs, [[XXX]] margin of [[XXX]] per cent disappears below zero. The EC's defense is that the [[XXX]] NOK 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*)."[120] However, there is no doubt that the EC was thoroughly familiar with the figure and had ample opportunity to verify it. The Panel should therefore find that the EC violated Articles 2.2 and 2.2.1.1 of the *Anti-Dumping Agreement.*

13. Conclusion

4.236 Norway maintains all its claims and respectfully reiterates the requests that are set forth in Section XII of its First Written Submission.

F. SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

4.237 The following summarizes the European Communities' arguments in its second written submission.

[118] EC's FWS, para. 697.
[119] EC's FWS, para. 705.
[120] EC's FWS, para. 715.

1. Terms of Reference

4.238 The EC requests the Panel to dismiss that part of Norway's claim that accuses the EC of wrongly excluding mere exporters from the calculation of the dumping margin on the ground that it is outside the Panel's terms of reference. The matter was not raised in Norway's panel request. Norway did not respect the requirements of Article 6.2 of the DSU in that it failed to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Norway's failure on this point has caused significant prejudice to the EC in terms of the time and effort that has been devoted to countering Norway's claim.

2. Product Concerned

4.239 As preliminary points, the EC notes that Norway should refer to "the product under investigation" not the "the product under consideration". Also, Norway's claim is that fish and fillets cannot be included within the scope of a single original *proceeding*.

4.240 The EC's position is simply that Articles 2.1 and 2.6 (as opposed to the entire *AD Agreement*) do not contain relevant obligations. The EC states only that an investigating authority has very considerable latitude when it comes to selecting the product concerned. Norway's reading of Article 2.6 does not respect the text, context or object and purpose. In any event, the point has already been confirmed by the case law.

4.241 Bicycles and cars are irrelevant to this case and a false analogy. The EC agrees that an anti-dumping proceeding does result in a single dumping determination for each exporter/producer, as in this case; and that the results of multiple intermediate comparisons are not themselves margins of dumping. The use of models may permit an investigating authority to avoid complicated adjustments for differences affecting price comparability. What is contained in recitals 10 and 11 of the Provisional Regulation *to which neither Norway nor the Norwegian companies objected during the anti-dumping proceedings* is perfectly adequate and does not disclose anything inconsistent with Articles 2.1 and/or 2.6. The Appellate Body has recently expressly confirmed that it is for an investigating authority to select or define the product concerned.

4.242 The investigating authority reasonably took the view that the transformation from head-off gutted fish to large skin on fillets was not so great as to render separate anti-dumping proceedings essential; preferring instead to draw the line at further processed types, such as smoked salmon. Some undertakings, particularly in the EC, engage in both salmon farming and filleting, and as such may have a filleting facility, albeit not a "dedicated" one; may not always have their fish filleted far from where they are harvested; and may use the same labour force for different activities. It is self-evident that it costs something to cut a fish up. Norway is simply wrong to assert that an anti-dumping proceeding can only ever have as the product concerned one tariff classification.

4.243 The EC disagrees with Norway that it is possible to extrapolate from nebulous assertions about alleged object and purpose precise obligations regarding the selection of the product concerned. The EC makes a sharp distinction between the selection of the product concerned; and the proposition that, having selected the product concerned, the investigating authority must apply a rigorously consistent approach to that aspect of the investigation throughout the proceeding. This is not a matter that the Members expect to be decided through dispute settlement. Panels "cannot add to or diminish the rights and obligations provided in the covered agreements." This view is confirmed by a review of the preparatory work.

3. Domestic Industry

4.244 The EC disagrees with Norway's submissions regarding the nature of any obligation in Article 4.1 of the *AD Agreement*. The panel report in *Argentina – Poultry* did not benefit from Appellate Review. The definitional point was not argued in *EC-CVDs on DRAMs*, which consequently contains no relevant findings on the issue, and in any event that panel report also did not benefit from Appellate Review. With respect to the *US-Hot-Rolled Steel* case, contrary to what Norway asserts, the Appellate Body has recently stated clearly that Article 2.1 of the AD Agreement does not contain independent obligations, and the same must be true of Article 4.1. Finally, the *US-Lamb* case, apart from relating to a different agreement, does not contain a finding of inconsistency with Article 4.1(c) of the *Agreement on Safeguards*, but rather a finding of inconsistency with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards.*

4.245 Norway and the EC agree that double counting is a "problem", to which the investigating authority had to find a "solution". Norway and the EC also agree that there is an indissociable link between the selection of the product concerned and the question of "double counting" or more precisely which undertakings to include as producers. Thus, Norway and the EC agree that this question flows from the selection of the product concerned. And Norway and the EC agree that, because Norway rejects the "no double counting" approach adopted by the investigating authority, the only alternative, as far as Norway is concerned, is to "re-visit" the selection of the product concerned. This means that once the Panel has found in favour of the EC with respect to Norway's claims regarding the selection of the product concerned, as the EC respectfully believes the Panel must, then the Parties agree that this necessarily means that Norway's claim regarding the domestic industry must also fail, at least as regards the EC filleting only undertakings.

4.246 The Definitive Regulation states clearly that the detailed analysis of the data received from the salmon industry indicated that some companies did not produce salmon any longer. The EC does not agree that the elimination of such companies can reasonably be described as "self-serving" or "biased". On the contrary, the EC would rather tend towards the view that a problem might arise if companies that no longer produce the product concerned were nevertheless included in the investigation. With respect to this issue, the EC simply cannot understand on what basis Norway makes the bare assertion that there is something "self-serving" or "biased" in the measure at issue. And precisely the same is true if a company did not produce the product concerned during the investigation period; or fell into receivership; or failed to provide the necessary data.

4.247 Norway's submissions regarding organic salmon are simply irrelevant, because producers of organic salmon were not excluded from the domestic industry.

4. Dumping Determination

(a) Article 6.10 of the AD Agreement

4.248 Norway's further arguments against the EC's concentration on producers rather than mere exporters of salmon have added nothing. The occasions on which the AD Agreement refers to exporters and not to producers are easily explicable. For example, in some instances, such as Article 10.6, only an exporter is referred to because in the circumstances reference to a producer would serve no function. Likewise, as regards Articles 4.2 and 8, only the person involved in exporting a product can give undertakings about the price of that export. The role of production costs as a basis for normal value cannot be dismissed as 'only an exception'. The notion of sales 'in the ordinary course of trade' is of central importance.

4.249 Finally, there is nothing in Article 6.10 that favours an investigation based on exporters rather than exporters. Contrary to Norway's assertion, the EC's reasons for excluding two producers, Salmar

and Bremnes, from the list of companies examined is perfectly justifiable. Here as elsewhere Norway resorts to misquotation. The former was not included because of lack of relevant information, and the latter because of the Norwegian industry's representations.

(b) Article 2.2.1

4.250 Norway's comments in the Oral Statement do not add anything substantive to its previous arguments.

(c) Disregarding sales

(i) Article 2.2.2, opening paragraph

4.251 Examination of the internal logic of Articles 2.2, 2.2.1 and 2.2.2 shows that the meaning of the phrase 'ordinary course of trade' in the first paragraph of Article 2.2.2 must be independent of its meaning earlier in the Article. Any other view leads to a circular definition of the concept. If, as claimed by Norway, data from sales disregarded for reasons of low volume is included in constructing normal values the result would be to calculate dumping margins on the basis of comparisons of sales which the *Agreement* itself defines as non-comparable.

(ii) The less-than-10 per cent profitable sales rule

4.252 Norway's comments do not appear to raise any issue regarding the less-than-10 per cent profitable sales rule that the EC has not already responded to in its answers or in its First Written Submission.

(d) Facts available

4.253 Norway's approach to the issue of 'facts available' is not consistent.

(i) Filleting costs

4.254 The EC authorities did not knowingly choose a prejudicial solution for calculating filleting costs. As regards the need for on the spot verifications, Norway does not understand their importance in getting at the truth. Although Norway has attempted to reconfigure the facts, the situation was in fact one of the unavailability of evidence and not one of non-acceptance on the part of the EC authorities. Norway's criticisms of the EC for not communicating in writing with the company do not conceal the truth which is that the EC authorities explained the situation regarding filleting costs fully during the verification.

(ii) Financing costs

4.255 As regards financing costs, faced with conflicting information from the company the EC authorities chose to rely on the annual accounts, which being audited were more persuasive. The loan rates were found to be well below prevailing commercial rates so the EC authorities referred to the Norwegian Central Bank rate as a benchmark.

(e) Treatment of non-sampled companies

(i) Article 9.4

4.256 Once again Norway has misrepresented the EC's argument. The EC has already demonstrated that in substance the fixed duty is not, as far as the WTO legal regime is concerned, an anti-dumping duty. Norway provides no WTO basis for its arguments about supposed chilling effect.

(ii) Non-cooperating, non-examined companies

4.257 This issue is addressed in the EC's answers to the Panel's Questions 88 and 89. Norway wrongly invokes paragraph 6 of Annex II in a case where information was not supplied (rather than refused). It also invokes a non-existent duty to state how the alleged non-cooperation impeded the investigation. Finally, by the time that the non-responding companies complained of their treatment it was far too late to consider including them in the investigation.

5. Domestic Industry and Article 3 of the *AD Agreement*

(a) EC definition of domestic industry did not and could not violate the provisions of Article 3 of the AD Agreement

4.258 Norway's argument that as a consequence of defining the domestic industry in the present case, the EC violated the provisions of Article 3 of the AD Agreement is *non sequitur*. The main thrust of the provisions of Article 3 of the *AD Agreement*, and in particular Articles 3.1, 3.4 and 3.5 thereof (which Norway claims have been violated), is to ensure the *consistency* of injury analysis. O*nce* the domestic industry has been defined, the investigating authority is obliged to conduct an injury analysis with respect to the domestic industry so defined. Norway's proposal to modify the detailed and clear terms of Article 4.1 of the *AD Agreement*, which contains a *definition*, by importing the concept of objective examination into the analysis under Article 4.1, goes against the express intention of the drafters as well as the WTO case law.

(b) The EC sampling of the domestic industry is in accordance with the AD Agreement

4.259 The EC notes that Norway has *never* argued that the *composition* of the sample by the EC investigating authority in the present case actually violated Article 3.1 of the *AD Agreement*. Rather, Norway argued that that the use of sampling in an injury analysis is impermissible as such or, at most, that a sampling exercise has to comply with the terms of footnote 13 to Article 5.4 of the AD Agreement and never provided any evidence specific to the present case. The EC understands that the Panel would not make a case for Norway. If the Panel finds that sampling of domestic industry is allowed and that footnote 13 is not determinative of the method by which sampling must in such cases be conducted, in the EC view, the Panel has to stop there and abstain from any factual findings with regard to the present case.

4.260 As regards the issue of the compatibility of sampling of the domestic industry with the AD Agreement in general, by arguing that the AD Agreement authorizes sampling only in expressly described circumstances, Norway effectively ignores the text of the agreement and reads into it a new rule: whatever is not expressly allowed, is prohibited by the *AD Agreement*. Yet, the AD Agreement contains an effective rule for the injury analysis: Article 3 and, in particular, Article 3.1. This provision requires an *objective* examination, but does not prescribe the methods by which it should be conducted. To read into this provision a prohibition of sampling would be, in the EC view, a direct misreading of the text. This approach would imply that the use of sampling techniques is inherently unable to produce objective results. It also would be absurd to accept that the AD Agreement purposely creates a looser standard for the determination of support of a complaint under Article 5.4

of the AD Agreement (where sampling is allowed) than for the determination of injury under Article 3. Footnote 13 shows that sampling of the domestic industry is, conceptually, accepted by the *AD Agreement*. Norway also ignores the acceptance of sampling by the panel in *EC – Bed Linen*. Finally, Sampling naturally is not about segmentation addressed in the in *US – Hot-Rolled Steel* case.

4.261 As regards the methods by which sampling should be conducted, the EC considers that the appropriate legal standard is that of Article 3.1 of the *AD Agreement*: "objective examination" on the basis of "positive evidence". Article 6.10 of the AD Agreement may serve as a very good guidance for the determination of whether sampling of domestic industry was conducted in compliance with Article 3.1. However, there also may be other methods which satisfy the requirements of Article 3.1.

6. Injury

(a) EC correctly determined the volume of dumped imports

4.262 Norway "recycles" its claim under Article 6.10 of the AD Agreement and brings it again, relying on the same "evidence" and arguments, under Article 3 (3.1) of the *AD Agreement*. In the EC view, if a sampling exercise complies with the terms of Article 6.10, it has to be considered as being objective and complying with Article 3.1. Otherwise it would have to be implied that the sampling methods described in Article 6.10 are not sufficient and are not objective. It would thus mean that a sampling exercise under Article 6.10 is not enough for the purposes of Article 3.1 and, that an investigating authority has to conduct a separate analysis of dumping for the non-sampled parties under that provision. Further, there was other additional evidence before the investigating authority on dumped imports besides that generated by sampling: this regards the imports from non-cooperating companies, which also included imports *via* traders.

(b) The EC properly examined price-undercutting

4.263 Norway fundamentally misunderstands the functioning of a price premium. In a dumped market, the issue is not a question of whether a consumer is willing to pay a premium. Rather, the question is whether a producer can ask for or is likely to obtain a premium he would normally get under normal market conditions. A producer facing a surge of low-priced products will do anything to survive, and first of all depress prices to keep its share of the market. The facts demonstrate that at the moment the domestic industry increased its average unit sales prices (even by mere 4.9 per cent), it started to lose sales volume (by 7.3 per cent) and thus lose market share.

(c) The EC Properly Evaluated Price Trends

4.264 For the purposes of the analysis of the financial performance of the EC industry, it does not matter whether one conducts the analysis in Euro or in GBP. If the analysis is conducted in Euro, one will be able to establish a decline (-9 per cent) in sales prices and a minor increase in the costs of production (4 per cent) from 2001 to IP. In contrast, if the same analysis is made in GBP, one establishes relatively stable prices but an increase in the cost of production (14 per cent) over the same period. The ultimate result of the analysis, namely the profit and loss ratio, is the same.

7. Causation

(a) Effect of "smaller less efficient producers in the EC and higher cost of production"

4.265 It is normal that an industry which has suffered cost increases would try to recuperate them by raising sales prices. The EC domestic industry was prevented from a such increase in sales prices because of the dumped imports from Norway (which undercut the prices of the EC domestic industry). At the same time, as explained in the Provisional Regulation (recital 108), Norwegian

industry did not have any overall cost advantage in comparison with the EC domestic industry and suffered itself losses at the prices at which it was selling. It was the dumped imports that have caused the injury.

(b) Imports of wild salmon from Canada and the United States

4.266 There was considerable information concerning the imports of wild salmon from the US and Canada and the non-interchangeability of wild salmon with farmed salmon before the investigating authority (and referred to in the Definitive Regulation) and some of it, in fact, originated directly with the government of Norway. Norway makes its claim not to convince the Panel that the EC was deciding on the basis of incorrect facts. Instead, Norway argues that establishment of facts that are not footnoted automatically violate Article 3.5 of the *AD Agreement*. That is an unacceptable legal standard.

8. MIPs

(a) MIPs and normal values

4.267 Norway again misstates the EC's arguments. As regards the results of calculation of the maximum level of MIPs the EC strongly criticises Norway's methodology, but it has no view as to whether, using this methodology, Norway's calculation is correct. The EC's adjustment of normal values to a CIF basis when calculating 'dumping' MIPs is a consequence of its use of this basis for all customs duties. If it did not make this adjustment the exporter would be able to claim that it had raised prices when in reality the increase was merely due to transport and insurance costs.

(b) Limits on MIPs

4.268 Norway's argument for the use of a cap on MIPs is based on a misunderstanding of the WTO rules that limit anti-dumping duties to the level of the 'margin of dumping'. As recently emphasized by the Appellate Body, these rules, notably Article 9.3 of the *AD Agreement*, apply to the final stage of the assessment of duty. In the case of MIPs this is when an importer claims a refund in respect of a particular exporter's sales on which duties have been charged. Norway misguidedly proposes that the rule applies at the point when the goods are imported.

9. Fixed Duties

4.269 The EC has addressed Norway's latest arguments on the issue of fixed duties in its answers to the Panel's Questions numbers 41 to 44 and sees nothing useful that it can add to those answers.

10. Cost Adjustments

4.270 In looking at the EC authorities' assessments of the Norwegian exporters' costs the Panel should keep in mind the well-established principle that the WTO agreements should not be interpreted in ways that would enable Members to evade or circumvent WTO disciplines. Consequently, exporting companies should not be allowed manipulate their accounts in order escape the application of WTO rules on dumping.

(a) 'Improper inclusion of all NRC in the costs of production'

4.271 The approach used by the EC authorities is based on the 'matching' principle. This refers to aligning revenues and costs to the items sold. If this principle is not adopted the reported profitability would be distorted. It is the principle that best enshrines the rules in Article 2.2.1.1. The use of the

matching principle in accounting by no means restricts the costs to those that are directly related to the production process.

4.272 The EC does not say that *any* reduction in the equity or wealth of company is a cost that benefits production in the investigation period or in the future. However, costs provoked by disease or mortality of the salmon biomass, for example, must be incorporated into the costs of farming salmon and influence the bottom line.

4.273 Norway's approach would even exclude costs that appear in the exporting companies' annual accounts. Costs such as those due to restructuring or deformed fish cannot be dismissed as 'non-recurring costs'. They are a constant feature of the Norwegian industry. On the other hand, the EC authorities did not treat all costs in this way. Only those non-recurring costs that were attributable to salmon sales were included, and an average of three years of such costs was made to ensure fairness.

(b) 'The EC's defence is premised on factual inaccuracies'

4.274 Although project accounting is the best system for salmon production the EC authorities accepted whatever methodology was used by the companies under investigation, provided the results were in line with the (audited) annual accounts. The types of accounting used by the companies are much more varied than Norway pretends. Averaging over three years was used by the EC in only a limited number of cases and only where the classic accounting methodology applied by the company gave a false picture of its expenses. Norway's argument that the appropriate period for salmon production is less than three years is refuted by contemporary evidence, including their producers' own statements.

11. Procedural Requirements

(a) Access to information under Article 6.4 of the AD Agreement

4.275 Norway's statements in the first substantive meeting have again referred to the concept of a record. It could, however, not point to any provision in the AD Agreement obligating members of the WTO to operate a record, let alone any jurisprudence. The EC also notes that Norway kept silent about its own proposals in the Doha-round to introduce its concept into a revision of the text.

4.276 Norway made certain assertions about the visit of one of its legal advisors to Brussels to inspect the investigation files. Norway complained that the files were "very disorganized", "not in chronological order" and that "68 missing documents" were not among the files seen. The EC is not impressed by this subjective account, which appears to have been organised as a preparation for this dispute.

4.277 First, Norway confirms that it was granted access to all the information that was used by the Commission in its investigation. Second, questions of "organization" and "chronological order" are not regulated by the Agreement. These are house-keeping issues where each WTO member may decide on its own how to store relevant information used in the investigation. Some members may file information relating to certain subject-matters, others on the basis of the date of submission. The EC notes in passing that the submission practice of Norwegian exporters was – at best – not conducive to a certain filing order. Rather than submitting – as requested – files in hard copy to a central point, Norwegian exporters simply sent e-mails to individual persons as they deemed fit.

4.278 Third, the issue of the so-called 68 "missing" documents is a misnomer. The EC disagrees with Norway's contention that the EC had accepted an obligation to show the "68 missing documents" to Norway. Norway assumes that these documents were relevant, non-confidential and used by the investigating authority within the meaning of Article 6.4 of the AD Agreement simply because

Norway knows that they have been submitted. However, the frustration of a WTO member not to find documents, that it knows to have been submitted, also in the investigation file of an investigating authority is not protected by the *AD Agreement*.

4.279 In the present case there were various grounds for not including the 68 documents into the investigation files. A substantial number of documents were submitted by exporters. Although they contained confidential information, the exporters did not provide a non-confidential version in contravention of Article 6.5.1 of the *AD Agreement*. In that situation the document was not included in the files, but reference to it could be regularly found in the non-confidential summaries in the files. Other documents related to the question of Community interest. Document No. 34 of Norway's list of 68 "missing documents" (letter from Dr. Jaffa) was not included in the file for the reasons given in response to Question No. 45 of the Panel. Finally, 15 documents from the Norwegian list are *Notes Verbales* of the Norwegian government. These are treated as government-to-government correspondence, not to be included in the file.

(b) Disclosure of essential facts under Article 6.9 of the AD Agreement

4.280 Norway's interpretative remarks on the duty under Article 6.9 of the AD Agreement give a wrong impression of the EC's position. Norway construes a difference between "factual findings" and "underlying facts" that the EC has never made. Therefore, Norway's observations about the expressions "facts under consideration" in Article 6.9 and the term "findings reached on issues of fact" in Article 12.2 of the AD Agreement are interesting, but without merit. The EC agrees with Norway that Article 12.2 applies in a situation when a final determination is already made, whereas Article 6.9 contains an obligation to inform about essential facts under consideration before the final determination. The EC's point is a different one. Under Article 6.9 of the AD Agreement the investigating authority shall *inform* the parties of the essential *facts* under consideration. When the EC used the term "factual findings" in that context, it meant the "information" that the investigating authority provided to the parties on the facts that are used by it.

4.281 The EC has therefore not contended that it was only obliged to offer its "reasoning", but not the underlying facts to the interested parties under Article 6.9 of the *AD Agreement*. What the EC has said is that to "inform of the essential facts" does not mean to produce a list with citations of each and every single piece of evidence for a fact.

4.282 That is supported by the due process ends of Article 6.9 of the *AD Agreement*. The interested parties shall know the facts on which the investigating authority will base its final determination. In case these facts are considered to be inaccurate, the interested parties can challenge the factual basis of the legal findings, serving their due process rights. Due process rights do, however, not require knowing exactly which piece or pieces of evidence have led the investigating authority to accept a certain fact. What counts is to be informed about the acceptance of a fact by the investigating authority, not the source or reasons why the investigating authority did so.

4.283 Contrary to Norway's assertion, the finding of the *Argentina – Ceramic Tiles* panel does not suggest otherwise. In that case, exporters had been given access to the complete file, but the investigating authority had not furnished any further explanation to them. The EC met this standard by providing Norway with a comprehensive disclosure document. The *Argentina - Ceramic Tiles* panel then turned to the question whether – in the absence of a specifically prepared disclosure document - the documents contained in the file had sufficient informative value for the exporters to know which were the essential facts "under consideration" of the investigating authority. In light of the facts before it the Panel found that the reporters could not be aware that the evidence submitted by the petitioners and derived from secondary sources would form the primary basis for the determination of dumping.

4.284 However, this citation does not support Norway's legal interpretation that the obligation under Article 6.9 of the AD Agreement is violated if a specifically prepared document does not contain references to all the evidence. Rather, as the *Argentina – Ceramic Tiles* panel held, such a specifically prepared document has simply to *summarize* the essential facts.

4.285 Turning to the four specific examples, the EC continues opposing Norway's allegation that it was not informed about the essential facts relating to domestic industry and causation – Norway's First Opening Oral Statement is entirely redundant so that the EC refers to its First Written Submission in this regard. With regard to the dumping determination, Norway asserts that the EC had "changed essential facts" after the disclosure and insists that the three concerned producers should have been informed about this in writing. The EC does not understand what Norway means when referring to the "change of essential facts". In the EC's view the "re-assessment" does not change the underlying facts. Rather it is part of the investigating authority's task to asses all the relevant facts before it to make a final determination in good time.

4.286 In addition, the investigating authority's duty to inform all interested parties about the essential facts under consideration triggers important practical consequences. Interested parties have a right to defend their interests throughout the whole process under Article 6.2 of the *AD Agreement*. If the investigating authority were obliged to disclose all "re-assessments" it could never be able to finalize the investigation within the time available. One cannot have one's cake and eat it. Even if there was a repeated duty under Article 6.9 of the AD Agreement to inform the three importers about the re-assessment of their dumping margin (*quod non est*), there is no legal basis for Norway's contention that information about this must be given in writing. As is apparent from the above quoted finding of the *Argentina – Ceramic Tiles* panel, the disclosure obligation may be fulfilled in many ways. There is no reason why oral information should fall short of this standard. Any uncertainty can be removed by writing down an executive summary immediately after the oral information. The EC fails to see why the possible negligence of an exporter to do so would defeat its due process rights.

4.287 Finally, a similar reasoning is valid with respect to the remedy determination. "Re-calculation" of the MIPs is not a change of essential facts that could trigger another information round after the definitive disclosure. Any other interpretation of Article 6.9 of the AD Agreement would seriously hamper the investigating authority's duty to finalise an investigation speedily within strictly prescribed time-limits.

(c) Obligation to provide a reasoned and adequate explanation under Article 12.2 of the AD Agreement

4.288 In its First Written Submission, the EC explained at length that the duty to provide a reasoned and adequate explanation relates to the information and reasons that the investigating authority found decisive. Norway finds this approach "absurd", claiming that no WTO member can decide for itself whether it meets a WTO standard, that being the task of panels and the Appellate Body.

4.289 The EC respectfully disagrees with Norway's proposition which seems to be based on a fundamental misunderstanding of international law. Under Article 26 of the *Vienna Convention on the Law of Treaties* it is the duty of each party to an international treaty to implement in good faith its treaty obligations. In order to do so each party must necessarily decide for itself how it interprets and applies the relevant treaty in the first place. In most of the cases its unilateral interpretation and application of the commitments are to the satisfaction of the other parties to the treaty. If, however, another party doubts that the treaty is properly applied, it can bring a dispute about the interpretation and application before the relevant dispute settlement body. With regard to the AD Agreement this is of course this Panel. However, the existence of this supervisory machinery does in no way prohibit the party to adopt its own interpretation and to engage in its way of implementation of the agreement in the first place.

4.290 Nothing else can be drawn from Article 12.2 of the *AD Agreement*. The text does not indicate that a party should give a public notice about all matters of fact and law and reasons that a third party, let alone a dispute settlement body considers to be relevant. *That* would be far-fetched. Rather, the whole purpose of this provision is that the interested parties get sufficient knowledge about the investigating authority's decision, taking due account of the need to protect confidential information.

4.291 As the EC stays firm on the applicable standard, there is no merit in discussing again Norway's examples about allegedly lacking explanations. As these allegations rest on an erroneous interpretation of Article 12.2 of the AD Agreement they are without any merit. The EC is therefore confident that the detailed and careful reasoning set out in the Definitive Regulation fully satisfies the requirements as set out in that provision.

G. SECOND ORAL STATEMENT OF NORWAY

4.292 The following summarizes Norway's arguments in its second oral statement.

1. Introduction

4.293 In this statement, Norway responds to issues raised by the EC in its answers to the Panel's questions ("Answers") and in its Second Written Submission ("SWS"). The EC's latest submissions provide the Panel with a mixed bag: on some issues, it makes admissions that substantiate Norway's claims; on others, it offers a new defense that differs from both the published determination and its First Written Submission; and, on yet others, the EC still presents an inaccurate picture of the investigation.

2. The Panel Cannot Conduct a *de novo* Review

4.294 Because this dispute concerns an anti-dumping measure, the Panel's task is to review the *investigating authority's factual and legal determinations* as set forth in the published determination. However, on almost every issue, the EC provides new explanations that the authority never gave in an attempt to justify its authority's determinations. Panels and the Appellate Body have consistently refused to allow such *ex post* rationalization. The Panel cannot make new determinations, on the basis of new facts and reasons that replace those originally made by the authority.

4.295 *Further*, the EC argues that publicly available information is *automatically* part of the authority's record. However, the EC cannot show that the contested public information was gathered during the investigation; nor that it was shown to interested parties under Article 6.4; nor that it was disclosed under Article 6.9; nor that it was mentioned in the published determination. In short, the EC cannot show any *procedural connection* between the public information it now presents and the investigation. As a result, Article 17.5(ii) requires the Panel to disregard this information. This applies likewise to other exhibits that Norway argues are inadmissible.

3. The Product Under Consideration

4.296 Norway believes that Articles 2.1 and 2.6, and Article VI:1 of the GATT 1994, impose obligations on the authority's determination of the product. Although the EC accepts that these provisions require that likeness be ensured at the level of models, Norway has explained that this is not sufficient. As the EC accepts, Article 2.1 and Article VI:1 require that the authority make a *single determination of price discrimination for the investigated product as a whole*. In making that determination, the authority necessarily compares the prices of all models in a single, overall comparison. As a result, likeness must be established for the product as a whole.

4.297 Contrary to the EC's views, the Appellate Body has already found that Article 2.1 imposes independent obligations.[121] In any event, Norway does *not* read Article 2.1 "in isolation" because it always *combines* Article 2.1 with claims under *other provisions*. Norway's claims are that the improper product determination vitiates: (1) the EC's initiation of the investigation under Articles 5.1, 5.2, 5.3 and 5.4; (2) the EC's dumping determination under Articles 2.1 and 2.6; and (3) the EC's injury determination under Articles 3.1, 3.2, 3.4, 3.5 and 3.6.

4.298 The EC now appears to accept that: there are physical differences between the products it bundled together; they are produced from different productions processes; are not fully substitutable; have different end uses; and have different tariff classifications. The lack of a reasoned and adequate explanation for its product determination makes it WTO inconsistent.

4. Domestic Industry

4.299 The domestic industry examined for purposes of both initiation under Article 5.4, and injury under Articles 3.1, 3.4 and 3.5, must be defined in accordance with Article 4.1. By failing to examine the correctly defined industry, the EC violated the obligations in these provisions.

4.300 The EC defined the domestic industry as 15 complaining producers to the exclusion of several other categories of producer. The EC tries to excuse its exclusion of fillet producers by referring to an alleged problem of double-counting. However, no problem of double-counting arises if the product is properly defined pursuant to Articles 2.1 and 2.6, without combining upstream and downstream products. Moreover, even where double-counting arises under the EC's flawed product definition, the scale of the problem is much overstated by the EC and there are various ways to deal with it. Further, the EC has not explained, with evidence, how it separated out data for organic and conventional production for all injury factors, including costs, prices and profits. The data presented by the EC is contradictory[122]. Also the EC treated at least one producer as conventional, even though it presented itself as a non-conventional producer.

4.301 The EC violated Articles 3.1, 3.4 and 3.5 of the *Anti-Dumping Agreement* by examining certain injury factors for a sample of five complaining producers. Norway argues that sampling in an injury determination is not permitted but, even if it were, the EC's sample was not properly constituted. These are not separate claims, as the EC suggests, but two arguments supporting a single claim under the provisions of Article 3.

4.302 If sampling were permitted under Article 3, the rules governing sampling must be derived by analogy from footnote 13 because it is the only provision dealing with sampling of the domestic industry. The EC resorted to sampling without respecting the criteria in footnote 13, and is still unable to explain why and how it sampled the domestic industry. Moreover, a sample comprising a sub-set of the complainants does not permit an objective examination. Also, three of the sampled producers are non-conventional producers with a different cost structure. All of this makes clear that the EC did not perform an objective examination of the domestic industry.

5. Dumping

(a) The EC Acted Inconsistently with Article 6.10 in Composing the Sample

4.303 Contrary to the EC's argument, the *Anti-Dumping Agreement* expresses no preference for determining dumping for producers, to the exclusion of exporters. Indeed, it would be perverse to exclude exporters under Article 6.10 because "dumping", by definition, "relates to the pricing

[121] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 131 to 158, and 240(d).
[122] See Norway's Second Opening Statement, paras. 30-31.

behavior of the *exporter*".[123] For this reason panels and the Appellate Body have ruled that, in principle, Article 6.10 requires an authority to determine dumping for known producers *and* exporters. In keeping with this requirement, the second sampling option focuses neutrally on the "volume of *exports from the country in question*". In fact, as recently as 2003, the EC conducted an investigation in which it constructed normal value for Norway's non-producing exporters.[124]

4.304 Rather than defending the improper exclusion of exporters, and of two large exporting producers, which it cannot, the EC makes an utterly baseless claim that Norway's claim under Article 6.10 is outside the Panel's terms of reference. Paragraph 4 of Norway's panel request plainly identifies Article 6.10 as within the Panel's terms of reference. The EC's view that Article 6.10 permits these exclusions raises an interpretive question that does not alter the Panel's terms of reference. The Panel must therefore address Norway's claims.

(b) The EC's Failure to Perform the Cost Recovery Test under Article 2.2.1

4.305 The EC's latest submissions contain important admissions regarding its approach to the cost recovery test under Article 2.2.1. The EC expressly acknowledges that it did *not* conduct the cost recovery test in the second sentence of Article 2.2.1. Consequently, the EC cannot be found to have made a determination under that sentence, explicitly or implicitly.

4.306 The EC seeks to equate the duration of the "reasonable period" and the IP. This is untenable under the *Vienna Convention*. If the drafters had intended to equate the reasonable period with the IP, they could easily have said so. Yet, they chose to distinguish between the two periods. The drafters' use of different words to refer to different periods in Article 2.2.1 must be given meaning.

(c) The EC Improperly Excluded Domestic Sales under Articles 2.2 and 2.2.2

4.307 First, in constructing normal value, the EC improperly excluded data on profits, and selling, general and administrative ("SG&A") costs relating to low volume domestic sales under its 5 per cent representative sales test. Second, in deciding to construct normal value, and in constructing normal value, the EC improperly rejected data relating to low volume, profitable domestic sales under its 10 per cent test. The EC thereby violated Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement.

(d) The EC Improperly Applied Facts Available to Grieg

4.308 The EC rejected information on filleting and finance costs provided in a timely fashion by the company and, instead, used secondary source information that was less favorable to the company. However, in so doing, the EC failed to respect the rules in Article 6.8 and Annex II. The EC's defense is premised on the view that it did not use "facts available". However, the EC has been unable to explain how an authority can use secondary source information without resorting to "facts available".

(e) The EC Violated Articles 9.4 and 6.8 with Respect to Non-Sampled Companies

4.309 The EC admits that it incorrectly calculated a weighted average dumping rate for nonsampled companies. The EC used that rate in determining the fixed anti-dumping duty. As a result, the EC acted inconsistently with Article 9.4.

4.310 The EC accepts that it used facts available with respect to allegedly non-cooperating, nonsampled companies, to determine the residual dumping margin for these companies. Norway contests the right of a Member to apply adverse facts to non-sampled companies because the

[123] Appellate Body Report, *US – Zeroing (Japan)*, para. 165.
[124] Exhibit NOR-5.

maximum "all others" rate is set forth in Article 9.4. In any event, in applying adverse facts to these companies, the EC did not even comply with the requirements of Article 6.8 and Annex II.

6. Injury

(a) The EC Improperly Determined the Volume of Dumped Imports

4.311 In its injury determination, the EC assumed that *all* imports from Norway were dumped, even though the EC examined a sample that comprised solely producers, and even though the EC's dumping determination covered a mere 25.5 per cent of Norwegian exports to the EC. The EC now accepts that the evidence from the sampled companies "could" qualify as just "*part* of the 'positive evidence'". The Parties thus agree that there is a need to present "other positive evidence". Norway has shown that no such evidence can be found in the published determination. The inclusion of the volumes of Nordlaks also vitiates the analysis.

(b) The EC Improperly Examined Price Undercutting

4.312 The price premium enjoyed by EC producers was documented in the record, and described in the Definitive Disclosure. The alleged price undercutting of 12 per cent equaled the price premium of 12 per cent disclosed in the Definitive Disclosure. This should have been taken into account by the authority.

(c) The EC Incorrectly Analyzed Price Trends

4.313 The authority's determination relied on a *decline* in prices, which did not occur in the "material" currency. The EC now accepts that no price decline occurred in pounds sterling, and all of its arguments in its Second Written Submission are intended to show that the analysis would have led to a finding of injury even if conducted in pounds sterling. The EC cannot now reinvent its authority's reasoning by arguing that the price decline was irrelevant.

7. Causation

4.314 *First*, the EC was obliged to address the significant increase in costs to the EC domestic industry in the published determination, but did not.

4.315 *Second*, the EC has not been able to show that it provided a reasoned and adequate explanation for imports from Canada and the United States. Also, it cannot demonstrate that the record contained positive evidence supporting its findings that: (1) imports from Canada and the United States consist mostly of wild salmon; and (2) wild and farmed salmon do not compete.

4.316 The EC now contends that its authority relied on data submitted by Norway in a *safeguard* investigation. However, if the authority wishes to use information from other investigations, it must formally make it part of the record, and disclose it to interested parties. In this investigation, the data in question was *not* made available under Article 6.4; was *not* disclosed as essential facts under Article 6.9; and was not mentioned in the published determination.

8. The EC'S MIPs Exceed the Individually Determined Normal Values

4.317 The EC has repeatedly refused to provide the calculations for its MIPs. The EC incorrectly states that Norway's MIPs table is based on "interpretations of the *Anti-Dumping Agreement* that are different from those of the EC." In fact, Norway stated in its First Written Submission that: "… the normal values are those that the EC determined on the basis of the examined producer's costs, as

determined by the EC. They, therefore, include the substantial adjustments that the EC made to these costs, which are contested …".[125]

9. The EC's Fixed Duties Exceed the Margin of Dumping

4.318 By design, architecture, and declared purpose, the fixed duties are anti-dumping duties. The EC's argument that they are not anti-dumping duties, but set to deter and sanction customs fraud, is without merit.

4.319 Even by the standards described in the EC's Answers, the fixed duties are specific action against dumping. For example, the fixed duties result in the imposition of higher anti-dumping duties than the variable duties system; this is so whenever the amount of the fixed duty is greater than the difference between the actual import price and the MIP.

10. Procedural Requirements

4.320 The EC now acknowledges that it did *not* grant Norway access to the 68 documents listed in Exhibit NOR-31. There were no "practical" impediments that prevented the EC from providing timely opportunities for Norway to see the documents in November and December 2005. Further, all of the documents were "relevant" to Norwegian interested parties and "used" by the authority. The EC arguments for not including the documents into the files are flawed. Article 6.4 applies to *any* information that is "relevant" to interested parties, and that is "used" by an authority. The source of the information, and the reasons why it is submitted, are not important under Article 6.4.

4.321 Norway has explained that the word "*basis*" in Article 6.9 shows that the authority must disclose the *essential facts* in the record that provide the "*foundation*" for the authority's findings and conclusions. If the authority merely discloses its own findings and factual conclusions, without disclosing the facts in the file that support its findings, interested parties are simply not aware of the "basis" in fact for the authority's determination, and they cannot point out that the facts are unreliable or have been incorrectly interpreted by the authority.

4.322 By way of example, on dumping, Norway fails to see how the same set of essential facts can simultaneously support dumping determinations of 17.7 per cent and 24.5 per cent for Pan Fish Norway ("PFN"). Either the authority's assessment of export price or normal value, or both, must have changed significantly in order for the dumping margin to decrease by 6.8 per cent. With respect to the MIPs, the EC explicitly *acknowledged* that new "information", requested by the EC *after* the Definitive Disclosure, formed the "basis" for a change in MIPs. The authority was obliged to disclose the essential facts underlying these changes. Yet, it provided no disclosure. The EC alleges that there were "oral disclosures". Norway contests the right of an authority to provide oral disclosure, and provides evidence disputing such disclosures were made.

4.323 The EC argues that Articles 12.2 and 12.2.2 are satisfied when the authority provides the information that the authority *itself* considers relevant, and *until* such time as its conduct is challenged in a WTO proceeding. This is not a response to Norway's claims. Norway has challenged the EC's published notice and explained why it is insufficient. The Panel must now decide whether the EC's notice is reasoned and adequate.

[125] Norway's First Written Submission, para. 638.

11. The EC's Improper Cost Adjustments

(a) The EC's Inclusion of Non-Recurring Costs and Operating Losses in the Cost of Production

4.324 The major difference between the Parties regarding many of the contested cost adjustments boils down to the meaning of the term "cost of production" in the *Anti-Dumping Agreement*. Norway argues that the treaty requires a demonstrable relationship between costs and production. The relevant costs are those incurred to pay for resources used in the production process to produce the like product sold in the IP. In contrast, the EC continues to argue that all costs that affect a company's *profitability* are costs of production. Contrary to the wording of the treaty, the EC makes no attempt to establish the existence of the required relationship between costs and production.

(b) The EC Has No Justification for the Three-Year Averaging of Non-Recurring Costs (NRC) and Finance Costs

4.325 The EC's justification for using a three-year averaging period for these costs has continuously shifted and, for this reason alone, lacks credibility.

4.326 For NRC, in the Definitive Regulation, the EC claimed to use three years as a substitute for allocating what it then called "extraordinary costs" over the lifetime of the fixed asset.[126] It wrongly claimed that it had no information on the lifetime of the assets concerned, whereas the record included evidence on depreciation periods. The EC stated that three years was an "appropriate" alternative period because it was the average time to grow "a *smolt* to a harvestable salmon".[127]

4.327 As for finance costs, the EC gave no separate explanation for the use of a three-year period to calculate finance costs for five companies. This approach significantly inflated costs because interest rates fell markedly during the period concerned. Exhibit EC-37 also shows that the EC used different three-year periods for different companies. For some, 2001 to 2003 was used and, for others, 2002 to 2004 was used. The EC asserts that this is because it used the audited accounts for the three most recent years. For some companies, it contends that the 2004 statements were available, while for others they were not. However, this is incorrect as all 2004 statements were available.

4.328 In these proceedings, the EC no longer argues that it used a three-year period as a proxy for the useful life of fixed assets, and it has not addressed the fact that the record included evidence on depreciation periods. Also, it no longer contends that three years is the period from smolt to harvest, and instead argues that three years is the period from egg to harvest.[128] This difference is important because the period from eggs to smolt, which is an on-shore activity in hatcheries and fresh-water cages, can last nine to 15 months.

4.329 More importantly, the EC has introduced a new justification for three-year averaging based on project accounting ("PA"). Besides constituting *ex post* rationalization, the EC's reliance on a PA approach is riddled with inconsistencies, and is factually wrong. Further, this reason was never mentioned either in the published determination or the disclosures. This argument is *ex post* rationalization. For that reason alone, the Panel can reject this justification. The Panel need not decide, therefore, whether a PA or IP approach is "correct" or "preferable", or even whether the EC used a PA approach.

[126] Definitive Regulation, para. 18.
[127] Definitive Regulation, para. 18.
[128] EC's FWS, paras. 617 and 692.

4.330 For one company, the EC simply counted twice the costs of slaughtering and packing services; without such double-counting, the EC would have had to find that this company was not dumping.

12. Conclusion

4.331 Norway, also submits 10 new exhibits, from Exhibit NOR-176 to Exhibit NOR-185, together with this Opening Statement. Pursuant to para. 11 of the BCI procedures, Norway requests that the Panel apply the BCI procedures to protect the information in Exhibits NOR-177, NOR-183 and NOR-185.

H. SECOND ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

4.332 The following summarizes the European Communities' arguments in its second oral statement.

1. Standard of Review

4.333 Norway's response to the EC's Opening Statement as regards the notion of standard of review serves only to confuse what are actually quite distinct issues. No one doubts that the investigating authorities must provide an explanation for their conclusions, and the EC is familiar with the rulings of the Appellate Body on the nature of that explanation. Nevertheless, the Appellate Body has said that a panel must give 'due regard to the approach taken by the investigating authority, or it risks constructing a case different from the one put forward by that authority.' We have no doubt that the Panel will bear this warning in mind when considering how to apply the rules in Article 17.6(i) of the *Anti-Dumping Agreement*.

2. Product

4.334 Norway persists in referring to the product that is examined in an anti-dumping investigation as the 'product under consideration', which is incorrect.

3. Domestic Industry

4.335 As regards Norway's assertion that the sampling of domestic industry is not permitted by the *AD Agreement*, the EC notes that Norway does not even address the legal arguments set forth by the EC and instead limits itself to what it said before.

4. Dumping Issues

(a) Selection of Norwegian producers

(i) Exclusion of exporters

4.336 In its First Written Submission, in answer to Norway's complaint that 'mere exporters' should not have been excluded from the investigation, the EC pointed out the problems that would arise if dumping duties were imposed on both exporters and producers. A batch of fish, originating with a producer and passing through the hands of an exporter would arrive in the EC and apparently be liable for two possible levels of duty depending on whether that for the producer or the exporter was invoked.

(ii) Composition of list

4.337 The issue is not whether Article 6.10.1 places the investigating authority under a duty to take exporters views into account. Rather it is whether it is legally *entitled* to do so. In other words, in the EC's view whether or not the authority is obliged to deal with exporters or producers, it cannot be faulted for attempting to consult and reach agreement with them.

(b) Articles 2.2 and 2.2.1

4.338 Norway's claims regarding the EC's obligations under the 'reasonable period' rule in Article 2.2.1 are undermined by its failure to understand the structure of this provision. The paragraph starts by identifying a particular category of domestic sales: those 'at prices below per unit … costs of production plus administrative, selling and general costs'. It then apparently proceeds to identify what appears to be a subcategory of such sales, those 'made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time.' However, as the EC has noted in its answer to the Panel Question 80, the third of these points, that of recovery of costs within a time period, is intrinsic to the notion of sales below cost, and is not an additional criterion. In other words, no determination of whether sales may be made below cost is possible without having set a period over which costs those costs are determined.

(c) Rejection of data relating to prices – Article 2.2.2

(i) Low volume sales

4.339 Norway keeps referring to the EC's arguments in the *Fittings* case. If these arguments are examined it will be seen that the very situation which the EC distinguished as not relevant in the circumstances of that case is the one that has arisen in this dispute. Specifically, in this dispute the result of taking into account data from non-representative sales is to construct normal values that are the same as the normal values that would have resulted from using the prices of the sales that have been disregarded as being non-representative. That was not the situation in the *Fittings* case. In that case the Appellate Body adverted to this problem in a footnote. Referring to Brazil's argument that an interpretation that allowed the inclusion of data from low volume sales (that had previously been disregarded) would render the provision 'ineffective', the Appellate Body said 'the example posited by Brazil is premised on certain factual assumptions. … We are not convinced that these factual assumptions necessarily hold true for most anti-dumping investigations. We are of the view that the *possibility* of the outcome suggested by Brazil, based on a certain set of circumstances, cannot overcome the specific text of the chapeau of Article 2.2.2.'

(ii) 10 per cent rule

4.340 The EC has already given substantial explanations of its justification for operating a 10 per cent rule in regard to profitable sales. Norway has responded by citing the phrase 'normal commercial practice' used by the Appellate Body in *US – Hot-Rolled Steel*. However, Norway misinterprets the ruling. It is true that Appellate Body said 'Where a sales transaction is concluded on terms and conditions that are incompatible with "normal" commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating "normal" value.' However, it is clear that the Appellate Body was not attempting a comprehensive definition of the concept of sales that are not in the ordinary course of trade. Rather, it was presenting one category of such sales. Most obviously missing are the type of sales which the AD Agreement most clearly identifies as not in the ordinary course of trade, which are those made at a loss.

(d) Article 6.8 and Annex II as regards [BCI]

4.341 In its latest contributions Norway says little if anything that is new on the subject of the investigation of [BCI]. Regarding what took place during the verification visit, Norway, although it has access to [BCI], still does not contradict the EC's account but merely describes it as 'unsubstantiated'.

(e) Non-investigated companies

4.342 As regards the status of companies found by the EC to be non-cooperating, the EC has already analysed the notification obligations of the investigating authority. The list of obligations that Norway claims have been infringed by the EC serves to emphasise the bizarre nature of Norway's claim. Regarding companies that had made no effort to respond to its requests for information and had not even acknowledged their existence to the investigators, the EC is accused of not supplying information regarding information that they should have supplied; of failing to allow them make further explanations; and of not telling them how their non-cooperation was hindering the investigation.

5. Injury

4.343 Nothing that Norway has said serves to answer the EC's argument that the methods defined in Article 6.10 must be regarded as acceptable ways of limiting the scope of investigations and are therefore valid for application in the circumstances of Article 3. In addition, the EC authorities combined the information from the sample of companies with data from other sources. Norway has likewise nothing substantially new to say about undercutting, no doubt because of its failure to understand the functioning of a price premium. Regarding price trends Norway has still not shown why the analysis must be carried out in pounds as opposed to Euro.

6. Causation

4.344 The EC does not find in Norway's most recent contributions anything that adds to its previous comments and arguments. Instead, Norway merely repeats its untenable position that a factual finding which is explained but not footnoted to a source violates any determination under Articles 3.1 and 3.5 of the *AD Agreement*.

7. MIPs

4.345 Normal values are calculated at a factory gate level. In other words, the price is set at point at which the goods leave the factory gate, removing any element corresponding to the cost of shipping the product to the EC. Export prices are calculated at the same basis. However, the EC traditionally charges duties on a CIF basis, that is on the price of the goods including costs of shipment to the EC. The MIPs are adjusted upwards to take account of this. An alternative approach would be to set the MIPs at the actual normal value, and reduce the invoice price of imported salmon by an amount corresponding to transport and insurance costs. The result in terms of the duty imposed under the MIP would be the same, but the process would considerably add to the cost and bother of passing goods through customs control. The EC can hardly imagine that this is something that Norway wishes its salmon exports to face.

8. Fixed Duties

4.346 The EC has no further observations to make on the topic of fixed duties at this stage.

9. Procedural Requirements

(a) Record of the investigation

4.347 The various points made by Norway in its Rebuttal Submission and Answers to Panel Questions as regards the record of the investigation have already been addressed by the EC in its presentations to the Panel.

(b) Information on essential facts

4.348 The Panel will be well aware of the rule in Article 6.14 of the AD Agreement that anti-dumping procedures 'are not intended to prevent the authorities of a Member from proceeding expeditiously' and reaching final determinations. This principle necessarily acts as a limit to the kind of right being claimed by Norway as regards 'essential facts'. In other words, the rights that Norway invokes are not without limits. The investigating authority must balance the various interests involved, and inevitably there will be occasions when it has to limit parties' interest in disclosures in order not to prejudice expeditiousness.

10. Costs

(a) Introduction

4.349 The principle of equal treatment is important because the imposition of anti-dumping duties reflects a conflict of interests not just between foreign producers that are alleged to be dumping and a domestic industry that claims it is being caused injury, but also between the individual foreign producers who are the subject of the investigation and the eventual anti-dumping measures.

(b) Inclusion of non-recurring costs (NRC) and operating losses

(i) Costs of production pay for resources used in production

4.350 Limiting the cost of production to those costs that pertain to production is equivalent to establishing the manufacturing cost of a product. This is in any case too narrow in the light of the definition of Article 2.2.2 – 'costs incurred in respect of production and sale' – highlighting the costs that are made to commercialise the produced goods.

(ii) [BCI]'s closure of smolt facilities

4.351 On the basis of the findings of the on-site verification, the depreciation costs of 67 million NOK did not cover any write-down on the closure of smolt facilities. Moreover, on the basis of GAAP such a write-down would not even be expected to figure under the regular depreciations.

(iii) Closure of selling operations in Denmark

4.352 The investigating authorities fail to see why the admission that the costs of closure of selling operations in Denmark were included incorrectly would alter the conclusions and invalidate the investigation, nor why this should be considered by the Panel as a violation of Articles 2.2.1.1, 2.1 and 2.2. Norway does not explain its position in this respect. The EC has made makes clear that the adjustment does not represent 2.4 per cent of the cost of production but 2.4 per cent of Norway's total claim on other non-recurring costs as presented in Table 12 in its First Written Submission. In reality the incidence on the cost of production is a mere 0.27 per cent, and can be regarded as *de minimis*.

(iv) Write-down of salmon farming licences

4.353 The EC has already replied to Norway's claim regarding the write-down of salmon farming licences. Without the licences, [BCI] would not have been allowed to produce salmon at the production facilities in question. Given the fact that salmon is farmed over a three year period, salmon harvested in the IP would have been grown during a period in which the licences were still in use. Norway appears to say that the relevant period is further narrowed down to that part of the growth cycle of the salmon generation that is situated in the IP. That is clearly a distortion of the reality of the salmon business.

(v) Operating losses

4.354 Norway has admitted that it mislabelled a write-down of financial participations as operating losses. The EC has already explained its treatment of write-downs.

(vi) Investment losses

4.355 The EC has confirmed that all salmon related investment losses were indeed treated as NRC to be included in the cost of production of salmon. Such an approach was based on the business segment approach.

(c) Averaging of NRC over a three year period for several companies

4.356 The EC has addressed this issue in its reply to the Panel's Question 31. From Exhibit EC-37 it can be seen that the accounting method most frequently used by the investigating authorities in the determination of cost of production was that of project accounting, and this was in line with the companies' own methodologies. It was based on an average three year salmon generation. Moreover, the so-called NRC were an integral part of running the salmon business and were therefore properly counted as cost of production, in line with the audited results communicated by the companies in their financial reports to third parties, such as investigating authorities, shareholders and the general public.

(d) The EC's adjustments relating to finance costs

4.357 The three year approach is criticised again by Norway on the basis of the alleged limitation of the use of project accounting to one company and the use of different three year periods. Norway does not reply to the argument that the finance costs of [BCI], [BCI] and [BCI] were not fully included in the companies' reported cost of production and does not comment on the investigating authorities' decision to use group accounts to remedy this situation. Nor does Norway clarify its inconsistent claim regarding the limitation of finance costs to the IP, or explain how the costs reported by [BCI] by virtue of its use of project accounting can be reconciled with its position.

4.358 Consequently it seems that the Norway's repeated efforts to cast doubt on the use of project accounting and the three year approach are merely means by which to avoid the fundamental issue of costs in this dispute, i.e. the failure of the Norwegian companies to fully report their costs of production. Finally, it should be said that as regards [BCI] the investigating authorities did not agree that the revised accounts for 2002 contained the losses on the investment in Pan Marine.

(e) The EC's adjustments relating to smolt cost

4.359 As concerns the changes regarding smolt costs between definitive disclosure and definitive regulation, Norway should already possess all the information necessary to verify the correctness of the investigating authorities' statement, because the relevant data were disclosed to the companies.

(f) The EC's adjustments relating to SG&A costs for [BCI]

4.360 The statements in the information note on cost of production, and in the provisional disclosure, are superseded by the reasoning given in the final determination. Moreover, the SG&A costs of [BCI] were technically not rejected because they were part of the consolidated accounts. Since consolidation eliminates intra-company transactions, the issue of transfer pricing could be resolved. Finally, because such an exercise does not yield any conclusive results, the investigating authorities never undertake to evaluate transfer prices between companies based on those companies' individual accounting records, but prefer to have recourse to consolidated accounts when these are available, or to external market information.

(g) The EC's improper adjustments relating to costs of purchased salmon for [BCI]

4.361 The figure of 8.8 million NOK was not substantiated during the on-site investigation, a fundamental issue that Norway tries to obscure.

(h) CNV Adjustment Claims

4.362 In Question 62 the Panel raised with Norway the crucial issue of non-recurring costs and the of notion benefit to current and future production. Norway's answer makes serious misstatements about fundamental accounting principles.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties are set out in their written and oral submissions to the Panel, and in their answers to questions. The third parties' arguments, as summarised by them pursuant to paragraph 12 of the Panel's working procedures, are set forth in this section.

A. CANADA

1. Written Submission of Canada

5.2 Canada did not present a written submission to the Panel.

2. Oral Statement of Canada

(a) Introduction

5.3 Mr Chairman, Members of the Panel, we appreciate this opportunity to provide our views to the Panel. Canada's submission today addresses Norway's claim that under the Antidumping Agreement, the EC may not impose anti-dumping duties based on "minimum import prices" that are higher than the dumping margin established in the original investigation. Canada disagrees with this claim.

5.4 In our respectful submission, under the Antidumping Agreement, the assessment of anti-dumping duties based on "minimum import prices" and using a prospective normal value is distinct from the determination of dumping margins in the investigation phase. The Antidumping Agreement does not require that the dumping margins in the *investigation phase* act as a cap on the duty that may be imposed based on a minimum import price. Let me explain.

(b) Argument

5.5 What does Norway argue? Norway does not challenge the right of Members to impose anti-dumping duties on the basis of minimum import prices in the context of a prospective duty assessment system. Rather, it alleges that the Antidumping Agreement imposes a "cap" on anti-dumping duties imposed on the basis of such fixed reference prices. According to Norway, this cap is the margin of dumping determined in the original investigation.[129]

5.6 Norway does not rely on any authority for this proposition, and there is none. In fact, a previous panel has already addressed this issue and rejected the argument advanced by Norway.[130] In *Argentina – Poultry Anti-Dumping Duties* the panel found that Argentina had not violated Article 9 of the AD Agreement by imposing variable anti-dumping duties on the basis of margins of dumping established at the time of collection.

5.7 The *Argentina – Poultry* panel did not expressly address Norway's allegation of a cap. However, we agree with the EC that the findings of the panel in that dispute are relevant to the facts of this case.[131] The reasoning of that panel establishes that, consistent with Article 9 of the Antidumping Agreement, a Member may impose anti-dumping duties on the basis of the difference between the minimum import price and actual export prices established at the time of collection.

5.8 In this respect, let me highlight three points in the findings of the *Argentina – Poultry* panel that Canada finds particularly relevant.

5.9 **First**, the panel saw nothing in the Antidumping Agreement that "explicitly identifies the form that anti-dumping duties must take." Specifically, the panel held that the Antidumping Agreement does not prohibit the use of variable anti-dumping duties. We agree with this point and urge you to follow this finding.

5.10 **Second**, Article 9.3 does not refer to the establishment of the margin of dumping during *the investigation phase*. Rather, as the *Argentina – Poultry* panel found, Article 9.3 simply refers to the margin of dumping established "under Article 2." According to that panel, this meant "simply that, when ensuring that the amount of the duty does not exceed the margin of dumping, a Member should have reference to the methodology set out in Article 2," that is, the various elements of Article 2 such as normal value, fair comparison, and so on.[132]

5.11 In the context of these two points, the panel went on to state that Article 9.3 is primarily concerned with "duty assessment." The panel also explained that "neither the ordinary meaning of Article 9.3, nor its context supports [the] view that Article 9.3 prohibits variable anti-dumping duties." To impose a prohibition on variable anti-dumping duties, Article 9.3 would have had to require that anti-dumping duties do not exceed the dumping margin established during the investigation phase of Article 2.4.2.[133] Article 9.3 does not do this.

5.12 **Third**, the panel noted that the immediate context of Article 9.3 contradicted the interpretation of that Article as prohibiting the collection of anti-dumping duties in excess of the margin of dumping established during the initial investigation. The panel observed that Article 9.4(ii)

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[129] Norway's First Written Submission, Section VIII, para. 666.

[130] Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil, Report of the Panel, WT/DS241/R, adopted May 19, 2003.

[131] EC's First Written Submission, para. 493.

[132] Report of the Panel, WT/DS241/R, adopted 19 May 2003., para. 7.357.

[133] *Ibid.*, paras. 7.354-355.

expressly envisaged a prospective normal value system and concluded on that basis that the use of such a system should be consistent with Article 9.3 of the AD Agreement.[134]

5.13 In Canada's respectful submission, the panel's findings in *Argentina – Poultry* establish that a Member has the right, under the Antidumping Agreement, to assess antidumping duties on the basis of minimum import prices. The panel's findings are based on the fact that there is a distinction between the conditions that prevail during the investigation period and the conditions relevant to the assessment of anti-dumping duties for each importation of subject goods during the life of the measure. Normal values and export prices can, and often do, vary over the life of an anti-dumping duty measure; accordingly, duties are assessed in appropriate amounts so long as they do not exceed the margin of dumping determined for each importation of subject goods. That such amount could exceed the margin of dumping established during the original investigation is of no legal consequence under the Antidumping Agreement.

(c) Conclusion

5.14 In conclusion, let me make the following observation about the consequences of accepting Norway's arguments. If you accept Norway's "capping" argument, this would provide a strong incentive for foreign producers and/or exporters to seek to evade antidumping measures by simply pricing at even *higher* margins of dumping than those established during the investigation. This is because those producers and/or exporters would be secure in the knowledge that an increase in the dumping margin would not result in correspondingly higher rates of anti-dumping duties. Such an outcome would not only be counterintuitive, it would be inconsistent with the scheme of the Antidumping Agreement as a whole.

5.15 Aside from Article 9.3, there is no rule in the Antidumping Agreement requiring a cap of the kind claimed by Norway.

5.16 Canada respectfully requests that the panel find that there is nothing that prohibits duty enforcement systems based on variable anti-dumping duties that may exceed the margin of dumping found during the original investigation.

5.17 Mr. Chairman and members of the Panel, I thank you again for allowing Canada an opportunity to address the Panel on this issue.

B. CHINA

1. Written Submission of China

5.18 China welcomes this opportunity to present its views in this proceeding before the Panel involving Norway's complaint regarding the European Communities' antidumping measures on farmed salmon products.

5.19 In this third party submission, China would like to contribute its understanding on the following aspects of the dispute: (1) The Domestic Industry; (2) Sampling in Injury Determination; and (3) The Minimum Import Prices ("MIPs") imposed by the EC.

5.20 With respect to the issues of domestic industry, the EC argues that Article 4.1 is a definition, not an obligation. China points out that previous Panel decisions in both *Argentina – Poultry* and

[134] *Ibid.*, para. 7.359. Canada agrees with EC's argument that the panel in *Argentina – Poultry Anti-Dumping Duties*, para. 7.359, explicitly approves the extension of the lesser duty principle to include prospective reference prices set below the level of the normal value. EC's First Written Submission, para. 481.

Mexico - Corn Syrup supports China's opinion that Article 4.1 imposes an obligation that the Members need to fulfil.

5.21 Besides, the EC considers that Article 4.1 simply provides two options for defining the domestic industry, and the investigation authority has the discretion to select either option. However, China believes that the AD Agreement establishes a direct correlation between the product under consideration, the like product and the domestic industry. There is inherent connection among those definitions which should match with each other strictly. China considers that the EC's such interpretation of Article 4.1 will eventually cause a mismatch between the industry and the product.

5.22 Further, if Article 4.1 allows the investigation authority, when defining domestic industry subject to investigation, to have the discretion to simply select a part of the domestic producers which may be injured to a higher extent than the other parts so as to find injury easily, the injury evaluation will not be objective under such discretion allowed. Also, it is against the original intention of the drafters to nullify any of the options clearly stated in the agreement.

5.23 Concerning the sampling issue, in China's view, Article 3.1 and Article 3.4 of the AD Agreement set the obligation for the investigating authorities to conduct an objective examination of all relevant economic factors and indices having a bearing on the state of the injury to the domestic industry. And China considers that it is within the discretion of the investigation authority to decide what methodology it would use in an injury examination.

5.24 In both Footnote 13 and Article 6.10, the drafters set forth expressly the specific circumstances and conditions under which an authority can resort to sampling; however, in China's view, this does not automatically demonstrate that the drafters of the AD Agreement intended to permit only two circumstances where sampling could be used and that sampling in other circumstances would violate the AD Agreement by default. The requirement in the AD Agreement is that the investigation be conducted "objectively" and include an evaluation of all relevant economic factors and indices that affect the state of the injury to the domestic industry.

5.25 Moreover, Although Article 6.10 applies to sampling for the purpose of dumping margin determination only, it sets out the rationales that the drafters may have had in mind, and China considers that the same rationales support sampling for the purpose of injury determination when it is "impracticable" for the authority to evaluate all relevant economic factors of "all producers as a whole" in the domestic industry within the time-limits. Meanwhile, sampling shall not compromise the "objectiveness" of the examination.

5.26 China notes that the Appellate Body in *US – Lamb* rules that the "data evaluated by the competent authorities must be sufficiently representative of the 'domestic industry'. Accordingly, China considers that as long as the investigation authority can demonstrate that the specifics of the case create an exceptional circumstance where sampling of the domestic industry is required and that the sampling allows the authority to evaluate the data that's **sufficiently representative** of the "domestic industry", the investigation authority has the discretion to choose the evaluation methodologies it uses in its injury determination, and sampling shall be one of the options.

5.27 China considers that the MIPs imposed by the EC against farmed salmon in this case are inconsistent with the AD Agreement because, with six different MIPs, the EC did not impose "a single anti-dumping duty" against "a single product" in a single investigation.

5.28 China considers that there should be only one duty for a product investigated against each exporter/producer concerned. In China's view, the wording of the AD Agreement shows that the drafters intended a strict corresponding relationship between a product (singular form), a margin of dumping (singular form), an exporter/producer (singular form), and an antidumping duty (singular

form). Once the investigation authority has defined "a product", i.e., the product under consideration, it shall determine "an individual margin of dumping" for "a known exporter or producer" and impose "an anti-dumping duty" against such product and such exporter/producer.

5.29 In the EC investigation in this case, the EC decided that all farmed salmon constitutes a single product. For this single product, however, the EC determined six different minimum import prices for the six different presentations of the "single product". In the end, the EC imposed plural antidumping duties on a single product it defined at the beginning of the investigation. Therefore, China considers the MIPs the EC imposed in this investigation inconsistent with the AD Agreement.

5.30 In conclusion, China is of the view that the MIPs imposed by the EC in this case are not WTO-consistent. However, China considers that the AD Agreement does not prohibit sampling to be used in injury determination provided that it shall not compromise the "objectiveness" of the examination. In addition, China hereby requests this Panel to clarify on the definition of the domestic industry under Article 4.1 of the AD Agreement.

2. Oral Statement of China

5.31 Thank you, Mr. Chairman, and members of the Panel. China welcomes this opportunity to appear before you today to present its view on two legal issues raised in this proceeding. One is sampling in injury determination; another one is the minimum import prices (MIPs) imposed by the EC.

(a) Sampling in injury investigation

5.32 Regarding the issue of using sampling in injury investigations, China's view is that Article 3.1 and Article 3.4 of the AD Agreement obligates the investigating authorities to conduct an objective examination of all relevant economic factors and indices having a bearing on the state of the injury to the domestic industry. As long as these requirements are satisfied, it is the discretion of the investigating authority to decide what methodology it will use to conduct an objective injury examination.

5.33 Footnote 13 and Article 6.10 of the AD Agreement set forth the specific circumstances and conditions under which an authority may resort to sampling. However, in China's view, this should NOT be interpreted to mean that the AD Agreement permits only two circumstances where sampling can be used. Rather, the requirement in the AD Agreement is that the investigation shall be conducted "objectively" and shall include an evaluation of all relevant economic factors and indices that affect the state of the injury to the domestic industry.

5.34 In addition, although Article 6.10 applies to sampling for the purpose of dumping margin determination only, China considers that the same rationale in this Article supports sampling for the purpose of injury determination when it is "impracticable" for the authority to evaluate all relevant economic factors of "all producers as a whole" in the domestic industry within the time-limits. However, sampling should only be used in exceptional circumstances, and it should not compromise the "objectiveness" of the examination.

5.35 As long as the investigating authority can demonstrate that the specifics of the case create exceptional circumstances where the sampling of the domestic industry is necessary, and that the sampling allows the authority to evaluate the data that is **sufficiently representative** of the "domestic industry", the investigating authority has the discretion to choose the evaluation methodologies it uses in its injury determination, and sampling should be one of the options.

(b) The minimum import prices (MIPs) imposed by the EC

5.36 In China's opinion, once the investigating authority has defined "a product" (i.e. - the product under consideration), it should determine "an individual margin of dumping" for "a known exporter or producer" and impose "an anti-dumping duty" against such product and such exporter.

5.37 In this case, the EC claims that all farmed salmon constitutes one single product. For this single product, however, the EC determined six different minimum import prices for the six different presentations of the "single product", and finally imposed several antidumping duties on a single product.

5.38 Therefore, China considers that the MIPs imposed by the EC against farmed salmon in this case are inconsistent with the AD Agreement. With six different MIPs, the EC did not impose "a single anti-dumping duty" on "the product" under investigation.

5.39 Thank you again for this opportunity to express our views.

C. HONG KONG, CHINA

1. Written Submission of Hong Kong, China

(a) Introduction

5.40 Hong Kong, China welcomes the opportunity to take part as a third party in these proceedings. Hong Kong, China has substantial interest in certain matters raised before the Panel and would like to present its views in the present written submission on some specific issues concerning the interpretation and application of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD Agreement").

5.41 It appears that in its investigation to determine injury in this case, the EC limited its examination to only some domestic producers. This raises the question as to whether the AD Agreement permits a Member to select a sample with respect to the domestic industry for the purposes of the injury determination. In addition, regarding the dumping determination, the EC appears to have excluded from the sample all non-producing exporters. This gives rise to the question as to what extent a Member has discretion in selecting interested parties or categories thereof in the framework of a sample for the purposes of determining dumping margins. These issues are of systemic importance to anti-dumping investigations, and Hong Kong, China would like to provide its comments thereon in the following paragraphs for consideration by the Panel.

(b) Sampling of domestic industry in injury determination

5.42 Article 3 of the AD Agreement governs the determination of injury by investigating authorities. Injury is defined in footnote 9 of the AD Agreement as "material injury to a *domestic industry*, threat of material injury to a *domestic industry* or material retardation of the establishment of such an *industry*" (emphasis added). Article 4.1 of the AD Agreement defines the term "domestic industry" as referring to "*the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products*."

5.43 Article 4.1 read in conjunction with footnote 9 thus requires that the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in

accordance with Article 4.1[135], that is, the domestic producers of the like product as a whole, or those of them whose collective output of the like product constitutes a major portion of the domestic production of the like product. Once the domestic industry has been defined for the purposes of the investigation, it is not permissible to pick and choose among the producers, or to limit the injury analysis to the few selected.

5.44 Hong Kong, China submits that the adoption of a selective approach, be it sampling or otherwise, in investigating producers of a defined domestic industry in injury determination is inconsistent with the above-mentioned Articles of the AD Agreement.

5.45 This position is reinforced by the fact that, unlike dumping determination or the establishment of standing where sampling is expressly permitted in certain precisely defined circumstances (Article 6.10 and Footnote 13), Article 3 does not contain any provision that permits the use of sampling or other selective approaches to limit the examination to only some of the domestic producers. Neither does the context of the Article, as revealed in the various paragraphs thereof, support an implied permission.

5.46 The possibilities of excluding certain specific producers in defined "domestic industry", as allowed under Article 4.1(i) and (ii), are only relevant to the specific scenarios of "related" producers and "isolated" markets respectively. The provisions are not and should not be read as general enabling clauses in support of sampling or other selective approaches.

5.47 Likewise, the alternate interpretation of the term "domestic industry" as constituting "a major proportion of the total domestic production" in the chapeau of Article 4.1 neither stipulates nor implies a right to sample or pick selectively domestic producers among the pre-determined "major proportion" of the industry for the purposes of injury determination.

5.48 In the present case, the EC defined the Community industry as referring to 15 producers. By making the injury analysis with respect to only 5 of them, the EC did not act in compliance with the AD Agreement.

5.49 In its first submission, the EC argues that WTO case-law confirms that WTO Members can resort to sampling in an injury analysis, referring to the *EC – Bed Linen case*. However, in that case, the Panel was only dealing with the issue as to whether investigating authorities, having defined the domestic industry as a group of 35 producers and resorted to a sample of those producers, were precluded from considering information relating to producers not within that sample, or not within the Community industry (para. 6.175). As underlined by the Panel, India's claim in that case rested "on premises concerning the correct definition of domestic industry and sampling which are outside the scope of our terms of reference" (para. 6.177). In other words, the Panel, in that case, was not requested to deal with the definition of domestic industry or the legality of using sampling. This case is therefore not relevant.

5.50 Instead, Hong Kong, China finds support to its view in the findings of the Appellate Body which held in *US – Hot-Rolled Steel* that "[t]he investigation and examination must focus on the totality of the 'domestic industry' and not simply on one part, sector or segment of the domestic industry" (para.190). Indeed, these findings, even though made in the specific context of that case and not necessarily relating to sampling as such, support the view that the injury analysis must focus on the "totality of the domestic industry" as defined in accordance with Article 4 of the AD Agreement.

[135] See Panel Report, *Mexico – Corn Syrup* (DS132), para.7.147.

(c) Exclusion of (non-producing) exporters in dumping determination

5.51 Under specific circumstances, Article 6.10 of the AD Agreement allows a limited examination of interested parties in the determination of dumping margins. This is the case where the "number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable." Examinations in the circumstances are limited to either a reasonable number of interested parties by using statistically valid sampling method or to the largest percentage of the volume of the exports that can reasonably be investigated.

5.52 Yet, neither this provision nor any other provision of the AD Agreement allows the exclusion from the examination an entire category of interested parties, such as that in the present case, the non-producing exporters.

5.53 Since limited examination is an exception to the general rule of Article 6.10 which requires investigating authorities to determine an individual dumping margin for *each known exporter or producer*, it must be *strictly* interpreted. It should also be mindful that the use of that exception actually deprives interested parties of their usual due process rights. In addition, the composition of the investigated parties has a significant impact on selected as well as non-selected parties since Article 9.4 authorizes the imposition of anti-dumping duties on non-selected parties on the basis of the dumping margins determined for selected parties. This requires that the criteria used to select the parties must guarantee that the selected ones are *representative* of all exporters and producers of the country of export.

5.54 Article 6.10 and other provisions of the AD Agreement (e.g. Articles 2 and 9) clearly provide for equal or evenhanded treatment to exporters and producers. As stated above, they are entitled to an individual margin of dumping whenever circumstances allow. An *en bloc* exclusion of a specific category of interested parties, i.e. exporters who are not producers themselves in the present case, in the calculation of the dumping margins which will eventually be imposed on them is inconsistent with Article 6.10 of the AD Agreement.

5.55 As a matter of fact, exporters and producers may have different export prices or normal values in respect of the products concerned. Administrative, selling and general costs as well as profits, which are key factors in constructing normal value, differ among exporters and producers, and among producing and non-producing exporters. Exclusion of exporters, or other categories of interested parties, may lead to biased results in dumping determination; and this also runs contrary to the requirement of providing to all interested parties full opportunity for the defence of their interests in accordance with Article 6.2.

(d) Conclusion

5.56 While Hong Kong, China respects the rights of WTO Members to apply anti-dumping measures in accordance with the rules of the WTO, Hong Kong, China considers it highly important that Members comply with the requirements laid down by WTO rules in taking anti-dumping measures, not least those pertaining to dumping and injury determinations in anti-dumping investigations. In the light of the reasons set out in this submission, Hong Kong, China submits that the practice of Members to engage in sampling of the domestic industry for the purposes of an injury determination, or to exclude a category of interested parties, for instance all exporters who are not producers, in the determination of dumping margins are inconsistent with the requirements of the AD Agreement. Hong Kong, China respectfully requests the Panel to take into account its comments and views in its deliberations.

5.57 Hong Kong, China reserves its rights to submit further comments on these issues or on other matters of this case on other appropriate occasions of the proceedings.

2. Oral Statement of Hong Kong, China

5.58 Hong Kong, China welcomes this opportunity to present its views as a third party to the Panel.

5.59 Hong Kong, China recalls the two systemic issues raised in its earlier written submission, namely, (a) sampling of the domestic industry in injury determination, and (b) exclusion of non-producing exporters in dumping determination. Hong Kong, China submits that both practices are of questionable WTO-consistency. Detailed arguments have been set out in the written submission, and suffice it to highlight a few of them today.

5.60 While sampling is not novel in the Agreement on Anti-dumping, wherever its use is envisaged and permitted, there are express enabling clauses, with rules and standards accompanying. As far as injury determination is concerned, the word "sample" or "sampling" is simply non-existent in the Agreement, and neither are the relevant rules or standards. In the circumstances, the only logical conclusion is that drafters of the Anti-dumping Agreement did not intend to allow the use of sampling in injury determination. This reading is also in line with AB jurisprudence on the importance of focusing on "the totality of the domestic industry"[136] in the injury determination.

5.61 We note that some parties have put forward practical difficulty as an argument in support of the use of sampling. We note that first of all this is not a legal argument. Secondly, the definition of "domestic industry" in Article 4.1, which applies to the entire Agreement, already provides some flexibility.

5.62 On the exclusion of non-producing exporters in dumping determination, Article 6.10 of the Agreement requires investigating authorities to determine an individual dumping margin for each known exporter or producer. In the event of a limited examination where a dumping margin is calculated for and applied to a non-selected party, it is of profound importance that selected parties, whose data will be used as a basis for the calculation of the dumping margin, must be representative. Given the vast differences, in terms of cost and profits, between producing and non-producing exporters, an en bloc exclusion of the latter will lead to biased dumping margins, and it is inconsistent with Article 6.10. This also flies in the face of Article 6.2 which requires that "[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests".

5.63 Hong Kong, China respectfully requests the Panel to take full account of Hong Kong, China's views and arguments as set out in its written submission and highlighted in this oral statement in the Panel's deliberation.

5.64 Thank you for your attention.

D. JAPAN

1. Written Submission of Japan

5.65 The following comments arise from Japan's systemic interest in ensuring fair and objective interpretation of the AD Agreement.

[136] See AB Report, *US-Hot-Rolled Steel* (DS184), para. 190.

(a) EC's definition of the domestic industry and Article 4.1

5.66 Japan has a systemic concern with regard to the definition of the domestic industry, on the premise that the definition of the domestic industry has broad implications for anti-dumping investigations, including determinations of injury and causation.

5.67 In this case, both parties to the dispute recognize that the EC authorities limited the definition of the domestic industry to a group of 15 producers, and that all of these producers were either complainants or explicit supporters to the complaint.

5.68 Japan has grave concern about the EC's interpretation that authorities may exclude domestic producers of the like product from the "domestic industry" for any reason (or for no reason), so long as the remaining producers constitute "a major proportion" of domestic production of the like product.

5.69 Under Article 4.1 of the AD Agreement, as the Appellate Body has found in *US – Hot-Rolled*, the investigation and examination must focus on the *totality* of the domestic industry and not simply on one part, sector or segment of the domestic industry. An interpretation of Article 4.1 of the AD Agreement which would allow an authority to pick and choose domestic producers such as to make a positive injury finding more likely, would be inconsistent with this obligation.

5.70 In addition, Japan recalls that if an authority defines the "domestic industry" narrowly, to include only one segment of domestic production of the like product, then the authority might be unable to conduct an "objective examination" of the consequent impact of the dumped imports on "domestic producers of [like] products" under Article 3.1 of the AD Agreement.

(b) EC's sampling techniques regarding the domestic industry

5.71 From those 15 producers noted in paragraph 5.67 above, the EC chose a sample of only five, effectively excluding the remaining ten producers from the inquiry. The EC justified this by reason of "the large number of producers of farmed salmon in the Community."

5.72 Japan has a systemic interest in ensuring that, if the AD Agreement allows authorities to conduct sampling on the domestic industry, that the sampling be subject to clear standards. For the Panel's consideration, Japan therefore makes the following observations.

5.73 First, there are no clear provisions in the AD Agreement which is applicable to the post-initiation phase of the investigation that permit the authorities to engage in sampling of the domestic industry. Secondly, active participation of the domestic industry may be expected in the present case, where the domestic industry consists of a relatively small number of companies, and the burden on authorities of obtaining data from all producers should not be excessive. Third and lastly, Japan thinks that even if the sampling of the domestic industry is permitted for the purposes of an injury determination, the samples have to represent the comprehensive picture of the domestic industry.

(c) EC's use of minimum import prices (MIPs) and fixed duties

5.74 Japan considers that the lack of transparency in calculating the MIPs and fixed duties is more than simply a problem of procedure. In the absence of a reasoned and adequate explanation of the determination made, the conclusion of the EC that the non-injurious MIP did not exceed the level of the non-dumped MIP, and that it therefore complied with its obligation under the AD Agreement, becomes a mere assertion. In the absence of an adequate and reasoned explanation, no meaningful review by a Panel is possible.

5.75 Japan notes that Articles 9.1 and 9.3 of the AD Agreement and Article VI .2 of GATT 1994 make clear that an authority is not allowed to impose a duty in excess of the margin of dumping found to exist. In light of this obligation, Japan believes it is incumbent upon the authorities to demonstrate through a reasoned and adequate explanation that the level of the duty imposed did not exceed the level of the margin.

(d) Residual dumping margin applied to the unknown producers

5.76 Japan requests the Panel to consider whether facts available may be applied to companies which were not identified in the course of the investigation. Japan's concern relates to the application of facts available to such companies without respect for the necessary notification requirements provided for by the AD Agreement, for example in paragraphs 1 and 6 of Annex II to the AD Agreement.

5.77 The Appellate Body in *Mexico – Antidumping Measures on Rice* found that putting exporters or producers on notice that facts available will be used is a precondition for the use of facts available. The need to notify exporters as set forth *inter alia* in paragraphs 1 and 6 of Annex II to the AD Agreement, applies whenever facts available are used, whether based on information from the applicant or otherwise. In this case, the EC assigned to the unidentified exporters or producers a margin of dumping equal to the highest margin of an exporter individually calculated.

(e) The EC's consideration of other factors in causation analysis

5.78 Japan recalls that the Appellate Body in *US – Hot-Rolled* found that investigating authorities must *separate and distinguish* the injurious effects of the dumped imports from the injurious effects of those other factors in terms of the application of Article 3.5 of the AD Agreement.

5.79 In this respect, Japan queries the sufficiency of the EC' analysis of such factors as (i) the EC industry's increased cost of production, (ii) imports of salmon from the United States and Canada, (iii) the price premium enjoyed by the EC products and (iv) the consistent trend of appreciation of the euro against the Norwegian kroner.

2. Oral Statement of Japan

(a) Introduction

5.80 Mr. Chairman and distinguished Members of the Panel, it is a pleasure to appear before you today to present views of Japan as a third party in this proceeding. The purpose of this statement is not repeating the arguments shown in our written submission. Instead, we would like to cast light on certain additional issues relating to (1) the interpretation of Article 6.10 of the AD Agreement concerning the sampling methodology; (2) the interpretation of Article 2.2 and 2.2.1 of the AD Agreement concerning the term "reasonable period of time"; (3) the interpretation of Article 3.5 of the AD Agreement concerning other known factors; and (4) the interpretation of the proviso of Article 9.4 concerning the applicability of the term "margins established under the paragraph 8 of Article 6".

(b) Arguments

(i) The interpretation of Article 6.10 of the AD Agreement concerning the sampling methodology

5.81 Japan has a systemic concern about an interpretation of Article 6.10 of the AD Agreement that would allow the authorities to pick and choose respondents without constraints.

5.82 More specifically, our concern arises from the United States' argument in paragraph 16 of its third party submission, that is, "Article 6.10 does not specify how the investigating authority is to arrive at the largest percentage or which companies must be included in the result."

5.83 We would like to note that Article 6.10 sets forth that the "authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." It is conditional to use two sampling techniques under the second sentence of Article 6.10 only in cases "where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable." In this case at issue, the EC used the second option under the second sentence of Article 6.10: the authorities may limit their examination to "the largest percentage of the volume of the exports from the country in question which can reasonably be investigated."

5.84 It is true, as the United States argues, that Article 6.10 does not prescribe the specific manner in which the authorities are to comply with the requirement with arriving at "the largest percentage"; it does not specify which companies must be included in the result, either. However, it does not mean that Article 6.10 allows the authorities to pick and choose the exporters or producers freely as they want.

5.85 It would be natural to suppose that the workload required to investigate one company does not significantly differ depending on the volume of the exports. Then, the authorities can normally maximize the volume of the exports investigated if they choose companies with larger volume of the export. In other words, you may say the authorities cannot make the most of their resources if they choose the *same number* of companies with *smaller volume* of the exports as samples. You may say at least that the authorities would not satisfy the requirements set forth in Article 6.10 if they chose companies with smaller volume of the exports without sufficient reasons.

5.86 Thus, Japan asks the Panel to consider Norway's claims in accordance with an appropriate interpretation of Article 6.10 indicated above.

(ii) The interpretation of Article 2.2 and 2.2.1 of the AD Agreement concerning the term "reasonable period of time"

5.87 It seems to be undisputed between parties to this dispute that the EC authorities determine the "reasonable period of time" on a case specific basis, although the EC's "normal practice" is to determine the "reasonable period of time" the same as the period of investigation. It is the third party submission of the United States that raised our concern, which argues that Article 2.2.1 does not preclude an investigating authority from using the period of investigation as the "reasonable period of time." Japan has a concern if the argument of the United States indicates that Article 2.2.1 allows the authorities to use the period of investigation as the "reasonable period of time" in every case without examination of the specific situation of the case.

5.88 *First of all*, in accordance with the principle of effective treaty interpretation, different terms should be interpreted having different meanings. Therefore, it will be meaningless to use the term "reasonable period of time" if the AD Agreement refers to the "period of investigation" by it.

5.89 *Secondly*, as Norway mentioned in its first written submission, the appellate body in *US – Hot-rolled Steel* already found that the word "reasonable" implies a degree of flexibility that involves consideration of all of the circumstances of a particular case.

5.90 *Thirdly*, the second sentence of Article 2.2.1 which the United States referred to is only an example of situations in which the authorities must consider the price as above cost. It does not lead

to the interpretation that the term "period of investigation" equals to the term "reasonable period of time" in every case.

5.91 In any case, Japan would like to note that both the EC and Norway recognized that the length of the "reasonable period of time" depends on specific circumstances of the investigation, which would make the United States' reference less relevant. Therefore, Japan asks the Panel to consider whether the EC's determination of the "reasonable period of time" is appropriate in light of the specific circumstances of the case at hand.

(iii) The interpretation of Article 3.5 of the AD Agreement concerning other known factors

5.92 It is Japan's concern that the argument made by the United States may lead to an interpretation of Article 3.5 of the AD Agreement that the decision as to the types and amount of information concerning "other factors," including non-subject imports, that will be collected and examined by the investigating authorities is left to their discretion. Japan disagrees with this argument.

5.93 Article 3.5 of the AD Agreement states that:

> It must be *demonstrated* that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of *all relevant evidence* before authorities. The authorities shall also *examine any* known factors other than the dumped imports which are at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. (Emphases added.)

5.94 By requiring the authorities to "demonstrate" the causal relationship on the basis of an examination of "any" known factors other than dumped imports, Article 3.5 requires the authority to examine whether any other known factor is causing injury to the domestic industry or not as a prerequisite for separating and distinguishing the injurious effects of the dumped imports from the injurious effects of such other factor. Article 12.2.2 also requires that the notice or report "shall contain the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers." Under the circumstances where the parties to the case do not dispute between each other that "other factors" at issue are "known" to the authorities during the course of the investigation, Japan believes that the authorities must explain reasons why the authorities denied the injury caused by those other factors.

5.95 Thus, Japan requests the Panel to examine carefully whether the EC complied with its obligation under Article 3.5.

(iv) The interpretation of the proviso of Article 9.4 concerning the applicability of the term "margins established under the paragraph 8 of Article 6."

5.96 In its first written submission, the EC contends that the proviso in Article 9.4 which deals with the treatment of dumping "margins" applies only to cases in subparagraph (i), and not to cases in subparagraph (ii), including cases of the MIPs as in this case. Thus, according to the EC's argument, regardless of the fact whether or not Grieg's margin was determined on the basis of the facts available, its normal value must be taken into account in calculating the weighted average normal value applicable to "all others."

5.97 However, Japan notes that the proviso including the phrase "for the purpose of this paragraph" indicates that the proviso covers both subparagraphs (i) and (ii).

5.98 Furthermore, Japan doubts the consistency of the EC's argument. Japan does not reiterate its comment, as was shown in Japan's third party submission, that the EC's calculation methodologies of the MIPs are not disclosed. However, Japan believes that the EC's interpretation of Article 9.4 would not be consistent if the EC, when it calculated MIP in accordance with the proviso of Article 9.4, disregarded normal values of exporters for which zero and *de minimis* margins were determined, while using the normal values of exporters for which margins were established under Article 6.8.

5.99 Therefore, Japan asks the Panel to confirm that the proviso of Article 9.4 applies in a consistent manner between subparagraphs (i) and (ii).

(c) Conclusion

5.100 To conclude, Japan would like the Panel to carefully examine these issues mentioned in this statement, in addition to the arguments advanced in its written submission. Thank you again, for your attention.

E. KOREA

1. Written Submission of Korea

(a) Introduction

5.101 Korea believes that the anti-dumping investigation conducted by the European Communities ("EC") against farmed salmon from Norway constitutes serious violation of Articles 2, 3, 5 and 6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"). In particular, Korea notes that the EC determination on "product under consideration," its determination on "domestic industry," and its application of "facts available" were not based on adequate factual information gathered in the course of the anti-dumping investigation, thus constituting legal errors.

(b) Legal Arguments

(i) The EC determination of "product under consideration" constitutes violation of Articles 2, 3, and 5 of the AD Agreement

5.102 Articles 2.1 and 2.6 of the AD Agreement require an investigating authority to ensure that different products considered in an anti-dumping investigation are all "like" in all relevant respects. In the underlying investigation of the current dispute, however, the EC failed to implement this important obligation.

5.103 Here, the EC simply ignored widely different characteristics of various salmon products sold in the EC market. The EC determined that everything from whole fish to small, skinned fillets constitute "a single product."[137] In fact, the breadth of the EC determination can be evidenced by the

[137] The EC product under consideration includes (i) whole fish, (ii) head-on-gutted ("HOG") fish, (iii) "other" (including in particular gutted, head off), (iv) whole fish fillets and fillets cut into pieces of any size, weighing more than 300 grams per fillet, skin on, (v) whole fish fillets and fillets cut into pieces of any size, weighing more than 300 grams per fillet, skin off, and (vi) fillets weighing less than 300 grams, cut into pieces of any size, with skin on or off. *See* Article 1(5) of the EC Definitive Regulation.

fact that the "product" covers 6 different customs nomenclature codes and 33 different control numbers in the Taric system.[138]

5.104 The EC attempted to justify this broadly defined definition by simply stating that "they are considered to constitute a single product for the purpose of the proceeding," but it fails to provide any meaningful factual discussion to support this conclusory statement. Without adequate explanation and discussion, Korea believes, the EC determination that six actually separate products constitute a single product under consideration cannot be sustained and constitutes violation of Articles 2.1 and 2.6 of the AD Agreement.

5.105 In Korea's view, the combination of non-like products in an anti-dumping investigation undermines the fundamental accuracy and reasonableness of the investigation. In other words, this erroneous determination leads to finding an anti-dumping margin when there is actually no dumping and material injury when there is not.

5.106 Such being the case, by relying on an erroneous "product under consideration" determination throughout its anti-dumping investigation, the EC also violated Articles 3.1,3.2, 3.4, 3.5 and 3.6 of the AD Agreement to the extent that the EC reached a material injury determination based on this faulty "product under consideration" finding. In addition, the EC violated Articles 5.1 and 5.4 of the AD Agreement since it initiated an anti-dumping investigation on the basis of legally and factually flawed "product under consideration" determination.

(ii) By failing to ensure that the petition was made by or on behalf of the EC domestic industry, the EC violated Article 5.4 of the AD Agreement

5.107 Furthermore, Article 5.4 of the AD Agreement stipulates a so-called "standing" threshold that an investigating authority must satisfy in initiating an anti-dumping investigation. This provision requires the investigating authority to confirm that a petition for an anti-dumping investigation is not made by a certain group of the domestic industry, but made "by the domestic industry or on behalf of the domestic industry."

5.108 In the underlying investigation, the EC noted that fifteen domestic producers who made the petition satisfied the standing requirement as set out in Article 5.4 of the AD Agreement. The EC, however, did not support its finding with adequate factual information. There exists conflicting factual information and industry data that were not adequately accounted for by the EC. The EC also failed to provide an explanation as to how it examined the degree of support for, or opposition to, the application expressed by domestic salmon producers.

5.109 Korea therefore believes that unless the EC presents adequate factual information to support its initiation decision, the Panel should determine that the EC initiation violates Article 5.4 of the AD Agreement.

(iii) The EC application of "facts available" is not warranted under the circumstances and thus violates Article 6.8 and Annex II of the AD Agreement

5.110 Article 6.8 and Paragraphs 3 and 6 of Annex II of the AD Agreement do not provide a *carte blanche* to an investigating authority conducting an anti-dumping investigation whenever it encounters a less than optimal information from a foreign respondent. Instead, these provisions unequivocally provide conditions that need to be satisfied before the investigating authority applies the facts available standard.

[138] *See id.*

5.111 Paragraph 3 of Annex II stipulates that all verifiable information that can be used in the investigation without undue difficulties should be taken into account by the investigating authority. Paragraph 6 of Annex II, in turn, stipulates that if the investigating authority plans to apply facts available, it must inform the foreign respondent of the reason and offer another opportunity to provide the requested information within a reasonable period of time.

5.112 In the underlying investigation, however, the EC applied facts available standard in a manner inconsistent with these provisions and rejected the information submitted by a Norwegian company. Under the circumstances surrounding the company and the communication between the EC investigating authority and the company, Korea believes that the Norwegian company cooperated with the EC investigation in a reasonable manner.

5.113 Korea believes that the EC's rejection of the company's information was unreasonable and unwarranted. The EC's recourse to facts available, therefore, constitutes violation of Article 6.8 and Paragraphs 3 and 6 of Annex II of the AD Agreement.

(c) Conclusion

5.114 For the foregoing reasons, Korea respectfully submits that the Panel finds that the EC's anti-dumping investigation against farmed salmons from Norway constitutes violation of Articles 2, 3, 5 and 6 of the AD Agreement, respectively, and recommends that the EC bring the measure into conformity with its obligation under the AD Agreement. Korea appreciates this opportunity to present its view to the Panel.

2. Oral Statement of Korea

5.115 Korea did not submit an oral statement to the Panel.

F. UNITED STATES

1. Written Submission of the United States

(a) Scope and definition of domestic industry

5.116 "**Product Under Consideration**". Norway argues that the European Communities ("EC") acted inconsistently with Articles 2.1 and 2.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement") in identifying the product under consideration, and as a consequence issued affirmative dumping and injury determinations inconsistent with Articles 2.1, 3.1, 3.2, 3.4, 3.5, 3.6, 5.1 and 5.4 of the AD Agreement. Norway's argument, however, rests upon an incorrect reading of Article 2.6, which contains a *definition* of the *like product* (*i.e.*, the product to which the product under consideration is compared) not an *obligation* with respect to the *product under consideration*. Article 2.1, in turn, provides that "a product is to be considered as being dumped . . . if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." This general statement regarding the comparison between the product under consideration and the like product likewise does not provide guidance on how the product under consideration is to be defined.[139] Thus, as previous panels have found, these

[139] First Written Submission of the EC, paras. 19-21; *cf.* First Written Submission of Norway, para. 85.

provisions leave to the investigating authority's discretion how a product under consideration is to be established.[140]

5.117 **Definition of the Domestic Industry**. If the EC's definition meets the "major proportion" of domestic production standard of Article 4.1, the Panel still should assess whether the EC's exclusion of certain categories of salmon producer from the industry was biased or designed to favor the interest of any group of interested parties in the investigation, including the producers who filed the petition.[141] An investigating authority's definition of the domestic industry under Article 4.1 must be based on "positive evidence and involve an objective examination" of the evidence relating to injury.[142] According to the Appellate Body, "an 'objective examination' [under Article 3.1] requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favoring the interests of any interested party, or group of interested parties, in the investigation."[143] With regard to Norway's argument that the EC's definition of its domestic industry was inconsistent with the requirements of the AD Agreement because the EC analyzed only a sampling of the domestic industry,[144] while the Agreement does not explicitly permit an investigating authority to rely on a small sample of domestic producers when performing its injury analysis in antidumping investigations, it does make clear that sampling is an appropriate methodology when used in other contexts. The EC could reasonably decide to rely on a sample of the domestic industry, as long as its decision was based on a reasonable set of assumptions or inferences as to the validity of the sample.

(b) Determination of dumping

5.118 **Selection of Interested Parties When Limiting Examination to the Largest Percentage of Exports**. The United States disagrees with Norway's view that, as a general rule, Article 6.10 precludes an investigating authority from limiting the selection of investigated parties to particular categories, as circumstances may exist in which an investigating authority may appropriately limit its examination to certain categories in accordance with Article 6.10. Furthermore, Article 6.10 does not oblige investigating authorities using the second methodology to generate a "statistically valid" sample, a requirement that applies only when the first methodology is used. Norway's assertion that the companies selected by the EC were unrepresentative is therefore not relevant to an assessment of whether the EC complied with Article 6.10.[145]

5.119 **Determination of Sales in Ordinary Course of Trade**. Norway incorrectly argues that the EC's use of the investigation period as a reasonable period of time, without "determining" that such period was in fact reasonable based on the particular facts of the investigation, was inconsistent with Article 2.2.1.[146] Article 2.2.1 does not preclude an investigating authority from using the period of investigation as "a reasonable period of time" or oblige the investigating authority to define the reasonable period of time differently from case to case. Indeed, the cost recovery test described in Article 2.2.1, second sentence, deems the period of investigation to be the reasonable period of time.

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[140] Certain determinations of the US Department of Commerce ("Commerce") and the US International Trade Commission ("USITC") cited by Norway simply demonstrate that Commerce and the USITC define the "product under consideration" on a case-by-case basis, taking into consideration the particular facts available to them. The investigations cited by Norway do not support the claim that the AD Agreement contains rules for defining the "product under consideration."

[141] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 193 (hereinafter *US – Hot-Rolled Steel* (AB)); *see also* First Written Submission of Norway, para. 243.

[142] AD Agreement, Article 3.1.

[143] *US – Hot-Rolled Steel (AB)*, para. 193.

[144] First Written Submission of Norway, paras. 272-281.

[145] *Id.*, paras. 300-307.

[146] *Id.*, paras. 362-63.

Furthermore, Norway is incorrect in asserting that unless three conditions exist (*i.e.*, below-cost sales are made within an extended period of time, in substantial quantities, and at prices that do not provide for the recovery of all costs within a reasonable period of time), "below-cost sales must be treated as made in the ordinary course of trade."[147] As the Appellate Body has observed, "Article 2.2.1 . . . does not purport to exhaust the range of methods for determining whether sales are 'in the ordinary course of trade', nor even the range of possible methods for determining whether low-priced sales are 'in the ordinary course of trade.'"[148] Thus, the fact that the EC identified sales as outside the ordinary course of trade based on criteria other than those identified in Article 2.2.1 would not alone support the conclusion that it acted inconsistently with that provision.[149]

5.120 **Application of Antidumping Duty**. Consistent with Articles 9.1 and 9.3, the amount of any antidumping duty may not exceed the margin of dumping. Article VI:2 of the GATT 1994, read in conjunction with Article VI:1, provides that the margin of dumping is the price difference when a product is being introduced into the commerce of the importing country at a price less than normal value. Article 9.4 of the AD Agreement recognizes that a Member may utilize a prospective normal value system of assessing antidumping duties. Assuming Norway's description of the EC's minimum import price ("MIP") system is accurate, and based on the EC's description in its own submission, the system appears to operate in a similar fashion to a prospective normal value system. To the extent that the EC used MIPs that exceed properly established normal values, the antidumping duties calculated on the basis of such MIPs would exceed the margin of dumping. If this is the case, such action would be inconsistent with Article VI:2 of the GATT 1994, and Articles 9.1, 9.2, 9.3 and 9.4 of the AD Agreement.

5.121 **Profit Calculation**. The United States agrees with Norway that an investigating authority may not exclude actual data from the calculation of the profit and selling, general and administrative ("SG&A") ratios solely because sales were made in low volumes. As the Appellate Body explained in *EC – Cast Iron Fittings*, Article 2.2.2 "excludes actual data outside the ordinary course of trade, but does not exclude data from low-volume sales."[150] The United States disagrees, however, with Norway's assertion that because the EC accepted actual SG&A cost data, it must also have accepted the actual profit data.[151] An investigating authority may use actual SG&A data even when actual profit data is rejected because SG&A costs relate to the actual selling and general operations of a company.

5.122 **Transparency**. In response to Norway's assertion that the EC acted inconsistently with Article 6.4, and in turn, Article 6.2, because certain documents filed by interested parties during the investigation were missing from the non-confidential record accessible at the EC Commission's premises, the EC incorrectly argues that, under Article 6.2 and 6.4, "the investigating authority may not disclose information it has received from one interested party to another interested party, unless it is relevant for the preparation of the latter's case."[152] The United States agrees with Norway that transparency and procedural fairness are key principles of the AD Agreement. Article 6.4 operates as an affirmative obligation to disclose certain information to interested parties "whenever practicable," and requires disclosure of all non-confidential information "relevant to the presentation" of a party's case that is used by the authorities in the antidumping investigation.[153] "Relevant" information

[147] *Id.*, para. 338.
[148] *US – Hot-Rolled Steel (AB)*, para. 141.
[149] First Written Submission of the EC, paras. 218-19 (discussing ordinary course of trade test for profitable sales).
[150] Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, para. 101 (hereinafter *EC – Cast Iron Fittings (AB)*).
[151] First Written Submission of Norway, para. 383.
[152] First Written Submission of the EC, para. 531.
[153] *EC – Cast Iron Fittings*, para. 146.

includes all information relevant from the perspective of the interested party, and is not limited to that which the investigating authority deems relevant.

5.123 **Cost Adjustments**. With regard to Norway's claim that the EC made several cost adjustments in a manner inconsistent with the AD Agreement, as the EC notes, Article 2.2.1.1 provides that costs shall be adjusted as provided "unless already reflected in the cost allocations under this subparagraph." Many of the costs Norway discusses in its submission may be captured appropriately under the first sentences of Article 2.2.1.1 without the requirement of the last sentence that they "benefit future and/or current production."

5.124 **Facts Available**. In response to Norway's assertion that the EC failed to contact "non-cooperating companies" before assigning them a higher rate, inconsistent with Article 6.8 and Annex II,[154] the EC incorrectly suggests that it is excused from complying with Article 6.8 and Annex II merely because it used the MIP as the basis for imposing antidumping duties on these companies. The obligation contained in Article 6.8 is not by its terms limited to determinations that are "determinative of the duty imposed," as the EC claims; rather, Article 6.8 provides that it applies to the use of facts available in "preliminary and final determinations, affirmative or negative." To the extent that the EC failed to give proper notice of the investigation before applying facts available to the alleged "non-cooperating" companies, its application of a higher margin would be inconsistent with Article 6.8 and Annex II.

(c) Determination of injury

5.125 Norway also claims that the EC violated Articles 3.1 and 3.5 of the Agreement because it failed to ensure that injury allegedly caused by two other factors was not attributed to dumped imports. According to Norway, the EC failed reasonably to explain why increases in the EC salmon industry's costs and an increase in non-subject imports from the United States and Canada were not the causes of injury to the EC's salmon industry.[155] Although Article 3.5 of the Agreement sets out several factors that "may" be considered by investigating authorities in ascertaining whether there is a "causal relationship" between dumped imports and injury to the domestic industry, it does not specify the type of information that an authority must collect and examine for this purpose, or identify the detail in which the authority must explain its analysis of the information. Rather, Article 3.5 simply provides that the investigating authority must determine, on the basis of "all relevant evidence" before it, whether such a causal relationship exists.

5.126 Similarly, Article 3.5 provides that the investigating authorities must examine any known factors other than the dumped imports which at the same time are injuring the domestic industry to ensure that injury caused by these other factors is not attributed to the dumped imports. As the Appellate Body has recognized, however, the AD Agreement does not prescribe the particular methods to be used by investigating authorities to separate and distinguish the injurious effects of unfair imports from the injurious effects of the other known causal factors.[156] Further, the decision as to the types and amount of information concerning "other factors," including non-subject imports, that will be collected and examined by the investigating authorities is left to their discretion.

[154] First Written Submission of Norway, para. 490.
[155] *Id.*, paras. 574-624.
[156] *EC – Cast Iron Fittings (AB)*, para. 189 (stating that "provided that the investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury.")

2. Oral Statement of the United States

5.127 It is a pleasure to appear before you to present the views of the United States concerning certain issues in this dispute. Today, we would like to make a few brief points on two issues discussed in our written submission: (1) transparency and (2) the definition of the product under consideration.

(a) Transparency

5.128 First, regarding Norway's claim relating to the proper interpretation and application of Articles 6.2 and 6.4 of the AD Agreement, the United States agrees with Norway that transparency and procedural fairness are key principles reflected in the AD Agreement.[157] Consistent with these principles, Article 6.2 provides that "all interested parties shall have a full opportunity for defence of their interests," and Article 6.4 provides in relevant part that "authorities shall whenever practicable provide timely opportunities to see all information that is relevant to the presentation of their cases, that is not confidential . . ., and that is used by the authorities in an anti-dumping investigation."

5.129 In connection with Article 6.4, referring to the language on "relevance" contained in that provision, the EC makes two assertions on which the United States would like to comment. First the EC asserts that "the investigating authority may decide on which information access should be granted or not."[158] With respect to this statement, as the EC concedes, relevance must be assessed from the perspective of the interested party presenting its case.[159] As the panel observed in *EC-Cast Iron Fittings*, "whether or not the investigating authorities regarded...information...to be relevant does not determine whether the information would in fact have been 'relevant' for the purposes of Article 6.4."[160]

5.130 The EC further asserts that "the investigating authority may not disclose information it has received from one interested party to another interested party, unless it is relevant for the preparation of the latter's case."[161] With respect to this assertion, the EC's statement is unsupported by the text of Article 6.4, which contains an affirmative obligation to disclose information in certain circumstances, not a prohibition against such disclosure.

5.131 Like Article 6.4, other provisions of Article 6 contain affirmative obligations to provide opportunities to interested parties to see certain non-confidential information. For example, Article 6.1.2 requires that non-confidential "evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation." Article 6.9 requires that investigating authorities "inform all interested parties of the essential facts under consideration that form the basis for the decision whether to apply definitive measures" and that such disclosure should take place "in sufficient time for the parties to defend their interests."

5.132 These provisions of Article 6 promote the ability of interested parties to be fully in control of their own defense. They do not contain prohibitions on the types of information that may be provided to interested parties. The very language of Article 6.4 makes clear that it establishes a rule regarding when an authority must disclose information, and not when it must withhold information.

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[157] First Written Submission of Norway, paras. 687, 698.
[158] First Written Submission of the EC, para. 531.
[159] First Written Submission of the EC, para. 531.
[160] Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, para. 145.
[161] First Written Submission of the EC, para. 531.

(b) Product under consideration

5.133 We turn next to Norway's claim that the EC's definition of the "product under consideration" was inconsistent with Articles 2.1 and 2.6 of the AD Agreement. On this issue, Norway, as well as Korea in its third party submission, reasons backwards from the definition of "like product" contained in Article 2.6 in an attempt to create an obligation on Members regarding how to define the product under consideration. No such obligation exists in the AD Agreement.[162] The United States agrees with the EC and the panel in *US - Softwood Lumber V* that the product under consideration is the starting point for defining the "like product," and not the reverse.[163] Neither Article 2.1 nor Article 2.6 contain rules on how the product under consideration should be determined. Norway's assertion otherwise does not accord with the text and would be unworkable, given that the "like product" cannot be determined until the product under consideration has been specified by the investigating authority.[164]

5.134 Finally, the determinations by US investigating authorities cited by Norway and Korea do not support the conclusion that Articles 2.1 and 2.6 impose obligations with respect to how an investigating authority defines the product under consideration. As an initial matter, Norway as the complaining party must demonstrate that the actions of the EC are inconsistent with specific obligations contained in the AD Agreement. The fact that one WTO Member's investigating authority made particular determinations in certain cases does not support the conclusion that such actions are *required* by the AD Agreement. The AD Agreement does not prescribe rules for all aspects of an antidumping determination; where no such rules exist, those aspects of the determination may be left to the investigating authority's discretion or otherwise governed solely by a Member's domestic law. Insofar as it is relevant, US investigating authorities determine the product under consideration on a case-by-case basis, taking into consideration the particular facts of each case. The two cases cited by Norway and Korea do not stand for the proposition that the EC was required to conduct two separate investigations, as Korea and Norway claim, or that the US investigating authorities would necessarily have done so had the facts of this case been before them.

VI. INTERIM REVIEW

6.1 On 2 July 2007, we submitted our Interim Report to the parties. On 16 July 2007, Norway and the European Communities submitted written requests for review of precise aspects of the Interim Report. On 30 July 2007, Norway and the European Communities submitted written comments on each other's request for interim review. Neither party requested an additional meeting with the Panel.

6.2 Due to changes as a result of interim review, the numbering of paragraphs and footnotes in the final report has changed from the Interim Report. The text below refers to the paragraph and footnote numbers in the Interim Report. Where we have made changes, a reference to the corresponding paragraph or footnote number in the final report is included (in parentheses) for ease of reference. We have also corrected a number of typographical and other non-substantive errors thorughout the report.

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[162] First Written Submission of Norway, paras. 84-98; Third Party Submission of the Republic of Korea, paras. 5-12.

[163] First Written Submission of the EC, paras. 19-21; *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, modified by Appellate Body Report, adopted 19 May 2003, paras. 7.153, 7.156-7.158 ("*US – Softwood Lumber V (Panel)*").

[164] *US – Softwood Lumber V (*Panel*)*, paras. 7.153, 7.156-7.158; Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, paras. 7.219-7.221.

A. REVIEW REQUESTED BY NORWAY

6.3 Norway requested review of paragraphs 4.138, 7.157, 7.158, 7.160, 7.192, 7.195, 7.197, 7.233, 7.240, 7.287, 7.382, 7.447, 7.455, 7.460, 7.485, 7.491, 7.668, 7.670, 7.720, 7.779, 7.796, 8.1, 8.6 – 8.9, and footnotes 278 and 338 of the Interim Report, and requested that we insert a new section following paragraph 7.513.

6.4 In the absence of any objections from the European Communities, we made the changes requested by Norway to paragraphs 4.138 and 8.1(xi) and footnotes 278 (now 307) and 338 (now 367) of the Interim Report, albeit not always in the exact terms proposed by Norway.

6.5 Norway asks the Panel to make certain modifications to the text of paragraphs 7.157, 7.158, 7.160 and 7.195, in order to reflect what, in its view, was the fact that the Norwegian Seafood Federation ("FHL"), interested parties and the Norwegian government were all under the impression that the investigating authority intended to make the selection of parties to investigate on the basis of a "statistically valid" sample, in the same way it had allegedly done so in previous investigations. The EC asks the Panel to reject Norway's request because it argues that it tries to introduce factual findings that were not argued before the Panel.

6.6 We decline to make the changes requested by Norway. In its comments on the Interim Report, Norway recalled that it referred to the Norwegian government's impression of the investigating authority's intention to select the investigated parties on the basis of a "statistically valid" sample in its comments on the EC's answers to the Panel's second set of questions. Thus, it was not until a late stage in this dispute that Norway advanced the factual assertions that are the basis for the requested modifications. The EC has contested Norway's factual assertions, and noted that it did not have an opportunity to respond to Norway's assertions during the dispute. We confirm that the EC did not have an opportunity during the proceedings in this dispute to respond to the factual assertions that Norway now asks the Panel to treat as findings of fact. In this light, we believe that we cannot simply accept Norway's factual assertions. In any case, we have closely reviewed the two pieces of evidence that Norway argues support its assertions, and believe that they do not unambiguously substantiate Norway's position.

6.7 Norway asks the Panel to add text to paragraph 7.197 to reflect part of the argument it made to explain why Salmar reported zero export sales in its reply to the EC's "sampling questionnaire". The EC contends that the requested changes suggest that the questionnaire excluded information on exports made by unrelated traders. We have added footnote 377 to paragraph 7.197 recalling Norway's argument and added some of our own observations in order to clarify the facts.

6.8 Norway requests that the Panel amend the characterisation of its arguments at paragraph 7.233 in respect of the meaning of the verb "determine" in Article 2.2.1 of the AD Agreement. In particular, Norway asks the Panel to "correctly formulate its contentions" as set out in response to Panel Question 80.[165] The EC did not respond to Norway's comments. We have made an appropriate amendment to paragraph 7.233 (now 7.235) and added paragraph 7.236 in order to address what we understand to be Norway's concerns.

6.9 Norway asks the Panel to delete from paragraph 7.240 the reference to its answer to Panel Question 137 because it contends that it wrongly characterizes Norway's position on the meaning of the expression "the time of sale" in the last sentence of Article 2.2.1. In particular, Norway argues that it did not intend that its response to Panel Question 137 should be interpreted as indicating that "the time of sale" could be equated with "the particular day of sale, or an average including that day,

[165] Norway, Comments on the Interim Report, para. 15.

over a week, month or the period of investigation".[166] The EC did not respond to Norway's comments.

6.10 We have reviewed Norway's response to Panel Question 137 and consider that the Panel's initial understanding of Norway's answer was not unreasonable. However, we recognize that it might also be interpreted in the manner that Norway now contends was intended. Therefore, we have decided to grant Norway's request, and modified the text of paragraph 7.240 (now 7.243) accordingly.

6.11 Norway asks the Panel to modify paragraph 7.287 to reflect what it asserts was the fact that the investigating authority constructed normal value for all investigated parties, including [[XXX]] and [[XXX]]. The EC did not respond to Norway's comments. We believe that the facts surrounding the treatment of [[XXX]] and [[XXX]] in the investigation are appropriately addressed in paragraph 7.290. Therefore we see no need to make the changes requested by Norway.

6.12 Norway requests that the Panel provide a more detailed explanation of the rationale for the findings made in paragraph 7.382 in respect of Grieg's filleting costs. The EC considers that the present text of this paragraph "clearly states the Panel's conclusions".[167] We believe that the current text of paragraph 7.382 adequately explains the Panel's findings, *inter alia*, by cross-reference to the Panel's previous observations on the disciplines of paragraph 3 of Annex II. Accordingly, we decline Norway's request.

6.13 Norway asks the Panel to amend the description of the meeting that took place on 2 June 2005 between the FHL and the investigating authority to reflect the fact that a number of companies also attended the same meeting and made statements before the investigating authority. The EC submits that Norway's request is irrelevant because the EC's justification for treating unknown producers as non-cooperators arose from their failure to participate in the process for selecting a sample, at the outset of the investigation. We have made a number of modifications to paragraphs 7.447 (now 7.450) and 7.457 (now 7.460) to more accurately reflect the facts surrounding the meeting of 2 June 2005.

6.14 Norway asks the Panel to replace the word "all" in paragraph 7.455 with the word "those", in order to clarify that the FHL did not undertake to contact "all" Norwegian salmon producers, but only "those" producers that FHL considered to be of relevance for the anti-dumping proceeding. The EC argues that any change to the wording must not conceal what it argues was the distinction drawn by the Panel between what the FHL had presented itself as doing (act as a channel to all the industry associations) and what it actually decided to do (contact some of them only). We consider that the language of paragraph 7.455 states the Panel's views on this issue sufficiently clearly, and accordingly we reject Norway's request.

6.15 Norway requests that the Panel insert several passages of additional text into paragraph 7.460 in order to fully reflect all of the arguments Norway made in respect of the meaning of the term "cost of production". The EC did not respond to Norway's comments. In our view, the text of paragraph 7.460, and the following paragraphs in section F.1 of our findings, provide a sufficiently clear summary of Norway's arguments for the purpose of resolving the particular claims at issue. Therefore, we do not consider that it is necessary to make the requested modifications.

6.16 Norway argues that the Panel's findings in respect of its complaint against the investigating authority's NRC adjustments (paragraph 7.485) fail to properly address Norway's claims and, therefore, did not resolve the dispute between the parties. Specifically, Norway submits that once the Panel had dismissed Norway's arguments on the correct interpretation of the last sentence of

[166] Norway, Answer to Panel Question 137.
[167] EC, Comments on Norway's Comments on the Interim Report.

Article 2.2.1.1, it should have applied its own interpretation of Article 2.2.1.1 to the facts. Norway now asks the Panel to do so. The EC states that it agrees with the Appellate Body that it is not the role of a panel to "make the case for a complaining party".[168]

6.17 As our evaluation in section F.1(c)(i) reveals, the claims against the investigating authority's treatment of NRCs, that are the subject of Norway's interim review comments, were premised on the legal argument that the last sentence of Article 2.2.1.1 requires that solely NRCs which benefit current and/or future production can be included in the cost of production. In dismissing Norway's legal argument, we have therefore found that Norway has failed to establish a *prima facie* case against the investigating authority's NRC adjustments. Having made this finding, we consider that we have satisfied our obligation of making an objective assessment of the matter that is before us, and have properly resolved the dispute between the parties. In this regard, we recall that the Appellate Body has observed that a "panel errs when it rules on a claim for which the complaining party has failed to make a *prima facie* case".[169] We therefore reject Norway's request.

6.18 Norway asks the Panel to insert a new section in the report to address a claim it alleges was made in its FWS against the investigating authority's treatment of certain NRCs incurred by [[XXX]] on the closure of four smolt production facilities, that was not addressed by the Panel in the Interim Report. Norway submits that it made two separate and distinct claims on this issue: First, that the investigating authority was not entitled to treat the NRCs as costs of production within the meaning of Article 2.2.1.1; and secondly, "in the alternative"[170], that even if the NRCs were costs of production, the investigating authority nevertheless acted inconsistently with Article 2.2.1.1 because it failed to properly allocate those NRCs to [[XXX]] cost of production. In its comments on Norway's request, the EC does not express an opinion on whether the Panel should accept Norway's proposal, but repeats certain factual assertions already made during the proceedings.

6.19 After closely reviewing the parties' submissions regarding the investigating authority's treatment of [[XXX]] NRCs, we do not understand Norway to have made a separate and "alternative" claim that the investigating authority acted inconsistently with Article 2.2.1.1 because it failed to properly allocate NRCs to [[XXX]] cost of production. Norway asserts that its "alternative" claim was expressed in two paragraphs of its FWS. However, even when read in isolation, we do not understand these two paragraphs to unequivocally state the claim that Norway alleges was being made. For instance, there is no reference to Article 2.2.1.1, nor does it appear to us that the paragraphs are drafted using language suggesting that an "alternative" argument or claim was being made. The existence of any such claim is even less apparent when the two paragraphs are reviewed together with the remainder of the section of Norway's FWS addressing [[XXX]] NRCs. In this regard, we find it telling that in the last paragraph of this section, Norway summarises its claim in the following terms:

> "By <u>including</u> the NRC incurred by [[XXX]] on the closure of four smolt production facilities, the EC, therefore, violated Articles 2.2 and 2.2.1.1 of the *Anti-Dumping Agreement*."[171]

This paragraph reveals that Norway was concerned with the consistency of the *inclusion* of [[XXX]] NRCs in its cost of production with Articles 2.2 and 2.2.1.1. There is no mention of any "alternative" claim or argument. The same formulation of words is used in the concluding paragraphs of other sections of Norway's FWS where it challenges the investigating authority's "inclusion" of the NRCs of

[168] Appellate Body Report, *Japan – Agricultural Products II*, para. 129.
[169] Appellate Body Report, *US – Gambling*, para. 139.
[170] Norway, Comments on the Interim Report, para. 40.
[171] Norway, FWS, para. 939. (Underline added).

two other companies, [[XXX]] and [[XXX]], on the basis of the same legal argument.[172] It is noteworthy that although Norway challenged the investigating authority's *allocation* of these two companies' NRCs, it did so in a separate and distinct section of its FWS,[173] where it explained its claims as follows:

> "Norway submits that these costs are non-recurring costs that do not benefit current or future production. As such, Article 2.2.1.1 does not permit the EC to include them in the cost of producing salmon during the IP. Accordingly, none of the costs subject to the three-year averaging approach may be included in the COP.
>
> Additionally, in this section, Norway challenges the approach that the EC took to allocating these costs across time. Assuming that the Panel upholds the primary claim that the NRC are excluded from the COP, Norway nonetheless requests the Panel to address this allocation issue as it is an important part of the contested measure and involves a methodology that could, for example, be used on implementation."[174]

6.20 By contrast, the language that Norway suggests indicates that it made a two-tiered claim in respect of [[XXX]] NRCs is much less precise and significantly more ambiguous. Given the very detailed nature of Norway's arguments on this (and other matters raised in this dispute), it could be expected that such an alternative claim, if in fact intended, would have been more clearly expressed. Indeed, in other parts of Norway's FWS, where it wanted to make an alternative argument or claim, Norway explicitly said so.[175]

6.21 Finally, we note that in responding to Norway's claim in respect of [[XXX]] NRCs, the EC did not specifically address the element of allocation as if it were a separate and alternative claim or argument. In our view, this also supports the reasonableness of the Panel's reading of Norway's submissions. Thus, for all of these reasons, we decline Norway's request.

6.22 Norway asks the Panel to amend the description of the investigating authority's rationale for using the three-year averaging allocation methodology in paragraph 7.491 to reflect the fact that, in the Definitive Regulation and the General Definitive Disclosure Document, the investigating authority stated that it applied a three-year average because three years is the average length of time to grow a salmon *from a smolt to a harvestable salmon*. The EC considers that Norway's proposal is "factually

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[172] For example, "The EC was not entitled to include in [[XXX]] costs of production the company's losses on its investment operations." Norway, FWS, para. 923; "In sum, the EC has not provided an adequate and reasoned explanation that supports its inclusion of the costs incurred by [[XXX]] ..." Norway, FWS, para. 894. For both companies, as with [[XXX]], Norway's claims were based on the argument that the last sentence of Article 2.2.1.1 permits the inclusion of NRCs in a company's cost of production solely when they "benefit future and/or current production".

[173] Section XI.C(iv), setting out Norway's claims in respect of the three-year average allocation methodology.

[174] Norway, FWS, paras. 945-946. (Underline added).

[175] For example: "Norway claims that the EC violated Article 6.10 by excluding all exporters from the investigation. In the alternative, assuming that the EC was entitled to exclude all exporters from the sample, the EC violated Article 6.10 by failing to include two of the largest producers in the sample (Salmar and Bremnes)." Norway, FWS, para. 296, (underline added); "The EC violated Article 2.2.2 of the *Anti-Dumping Agreement*, because it failed to determine [[XXX]] SG&A costs on the basis of actual sales data submitted by the company and because, in the alternative, it did not use a "reasonable method" to compute [[XXX]] SG&A costs." Norway, FWS, para. 1061, (underline added).

defective", noting that the Definitive Disclosure to [[XXX]] describes that NRC were treated "[i]n line with the 3 year salmon generation approach".[176]

6.23 While the EC is correct to point out that the Definitive Disclosure to [[XXX]] describes that its NRCs were treated "[i]n line with the 3 year salmon generation approach", it is also the case that the Definitive Regulation states that three years was considered to be the "average length of time that it takes to grow a salmon from a smolt to a harvestable salmon". We have therefore made an appropriate amendment to the text at what is now paragraph 7.494, taking into account the fact that the EC has, during these proceedings, admitted that the statement made in the Definitive Regulation was erroneous.

6.24 Norway asks the Panel to reflect, in the summary of Norway's arguments contained in paragraph 7.668, the fact that it was unaware of the precise methodology used by the investigating authority to calculate the MIPs until after the EC response to the Panel Question 130, following the second substantive meeting of the Panel with the parties. The EC comments that any modifications accepted by the Panel should be limited to Norway's arguments and should not describe the EC's actions in regard to the disclosure of the calculations. We have modified paragraph 7.668 (now 7.671) in order to more accurately reflects Norway's arguments.

6.25 Norway asks the Panel to amend the summary of its arguments contained in paragraph 7.670 to capture the full range of views it expressed in respect of the investigating authority's use of "weight conversion factors" when determining the MIPs. The EC does not explicitly object to Norway's proposal, but reminds the Panel that it has not had the opportunity to respond to the assertions made by Norway in its proposed amendments. We have modified paragraph 7.670 (now 7.673) with a view to summarizing all arguments that are relevant to the Panel's evaluation of Norway's claims.

6.26 Norway asks the Panel revise paragraph 7.720 so as to address two arguments it alleges it made in respect of the investigating authority's use of "weight conversion factors", and thereby find a violation of Article 9.2. The two arguments Norway alleges the Panel has not addressed are: (i) the argument that the investigating authority "failed to provide a reasoned and adequate explanation for its MIPs, including identifying which 'weight conversion factors'"; and (ii) that the '"weight conversion factors' used by the EC were not 'standard'", and inflated the MIPs.[177] The EC does not explicitly object to Norway's proposal, but reminds the Panel that it did not have an opportunity to respond to Norway's assertions.

6.27 We note that Norway's argument that the investigating authority failed to provide a reasoned and adequate explanation for its MIP calculations is addressed in the context of its claim under Articles 12.2 and 12.2.2 of the AD Agreement. As regards Norway's second argument, we have now explicitly addressed Norway's concerns by inserting new paragraph 7.724, and amending paragraph 7.720 (now 7.725).

6.28 Norway requests that the Panel make certain additions to the text of paragraphs 7.779 and 7.796. Norway considers that the text as originally drafted gives the impression that in recalculating the MIPs, the EC simply reviewed and took into account comments made by interested parties in response to the definitive disclosure. Norway asserts, however, that after the definitive disclosure of 28 October 2005, and after receiving the parties' comments on that disclosure on 8 November 2005, the investigating authority "initiated a new step in the investigation" by "deepening" the investigation, referring in this regard to a letter from the investigating authority transmitting the recalculated MIPs.[178] Norway considers it important that the Panel Report fully reflect these "additional

[176] EC, Comments on Norway's Comments on the Interim Report.
[177] Norway, Comments on the Interim Report, paras. 51-52.
[178] Norway, Comments on the Interim Report, para 56, citing, *inter alia*, Exhibit NOR-19.

investigative steps undertaken by the investigating authority with respect to the MIPs".[179] The EC did not respond to Norway's comments.

6.29 Norway is asking us to include, as a fact, a characterization of the steps the investigating authority took following the definitive disclosure, and which resulted in the changes to the MIPs. It is true that this characterization is one that the investigating authority itself used in referring to the actions it took following the definitive disclosure. However, Norway did not rely upon this characterization in making its arguments to the Panel. Although it cited the passage of the letter from the investigating authority containing the reference to "deepened … investigation" in its first written submission[180] and in its answer to a question from the Panel,[181] and emphasized certain aspects of the passage in its submission, it did **not** emphasize this phrase, and did not refer to "deepening" of the investigation as pertinent in any of its arguments, written or oral. Thus, to include this in the summary of Norway's argument at paragraph 7.779 would introduce a new element to its arguments at the Interim Review stage that was not argued as such to the Panel during the course of the proceedings, which we do not consider to be appropriate.

6.30 With respect to paragraph 7.796, this paragraph forms part of our findings. We did not, in our analysis, consider the characterization of the actions taken by the investigating authority after the definitive disclosure that resulted in the recalculation of the MIPs in its analysis. The characterization of those actions is not, in our view, a fact. The actions themselves are accurately described in paragraph 7.796, which states that the investigating authority "verified and cross-checked the information available, including information provided by parties in response to the definitive disclosure". The characterization of that process of "verify[cation] and cross-check[ing]" as a "deepened … investigation" was not relevant to our determination. We therefore decline to make the requested additions to paragraphs 7.779 and 7.796.

6.31 Norway requests that the Panel reconsider its decision not to suggest that the EC repeal the contested measure, set forth in paragraphs 8.6-8.9 of the interim report. Norway notes that panels have made suggestions under the second sentence of Article 19.1 in at least 16 cases, including the recent *Mexico – Steel Pipes and Tubes* dispute.[182] Norway argues that panels in anti-dumping cases have exercised their discretion to suggest ways for implementation when two elements existed: there was a violation of the provisions on initiation, and there were violations of many or various provisions of the AD Agreement, including provisions on dumping, injury and causation. Norway asserts that those same circumstances are present in this dispute – a finding of inconsistency with Article 5.4 based on the wrongly-defined domestic industry, and 20 findings of violation covering all aspects of the investigation. The EC does not accept the view that the number of violations necessitates withdrawal of the measure in question. The EC asserts that the WTO operates on the principle that a Member found to have violated its obligations is free to find whatever means it wishes to bring itself into compliance. The EC considers this to be a sound principle, as only the Member in question will know the full range of options available to it under domestic law and procedures, and the implications of various possible means of implementation. The EC points out that it has commenced a review of the issue of dumping of Norwegian salmon,[183] which investigation will inevitably have consequences for the measure at issue in this dispute, which illustrates the wisdom of leaving Members free to decide how they will respond to adverse panel findings.

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[179] Norway, Comments on the Interim Report, para. 57.

[180] Norway, FWS, para. 748.

[181] Norway, Answer to Panel Question 71, para. 246.

[182] Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala* ("*Mexico – Steel Pipes and Tubes*"), WT/DS331/R, adopted 24 July 2007.

[183] Notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of farmed salmon originating in Norway, *Official Journal of the European Union*, C88/26, 21 April 2007.

6.32 Pursuant to the second sentence of Article 19.1 of the DSU, a panel is free to suggest ways in which a Member found to be in violation could implement a panel recommendation to bring its measure into conformity. That discretion applies equally to allow a panel to decline to make such a suggestion. There is no guidance in the text of the DSU, or in any other covered agreement, concerning relevant criteria for the exercise of that discretion in the context of a dispute involving an anti-dumping measure. The fact that previous panels reviewing anti-dumping measures which exercised their discretion to make a suggestion on implementation have referenced the circumstances which informed that exercise of discretion does not mean that, if those circumstances exist, a different panel reviewing a different anti-dumping measure must, or even should, exercise its discretion in the same way. Moreover, while the Appellate Body has indicated that "it would [be] advisable" for a panel to articulate the reasons why it declined to make a suggestion, it has made clear that a failure to do so "does not mean that Panel's exercise of its discretion was improper".[184]

6.33 We recognize that withdrawal of the measure is one means by which our recommendation in this dispute might be implemented. However, we consider that a suggestion to withdraw the measure would imply that, in our opinion, no other action would be sufficient to comply with the underlying recommendation, and thus could have significant implications in the event of any subsequent proceedings under Article 21.5 of the DSU concerning the "existence or consistency with a covered agreement of measures taken to comply with the recommendations". Neither Norway nor the EC has addressed the question whether any means other than revocation of the measure may be available to the EC to implement the recommendation in this dispute. Nor do we believe that we are well situated to assess that question, even if a factual basis for it were presented. As we cannot conclude that withdrawal of the measure is the only means of implementation available to the EC to implement the recommendation in this dispute, and we are unwilling to prejudge, or appear to prejudge, the issue which may arise under Article 21.5 of the DSU, we therefore exercise our discretion to decline to make any suggestion as to implementation.

B. REVIEW REQUESTED BY THE EC

6.34 The EC requested review of paragraphs 7.11, 7.26, 7.28 7.44, 7.54, 7.57, 7.61, 7.91, 7.92, 7.94, 7.95, 7.96, 7.107, 7.112, 7.113, 7.115, 7.117, 7.119, 7.120, 7.122, 7.123, 7.200, 7.201, 7.202, 7.203, 7.497, 7.499, 7.503, 7.633, 7.643, 7.740 and 8.1(xv), and footnotes 201, 204, 260, 268, 773 (incorrectly referenced as 733) and 919 of the Interim Report.

6.35 In the absence of any objections from Norway, we made changes requested by the EC to paragraphs 7.11, 7.26, 7.28, 7.44, 7.54, 7.57, 7.91, 7.92, 7.95, 7.96, 7.113 (final sentence), 7.503 (now 7.506), 7.740 (now 7.745) and 7.754 (now 7.759) and footnotes 201 (now 228) and 773 (now 810) of the interim report, albeit not always in the exact terms proposed by the EC.

6.36 The EC requests that the Panel revise the text of footnote 204 in two respects. Norway did not object to the first requested change, which we have made to what is now footnote 231.

6.37 With respect to the second requested changed, the EC argued that the reasoning in prior panel and Appellate Body decisions indicates that everything within "the product" is by definition comparable (necessary adjustments having been made), and that it is not just within an averaging group that transactions are "comparable", and therefore requested that the Panel delete that word. Norway objected to the EC's request in this respect, asserting that, if the Panel were to delete the word "comparable" as requested by the EC, this would indicate that Norway was correct in arguing that all

[184] *Appellate Body Report, United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina ("US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)"), WT/DS268/AB/RW, adopted 11 May 2007*, para. 183.

models must be "like" to ensure comparability, and accordingly, asked for additional explanation from the Panel if it made the requested change.

6.38 We did not make the second requested change, because the text as drafted fully reflects our understanding of the practice of multiple averaging.

6.39 The EC requests a corresponding change to the fourth sentence of paragraph 7.61, to which Norway objected for the same reasons as its objection to the requested change to footnote 204.

6.40 We have amended the text of the fourth sentence of paragraph 7.61 to more clearly reflect our understanding of the practice of multiple averaging, corresponding with the text of footnote 204 (now 231), but have not made the change requested by the EC.

6.41 The EC requests that the Panel make an addition to the text of paragraph 7.94. The EC argued that the text should make clear that the production of silent producers was estimated and included in Community production. Norway objected to this request, pointing out that the referenced Definitive Regulation does not disclose whether silent producers were included in total EC production, although the EC did explain that they were during the course of the proceeding. Norway suggested that if the Panel were to make the requested change, it should add a new sentence to clarify that the inclusion of silent producers in the volume of Community production was explained during the dispute proceedings, to properly reflect the chronology of the EC's explanation.

6.42 We have not made the requested addition to the text of paragraph 7.94. Norway is correct that the inclusion of silent producers is not apparent on the face of the referenced recitals of the Definitive Regulation, and that their inclusion was explained by the EC during the course of the proceedings. One aspect of Norway's claims was an alleged failure to adequately explain the volume of EC production referenced in the Definitive Regulation. It would in our view be inappropriate to imply that the Definitive Regulation clearly sets out the inclusion of silent producers.

6.43 The EC requests that the Panel modify the first sentence of paragraph 7.107 to avoid prejudging the question of whether or not certain activities constitute production of the like product. Norway objects to the EC proposal, arguing that the sentence summarizes Norway's claims and arguments, and correctly reflects them. Norway made an additional request, to change the phrase "filleting-only undertakings" in the first sentence to "producers of fillets only", or in the alternative to more fully describe the term to identify the economic activity of these enterprises.

6.44 We do not agree with Norway that the first sentence of this paragraph summarizes Norway's claims – rather, it is our introduction of the issues we will address in the subsequent paragraphs. We do agree with the EC that it is better to use terminology that does not imply any prejudgement, and have therefore amended the text to a more neutral formulation, which we consider more appropriate in an introductory paragraph. We have not granted Norway's additional request to change the reference to "filleting-only undertakings". As noted, this sentence is not a description of Norway's arguments, but rather our statement of the issues before us. Moreover, this is the phrase we have used in discussing the issue, and therefore we consider its use appropriate here. We have, however, added a new footnote 276 explaining what we mean by the term, for clarification.

6.45 The EC requests a series of changes to the Panel's discussion of the domestic industry issue that all rest on largely the same argument. Specifically, the EC proposes:

(i) changing the phrase "domestic industry" to "domestic producers" in paragraphs 7.112 (first sentence) and 7.120 (line 12),

(ii) changing the phrase "domestic industry" to "domestic production" in paragraphs 7.115 (second sentence) and 7.120 (first sentence) and in footnote 268,

(iii) changing the term "production" to "economic activity" in paragraphs 7.113 (first sentence) and 7.123 (fourth sentence),

(iv) changing the term "producers of the like product" in paragraph 7.112 (first sentence) to "undertakings whose input and output falls within the scope of the like product",

(v) changing the phrase "any enterprise that produced any form of the like product" in paragraph 7.115 (second sentence) to "any enterprise that has as an output and thus, in the Panel's view, "produced" any form of the like product", and

(vi) adding text to paragraph 7.120 (first sentence).

6.46 The EC stated its understanding that the issue before the Panel was whether or not it was impermissible for the European Communities to consider that the filleting-only undertakings were not "producers" of the like product, but rather "industrial users" of whole salmon, and argued that it excluded filleting-only undertakings from the "domestic producers" as a first step, before determining what was the "domestic industry". The EC stated its view that "the key finding by the Panel is that because the output of these undertakings was fillets (that is, something within the scope of the like product), they were necessarily "producers" of the like product, notwithstanding that their input was whole salmon (which is already part of the like product).[185] Norway did not comment on all of the EC's requested changes, but specifically objected to the proposed changes in (i) and (iv) above, and the proposed changes to paragraphs 7.115 (first sentence) and 7.123 (fourth sentence) and footnote 268. Norway argued that the proposed changes reformulate Norway's claims, and the Panel's findings, to a focus on "domestic production" and "domestic producers" rather than on Norway's claims concerning the proper definition of the "domestic industry".

6.47 Taken as a whole, we consider that the changes proposed by the EC would recast this section of our Report from an analysis of what enterprises comprise the "domestic industry" to an analysis of what enterprises comprise "domestic production" or "domestic producers". This was neither the focus of Norway's claim, nor the focus of our analysis and findings. Norway's claim was that the EC improperly excluded filleting-only undertakings from the domestic industry. Our analysis focused on this question. We concluded that filleting-only enterprises were engaged in production of the like product, and therefore could not be excluded, as a group or category, from the domestic industry.

6.48 We first addressed the interpretation of Article 4.1 of the AD Agreement, and concluded that Article 4.1 was properly understood as not allowing the exclusion, as a category or group, of any enterprises that produced the like product (paragraph 7.112). We went on to address the EC's argument that filleting-only undertakings did not produce the like product, and rejected this argument as a matter of fact, concluding that the activities engaged in by filleting-only undertakings constituted "production" of the like product, based on the ordinary meaning of the verb "to produce" (paragraph 7.114). We noted that filleted salmon was within the scope of the like product, and concluded that any enterprise producing any form of the like product should be considered, at least in the first instance, a producer of the like product, and as such, part of the domestic industry (paragraph 7.115).

6.49 We have not made the changes requested by the EC. The focus of our analysis in this section of our Report is Article 4.1 of the AD Agreement, which defines "domestic industry". The EC's argument that it excluded filleting-only undertakings from the "domestic producers" as a first step, before determining what was the "domestic industry" as a second step, is irrelevant to our analysis and

[185] EC Comments on Interim Report, para. 20.

conclusions. Whether the error occurred in the first step, or the second step, does not change our conclusion in this case, that the EC's approach to defining the domestic industry resulted in the investigation of a domestic industry that did not comport with the definition in Article 4.1 of the AD Agreement.

6.50 However, having considering this section of the Report in light of the comments made by both parties, and taking into consideration the EC's concerns with the rendering of its arguments, we have made changes to paragraphs 7.112, 7.113 (including new footnote 284) and 7.114, to avoid misrepresenting the parties' arguments or giving the appearance of having pre-judged matters, and to clarify our reasoning.

6.51 The EC requests that the Panel address, in paragraph 7.119, what the EC refers to as "the one authoritative statement by the Appellate Body that confirms that a definitional provision does not impose obligations,"[186] referring to the decision of the Appellate Body in *US - Zeroing (Japan)*.[187] The EC asserts that, as part of an objective assessment under Article 11 of the DSU, the Panel must either agree with this statement and dismiss Norway's claim, or distinguish it. Norway sees no need for the Panel to alter its views, noting that the Panel cites extensive relevant case-law, including Appellate Body reports, that address the same question, in reaching its conclusion.

6.52 We have not granted the EC's request. Contrary to the view stated by the EC, we do not consider the Appellate Body's statement in *US – Zeroing (Japan)* constitutes an "authoritative" statement that precludes our finding that the EC's approach to defining domestic industry in this case resulted in an investigation concerning a domestic industry that did not comport with the definition set forth in Article 4.1. In that decision, the Appellate Body had already found that the challenged "zeroing" practice violated Article 2.4.2. It went on to decline to address Japan's additional claim asserting a violation of Article 2.1 and Articles VI:1 and VI:2 of the GATT 1994, stating:

> "Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 are definitional provisions. They set out a definition of "dumping" for the purposes of the *Anti-Dumping Agreement* and the GATT 1994. The definitions in Article 2.1 and Article VI:1 are no doubt central to the interpretation of other provisions of the *Anti-Dumping Agreement*, such as the obligations relating to, *inter alia*, the calculation of margins of dumping, volume of dumped imports, and levy of anti-dumping duties to counteract injurious dumping. But, Article 2.1 and Article VI:1, read in isolation, do not impose independent obligations."[188]

We do not consider that this statement has the significance imputed to it by the EC, and do not consider that it requires the dismissal of Norway's claim. The Appellate Body was not addressing Article 4.1 of the AD Agreement, while several panels, cited in paragraph 7.119, which were considering that provision reached conclusions similar to ours.

6.53 We did not conclude, in this case, that the EC's definition of domestic industry violated an "independent obligation" established in Article 4.1 of the AD Agreement. As we noted in paragraph 7.118, regardless of whether Article 4.1 itself imposed obligations on Members, we considered it necessary and appropriate to address Norway's claims. As we noted in paragraph 7.117, whether or not the EC defined the domestic industry in a manner consistent with the definition in Article 4.1 could be central to consideration of other claims – as indeed, we subsequently found it

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[186] EC, Comments on Interim Report at para. 23 (footnote omitted).

[187] Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("*US – Zeroing (Japan)*"), WT/DS322/AB/R, adopted 23 January 2007, para. 140.

[188] Appellate Body Report, *US – Zeroing (Japan)*, para. 140.

was. To accept the EC's view on this matter would effectively mean that an investigating authority's definition of the domestic industry in an anti-dumping investigation could not be challenged.

6.54 The EC requests that the Panel reconsider footnote 260. The EC asserts that the Panel found that the burden of demonstrating that the level of economic activity of an enterprise is so low that it does not constitute "production" of the like product, a principle with which the EC expresses agreement, is on the EC. The EC requests reconsideration of this latter aspect, arguing that to the contrary, the burden should be on the party making that assertion, in this case Norway. Norway disagrees with the principle stated in this footnote, and suggests that the Panel delete it, and the statement on the same principle in paragraph 7.120. Norway considers that the footnote raises a complex interpretive question, not addressed by the investigating authority or the parties, and suggests it would be best left for consideration in a dispute where it is relevant on the facts and argued by the parties. In the alternative, Norway asserts that the level of economic activity by filleting-only undertakings was significant, pointing to information before the investigating authority in support of its assertion. Finally, Norway disagrees with the EC's view that the burden of demonstrating that the level of economic activity of an enterprise is so low that it does not constitute "production" of the like product rests with Norway, and asserts that the burden lies with the investigating authority, which must make a determination in this regard based on the evidence and provide a reasoned explanation for it.

6.55 Footnote 260 relates to the statement in the previous footnote that whether an enterprise is a domestic producer is a question of fact, and recognizes that there may be circumstances where the facts justify finding that an enterprise did not "produce" the like product, in the sense the Panel used that term, i.e., bring it into existence. We did not address this factual issue, which was not addressed in the underlying investigation. In the absence of any consideration by the investigating authority, a panel would be making a *de novo* decision were it to address such a factual question in dispute settlement, which of course it may not do. We consider that the point made in this footnote, while not necessitated by the facts of this case, is important to a full understanding of our views on the issues that were before us, and we therefore have clarified the text of footnote 260 (now 289) to avoid any implications as to the burden of proof on this issue, should it arise on the facts of another dispute.

6.56 The EC requests that the Panel reconsider the use of the term "subsidiary" in paragraph 7.117, referring to Norway's claims regarding initiation, injury and causation, arguing that the Panel should refer to them as "consequential" claims. The EC argues that the Panel is not entitled to convert "consequential" claims into "subsidiary" claims, and that the Panel found, as a matter of fact, that Norway's claims were "as a consequence", and cannot now change that factual finding, set out at paragraph 7.124, and reiterated at paragraph 8.1(i). Norway disagrees with the EC's view that its claims of inconsistency on initiation, injury, and causation are merely consequential, arguing that these claims were independent claims within the Panel's terms of reference.

6.57 In paragraph 7.117, we identified Norway's claims under Articles 5.4, and 3.1, 3.4, and 3.5 as "subsidiary" claims in view of the fact that Norway presented no independent arguments on those claims, relying on its principal argument that the EC wrongly-defined the domestic industry under Article 4.1. We did not, as the EC asserts, find as a matter of fact that Norway's claims under Articles 5.4, and 3.1, 3.4, and 3.5 were "as a consequence" – rather, we found violations of those claims "as a consequence" of our findings with respect to Norway's principal claim concerning Article 4.1. There is no inconsistency between describing claims as subsidiary to a principal claim, and describing the findings on those subsidiary claims as being a consequence of the finding on the principal claim. We therefore reject the EC's request.

6.58 The EC requests that the Panel reconsider paragraph 7.122. The EC argues that it did not exclude organic producers from either domestic production or the domestic industry, but only from the price under-cutting analysis, and that it did not exclude silent producers from domestic production,

including their volume of production on the basis of an estimate, although it did exclude them from the domestic industry. The EC asserts that there is no basis on which "similar considerations" to those underlying the Panel's decision regarding filleting-only undertakings could apply to these two categories of producer. The EC suggests that this paragraph be deleted, in light of the fact that the Panel exercised judicial economy with respect to the question of whether the EC was entitled to not include in the domestic industry, *inter alia*, producers of organic salmon and silent producers, since the producers it did include accounted for a major proportion of domestic production of the like product. Norway objects to the EC request, arguing that this paragraph properly responds to its claims that the EC wrongly excluded these producers from the domestic industry, albeit the exclusion of organic producers was in the injury assessment and not at the time of initiation. Norway asserts that the Panel's exercise of judicial economy has no bearing on the discussion in this paragraph, which adds clarity for purposes of implementation, and that to delete it would therefore reduce the EC's obligations regarding implementation.

6.59 It is clear that the EC did not include silent producers in the domestic industry, and it does not argue otherwise. As there is no dispute that they produced the like product, the considerations we outlined regarding filleting-only undertakings apply equally to them. With respect to organic producers, the situation is more difficult to understand. However, referring to Exhibit EC-32, it is clear that at least one domestic enterprise was excluded from the domestic industry on the basis that its production was "exclusively organic." Two related enterprises apparently were not excluded *per se*, but their information not considered in the price undercutting analysis. In its FWS, the EC had argued, with respect to silent producers, that if they were excluded, but a major proportion of domestic production is included, Article 4.1 is satisfied.[189] The EC went on to assert that the same analysis applied with respect to organic salmon.[190] Thus, it seems that the EC did not exclude from the domestic industry enterprises only a portion of whose production was organic, but did exclude at least one producer whose production was exclusively organic. Norway argued that the exclusion of organic and silent producers was inconsistent with Article 4.1. As discussed above, whether domestic producers are excluded from "domestic production" (the EC's "first step"), or from the domestic industry (the EC's "second step"), the end result is the same – the domestic industry is wrongly defined because domestic producers of the like product are excluded. Thus, the considerations regarding filleting-only undertakings apply equally to organic producers. We therefore reject the EC's request to delete this paragraph.

6.60 The EC requsts that the Panel modify paragraph 7.200. We understand the EC to be of the view that the text of paragraph 7.200 could be interpreted as suggesting that the EC does not accept that the investigating authority knew of the relative size of the Norwegian market and of the proportion of Norway's exports that went to the EC. The EC recalls that it does not contest that the investigating authority had knowledge of these two facts. However, what it does not accept is that the investigating authority knew of the destination of Salmar's production, as alleged by Norway. Norway submits that the EC's objection misses the point and that its arguments do not fully reflect the Panel's findings. In order to avoid any doubt, we have added one sentence to paragraph 7.200 reaffirming that the EC does not contest that the investigating authority knew of the relative size of the Norwegian market and of the proportion of Norway's exports that went to the EC.

6.61 The EC submits that the Panel's evaluation of the investigating authority's decision not to investigate Salmar fails to report and take account of certain significant elements. In particular, the EC considers that the Panel's assessment does not report that: (i) the FHL presented the investigating authority with separate lists of salmon exporters and producers, which classified Salmar as a producer; (ii) Salmar was absent from the FHL's list of the 15 largest Norwegian exporters; and (iii) Salmar failed to reply to the investigating authority's second sampling questionnaire. The EC suggests that all

[189] EC, FWS, para. 77.
[190] EC, FWS, para. 83.

of these facts should be taken into account in evaluating whether the investigating authority's exclusion of Salmar was justified. Norway does not object to the EC's suggestion, but requests the Panel to take into account its own submissions on the relevance of the facts identified by the EC, should it consider modification of the Interim Report to be appropriate.

6.62 Although we consider that the facts the EC refers to were already noted in the Interim Report, we have taken the parties' comments into account and decided to more directly address the facts identified by the EC in the body of our findings relating to Salmar. We have therefore made changes to paragraphs 7.196, 7.201 (now 7.201 and 7.203) and have inserted a new paragraph 7.202.

6.63 The EC asks the Panel to review paragraph 7.202, stating that it does not understand the relevance of the discussion contained in this paragraph to the question of whether Salmar's exclusion from the investigation could be justified. Norway disagrees with the EC, observing the evidence discussed therein is highly relevant to the Panel's task. We agree with Norway that the explanation provided by the investigating authority, in the written communication to the FHL, for not having selected Salmar for investigation is evidence that is relevant to the Panel's assessment of the merits of Norway's claims. We believe the text of this paragraph articulates the Panel's views on this issue with sufficient clarity, and have therefore left it unchanged.

6.64 The EC asks the Panel to amend the text of paragraph 7.203 because it considers that the language used in the Interim Report might be interpreted as expressing a view about whether or not Salmar should be selected for investigation in any future investigation or re-investigation, regardless of factual circumstances. Norway opposes the EC's requested change because it considers it to be both unnecessary and ambiguous. We agree with Norway that the EC's proposed change is unnecessary. We believe the text of this paragraph articulates the Panel's views on this issue with sufficient clarity, and have therefore left it unchanged.

6.65 The EC requests the Panel to re-consider the reasoning set out in paragraphs 7.497 and 7.499 relating to the question of whether [[XXX]] reported its cost of production on the basis of project accounting. The EC considers that the Panel's reasoning suggests that it was of the view that because [[XXX]] stated that the cost extracts from its project accounting system used to calculate the cost of production reported to the investigating authority covered two years, and not three, it necessarily follows that [[XXX]] did not report on a project accounting basis. The EC argues that the fact that [[XXX]] reported costs of production over two years simply reflects the fact that the period of investigation straddled two accounting years. Therefore, it does not necessarily follow that [[XXX]] did not report on a (three year) project accounting basis. Norway states that it is uncertain as to whether the EC has interpreted the Panel's reasoning correctly. It notes that the key characteristic of reporting on a project accounting basis is that the cumulative costs incurred during the growth cycle of salmon generations harvested in the period of investigation is reported. In calculating such costs, the cumulative cost is divided by the total harvested volume.

6.66 The Panel's assessment of whether [[XXX]] reported costs of production on the basis of project accounting was guided by the EC's own description of what this would involve, namely, reporting of the "weighted average cost of production for all salmon generations that were harvested during the investigation period".[191] The Panel's reasoning was intended to reflect this understanding of what it means to report costs of production on the basis of project accounting. In order to avoid any confusion, we have therefore amended paragraphs 7.497 (now 7.500), 7.499 (now 7.502) and 7.501 (now 7.504) to more accurately reflect the Panel's reasoning.

6.67 The EC also asks the Panel to replace the word "incurred" with the word "booked" in paragraph 7.499. The EC argues that the word "booked" would more accurately reflect the term used

[191] See, para. 7.493 (now 7.496).

in the diagram that is discussed in this paragraph. Norway considers that the words "incurred" and "booked" are synonymous in this context, but expresses a preference for the use of the word "incurred". It is true that the word "incurred" is not used in the diagram that is the subject of the discussion in paragraph 7.499. We have therefore made a change to paragraph 7.499 (now 7.502) to reflect the precise content of the relevant diagram. However, in doing so, we note that this change is not intended to impact or modify the findings set out in this section of the report, as we consider the words "incurred" and "booked" to be synonymous in this context.

6.68 The EC requests that the Panel delete the final sentence of paragraph 7.503 because, in its view, it raises an example that is irrelevant to the factual circumstances that were before the investigating authority. In particular, while the example describes a situation requiring the allocation of NRCs associated with acquiring fixed assets, the EC contends that the NRCs before the investigating authority were of a different nature. Norway did not comment on the EC's request. As we understand it, the EC is concerned that the last sentence of paragraph 7.503 could be interpreted as indicating that the investigating authority treated NRCs associated with the acquisition of fixed assets in the manner described in the example during the investigation. We recognize that in the absence of a complete description of each and every NRC that is the subject of Norway's claim, the last sentence of this paragraph could be perceived to have the meaning the EC is concerned about. We have therefore removed the example from paragraph 7.503 (now 7.506).

6.69 The EC requests that the Panel rephrase the first sentence of paragraph 7.633 to clarify that the second error identified in that sentence, treating all imports from unexamined producers and exporters as dumped, was a consequence of the first error identified, treatment of imports attributable to a company for which a *de minimis* margin was calculated as dumped. The EC also requests a corresponding change in paragraph 8.1(xv). Norway objects to this request, considering that the Panel separately relied on the error it had found in the selection of the sample of Norwegian producers and exporters in making the second finding.

6.70 We did consider the fact that the EC erred in selecting the sample of Norwegian producers and exporters in finding that the EC erred in treating all imports from unexamined producers and exporters as dumped. Therefore, that finding was not solely as a consequence of our findings regarding Nordlaks, and the text as currently drafted reflects this. We therefore reject the EC's request regarding paragraph 7.633 and the corresponding request regarding paragraph 8.1(xv).

6.71 The EC requests that the Panel rephrase paragraph 7.643 (first sentence) to reflect the different legal bases for Norway's claims regarding price undercutting (Articles 3.1, 3.2, and 3.5) and price trends (Articles 3.1, 3.4, and 3.5). Norway does not object.

6.72 Paragraph 7.643 does contain incorrect references to the specific Articles alleged and found to be violated with respect to the EC's analysis of the volume of dumped imports, price undercutting, and price trends. We have redrafted paragraph 7.643 (now 7.646) to correct these and to set forth a more detailed summary of the Panel's findings, rather than the original more summary text, and made conforming changes in paragraphs 7.633 (now 7.636) and 7.642 (now 7.645) to correctly reflect Norway's claims.

6.73 The EC asks the Panel to amend paragraphs 7.740 and 7.754 by removing language that it considers could be interpreted to suggest that the Panel believes that duty collection and assessment proceedings can be described as the duty collection and assessment *phase* of an anti-dumping proceeding. Norway did not comment on the EC's request. The language used in the two paragraphs was not intended to express a view on the matter raised by the EC. To avoid any possible confusion, we have therefore modified the text of paragraphs 7.740 (now 7.745) and 7.754 (now 7.759) accordingly.

6.74 The EC requests that the Panel amend footnote 919 to delete the reference to paragraph 7.643. Norway does have strong views on this request, but considers it would be more appropriate to maintain the reference.

6.75 As redrafted, pursuant to our decision in paragraph 6.72 above, paragraph 7.643 (now 7.646) summarizes the Panel's findings on Norway's claims regarding the volume of dumped imports, price undercutting, and price trends. Therefore, the reference to that paragraph in footnote 919 (now 960) is correct, and we therefore have made no change.

6.76 The EC requests that the Panel separate paragraph 8.1(xv) into three separate paragraphs setting out the Panel's conclusions on Norway's claims regarding the volume of dumped imports, price undercutting, and price trends, as well as incorporating other changes requested separately. Norway does not object.

6.77 There are no strict rules concerning the form of the Panel's conclusions, and therefore we have modified paragraph 8.1(xv) to separately reflect our findings on Norway's claims regarding the volume of dumped imports, price undercutting, and price trends in paragraphs 8.1(xvi), (xvii) and (xviii), but without the additional change we have rejected in paragraph 6.75 above.

VII. FINDINGS

A. INTRODUCTION

7.1 This dispute concerns the anti-dumping investigation of, and definitive anti-dumping measures imposed on, imports of farmed salmon from Norway. The investigation was initiated on 23 October 2004 on the basis of a complaint lodged by the EU Salmon Producers' Group. The investigation of dumping and injury covered the period from 1 October 2003 to 30 September 2004, and data for the period from 1 January 2001 to 30 September 2004 was analyzed with respect to trends relevant for the injury assessment. The product concerned was defined as "farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen. The definition excludes other similar farmed fish products such as large (salmon) trout, biomass (live salmon) as well as wild salmon and further processed types such as smoked salmon".[192]

7.2 The Commission, the investigating authority in the EC, made preliminary determinations of dumping for ten Norwegian exporting producers and material injury to the EC industry producing the like product caused by dumped imports. Provisional anti-dumping measures, in the form of *ad valorem* duties based on a non-injurious price were imposed on imports of farmed salmon from Norway on 22 April 2005.[193] These measures were modified by an amendment dated 30 June 2005, which replaced the *ad valorem* duties with minimum import prices ("MIPs") for five presentations of farmed salmon.[194] Following affirmative determinations of dumping, injury and causal link, definitive anti-dumping measures were imposed on 17 January 2006. The definitive measures took the form of a system of MIPs and fixed duties, both calculated based on non-injurious prices, for six presentations of farmed salmon.[195]

7.3 On 17 March 2006, Norway requested consultations with the European Communities ("EC") with respect to the Definitive Regulation. Norway requested the establishment of this panel on

[192] Provisional Regulation, para. 10.
[193] *Id.* at para. 139 and Article 1.
[194] Commission Regulation (EC) No. 1010/2005 of 1 July 2005 (Official Journal, L170/32, published 1 July 2005), amending Provisional Regulation, Exhibit NOR-10, para. 7 and Article 1.
[195] Definitive Regulation, paras. 128, 129, 136, and Article 1.

29 May 2006.[196] Norway challenges the WTO-consistency of several aspects of the investigation and Definitive Regulation, in particular: (i) the identification of the product under consideration; (ii) the definition of the domestic industry; (iii) the calculation of the margin of dumping (including certain adjustments made to the cost of production when calculating constructed normal value); (iv) the findings of injury and causation; (v) the remedies imposed on dumped imports; and (vi) certain procedural aspects of the investigation.

B. RELEVANT PRINCIPLES REGARDING STANDARD OF REVIEW, TREATY INTERPRETATION AND BURDEN OF PROOF

1. Standard of Review

7.4 Article 11 of the DSU provides the standard of review for WTO panels in general. Article 11 requires panels to make an objective assessment of both the factual and the legal aspects of the case.

7.5 Article 17.6 of the AD Agreement sets forth a special standard of review that applies specifically to panel proceedings dealing with the application of this agreement. Article 17.6 provides:

> "(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

7.6 Taken together, Article 11 of the DSU and Article 17.6 of the AD Agreement establish the standard of review we must apply with respect to both the factual and the legal aspects of the present dispute. Thus, we may find the challenged anti-dumping determination to be consistent with the WTO Agreements if we find that the EC investigating authorities established the facts properly and evaluated them in an unbiased and objective manner, and that the determinations in question were based on a permissible interpretation of the relevant treaty provisions. In our assessment of the matter, we must limit our review to the "facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member", in accordance with Article 17.5(ii) of the AD Agreement. We may not undertake a *de novo* review of the evidence before the investigating authority during the proceeding, and may not substitute our judgement for that of the EC investigating authorities even though we might have made a different determination were we examining the evidence that was before the investigating authority ourselves.

7.7 Recently, the Appellate Body clarified a panel's standard of review of the facts pursuant to the above provisions in the following terms:

> "It is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority. A panel's examination of those conclusions must be critical and searching, and be based on the information contained

[196] WT/DS337/2.

> in the record and the explanations given by the authority in its published report. A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. What is 'adequate' will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given 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. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by 'simply *accept[ing]* the conclusions of the competent authorities.'"[197] (Footnote omitted.)

2. Relevant Principles of Treaty Interpretation

7.8 With respect to the question of legal interpretation, Article 3.2 of the DSU provides that Members recognise that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 31.1 of the Vienna Convention on the Law of Treaties ('Vienna Convention')",[198] which is generally accepted as such a customary rule, provides:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

7.9 There is a considerable body of WTO case law dealing with the application of these provisions on treaty interpretation in dispute settlement in the WTO. It is clear that interpretation must be based above all on the text of the treaty,[199] but that the context of the treaty also plays a role. It is also well-established that these principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[200] Furthermore, panels "must be guided by the rules of treaty interpretation set out in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement."[201]

7.10 In the context of WTO disputes under the AD Agreement, the Appellate Body has made it clear that:

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[197] Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada* ("*US – Softwood Lumber VI (Article 21.5 – Canada)* "), WT/DS277/AB/RW, adopted 9 May 2006, para. 93.

[198] (1969) 8 International Legal Materials 679.

[199] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II* "), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, p. 11.

[200] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products ("India – Patents (US)")*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 45.

[201] Appellate Body Report, *India – Patents (US)* , para. 46.

> "The *first* sentence of Article 17.6(ii), echoing closely Article 3.2 of the DSU, states that *panels* 'shall' interpret the provisions of the *Anti-Dumping Agreement* 'in accordance with customary rules of interpretation of public international law.' Such customary rules are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*'). Clearly, this aspect of Article 17.6(ii) involves no 'conflict' with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *Anti-Dumping Agreement*. …
>
> The *second* sentence of Article 17.6(ii) … *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be '*permissible* interpretations'. In that event, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* 'if it rests upon one of those permissible interpretations.'"[202]

7.11 Thus, it is clear that under the AD Agreement, we are to follow the same rules of treaty interpretation as a panel in any other dispute. The difference is that if, after following those rules, we find more than one permissible interpretation of a provision of the AD Agreement, we may uphold a measure that rests on one of those interpretations.

3. Burden of Proof

7.12 While the parties have not raised burden of proof as an issue, we have kept in mind the general principles applicable to burden of proof in WTO dispute settlement, which require that a party claiming a violation of a provision of a WTO Agreement by another Member must assert and prove its claim.[203] In this dispute, Norway, which has challenged the consistency of the EC's anti-dumping measure, thus bears the burden of demonstrating that the EC's determination is not consistent with the relevant provisions of the relevant Agreements. It is generally for each party asserting a fact to provide proof thereof.[204] Therefore, it is also for the EC to provide evidence for the facts which it asserts. We have also kept in mind that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.

C. ALLEGED INCONSISTENCY OF THE EC'S DETERMINATION OF THE "PRODUCT UNDER CONSIDERATION" WITH ARTICLES 2.1 AND 2.6 OF THE AD AGREEMENT

1. Arguments of the Parties

(a) Norway

7.13 Norway claims that the EC's determination of the "product under consideration" was inconsistent with Articles 2.1 and 2.6 of the AD Agreement, and that as a consequence, the EC initiated the investigation, and determined the existence of dumping and injury, on the basis of a flawed determination of the product under consideration, resulting in consequent violations of Articles 2.1, 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 5.1 and 5.4 of the AD Agreement.

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[202] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan ("US – Hot-Rolled Steel")*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, paras. 57 & 59.

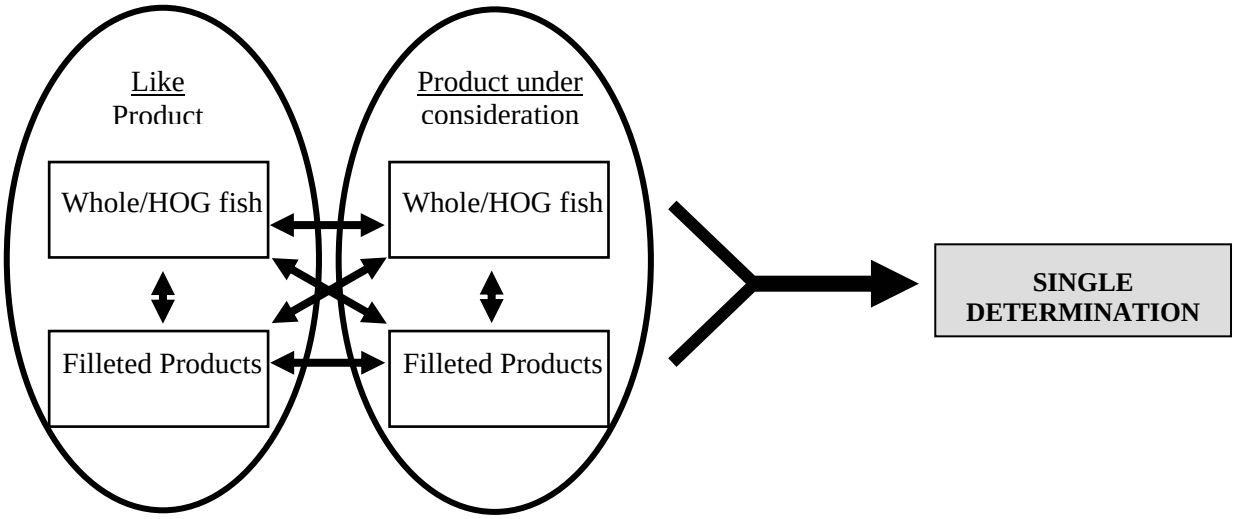
[203] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India ("US – Wool Shirts and Blouses")*, WT/DS33/AB/R and Corr. 1, adopted 23 May 1997, DSR 1997:I, 323, p. 337.

[204] *US – Wool Shirts and Blouses*, p. 337.

7.14 Norway argues that the text of Article VI:1 of the GATT 1994 indicates that dumping occurs when the export price of a product is lower than the normal value of the "very same product". Norway notes that Article 2.1 of the AD Agreement likewise defines dumping in terms of a comparison between the prices of the export product (*i.e.*, the "product under consideration") and the "like product". Norway recalls that Article 2.6 defines the "like product" as a product that is "identical" or has "characteristics closely resembling" those of the "product under consideration". Accordingly, Norway argues that the pricing comparison necessary to establish the existence of dumping must be made between "identical" products or products that have "closely resembling" characteristics.

7.15 Norway contends that this obligation implies that where an authority wishes to group multiple products together in a single investigation, any given product forming part of "like product" must be "like" each and every product forming part of the product under consideration. In this regard, Norway argues that the assessment of the conditions of whether likeness exists between the product under consideration and the allegedly "like product" must be made for each product "as a whole", and not just for individual sub-product categories. Norway asserts that this view is in consonance with that expressed by the Appellate Body in *US – Softwood Lumber V*, which Norway contends confirms that a product must always be treated "as a whole" throughout an anti-dumping investigation.[205]

7.16 Norway has diagrammed what it describes as the "vectors" of likeness that must be respected under Article 2.6.[206]



Norway contends that because the assessment of the "like product" under Article 2.6 must be made in respect of the product under consideration "as a whole", all sub-product categories making up the product under consideration must be matched with (i.e., be "like") all sub-product categories making up the "like product". In the above example provided by Norway, the product under consideration and the "like product" are each made up of the same two categories of products – whole/HOG fish and fish fillets. According to Norway, the obligation to make an assessment of "likeness" under Article 2.6 in terms of the product "as a whole" means that the whole/HOG fish forming part of the "like product" must be "like" both the whole/HOG fish and the fish fillets making up the product under consideration. Similarly, fish fillets forming part of the "like product" must be "like" both the whole/HOG fish and the fish fillets making up the product under consideration.

[205] Norway, First Written Submission, (hereinafter "Norway, FWS"), paras. 88-89.
[206] Norway, FWS, para. 89.

7.17 Finally, Norway argues that "a logical consequence" of the "horizontal" and "diagonal" "vectors" of likeness is that each of the sub-product categories making up the product under consideration (and the "like product") must also be "like" each other – i.e., the whole/HOG fish forming part of the product under consideration must be "like" the fish fillets that are also part of the product under consideration.

7.18 Norway presents a number of contextual arguments in support of its position. First, Norway argues that the first method of comparison set out in Article 2.4.2 (weighted average normal value to weighted average export price) confirms that all products under investigation must be alike.[207] Norway contends that the language in Article 2.4.2 envisages "a" single comparison between a single normal value and a single export price for the product as a whole, implying that investigating authorities are not entitled to define the product under consideration to include different products. Norway recognises that the product under consideration and the "like product" may be sub-divided into different models for the purpose of comparison, however, it argues that even in this event, the different models making up the product under consideration must all be sub-categories of a group of products that meet the definition of likeness. Norway cites the following passage of the Appellate Body Report in *EC – Bed Linen* in support of this contention:

> "Having defined the product at issue and the 'like product' on the Community market as it did, the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not 'comparable'. All types or models falling within the scope of a 'like' product must necessarily be 'comparable', and export transactions involving those types or models must therefore be considered 'comparable export transactions' within the meaning of Article 2.4.2."[208]

7.19 The second contextual argument made by Norway relates to the obligation on investigating authorities under Article 3.6 of the AD Agreement to focus their injury analysis, to the extent possible, on the production resources directly engaged in the making of the "like product".[209] Norway contends that this obligation implies that different products made in different industries using different production processes cannot be combined into a single product for the purpose of determining injury.[210] According to Norway, the result of any such combination would be a distorted injury determination because it would amount to an investigation into the health of two or more different industries - a result contrary to the object and purpose of the AD Agreement, which Norway submits is to permit the imposition of duties solely when they are justified to afford protection to a domestic industry.

7.20 Finally, Norway submits that its interpretation of the AD Agreement in this respect is consistent with the practice of the United States' investigating authorities (USDOC and USITC).

7.21 Norway notes that the EC combined into a single product under consideration whole salmon, HOG salmon and processed filleted salmon products. Norway argues that neither the facts on the record of the investigation, nor the EC's own explanation for this choice of product under

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[207] Norway, FWS, paras. 99-102.

[208] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India ("EC – Bed Linen")*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049, para. 58.

[209] Norway, FWS, paras. 103-117.

[210] Norway also cites two GATT 1947 dispute settlement cases and one Appellate Body Report to support its view that differences in production processes will typically imply different products.

consideration, supports the conclusion that all of these different product types are "like products" within the meaning of Article 2.6.

7.22 Although Norway agrees with the criteria adopted by the EC to determine the product under consideration, it argues that the EC wholly failed to demonstrate that the facts in the record supported its conclusion in respect of the criteria. Norway contends that the "EC's entire three sentence 'explanation' of the product determination does not refer to a single fact in support of that determination".[211] Moreover, according to Norway, the facts on the record of the investigation showed that there were important differences in the physical characteristics, substitutability, end-uses and tariff classifications of the salmon products at issue, as well as the processes used in their production. Norway devotes several pages of its first written submission to explaining exactly what these facts were and how they were not properly taken into account by the EC.

(b) European Communities

7.23 The EC begins its argument by observing that Article 2.6 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. Therefore, the EC considers that it cannot be found to have acted inconsistently with Article 2.6, since it contains no obligation at all.[212]

7.24 The EC goes on to argue that Article 2.1 contains no obligations regarding the selection of the product under consideration (which the EC refers to as the "product concerned"). This provision, in the EC's view, establishes obligations concerning the determination of dumping and calculation of dumping margins, during a later stage of the proceeding, and does not relate to question of selection of the product under consideration, which happens at the very beginning, at all.[213] Moreover, the EC argues that even reading Articles 2.1 and 2.6 together, no obligation concerning the selection of the product under consideration exists. Thus, the EC considers that Norway's claims under Articles 2.1 and 2.6, as well as consequential claims under Articles 3.1, 3.2, 3.4, 3.5, and 3.5, are without merit.

7.25 The EC argues that there is distinction between the product under consideration, and the like product as defined in Article 2.6 of the AD Agreement. The product under consideration is the product exported, while the like product is either the good produced in the country of export, in this case Norway, (in the context of the dumping calculation); or the good produced in the country of import, in this case the EC (in the context of the injury determination). The EC notes that this distinction is apparent from Article VI:1 of the GATT 1994, which refers three times in its first two sentences to the product; and then, in sub-paragraphs (a) and (b) to the term "like product", and is maintained in the AD Agreement.

7.26 The EC considers non-controversial the view that the concept of the product concerned may be an abstract category that can encompass hundreds or thousands of individual instances of export of a good.[214] The EC considers that Norway's view, that each instance of the goods within the category of the exported "product concerned" must be "identical, i.e. alike in all respects" within the meaning of Article 2.6 of the Anti-Dumping Agreement, is legally erroneous. The EC argues that Norway's argument imports concepts concerning the like product into the concept of product under consideration without legal basis, as Article 2.6 does not concern the product under consideration, citing in support the Panel Report in *Korea – Paper*:

[211] Norway, FWS, para. 163.
[212] European Communities, First Written Submission, (hereinafter "EC, FWS"), paras. 17-18.
[213] EC, FWS, paras. 19-20.
[214] EC, FWS, para. 29.

> "Indonesia argues that the KTC had to determine that PPC and WF were like products. We note that these two, together, constituted "the product under consideration" in the investigation at issue. We see no basis in Article 2.6 for the proposition that the like product definition also applies to the definition of "the product under consideration". We are aware of no provision in Article 2.6, or any other Article in the Agreement, that contains a definition of "the product under consideration" itself.[242]
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> [242] In this regard, we note the finding by the panel in *Softwood Lumber V*, *Ibid.*" [215]

7.27 Thus, in the EC's view, Norway's arguments are not based on the text of the AD Agreement, but are purely contextual, and even so, are without basis. The EC argues that definitions, such as Article 2.6, have special significance in the AD Agreement, and that Members took care to define like product, but did not take the trouble to define product under consideration. Thus, the use of the term "like product" must be understood as defined in Article 2.6 in each instance where it is used. The concept of "product under consideration" is referred to in several parts of the AD Agreement, but always using some terminology other than "like product" – for instance, Article 2.1, first sentence, uses the different term "a product" to refer to the product concerned, which is to be compared with the "like product", referred to in the very same sentence. To the EC, this makes it clear that the two concepts are different, and that Norway errs in importing notions of "like product" as defined in Article 2.6 into the reference in Article 2.1 to "a product".

7.28 For the EC, Article 2.6 is simply irrelevant to the question of what is the product under consideration. Moreover, the EC asserts that Norway's position ignores that Article 2.6 provides for a comparison of products, in assessing likeness. However, at the stage of a proceeding where the product under consideration is at issue, there has not yet been a product identified which can serve as a point of comparison. Thus, for the EC, it is clear that Article 2.6 does not speak to the selection of the product under consideration, but to a later stage of the process at which a "like product" is identified by comparison to a previously selected product under consideration.

7.29 The EC also maintains that Article 2.4 of the AD Agreement undermines Norway's position. The EC points out that Article 2.4 relates to the question of comparison of export price and normal value, and provides that due allowance must be made for difference in physical characteristics. For the EC, this demonstrates that there is no obligation for identity of products either within the product under consideration, or between the product under consideration and the like product, since if there were such an obligation, there would never be a need for adjustments for differences in physical characteristics. Such an interpretation would render this element of Article 2.4 meaningless and redundant, and is therefore not proper.[216] Moreover, the EC notes that even Norway admits that there may be multiple models or sub-categories of the product under consideration in the context of comparison of normal value and export price,[217] which undermines Norway's arguments concerning an obligation of identity within the product under consideration.[218]

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[215] Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia ("Korea – Certain Paper")*, WT/DS312/R, adopted 28 November 2005, para. 7.221

[216] EC, FWS, para. 32.

[217] Referring to Norway, FWS, para. 100.

[218] The EC also points to Article 6.10, which refers to a large number of "types of products" covered by a single investigation as a justification for use of sampling, as context in support of its position. EC, FWS, para. 33.

7.30 The EC considers that while it is true that anything that is part of the product concerned must be "comparable", after making due adjustments for differences in physical characteristics affecting price comparability if necessary, and that anything that is defined as part of a "like product", as that term is used in Article 2.6 of the Anti-Dumping Agreement, must necessarily be comparable, that says nothing about the selection of the product under consideration itself. For the EC, it simply does not follow from these obligations to compare that each instance of goods within the category of the product concerned must necessarily be "identical, i.e. alike in all respects" within the meaning of Article 2.6.

7.31 The EC also asserts that there is nothing in the object and purpose of the Anti-Dumping Agreement, which has no preamble, which can override the textual and contextual considerations it relies on in support of its position. Indeed, the EC considers that, insofar as the Anti-Dumping Agreement addresses unfair international price discrimination, the object and purpose of the Anti-Dumping Agreement would support the view that the "like product" requirement in Article 2.6 is central to ensuring that such discrimination has actually been identified: the same product category being priced differently in the exporting and importing countries. However, for the EC, this says nothing about how the product under consideration itself should be selected, and in the EC's view, there is no reason why the AD Agreement should establish restraints in that regard.

7.32 For the EC, the AD Agreement foresees considerable latitude in the selection of the product under consideration, allowing the investigating authorities to focus on international price discrimination, without being required to initiate multiple investigations in cases where multiple models or sub-products are allegedly being dumped. In this regard, the EC notes that there is no provision of the AD Agreement which imposes an obligation to "determine", "evaluate", "demonstrate", "establish", "find", etc. with respect to the product under consideration. The absence of such terms with respect to the selection of the product under consideration cannot be construed as accidental, but must be taken to indicate an intention on the part of Members that investigating authorities should have a particular latitude in that respect. The EC also points to Article 5.2(ii) of the AD Agreement, which requires the applicant for an anti-dumping investigation to describe the allegedly dumped product, but does not impose any obligations on the investigating authorities regarding the selection of the product under consideration.

7.33 With respect to the facts of this case, the EC argues that it described the product under consideration in terms of physical characteristics, thus excluding trout and live salmon (biomass), production processes, thus excluding wild salmon, and focused on the product under consideration described as farmed salmon, presented in a number of forms, including whole fish, gutted head-on, gutted head-off, fresh, chilled or frozen. The EC points out that Norway has no objections to the exclusion of trout and biomass, or the inclusion in the product under consideration of whole fish and "gutted head-on" fish. The EC also notes that Norway does not object to the inclusion of farmed salmon in other forms, including "gutted head-off", and the inclusion of these in fresh, chilled, or frozen states. The EC thus maintains that there are at least nine sub-categories that Norway considers are properly within the product under consideration. Norway does, however, object to the inclusion of fillets (skin on or off, fresh, chilled, or frozen, of any weight) in the product under consideration, on the basis that these categories constitute a single product which must be considered separately from whole fish categories, thus obliging the EC to initiate two separate investigations. The EC asserts that, according to Norway, in one of these, the EC was obliged to select as the product concerned the first nine (plus) sub-categories of whole fish described above, and in the second the EC was obliged to select as the product concerned the second nine sub-categories of fillets described above. The EC maintains that Norway has failed to demonstrate that the Anti-Dumping Agreement imposes any such obligation on the EC. Article 2.6 is irrelevant to the selection of the product concerned; and Article 2.1 does not impose any obligations on the investigating authority concerning the selection of the product concerned. This is not a case in which different goods or products (perhaps such as salmon and trout) have been grouped together. Nor is it a case in which, out of a large number of

contiguous models or types of a product, a few non-contiguous models or types have been selected as together constituting the product concerned. Rather, the product concerned has been selected in a straightforward, simple and non-contentious manner: farmed salmon, however presented.

7.34 Finally, the EC argues that even if the Panel were to consider that there must be internal likeness in the product under consideration, that criterion would be met in this case, as the product concerned is not salmon "fish", but "farmed salmon", essentially, the flesh of the fish, in whatever form it is presented for export, whether or not it is cut up into small or large pieces, and whether or not it has attached to it skin, head, tail, fins, bone or guts.[219]

7.35 The EC points out that there were potentially hundreds of different "models" or "presentations" of farmed salmon, and that the relevant question is where the parameters of the product under consideration can reasonably be drawn. The investigating authority in this case took the view that the transformation from a head-off gutted fish to large skin-on fillets was not so great as to render separate anti-dumping proceedings essential, while further processing, such as smoking, was a different matter. For the EC, while opinions may differ as to this decision, Norway has failed to demonstrate that it was inconsistent with Article 2.1 of the AD Agreement.

2. Arguments of the Third Parties

(a) Korea

7.36 Korea shares Norway's views concerning the importance of the determination of product under consideration" in an anti-dumping investigation, including Norway's position that an erroneous "product under consideration" determination will entail violation of various provisions of the AD Agreement, *inter alia*, Articles 2.1, 2.6, 3.1, 3.2, 3.4, 3.5, 5.1, and 5.4. Korea argues that Articles 2.1 and 2.6 of the AD Agreement establish a standard for product under consideration which together require an investigating authority to ensure that different products considered in an anti-dumping investigation are all "like" in all relevant respects.

7.37 In Korea's view, in this case the EC simply ignored widely different characteristics of various salmon products sold in the EC market. Korea considers that the EC failed to explain how and with what factual evidence it examined the four criteria on which it based its selection of product under consideration. Korea believes that the EC determination that six separate products constitute a single product under consideration cannot be sustained and constitutes violation of Articles 2.1 and 2.6 of the AD Agreement. Moreover, Korea considers that the determination may have helped the EC find an anti-dumping margin in the investigation, but does not reflect the reality in the EC salmon market. For instance, whole/HOG fish products are not identical to filleted products; nor do they closely resemble filleted products. In fact, Korea does not believe that there is any basis for combining them in a single anti-dumping investigation. If the EC had wanted to conduct anti-dumping investigations into these products, it should have conducted two separate investigations, as Korea asserts the US Department of Commerce has done in similar situations.

7.38 Korea also notes that the EC's determination in this regard sets up an inconsistency with the EC's domestic industry determination, by including fillets in the product under consideration, but excluding EC producers of filleted product from the determination on domestic industry.

[219] EC, FWS, paras. 53-54.

(b) United States

7.39 The United States considers that Norway's argument concerning product under consideration rests upon an incorrect reading of Article 2.6. In the US view, Norway's argument implies obligations that cannot be found in the text of the AD Agreement.

7.40 The US notes that Article 2.6 contains a definition of the like product (*i.e.*, the product to which the product under consideration is compared), not obligations with respect to the product under consideration. Moreover, the US argues that the general statement in Article 2.1 regarding the comparison between the product under consideration and the like product does not provide guidance on how the product under consideration is to be defined. Thus, these provisions leave to the investigating authority's discretion how a product under consideration is to be established. Therefore, no inconsistency with either provision would arise based on the approach an investigating authority selects.

7.41 The US notes that previous Panels have reached the same conclusion, citing in this regard *US – Softwood Lumber V*, where the Panel rejected Canada's claim that Article 2.6 requires "that there must be 'likeness' within both the product under consideration and within the like product," stating that:

> "As the definition of 'like product' implies a comparison with another product it seems clear to us that the starting point can only be the 'other product', being the allegedly dumped product. Therefore, once the product under consideration is defined, the 'like product' to the product under consideration has to be determined on the basis of Article 2.6. However, in our analysis of the AD Agreement, we could not find any guidance on the way in which the 'product under consideration' should be determined. . . . It is not our role as a panel to create obligations which cannot clearly be found in the AD Agreement itself."[220]

7.42 The US considers that Norway's reliance on determinations of the US Department of Commerce ("Commerce") and the US International Trade Commission ("USITC") in anti-dumping investigations of antifriction bearings and magnesium to support its argument that an investigating authority must establish that products are like or "closely resembling" one another in order to consider them collectively the product under consideration is misplaced. The US notes that a complaining party must demonstrate the existence of an obligation in the text of the AD Agreement: an investigating authority's practice with regard to the examination of product coverage in an investigation does not lead to the conclusion that such practice is required by the AD Agreement. To the extent they are relevant at all, the investigations cited by Norway simply demonstrate that Commerce and the USITC define the "product under consideration" on a case-by-case basis, taking into consideration the particular facts available to them, including the product coverage proposed by the petitioning domestic parties. Moreover, the US notes that the US authorities apply US statutes and regulations, as well as legal principles developed by US domestic courts interpreting these statutes and regulations, and thus their determinations do not support the claim that the AD Agreement contains rules for defining the "product under consideration."[221]

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[220] Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* ("*US – Softwood Lumber V*"), WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report, WT/DS264/AB/R, DSR 2004:V, 1937, paras. 7.153, 7.156-7.158; the US also points to *Korea – Certain Paper*, also relied upon by the EC.

[221] The United States does not express a view as to whether the EC's explanation adequately addressed the facts on the record in this case. However, the US asserts that to the extent the EC did not, such action would properly be analyzed under AD Agreement Article 12, with due regard for the standard of review set forth in Article 17.6(i), but would not support a claim under Article 2.1 and 2.6.

3. Evaluation by the Panel

7.43 In considering Norway's claims concerning product under consideration,[222] we begin by observing that there is no specific provision in the AD Agreement concerning the selection, description, or determination, of a product under consideration. While Norway relies on Articles 2.1 and 2.6 in conjunction, it does not contend that the text of these provisions directly addresses the question. Thus, Norway has constructed an argument in support of its claim that is based largely on contextual considerations.

7.44 In essence, Norway's claims under Articles 2.1 and 2.6 of the AD Agreement are premised on two contentions: First, that these provisions establish an obligation on investigating authorities to ensure that where the goods being investigated comprise groups or categories of goods, all such groups or categories must individually be "like" each other, thereby constituting a single homogenous "product under consideration";[223] and second, that the facts that were before the investigating authority during the investigation in dispute show that the "product under consideration" investigated by the EC was made up of a broad range of goods that do not constitute a single homogenous "product" because they were not all "like" each other.[224]

7.45 According to Norway, the obligation to ensure that all categories making up the product under consideration are "like" each other follows "as a logical consequence" from what it argues is a requirement under Articles 2.1 and 2.6 for investigating authorities to ensure that any product category making up the "like product" must be individually "like" each and every separate product category making up the product under consideration. Thus, a threshold question for us is whether Norway's premise, that Articles 2.1 and 2.6 require all product categories making up the "like product" to be each individually "like" each and every separate product category making up the product under consideration, is correct. If it is not, then Norway's legal argument is incorrect, and we need not consider its contentions regarding the facts of this case.

7.46 Article 2.1 reads:

> "For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

7.47 Beyond stating that the language of Article 2.1 reveals that a determination of dumping can only be made through a comparison of "the prices of an exported product – referred to as the 'product under consideration' – and a 'like product'"[225], Norway provides no analysis of the text of this provision. Moreover, Norway identifies no explicit obligation in the text of Article 2.1 to support its claim that the "product under consideration" must consist of a single, internally homogeneous,

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[222] The parties use different terminology in describing what is at issue in this claim, but as the EC noted, "there is no doubt that conceptually what Norway seeks to challenge is ... the overall product scope of the proceeding." European Communities, Second Written Submission, (hereinafter "EC, SWS"), para. 19. We express no views on the position expressed by the EC that the term "product under consideration" may, in some contexts, refer to some category of product narrower than the entire category that is subject to the anti-dumping proceeding, which the EC refers to as the "product under investigation." EC, SWS, para. 18. Article 2.6, which is at the core of Norway's arguments, refers to "product under consideration", and we will use that term in our analysis.

[223] Norway, FWS, paras. 45, 88-90.

[224] Norway, FWS, paras. 138-165.

[225] Norway, FWS, para. 85.

product or, alternatively, categories that are each individually "like" each other so as to constitute a single homogenous product.[226]

7.48 We agree that Article 2.1 refers to "a product" as being dumped, but cannot agree that there is any obligation concerning the scope of that product in that provision. There is simply nothing in the text of Article 2.1 that provides any guidance whatsoever as to what the parameters of that product should be. The mere fact that a dumping determination is ultimately made with respect to "a product" says nothing about the scope of the relevant product. There is certainly nothing in the text of Article 2.1 that can be understood to require the type of internal consistency posited by Norway.

7.49 At the same time, other provisions of the AD Agreement, relevant as context, suggest that whatever the parameters of "a product" in Article 2.1 may be, the concept is not so limited as Norway argues. For instance, Article 6.10 provides for limited examination in cases where the number of "types of products involved" is so large as to make it impracticable to determine an individual margin of dumping. Similarly, the Appellate Body has recognized that an investigating authority may divide a product into groups or categories of comparable goods for purposes of comparison of normal value and export price – the practice of "multiple averaging". Neither of these would be necessary if Norway's view of the meaning of "a product" in Article 2.1 were the only permissible interpretation. There would be no possibility of investigating more than one "type of product" as mentioned in Article 6.10, and no reason to group comparable goods for purposes of making price comparisons for each group in the process of calculating a single dumping margin for the product as a whole. These considerations lead us to conclude that, while Article 2.1 establishes that a dumping determination is to be made for a single product under consideration, there is no guidance for determining the parameters of that product, and certainly no requirement of internal homogeneity of that product, in that Article.

7.50 In essence, Norway's claim seems to be grounded in Article 2.6. Article 2.6 reads:

> "Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."

7.51 It is clear that the subject of Article 2.6 is not the scope of the product that is the subject of an anti-dumping investigation at all. Rather, the purpose of Article 2.6, apparent from its plain language, is to define the "like product".[227] Norway does not appear to contest this view. The plain language of Article 2.6 calls for an assessment of "likeness" between some group of goods[228] and "the product under consideration" in order to identify a "like product". Thus, logically, the scope of the "product under consideration" referred to in Article 2.6 must already be known before the provisions of Article 2.6 come into play. That is, it must be known what the comparator is, before any assessment can be made as to whether another product is "identical" to or, in the absence of an identical product, "has characteristics closely resembling those of" the imported "product under consideration".

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[226] See, e.g., Norway, FWS, paras. 45 and 129.

[227] See, Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* ("*EC – Tube or Pipe Fittings*"), WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report, WT/DS219/AB/R, DSR 2003:VII, 2701, para. 7.149; and Panel Report, *US – Softwood Lumber V*, para. 7.148.

[228] In an anti-dumping investigation, the question of "like product" arises in two contexts – identifying domestically produced goods that are "like" the product under consideration, and identifying goods sold in the market of the investigated foreign producers/exporter that are "like" the product under consideration. The identification of "like product" in these two contexts is for different purposes in the investigation.

7.52 It is important to note that the assessment of whether goods are "like" in the sense of Article 2.6 entails first, a consideration of whether goods are identical. Only if there are no goods which are identical to the product under consideration does Article 2.6 allow an investigating authority to consider whether there is some other good which "has characteristics closely resembling those of the product under consideration". Norway argues that in defining the "like product", Article 2.6 requires an assessment of "likeness" in respect of the product under consideration "as a whole", and that this requires a comparison of all product categories comprising the product under consideration, with each other and with all product categories considered as potentially "like product".[229] Norway provides no analysis of the text of Article 2.6 in support of this contention.

7.53 In our view, even assuming Article 2.6 requires an assessment of likeness with respect to the product under consideration "as a whole" in determining like product, an issue which is not before us and which we do not address, this would not mean that an assessment of "likeness" between categories of goods comprising the product under consideration is required to delineate the scope of the product under consideration. Merely to say that the product under consideration must be treated "as a whole" in addressing the question of like product does not entail the conclusion that the product under consideration must itself be an internally homogenous product. We can see nothing in the paragraph from the Appellate Body Report in *US – Softwood Lumber V*, relied upon by Norway, which would indicate otherwise.[230] Treating the product under consideration "as a whole" means that a single dumping margin is calculated for that product, however defined, but says nothing about the scope of that product.

7.54 The Appellate Body's decision in *US – Softwood Lumber V* indicates that the product under consideration must be treated as a whole throughout an anti-dumping investigation, including at the stage of identifying the "like product". It does not, however, say anything about determining the scope of the product under consideration *per se*. Moreover, the Appellate Body was considering a claim under Article 2.4.2 of the AD Agreement concerning the permissibility of a methodology for calculating dumping margins which entails calculations in respect of defined sub-categories of the product under consideration as an intermediate step in the determination of the margin of dumping for the "product as a whole" ("multiple averaging"[231]). We see no basis for the conclusion that the treatment of the product under consideration "as a whole" means anything more than that where an investigating authority splits the product under consideration into different sub-categories in the

[229] In its Second Written Submission, Norway argued that, in the *US-Steel Safeguards* dispute, (*United States – Definitive Safeguard Measures on Imports of Certain Steel Products ("US – Steel Safeguards"*), WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, DSR 2003:VIII, 3273), the EC advanced arguments similar to those put forward by Norway in this case. Norway, SWS, paras. 99-105. While we recognize that the EC's position in this case is diametrically opposed to the position it took as complainant in the *US - Steel Safeguards* case, this says nothing relevant about the issue we must resolve in this case. We note that the Panel and Appellate Body did not rule on this issue in the *US - Steel Safeguards* case. We also recognize that the position Korea takes as a third party here is contrary to the position it took as defendant in *Korea - Certain Paper*, but as with the differing position taken by the EC, we accord no weight to this fact.

[230] Norway, FWS, para. 88-89, citing Appellate Body Report, *US – Softwood Lumber V*, para. 99.

[231] The term "multiple averaging" refers to a method of comparing export price and normal value whereby an authority divides a product under investigation into product types or models, calculates a weighted average normal value and a weighted average export price for each product type or model and then aggregates the results of these comparisons to derive an overall margin of dumping. See, Appellate Body Report, *US – Softwood Lumber V*, para. 80; and Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("*US – Zeroing (Japan)*"), WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report, WT/DS322/AB/R, para. 7.92. In effect, "multiple averaging" results in the separation of the product under consideration into groups of comparable goods in order to facilitate the process of comparing export price and normal value to determine the existence and extent of dumping.

course of its "determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping", it is not entitled to discount any of these sub-categories when performing the ensuing analysis.[232]

7.55 In the context of Article 2.6, this logic could be understood to mean that where the product under consideration consists of different sub-categories, the investigating authority, in assessing the question of like product, must take into account each and every sub-category, and may not ignore any. It cannot, however, be stretched to require that an investigating authority assess whether each category or group of goods **within** the product under consideration is "like" each other category or group of goods.

7.56 Norway's position would, in our view, require that any difference between sub-categories, or even individual goods, within a product under consideration would mean that each must be treated individually. As noted, Article 2.6 first refers to whether goods are identical in assessing likeness. Since every article is identical to itself, each such article would have to be considered separately. There would never be occasion to move on to consideration of whether another article has "characteristics closely resembling" it. Thus, a product under consideration could not consist of any grouping of non-identical product categories. This would, in our view, be an absurd result. Norway ignores the concept of "identical" products, arguing that an investigating authority should determine, based on a series of criteria, whether products "resemble one another physically" in determining an appropriate product under consideration. Such an assessment of whether products resemble one another is only permitted, however, in the absence of identity under Article 2.6. Moreover, the possibility of treating non-identical goods as like products to an imported product under consideration makes sense, as it is entirely possible that, for instance, the products manufactured in the importing country are not identical to the imported product under consideration. In such a case, if the AD Agreement did not allow the possibility of treating another, non-identical product, as the like product, there would be no basis for investigation and imposition of anti-dumping duties. But this consideration simply does not arise in the context of delineating the product under consideration, which is necessarily identical to itself.

7.57 We note that, on its face, Article 2.6 does not apply to the question of "determining" a product under consideration at all. Norway asserts that, in order to make a determination of dumping, an investigating authority must make a determination with respect to each of the constituent elements of dumping, including, *inter alia*, product under consideration. Norway does not argue that there is a specific direction to "determine" product under consideration in the AD Agreement, but asserts that there must be an active step of making a finding.[233] Norway further asserts that specific criteria govern this determination, although, again, there is no specific identification of any relevant criteria in the AD Agreement.[234] While it seems self-evident to us that an investigating authority must, at the time it initiates an anti-dumping investigation, make a decision as to the scope of that investigation, and give notice of the "product involved"[235], we are not persuaded that either Article 2.1 or Article 2.6

[232] This view is consistent with the views of the Appellate Body in *US – Hot-Rolled Steel* that an investigating authority may, in its analysis of injury, look at different sectors of the domestic industry, but it must make its determination after an analysis of each of those sectors, so that the decision relates to the entire domestic industry, and not just some sector or sectors. Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.

[233] Norway, Answer to Panel Question 46, para. 2.

[234] Norway, Answer to Panel Question 47, para.7.

[235] Article 12.1.1(i), AD Agreement.

of the AD Agreement establish a requirement for making an elaborated determination in that regard.[236]

7.58 Essentially, Norway's argument raises an issue of policy, suggesting that the absence of limits on the scope of the product under consideration might result in erroneous dumping determinations by investigating authorities. Norway argues that, if products that are not "like" are treated as the product under consideration in a single investigation, a dumping determination cannot reveal whether some or all of those products are dumped.[237] Norway gives, as an example, in investigation in which cars and bicycles are treated as one product under investigation.[238] We are not persuaded by Norway's extreme example. Any grouping of products into a single product under consideration will have repercussions throughout the investigation, and the broader such a grouping is, the more serious those repercussions might be, complicating the investigating authority's task of collecting and evaluating relevant information and making determinations consistent with the AD Agreement. Thus, it seems to us that the possibility of an erroneous determination of dumping based on an overly broad product under consideration is remote. That possibility is certainly not enough to persuade us to read obligations into the AD Agreement for which we can find no basis in the text of the Agreement.

7.59 Moreover, Norway's position would result in the absurd situation of requiring fragmentation of the product under consideration, and a consequent fragmentation of the like product, and ultimately the domestic industry, which would render the possibility of imposing dumping duties consistent with the AD Agreement a nullity. We see nothing in Article 2.6, which as discussed, defines "like product", which would support this view. In this regard, it is noteworthy that, while the AD Agreement specifically defines "like product" by requiring a comparison between domestically-produced (or foreign) goods and the imported products that are the subject of the investigation, there is no specific definition of "product under consideration".[239] In our view, the very fact that there is a definition of like product in the AD Agreement indicates that Members were well able to define terms carefully and precisely when considered necessary. The absence of a definition of product under consideration indicates that no effort was undertaken in that regard. In our view, this consideration supports the conclusion that it would be absurd to impose the definition of like product from Article 2.6 onto the undefined term product under consideration. We simply see no basis in the text of Articles 2.1 and 2.6 for the obligations Norway seeks to impose on investigating authorities with respect to product under consideration.

7.60 Norway makes a number of additional contextual arguments in support of its interpretation of Article 2.6, none of which persuade us to change our views based on the text. Norway argues that the first comparison methodology for calculating the margin of dumping set out in Article 2.4.2 (weighted average normal value to weighted average export price) confirms that "the group of products under investigation must all be alike".[240] According to Norway, while it is possible under this methodology to sub-divide the product under consideration into segments for the purpose of making the comparison

[236] The criteria identified by Norway may well be relevant in the decision of the an investigating authority in this regard, but that does not establish that consideration and determination based on those criteria is a legal requirement, as Norway argues.

[237] Norway, Answer to Panel Question 46, para.4.

[238] Norway, Oral Statement at the first substantive meeting (hereinafter "Norway First Oral Statement"), paras. 26-27.

[239] We note that proposals regarding definition of "product under investigation" have been made in the context of the negotiations on anti-dumping pursuant to the Doha Development Agenda, which supports our view that the existing text cannot be understood to contain such a definition. See, e.g., document TN/RL/W/143 at page 11, paragraph 17.

[240] Norway, FWS, para. 99.

(i.e., "multiple averaging"), all such segments must belong to a group of products meeting the definition of likeness, citing in this respect, a statement by the Appellate Body in *EC – Bed Linen*.[241]

7.61 Again, as with Norway's reliance on the passage from the Appellate Body's ruling in *US – Softwood Lumber V*, the Appellate Body's statement in *EC – Bed Linen* was made in the context of a claim relating to "multiple averaging" under Article 2.4.2, not Article 2.6. Neither like product nor product under consideration were issues under consideration. Moreover, the Appellate Body has since clarified that its reasoning in *EC-Bed Linen* should not be read as prohibiting multiple averaging.[242] As the practice of multiple averaging is based on the premise that the product for which a dumping duty is determined may not be internally homogeneous, making price comparisons for groups of comparable goods within the product under consideration a practical analytical tool in determining a single margin of dumping, it is impossible to reconcile multiple averaging with Norway's position on product under consideration. In our view, there would be an inherent inconsistency in concluding that multiple averaging is permitted, which the Appellate Body has found and Norway acknowledges to be the case, and at the same time concluding that there must be identity within the product under consideration. If the latter were true, there would be no need for multiple averaging.

7.62 Norway also relies on Article 3, and in particular, Article 3.6, as contextual support for its claim. Article 3.6 provides:

> "The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided."

7.63 Norway argues that Article 3.6 supports the proposition that under the AD Agreement, the results of separate production processes cannot be considered a single product under investigation and thus cannot be the subject of a single investigation.[243] Norway contends that the GATT 1947 panel reports in the *US – Wine and Grapes* and *Canada – Beef* cases, as well as the Appellate Body Report in *US –Lamb*, support this understanding of Article 3.6.

7.64 Article 3.6 is a provision about what information an investigating authority may evaluate in considering the effects of dumped imports for the purpose of determining injury to a domestic industry.[244] It simply has no bearing on the question of product under consideration. Article 3.6

[241] Norway, FWS, para. 101, citing Appellate Body Report, *EC – Bed Linen*, para. 58.
[242] Appellate Body Report, *US - Softwood Lumber V*, para. 81.
[243] Norway, FWS, paras. 103-115.
[244] The general rule set out in the first sentence of Article 3.6 is that an investigating authority's focus must be on information relating to domestic production of the "like product", provided that it is possible to separately identify such domestic production of the "like product" "on the basis of such criteria as the production process, producers' sales and profits". Where this is not possible, the second sentence of Article 3.6 requires investigating authorities to focus their analysis on the narrowest group of products, including the "like product", for which data may be available. Thus, the second sentence of Article 3.6 establishes a rule for how investigating authorities should behave when data pertaining to domestic production of the "like product" either does not exist or is so intertwined with data pertaining to a product other than the "like product" that a separate analysis of the state of the domestic production of the "like product" cannot be made. See, Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* ("*Mexico – Corn Syrup*"), WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345, para. 7.157. Clearly,

addresses a particular question about the data to be considered in an investigating authority's inquiry into the effects of dumping. This happens, in every investigation, **after** the product under consideration has been defined, the domestic like product has been determined pursuant to Article 2.6, and the relevant domestic industry has been determined pursuant to Article 4.1, which defines "domestic industry" for the purposes of the AD Agreement. Article 4.1 makes clear that the starting point for the identification of the domestic industry is the "like product". Norway's argument, on the other hand, would entail a consideration of the production activities of the domestic industry in the definition of the like product, and of the product under consideration, introducing a circularity into the analysis which is untenable. Thus, we consider, Norway's reliance on Article 3.6 to be misplaced and unpersuasive.

7.65 Norway's reliance on the two GATT 1947 reports and one Appellate Body report in support of its position is also misplaced. First, the statements cited by Norway were all made in the context of claims relating to the definition of the domestic industry, not the "like product". Indeed, in none of the three cases did the parties raise the definition of the appropriate product. Rather, the issue in those cases was whether certain enterprises could be considered part of the domestic industry producing the relevant domestic product.[245] In all three cases, it was held that producers that were not in the business of producing the relevant product could not be considered part of the domestic industry based on their production of an input to that product.[246]

7.66 In the two GATT 1947 cases, the Panels referred to the provision in the Subsidies Code that is reflected in Article 3.6 of the AD Agreement merely to confirm their views in this respect. In other words, although the Panels' inquiries into what constituted the domestic industry involved consideration of different production processes, the purpose of this consideration was to evaluate whether enterprises engaged in one production process could be considered producers of a product resulting from a subsequent production process. Thus, these cases do not require the conclusion that different production processes necessarily result in different "like products". Rather, they indicate that the fact that enterprises engage in different production processes may be determinative in deciding whether they are "producers" of an identified like product and therefore may be considered part of the domestic industry producing that product. The Panels concluded that grape growers and cattlemen and feedlot operators were not producers of, respectively, wine and fresh or frozen beef.

7.67 There is no provision comparable to Article 3.6 in the Safeguards Agreement. However, the Appellate Body in *US – Lamb* did consider a similar question, stating:

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any of these considerations can only be addressed after a domestic industry is defined, which comes after a like product is defined, by reference to a product under consideration whose scope has been established.

[245] In *US - Wine and Grape Products*, the issue was whether, the relevant domestic product having been defined as wine, growers of grapes could be considered part of the US industry producing that product. GATT Panel Report, *Panel on United States Definition of Industry Concerning Wine and Grape Products*, SCM/71, adopted 28 April 1992, BISD 39S/436, paras. 4.2-4.6. Likewise, in *Canada – Manufacturing Beef CVD*, the issue was whether, the relevant domestic product having been defined as fresh or frozen beef, cattlemen and feedlot operators who raised and fattened live cattle could be considered part of the Canadian industry producing that product. GATT Panel Report, *Canada – Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC*, SCM/85, 13 October 1987, unadopted, para. 5.1. Finally, in *US – Lamb*, the issue was whether, the relevant domestic product having been defined as lamb meat, US growers and feeders of live lambs could be considered part of the US lamb meat industry. Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*US – Lamb*"), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051, paras. 77-96.

[246] *US – Wine and Grape Products, para. 4.2; Canada – Manufacturing Beef CVD*, para. 5.1; and Appellate Body Report, *US – Lamb*, para. 90.

> "As we have indicated, under the *Agreement on Safeguards*, the determination of the "domestic industry" is based on the "producers … of the like or directly competitive products". The focus must, therefore, be on the identification of the *products*, and their "like or directly competitive" relationship, and not on the *processes* by which those products are produced."[247]

In making this statement, the Appellate Body noted: "We can, however, envisage that in certain cases a question may arise as to whether two articles are *separate products*. In that event it may be relevant to inquire into the production processes for those products." Thus, the Appellate Body did not say, as Norway argues, that in determining whether two articles are separate products the authorities should examine the production processes used to manufacture the two articles. The Appellate Body indicated only that under the Safeguards Agreement, an inquiry into production processes is not appropriate for determination of domestic industry, but that it may be necessary to identify separate products. This does not, in our view, support Norway's position.

7.68 Thus, we conclude that, contrary to Norway's claim, Articles 2.1 and 2.6 of the AD Agreement do not establish an obligation on investigating authorities to ensure that where the product under consideration is made up of categories of products, all such categories of products must individually be "like" each other, thereby constituting a single "product". We therefore do not consider it necessary to address Norway's arguments concerning the facts. Whether the range of goods comprising the product "farmed salmon" that was investigated by the EC are or are not all "like" each other within the meaning of Article 2.6 is not a relevant question in light of our decision on the interpretation of Articles 2.1 and 2.6.

7.69 Finally, this very issue, and many of the arguments raised by Norway, have been previously addressed by other Panels. Norway has not attempted to distinguish the views of those Panels from the circumstances of this case. While we are not bound by the decisions of other Panels, we nonetheless consider it appropriate to review those decisions to assess the similarities and differences in the underlying facts, and determine whether the analysis of those Panels is helpful in our assessment of the arguments in this case.

7.70 The most significant discussion of the issue of product under consideration was in the *US – Softwood Lumber V* dispute, which involved facts and arguments very similar to those in the case at hand. In the underlying investigation, the US Department of Commerce (USDOC) had identified the "product under consideration" as all "softwood lumber, flooring and siding (softwood lumber products)", comprising numerous types of softwood lumber products, including certain products (bed frame components, finger-jointed flangestock, Eastern White Pine and Western Red Cedar) that Canada argued should have been excluded from the investigation. The "like product" identified by the USDOC for purposes of the dumping determination was described in exactly the same terms as the "product under consideration" - all "softwood lumber, flooring and siding (softwood lumber products)".[248] Thus, the product under consideration and the "like product" both included a variety of product types, but exactly the same product types in each case, as is true in the case at hand. There is no dispute in this case that the like products (Norwegian farmed salmon and EC farmed salmon) are coextensive with the product identified by the EC as the product under consideration, farmed salmon.

7.71 Canada argued, similarly to Norway here, that Article 2.6 requires that each individual product making up the "like product" must be "like" each individual product making up the "product

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[247] Appellate Body Report, *US – Lamb*, para. 94.

[248] The comparisons for purposes of determining the dumping margin were carried out on the basis of categories of products in the original investigation. While Canada challenged the "zeroing" aspect of this analysis, it did not dispute the "model matching".

under consideration".[249] Canada asserted that the USDOC had not defined the characteristics of the product under consideration, and did not compare the characteristics of each potential like product with those of the product under consideration as a whole. According to Canada, the facts on the record of the *US - Softwood Lumber V* investigation showed that the range of products included by the USDOC in the product under consideration was so broad that all the individual products, constituting collectively the "like product", were not alike each and every one of the products collectively forming the product under consideration as they did not have characteristics closely resembling those of each and every one of the individual products constituting collectively the product under consideration.[250] Thus, Canada argued that the United States had acted inconsistently with Article 2.6.

7.72 The Panel in *US – Softwood Lumber V* found that Article 2.6 addresses the definition of the product that is to be considered "like" the product under consideration. According to the Panel, the starting point for the application of Article 2.6 was the product under consideration. However, the Panel could find no guidance in the AD Agreement on the way in which the "product under consideration" itself should be determined. The Panel stated that "[w]hile there might be room for discussion as to whether [the approach advocated by Canada] might be an appropriate one from a policy perspective, whether to require such an approach is a matter for the Members to address through negotiations. It is not our role as a panel to create obligations which cannot clearly be found in the AD Agreement itself."[251] This aspect of the Panel's report was not appealed, and was thus adopted by the DSB without modification

7.73 In another case, *Korea – Certain Paper*, the Panel referred to the product under consideration in the context of its consideration of a claim concerning the determination of like product under Article 2.6. In that case, the Korean Trade Commission (KTC) had initiated an investigation concerning dumped imports of "plain paper copier" ("PPC") and "wood-free printing paper" ("WF") from Indonesia. Indonesia made no claims concerning the product under consideration, which included both categories pf paper, but did dispute the KTC's decision that there was one domestic industry producing the two categories of paper, and the determination of injury to that industry, despite having made separate dumping determinations for the two categories of paper. Indonesia argued that PPC and WF are not like products, and that under Article 2.6, the KTC should have analyzed the effects of imports of PPC on producers of PPC, and the effects of imports of WF on producers of WF. Korea argued that under Article 2.6, like product is defined by reference to the imported product, and that Indonesia's reference to the differences among the products produced by the domestic industry had no legal basis under the Agreement.

7.74 In its analysis, the Panel noted that the investigation initiated by the KTC concerned dumped imports of PPC and WF, that the KTC determined that Korean PPC and WF were identical to imported PPC and WF, and made a single injury determination. The Panel considered that the issue before it was whether Article 2.6 of the AD Agreement required the KTC to determine that PPC and WF were like products before proceeding to carry out a single injury determination. The Panel concluded that it did not, stating "once the product under consideration is defined, the investigating authority has to make sure that the product it is using in its injury determination is like the product under consideration. As long as that determination is made consistently with the parameters set out in Article 2.6, the investigating authority' s like product definition will be WTO-consistent."[252] The Panel went on to state that it saw "no basis in Article 2.6 for the proposition that the like product definition also applies to the definition of "the product under consideration". We are aware of no provision in Article 2.6, or any other Article in the Agreement, that contains a definition of "the product under consideration" itself," citing in this regard *US - Softwood Lumber V*.

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[249] Panel Report, *US – Softwood Lumber V*, para. 7.157.
[250] Panel Report, *US – Softwood Lumber V*, para. 7.155.
[251] Panel Report, *US – Softwood Lumber V*, para. 7.157.
[252] Panel Report, *Korea – Certain Paper*, para. 7.219.

7.75 We agree with the views expressed by these two Panels, and consider that they support our conclusions on Norway's claim under Articles 2.1 and 2.6.

7.76 Based on the foregoing, and in the light of standard set out in Article 17.6(i) of the AD Agreement, we do not accept Norway's view that Articles 2.1 and 2.6 must be interpreted to require the EC to have defined the product under consideration to include only products that are all "like". As a consequence, we dismiss Norway's claim that the product under consideration identified by the EC was inconsistent with the requirements of Articles 2.1 and 2.6. We further dismiss Norway's consequential claims under Articles 5.1 and 5.4 (initiation); Article 2.1 (dumping determination); and Articles 3.1, 3.2, 3.4, 3.5, and 3.6 (injury determination), which depended upon its claims regarding the product under consideration. While Norway is correct that the product under consideration has repercussions for an investigating authority's further considerations in an anti-dumping investigation, in the absence of any violation with respect to the product under consideration, there can be no violation, on that basis, in subsequent aspects of the investigation and determination.

D. ALLEGED INCONSISTENCY OF THE EC'S DETERMINATION OF THE DOMESTIC INDUSTRY WITH ARTICLE 4.1 OF THE AD AGREEMENT

1. Arguments of the Parties

(a) Norway

7.77 Norway claims that the EC's determination of domestic industry was inconsistent with the requirements of the AD Agreement. Norway argues that, since the product under consideration, as defined by the EC, included farmed salmon ranging from whole head-on gutted (HOG) fish to fillets, the domestic industry must include producers of any one or more of these. Norway contends that the EC improperly excluded from the domestic industry several categories of domestic producer that it was required to include, pursuant to Article 4.1 of the AD Agreement. Norway points out that the domestic industry as defined by the EC comprises 15 fish farmers that grow salmon, and sell predominantly whole/HOG fish, but does not include any processors that produce filleted products without also growing salmon. Norway asserts that assuming that the product under consideration was properly defined, which Norway disputes, there is a fatal mismatch between the determinations of the "product" and the "domestic industry", and the latter is in violation of Article 4.1. Norway further asserts that the EC improperly excluded six other categories of domestic producer that it was required to include. As a result, Norway asserts that the EC failed to define the domestic industry to include domestic producers of the like product whose collective output of the products constitutes a major proportion of the total domestic production of those products, as required by Article 4.1.

7.78 Norway further claims that, as a consequence of these violations, the EC failed to establish that the application for initiation of the investigation was made by or on behalf of the proper domestic industry, as required by Article 5.4 of the AD Agreement, and failed to determine that the proper domestic industry was injured, pursuant to Articles 3.1, 3.4 and 3.5 of the AD Agreement.

7.79 Norway also claims that the EC's determination of injury violated Articles 3.1, 3.4 and 3.5 of the AD Agreement because the EC engaged in sampling of the domestic industry, which it claims is not permitted under the AD Agreement.

7.80 Norway's claim is based on Article 4.1 of the AD Agreement, which provides, in pertinent part that:

> "[f]or purposes of this Agreement the term "domestic industry" shall be interpreted as referring to the *domestic producers as a whole of the like product* or to those of

> them whose collective output of the products constitutes a major proportion of the total domestic production of those products …"

In Norway's view, the plain meaning of this provision defines the domestic industry on the basis of two elements: "producers" and the "products" that they produce. Norway points to discussions of industry in cases under other WTO Agreements to support its view that the focus of the domestic industry definition is on the producers of, in the case of the AD Agreement, the like product.

7.81 Norway refers to the decision of the Appellate Body in *US – Lamb*, interpreting the term "domestic industry" in the *Agreement on Safeguards*, where the Appellate Body held that "'producers' are those who grow or manufacture an article; 'producers' are those who bring a thing into existence."[253] Similarly, Norway relies on the decision of the Appellate Body in *US – Cotton Yarn*, interpreting the term "domestic industry" in the now defunct *Agreement on Textiles and Clothing*, where the Appellate Body noted that the definition of the "domestic industry" is "product-oriented and not producer-oriented".[254]

7.82 Norway acknowledges that, in principle, some producers may be excluded from the domestic industry, given that Article 4.1 provides that the "domestic industry" includes, in principle, the domestic producers of the like product "as a whole" or those whose collective output constitutes "a major proportion of the total domestic production", which latter implies that not all producers need be included. However, Norway asserts that Article 4.1 allows for the wholesale exclusion of producers of the like product from the domestic industry **only** if they are found to be "related" to exporters or importers, or are themselves importers of the allegedly dumped product, as provided for in Article 4.1(i).

7.83 Thus, in Norway's view, the EC violated Article 4.1 by excluding producers which exclusively filleted salmon sourced from elsewhere, producers that did not express an opinion regarding the investigation ("silents"), producers of organic salmon, producers that did not provide information to the investigating authority, and producers of "certain unspecified types".[255] Moreover, Norway considers it impermissible for an investigating authority to limit the domestic industry to only the complaining producers, as the EC did in this case., even if they represent a "major proportion" of domestic producers.[256] In Norway's view, the definition in Article 4.1 ensures that the domestic industry includes producers from all segments of the industry, except, possibly, related producers. Norway also refers to Articles 3 and 5 as contextual support for the view that the domestic industry must be defined in a manner that reflects the totality of the industry, noting for instance the requirement for an "objective examination" of the state of the "domestic industry" on the basis of "positive evidence" of the whole industry, and the obligation in Article 5.4 to determine the degree of support for the application based on consideration of the volume of production attributable to supporting producers, and the volume of production of opposing producers, as well as the total volume of production by the domestic industry, including those expressing no opinion.

7.84 Turning to the facts of this case, Norway maintains that the EC improperly excluded defined categories of producer from the domestic industry. Norway asserts that any party that produces any of the like product is necessarily a member of the domestic industry.[257] With respect to producers of

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[253] Appellate Body Report, *US – Lamb*, para. 84.

[254] Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ("*US – Cotton Yarn*"), WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027, para. 86.

[255] Norway does not contest the exclusion of related parties, or , it appears, the exclusion of companies which fell into receivership during the period of investigation.

[256] Norway, SWS, para. 109.

[257] Norway, SWS, para. 112.

salmon fillets who did not themselves grow salmon fish, Norway argues that, having defined the product as it did, to include salmon fillets, the EC could not exclude the producers of fillets from the domestic industry. Under Article 4.1, Norway considers that these producers are part of the domestic industry, whether they also grow salmon or not. With respect to "silent" producers, Norway maintains that there is no legal basis for the exclusion of producers on the basis of their silence, and that the EC's explanation is in any event inadequate, as it failed to state the number and identity of the silent producers and the volume of production thereby excluded from the domestic industry, making it impossible for Norway to appreciate the significance of this exclusion for the investigation. With respect to producers of "certain types" of salmon, Norway asserts that the fact that producers produced some, but not all, types of the like product, is inadequate, as a matter of law, to justify their exclusion, and in any event, the EC's explanation of this basis for exclusion is inadequate. With respect to producers of organic salmon, Norway asserts that the product scope of the investigation included organic salmon[258], and that producers of organic salmon must, therefore, be included in the domestic industry. Moreover, Norway considers that the EC's explanation of why, and how, it excluded organic producers from the domestic industry is entirely inadequate, particularly in light of the fact that it appears from the Definitive Regulation that the EC concluded that none of the five sampled companies produced *exclusively* organic salmon. Finally, Norway considers that the exclusion of producers that did not provide data in the format requested or were otherwise deemed not to have cooperated fully is without legal basis, and is insufficiently explained. Norway asserts that Article 4.1 does not authorize the exclusion of domestic producers that do not cooperate fully. Rather, these producers must be retained within the domestic industry and, where there are gaps in the information provided by a domestic producer, Article 6.8 and Annex II of the *Anti-Dumping Agreement* provide a mechanism to overcome deficiencies in the information provided.

7.85 Norway also asserts that, in any event, after excluding categories of producers, the EC failed to demonstrate that the remaining group of domestic producers constitute a "major proportion" of total domestic production. Norway notes that the EC found that total domestic production of salmon was 22,000 tons; the 15 producers in the EC's industry produced 18,000 tons; and the five sampled produced 8,640 tons. However, Norway argues that since the EC failed to specify the volume of production of the excluded producers, the EC failed to substantiate its finding that the 15 producers included in the domestic industry accounted for a "major proportion" of total production by reference to sufficient facts.

7.86 Norway's last claim concerning the domestic industry is that the EC violated the AD Agreement by relying on a sample of five producers in conducting an important part of its injury analysis. Norway maintains that the AD Agreement does not permit a Member to engage in sampling of the domestic industry for purposes of an injury determination. Norway points to the absence of any provision specifically allowing for sampling in the injury part of anti-dumping investigations, such as is set out in Article 6.10 of the AD Agreement for the dumping part. Norway also relies on the decision of the Appellate Body held in *US – Hot-Rolled Steel*, which stated that Article 3 of the AD Agreement requires "[t]he investigation and examination must focus on the totality of the 'domestic industry' and not simply on one part, sector or segment of the domestic industry."[259]

7.87 Norway also relies on Footnote 13 of the AD Agreement as contextual support for its position. That footnote provides for sampling to determine the degree of support for an application in the case of fragmented industries. Norway argues that it demonstrates that when the drafters intended to permit the use of sampling in the examination of the domestic industry, they did so expressly, and

[258] Definitive Regulation, Recital 10.

[259] Appellate Body Report, *US – Hot-Rolled Steel*, para. 190. In that dispute, the USITC had conducted an aggregate injury examination for all producers as well as an in-depth examination in relation to the production for the merchant market, but did not conduct an equivalent examination of captive production. The Appellate Body found that failure to do so violated Article 3 of the AD Agreement.

only for the limited purposes set out in the footnote. Moreover, Norway considers that footnote 13 establishes more limited conditions in which sampling may be used, as well as stricter requirements for how sampling may be undertaken. Thus, Norway contends, even if Article 3 could be interpreted to confer an implied right to sample in an injury determination, the conditions governing sampling should be based on footnote 13 as the sole provision in the AD Agreement that authorizes sampling of the domestic industry in the importing country. Norway considers that even in that case, the EC would not have justified the use sampling, or of the particular sample relied upon in this case.

(b) European Communities

7.88 The EC argues that Article 4.1 merely sets out a definition of domestic industry, and therefore does not, in itself, impose any obligation on the EC or any other WTO Member. As a result, the EC considers that it cannot be found to have acted inconsistently with Article 4.1, and that Norway's consequential claims under Articles 3 and 5 also fail.

7.89 Turning to Norway's argument, the EC asserts, with respect to "filleting-only" undertakings, Norway's arguments appear premised on the notion that this case involved different goods grouped in one investigation. However, the EC recalls that the product concerned is defined as farmed salmon, however presented. The EC does not dispute Norway's statements that filleting-only undertakings essentially benefit from dumped imports, which lower their costs, and would not have supported the application in this case. The EC argues that the inclusion of such undertakings in the domestic industry would have rendered impossible any anti-dumping remedy for EC salmon producers faced with dumped Norwegian salmon.

7.90 The EC maintains that in these circumstances, the investigating authority was called upon to take a reasonable and balanced approach that fairly addressed the underlying economic issues, consistent with the Anti-Dumping Agreement. In the EC's view, this is what the investigating authority did in this case. The EC asserts that Norway's position is based on the view that whenever something is changed in some way, a first thing is consumed, and a second thing is produced. Thus, when a whole fresh salmon fish is harvested, a whole fresh salmon fish is produced. When it is gutted, a whole fresh fish is consumed, and a head-on-gutted fish is produced. When the head is removed, a head-on-gutted fish is consumed, and a head-off gutted fish is produced. When it is filleted, a head-off gutted fish is consumed, and fillets are produced, and so on. Thus, for the EC, Norway's approach, that every change involves the production of product, and everyone involved is a producer, would result in double counting of production. The EC does not consider this position either convincing or legally correct.

7.91 The EC posits that different undertakings involved in activities described in the preceding paragraph are not all necessarily properly characterised as "producers". Thus, to the EC, filleting-only undertakings are in the nature of intermediaries between the original producer of salmon fish and the final consumer. The EC asserts that Article 6.12 of the AD Agreement recognizes the category of "industrial users" and provides for their interests to be taken into account in the consideration of dumping, injury and causality. Thus, the EC maintains that in this case, the investigating authority had to make a choice whether to categorize filleting-only undertakings as "producers" or take their interests into account pursuant to Article 6.12 of the Anti-Dumping Agreement. The EC submits that there can be no doubt that the investigating authority was entitled to take the latter course of action.

7.92 The EC points to the text of Article 4.1 in support of its view. The EC notes that the definition of the verb "to produce" includes : "Bring (a thing) into existence; …".[260] The EC asserts that filleting-only undertakings are not really concerned with bringing the product concerned (farmed salmon) into existence, or producing it. Rather, if anything, they are concerned with the process of

[260] Citing Shorter Oxford English Dictionary (fifth edition, 2002).

consuming it. The EC further supports this view by reference to the dictionary meaning of "produce" in an agricultural (or fisheries) context as having a particular connotation, indicating a "natural" process (such as growing salmon), as distinct from a more "industrial" process (such as chopping it up as a prelude to consumption). In addition, the EC points to the inclusion of Article 6.12 in the WTO Agreement, arguing that this new provision, without equivalent in the Tokyo Round Code, supports the view that the negotiators specifically sought to address the particular matter at issue here in Article 6.12, and this intention and provision must be respected and given meaning. The EC asserts that Article 6.12 began as a proposal by Nordic countries in the Uruguay Round negotiations,[261] and that Norway is thus asking the Panel to ignore a provision that Norway itself put forward during the negotiations, and to interpret the AD Agreement as if the original proposal, which might have enabled industrial users to block the initiation of anti-dumping proceedings indefinitely, had been accepted in the negotiations. The EC considers that its position is based on a reasonable interpretation of the AD Agreement, and must therefore be sustained by the Panel.

7.93 The EC also asserts that the Appellate Body decision in *US - Lamb* concerns a safeguard measure, which has a different underlying logic, and that the Safeguards Agreement has no equivalent to Article 6.12 of the AD Agreement. The EC argues that the issue in that dispute was whether the domestic industry in a safeguards case could include lamb growers despite the fact that whole lambs were not part of the product. The EC considers that similar arguments demonstrate that the GATT and WTO Panel reports referred to by Norway are also inapposite, as they concern questions of definition of the industry to include producers of a product not included in the product concerned, and different textual provisions.

7.94 With respect to the exclusion of "silent" producers, the EC asserts that Article 4.1 refers to the domestic producers as a whole or to those of them whose collective output constitutes "a major proportion" of the total domestic production. Thus, if "silents" are excluded, but nevertheless "a major proportion" of total domestic production is included, the EC maintains that the terms of Article 4.1 are satisfied. In this case, the EC asserts that during the investigation period the estimated total EC production of farmed salmon was 22,000 tonnes; that the 15 cooperating EC producers produced around 18,000 tonnes; and that they therefore represent around 82 per cent of EC production, which is clearly a major proportion of the total.[262] The EC notes that Norway does not contest the accuracy of this calculation, although it does argue that it is not adequately explained.

7.95 With respect to the exclusion of other categories of producers – producers of "certain types" of salmon, producers of organic salmon, and producers that did not provide the data in the format requested, the EC considers that the same argument supports the same conclusion. The EC argues that Norway misses the point that if the domestic industry as defined by the investigating authority comprises producers whose output constitutes a "major proportion" of total domestic production, Article 4.1 is satisfied.

7.96 Turning to Norway's claims concerning sampling of the domestic industry, the EC considers that Norway's claim is strictly legal, and not of a factual nature. The EC maintains that Articles 3.1, 3.4 and 3.5 of the AD Agreement do not impose any additional requirements with regard to the definition of domestic industry set forth in Article 4.1 of the AD Agreement. While they do require

[261] MTN.GNG/NG8/W/76 of 11 April 1990, Negotiating Group on MTN Agreements and Arrangements, Drafting Proposals of the Nordic Countries Regarding Amendments of the Anti-Dumping Code, page 4, third para, and footnote : "**Public interest** clause : In deciding on the **initiation** of an anti-dumping investigation, on whether or not to apply provisional or definitive anti-dumping measures and on the extent and level of such measures the investigating authority should consider whether an investigation or anti-dumping measures would be in the **public interest**. Footnote : Consideration of the **public interest** could cover such questions as the competitive situation, the interests of consumers and **industrial users** of the product subject to the complaint and other relevant economic circumstances."

[262] Definitive Regulation, Section 4.1, particularly Recitals 38 and 40.

that the determination of injury be made with respect to the industry that is the subject of the investigation, the EC maintains that it satisfied this requirement in this case. The EC considers that Norway's reliance on the *US – Hot-Rolled Steel* case is inapposite, since the EC did not undertake analysis of only a segment or part of the domestic industry defined in the investigation. The EC notes that Norway has not cited a single provision of the Anti-Dumping Agreement which would prohibit sampling in an injury analysis. The EC also argued that it would be absurd to conclude that the negotiators of the AD Agreement agreed to establish a lower standard for the determination under Article 5.4 of the AD Agreement, for which sampling is allowed, than for the determination of injury under Article 3.

7.97 The EC asserts that the use of sampling for injury analysis is well accepted among WTO Members and established in WTO case law, citing the Panel's report in *EC – Bed Linen*.[263] The EC further notes that the *US – Hot-Rolled Steel* case involved an entirely different issue from sampling, and gives no support to Norway's view that sampling in an injury analysis is prohibited. The EC considers that footnote 13 is irrelevant to the obligations concerning injury determinations, in part because it relates to the question of initiation under Article 5, and not injury under Article 3.

2. Arguments of the Third Parties

(a) China

7.98 China, referring to Panel decisions in *Argentina – Poultry Anti-Dumping Duties*[264] and *Mexico - Corn Syrup*[265], argues that Article 4.1 imposes an obligation that Members are obligated to fulfil. China disputes the EC's view that Article 4.1 provides two equally valid options for defining the domestic industry – domestic producers "as a whole" **or** "those of them whose collective output of the products constitutes a major proportion of the domestic production of those products". China considers this interpretation would allow investigating authorities to simply identify "a major proportion" of the total production and ignore the rest of the producers in the domestic market. In China's view, this would not allow for the necessary match between the product and the industry. Moreover, it opens the possibility that an investigating authority might pick and choose from all domestic producers and include those that may be injured to a higher extent than the others, thus making it easier to find injury, and twisting the injury evaluation.

7.99 Regarding Norway's sampling claims, China takes no position regarding the factual details of the EC's decision to sample, nor on the selection of the sample actually chosen. China notes that Articles 3.1 and 3.4 establish an obligation for the investigating authorities to conduct an objective examination and evaluation of all relevant economic factors and indices having a bearing on the state of the injury to the domestic industry, but neither these two Articles nor any other Articles in the AD Agreement specify what methodology may be used to conduct such an objective examination. China agrees with Norway that Footnote 13 and Article 6.10 set out specific circumstances and conditions for resort to sampling, but in China's view, this does not automatically demonstrate that the drafters of the AD Agreement intended to permit only two circumstances where sampling could be used and that sampling in other circumstances would violate the AD Agreement. Thus, China argues that that it is within the discretion of the investigating authority to decide what methodology it will use in an injury examination as long as the investigation is conducted "objectively" and includes an

[263] EC, FWS, para. 93, referring to Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India ("EC – Bed Linen")*, WT/DS141/R, adopted 12 March 2001, paras. 6.175 to 6.183.

[264] Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil ("Argentina – Poultry Anti-Dumping Duties")*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727, para. 7.338.

[265] Panel Report, *Mexico- Corn Syrup*, para.7.147.

evaluation of all relevant economic factors and indices that affects the state of the injury to the domestic industry.

7.100 Moreover, China considers that the rationale underlying Article 6.10 of the AD Agreement, allowing sampling where a complete evaluation is "impracticable" supports the use of sampling in injury analysis when it is "impracticable" for the authority to evaluate all relevant economic factors for all producers in the domestic industry within the time-limits, so long as the evaluation is objective. China points to the Appellate Body's decision in *US – Lamb*, where, despite the fact that no provision in the Safeguards Agreement addresses specifically the question of the extent of data collection, the Appellate Body concluded that "authorities must have a *sufficient factual basis* to allow them to draw reasoned and adequate conclusions concerning the situation of the 'domestic industry,'" which means "that the data examined, concerning the relevant factors, must be *representative* of the 'domestic industry.'" (emphasis added) .[266] China considers that this reasoning applies in the case of the AD Agreement to support the view that as long as the investigating authority can demonstrate that the sampling allows the authority to evaluate data that is sufficiently representative of the "domestic industry", the investigating authority may use sampling.

(b) Hong Kong, China

7.101 Hong Kong, China submits that the adoption of a selective approach, be it sampling or otherwise, in investigating producers of a defined domestic industry in injury determination is inconsistent with Articles 3 and 4.1 of the AD Agreement. Hong Kong, China considers that Article 4.1, read in conjunction with footnote 9 (defining injury) requires that the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1, that is, the domestic producers of the like product as a whole, or those of them whose collective output of the like product constitutes a major portion of the domestic production of the like product. Once the domestic industry has been defined for the purposes of the investigation, it is not permissible to pick and choose among the producers, or to limit the injury analysis to the few selected. Hong Kong, China considers that the absence of a sampling provision for injury analysis reinforces its view in this regard. Hong Kong, China asserts that neither the possibility of excluding "related" producers, nor the possibility of defining the domestic industry as producers whose output constitutes "a major proportion of the total domestic production" implies a right to sample or pick selectively domestic producers among the pre-determined "major proportion" of the industry for the purposes of injury determination. Thus, in Hong Kong, China's view, having defined the industry as 15 producers, the EC violated the AD Agreement by making its injury determination with reference to only 5 producers.

(c) Japan

7.102 Japan does not agree with the EC's argument that Article 4.1 of the AD Agreement contains a definition rather than an obligation. The Appellate Body has found violations of such definitional provisions in a number of cases, generally in combination with violations of what might be called "operative" provisions.[267] In this case, if the EC authorities' limitation of the scope of the "domestic

[266] Appellate Body Report, *US – Lamb*, paras. 128-132

[267] *See*, e.g., Appellate Body Report, *US – Lamb*, paras. 95-96. Therein, the Appellate Body found that the USITC had included in the "domestic industry" producers of products other than the product concerned (namely, *live lambs*). The Appellate Body found this inconsistent with definition of "domestic industry" set forth in Article 4.1(c) of the Agreement on Safeguards. Thus, the Appellate Body considered that an authority acts in a manner inconsistent with the AD Agreement if it defines the domestic industry in a way inconsistent with Article 4.1(c) of that Agreement. The Panel in *Argentina – Poultry Anti-Dumping Duties* considered that Article 4.1 of the AD Agreement "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

industry" is not consistent with the requirements of Article 4.1 of the AD Agreement, then the EC cannot make a determination about injury to the "domestic industry" consistent with Article 3.1 of the AD Agreement. This is because the injury determination would pertain to an industry other than the relevant "domestic industry," correctly defined. Thus, failure to comply with the definition of the "domestic industry" in Article 4.1 of the AD Agreement would lead to a consequent violation of Article 3.1 of the AD Agreement.[268]

7.103 Japan considers that the EC's interpretation of "domestic industry" essentially means that authorities may exclude domestic producers of the like product from the "domestic industry" for any reason (or for no reason), so long as the remaining producers constitute "a major proportion" of domestic production of the like product. Japan considers that this could allow authorities to define the domestic industry in a results-oriented way, for example, by choosing only unprofitable producers and excluding profitable ones, which would be inconsistent with the obligation of Article 3.1 of the AD Agreement to conduct an "objective examination" of injury. In Japan's view, an interpretation of Article 4.1 of the AD Agreement which would allow an authority to pick and choose domestic producers such as to make a positive injury finding more likely, would be inconsistent with this obligation.

7.104 With regard to sampling, Japan does not deny the theoretical possibility to apply Article 6.10 of the AD Agreement to the domestic industry on its face. Indeed, Japan agrees with the EC that there would be cases where there are so many domestic industry members that individual examination of all of them would be impracticable. On the other hand, Japan notes that the parties agree that there are no clear provisions in the AD Agreement that permit the authorities to engage in sampling of the domestic industry, except for footnote 13, which does not relate to the post-initiation phase of the investigation, according to the EC.[269] Japan also notes that active participation of the domestic industry might be expected in the present case, where the domestic industry consists of a relatively small number of companies, and that where there are relatively few producers, the burden on authorities of obtaining data from all producers should not be excessive. Finally, even if sampling of the domestic industry is permitted for the purposes of an injury determination, the samples have to represent the comprehensive picture of the domestic industry. Japan suggests that it is unclear whether the sampling techniques applicable under Article 6.10 may be applied in the injury context.

(d) United States

7.105 The United States takes no position with respect to the issue of whether the EC reasonably excluded, as a factual matter, certain categories of salmon producers from its domestic salmon industry. The United States does not, however, agree with Norway's argument that an investigating authority may only exclude "related" producers from the definition of the domestic industry under Article 4.1 when performing its injury analysis. In the US view, Article 4.1 is satisfied if and investigating authority includes in the industry those domestic "producers whose collective output of the products constitutes a major proportion of the total domestic production of those products."[270] The United States notes that the definition of domestic industry must be based on "positive evidence and involve an objective examination" of the evidence relating to injury,[271] and that "an 'objective examination' [under Article 3.1] requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favoring the interests of any interested party,

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anti-dumping investigation, that Member would violate the obligation set forth in Article 4.1." Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.338.

[268] *See ibid*.

[269] EC, FWS, para.99.

[270] AD Agreement, Article 4.1.

[271] AD Agreement, Article 3.1.

or group of interested parties, in the investigation."[272] Accordingly, the US suggests that if the EC's definition meets the "major proportion" of domestic production standard of Article 4.1, the Panel still should assess whether the EC's exclusion of certain categories of salmon producer from the industry was biased or designed to favor the interest of any group of interested parties in the investigation, including the producers who filed the petition.

7.106 The United States takes no position concerning the EC's method for selecting the sample of companies it analyzed. The US recognizes that there is no explicit permission in the AD Agreement allowing an investigating authority to rely on a small sample of domestic producers when performing its injury analysis in antidumping investigations. However, the United States considers that the AD Agreement does make clear that sampling is an appropriate methodology when used in other contexts. For example, the Agreement permits the "us[e of] samples which are statistically valid" for the purpose of calculating dumping margins,[273] and it permits the use of "statistically valid sampling techniques" to determine an industry's support for an antidumping petition when the industry is a fragmented one.[274] The US points to the decision of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, which recognized that:

> "Articles 3.1 and 3.2 [of the Agreement] do not prescribe a methodology that must be followed by an investigating authority in conducting an injury analysis. Consequently, an investigating authority enjoys a certain discretion in adopting a methodology to guide its injury analysis. Within the bounds of this discretion, it may be expected that an investigating authority might have to rely on reasonable assumptions or draw inferences."[275]

Thus, the US considers that the EC could reasonably decide to rely on a sample of the domestic industry, as long as its decision was based on a reasonable set of assumptions or inferences as to the validity of the sample.

3. Evaluation by the Panel

7.107 There are three basic questions raised by Norway's domestic industry claims – first, whether the EC erred in not including certain categories of enterprises in the domestic industry based on the nature of their specific activities (filleting-only undertakings,[276] organic producers, and producers of "certain kinds" of salmon), their silence concerning the investigation, or their failure to provide information in the format requested. The second question is whether the EC's interpretation of Article 4.1 as allowing the investigating authority to conclude that, so long as the producers included in the domestic industry accounted for a major proportion of total domestic production, it was entitled to ignore other producers, is permissible. The third question is whether the EC was entitled to engage in sampling of the domestic industry in the context of its injury analysis. We will begin our analysis by considering the text of the relevant provision, Article 4.1.

7.108 Article 4.1 of the AD Agreement provides, in pertinent part:

> "For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of

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[272] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[273] AD Agreement, Article 6.10.
[274] *Id.*, Article 5.4, note 13.
[275] Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice ("Mexico – Anti-Dumping Measures on Rice")*, WT/DS295/AB/R, adopted 20 December 2005, para. 204.
[276] A "filleting-only undertaking" as used in this report is an undertaking which transforms acquired farmed (other than wild) salmon that is not filleted, into farmed (other than wild) salmon fillets.

> them whose collective output of the products constitutes a major proportion of the total domestic production of those products..."

Thus, domestic producers of the "like product" are the starting point for the determination of the domestic industry. "Like product" is defined in Article 2.6 of the AD Agreement as:

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

As discussed above, the EC defined the product under consideration in this case as "farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen,"[277] finding in addition that "all farmed salmon constitutes a single product. The different presentations all serve the same end use and are readily capable of being substituted between each other. Therefore, they are considered to constitute a single product for the purposes of the proceeding."[278] The EC specifically excluded from the product under consideration "other similar farmed fish products such as large (salmon) trout, biomass (live salmon) as well as wild salmon and further processed types such as smoked salmon."[279]

7.109 With respect to like product, the EC found "the basic physical characteristics of farmed salmon produced and sold by the Community industry in the Community, farmed salmon produced and sold on the domestic Norwegian market, and farmed salmon imported into the Community from Norway are the same and [] they have the same use."[280] The EC therefore provisionally concluded that "the product concerned and the farmed salmon produced and sold on the domestic market of Norway, as well as the farmed salmon produced and sold in the Community by the Community industry have the same basic physical characteristics and uses and are therefore considered to be alike...."[281] It confirmed this conclusion in its Definitive Regulation.[282]

7.110 Thus, it is clear that the EC like product was found to be coextensive with the product under consideration. Therefore, the like product perforce included the specified "farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen". In our view, the plain language of Article 4.1 establishes that the domestic industry in this case was therefore to be defined as producers "as a whole" of *this* product, or those producers whose output of *this* product constitutes a major proportion of total EC production of *this* product.

7.111 Putting aside for the moment the question of whether producers of the like product "as a whole" or producers of a "major proportion of total domestic production" of the like product are to be considered the domestic industry, it is clear that Article 4.1 is unqualified in providing that the term "domestic industry" is to be interpreted by reference to "producers" of the like product. The text subsequently sets out circumstances in which some producers of the like product **may** be left out of the domestic industry. Thus, Article 4.1(i) provides for exclusion of producers related to the exporters or importers, or producers who are themselves importers of the allegedly dumped product. Article 4.1(ii) provides that, in the exceptional circumstances of two or more competitive markets within the territory of a Member, producers within each market may be regarded as a separate industry if certain conditions are satisfied.

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[277] Provisional Regulation, Recital 10
[278] Provisional Regulation, Recitals 10-11.
[279] Provisional Regulation, Recital 10.
[280] Provisional Regulation, Recital 12.
[281] Provisional Regulation, Recital 14.
[282] Definitive Regulation, Recital 8. Although Norway does not address the EC's determination of like product, there is no dispute that the like product was coextensive with the product under consideration.

7.112 However, nothing in the text of Article 4.1 gives any support to the notion that there is any other circumstance in which the domestic industry can be interpreted, from the outset, as not including certain categories of producers of the like product, other than those set out in that provision.[283] Thus, we see no basis in the text of Article 4.1 which would allow for the exclusion from the domestic industry, as a category or group, of producers of any form of the like product – in this case, producers of any of the "presentations" identified by the EC as the like product – "farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen".

7.113 The EC asserts, however, that enterprises engaged in filleting are not "producers" as "fillets do not result from a process of "production", but merely transformation of one presentation to another presentation."[284] Thus, the EC argues that filleting-only undertakings are "not really concerned with bringing the product concerned (farmed salmon) into existence, or *producing* it. Rather, if anything, they are concerned with the process of *consuming* it."[285] The EC considers that the interests of filleting-only undertakings are properly taken into account under Article 6.12 of the AD Agreement and focuses on the analytical problems that it considers would arise if filleting-only undertakings were considered "producers" in this case and treated as part of the domestic industry.

7.114 The EC's assertion is difficult to square with the ordinary meaning of the term "produce". The verb "to produce" is defined, *inter alia*, as "[b]ring (a thing) into existence" and ""bring into existence by mental or physical labour (a material object)".[286] There can be no doubt, in our view, that an enterprise engaged in, as the EC puts it, "gutting, beheading, and filleting" is engaged in "producing", that is, bringing into existence, by physical labour, salmon fillets.[287] We do not dispute that undertakings that **only** engage in filleting operations, as opposed to operations engaged in growing live salmon, and selling them whole, and/or beheaded, and/or gutted, and/or filleted, and/or fresh, and/or frozen, or any combination thereof, may have different economic interests. Thus, an investigation concerning a domestic industry comprising enterprises with more than one of these various economic interests may well involve complicated questions regarding data collection and analysis. Such complications cannot, however, override the plain meaning of the text of Article 4.1.[288]

7.115 There is no dispute that filleted salmon is within the scope of the like product identified by the EC in this case. Thus, based on our interpretation of the plain language of Article 4.1, we consider that any enterprise that produced any form of the like product should be considered, at least in the first instance, a "producer" of the like product, and as such, part of the domestic industry.[289]

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[283] By this, we do not mean to suggest that a determination based on information from fewer than all domestic producers of the like product will necessarily be insufficient as an element of a decision to impose anti-dumping duties. However, we do see a clear distinction between the definition of the domestic industry as set out in Article 4.1, and whether the information obtained during the investigation concerning the domestic industry, as defined, is sufficient to form the basis of a determination of injury and causation.

[284] EC, Answer to Panel Question 2, para. 6.

[285] EC, FWS, para. 71.

[286] New Shorter Oxford English Dictionary, Clarendon Press, 1993.

[287] EC, FWS, para. 71.

[288] The EC argues that its view that filleting-only undertakings are not "producers" of farmed salmon represents a "permissible interpretation" of the AD Agreement. EC, FWS, para. 74. It is not clear which provision of the AD Agreement the EC is referring to here, Article 4.1 or Article 6.12. However, we consider that whether a particular undertaking "produces" the like product may present an issue of fact in a particular investigation (see footnote 289, below) but it does not present an issue of interpretation of the AD Agreement.

[289] There may be circumstances in which an enterprise whose product is within the scope of the like product may be found to have engaged in a level of activity so low as to justify the conclusion that it did not, in fact, "produce" the like product. However, there was no consideration of the degree of activity of filleting-only

7.116 It is clear that the investigating authority never considered EC producers of salmon fillets who did not also farm salmon fish to be part of the domestic industry. This is apparent from the fact that the volume of production cited by the EC as "total domestic production", 22,000 tonnes, is, as we understand it, the EC's estimate of the volume of salmon fish farmed by EC salmon growers.[290] It certainly does not include the volume of salmon fillets produced by enterprises that produced salmon fillets from purchased salmon fish.[291] In our view, this wholesale exclusion of an entire category of producers from the domestic industry is not compatible with the definition of domestic industry as set out in Article 4.1.

7.117 The EC, however, argues that since Article 4.1 is a definitional provision, it imposes no obligation, and therefore cannot be the basis of a finding of violation. In our view, merely that Article 4.1 sets out a definition does not preclude a panel finding that the decision of the investigating authority concerning the appropriate domestic industry is inconsistent with the AD Agreement. The question whether the EC defined the domestic industry in a proper manner may well be decisive in the consideration of other claims in dispute, *i.e.*, subsidiary claims regarding initiation, as well as claims regarding injury and causation. In our view, it is necessary to address Norway's claims concerning the definition of the domestic industry in order to establish whether other determinations were made in relation to a domestic industry defined consistently with Article 4.1.

7.118 In our view, regardless of whether Article 4.1, as a definitional article, itself imposes obligations on Members which can be the basis of a finding of violation, it is necessary and appropriate to address Norway's claims under Article 4.1 in this dispute. If the EC's approach to defining domestic industry in this case resulted in an investigation concerning a domestic industry that did not comport with the definition set forth in Article 4.1, then it seems clear to us the EC analyzed the wrong industry in determining the adequacy of support for the initiation of the investigation under Article 5.4 of the AD Agreement, and in considering injury and causation under Article 3, committing an error which is potentially fatal to the WTO-consistency of the investigating authority's determinations on those issues.

7.119 We note that the question of whether definitional provisions can be the basis of a finding of a violation under a covered agreement has been addressed by several panels, whose decisions support our views on the matter. Thus, the Panel in *United States – Softwood Lumber V* noted with respect to Article 2.6, which defines like product,

> "Article 2.6 is a definitional article, and as such it is not clear to us that it contains *in itself* obligations on Members, or in any event that it could be the basis for an *independent* violation. On the other hand, it appears to us that Canada's claim is predicated on the proposition that DOC took an approach to the definition of like product which deviated from that in Article 2.6. Thus, a threshold and potentially dispositive issue is whether DOC in fact took an approach to like product which deviated from that of Article 2.6."[292]

The Panel in *Argentina – Poultry*, considering the same provision as is at issue here, concluded that Article 4.1 "imposes an express obligation on Members to interpret the term "domestic industry" in that specified manner" and stated that "if a Member were to interpret the term differently in the

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undertakings in defining the domestic industry during the investigation. Therefore, the question is not before us on the facts of this case.

[290] EC, Answer to Panel Question 5, para. 29. Also, Definitive Regulation, Recital 38.

[291] *See*, e.g., Norway, FWS, para. 55 and Exhibit NOR-17.

[292] Panel Report, *United States – Softwood Lumber V*, para. 7.146. The Panel went on to conclude that "the DOC's approach to "like product" was not inconsistent with the definition of "like product" in Article 2.6 of the *AD Agreement*". Panel Report, *United States – Softwood Lumber V*, para. 7.158.

context of an anti-dumping investigation, that Member would violate the obligation set forth in Article 4.1".[293] 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.[294] In *US – Hot-Rolled Steel*, the Panel and Appellate Body both found that the United States had violated Article 2.1 of the Anti-Dumping Agreement, which defines the term "dumping".[295] In *EC – CVDs on DRAMS*, the Panel found that the EC violated Article 1.1 of the SCM Agreement, which defines a "subsidy".[296]

7.120 The only textual basis the EC proposes in support of its view that filleting-only enterprises were properly not considered part of the domestic industry is Article 6.12. However, that provision deals with an entirely different issue than the definition of the domestic industry. Article 6, as a whole, deals with various issues pertaining to evidence in an anti-dumping investigation. Article 6.12 specifically requires an investigating authority to provide opportunities for information to be provided by certain entities that are not "interested parties" – *inter alia*, industrial users of the product under investigation. In our view, even granting that filleting-only undertakings might be considered "industrial users" of imported salmon, in that they "use" one presentation of the like product (salmon fish, in some form), they cannot properly be considered to be **exclusively** industrial users, as they themselves are engaged in producing another presentation of the like product (fillets). As producers of salmon fillets, which is within the scope of the like product, such enterprises should, at least initially, be considered as part of the domestic industry.[297] As we noted above, there may be circumstances in which an investigating authority might conclude that certain enterprises whose output is part of the like product should not be considered "producers", as their level of activity is so low as to suggest that they do not actually bring the like product into existence. There was no consideration of any such possibility in the investigation at issue here, however, and thus we need not resolve this question, either as a matter of law or on the facts of this case.

7.121 We recognize that, as argued by the EC, this conclusion has certain implications which may need to be addressed by an investigating authority, particularly with respect to the collection and analysis of data for different presentations of the like product. However, we do not see how problems of data collection and evaluation could possibly trump the plain meaning of the text of Article 4.1. Moreover, there is no prohibition in the AD Agreement on the examination of different sectors of a domestic industry, so long as all sectors are included in the analysis and determination on an even-handed basis, without favoring any one sector.[298] Thus, we see no bar to gathering and analysing information for different categories of producer in the course of an investigation. That this might result in a more complicated investigation and more complex analysis does not undermine our conclusion based on the text of Article 4.1.

7.122 Similar considerations apply to our consideration of the EC's treatment of producers of organic salmon, which again is within the like product as defined by the EC, and "silent" producers. The EC has not argued that these enterprises are not producers of the like product, and has not made any argument concerning the different nature of these producers, as it did for filleting-only

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[293] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.338.

[294] Appellate Body Report, *US – Lamb*, para. 96.

[295] Appellate Body Report, *US – Hot-Rolled Steel*, para. 240(d), upholding the panel's finding in para. 8.1(c).

[296] Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea ("EC – Countervailing Measures on DRAM Chips")*, WT/DS299/R, adopted 3 August 2005, paras. 8.1(a), 8.1(b) and 8.1(c).

[297] To the extent filleting-only undertakings in a domestic industry were related to exporters or importers of the allegedly dumped product. or were themselves importers of the allegedly dumped goods, Article 4.1(i) would allow for their exclusion. Of course, such exclusion, and the reasons for it, would have to be apparent on the face of the determination. In this case, the EC not having included them in the industry in the first place, they could not be excluded under Article 4.1(i).

[298] Appellate Body Report, *US-Hot-Rolled Steel*, paras. 195-196.

undertakings. Thus, in our view, there is no support for the exclusion of these producers, as a group, from the domestic industry.

7.123 With respect to producers of "certain types" of salmon, producers of organic salmon, "silent" producers of salmon, and producers of salmon that did not provide information in the format requested, the EC argues that since the producers it did include in the domestic industry accounted for a major proportion of domestic production of the like product, it was entitled to not include producers of these types. These arguments raise the second question which we identified above, whether once producers of the like product accounting for a major proportion of domestic production of that product are included in the domestic industry, other producers need not even be considered. While this is a very interesting issue, of some import, it is not necessary for us to decide it in the context of this dispute. We have concluded that the EC erred in excluding certain enterprises from the domestic industry. Thus, it is clear that the EC's assessment of whether the producers it did include accounted for a "major proportion" of domestic production of the like product is based on incorrect information concerning the volume of total domestic production of the domestic like product. The EC not having even obtained information on, insofar as we can determine, much less made a determination of the proportion of total production of the domestic like product accounted for by individual producers, any assessment by us would be entirely *de novo*, which is, of course, an exercise we are prohibited from undertaking. Therefore, we exercise judicial economy in not addressing this aspect of Norway's claims.

7.124 We therefore conclude that the EC's approach to defining the domestic industry in this case resulted in an investigation concerning a domestic industry that did not comport with the definition set forth in Article 4.1 of the AD Agreement. As a consequence, the EC's determination of support for the application under Article 5.4 was based on information relating to a wrongly-defined industry, and is therefore not consistent with the requirements of that Article. Furthermore, the EC's analyses of injury and causation were based on information relating to a wrongly-defined industry, and are therefore necessarily not consistent with the requirements of Articles 3.1, 3.4, and 3.5.

7.125 Having concluded that the EC's approach to defining domestic industry was erroneous, we also consider that the sample of that industry relied upon by the EC necessarily is itself erroneous, as it relates to a wrongly-defined domestic industry. Nonetheless, we consider it appropriate to address Norway's claims on the issue of sampling in more detail, as they fall within the range of issues which we believe it appropriate to address despite our exercise of judicial economy. This is because this issue may well arise in the context of any actions taken by the EC in implementing our decision. [299] We therefore go on to consider it.

7.126 It is clear that there is no specific provision providing for sampling in the context of the injury aspect of an anti-dumping investigation. Norway's argument that sampling is prohibited in the injury context is thus based on the silence of the Agreement on this issue. In our view, however, the mere absence of a specific provision allowing for sampling is not a sufficient basis for finding sampling to be prohibited in injury determinations. In our view, the mere absence of a provision permitting a particular investigative or analytical method in an anti-dumping investigation cannot mean that it is, for that reason alone, prohibited. The AD Agreement does not specify all the different methodologies of investigation and analysis that might be useful or appropriate in particular circumstances, and cannot be expected to do so. If applied as a general interpretive principle, Norway's position would

[299] Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327, para. 223: "A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members".

render the AD Agreement potentially null in numerous situations where it simply does not specifically address a question that may arise in an investigation.

7.127 The silence of the AD Agreement on the question of sampling in the context of injury determinations is in contrast to the situation regarding dumping determinations. With respect to the dumping aspect of an anti-dumping investigation, Article 6.10 of the AD Agreement specifically authorizes, and sets out criteria and methodological guidelines for, the use of limited examination. Norway argues that since there is a specific provision allowing for sampling in the context of determinations of dumping, the absence of a similar provision in the context of determinations of injury must be given effect by concluding that sampling is prohibited in the latter case. We do not agree, as in our view, there is a distinct difference between the determination of injury in an anti-dumping investigation, and the determination of dumping which provides a logical explanation for the lack of a sampling provision in the context of injury determinations.

7.128 The AD Agreement makes clear that a determination of dumping is **individual**. Article 2, together with Article 6.10, make it clear that the preferred method for determining dumping is to calculate a margin of dumping for each foreign producer or exporter on the basis of that producer's own data. In addition, there are specific rules in the AD Agreement concerning the collection and verification of that information.[300] By contrast, only a single injury determination is made in each investigation, for the entire domestic industry in question. Article 3, and the decision of the Appellate Body in *US - Hot-Rolled Steel*, make it clear that a determination of injury is a collective assessment for the entire domestic industry as defined by the investigating authority in the investigation.[301] Moreover, there is little if any methodological guidance for the determination of injury, although it is clear that the relevant factors must be assessed with respect to the industry, and not individual domestic producers.[302] Thus, the starting point for injury analysis is aggregate or collective information, rather than information for individual enterprises.[303] Thus, the calculation of dumping margins and the assessment of injury are different types of analytical exercises, leading to different types of conclusions.

7.129 In our view, this implies that, in the absence of a provision specifically allowing for a limited examination, as an exception to the general rule of individual determinations, it would be impossible for investigating authorities to make dumping determinations in certain cases involving more than some relatively limited number of foreign producers or exporters, given the complexities of the investigation and the applicable time limits. Thus, a specific provision authorizing limited

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[300] For instance, Article 2.2 sets out detailed rules concerning what information may be used and what sources may be used to obtain that information for individual enterprises. Article 2.4 specifies, *inter alia*, what adjustments, and in what circumstances, may be made to the information obtained from individual enterprises. Article 6.1, and particularly Article 6.1.1 sets out rules governing the collection and handling of information. Article 6.7 and Annex I set out rules for the verification of information obtained from individual foreign firms.

[301] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 204-206. See also, Panel Report, *EC – Bed Linen*, para. 6.182 (injury information and determination limited by definition of industry – investigating authority may not look at facts concerning companies not within the defined domestic industry.)

[302] We note that Article 4.1(ii) provides that "injury may be found to exist even where a major portion of the total domestic industry is not injured, provided ...that the dumped imports are causing injury to the producers of all or almost all of the production within" the regional market considered. This specific standard applicable in the case of regional industry lends further support to our view that injury in non-regional industry cases is a question to be answered with reference to the entire domestic industry, and certainly not with reference to individual producers. This is not to say that individual producers, or groups of producers, may not be examined and analysed separately in the course of an injury investigation and analysis, but merely that the final conclusion concerning the existence of injury must encompass the entire industry.

[303] Of course, much of the necessary information may well be obtained from individual enterprises, but this is not the only relevant source – information from industry groups and associations may also be gathered and evaluated.

examination is necessary in order to ensure that the anti-dumping mechanism can function. By contrast, since the injury determination is an aggregate one, based on a collective assessment of information, there is no similar need for a specific provision for sampling. There is certainly nothing in the AD Agreement that would necessitate obtaining information from each domestic producer in the industry on each element of an injury analysis.[304] There is no guidance in the AD Agreement on the sources, collection or verification of information concerning injury. In light of this absence of methodological guidance, and the aggregate nature of the injury determination, we are unsurprised that the specific question of sampling in this context is not addressed in the AD Agreement, and cannot conclude that this absence requires the conclusion that sampling in the context of injury determinations is prohibited. Such a conclusion would make it impossible for investigating authorities to make injury determinations in certain cases involving more than some relatively limited number of domestic producers.[305] We therefore dismiss Norway's claim that the use of sampling by the EC investigating authority was in violation of Articles 3.1, 3.4 and 3.5

7.130 We do consider that the AD Agreement establishes some general parameters for the use of sampling in the injury context. Thus, in our view, the obligation in Article 3.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of the volume, price effects, and impact of dumped imports, limits an investigating authority's discretion both in choosing a sample to be examined in the context of injury, and in collecting and evaluating information obtained from the sampled producers. The Appellate Body stated, in *US – Hot-Rolled Steel*, that "an 'objective examination' [under Article 3.1] requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favoring the interests of any interested party, or group of interested parties, in the investigation."[306] A sample that is not sufficiently representative of the domestic industry as a whole is not likely to allow for such an unbiased investigation, and therefore may well result in a determination on the question of injury that is not consistent with the requirements of Article 3.1 of the AD Agreement.[307]

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[304] We note in this regard that Article 3.4 specifies that the list of relevant factors to be considered in examining the impact of dumped imports on a domestic industry is not exhaustive, and no one or several of those factors can necessarily give decisive guidance. Article 3.2 contains a similar provision concerning the impact of dumped imports on prices. These provisions support our view that a determination of injury to a domestic industry may be made even in a case in which there is not complete information concerning all relevant factors for all domestic producers in the industry.

[305] Norway recognized this consequence of its position, when it replied to a Question by the Panel, stating that:

> "The authority must seek information from each and every producer comprising the domestic industry, as defined by the investigating authority. ... The degree and quality of the information that an authority secures for each of the producers may differ from producer to producer. However, an authority must make an effort to secure relevant information from all domestic producers – which are, after all, within its jurisdiction. Where an authority is unable to obtain information, it can, if necessary, obtain the "best information" available from secondary sources under Article 6.8 of the *Anti-Dumping Agreement*."

In our view, this would impose an excessive burden on investigating authorities that is eliminated by recognition of the permissibility of sampling.

[306] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

[307] In response to a question from the Panel, Norway stated its disagreement with the premise underlying the question, that is, the assumption that sampling for purposes of injury determinations is not prohibited. Norway went on to state that, assuming it were not, the conditions governing sampling would be drawn from footnote 13, and that, further "the obligation in Article 3.1 to conduct an "objective examination" based on "positive evidence" requires that a sample be "unbiased", "conform to the dictates of the basic principles of good faith and fundamental fairness", and not "favour[] the interests of any interested party or group of interested parties". Norway, Answer to Panel Question 51, para. 44, citing Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

7.131 Norway, however, relies on the decision of the Appellate Body held in *US – Hot-Rolled Steel* in support of its view that sampling is prohibited in the injury context. That case did not involve the question of sampling at all. Rather, in that case, the Panel was faced with a situation where the investigating authority found that the domestic industry comprised production for the merchant market, and captive production for internal consumption, and considered information for the merchant market segment of the industry separately, without a commensurate separate consideration of the captive production segment. Thus, the conclusion of the Appellate Body, that Article 3 of the AD Agreement requires "[t]he investigation and examination must focus on the totality of the 'domestic industry' and not simply on one part, sector or segment of the domestic industry"[308] says nothing, in our view, relevant to the question of whether sampling is permitted in injury determinations.

7.132 Norway also argues that assuming sampling is permitted in injury determinations, it is permitted only in the circumstances provided for in footnote 13 of the AD Agreement, which it argues is the only provision authorizing sampling of the domestic industry in the importing country. Footnote 13 is appended to Article 5.4 of the AD Agreement, which requires investigating authorities to determine the degree of support for an application for anti-dumping duties expressed by domestic producers. Thus, not only is footnote 13 not, on its face, applicable to the determination of injury under Article 3, but it is in the context of a required determination that involves assessments of the individual positions of domestic producers to determine whether there is, in the aggregate, adequate support for the application. Thus, as is the case with dumping determinations, there would seem to be a logical rationale for an explicit authorization of sampling in this context as an exception to what might otherwise be impossible, that is, determining the views of an "exceptionally large" number of domestic producers in a "fragmented industr[y]" with respect to the application. However, as discussed above, the situation with respect to injury determinations is different, and we see no basis to impose the conditions set out in footnote 13 on sampling for injury assessments.[309]

7.133 Given that we have determined that the EC's definition of the domestic industry in this case is not consistent with Article 4.1 of the AD Agreement, we do not go on to consider whether the sample it selected satisfies these considerations, as we have no relevant determination to review in this regard, and will not undertake an independent analysis of this question.

[308] Appellate Body Report, *US – Hot-Rolled Steel*, para. 190.

[309] In addition, we see no basis to impose the criteria of Article 6.10 on sampling in the context of injury. It is not clear that the "largest volume that can reasonably be investigated" criterion of Article 6.10 would an appropriate basis for the selection of a sample in the context of an injury investigation. On the dumping side, ensuring that an adequate portion of total exports is investigated might be sufficient to justify imposition of an anti-dumping duty, particularly given that there is a possibility for subsequent refunds if an individual producer is not actual dumping. In the investigation of injury, factors other than the volume of production would seem at least equally, if not more, relevant to ensuring that a sample adequately represents the domestic industry as a whole, sufficient to justify a finding of injury to the domestic industry. Thus, while the volume of production covered by a sample may be relevant in assessing whether a determination based on information from sampled domestic producers satisfies the requirements of Article 3.1, other considerations may also be as relevant, or potentially more relevant.

E. ALLEGED INCONSISTENCY OF VARIOUS ASPECTS OF THE EC'S DETERMINATION OF DUMPING WITH THE AD AGREEMENT

1. Alleged Inconsistency of the EC's Limited Examination with Article 6.10 of the AD Agreement

(a) Alleged insufficiency of Norway's request for establishment

7.134 Before turning to Norway's substantive claims, we address the European Communities' argument that Norway's claim under Article 6.10 is outside the Panel's terms of reference. The EC raised this objection in its second written submission.[310]

7.135 The European Communities argues that Norway's claim that it acted inconsistently with Article 6.10 of the AD Agreement by excluding "mere exporters" from the scope of its examination of dumping, is outside of the Panel's terms of reference because it was not properly identified in Norway's panel request, as required by Article 6.2 of the DSU. In particular, the European Communities alleges that part of the Article 6.10 claim presented by Norway in its written submissions in this dispute is different from the claim presented in its panel request, which according to the European Communities, concerned the *selection* of interested parties investigated, not the *exclusion* of "mere exporters" from the scope of the investigating authority's investigation. Furthermore, the European Communities contends that the question whether an investigating authority is permitted to exclude "mere exporters" from the scope of its investigation does not fall within the subject matter of the obligations contained in Article 6.10, but rather Article 2. Thus, the European Communities argues that Norway's claim is founded on the wrong legal basis and asks the Panel to dismiss Norway's complaint.[311]

7.136 Norway argues that paragraph 4 of its panel request plainly identified Article 6.10 as the legal basis for its claim. Furthermore, according to Norway, the European Communities' view that Article 6.10 permits the exclusion of "mere exporters" is an interpretative question that does not alter the Panel's terms of reference.[312]

7.137 It is well established that a panel's terms of reference are governed by a complainant's panel request, and that a panel request must be consistent with Article 6.2 of the DSU. Article 6.2 reads:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference."

7.138 In general, when faced with a question relating to the scope of its terms of reference, "a panel must scrutinize very carefully the request for establishment of a panel to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU".[313] To this end, below we begin our analysis of the European Communities' objection by closely examining the relevant text of Norway's panel request, which reads:

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[310] EC, SWS, para. 3.

[311] EC, SWS, paras. 3-16.

[312] Norway, Oral Statement at the second substantive meeting (hereinafter "Norway Second Oral Statement"), para. 45.

[313] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 142.

> "Norway considers that the measure is inconsistent with, at least, the obligations of the European Communities under the following provisions of the *Anti-Dumping Agreement* and, where specified, the GATT 1994:
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> ...
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> 4. Article 6.10 because the European Communities determined an individual margin of dumping for a selection of producers that neither constituted a statistically valid sample nor represented the largest percentage of the volume of exports from Norway that could reasonably be investigated; and because the European Communities failed to determine an individual margin of dumping for one of the producers included by the European Communities in the defective sample."[314]

7.139 The European Communities' objection is centred on the first part of item 4 of the panel request, where Norway explicitly contests the margin of dumping calculated for a "selection of producers" on the grounds that they allegedly did not constitute a statistically valid sample nor have exports representing the largest percentage of the volume of exports from Norway that could reasonably be investigated. The Panel understands that the European Communities' concerns are twofold: First, it contends that nothing in the text of the panel request indicates that Norway is making a claim under Article 6.10 of the AD Agreement in respect of the exclusion of "mere exporters" from the scope of its investigation. In other words, to the extent that Norway contests the exclusion of "mere exporters" from the scope of the investigation, the European Communities argues that Norway is now making a new claim that cannot be found in the panel request. Second, the European Communities is of the view that Article 6.10 cannot be the correct legal basis for bringing such a claim, because the exclusion of "mere exporters" from a dumping investigation is, according to the European Communities, a matter that falls within the scope of Article 2 of the AD Agreement, not Article 6.10.

7.140 Norway's panel request identifies a concern with the "selection of producers" actually investigated by the European Communities and the extent to which they "represented the largest percentage of the volume of exports from Norway that could reasonably be investigated". This concern is repeated in Norway's First Written Submission, which explicitly identifies the "European Communities' selection of the sample" and the alleged failure to "examine the largest percentage volume of Norway's exports to the European Communities" as the focus of the claim that the European Communities acted inconsistently with Article 6.10.[315] The exclusion of "mere exporters" from the scope of the investigation is raised in several passages of Norway's First Written Submission.[316] However, it is clear from reading Norway's First Written Submission that this assertion is made not for the purpose of making a new claim under Article 6.10, but rather to substantiate the Article 6.10 claim that is already set out in Norway's panel request. In particular, Norway argues that the European Communities' exclusion of all non-producing exporters from even being considered for inclusion in the EC's investigation of dumping meant that the exports of the producers actually investigated did not represent the largest percentage of the volume of exports that could reasonably be investigated. According to Norway, six of the non-producing exporters excluded from the investigation had greater volumes of exports than eight of the ten producers actually investigated.[317] Thus, Norway's First Written Submission reveals that one of the *arguments* made to substantiate its claim that the European Communities' "selection of producers" was inconsistent with Article 6.10 was that non-producing exporters were excluded *per se* from the investigation. In this

[314] WT/DS337/2, page 2.
[315] Norway, FWS, headings V.A, V.A(iii) and paras. 284, 287 and 319.
[316] Norway, FWS, paras. 294, 297-319.
[317] Norway, FWS, paras. 293.

light, we reject the European Communities' contention that Norway *claims* that the exclusion of "mere exporters" from the dumping investigation was inconsistent with Article 6.10.

7.141 Next, we turn to the European Communities' submission that Article 6.10 is the incorrect legal basis for a claim that the exclusion of "mere exporters" from a dumping investigation is impermissible. First, we note that because we have found that Norway is not bringing such a claim, there is no basis to support the European Communities' objection. In any event, the EC's argument here relates to the substance of Norway's case, rather than to the sufficiency of Norway's request for establishment of a panel. Accordingly, we will address it, to the extent required, as part of our analysis of the substance of Norway's Article 6.10 claim.

7.142 For the above reasons, we therefore dismiss the European Communities' objection to Norway's claim in respect of Article 6.10 of the AD Agreement.

(b) Arguments of the parties

(i) Norway

7.143 Norway claims that, by excluding all *non-producing exporters* from its examination of dumping, and limiting its examination to ten Norwegian *exporting producers*, the European Communities acted inconsistently with Article 6.10. According to Norway, having made the decision to examine ten interested parties, the European Communities was obliged under Article 6.10 to investigate the ten interested parties with the largest possible volume of exports from Norway to the European Communities, irrespective of whether these interested parties were producers, producer-exporters or non-producing exporters. Norway asserts that the facts show that the European Communities failed to comply with this alleged requirement, because it examined only three of the ten interested parties with the largest export volumes to the European Communities.

7.144 Norway submits that nothing in Article 6.10 of the AD Agreement supports the view that one category of interested parties can simply be excluded from the investigation of dumping. Under Article 6.10, an investigating authority must, as a rule, determine an individual margin of dumping "for *each* known *producer or exporter*" (emphasis added by Norway). This general rule places producers and exporters on an equal footing in an investigation. In Norway's view, the word "or" in the text of the first sentence of Article 6.10 has a conjunctive meaning, implying that investigating authorities are required to calculate a margin of dumping for both producers and exporters. This, according to Norway, is supported by the text of several other provisions of the AD Agreement, as well as certain statements of the Appellate Body in the *Mexico – Rice* case,[318] and the Panel in the *Korea – Paper* case.[319] Thus, although the investigating authority is entitled to depart from the general rule by engaging in a limited examination, nothing in the text of Article 6.10 permits an investigating authority to exclude one or other category from the investigation.

7.145 Norway further contends that the exclusion of *non-producing exporters* from an examination of dumping could give rise to distortions that make affirmative dumping determinations more likely because the excluded category of interested parties might have had higher export prices, lower domestic prices or lower costs of production. Referring to certain Appellate Body statements made in the *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Hot-Rolled Steel* case,[320] Norway

[318] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 216, citing Appellate Body Report, *US – Hot-Rolled Steel*, para. 118.

[319] Panel Report, *Korea – Certain Paper*, para. 7.157.

[320] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada ("US – Softwood Lumber V (Article 21.5 – Canada)")*, WT/DS264/AB/RW, adopted 1 September 2006, para. 142; Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

argues that such a result is impermissible because it would not be even-handed and fair. Moreover, Norway submits that investigating authorities must consider all categories of interested parties because pursuant to Article 9.4 of the AD Agreement, the anti-dumping duty that may be imposed on non-investigated parties is based on the determinations of dumping made in respect of the investigated parties.

7.146 Finally, Norway argues that even assuming that the European Communities was entitled to exclude all non-producing exporters from its examination of dumping, the European Communities nevertheless acted inconsistently with Article 6.10 by failing to investigate the ten producers or producer/exporters with the largest volume of salmon exports to the European Communities. In particular, Norway asserts that the European Communities left two producers (Salmar and Bremnes) out of its investigation despite the fact that their exports were greater than other producers included in the European Communities' investigation.

(ii) European Communities

7.147 The EC acknowledges that it chose to investigate only *producers* and *exporting producers*, and that it excluded all *non-producing exporters* from its examination of dumping. However, according to the EC, the AD Agreement not only permits IAs to focus an examination of dumping on producers and exporting producers rather than non-producing exporters, but it also identifies a preference for doing so. The EC presents a number of arguments in support of this position. First, the European Communities argues that the language of Article 6.10 does not compel IAs to examine non-producing exporters. In this regard, the EC argues that the reference to "exporter or producer" in Article 6.10 (as well as in other provisions of the AD Agreement) could be read in "a disjunctive manner so that if a margin is calculated for [a] producer then no corresponding margin need be calculated for the exporter of the goods in question".[321] In this regard, the EC argues that, under certain circumstances, to calculate a margin of dumping for both exporters and producers would result in double-counting and risk applying two sets of anti-dumping duties to a single consignment of imports.

7.148 Secondly, the EC finds support for its position that a focus on producers is preferable under the AD Agreement in the language of Article 2 of the AD Agreement, which it argues shows that the notion of normal value is closely connected to the calculation of production costs, i.e., a producer's pricing behaviour, rather than an exporter. Moreover, the EC argues that a preference for investigating producers over exporters can also be found in Article 2.5 of the AD Agreement. In particular, the EC points to the fact that pursuant to this provision, IAs are entitled to compare the export price from an exporter in an intermediate country with the price of a domestic sale made by a producer in the country of origin, notwithstanding the fact that the exporter may have made sales in the intermediate country at issue. The EC also argues that a preference for assessing margins of dumping for producers and not exporters would increase the effectiveness of anti-dumping measures, a consideration that the EC argues must be regarded as part of the object and purpose of the AD Agreement.

7.149 The EC responds to Norway's allegation that the exclusion of non-producing exporters rendered its determination biased by arguing that the Appellate Body reports relied upon by Norway give no support to the proposition that the mere possibility of different dumping margin outcomes makes a particular methodology biased and illegal. In any case, the EC argues that Norway has provided no factual basis for its claim that the European Communities should have concluded that the exclusion of exporters from the sample would necessarily have distorted the outcome of the investigation.

[321] EC, FWS, para. 142.

7.150 The EC submits that the identification of what level of exports can "reasonably be investigated" may be determined in the light of the consultation procedure that is envisaged under Article 6.10.1 of the AD Agreement. According to the EC, this is exactly what happened in the present case: it chose, on the basis of the facts before it, the 10 producers and producing exporters that made the largest volume of exports to the EC, in the light of the representations made by the Norwegian Seafood Federation ("FHL") during the course of its consultations. In this regard, the EC asserts that Bremnes was not included in its investigation, because it was not identified by FHL in the list of companies it requested the EC to use for limited investigation purposes. As regards Salmar, a company that the EC acknowledges was included in FHL's list, the EC argues that it had no information on the level of exports made by that company and no reason to suspect that these would be large.

(c) Arguments of the third parties

(i) Hong Kong, China

7.151 Hong Kong, China argues that the use of sampling techniques for the purpose of selecting the parties examined in an AD investigation cannot result in the exclusion of an entire category of interested parties. Hong Kong, China argues that such a result finds no support in Article 6.10 nor any other provision of the AD Agreement. According to Hong Kong, China, sampling is an exception to the general rule of Article 6.10 which requires investigating authorities to determine an individual dumping margin for each known exporter or producer. Therefore, it must be strictly interpreted. In the view of Hong Kong, China, sampling deprives interested parties of their usual due process rights, and to the extent that the composition of the investigated parties has a significant impact on the final margins of dumping imposed on selected as well as non-selected parties through the application of Article 9.4, the criteria used to select the parties investigated must guarantee that the selected parties are representative of all exporters and producers from the country of export. Finally, Hong Kong, China also contends that the exclusion of exporters, or other categories of interested parties, may lead to biased results in dumping determination, which runs contrary to the obligation under Articles 2 and 9 to treat exporters and producers evenhandedly as well as the requirement of providing all interested parties a full opportunity for the defence of their interests in accordance with Article 6.2.

(ii) United States

7.152 The United States argues that Article 6.10 does not specify how an investigating authority is to arrive at the largest percentage or which companies must be included in a sample of interested parties selected in accordance with the second sampling method possible under Article 6.10. According to the United States, circumstances may exist in which an investigating authority may appropriately limit its examination to certain categories in accordance with Article 6.10. Therefore, the United States disagrees with Norway's view that, as a general rule, Article 6.10 precludes an investigating authority from limiting the selection of investigated parties to particular categories. Finally, the United States contends that the extent to which the companies selected by the European Communities were representative of the industry as a whole, such as through their cost structure and pricing behavior, is immaterial to evaluating the WTO-consistency of the European Communities' sampling decision, because Article 6.10 does not oblige investigating authorities using the second sampling methodology to generate a "statistically valid" sample, a requirement that applies only when the first sampling methodology is used.

(d) Evaluation by the Panel

7.153 Norway contends that the limitation of the EC's dumping investigation to ten interested parties that were either producers or integrated producer-exporters of salmon was inconsistent with Article 6.10 of the AD Agreement because it did not result in an examination of the largest percentage

of the volume of salmon exports to the European Communities that could reasonably be investigated. Norway argues that the EC failed to comply with Article 6.10 because: (i) six of the non-producing exporters not investigated made greater export sales to the EC than eight of the companies that were investigated; and (ii) two producers ([[XXX]] and [[XXX]]) not included in the ten companies investigated made greater export sales to the EC than several of the producer and integrated producer-exporter companies that were investigated. These two factual assertions (which the EC does not contest), form the basis of the two separate lines of argument that Norway uses to substantiate its claim. We will address the merits of each of these arguments in turn. However, before doing so, we briefly set out some of the pertinent facts surrounding the investigating authority's decision to conduct a limited investigation and its selection of the interested parties to investigate.

(i) Facts

7.154 The possibility that the investigating authority would conduct its investigation into imports of farmed salmon from Norway on the basis of a limited number of interested parties was first publicly communicated in the Notice of Initiation published in the Official Journal on 23 October 2004. Shortly thereafter, on 26 October 2004, the investigating authority met with a representative of the Norwegian Seafood Federation ("FHL"), who also acted on behalf of the Norwegian Seafood Association,[322] to discuss the initiation of the investigation.

7.155 In response to the request for information made in the Notice of Initiation, the investigating authority received information from 102 companies by the 8 November 2004 deadline.[323] These included the responses of 89 companies to the "sampling questionnaire", coordinated through the FHL.[324] Of the 102 companies that provided information, 38 were producers of farmed salmon that also exported farmed salmon to the European Communities either directly or via unrelated exporters.[325]

7.156 On 16 November 2004, the investigating authority asked a number of companies a series of follow-up questions focused on clarifying the relationships between companies operating in the Norwegian salmon industry.[326] One further meeting between the investigating authority and the FHL was held on 17 November 2004 to discuss the identity of the companies that would be selected for examination.[327] At this meeting, the FHL was apparently informed that the investigating authority intended to focus its examination at the producer level, and exclude all non-producing exporters from its investigation.[328] On 18 November 2004, the FHL sent an e-mail to the investigating authority referring to the meeting of 17 November 2004 and proposing ten companies for inclusion in the investigating authority's limited investigation.[329]

7.157 On 22 November 2004, the investigating authority informed the FHL of the ten companies that would form part of its limited investigation.[330] On 24 November 2004, the FHL submitted a letter to the investigating authority requesting that three of the companies selected for the investigation be replaced with two non-producing exporters and one producer.[331] By letter of the same date, the investigating authority responded to the FHL indicating that it intended to pursue its "normal anti-

[322] See, *Note for the File*, 28 October 2004, Exhibit EC-55; *NSL Power of Attorney*, 22 November 2004, Exhibit EC-56.
[323] Provisional Regulation, Recital 16
[324] Exhibit NOR-38.
[325] Provisional Regulation, Recital 15
[326] Exhibit NOR-51.
[327] EC, FWS, para. 176.
[328] See, *Letter of the European Communities to the FHL*, dated 24 November 2004, Exhibit EC-6.
[329] Exhibits EC-4 and EC-52.
[330] Exhibit NOR-39.
[331] Exhibit NOR-47.

dumping policy" of "performing dumping calculations and identify dumping margins on producers rather than exporters" and confirming the companies originally selected for the investigation.[332] This letter also explained that the selected companies would receive a copy of the questionnaire by e-mail to be sent on the same day.

7.158 On 2 December 2004, the Norwegian Government delivered a *Note Verbale* to the EC, in which it argued that the investigating authority's selection of companies for the limited investigation was not "representative". It urged the EC to reconsider the selected companies, in the light of the representations made by the FHL. In this regard, the Norwegian Government's *Note Verbale* identified the same ten companies listed in the FHL's final proposal to the investigating authority, as a selection of companies that would achieve a "representative" outcome.[333] The FHL submitted another letter to the investigating authority on 3 December 2004, in which it stated that it did not regard the companies finally selected for the limited investigation to be "representative for the Norwegian salmon industry", and that it considered the investigating authority's selection unilateral.[334]

7.159 The investigating authority's decision to carry out its investigation at the level of producers and producer exporters was confirmed in the Provisional Regulation, which in pertinent part, reads:

> "In view of the large number of companies involved, it was decided to make use of the provisions for sampling and, for this purpose, a sample of companies, with the largest export volumes to the European Communities was chosen, in consultation with the Norwegian authorities. There were some issues that could not be resolved with the Norwegian authorities, in particular concerning the exclusion from the sample of certain exporters with relatively low export volumes to the European Communities of the product concerned. The requests made by the Norwegian authorities would have meant that the principle for selection of the sample, i.e. to include as many companies that could reasonably be investigated within the time available with the largest possible representative volume of exports, would not have been respected. Therefore those claims could not be accepted. The sample comprises the ten largest Norwegian exporting producers, representing almost 80 per cent of the export volume to the Communities of all co-operating exporting producers."[335]

7.160 Thus, the investigating authority decided to investigate ten companies chosen from a pool of interested parties that was made up of 38 producers and integrated producer-exporters. This pool of interested parties excluded all non-producing exporters.

(ii) The exclusion of non-producing exporters of farmed salmon from the investigation

7.161 The first argument made by Norway in support of its Article 6.10 complaint is centred on the investigating authority's exclusion of all non-producing exporters from the investigation. In particular, Norway argues that the investigating authority's selection of the ten interested parties investigated was inconsistent with the second limited investigation technique described in the second sentence of Article 6.10 because the investigating authority excluded, *ab initio*, all non-producing exporters from even being considered for selection. Article 6.10 reads:

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[332] Exhibit EC-6. This exhibit notes that the investigating authority's intention to follow "normal anti-dumping policy" was also made known to FHL at the meeting of 17 November 2004. Moreover, the investigating authority communicated its intention to "carry out a normal investigation in line with normal policy applied in AD cases" and make "dumping calculations for each producer in the sample" in a letter to the FHL dated 23 November 2004, Exhibit EC-5.

[333] Exhibit EC-59.

[334] Exhibit EC-53.

[335] Provisional Regulation, Recital 17.

> "The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated."

7.162 Article 6.10 first sentence requires that, as a rule, an individual margin of dumping must be determined for "each known exporter or producer concerned". The second sentence provides that when "such a determination" – that is, when a determination of an individual margin of dumping for "each known exporter or producer concerned" – would be impracticable because of the large number of, e.g., exporters and/or producers, one of two forms of limited examination may be possible. In other words, when there is a large number of "known exporter[s] or producer[s] concerned", an investigation may be limited to a smaller number of the "known exporter[s] or producer[s] concerned" through the application of one of two limited examination techniques. In our view, it follows that the starting point for the application of the limited examination techniques set out in the second sentence of Article 6.10 is the pool of interested parties making up all of the "known exporter[s] or producer[s] concerned" for whom, because of their large number, it is "impracticable" to calculate an individual margin of dumping. Thus, the "statistically valid" sample referred to in the second sentence of Article 6.10 is a "statistically valid" sample of all of the "known exporter[s] or producer[s] concerned" for whom it is "impracticable" to calculate an individual margin of dumping. Likewise, the "largest percentage of the volume of the exports ... which can be reasonably investigated" is the "largest percentage of the volume of the exports ... which can be reasonably investigated" in respect of all of the "known exporter[s] or producer[s] concerned" for whom it is "impracticable" to calculate an individual margin of dumping.

7.163 All this implies that the identification of the pool of "known exporter[s] or producer[s] concerned" will be central to the selection of interested parties that is envisaged in the second sentence of Article 6.10. It follows that an assessment of whether a selection of interested parties has been made consistently with the second sentence of Article 6.10 may involve checking whether the starting pool of interested parties from which that selection was made is permissible. If there has been an error in the identification of the starting pool of "known exporter[s] or producer[s] concerned", this would, in our view, invalidate the selection of interested parties carried out under the terms of the second sentence of Article 6.10, at least to the extent that it resulted in a lower percentage of the volume of exports being investigated than could otherwise have reasonably been achieved. To this extent, we find that the exclusion of a particular category of interested parties from even being considered for selection in the group of interested parties investigated is an issue that falls squarely within the scope of Article 6.10 of the AD Agreement.

7.164 Thus, the threshold question that is before us under this part of Norway's claim is whether it is permissible under Article 6.10 of the AD Agreement for an investigating authority to exclude non-producing exporters from the "known exporter[s] or producer[s]" that serve as the starting point for the selection of the interested parties investigated pursuant to the second limited investigation technique described in the second sentence of Article 6.10.

7.165 We recall that the first sentence of Article 6.10 requires investigating authorities to determine an individual margin of dumping for "each known exporter or producer concerned" (underline added).[336] The word "or" has multiple grammatical functions, the most common being the

[336] The full text of Article 6.10 is reproduced above at para. 7.161.

introduction of two or more alternatives into a phrase or sentence.[337] This suggests that the obligation set out in the first sentence of Article 6.10 to "determine an individual margin of dumping" could be understood as leaving open the possibility to determine an individual margin of dumping for only "each known exporter" or, alternatively, only "each known ... producer". In practice, the choice of alternatives (where the exporters and producers are distinct) may be dictated by the particular facts of the proceeding at issue. For instance, when there are only known exporters or only known producers, it may be possible to investigate, and hence determine an individual margin of dumping, for only one of these categories of interested parties. However, on its face, nothing in the text of the first sentence of Article 6.10 indicates that a choice of alternatives may not also be possible when there are both known exporters *and* known producers. Indeed, such a possibility follows naturally from the ordinary meaning of this provision's language. A second usage of the word "or" is to connect two words denoting the same thing.[338] Thus, the obligation to determine an individual margin of dumping for each known exporter or producer may also be understood as an obligation to determine an individual margin of dumping for one and the same entity, a result that would obtain whenever a known exporter was also a producer.

7.166 In our view, neither of these two grammatical functions of the word "or" supports Norway's interpretation of Article 6.10. In this regard, we find it particularly telling that the drafters of the AD Agreement chose to use the word "or" and not the word "and" in agreeing on the text of this provision. This choice of language suggests the drafters intended that Members be left with discretion to choose the focus of their investigations. Indeed, though it is clear that the AD Agreement envisages that the pricing behaviour of both exporters and producers may be examined for the purpose of determining the existence of dumping, there is no preference to investigate one or the other. The provisions of the AD Agreement relating to the calculation of normal value and export price apply equally to investigations in respect of both types of interested parties.

7.167 Thus, the ordinary meaning of the text in Article 6.10 suggests that Members may choose to focus their investigations on either all known exporters, all known producers, or all known exporters and producers. We see that there may well be important reasons for making such a choice. For instance, in certain circumstances, a focus on both known exporters and known producers may result in the calculation of two margins of dumping in respect of the same export transactions. This may arise whenever a producer makes indirect export sales through a non-related exporter (or trader) that sells part of the products purchased from the producer on the domestic market.[339] By including both the exporter and the producer in the investigation, Article 6.10 would dictate that an individual margin of dumping would have to be calculated for each entity. Thus, two determinations of the existence of dumping would have to be made for the same export transactions.

7.168 We do not believe that the first sentence of Article 6.10 was intended to be interpreted in a manner that would require two, potentially very different, determinations of the existence of dumping in respect of the same export transactions. Thus, in our view, the ordinary meaning of the first sentence of Article 6.10 suggests that the "known exporter[s] or producer[s]" that serve as the starting

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[337] New Shorter Oxford English Dictionary, Clarendon Press, 1993.

[338] New Shorter Oxford English Dictionary, Clarendon Press, 1993.

[339] In its response to Panel Question 77, Norway argues that a sale by a producer to an unrelated exporter (or a trader) is a domestic sale, which is "not relevant in assessing a producer's export pricing behaviour for the purpose of a dumping determination". However, Article 2.1 makes clear that it is only sales that are "destined for consumption in the exporting country" that may qualify as domestic sales. Thus, where a producer sells to an unrelated exporter (or a trader) knowing that the product will be exported, that sale cannot, in our view, qualify as a sale intended for domestic consumption. Such a sale could more properly be characterised as a producer's indirect export sale. In respect of the proceeding in dispute, we note that Norway states that, "Norway's producers sell the vast majority [70%] of production to the EC, and just a tiny fraction is sold domestically". Norway, Comments on the European Communities' Answers to Panel Questions 104, 105 and 106.

point for the selection of the interested parties investigated under either of the two limited investigation techniques described in the second sentence of Article 6.10, do not always have to be all known exporters *and* all known producers. We see no provision in the AD Agreement that would explicitly prohibit such interpretation of Article 6.10.

7.169 Norway contends that certain statements of the Panel in *Korea – Certain Paper*, and the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, indicate that the word "or" should have a conjunctive meaning, implying that all known exporters *and* all known producers must always serve as the starting point for the selection of a limited number of interested parties to investigate pursuant to Article 6.10.[340] The statements that Norway relies upon are the following:

> "We note that Article 6.10 mentions 'exporters' and 'producers' of the subject product and requires that an individual margin be calculated for each of them."[341]
>
> "'[M]argins' means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product."[342]

7.170 We do not agree with Norway's characterisation of the relevance of the above statements. In both cases, the question of whether investigating authorities may be entitled to *exclude* known exporters or known producers from an investigation into the existence of dumping was not at issue. Indeed, in both cases, the statements in question were made in the context of claims relating to the treatment of interested parties that had already been *included* in the relevant investigations. Thus, in *Korea – Certain Paper*, the Panel's statement was made when deciding whether Article 6.10 of the AD Agreement permits an investigating authority to treat two or more separate legal entities under investigation as a single exporter and to determine an individual margin of dumping for that exporter.[343] In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body's statement was made in the context of a claim that the Mexican investigating authority acted inconsistently with Article 5.8 of the AD Agreement when it failed to terminate the anti-dumping investigation in respect of two companies that it had found were not dumping.

7.171 Norway also argues that the word "or" should have a conjunctive meaning because, in its view, the same word has a conjunctive meaning when it appears in Articles 2.2.1.1, 2.2.2, 2.2.2(i), 2.2.2(ii), 2.2.2(iii), 4.1(i), 5.2(ii), 6.1.1, 6.10.1, 6.10.2, 6.11, 9.4, 9.5 and 12.2.2 of the AD Agreement.[344] We do not share Norway's opinion. Because of the nature of the functions of the word "or", its meaning in different provisions of the AD Agreement will very much depend upon the obligations at issue and the specific context in which it appears. In this regard, we note that several of the provisions cited by Norway establish obligations on Members in respect of the treatment of exporters and/or producers that may already be subject to investigation. Thus, for instance, the obligations described in Articles 2.2.1.1, 2.2.2, 2.2.2(i), 2.2.2(ii) and 6.1.1 apply in respect of the "exporter or producer under investigation", the "exporter or producer in question", the "exporters or producers subject to investigation" of the "[e]xporters or foreign producers receiving questionnaires used in an anti-dumping investigation". We fail to see how these references relating to the treatment of exporters or producers that have already been *included* in an investigation assist in understanding whether investigating authorities may be entitled to *exclude* known exporters or known producers from an investigation of dumping, and hence the calculation of individual margins, under Article 6.10.

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[340] Norway, Answers to Panel Questions 75 and 76.

[341] Panel Report, *Korea – Certain Paper*, para. 7.157.

[342] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 216, citing Appellate Body Report, *US – Hot-Rolled Steel*, para. 118.

[343] Panel Report, *Korea – Certain Paper*, para. 7.157.

[344] Norway, Answers to Panel Questions 75 and 76.

7.172 In addition, if the word "or" in Article 4.1(i) was given the conjunctive meaning that is argued by Norway, it would only be domestic producers related to *both* exporters and importers that could be disregarded for the purpose of identifying the "domestic industry". In other words, producers related only to exporters or only to importers could not be excluded from the "domestic industry". However, such a outcome is not supported by the ordinary meaning of the language of this provision.[345]

7.173 Likewise, the ordinary meaning of the word "or" does not imply that it must have a conjunctive meaning, in all circumstances, in the context of Articles 5.2(ii) and 9.5. In the case of Article 5.2(ii), we see no reason why an applicant must be compelled to provide information on the identity of both known exporters and producers, especially if it considers that it would be appropriate to focus the investigation only on one or the other interested parties. Likewise, we see no reason why an investigating authority that focused its original investigation on only producers in accordance with Article 6.10, could not also permissibly focus on producers for the purpose of any newcomer review conducted pursuant to Article 9.5.[346]

7.174 Norway also relies upon Article 12.2.2, where the word "or" is used five times in the context of the obligation to publicly notify the "conclusion or suspension" of an investigation whenever there are findings providing for the imposition of a "definitive duty or the acceptance of a price undertaking". Given that the "conclusion" of an investigation and the "suspension" of an investigation are mutually exclusive actions, and that an investigation cannot result in *both* the imposition of a "definitive duty" and the "acceptance of a price undertaking" for any individually investigated company, we cannot see how the word "or" used in these circumstances has the "conjunctive" meaning that Norway contends. Furthermore, we note that the term "exporter or producer" is not found in Article 12.2.2. However, Article 12.2.2 does contains a reference to "exporters and importers". This would seem to imply that when the drafters of the AD Agreement wanted to use the word "and" and not the word "or", they did so.

7.175 We also find contextual support for our reading of the text of the first sentence of Article 6.10 in Article 2.5 of the AD Agreement. We consider significant that the drafters of this provision of the AD Agreement made explicit allowance for the possibility that Members may, in certain situations, focus their investigation into the existence of dumping on the pricing behaviour of producers, notwithstanding the existence of known exporters responsible for making the export sales under investigation. Article 2.5 reads:

> "In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export."

7.176 This provision describes how investigating authorities may perform a comparison between export price and normal value to determine whether sales made by an exporter, operating out of a country that is different from the country of origin of the products sold, are made at dumped prices.

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[345] Norway's view of the meaning of the word "or" would mean that the conditions set out in footnote 11 for determining whether producers shall be deemed to be related to exporters or importers under Article 4.1(i) must be cumulative, even though a plain reading of the language of this footnote indicates otherwise.

[346] Similar considerations would apply in respect of the usage of the word "or" in Articles 6.10.1 and 6.10.2.

In other words, Article 2.5 provides guidance on how to determine the existence of dumping in respect of sales made by an exporter located in a different country to the country of production of the exported products.

7.177 The first sentence prescribes that where products are exported to an importing country from a country that is not the country of origin (an intermediate country), the price at which the products are sold from the country of export shall normally be compared with the comparable price in the country of export. Thus, the first sentence of Article 2.5 establishes a general rule that the pricing behaviour of an exporter operating from an intermediate country will *normally* be the basis for determining the existence of dumping in respect of products exported from the same intermediate country.

7.178 However, the second sentence of Article 2.5 stipulates that the *normal* methodology described in the first sentence may be replaced with one that compares the price at which the products are sold from the country of export with the price in the country of origin, whenever any one of at least three circumstances arise: the products at issue are merely transshipped through the country of export; the products are not produced in the country of export; or, there is no comparable price for the products in the country of export. In effect, the methodology described in the second sentence of Article 2.5 could result in the determination of the existence of dumping through a comparison of the price of a producer's indirect export sales made through an exporter in an intermediate country with the price of the same producer's domestic sales. To this extent, Article 2.5 envisages that investigating authorities may be entitled to focus their determination of the existence of dumping on a producer's pricing behaviour, notwithstanding the existence of a known exporter that is responsible for the export sales under investigation.

7.179 Norway also argues that its interpretation of Article 6.10 is supported by the fact that the exclusion of all non-producing exporters from an investigation could give rise to distortions that make an affirmative dumping determination more likely. According to Norway, because investigating authorities must act in an even-handed and fair manner, an interpretation of Article 6.10 that could make a determination of dumping more likely is impermissible.[347] Norway asserts that in the present case, the investigating authority was aware of this possibility because it had been informed by the FHL during the course of the proceeding that Norwegian "independent exporters (traders)" were "known for low trading costs".[348] We first note that Norway has provided no basis to conclude that in general a decision to focus on producers rather than exporters would likely result in higher dumping margins, nor can we see any reason to so conclude; this would depend entirely upon the facts.[349] Nor, in our view, is the FHL's unsubstantiated assertion as to Norwegian exporters' "trading costs" in this

[347] Norway, FWS, para. 316, citing Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142; and Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

[348] Exhibit NOR-48. Norway also argues (Norway, FWS, para. 317) that the European Commission recognised that "exporters have lower costs than producers because they have different business activities" in a previous anti-dumping investigation into farmed salmon from Norway that was conducted in 1997. However, the passages from the EC's findings in this investigation that Norway cites as support for its proposition reveal only that the European Commission recognised that farmers and traders of farmed salmon in Norway "often defend divergent business interests". See, Norway, FWS, paras. 301-304.

[349] To the extent that Norway may be arguing that the normal value of salmon exporter's domestic sales will invariably be lower than the normal value of a salmon producer, it is not entirely clear to us that this would always be the case. While recognising that the resolution of Norway's claim does not requires us to make any specific findings about how to calculate a non-producing exporter's normal value, we note that one of the options available to investigating authorities under Article 2.2 of the AD Agreement is to construct normal value on the basis of "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits". In addition, Article 2.2.1 of the AD Agreement explicitly envisages that domestic sales (of an exporter or a producer) that are below "(fixed and variable) costs of production plus administrative, selling and general costs" may be treated as being outside of the ordinary course of trade by reason of price.

particular case enough to demonstrate that the investigating authority's exclusion of all non-producing exporters from the investigation resulted in the inclusion of interested parties with higher normal values, relative to export prices, than would otherwise have been the case, thus making an affirmative determination of dumping more likely.

7.180 Finally, Norway argues that contextual support for its interpretation of Article 6.10 may also be found in Article 9.4 of the AD Agreement, which Norway contends requires investigating authorities to consider all categories of interested parties for inclusion in a limited investigation.[350] We are not convinced by Norway's argument. First, we note that nothing in the text of Article 9.4 requires that the anti-dumping duties applied to non-investigated parties must be derived from the margins of dumping calculated for the investigated parties that have been chosen from all categories of interested parties. Indeed, Article 9.4 addresses the level of anti-dumping duties that may be applied to non-investigated parties, not the selection of investigated parties. Secondly, as we have observed above, there may be valid reasons for an investigating authority to exclude a category of interested parties from an investigation (for example, avoiding the determination of two margins of dumping for the same export transactions). Thus, it does not automatically follow that an investigating authority would be acting unfairly if it were to apply anti-dumping duties on non-investigated parties on the basis of the margins of dumping determined for investigated parties that were not chosen through a consideration of all categories of interested parties.

7.181 For all of the above reasons, and in the light of standard set out in Article 17.6(ii) of the AD Agreement, we do not agree with Norway when it claims that the EC's interpretation of Article 6.10 is impermissible. We therefore dismiss Norway's claim that the investigating authority's selection of the ten interested parties investigated was inconsistent with the second limited investigation technique described in the second sentence of Article 6.10 because the investigating authority excluded, *ab initio*, all non-producing exporters from even being considered for selection.

(iii) The investigated parties did not constitute the "largest percentage of exports that could reasonably be investigated"

7.182 Norway argues that even assuming that the EC was entitled to exclude all non-producing exporters from the investigation, the producers and producer-exporters finally selected did not account for the largest volume of exports that could be reasonably investigated because two producers, Bremnes and Salmar, which exported more than several of the investigated companies, were left out of the EC's limited investigation. The question before us under this part of Norway's claim is whether the investigating authority acted consistently with the second sentence of Article 6.10 by not investigating two producers of salmon that allegedly exported a larger volume of salmon to the EC than several of the companies actually investigated.

Bremnes

7.183 The European Communities asserts that Bremnes was not investigated because it was not among the companies that the FHL requested be included in the investigation during consultations.[351] It argues that in identifying the companies that would be subject to its limited investigation – i.e., in determining the largest percentage of the volume of exports to the EC which could reasonably be investigated – it gave preference to the companies proposed by FHL to the extent that they matched its stated policy of investigating producers or producer/exporters.[352] The European Communities argues that it was entitled to do so because, in its view, Article 6.10.1 of the AD Agreement envisages

[350] Norway, FWS, para. 318.
[351] EC, FWS, para. 191; EC, SWS, para. 81.
[352] EC, Answer to Panel Question 74.

the possibility that investigating authorities may take into account the representations of exporters and producers concerned when selecting the entities that will be the subject of a limited investigation.[353]

7.184 Norway argues that Article 6.10.1 is a procedural obligation which cannot affect the application of the substantive obligation to select by the largest percentage of the volume of exports that can be reasonably investigated.[354] To this end, Norway argues that the consultations that are envisaged under Article 6.10.1 are intended to address issues that go to ensuring that the substantive obligations in Article 6.10 are complied with, including "(1) which sampling option in Article 6.10 should be used; (2) the accuracy and interpretation of the data before the authority (e.g., the significance of the export data in the sampling returns, the identity of the largest exporters, etc.); and (3) how many companies can reasonably be investigated".[355]

7.185 Article 6.10.1 reads:

> "Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned."

7.186 Article 6.10.1 requires that the selection of interested parties for the purpose of either of the two types of limited investigation described in the second sentence of Article 6.10 "shall preferably" be undertaken in "consultation with and with the consent of" the relevant exporters, producers or importers. On its face, this requirement reveals a preference for selecting the interested parties that will be subject to a limited investigation in close cooperation with the exporters, producers or importers concerned.

7.187 To give this preference the meaning that Norway advocates would render the selection of interested parties by the largest percentage of the volume of exports which can reasonably be investigated a purely mathematical exercise. It would mean that only the largest exporting companies could ever be selected for investigation through the application of this limited examination technique. However, to the extent that it refers to the largest percentage of the volume of exports which can "reasonably" be investigated, the text of the second sentence of Article 6.10 suggests that such an outcome was not intended. In particular, the word "reasonably" implies that the objective of this limited examination technique is to identify the largest percentage of the volume of exports that it would be reasonable for an investigating authority to investigate.

7.188 In our view, the volume of export sales that may be reasonable for an investigating authority to investigate is a question that must be assessed on a case-by-case basis, taking into account all relevant facts that are before the investigating authority, including the nature and type of interested parties, the products involved and the investigating authority's own investigating capacity and resources. We see no reason why this assessment might not also be informed by the matters raised during consultations pursuant to Article 6.10.1.

7.189 Unlike Norway, we do not believe that the possibility that the investigated parties may be selected without the consent of the interested parties supports Norway's position.[356] We doubt that the drafters intended to encourage a mechanism for consultations while limiting the ability of the investigating authority to take into account the preferences expressed by exporters, producers and importers in those consultations. This does not mean that all information submitted or requests made during such consultations must be accepted by an investigating authority. There may well be

[353] EC, FWS, paras. 161-167.
[354] Norway, Answer to Panel Question 53.
[355] Norway, Answer to Panel Question 53.
[356] *See*, Norway, Answer to Panel Question 53.

disagreement on part or all of the matters raised during consultations. However, ultimately, what will be important for the purpose of compliance with Article 6.10, is that the investigated parties that are selected account for the largest percentage of the volume of exports which can reasonably be investigated, in the light of all relevant facts and circumstances, including those presented during any consultations, regardless of whether there is the consent of the interested parties involved in those consultations.

7.190 In the present case, consultations took place between the investigating authority and the FHL with a view to selecting the investigated parties. Following two meetings with the investigating authority,[357] the FHL submitted by e-mail dated 18 November 2004 a list of interested parties that it considered should be included in the investigation.[358] This list did not identify Bremnes as a potential candidate for the investigating authority's limited investigation. It proposed ten companies for selection, two producer-exporters, four exporters and four producers.[359] One of the producers was a company that the FHL knew had reported fewer export sales to the EC than Bremnes.[360] To this extent, the FHL's first proposed list of potential limited investigation candidates did not signal a concern with the possibility that producers with fewer export sales to the EC than Bremnes could be investigated. Indeed, according to the FHL's own data submitted with its proposal, only four of the companies it had nominated for selection were among the 15 largest Norwegian exporters of salmon.[361]

7.191 By letter dated 22 November 2004, the investigating authority informed the FHL of the identity of ten companies selected for the limited investigation, confirming that it had decided to focus its investigation on only producers and exporting-producers.[362] The selected companies included four of the companies that the FHL had proposed (two producer-exporters and two producers).[363] The investigating authority also included one other producer company that, although not identified by the FHL, was part of the group of companies belonging to one of the four exporters it had proposed.[364] The remaining five companies selected by the investigating authority were not included in the FHL's original proposal.

7.192 In a second proposal to the investigating authority, the FHL "in the spirit of positive cooperation and serious attempt to find a common solution",[365] agreed to the inclusion of seven of the ten companies identified by the investigating authority in its letter of 22 November 2004, on the condition that three selected companies be replaced by two non-producing exporters and one producer.[366] Notably, the FHL did not contest the fact that Bremnes was not included in the selection of companies, even though it was aware that the volume of exports of the interested parties would

[357] The first meeting was held on 26 October 2004 (Exhibit EC-55); and the second meeting on 17 November 2004 (Exhibit NOR-39).

[358] Exhibits EC-4 and EC-52; Exhibit NOR-47.

[359] Exhibits EC-4 and EC-52.

[360] The producer in question was Langfjordlaks. In its "sampling questionnaire" response, which was submitted to the investigating authority through the FHL, Langfjordlaks reported export sales to the EC of [[XXX]] kgs. Bremnes reported export sales to the EC of [[XXX]] kgs. See, Exhibit NOR-38.

[361] Exhibit NOR-47.

[362] The investigating authority's intention to follow its "normal anti-dumping policy" was apparently first made known to FHL at the meeting of 17 November 2004. Exhibit EC-6.

[363] Marine Harvest Norway AS, Fjord Seafood Norway AS / Fjord Seafood Sales AS, Nordlaks Oppdrett AS and Sinkaberg-Hansen.

[364] Hydroteck AS, part of the Leroy Seafood Group AS.

[365] Exhibit NOR-47.

[366] Exhibit NOR-47. The two non-producing exporters were Hallvard Leroy AS and Seabon AS. The producer was Salmar AS.

play a central role in the investigating authority's selection decision,[367] and that Bremnes' export sales were larger than four of the companies included in the investigating authority's selection.[368] In other words, the FHL would have accepted a selection of interested parties to be investigated that excluded Bremnes, had the investigating authority agreed to replace three selected companies with the two non-producing exporters and one producer it had nominated. As with its first proposal, the FHL's conditional acceptance of the investigating authority's selection of companies did not signal a concern with the possibility that producers with fewer export sales to the EC than Bremnes could be investigated.

7.193 The investigating authority responded to the FHL's revised proposal by rejecting the requested modifications to the selected parties, and confirming the ten selected companies. The investigating authority did not accept the FHL's two non-producing exporter nominations because of its desire to pursue its "normal anti-dumping policy" of "performing dumping calculations and identify dumping margins on producers rather than exporters".[369] In this regard, the investigating authority considered that by "selecting 4 integrated producer/exporters, [it] assured that a large proportion of the export industry is already covered".[370] The investigating authority dismissed the FHL's proposal to replace "one of the independent farmers in the south" with "one independent farmer from the middle of Norway",[371] by stating that, in its view, the selected interested parties already provided "good geographical coverage of the Norwegian coast".[372]

7.194 Finally, on 3 December 2004, the FHL sent another communication to the investigating authority informing it that it did not consider the companies finally selected for the limited investigation to be "representative for the Norwegian salmon industry".[373] The letter identified the same ten companies listed in the FHL's second proposal, arguing that only these companies would make the "sample representative". The details of the letter reveal that the notion of representativeness that the FHL had in mind involved the selection of different types of companies (three producer-exporters, five producers and two non-producing exporters), of different sizes (large and medium) from different regions of Norway (south, mid, western and northern coast).[374] Once again, the FHL did not mention Bremnes in its communication.

7.195 Thus, to the extent that the FHL (i) explicitly requested that companies not among the largest Norwegian exporters of salmon be included in the limited examination; and (ii) conditionally agreed

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[367] For instance, the Notice of Initiation indicated that the selection of investigated parties would be conducted pursuant to Article 17 of *Council Regulation EC No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community*, which identifies two limited investigation techniques that are similar to those described in Article 6.10 of the AD Agreement as the only bases for limiting an investigation. One of these consists of selecting "the largest representative volume of production, sales or exports which can reasonably be investigated within the time available". In addition, the investigating authority's letter to the FHL of 22 November 2004 identifying the "sampled companies" indicates, *inter alia*, that the selection ensured "a large coverage" of "exports to the EU25". Exhibit NOR-39.

[368] The FHL submitted "sampling questionnaire" responses on behalf of [[XXX]], [[XXX]], [[XXX]], [[XXX]] and [[XXX]]. These responses showed that [[XXX]] exported a greater volume of sales to the EC than [[XXX]], [[XXX]], [[XXX]] and [[XXX]] (Exhibit NOR-38).

[369] Exhibit EC-6. The investigating authority communicated its intention to follow "normal anti-dumping policy" also at the meeting of 17 November 2004, and in a letter to the FHL dated 23 November 2004, Exhibit EC-5. We note that we have already found that Norway has not established that the investigating authority's exclusion of non-producing exporters from the investigation was inconsistent with Article 6.10. *See*, paras. 7.161-7.181.

[370] Exhibit EC-6.

[371] Exhibit NOR-47.

[372] Exhibit EC-6.

[373] Exhibit EC-53.

[374] The same focus on selection ten companies that were "representative" of the Norwegian salmon industry is also present in the Norwegian government's *Note Verbale* of 2 December 2004. Exhibit EC-59.

with the selection of four companies that made fewer export sales to the EC than Bremnes, it is evident that the FHL considered that a selection of producer companies that would result in a limited investigation covering less than the largest percentage of the volume of exports to the EC that was mathematically possible would be acceptable. In fact, the FHL (like the Norwegian government[375]) was interested in achieving an investigation into a level of exports to the EC made through ten companies that it considered would be representative of the Norwegian salmon industry. In this light, and notably, in the absence of any FHL request to select Bremnes, we find that the investigating authority did not act inconsistently with Article 6.10 when, in the light of the consultations it held with the FHL, it did not include Bremnes in the ten companies selected for its limited investigation. We therefore dismiss this part of Norway's claim under Article 6.10.

Salmar

7.196 The European Communities argues that the investigating authority did not include Salmar in the limited investigation because at the time of the selection of companies, there was no specific information before the investigating authority in respect of Salmar's volume of exports to the EC. In particular, the EC notes that Salmar had responded to the "sampling questionnaire" indicating that it made zero sales for export to the EC; and that it provided no response to the investigating authority's follow-up questions on company relationships. The EC also asserts that the investigating authority had no pre-existing knowledge of Salmar from its previous trade remedy investigations into farmed salmon from Norway, and that the FHL, which had coordinated Salmar's response to the "sampling questionnaire", made no effort to bring the level of Salmar's export sales to the investigating authority's attention. According to the EC, the FHL consistently presented Salmar as a "producer". Furthermore, the list of the 15 largest exporters that was annexed to the FHL's first proposal did not include Salmar.[376]

7.197 Norway recognizes that Salmar did not report that it made export sales to the EC in its response to the "sampling questionnaire".[377] However, Norway considers that there was sufficient information before the investigating authority to cause it to suspect that Salmar's exports to the EC could have been significant. In particular, Norway asserts that the investigating authority knew: (i) Salmar's volume of production was among Norway's largest; (ii) a large part of this production had to be exported because it was several times larger than total Norwegian consumption; (iii) the EC was an almost certain destination because it is Norway's main export market; and (iv) FHL proposed Salmar, further signalling that the company was a significant exporter to the EC. In this light, Norway argues

[375] Norwegian government *Note Verbale* of 2 December 2004. Exhibit EC-59.

[376] EC, FWS, paras. 188-190; EC, SWS, paras. 79-80; EC, Answers to Panel Questions 11, 74b and 104.

[377] Norway argues that Salmar reported zero export sales to the Ec as a direct consequence of the formulation of the questions in the "sampling questionnaire". In particular, Norway contends that the "sampling questionnaire" did not explicitly request Norwegian companies to provide information on exports to the EC via unrelated exporters. (Norway, FWS, para. 325). While we recognize that the questionnaire did not explicitly ask for information about export sales made through *unrelated* exporters, it is equally true that it did not explicitly request information about export sales made through *related* exporters or directly by the companies themselves. The relevant sections of the questionnaire asking for export information read: "Turnover in local currency sold for export to EU 25 – 1/10/03 to 30/09/04" and "Volume in Kg sold for export to EU 25 – 1/10/03 to 30/09/04". We note that faced with the same questionnaire as Salmar, several other Norwegian companies that made sales to the EC through unrelated exporters (e.g., [[XXX]], [[XXX]] and [[XXX]]) reported this fact to the investigating authority in their responses to the questionnaire. Exhibit NOR-38.

that it was incumbent on the investigating authority to at the very least investigate the extent to which Salmar exported to the EC.[378]

7.198 Salmar's response to the EC's "sampling questionnaire" indicated that it sold [[XXX]] kgs of farmed salmon on the domestic market and that it made zero export sales to the EC in the relevant period.[379] According to Norway, the investigating authority knew from its prior trade remedy investigations into farmed salmon from Norway, that this volume of domestic sales could not be absorbed in its entirety into Norway's domestic market,[380] and that it was more than likely that a large part of it would have to be exported to the EC.[381] The EC has not contested the assertion that, at the time of the selection of the investigated parties, the investigating authority knew that the Norwegian domestic farmed salmon market could not absorb all of Salmar's reported sales; nor that a large proportion of Norwegian salmon production is exported to the EC. Rather, the EC argues that at the time the investigated parties were selected, the investigating authority did not have information enabling it to conclude that Salmar's production was being exported to the EC. [382]

7.199 We note that of the ten companies selected for the investigating authority's limited investigation, two producers, Nordlaks and Sinkaberg-Hansen, responded to the "sampling questionnaire" without identifying an amount of export sales of farmed salmon to the EC. Contrary to Salmar, these producers indicated in the narrative of their replies that they sold their production to Norwegian exporters.[383] However, another company that was also included in the investigating authority's selection, Stolt Seafarm, did not submit a "sampling questionnaire" at all. The EC argues that the investigating authority included Stolt Seafarm in its limited investigation because, unlike Salmar, Stolt Seafarm was a known producer-exporter with a history of cooperation with the investigating authority in previous anti-dumping and anti-subsidy cases. In this regard, the EC asserts that the investigating authority was aware of the level of Stolt Seafarm's exports to the EC because of the Undertaking Stolt Seafarm entered into during the 1997 anti-dumping and anti-subsidy investigations into farmed salmon from Norway.[384]

7.200 In our view, the fact that the investigating authority included Stolt Seafarm in the ten companies selected for the limited investigation on the basis of information obtained from previous trade remedy investigations confirms not only that the investigating authority considered information obtained from its previous trade remedy investigations relevant to the selection of the investigated

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[378] Norway, FWS, paras. 322-327; Norway, SWS, paras. 137; Norway, Answers to Panel Questions 54, 79, 132; Norway, Comments on the European Communities' Answers to Panel Questions 104, 105 and 106; and Norway, Second Oral Statement, para. 42.

[379] Exhibit NOR-38.

[380] Norway, Second Oral Statement, para. 42; Norway, Comments on the European Communities' Answers to Panel Questions 104, 105 and 106, referring to Recital 72 of *Council Regulation EC No. 930/2003 of 26 May 2003 terminating the anti-dumping and anti-subsidy proceedings concerning imports of farmed Atlantic salmon originating in Norway*, where the investigating authority found that "given the specific characteristics of the Norwegian domestic market, a percentage of at least 4 per cent of the volume of exports of the product concerned to the Community (instead of the usual 5 per cent) was held as sufficient to consider domestic sales to be representative". Exhibit NOR-5.

[381] Norway, Second Oral Statement, para. 42; Norway, Comments on the European Communities' Answers to Panel Questions 104, 105 and 106, referring to various Recitals of *Commission Regulation EC No. 1447/2004 of 13 August 2004 imposing provisional safeguard measures against imports of farmed salmon* and *Commission Regulation EC No. 206/2005 of 4 February 2005 imposing definitive safeguard measures against imports of farmed salmon*, which when read together suggest that over 65 per cent (66.9 per cent according to Norway) of Norwegian production of farmed salmon in 2003 was exported to the EC. Exhibits NOR-6 and NOR-7.

[382] *See*, e.g., EC, Answer to Panel Question 104, where the EC was directly asked to respond to Norway's assertions.

[383] Exhibit NOR-38.

[384] EC, Answer to Panel Questions 105 and 106.

parties, but also that the investigating authority must have been aware of the particular characteristics of the Norwegian salmon industry that Norway asserts were within its knowledge. Indeed, as we have already noted, the EC has not contested this assertion.

7.201 We recall that the interested parties to be investigated were selected in the context of consultations between the investigating authority and the FHL, during which Salmar was consistently identified in the list of producer companies that the FHL considered should be investigated. The EC suggests that this fact – i.e., that the FHL identified Salmar as a "producer" in its submissions – was significant. However, we note that on the basis of the investigating authority's own approach, it was not interested in exporter companies, but rather producers and exporting producers. Thus, at the time of its consultations with FHL and at the time it selected the investigated companies, the investigating authority's focus would have been on the producer and exporting producer companies identified in FHL's submissions – which included Salmar. For the same reason, we do not consider the fact that Salmar was not listed as one of the 15 largest exporters in the list provided by the FHL to be significant. Indeed, ultimately, only four of the ten companies chosen by the investigating authority were named on that list.

7.202 The EC contends that Salmar never replied to the investigating authority's "second sampling questionnaire" and suggests that this is also a significant fact. By "second sampling questionnaire" we understand the EC to be referring to the follow-up questions it asked that were focused on clarifying the relationships between companies operating in the Norwegian salmon industry. Although the EC considers this to be an uncontested fact, Norway has not accepted the EC's assertions.[385] Moreover, the EC has provided no evidence to prove that any such questionnaire was ever sent to Salmar.

7.203 Thus, in the light of the foregoing, and given that the investigating authority knew (i) that Salmar was among the largest producers in Norway, and (ii) that the characteristics of the Norwegian salmon industry were such that it was likely that a large proportion of Salmar's production would be exported to the EC, we believe that it was incumbent on the investigating authority to try to remove any doubts about Salmar's exports by asking the FHL (or Salmar directly) for clarification. In the particular circumstances of this case, we do not believe it is sufficient for the EC to seek to justify the investigating authority's exclusion of Salmar on the grounds that the FHL (and Salmar) failed to expressly identify the level of Salmar's export sales to the EC.

7.204 Finally, we note that a lack of information about whether Salmar made export sales to the EC was not the basis of the investigating authority's rejection of the FHL's request to include Salmar in the limited investigation. The only basis for excluding Salmar's candidature that was communicated in writing to the FHL was that Salmar was not needed to achieve a geographically balanced selection of investigated companies.[386] While we recognize that the investigating authority's written communication was made in response to the FHL's explicit request to include Salmar in order to balance the geographical representativeness of the chosen companies,[387] we believe that a genuine concern about an alleged lack of information in respect of the destination of Salmar's exports might, and perhaps should, also have served to dismiss FHL's request.

7.205 Thus, for all of the above reasons, we find that the EC's failure to include Salmar in the ten companies selected for the limited investigation was inconsistent with Article 6.10 of the AD Agreement.

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[385] Norway, FWS, para. 325; Norway, Answer to Panel Question 132; Norway, Comments on EC's Comments on the Interim Report, paras. 42-43.

[386] Exhibit EC-6.

[387] Exhibit NOR-47.

2. Alleged Inconsistency of the EC's Determination that Certain Below-Cost Sales Were Outside of the Ordinary Course of Trade with Articles 2.2.1 and 2.2 of the AD Agreement

(a) Arguments of the parties

(i) Norway

7.206 Norway claims that the investigating authority excluded the domestic sales of certain investigated companies from its calculation of normal value, on the grounds that they were outside of the ordinary course of trade by reason of price, in a manner that was inconsistent with the EC's obligations under Article 2.2.1 of the AD Agreement. Norway furthermore claims that, as a consequence, the EC failed to comply with Article 2.2 of the AD Agreement because the investigating authority constructed normal value for the relevant companies on the basis of a flawed finding that their domestic sales were outside of the ordinary course of trade.

7.207 Norway argues that Article 2.2.1 requires that before proceeding to exclude below-cost sales from the calculation of normal value, for being outside of the ordinary course of trade by reason of price, an investigating authority must "determine" the existence of three cumulative conditions: (i) that the below-cost sales are made within an extended period of time; (ii) that the below-cost sales are made in substantial quantities; and (iii) that the below-cost sales are made at prices that do not provide for the recovery of all costs within a reasonable period of time. Norway contends that in excluding the domestic sales from its calculation of the normal values of the companies at issue, the investigating authority failed to "determine" that the third of these conditions was satisfied.[388]

7.208 According to Norway, the word "determine" in Article 2.2.1 has the meaning given by the Appellate Body to the same word appearing in other provisions of the AD Agreement. Thus, Norway argues that the obligation to "determine" that below-cost sales are made at prices that do not provide for the recovery of all costs within a reasonable period of time requires a "reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination".[389] Norway submits that, in the light of the ordinary meaning of the word "reasonable", a determination of the "reasonable period of time" may only be achieved on a case-by-case basis, taking into account the "normal commercial practice" of a particular industry. Norway asserts that the investigating authority failed to make any such determination because it did not make an assessment of the appropriate "reasonable period of time" in the light of the particular circumstances of the investigation.

7.209 Furthermore, in response to the EC's contention that the investigating authority was entitled to apply a working rule that equated the reasonable period of time with the period of investigation, Norway argues that nothing in the findings shows that the EC actually adopted such a rule. In any case, even if such a rule were adopted, the EC could not rely on it if it was not made known to the interested parties, which Norway contends was not the case in the present investigation.

7.210 Norway also contends that the obligation to "determine" that below-cost sales are made at prices that do not provide for the recovery of all costs within a reasonable period of time means that

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[388] Norway, FWS, para. 341.

[389] Norway, FWS, para. 339; Norway, SWS, para. 141; Norway, Answer to Panel Question 80, referring to Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779, para. 111; Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("*US – Zeroing (Japan)*"), WT/DS322/AB/R, adopted 23 January 2007, para. 182 and Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, ("*US – Anti-Dumping Measures on Oil Country Tubular Goods*"), WT/DS282/AB/R, adopted 28 November 2005, para. 283.

an investigating authority must provide an "explanation" of its "determination" that is "clear and unambiguous" and explicit.[390] Norway submits that the investigating authority failed to make any such determination because its findings did not include an explicit and unambiguous explanation of why the prices of the sales discarded did not provide for the recovery of costs within a reasonable period of time. Indeed, according to Norway, the investigating authority's findings did not state the duration of the "reasonable period of time", and did not even mention "cost recovery" within a "reasonable period of time".

7.211 Finally, Norway argues that the investigating authority could not have even made the required determination implicitly, because the tests applied by the investigating authority for the purpose of identifying below-cost sales that could be treated as not being made in the ordinary course of trade by reason of price did not verify whether the below-cost sales were made at prices that could not recover costs within a "reasonable period of time".[391] In this regard, Norway submits that absent a determination that the "reasonable period of time" equalled the period of investigation, the mere fact that the investigating authority's profitability test compared prices with average costs over the period of investigation does not necessarily mean that those costs would not be recovered over a reasonable period of time.

(ii) European Communities

7.212 The EC submits that the investigating authority was not obligated to "determine", in the sense that is argued by Norway, that the appropriate "reasonable period of time" for the particular investigation at issue was the period of investigation. The EC advances various arguments in support of this contention.

7.213 First, the EC argues that the "reasonable period of time" test is part of the notion of sales below cost, and not an additional criterion applied to such sales in order to decide whether they may be discarded in the determination of normal value. According to the EC, the first sentence of Article 2.2.1 does not establish three conditions that must be fulfilled before finding that below-cost sales may be treated as not being made in the ordinary course of trade, but only two. In this regard, the EC argues that the true meaning of the first sentence of Article 2.2.1 can only be discovered if the obligation to "determine" that below-cost sales do not provide for the recovery of costs within a reasonable period of time is seen not as an additional requirement but as an elucidation of the initial definition of the class of sales to which the Article 2.2.1 is addressed. In other words, the EC argues that sales are to be understood as being below-cost only if their prices would not permit recovery of all costs within a reasonable period of time. Thus, the EC submits that the first sentence of Article 2.2.1 defines a class of sales (those made below costs based on a reasonable period of time), whose prices may be disregarded in calculating normal value only if two conditions are satisfied (those of the "extended period" and the "substantial quantities").

7.214 Secondly, the EC argues that the second sentence of Article 2.2.1 stands for the proposition that all sales (whether above or below per unit costs at the time of sale) will be considered to provide for the recovery of costs within a reasonable period of time to the extent that their prices are above the weighted average per unit costs for the period of investigation. The EC submits that this implies that the "reasonable period of time" is not one that must be determined for each investigation, but one that may be adopted as a "working rule" by Members.[392] According to the EC, the adoption of such a

[390] Norway, SWS, para. 139; Norway, Answer to Panel Question 80, citing Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("*US – Line Pipe*"), WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, 1403, paras. 194 and 217; Appellate Body Report, *US – Steel Safeguards*, paras. 296 and 442.

[391] Norway, FWS, paras. 360-369.

[392] EC, Answer to Panel Question 80.

working rule is permissible, because Members may adopt general rules when implementing the AD Agreement,[393] provided that these are not applied with "complete rigidity".[394] Thus, the effect of the last sentence of Article 2.2.1 is to shift the burden of proof, in the sense that if a Member adopts a working rule that prices will not be regarded as allowing for the recovery of costs unless the price is above average costs in the investigation period, the onus would be on the party concerned to show that, despite failing this standard, the price of a sale was sufficient to allow recovery of costs within a reasonable period of time.

7.215 The EC asserts that, in the investigation at issue, the investigating authority assessed whether below-cost sales could be excluded from the calculation of normal value for being outside of the ordinary course of trade by reason of price through the application of its "normal" "working rule" of equating the "reasonable period of time" with the twelve month period of investigation. It asserts that there is no evidence that the investigated companies were unaware of the EC's intentions regarding the way in which the issue of sales below cost would be determined; and no evidence to indicate that the investigated companies at any time questioned the appropriateness of the EC's conduct.

7.216 While recognising its non-binding character, the EC recalls that a Recommendation of the Committee on Anti-dumping Practices Concerning Periods of Data Collection,[395] explicitly stipulates that the period of data collection for investigating sales below cost should normally coincide with the period of investigation for dumping. The EC argues that this Recommendation, on its own, as well as in the context of the subsequent practice it has established in the application of Article 2.2.1, within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties, supports its interpretation of Article 2.2.1.

7.217 Finally, the EC argues that the profitability test actually applied by the investigating authority satisfied the substantive obligations under Article 2.2.1. In particular, the EC submits that the profitability test, to the extent that it compared whether net sales prices were above the weighted average cost of production for the period of investigation, properly addressed the question of whether any below-cost sales were made at cost recovery prices.

(b) Arguments of the third parties

(i) Japan

7.218 Japan argues that the ordinary meaning of the word "determine" implies that investigating authorities must make a reasoned finding on the basis of positive evidence that below-cost sales do not provide for the recovery of all costs within a reasonable period of time. Thus, Japan contends that investigating authorities must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of examination.

7.219 Japan argues that the principle of effective treaty interpretation demands that the terms "a reasonable period of time" and "the period of investigation" must be attributed a different meaning. In this regard, Japan recalls that the Appellate Body has found that "[t]he word 'reasonable' implies a degree of flexibility that involves consideration of all of the circumstances of a particular case."[396] Thus, according to Japan, the length of the "reasonable period of time" for the purpose of Article 2.2.1 will depend upon specific circumstances of the investigation. It would be inconsistent with

[393] EC, Answer to Panel Question 80, referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 148.

[394] EC, Answer to Panel Question 80.

[395] Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, G/ADP/6, adopted 5 May 2000, Exhibit EC-7.

[396] Appellate Body Report, *US - Hot-Rolled Steel*, para. 84.

Article 2.2.1 if an investigating authority were to determine that the "reasonable period of time" was identical to the period of investigation in every case, without due examination of whether or not such a period was reasonable under the specific situations of the case at hand.

(ii) United States

7.220 The United States submits that Article 2.2.1 does not preclude an investigating authority from using the period of investigation as "a reasonable period of time" or oblige an investigating authority to define the reasonable period of time differently from case to case. In this regard, the United States notes that the cost recovery test described in Article 2.2.1, second sentence, deems the period of investigation to be the reasonable period of time. While arguing that this factual scenario is not exhaustive of the situations when below-cost sales may be found to provide for cost recovery within a "reasonable period of time", the United States contends that Article 2.2.1, second sentence, stands for the proposition that using the investigation period to assess whether costs were recovered in a reasonable period of time is not necessarily inconsistent with Article 2.2.1.

7.221 According to the United States, the ordinary meaning of "determine" is to "settle or decide (a dispute, controversy, etc., or a sentence, conclusion, issue, etc.) as a judge or arbiter." Consistent with this definition, Article 2.2.1 requires the investigating authority to "decide" whether below-cost sales do not provide for the recovery of all costs within a reasonable period of time.

7.222 Finally, the United States argues that the fact that the EC identified sales as outside the ordinary course of trade based on criteria other than those identified in Article 2.2.1 would not alone support the conclusion that it acted inconsistently with that provision. This is because sales may be treated as outside the "ordinary course of trade" for reasons other than those set forth in Article 2.2.1, first sentence.

(c) Evaluation by the Panel

7.223 Norway claims that the investigating authority acted inconsistently with Article 2.2.1 of the AD Agreement when it excluded the below-cost domestic sales of five companies from its calculation of their respective normal values, without first "determining" whether such sales were made at prices that did not provide for the recovery of all costs within a reasonable period of time. We understand Norway to be arguing that the investigating authority did not make the requisite "determination" because: (i) it failed to make a reasoned assessment of the appropriate length of the "reasonable period of time" in the light of the particular circumstances of the investigation; (ii) it did not provide an explicit, clear and unambiguous explanation of why the below-cost sales at issue were made at prices which did not provide for the recovery of cost within a reasonable period of time; and (iii) the tests applied to exclude the below-cost sales at issue were not of the kind that could evaluate whether they were made at prices that did not provide for the recovery of all costs within a reasonable period of time. We will address each of Norway's arguments below. However, before doing so, we briefly set out some of the pertinent facts surrounding the investigating authority's exclusion of the domestic sales at issue.

(i) Facts

7.224 The investigating authority's determination of the investigated companies' normal values is first described in theProvisional Regulation.[397] The investigating authority proceeded in multiple steps. First, it examined whether the domestic sales of the investigated companies were made in "representative" quantities within the meaning of Article 2(2) of the EC's Basic Anti-Dumping

[397] Provisional Regulation, Recitals 19-31 (Exhibit NOR-9), confirmed without modification in the Definitive Regulation, Recital 11, Exhibit NOR-11.

Regulation.[398] The investigating authority undertook this assessment at both the level of overall domestic sales and sales of individual types of farmed salmon.[399]

7.225 Next, for all sales of farmed salmon types that were found to be sold in "representative quantities", the investigating authority checked to see whether they were made in the ordinary course of trade "in accordance with Article 2(4)" of the EC's Basic Anti-Dumping Regulation.[400] Article 2(4) of the EC's Basic Anti-Dumping Regulation repeats the text and footnotes of Article 2.2.1 of the AD Agreement almost *verbatim.* The investigating authority examined whether the relevant sales were made in the ordinary course of trade pursuant to this provision "by establishing the proportion of profitable sales to independent customers of the type in question".[401] The investigating authority's precise methodology was described in the following terms:

> "(23) In cases where the sales volume of a type of farmed salmon, sold at a net sales price equal to or above its cost of production, represented more than 80 per cent of the total sales volume of that type, and where the weighted average price of that type was equal to or above its cost of production, normal value was based on the actual domestic price. This price was calculated as a weighted average of the prices of all domestic sales of that type made during the IP, irrespective of whether these sales were profitable or not.
>
> (24) Where the volume of profitable sales of a type of farmed salmon represented 80 per cent or less of the total sales volume of that type, or where the weighted average price of that type was below its cost of production, normal value was based on the actual domestic price, which was calculated as a weighted average of profitable sales of that type only, provided that these sales represented 10 per cent or more of the total sales volume of that type.
>
> (25) Finally, where the volume of profitable sales of any type of farmed salmon represented less than 10 per cent of the total sales volume of that type, it was considered that this particular type was sold in insufficient quantities for the domestic price to provide an appropriate basis for the establishment of the normal value."[402]

7.226 The above passage explains that all "representative" sales of a salmon type were found to be in the ordinary course of trade when the "sales volume of [that] type of farmed salmon, sold at a net sales price equal to or above its cost of production, represented more than 80 per cent of the total sales volume of that type, and where the weighted average price of that type was equal to or above its cost of production". The disclosures made by the investigating authority to the individually investigated companies reveal that the "cost of production" used for the purpose of these comparisons was the weighted average cost of production for the twelve month period of investigation.[403] Thus, the first part of the investigating authority's evaluation of whether sales were made in the ordinary course of trade pursuant to Article 2(4) of the EC's Basic Anti-Dumping Regulation involved comparing the net

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[398] Provisional Regulation, Recital 19. The EC argues that the test applied to determine whether domestic sales were "representative" reflected Article 2.2 of the AD Agreement. EC, Answer to Panel Question 15.

[399] Provisional Regulation, Recitals 20-21. EC, Answer to Panel Question 15. We note that Norway has raised no claim regarding the investigating authority's determination of "representativeness".

[400] Provisional Regulation, Recital 22.

[401] Provisional Regulation, Recital 22.

[402] Provisional Regulation, Recitals 23-25. These findings were confirmed in the Definitive Regulation, Recital 11.

[403] E.g., Information Note to Grieg Seafood, 8 March 2005, Exhibit NOR-55; Provisional Disclosure to Grieg Seafood, 22 April 2005, Exhibit NOR-58, and Definitive Disclosure to Grieg Seafood, 28 October 2005, Exhibit NOR-16. See also, EC, Answers to Panel Questions 13 and 14.

sales price and the weighted average price to the weighted average cost of production for the period of investigation. Where the proportion of sales made at a net price equal to or above weighted average cost of production (i.e., the "profitable" sales)[404] was greater than 80 per cent of all sales of the same salmon type, and where the weighted average price was equal to or above the weighted average cost of production, the investigating authority found that *all* sales of the particular salmon type were made in the ordinary course of trade, regardless of whether they were "profitable".

7.227 In cases where the proportion of "profitable" sales was less than 80 per cent, but at least 10 per cent, of all sales of the same salmon type, or where the weighted average price was less than the weighted average cost of production, the investigating authority found that only the "profitable sales" of the particular salmon type were made in the ordinary course of trade.

7.228 Thus, the investigating authority treated two categories of domestic sales as outside of the ordinary course of trade: (i) all not "profitable" sales (i.e., where net sales price was less than weighted average cost over the period of investigation), to the extent these represented 20 per cent or more of the total sales of the particular salmon type at issue; and (ii) all "profitable" sales, to the extent these represented less than 10 per cent of the total sales of the particular salmon type at issue.

7.229 The Provisional Regulation explains that the investigating authority found five companies to have made "overall representative sales".[405] The individual company disclosures reveal that for only three of these companies were any sales found to be "representative", when examined at the level of individual salmon types.[406] The same disclosures also show that the investigating authority concluded that many of the sales found to be "representative" by individual salmon type were not made in the ordinary course of trade, after application of the "profitable" sales test described above. Thus, the "profitable" sales test served as the basis for finding that certain of the domestic sales of three of the ten investigated companies were made outside of the ordinary course of trade.

(ii) Whether the investigating authority failed to "determine" that the below-cost sales did not provide for the recovery of all costs within a "reasonable period of time"

7.230 We begin our evaluation of Norway's claim by reviewing the text of Article 2.2.1, which reads:

> "Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities[3] determine that such sales are made within an extended period of time[4] in substantial quantities[5] and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

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[404] Although the Provisional Regulation does not explicitly define "profitable" sales, when reading Recitals 22 to 25 together, it is evident that the references contained therein to "profitable" sales mean sales made at a net price above "cost of production". See also, EC, Answer to Panel Question 14.

[405] Provisional Regulation, Recital 29. Underline added.

[406] These companies were [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-69); [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR- 45), and [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibits EC-42 and EC-43). See also, EC, Answer to Panel Question 15; and Norway, Answer to Panel Question 84.

[3] When in this Agreement the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate senior level.

[4] The extended period of time should normally be one year but shall in no case be less than six months.

[5] Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value."

7.231 Article 2.2.1 describes a methodology for determining whether below-cost sales may be treated as not being made in the ordinary course of trade. Pursuant to the first sentence, sales made at prices below "per unit (fixed and variable) costs of production plus administrative, selling and general costs" may be treated as not being made in the ordinary course of trade "by reason of price" when an investigating authority "determine[s]" that "such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time".

7.232 On its face, the methodology set out in the first sentence of Article 2.2.1 involves two steps: First, the below-cost sales that may potentially be treated as not being made in the ordinary course of trade by reason of price must be ascertained. This initial step requires investigating authorities to identify sales made at prices below "per unit (fixed and variable) costs of production plus administrative, selling and general costs". Article 2.2.1 does not prescribe any particular time period for the purpose of measuring the per unit costs that must be used in this assessment, suggesting that investigating authorities have a degree of discretion to calculate such costs over different periods of time, which might be, for example, the day of sale or the period of investigation. We understand that this is also the view of the parties.[407]

7.233 Secondly, the investigating authority must "determine" whether "such" below-cost sales display three specific characteristics, *i.e.*, whether the below-cost sales identified under the first step are made: (i) "within an extended period of time"; (ii) "in substantial quantities"; and (iii) "at prices which do not provide for the recovery of all costs within a reasonable period of time". It is only below-cost sales that are found to exhibit all three of these characteristics that may be treated as not being made in the ordinary course of trade by reason of price.

7.234 The focus of Norway's claim is the second step of this methodology. In particular, Norway claims that the investigating authority failed to "determine" that the below-cost sales excluded from the calculation of normal value by reason of price were made "at prices which do not provide for the recovery of all costs within a reasonable period of time". Norway argues that the obligation to "determine" that the below-cost sales were made at prices that did not provide for the recovery of all costs within a "reasonable period of time" required the investigating authority to make a reasoned assessment of the appropriate length of the "reasonable period of time" in the light of the circumstances of the investigation, taking into account the particular characteristics of, for example, the product, the producer and the "normal commercial practice" of the industry concerned.[408] According to Norway, this follows from the ordinary meaning of the word "determine" and the term "reasonable period of time".

7.235 As previously observed by the Appellate Body, the dictionary definitions of the verb "determine" include "[c]onclude from reasoning or investigation, deduce" as well as "[s]ettle or decide

[407] EC, Answer to Panel Question 137; Norway, Answer to Panel Question 137. Norway does not assert any claim in respect of this aspect of Article 2.2.1.

[408] Norway, FWS, para. 352; Norway, Answer to Panel Questions 82, 83, 133 and 137.

(a dispute, controversy, etc., or a sentence, conclusion, issue, etc.) as a judge or arbiter".[409] The Appellate Body has found that the words "determine" and "review", when read together in the context of sunset reviews conducted pursuant to Article 11.3 of the AD Agreement, suggest that "authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination".[410] Norway contends that, in the context of Article 2.2.1, which Norway argues applies to investigations and reviews, the verb "determine" has the same meaning.[411] We disagree with the implication that Norway has drawn from the Appellate Body's findings. The Appellate Body did not, in *US – Corrosion-Resistant Steel Sunset Review*, conclude that the verb "determine" means what Norway contends. Rather, as the full text of the passage referred to by Norway demonstrates, the Appellate Body found that "[t]he words 'review' and 'determine' in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination".[412] Thus, the Appellate Body did not make a finding about the meaning of the verb "determine" in general, but the meaning of the words "review" *and* "determine", *when read together* in the context of interpreting Article 11.3 of the AD Agreement. We understand that this was confirmed in *US – Zeroing (Japan)*, where the Appellate Body recalled that in *US – Corrosion-Resistant Steel Sunset Review*, it had indicated that "the ordinary meanings of the terms 'determine' *and* 'review' *in the text of Article 11.3* of the *Anti-Dumping Agreement* requires a 'reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination'".[413]

7.236 Norway also observes that in *US – Line Pipe* and *US – Steel Safeguards*, the Appellate Body held that a "determination" must be set forth in an "explanation" that is "clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms".[414] Again, Norway contends that, in the context of Article 2.2.1, the verb "determine" has the same meaning.[415] We are not convinced by Norway's contention. The Appellate Body's statements in *US – Line Pipe* and *US – Steel Safeguards* were not made in the context of a claim under Article 2.2.1 of the AD Agreement, but rather Articles 3.1 and 4.2(b) of the Safeguards Agreement. Moreover, we can see nothing in the findings made by the Appellate Body in these cases to suggest that the meaning of the verb "determine" in Article 2.2.1 of the AD Agreement must necessarily be the same as in the context of Articles 3.1 and 4.2(b) of the Safeguards Agreement. Thus, as we read them, the Appellate Body's findings in *US – Line Pipe* and *US – Steel Safeguards* cannot be simply transposed into Article 2.2.1 of the AD Agreement. The meaning of the word "determine" that appears in Article 2.2.1 must be assessed in the light of the customary rules of interpretation of public international law, which we recall, require us to examine the ordinary meaning of the word "determine" in context and in the light of the object and purpose of the AD Agreement.

7.237 Turning again to the dictionary definitions of the verb "determine", we note that in addition to those identified by the Appellate Body, other definitions include "[c]ome to a judicial decision; make or give a decision about something", "[l]ay down authoritatively; pronounce, declare" as well as

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[409] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan ("US – Corrosion-Resistant Steel Sunset Review")*, WT/DS244/AB/R, adopted 9 January 2004, para. 110, quoting the Shorter Oxford English Dictionary, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. I, p. 659. See also, Appellate Body Report, *US – Zeroing (Japan)*, para. 182.

[410] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111.

[411] Norway, Answer to Panel Question 80.

[412] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111. Underline added.

[413] Appellate Body Report, *US – Zeroing (Japan)*, para. 182. (Emphasis added).

[414] Appellate Body Report, *US – Line Pipe*, paras. 194 and 217; Appellate Body Report, *US – Steel Safeguards*, paras. 296 and 442, cited in Norway, Answers to Panel Question 80.

[415] Norway, Answer to Panel Question 80.

"[s]ettle or fix beforehand (now esp. a date); ordain, decree".[416] This range of slightly varying definitions indicates that the verb "determine" may have a slightly different meaning depending on the context in which it is found.

(iii) What it means to "determine" that below-cost sales are made "within an extended period" in "substantial quantities" and at prices which do not provide for recovery of all costs within a "reasonable period of time"

7.238 As we have already noted, Article 2.2.1 provides that before disregarding below-cost sales from the calculation of normal value by reason of price, an investigating authority must "determine" that such sales display three specific characteristics. The first characteristic that an investigating authority must "determine" exists is that the below-cost sales are made "within an extended period of time". Footnote 4 defines the "extended period of time" as "normally ... one year but ... in no case ... less than six months". Thus, the "determination" that below-cost sales are made "within an extended period of time" does not call for the investigating authority to "determine" the "extended period of time" itself, but only that the below-cost sales in question are made within a period of time that is normally one year but no less than six months.

7.239 The second characteristic of below-cost sales that must be "determined" to exist by an investigating authority before it may exclude such sales from the calculation of normal value by reason of price is that they are made "in substantial quantities". Footnote 5 explains that below-cost sales may be considered to be "made in substantial quantities" when an investigating authority establishes that the "weighted average selling price" of the below-cost sales at issue is less than the "weighted average per unit costs", or when the volume of below-cost sales "represents not less than 20 per cent of the volume" of sales under consideration for the determination of normal value. Thus, as with the requirement that an investigating authority "determine" that below-cost sales are made "within an extended period of time", the obligation to "determine" that below-cost sales are made "in substantial quantities" does not call for the investigating authority to "determine" the quantity of below-cost sales that may be considered "substantial". Rather, the investigating authority is required to "determine" that the below-cost sales in question are either (i) made at a weighted average selling price that is below the weighted average per unit cost, or (ii) made in quantities that represent not less than 20 per cent of the volume of sales under consideration for the determination of normal value.

7.240 Thus, in the context of the obligation to "determine" that below-cost sales are made "within an extended period of time" and "in substantial quantities", the verb "determine" does not have a meaning that would *require* an investigating authority to make an individual assessment of the appropriate "extended period of time" and "substantial quantities", in the light of the particular circumstances of the investigation. Indeed, the language of Article 2.2.1 suggests that an investigating authority would be entitled to give the "extended period of time" and "substantial quantities" the same meaning in each and every investigation. To this extent, an investigating authority would not be acting inconsistently with Article 2.2.1 if it adopted a general rule that resulted in finding, in each and every investigation, that below-cost sales were made "within an extended period of time" and "in substantial quantities" whenever they were made within a one year investigation period and in quantities representing more than 20 per cent of all sales under consideration for the determination of normal value. We note that this was the result achieved by the investigating authority in the investigation at issue.

7.241 The third of the characteristics of below-cost sales that an investigating authority must "determine" exists before disregarding such sales by reason of price from its calculation of normal value, is that they are made "at prices which do not provide for the recovery of all costs within a reasonable period of time". Unlike the "extended period of time" and "substantial quantities", there is

[416] New Shorter Oxford English Dictionary, Clarendon Press, 1993.

no footnote to Article 2.2.1 that explains the meaning of "a reasonable period of time". However, important guidance on what it means to "determine" that below-cost sales are made "at prices which do not provide for the recovery of all costs within a reasonable period of time" may be found in the second sentence of Article 2.2.1.

7.242 The second sentence of Article 2.2.1 specifies that when "prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time." Thus, Article 2.2.1 directs investigating authorities to "consider", in each and every investigation, that "prices which are below per unit costs at the time of sale" will provide for the recovery of costs within a "reasonable period of time" whenever such prices are also above weighted average per unit costs for the "period of investigation". To this extent, the last sentence of Article 2.2.1 provides that, for the purpose of establishing whether prices that are below-cost at the time of sale may provide for the recovery of costs within a reasonable period of time, the "reasonable period of time" may be the same as the "period of investigation", irrespective of the particular circumstances of the investigation.

7.243 Article 2.2.1 does not explain what is meant by "prices which are below per unit costs at the time of sale". In this regard, we see a similarity between the first and second sentences of Article 2.2.1. Although both sentences envisage a calculation of per unit costs over a period of time, neither specifies exactly what this period of time should be. It is true that the second sentence goes further than the first sentence in that it contemplates an assessment of costs at the "time of sale". However, in our view this means only that the relevant time-period must include "the time of sale". Thus, it would be entirely consistent with the second sentence of Article 2.2.1 for an investigating authority to calculate per unit costs at the "time of sale" over the particular day of sale, or an average including that day, over a week, month or the period of investigation.[417]

7.244 All this suggests that an investigating authority that examined whether net prices were above weighted average costs for the period of investigation would have established whether such prices provide for the recovery of costs within a "reasonable period of time", and therefore complied with the second sentence of Article 2.2.1. We note that this is exactly what the investigating authority did in the investigation at issue.[418]

7.245 Norway contends that the second sentence of Article 2.2.1 does not establish an exhaustive test for determining whether below-cost prices provide for the recovery of costs within a reasonable period of time. According to Norway, the second sentence of Article 2.2.1 "merely describes one situation in which an authority must conclude that prices allow for cost recovery in a reasonable period of time", in this way serving to "protect foreign producers and exporters by fixing the

[417] In this regard, we find it significant that whereas the drafters of the AD Agreement used the words "date of sale" in Article 2.4.1, they chose to use "time of sale" in the second sentence of Article 2.2.1. In our view, this difference supports the view that the "time of sale" that is referred to in the second sentence of Article 2.2.1 does not necessarily have to be the "date of sale", and may include other "time" periods.

[418] We recognize that, in response to one of our questions following the first substantive meeting with the parties, the EC stated that the investigating authority had not performed an assessment of whether "prices at the time of sale" were above weighted average costs for the period of investigation, and therefore, in its view, the investigating authority had not performed the comparison set out in the second sentence of Article 2.2.1. However, it is evident that the EC's statement was made on the basis of its own interpretation of the last sentence of Article 2.2.1, which not only seems to have evolved over the course of this dispute, but is in any case inconsistent with what we believe to be the correct interpretation of this provision. See, EC, Answer to Panel Question 81; and EC, Second Oral Statement, paras. 43-50. We understand that Norway does not dispute that, in establishing whether domestic sales were made in the ordinary course of trade, the investigating authority compared net sales price to weighted average cost for the period of investigation ("... the EC determined whether an individual sales price to an unrelated party was equal to or above the company's average cost of production for the sub-type of the product ..."). Norway, FWS, para. 354.

minimum duration of the reasonable period as equal to the IP".[419] Thus, Norway argues that the identification of sales that *do* provide for the recovery of costs within a reasonable period of time through the methodology set out in the second sentence of Article 2.2.1 does not automatically result in compliance with the requirement in the first sentence of Article 2.2.1 to "determine" that below-cost sales *do not* provide for the recovery of all costs within a reasonable period of time. We understand Norway to be arguing that a finding that sales may be made at prices above weighted average cost for the period of investigation does not, *a contrario*, mean that sales not found to be above weighted average cost for the period of investigation *do not* provide for the recovery of costs within a reasonable period of time.

7.246 While we recognize that it does not necessarily follow from the language of Article 2.2.1 that the obligation to determine that below-cost prices *do not* provide for the recovery of all costs within a reasonable period of time may be satisfied through an assessment of whether below-cost sales *do* provide for the recovery of cost within a reasonable period of time, we are not convinced by Norway's arguments. In our view, it is less than clear that the second sentence of Article 2.2.1 was not intended to apply *a contrario* to identify the circumstances in which below-cost sales may be found *not* to provide for the recovery of all costs within a reasonable period of time.

7.247 First, an *a contrario* reading of the second sentence would not be inconsistent with the general structure of the first sentence of Article 2.2.1, which as we have observed, does not require investigating authorities to make specific determinations of the "extended period of time" or the "substantial quantities". In this regard, we see no reason why the content of the last sentence should be treated differently to the content of footnotes 4 and 5, simply because of the form of its presentation. Secondly, such a reading would also not be at odds with the flexibility that Article 2.2.1 affords investigating authorities when identifying the periods of time used for the purpose of measuring the per unit costs that are relevant to each and every application of the test in Article 2.2.1. Thirdly, we note that the nature of the inquiry that Norway argues the drafters of Article 2.2.1 agreed should be undertaken in order to "determine" whether below-cost sales *do not* provide for cost recovery within a "reasonable period of time" may be quite onerous and potentially even speculative.[420]

7.248 In a typical investigation, an investigating authority will discover the existence of below-cost sales only some months after the initiation of an investigation, once it has received, reviewed, evaluated and possibly verified the data and information submitted by the interested parties. If an investigating authority were required at this stage of its investigation to identify the "reasonable period of time" in which each of the investigated parties could be expected to recover all costs associated with the below-cost sales, other data and information relating to factors such as the investigated parties' sales, prices and costs outside of the period of investigation may need to be considered. Given that the period of investigation should normally end as close as possible to the date of initiation,[421] the identification of an appropriate "reasonable period of time" for each investigated party may also involve examining future projections of all of these factors. In our view, undertaking such an exercise as a matter of course in each and every investigation, without compromising the expeditious conduct of an investigation within prescribed time limits, would be a challenge to even

[419] Norway, Answer to Panel Question 55. See also, Norway, FWS, paras. 350-351; Norway, SWS, paras. 142-143.

[420] The type of data that Norway contends should be considered by an investigating authority when making such a determination includes information about an individual producer's pricing and marketing strategies, information about the broader business and economic cycles affecting the producer's operations and evolution of costs, and "factors such as ... whether unit prices during the IP are at a level that would recover both average variable costs and average fixed costs, where fixed costs are computed based on 'normalized' production volumes over the business cycle". Norway, FWS, paras. 343-346; Norway, Answer to Panel Questions 82 and 83.

[421] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 158-167.

the best resourced and organized investigating authority. These notable practical considerations also lead us to doubt that the last sentence of Article 2.2.1 may not have any *a contrario* implications.

7.249 Finally, we find important contextual support for the view that the second sentence of Article 2.2.1 could be read *a contrario* in Article 2.2.1.1 of the AD Agreement. The relevance of this provision is perhaps best explained and understood in the light of the reasons that Norway has advanced in support of its contention that the "reasonable period of time" cannot, in each and every investigation, be automatically equated with the "period of investigation", as could be the case if the last sentence of Article 2.2.1 were given an *a contrario* reading.

7.250 Norway argues that it may be normal commercial practice for a producer to incur unusually high costs that are above per unit sales price during the period of investigation. For instance, a producer might decide to incur "high marketing costs during the IP to improve market share", temporarily pushing "per unit costs above market price".[422] According to Norway, that same producer, in the pursuit of normal commercial practice, may have taken on such costs in the expectation that they would be recovered over a period of time extending beyond the period of investigation. Thus, although insufficient to permit cost recovery over the period of investigation, the market price "may [nevertheless] be sufficiently high to recover costs averaged over a reasonable period of time" that is longer than the period of investigation.[423] Norway argues that a similar situation might arise in "periods of recession"[424] or a "cyclical downturn"[425]. In such moments of relatively low economic activity, a producer's output will decline rendering per unit costs higher. However, a producer will eventually have to recover all of its costs "in order to replace productive fixed assets". So, ultimately, prices will have to increase relative to production costs over the business cycle,[426] and there is no reason why this may not extend beyond the period of investigation.

7.251 Thus, as we understand it, Norway's concern is that by equating the "reasonable period of time" with the "period of investigation" as a matter of course, below-cost sales may be treated as not being made in the ordinary course of trade "simply because costs were measured during a period when they were unusually high"[427] and not because such costs could not be recouped within what normal commercial practice would dictate to be a reasonable period of time for the recovery of those costs.

7.252 We note that rules for calculating the costs used in the determination of whether below-cost sales may be treated as not being made in the ordinary course of trade by reason of price are found in Article 2.2.1.1. The last sentence of Article 2.2.1.1, which we consider to be particularly instructive for the issue that is before us, reads:

> "Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.[6]

[6] The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation."

[422] Norway, FWS, para. 343.
[423] Norway, FWS, para. 343.
[424] Norway, Answers to Panel Questions 82 and 83.
[425] Norway, FWS, para. 343.
[426] Norway, Answers to Panel Questions 82 and 83.
[427] Norway, FWS, para. 344.

7.253 This sentence provides that, unless not already taken into account in the "cost allocations" made under the first two sentences of Article 2.2.1.1, costs for the period of investigation "shall be adjusted appropriately" for "non-recurring items of cost which benefit future and/or current production" or "for circumstances when costs during the period of investigation are affected by start-up operations".

7.254 Start-up costs may be described as costs specifically incurred for the purpose of setting up a new business or product line. When incurred during the investigation period, start-up costs may have the effect of increasing average costs of production. Where they exist and affect an investigated party's costs, the last sentence of Article 2.2.1.1 requires that the cost of production be "adjusted appropriately". Footnote 6 explains that this adjustment must reflect "costs at the end of the start-up period, or if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account" by the investigating authority. In other words, the appropriate cost adjustment must reflect costs when the start-up period has finished (i.e., when start-up costs no longer exist), or a period as close as possible to the end of the start-up period. Thus, the adjustment for start-up costs that is called for under the last sentence of Article 2.2.1.1 requires investigating authorities to exclude or minimize start-up costs in the calculation of cost of production for the period of investigation. In this manner, the last sentence of Article 2.2.1.1 ensures that the existence of start-up costs during the period of investigation has no or minimal impact on the identification of below-cost sales for the purpose of Article 2.2.1.

7.255 A similar adjustment mechanism is envisaged for non-recurring costs ("NRCs"). NRCs may be understood to be costs that are not repeated or incurred on a regular basis. These may relate to one-off transactions including the purchase of plant and capital equipment. The language of Article 2.2.1.1 suggests that the full amount of NRCs incurred during the period of investigation may not always be associated with the cost of production for the period of investigation. As we have more fully explained in the sections of this report that address Norway's claims under Article 2.2.1.1,[428] the second sentence of Article 2.2.1.1 calls for an appropriate allocation of NRCs incurred during the period of investigation over time. Where no such allocation is made, the last sentence of Article 2.2.1.1 requires investigating authorities to make an appropriate adjustment for NRCs which benefit current and/or future production. Thus, Article 2.2.1.1 envisages that it may be inappropriate to allocate in full to production and sale of the like product during the period of investigation all NRCs incurred during that period.

7.256 Thus, Article 2.2.1.1 recognizes that an investigated party's costs of production for the period of investigation may, to use Norway's words, be "unusually high" when affected by non-recurring items of cost and start-up operations. In such circumstances, investigating authorities are not entitled to simply include all such "unusually high" costs in the cost of production of an investigated party, but they must instead make appropriate allocations or adjustments. When such allocations or adjustments are made, an investigated party's costs will no longer be burdened with "unusually high" costs, and therefore serve as an appropriate measure of costs of production for the period of investigation. Consequently, they will also serve as an appropriate basis for the identification of below-cost sales under Article 2.2.1.

7.257 In the context of Norway's arguments, the elimination of certain costs associated with non-recurring items and start-up operations from the cost of production, means that there would be no need, when applying Article 2.2.1, for an investigating authority to determine whether the "reasonable period of time" within which to recover such costs should extend beyond the "period of investigation". Because these "unusually high" costs would no longer be counted in the cost of production, there would be no reason to extend the "reasonable period of time" beyond the "period of investigation". In our view, this result, which follows from the adjustment mechanism provided for in

[428] *See*, paras. 7.484-7.487.

the last sentence of Article 2.2.1.1 and footnote 6, also lends support to the view that the last sentence of Article 2.2.1 could be read to have *a contrario* implications.

7.258 In the light of the ambiguity we have identified in the meaning of Article 2.2.1, we consider it appropriate to examine the work of the treaty negotiators, in accordance with Article 32 of the Vienna Convention on the Law of Treaties,[429] in order to decipher the meaning that was intended by the drafters of the AD Agreement. We begin this examination by reviewing the last draft of the negotiating text of the AD Agreement prior to the draft negotiating text contained in the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (the "Dunkel Draft" text),[430] namely, the Draft Working Paper on Antidumping, dated 26 November 1991 (the "Ramsauer" text).[431] However, before doing so, we briefly explain what we understand to have been the negotiating context in which the present day text of Article 2.2.1 was developed.

7.259 The conditions under which below-cost domestic sales could be considered to be outside of the ordinary course of trade were among the key issues concerning the establishment of normal value discussed by negotiators during the Uruguay Round. At the time, several of the GATT Contracting Parties had developed a practice of treating below-cost sales made in the period of investigation as not being made in the ordinary course of trade. However, a number of delegations questioned this practice, arguing that below-cost sales often reflected normal business practice, and should therefore not be disregarded from the calculation of normal value.[432] In this regard, one delegation raised the issue of declining cost curves in high-tech industries:

> "Producers of such products tend to set stable domestic price and export price based on the average cost which is estimated to be incurred during a certain period of time leading to the future, while there are cases where the investigating authority of an importing country determines the existence of dumping using constructed value based on the cost prevailing at the time of actual export, on the grounds that the domestic sales price of such products is less than the cost of production and thus cannot be regarded as the price in ordinary course of trade. ... [W]ith respect to the dumping investigation of the products whose costs decline sharply, setting of price in anticipation of cost decline should be considered differently from sales at a price less than the cost of production only aiming at expanding market share of the products."[433]

7.260 As we understand it, the point being made by this delegation was that the determination of whether below-cost sales are outside of the ordinary course of trade should, for industries prone to incurring extraordinary high costs during the initial phase of production, in some way involve

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[429] Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* ("*EC – Computer Equipment*"), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851, para. 86.

[430] Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. No., MTN.TNC/W/FA, 20 December 1991 (the "Dunkel Draft"), p. F.2.

[431] Draft Working Paper on Antidumping, dated 26 November 1991, (unpublished working document), (the "Ramsauer" text). The relevant text in the Dunkel Draft is equivalent in all respects to Article 2.2.1 of the current AD Agreement. Thus, the Ramsauer text reflects the Members' negotiating positions immediately prior to the final agreed text of Article 2.2.1 of the AD Agreement.

[432] Proposed Elements for a Framework for Negotiations Principles and Objectives for Anti-Dumping Rules, Communication from the Delegation of Singapore, MTN.GNG/NG8/W/55, 13 October 1989; Amendments to the Anti-Dumping Code, Communication from the Delegation of Hong Kong, MTN.GNG/NG8/W/51/Add.1, 22 December 1989; Amendments to the Anti-Dumping Code, Communication from the Nordic countries, MTN.GNG/NG8/W/64, 22 December 1989; Meetings of 31 January-2 February and 19-20 February 1990, MTN.GNG/NG8/15, 19 March 1990.

[433] Communication from Japan, Proposals on the Anti-Dumping Code, MTN.GNG/NG8/W/11, 28 September 1987.

examining or taking into account the evolution of those costs and prices beyond the period of investigation.[434] This is because in the normal course of business, a company in such an industry will seek to recover those costs over a period that may be longer than the period of investigation. Similar observations appear to have been made by other delegations in respect of the effects of start-up costs and fluctuating business cycles on the levels of costs incurred (relative to prices) during the period of investigation.[435] Thus, the challenge facing negotiators was to agree upon an appropriate set of disciplines for determining whether below-cost sales in the period of investigation could be treated as not being made in the ordinary course of trade, that took into account these alleged business realities.

7.261 The Ramsauer text addressed the issue of below-cost sales over various provisions, starting with Article 2.2.2, which is reflected, almost *verbatim*, in the text of the first sentence of Article 2.2.1 of the present AD Agreement:

> "2.2.2 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) cost of production plus selling, general and administrative costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities[2] determine that (a) such sales are made within an extended period of time in substantial quantities and (b) such sales are at prices which do not provide for the recovery of all costs within a reasonable period of time.
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>
> [2] When in this Code the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate, senior level."

7.262 We note that there are no footnotes in this draft proposal to define the "extended period of time" or the notion of "substantial quantities". In addition, there is no second sentence recognizing that below-cost prices will recover costs within a reasonable period of time when above weighted average costs for the period of investigation. However, these elements of the current version of Article 2.2.1 were not ignored in the Ramsauer text. Language elaborating the meaning of the "extended period of time" and the notion of "substantial quantities" was contained in two additional sub-ordinate provisions:

> "2.2.2.1 The extended period of time should be long enough to enable the authorities to discern whether there is a consistent pattern, in terms of quantities, of sales below per unit costs. This period should normally be one year but shall in no case be less than six months.
>
> 2.2.2.2 Sales below per unit cost are made in substantial quantities when the authorities establish that within the extended period of time the weighted average selling price of all arm's length transactions is below the weighted average unit cost or the volume of those sales represents a substantial proportion[3] of all sales.
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> [3] For the purpose of this paragraph, a substantial proportion is not less than [A] per cent."

[434] See also, Communication from Japan, Background Notes to Japan's Proposals on the Anti-Dumping Code, MTN.GNG/NG8/W/30, 20 June 1988.

[435] Amendments to the Anti-Dumping Code, Submission by Canada, MTN.GNG/NG8/W/65, 22 December 1989; Amendments to the Anti-Dumping Code, Communication from the Delegation of Hong Kong, MTN.GNG/NG8/W/51/Add.2, 21 March 1990; Meetings of 31 January-2 February and 19-20 February 1990, MTN.GNG/NG8/15, 19 March 1990.

7.263 The Ramsauer text contained three additional provisions sub-ordinate to Article 2.2.2.[436] One of these, Article 2.2.2.3, specified the types of evidence that investigating authorities should take into account when establishing costs for the purpose of establishing normal value. The language of this provision is reflected in the first two sentences of Article 2.2.1.1 of the current AD Agreement:

> "2.2.2.3 Costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs."

7.264 The next sub-ordinate provision, Article 2.2.2.4, was presented in the Ramsauer text in the form of two square bracketed alternatives. The first square bracketed alternative read:

> "[2.2.2.4 In determining whether the prices provide for recovery of costs within a reasonable period of time, taking account of whether prices prevailing at the time of sale are below weighted average costs, the authorities shall be guided by the pattern of prices and costs pertaining to the product and industry in question. In addition, unless already reflected in the cost allocations, the following practices should be observed:
>
> (i) Producers shall be given an opportunity to identify those non-recurring items of cost which benefit current and future production and authorities shall adjust costs for the period of investigation appropriately.
>
> (ii) For products in the start-up phase of production the authorities shall determine if prices of the product provide for the recovery of all costs within a reasonable period of time based on actual and verified data of the exporter or producer concerning, ***inter alia***, cost curve, sales volumes and cost recovery period for a prior generation or model of the product subject to the investigation. When this is not possible the per unit costs shall reflect the cost at the end of the start-up phase, or the lowest cost during the period of investigation, if that is earlier.
>
> (iii) In the case of cyclical industries[4], where sales would otherwise be found to be made at prices below per unit cost of production pursuant to paragraph 2.2.2, the following provisions shall apply:
>
> (a) when capacity utilization and per unit costs of production vary significantly over the business cycle and sales prices vary only moderately the calculation of the per unit cost shall be adjusted to reflect average per unit costs for the exporter's or producer's most recent five-year period for the facilities involved;

[436] We do not consider that the last of these sub-ordinate provisions, Article 2.2.2.5, to be relevant to the issue that is before us, and therefore, have not addressed its substance in our analysis. Article 2.2.2.5 reads:

> "Nothing in this paragraph shall compel investigating authorities to determine sales in the domestic market of the exporting country, by reason of price, not to be in the ordinary course of trade for the purposes of establishing normal value."

(b) when the sales price varies significantly over the business cycle and the capacity utilization and the per unit costs of production vary only moderately the calculation of the export price shall be adjusted to reflect the average sales price for the exporter's or producer's most recent five-year period for the facilities involved.]

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[4] Cyclical industries are those characterized by [high sunk costs and] a pattern of recurring periods of sectoral contraction and expansion of demand, sales, and production not associated with seasonal variations or other short-term factors."

7.265 The second square bracketed alternative read:

"[2.2.2.4 The authorities shall determine that prices below cost provide for recovery of costs within a reasonable period of time if prices below cost at the time of sale are above weighted average costs of the period of investigation. In addition, unless already reflected in cost allocations, the following practices shall be observed:

(i) Authorities may adjust costs appropriately for those non-recurring costs which benefit future or current production;

(ii) For products in the start-up phase of production, costs shall be adjusted to reflect the cost at the end of the start-up period, or the lowest cost during the period of investigation, if that is earlier;

(iii) Costs for cyclical industries[4], for the purpose of this Article, shall reflect fixed unit factory costs adjusted by the ratio of capacity utilization over the period of investigation to capacity utilization over the most recent five-year period for the same facilities.]

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[4] Cyclical industries are those characterized by [high sunk costs and] a pattern of recurring periods of sectoral contraction and expansion of demand, sales, and production not associated with seasonal variations or other short-term factors."

7.266 In the same way that the Ramsauer text proposed Articles 2.2.2.1 and 2.2.2.2 to define what it meant under Article 2.2.2 to "determine" that below-cost sales were made within an "extended period of time" and in "substantial quantities", it is evident that the two Article 2.2.2.4 alternatives were intended to describe what would be required in order to "determine" that below-costs sales *do not* provide for the recovery of costs within a reasonable period of time. In this regard, we note that the meaning of the terms "extended period of time", "substantial quantities" and "reasonable period of time" was at the centre of the negotiating parties' discussions on the appropriate methodology for determining when below-cost sales could be treated as not being made in the ordinary course of trade by reason of price.[437] It is therefore not surprising to find that all three terms were the subject of specific textual proposals. In our view, this strongly suggests that, as with Articles 2.2.2.1 and 2.2.2.2 of the Ramsauer text, the two alternatives presented in Article 2.2.2.4 were intended to give definitive guidance on how the obligation to "determine" that below-cost sales *do not* provide for recovery of costs within a reasonable period of time should be interpreted. Indeed, given their detailed nature, it would be odd to find that they were not intended for this purpose but rather intended only to describe one situation that was irrelevant for the resolution of one of the key questions that was before the negotiators. As we see it, the fact that the bracketed proposals present two very different conceptions

[437] *See*, Meetings of 31 January-2 February and 19-20 February 1990, MTN.GNG/NG8/15, 19 March 1990.

of how cost recovery within a reasonable period of time should be assessed further substantiates this view.

7.267 The first of the two alternatives starts by stipulating that the question as to whether prices provide for recovery of costs within a reasonable period of time must be informed by whether prices are below weighted average costs, as well as the pattern of prices and costs pertaining to the product and industry in question. In other words, the starting premise of this first alternative is that cost recovery within a reasonable period of time is a function of whether prices at the time of sale are below weighted average costs, an assessment that may vary between different products and industries. Thus, as opposed to the current text of the second sentence of Article 2.2.1, the first proposal in the Ramsauer text does not equate the reasonable period of time with the period of investigation. Rather, it explicitly contemplates that the "reasonable period of time" will depend upon the particular characteristics of the product and industry under investigation. This suggests that the drafters of this alternative intended that cost recovery within a "reasonable period of time" be assessed on a case-by-case basis.

7.268 The next sentence of the first alternative in the Ramsauer text provides that, "in addition" to undertaking the assessment contemplated in the first sentence, and "unless already reflected in the cost allocations",[438] costs relating to non-recurring items, start-up operations and cyclical industries must be assessed in accordance with certain practices. The placement of this sentence in the same paragraph as the first sentence suggests that the practices that are described in the subsections that follow are intended to explain how the different types of cost should be accounted for in the calculation of costs for the purpose of determining whether below-cost prices recover costs within a reasonable period of time. In this regard, it is instructive to note that as regards start-up costs, Article 2.2.2.4(ii) requires that the "cost recovery period for a prior generation or model of the product subject to the investigation" be taken into account when identifying the appropriate reasonable period of time. In our view, this confirms that the first alternative Ramsauer text was intended to require investigating authorities to determine whether below-cost sales recover costs within a "reasonable period of time" on the basis of the particular circumstances of the investigation at issue.

7.269 The second of the two alternatives adopts a more limited approach to the question of whether below-cost prices provide for recovery of costs within a reasonable period of time. The language of the first alternative requiring consideration of "the pattern of prices and costs pertaining to the product and industry in question" is missing from the second alternative. Instead, there is a recognition that below-cost prices will provide for recovery of costs within a reasonable period of time when those prices are above weighted average costs for the period of investigation. In our view, the focus on examining whether below-cost prices provide for recovery of costs within the period of investigation in contrast to a requirement to take into account "the pattern of prices and costs pertaining to the product and industry in question" suggests that the second proposed alternative was intended to emphasize that it would be appropriate to equate the reasonable period of time with the investigation period, regardless of the factual circumstances.

7.270 As with the first alternative Ramsauer text, the next sentence of the second alternative provides that, "in addition" to undertaking the assessment contemplated in the first sentence, and "unless already reflected in the cost allocations", costs relating to non-recurring items, start-up operations and cyclical industries must be assessed in accordance with certain practices. However, unlike the approach taken in the first alternative Ramsauer text, none of the practices described in the subsections that follow suggest that the reasonable period of time should be determined in the light of the particular circumstances of the investigation at issue. In this regard, it is significant that the "practice" described in respect of start-up costs does not require that the reasonable period of time

[438] The "cost allocations" referred to in Article 2.2.2.4 would seem to be those made pursuant to Article 2.2.2.3 of the Ramsauer text.

must be determined through consideration of the "cost recovery period for a prior generation or model of the product". Rather, the "practice" that is called for under this alternative formulation envisages that start-up costs could be appropriately quantified on the basis of "the lowest cost during the period of investigation". In our view, this supports a reading of the second alternative Ramsauer text which would indicate that it was intended to emphasize that it would be appropriate to "determine" that below-cost sales provide for recovery of cost within a reasonable period of time by equating the reasonable period of time with the investigation period, regardless of the factual circumstances.

7.271 Thus, in the months immediately preceding the final agreement on the text of the AD Agreement, negotiators were faced with two alternative approaches to the question of how to comply with the obligation in Article 2.2.2 of the Ramsauer text to determine whether below-cost sales *do not* provide for cost recovery within a reasonable period of time. In our view, these two alternatives are, to differing degrees, reflected in the arguments of the parties in this dispute. In particular, to the extent that it has pursued its claim by arguing that the "reasonable period of time" must be always determined on the basis of the particular facts and circumstances of each investigation, Norway's position mirrors the approach described in the first of the two alternative texts.

7.272 As the final text of Article 2.2.1 demonstrates, the option that was ultimately agreed upon reflected the more limited approach set out in the second alternative of the Ramsauer text. The first sentence of this alternative became the second sentence of Article 2.2.1. Articles 2.2.2.1 and 2.2.2.2 of the Ramsauer text were accepted and inserted as footnotes 4 and 5 of Article 2.2.1. The subsections relating to the calculation of non-recurring costs and start-up costs were finally taken up in the text, in slightly modified form, in footnote 6 and the last sentence of Article 2.2.1.1, which itself reflects Article 2.2.2.3 of the Ramsauer text. The only proposed text contained in the Article 2.2.2.4 alternatives that was not accepted was that relating to the calculation of costs incurred by companies operating in cyclical industries.

7.273 Thus, the negotiators rejected an approach that would have required fact-intensive case-by-case pronouncements on the "reasonable period of time" for the purpose of determining whether below-cost sales *do not* provide for recovery of costs within a reasonable period of time, and agreed instead to adopt a methodology that could result in equating the "reasonable period of time" with the "period of investigation" regardless of the factual circumstances. However, in doing so, they did not ignore the concerns expressed about the effects of certain types of costs incurred during the period of investigation.[439] These concerns were addressed in the last sentence of Article 2.2.1.1 and footnote 6. As we have already explained, the final version of the last sentence of Article 2.2.1.1 establishes a cost adjustment mechanism intended to properly account for start-up costs and non-recurring costs in the cost of production calculated for an investigated party during the period of investigation.[440] To this extent, the negotiators recognized that there might well be situations when an investigated party's costs of production for the period of investigation could be "unusually high", and capable of distorting the assessment of whether below-cost sales may be treated as not being made in the ordinary course of trade pursuant to Article 2.2.1. By agreeing on the mechanism set out in the last sentence in Article 2.2.1.1 and footnote 6, the negotiators therefore ensured that any such distortions could be avoided.

7.274 We recall that we have found that an *a contrario* reading of the second sentence of Article 2.2.1 would not be inconsistent with the general structure of the first sentence of Article 2.2.1, which as we have observed, does not require investigating authorities to make specific determinations of the "extended period of time" or the "substantial quantities". In addition, we have found that an *a contrario* reading of the second sentence of Article 2.2.1 would not be at odds with the flexibility that

[439] *See*, paras. 7.259-7.260.
[440] *See*, paras. 7.252-7.257.

Article 2.2.1 affords investigating authorities when identifying the periods of time used for the purpose of measuring per unit costs. Indeed an *a contrario* reading of Article 2.2.1 would be conducive to the effective and expeditious conduct of investigations, which we consider to be an important practical consideration that should not be underestimated, given the consequences of Norway's arguments for investigating authorities' determinations of the "reasonable period of time". Furthermore, we have also found that, to the extent that they seek to address the problems of the kind that Norway argues require investigating authorities to determine the length of the "reasonable period of time" on a case-by-case basis, the last sentence of Article 2.2.1.1 and footnote 6 provide strong contextual support for the view that the last sentence of Article 2.2.1 was intended to be read *a contrario*. In the light of our foregoing analysis, we believe that the work of the treaty negotiators confirms this observation. In our view, in adopting the text of the last sentence of Article 2.2.1, the drafters intended to describe a methodology that if applied would result in compliance with the obligation to "determine" that below-cost sales *do not* provide for recovery of cost within a reasonable period of time.

7.275 Thus, for all of the above reasons, we find that the last sentence of Article 2.2.1 was intended to be read *a contrario*, such that a finding of sales made at prices above weighted average cost for the period of investigation would be sufficient to show that all sales not found to be above weighted average cost for the period of investigation *do not* provide for the recovery of costs within a reasonable period of time.

(iv) Conclusion

7.276 We recall that in examining whether domestic sales were made in the ordinary course of trade pursuant to Article 2(4) of the EC's Basic Regulation, and therefore by reason of price within the meaning of Article 2.2.1 of the AD Agreement,[441] the investigating authority checked to see whether the sales at issue were made at prices that were equal to or above the weighted average cost of production for the period of investigation.[442] In applying this methodology, which we have found to be consistent with the second sentence of Article 2.2.1,[443] the investigating authority determined that certain domestic sales made by three investigated companies were outside of the ordinary course of trade by reason of price.[444] It follows from our interpretation of the second sentence of Article 2.2.1 that the investigating authority's exclusion of these sales was not inconsistent with the EC's obligations under the first sentence of Article 2.2.1.

7.277 Norway also contends that the investigating authority failed to "determine" that the below-cost sales did not provide for the recovery of all costs within a reasonable period of time because its findings did not include an explicit and unambiguous explanation of why the prices of the sales discarded did not provide for the recovery of costs within a reasonable period of time.[445] We understand Norway's concern to be focused on the alleged absence of any mention of the terms "cost recovery" and "reasonable period of time" in the investigating authority's determination, as well as the alleged lack of any statement of the duration of the "reasonable period of time". We recall that an explicit reference to Article 2(4) of the EC's Basic Anti-Dumping Regulation, which repeats the text and footnotes of Article 2.2.1 of the AD Agreement almost *verbatim*, was made in the Provisional Regulation. Thus, the investigating authority's provisional determination did, indirectly, explain in clear terms that the tests described in paragraphs 23-25 of the Provisional Regulation were intended to determine whether any below-cost sales did not provide for the recovery of all costs within a reasonable period of time. Furthermore, as regards the absence of any statement of the duration of the

[441] *See*, para. 7.225.
[442] *See*, para. 7.226.
[443] *See*, paras. 7.225-7.229 and 7.244.
[444] *See*, para. 7.229.
[445] *See*, para. 7.210.

"reasonable period of time", it follows from our interpretation of the second sentence of Article 2.2.1 that an investigating authority need not "determine", in the sense of making a reasoned conclusion on the basis of the particular facts of the investigation at issue, that the "reasonable period of time" is equivalent to the period of investigation for the purpose of determining whether below-cost sales do not provide for the recovery of all costs within a reasonable period of time. In other words, an investigating authority that acts consistently with the second sentence of Article 2.2.1 need not "state" that the "reasonable period of time" is equivalent to the period of investigation because these two periods are equated by definition under the express terms of the second sentence.

7.278 Finally, to the extent that we have found that acting in accordance with the second sentence of Article 2.2.1 is sufficient to demonstrate compliance with the obligation to "determine" that below-cost sales do not provide for the recovery of costs within a reasonable period of time, we consider that the "profitable" sales test applied by the investigating authority, to the extent that it established whether net sales prices were above the weighted average cost of production for the period of investigation, did appropriately assess whether the below-cost sales at issue did not provide for the recovery of all costs within a reasonable period of time.

7.279 For all of the above reasons, we therefore dismiss the entirety of Norway's claim that the investigating authority acted inconsistently with the EC's obligations under Article 2.2.1 of the AD Agreement when it excluded the domestic sales of certain investigated companies from its calculation of normal value, on the grounds that they were outside of the ordinary course of trade by reason of price. In this light, we also dismiss Norway's consequential claim that the EC failed to comply with Article 2.2 of the AD Agreement because the investigating authority constructed the normal values of the same investigated companies on the basis of a flawed finding that their domestic sales were outside of the ordinary course of trade by reason of price.

3. Alleged Inconsistency of the EC's Exclusion of Actual SG&A and Profit Data in the Calculation of Normal Value with Articles 2.2.2 and 2.2 of the AD Agreement

(a) Arguments of the parties

(i) Norway

7.280 Norway claims that the investigating authority acted inconsistently with Article 2.2.2 of the AD Agreement because it failed to rely on actual data pertaining to sales in the ordinary course of trade for the purpose of calculating the appropriate amounts of SG&A cost and profit when constructing normal value for the investigated parties.

7.281 Norway argues that, in constructing normal value, the EC was required under Article 2.2.2 to utilise actual SG&A cost and profit data pertaining to all sales made in the ordinary course of trade. According to Norway, Article 2.2.2 does not permit investigating authorities to reject actual SG&A cost and profit data simply because the volume of sales from which such data are derived is considered to be "low".[446] Norway finds support for this view in the Appellate Body's findings in *EC – Tube or Pipe Fittings*, which Norway submits stand for the proposition that investigating authorities must use actual SG&A and profit data for sales in the ordinary course of trade whenever such sales exist, irrespective of the volume of those sales.[447]

[446] Norway, FWS, paras. 373, 384-395.

[447] Norway, FWS, paras. 387-395, citing Panel Report, *EC – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, para. 138, and Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil ("EC – Tube or Pipe Fittings")*, WT/DS219/AB/R, adopted 18 August 2003, paras. 97-98.

7.282 Thus, Norway contends that the investigating authority erred when it disregarded actual SG&A cost and profit data pertaining to domestic sales made in the ordinary course of trade on the grounds that (i) the volume of such sales, assessed by individual farmed salmon type, amounted to less than 5 per cent of the volume of export sales of the same salmon type; or (ii) the volume of such sales that were profitable, assessed by individual farmed salmon type, amounted to less than 10 per cent of total domestic sales of the same salmon type. Norway asserts that the investigating authority acted on this basis when it disregarded the actual SG&A cost data of one investigated party, and the actual profit data of "at least eight" investigated parties.

7.283 Finally, Norway argues that the less-than-10 per cent profitable sales test applied by the investigating authority to exclude a portion of the sales at issue, is not a permissible basis for determining whether sales are made in the ordinary course of trade. As such, the EC could not rely upon the results of the application of this test as a basis for determining whether it was entitled to disregard actual profit data from its calculation of constructed normal value. Thus, Norway claims that the EC's resort to the less-than-10 per cent profitable sales test for the purpose of deciding whether certain sales were outside of the ordinary course of trade was inconsistent with both Articles 2.2 and 2.2.2.

(ii) European Communities

7.284 The EC argues that the investigating authority did not act inconsistently with Article 2.2.2 when it disregarded actual data pertaining to sales in the ordinary course of trade for the purpose of calculating the appropriate amounts of SG&A cost and profit when constructing normal value for the investigated parties. The EC acknowledges that the basis for the investigating authority's non-reliance on actual data were findings made in respect of the volume of domestic sales compared to export sales (the 5 per cent sufficiency of sales test), and the volume of profitable domestic sales (the less-than-10 per cent profitable sales test). However, the EC argues that the investigating authority did not err when it rejected this data because: (i) in the view of the EC, an implicit qualification in respect of low-volume sales should be read into the text of the first sentence of Article 2.2.2; and (ii) the less-than-10 per cent profitable sales test was an ordinary course of trade test, implying that the investigating authority acted consistently with Article 2.2.2 when it disregarded SG&A cost and profit data in respect of sales excluded for having failed to satisfy this test.

7.285 The EC contends that Norway's interpretation of Article 2.2.2 is incorrect and argues that this provision does not preclude investigating authorities from disregarding actual SG&A cost and profit data pertaining to domestic sales that have been made in low volumes. The EC argues that when Article 2 is read as a whole, considering both its context and the object and purpose of the AD Agreement, an implicit qualification in respect of low-volume sales should be read into the text of the first sentence of Article 2.2.2. The EC submits that if, as Norway suggests, the SG&A cost and profit data pertaining to sales that have been excluded for failing to meet the 5 per cent sufficiency of sales test (prescribed under Article 2.2 of the AD Agreement) are used as the SG&A cost and profit components of constructed normal value, the effect would be to re-introduce into the calculation of normal value the same data that Article 2.2 explicitly excludes. The EC argues that this would render the possibility of excluding low-volume sales from the calculation of normal value through Article 2.2 a nullity. In particular, it would lead to constructed normal values being the same as normal values derived from sales disregarded when found to be non-representative, which the EC asserts would have been the case in the investigation at issue. Thus, the EC submits that if, in particular circumstances, the usual interpretation of Article 2.2.2 would require a comparison to be made between non-comparable prices, then such an interpretation must necessarily be altered to the extent necessary to avoid this outcome. To this extent, the EC argues that it would be mistaken to apply the Appellate Body ruling in *EC – Tube or PipeFittings* to the particular facts of the present dispute.

7.286 The EC also considers that an implicit qualification in respect of low volume sales must be read into the text of the first sentence of Article 2.2.2 because it argues that the meaning of the expression "ordinary course of trade" for the purpose of Article 2.2.2 is independent to the meaning of the same expression in Article 2.2. The EC argues that in the absence of giving the notion of "ordinary course of trade" different meanings in Articles 2.2.2 and 2.2, a "logical circle" would arise between the operation of Articles 2.2.2 and 2.2.1. This is because, according to the EC, the opening paragraph of Article 2.2.2 assumes that sales which are in the ordinary course of trade are already known. However, pursuant to Article 2.2.1, Article 2.2.2 is to be applied in deriving the SG&A costs necessary to identify the very sales that may be treated as not being in the ordinary course of trade by reason of price. The EC contends that the only way this "logical circle" can be broken is if the notion of "ordinary course of trade" found in Article 2.2.2 is defined without reference to the notion of "ordinary course of trade" found in Article 2.2.1, which it contends implies that the notion of "ordinary course of trade" found in Article 2.2.2 must also be defined without reference to the notion of "ordinary course of trade" found in Article 2.2.

7.287 Finally, the EC argues that the less-than-10 per cent profitable sales test that was the basis for the decision to disregard the actual SG&A and profit data of some of the sales at issue, represented an assessment of whether such sales were made in the "ordinary course of trade".[448] As such, the EC contends that the investigating authority was perfectly entitled to disregard the actual SG&A cost and profit data pertaining to sales that failed to satisfy this test. In this regard, the EC asserts that when profitable domestic sales are so few that they constitute less than 10 per cent of domestic sales, they can no longer be considered to be in the "ordinary course of trade". The EC justifies this view by, *inter alia*, arguing that the less-than-10 per cent profitable sales test is, in fact, "a corollary of the rule set out in Article 2.2.1 that where more than 80 per cent of sales are profitable even those sales that are unprofitable should be taken into account when determining normal value."[449]

(b) Arguments of the third parties

(i) United States

7.288 The United States contends that, in conformity with the Appellate Body's finding in the *EC – Tube or Pipe Fittings* case, an investigating authority may not exclude actual data from the calculation of the profit and SG&A ratios solely because sales were made in low volumes. The United States disagrees, however, with Norway's assertion that because the EC accepted actual SG&A cost data, it must also have accepted the actual profit data. According to the United States, an investigating authority may use actual SG&A data even when actual profit data is rejected because SG&A costs relate to the actual selling and general operations of a company. In other words, a fluctuation in prices does not necessarily result in a related fluctuation in SG&A. In contrast, profit on sales is directly impacted by the sales price. Thus, depending on the facts, it may not be unreasonable for an investigating authority to reject actual profit data, while accepting SG&A data.

(c) Evaluation by the Panel

7.289 Before assessing the merits of Norway's claims, we briefly describe the extent to which the investigating authority disregarded actual SG&A cost and profit data when constructing normal value for the investigated parties.

[448] EC, FWS, paras. 218-221, 228-229; EC, SWS, para. 95; EC, Answer to Panel Question 85.
[449] EC, FWS, para. 219.

(i) Facts

7.290 The findings set out in the Provisional Regulation, which in this regard were confirmed in the Definitive Regulation,[450] reveal that normal value was constructed for eight of the ten investigated parties.[451] The investigating authority constructed normal value by adding to each investigated party's adjusted cost of manufacture, a reasonable amount for SG&A costs and a reasonable margin of profit. Before utilising "the SG&A incurred and the profit realised by each" investigated party on the domestic market, the investigating authority checked to see whether it "constituted reliable data".[452] In respect of profit, the investigating authority found that:

> "[t]he actual domestic profit margin was considered reliable when the total domestic sales volume of the company concerned could be regarded as representative as compared to the volume of export sales to the Community. For companies with overall representative sales, the profit margin was determined on the basis of domestic sales of those types that were sold in the ordinary course of trade."[453]

7.291 Domestic sales were considered representative when the total domestic sales volume of each exporting producer was at least 5 per cent of its total export sales volume to the EC. Three companies were found not to have overall representative sales.[454]

7.292 Five companies were found to have overall representative sales.[455] The individual company disclosure documents reveal that some or all of these companies' sales were found not to be representative at the level of individual salmon types.[456] For the remainder of the sales, relating to

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[450] Definitive Regulation, Recital 11.

[451] Provisional Regulation, Recital 29. Individual disclosures reveal that these companies were [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-69); [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-45), [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit EC-39), [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibits EC-42 and EC-43); [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-28); [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-16); [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-53); and [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-54).

[452] Provisional Regulation, Recital 26.

[453] Provisional Regulation, Recital 27.

[454] Provisional Regulation, Recital 29. It appears that these companies were [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-28)]; [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-53); and [[XXX]] (Provisional Disclosure to [[XXX]], 22 April 2005, Exhibit NOR-120. See also EC, Answer to Panel Question 15; and Norway, Answer to Panel Question 84.

[455] Provisional Regulation, Recital 29. It appears that these companies were [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-69); [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-45), [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit EC-39), [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibits EC-42 and EC-43); and [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-16). We note, however, that [[XXX]] Definitive Disclosure states that "[i]n terms of overall sales it was established that the domestic sales volume ... was representative when compared to total domestic plus EU sales ... However, the volume of all PCNs sold domestically was unrepresentative ... ". It is unclear to us whether [[XXX]] domestic sales were excluded because they were unrepresentative overall or unrepresentative at the level of salmon types. In the light of the fact that the Provisional Regulation identified five companies as having made "overall representative sales" we have treated [[XXX]] as one of them, by exclusion.

[456] It would appear that this was the case in respect of all domestic sales of [[XXX]]. Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-16.

three of the five companies, it was found that some of these were not in the ordinary course of trade because they failed the less-than-10 per cent profitable sales test.[457]

7.293 No individual findings were made in respect of two investigated companies in the Provisional Regulation because it was found that "it was not possible to conclude on the basis of the information provided that sales of farmed salmon had been made to unrelated parties at arms length prices".[458] However, individual determinations were made for both companies in the Definitive Regulation. Although there is no information in the Definitive Regulation that explains how the investigating authority calculated the normal values of these two companies, the individual company disclosures reveal that one of these companies, [[XXX]], was combined with [[XXX]] and therefore obtained the same individual margin as [[XXX]].[459] The other company, [[XXX]], had its normal value constructed after it was found that "none of the domestic sales of the like product per PCN (product control number) were found to be made in the ordinary course of trade".[460] The extract of this company's Definitive Disclosure document that has been submitted as evidence in this dispute does not explain the extent to which the less-than-10 per cent profitable sales test was applied in finding this company's sales were outside of the ordinary course of trade.

7.294 Thus, it is apparent that for eight of the ten investigated companies, the investigating authority found that the actual domestic profit margin, relating to all or some of their sales, was not reliable because of the low volume of those sales (5 per cent representative sales test). For three of the ten investigated companies, the investigating authority found that the actual domestic profit margin, relating to some of their sales, was not reliable because of the low volume of profitable sales (less-than-10 per cent profitable sales test).

7.295 As regards SG&A costs, the investigating authority found in its Provisional Regulation that it could provisionally rely upon the company specific information provided by all of the investigated companies.[461] This finding was confirmed in the Definitive Regulation.[462] However, in the Definitive Disclosure to [[XXX]], the investigating authority stated otherwise:

> "As regards selling, general and administrative expenses ('SG&A'), the findings of the provisional disclosure have been revised. Given that [[XXX]] did not sell representative volumes on the domestic market and therefore these sales were not made in the ordinary course of trade, SGA were determined on the basis of the weighted average of the actual amounts determined for other exporters. This SGA rate was subsequently based on data pertaining to all co-operating exporters part of the sample that made domestic sales in the ordinary course of trade. It amounts to [[XXX]] per cent based on turnover."[463]

7.296 Thus, for this one company, the investigating authority found actual SG&A costs to be unreliable on the basis of the 5 per cent representative sales test.[464]

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[457] *See*, paras. 7.224-7.229. [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-69); [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-45); [[XXX]] (Definitive Disclosure to [[XXX]], 28 October 2005, Exhibits EC-42 and EC-43). See also EC, Answer to Panel Question 15; and Norway, Answer to Panel Question 84.

[458] Provisional Regulation, Recital 18.

[459] Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit EC-40.

[460] Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-29.

[461] Provisional Regulation, Recital 31.

[462] Definitive Regulation, Recital 11.

[463] Definitive disclosure to [[XXX]], 28 October 2005, Annex II, pages 2-3, heading "Selling, General and Administrative Expenses. Exhibit NOR-54.

[464] This understanding was also confirmed also by the EC. EC, Answer to Panel Question 18.

(ii) Whether the investigating authority acted inconsistently with Article 2.2.2 of the AD Agreement

7.297 The first question that we are called upon to resolve under Norway's Article 2.2.2 claim is whether an investigating authority may calculate the amounts of SG&A cost and profit to use in the construction of normal value by disregarding data pertaining to domestic sales made in "low volumes", in particular, sales found not to be made in "sufficient quantities" within the meaning of footnote 2 to Article 2.2. We begin our consideration of this question by reviewing the text of Article 2.2.2 of the AD Agreement, which reads:

> "For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:
>
> (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
>
> (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
>
> (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin."

7.298 Norway's claim is focused on the first sentence of Article 2.2.2. This sentence states in clear terms that the amounts for SG&A cost and profits used in the calculation of constructed normal value "shall" be based on "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation". Article 2.2.2 contains no exception or qualification to this rule. On its face, it does not appear to envisage the possibility of disregarding actual SG&A cost and profit data on any other basis than sales being outside of the ordinary course of trade. Furthermore, it is instructive to note that compared to Article 2.2 of the AD Agreement, which explicitly identifies low-volume sales (sales not made in "sufficient quantities") *and* sales outside of the ordinary course of trade as two of three conditions that when satisfied may result in the construction of normal value, Article 2.2.2 does not identify low-volume sales as an additional criterion of relevance to the calculation of appropriate amounts of actual SG&A cost and profit for the purpose of constructing normal value. Thus, the text of Article 2.2.2, when read in the context of Article 2.2, suggests in clear terms that Members are not entitled to disregard data pertaining to low-volume sales (within the meaning of Article 2.2) from the identification of appropriate amounts of SG&A cost and profit to use in the construction of normal value. In our view, this interpretation is consistent with the Appellate Body findings in *EC – Tube or Pipe Fittings* where it held that Article 2.2.2 does not require that data pertaining to low-volume sales be excluded from the calculation of SG&A cost and profits for the purpose of constructing normal value.[465]

7.299 The EC contends that an interpretation of Article 2.2.2 that would render impermissible the exclusion of data pertaining to sales made in "low volumes" from the calculation of SG&A cost and

[465] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 98. See also, Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.121-7.139.

profit, would, in certain factual scenarios, result in findings of dumping based on comparisons between prices of non-comparable sales. The EC argues that if data pertaining to sales found not to be representative because made in low volumes within the meaning of Article 2.2, are taken into account when determining SG&A cost and profit used for the purpose of constructing normal value, "the effect will be exactly to reintroduce the information that was previously excluded in accordance with Article 2.2".[466] The EC describes this "effect" in the following terms:

> "The effect concerns sales prices that, in the application of Article 2.2, were disregarded under the low-volume criterion but would not have been disregarded under the sales-below-cost criterion.[152] Under the narrow interpretation of Article 2.2 that is favoured by Norway the SG&A and the profit margins of these sales would have been used, along with those of the other profitable sales that the EC did use, to arrive at an average SG&A and profit margin which would then be added to the costs of various products in order to construct normal values. The crucial element in the process is that of profit margins. The profit margins that Norway says should be used for the constructed normal value were determined by the prices charged on sales of those products — the same prices that had just been disregarded in accordance with the Article 2.2 low-volume criterion. It is true that instead of being applied directly back to individual sales the various profit margins on sales of the product under consideration are subjected to a process of weighted averaging when constructing the normal value. However, this process of weighted averaging is in any case applied to all the costs of the sales whose prices have been rejected under Article 2.2. Likewise, even where normal value is based on actual sales prices these prices are subject to weighted averaging for each type or presentation of the product under consideration. Whether the data are taken directly from actual sales, or they are split up and brought together again in constructing a normal value, they are the same, and when subjected to weighted averaging produce the same figure.
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> [152] Under the system applied in the salmon measures the EC first rejected sales on the basis of the low-volume criterion, and only then applied the below-cost criterion. Consequently, some low-volume sales that could have been rejected as below cost were never identified as such." [467]

7.300 Thus, the EC argues that the effect of an interpretation of Article 2.2.2 that would render impermissible the exclusion of data pertaining to sales made in "low volumes" from the calculation of SG&A cost and profit, would run not only contrary to the express words of Article 2.2 (which prescribes that low volume "sales do not permit a proper comparison"), but also to the principle in Article VI:1(a) of the GATT 1994 that price comparisons should only be made between transactions that are comparable.[468]

7.301 The EC raises a similar issue that Brazil appears to have raised on appeal in *EC – Tube or Pipe Fittings*. The Appellate Body addressed Brazil's concerns in the following manner:

> "we note that Brazil further argues, by way of an example, that the Panel's interpretation of the chapeau of Article 2.2.2 implies that a constructed normal value would be identical to a normal value that is based on low-volume sales prices under Article 2.2. As a result, in Brazil's view, Article 2.2 is rendered ineffective, contrary to the principles of treaty interpretation in public international law. (Brazil's

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[466] EC, FWS, para. 244.
[467] EC, FWS, para. 245.
[468] EC, FWS, para. 248; EC, SWS, para. 93; EC, Second Oral Statement, para. 55.

> appellant's submission, paras. 89-90) We note, as does the European Communities, that the example posited by Brazil is premised on certain factual assumptions. (European Communities' appellee's submission, paras. 63-65) We are not convinced that these factual assumptions necessarily hold true for most anti-dumping investigations. We are of the view that the *possibility* of the outcome suggested by Brazil, based on a certain set of circumstances, cannot overcome the specific text of the chapeau of Article 2.2.2."[469]

7.302 The EC argues that the difference between *EC – Tube or Pipe Fittings* and the present dispute is that the particular factual scenario envisaged in Brazil's example is no longer a possibility, but a reality. Thus, the EC alleges that the result of taking into account data from non-representative sales in the present case would have been to construct normal values that were identical to the normal values that would be determined on the basis of the prices of the same non-representative sales.[470]

7.303 We recognize that the general result described by the EC does raise a real dilemma: how to reconcile the possibility that prices relating to sales excluded from the calculation of normal value under Article 2.2 of the AD Agreement, may be reconstructed and relied upon for the very same purpose through the application of Article 2.2.2? As the EC notes, the problem mainly arises because of the requirement in Article 2.2.2 that investigating authorities use actual profit margins pertaining to all sales in the ordinary course of trade when constructing normal value. SG&A costs represent the selling, general and administrative expenses incurred in the production and sale of a product. Typically, these will not vary much between different domestic sales because they relate to the same selling, general and administrative activities conducted in respect of all sales.[471] On the other hand, profit margins are more likely to vary across different domestic sales, and between low-volume and other sales, because they are related to factors external to costs actually incurred and depend upon a company's pricing policy. Thus, we see the main cause of the dilemma identified by the EC to be the requirement in Article 2.2.2 that actual profit margins pertaining to all sales in the ordinary course of trade be used when constructing normal value.

7.304 However, the text of Article 2.2.2 is clear, and it is not our task to read words into the AD Agreement that are not there. Therefore, on balance, in the light of the text of Article 2.2.2, and the Appellate Body's observations in *EC – Tube or Pipe Fittings*,[472] we find that Article 2.2.2 does not envisage a "low-volume" sales exception to the rule that SG&A costs and profit used for the purpose of constructing normal value be calculated on the basis of data pertaining to sales made in the ordinary course of trade.

7.305 The second argument made by the EC in support of its contention that an implicit qualification in respect of "low volume" sales must be read into the text of the first sentence of Article 2.2.2 relates to the meaning of the expression "ordinary course of trade".[473] The EC contends that the expression "ordinary course of trade", as it appears in Article 2.2.2, should be given an independent meaning to the same expression found in Articles 2.2.1 and 2.2. In essence, we understand the EC to be arguing that sales disregarded from the calculation of normal value because of their low volume, pursuant to footnote 2 of Article 2.2, should be considered to be outside of the "ordinary course of trade" for the purpose of Article 2.2.2, even though such sales could not be considered to be made outside of the "ordinary course of trade" for the purpose of Article 2.2. The

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[469] Appellate Body Report, *EC – Tube or Pipe Fittings*, footnote 99.

[470] EC, FWS, para. 254; EC, Second Oral Statement, para. 16.

[471] We recognize that this may not always be the case, and that, for instance, different selling methods may be employed to make different sales of the same product. However, we do not consider that this will be the typical way that a company will make its sales of the same product.

[472] Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 93-102, including footnote 99.

[473] *See*, para. 7.286.

EC submits that this conclusion follows from a "logical circle" created by the combined operation of Articles 2.2.1 and 2.2.2, which it argues can only be escaped if the meaning of "ordinary course of trade" in Article 2.2.2 is independent from its meaning in Articles 2.2.1 and 2.2. The EC describes the "logical circle" as arising because in order to determine whether below-cost sales are outside of the "ordinary course of trade" by reason of price pursuant to Article 2.2.1, it is first necessary to calculate SG&A cost, which the EC argues must be done according to Article 2.2.2. However, to calculate SG&A cost pursuant to Article 2.2.2, one needs to first know what sales are in "ordinary course of trade".[474]

7.306 We can see how, on its face, the language used in Articles 2.2.1 and 2.2.2 may be viewed as creating what the EC has described to be a "logical circle". It is true that a determination that below-cost sales have not been made in the "ordinary course of trade" by reason of price under Article 2.2.1 requires the proper calculation of SG&A costs in accordance with Article 2.2.2. Likewise, we recognize that the proper calculation of SG&A costs under Article 2.2.2 must be informed by whether the domestic sales transactions from which the relevant SG&A data are derived are made in the "ordinary course of trade". However, we do not agree with the EC when it suggests that the only way to escape the "logical circle" created by the apparent interdependence of these two provisions would be to give the expression "ordinary course of trade" in Article 2.2.2 a meaning that would result in finding that low-volume sales could be treated as outside of the "ordinary course of trade" for the purpose of Article 2.2.2, even when it appears they should not be treated as such under Article 2.2. In our view, the combined operation of Article 2.2.1 and 2.2.2 does not support such a conclusion.

7.307 Although the below-cost sales test in Article 2.2.1 appears in the text of the AD Agreement before Article 2.2.2, it is evident that, in practice, it cannot be performed without having first made the calculations referred to in Article 2.2.2. Thus, where an investigating authority intends to perform the below-cost sales test pursuant to Article 2.2.1, the provisions of Article 2.2.2 must be applied in advance. We consider that the expression "ordinary course of trade" in Article 2.2.2 must be understood in the light of this practical context. In other words, the reference to sales made in the "ordinary course of trade" in Article 2.2.2 must encompass all sales found by the investigating authority to be in the "ordinary course of trade" *at the time of its application*. Because there can be no determination of below-costs sales outside of the "ordinary course of trade" pursuant to Article 2.2.1 *before* the rules in Article 2.2.2 are applied to calculate SG&A costs, it follows that sales identified as not being made in the "ordinary course of trade" for the purpose Article 2.2.2 cannot include below-cost sales found to be outside of the "ordinary course of trade" within the meaning of Article 2.2.1. In effect, this means that sales found to be outside of the "ordinary course of trade" under Article 2.2.1 cannot also be outside of the "ordinary course of trade" for the purpose of Article 2.2.2.

7.308 We note that Article 2.2.1 does not exhaust the situations when domestic sales may be considered to be outside of the "ordinary course of trade". Indeed, as the Appellate Body has found, Article 2.2.1 establishes but one methodology for determining when below-cost sales may be treated as not being made in the "ordinary course of trade" by reason of price.[475] There may be many other reasons why domestic sales transactions might not be considered to have been made in the "ordinary course of trade".[476] Thus, to find that sales determined to be outside of the "ordinary course of trade" under Article 2.2.1 cannot also be considered to be "outside of the ordinary course" for the purpose of Article 2.2.2, does not render Article 2.2.2 ineffective. Indeed, it is clear to us that the appreciation of sales in "ordinary course of trade" that is called for under Article 2.2.2 envisages the identification of all sales that are outside the "ordinary course of trade" by any means *other* than the below-cost sales test set out in Article 2.2.1. Given how we understand that Articles 2.2.1 and 2.2.2 are intended to operate in practice, we cannot see how any other result is practically possible. In this light, we can

[474] EC, SWS, para. 87.
[475] Appellate Body Report, *US – Hot-Rolled Steel*, para. 147.
[476] Appellate Body Report, *US – Hot-Rolled Steel*, para. 146.

find no support in the so-called "logical circle" for the EC's suggestion that the notion of sales in the "ordinary course of trade" must be interpreted in such a manner that would permit "low-volume" sales to be treated as outside of the "ordinary course of trade" for the purpose of Article 2.2.2.

Data pertaining to sales disregarded on the basis of the application of the 5 per cent low-volume sales test

7.309 We recall that for eight of the ten investigated companies, the investigating authority disregarded the actual domestic profit margins pertaining to some or all of their sales because of the low volume of those sales (5 per cent low-volume sales test). For one investigated company, the investigating authority disregarded actual SG&A costs on the same basis. In this light, and bearing in mind our conclusions in respect of the proper interpretation of Article 2.2.2, we find that the investigating authority acted inconsistently with the EC's obligations under Article 2.2.2 of the AD Agreement when it disregarded the actual SG&A and domestic profit margin data pertaining to some or all sales of these companies because of the low volume of those sales.

Data pertaining to sales disregarded on the basis of the application of the less-than-10 per cent profitable sales test

7.310 For three of the ten investigated companies, the investigating authority found that the actual domestic profit margin, relating to some of their sales, was not reliable because it was derived from a low volume of profitable sales (less-than-10 per cent profitable sales test). In the first instance, Norway argues that the exclusion of this information through the application of the less-than-10 per cent profitable sales test amounted to disregarding actual profit margin data because of low-volume sales. The EC contends that the exclusion of the profit margin information was not based on low-volume sales, but on the investigating authority's finding that the sales in question were not made in the ordinary course of trade. In this regard, the EC submits that the less-than-10 per cent profitable sales test is a permissible means of checking whether sales are made in the ordinary course of trade. Norway argues that the less-than-10 per cent profitable sales test is not a permissible methodology for determining whether sales are made in the ordinary course of trade. Thus, a threshold question that we must resolve under this part of Norway's claim is whether the less-than-10 per cent profitable sales test is a permissible means of determining whether sales are in the ordinary course of trade.

7.311 We recall that in assessing whether the investigated parties' sales were made in the ordinary course of trade, the investigating authority first examined whether any non-profitable (i.e., below-cost) sales could be disregarded from the calculation of normal value by applying the test set out in Article 2.2.1.[477] After excluding all below-cost sales that satisfied this test, the investigating authority next checked to see whether "the volume of profitable sales [that remained] of any type of farmed salmon represented less than 10 per cent of the total sales volume of that type". Where this was found to be the case, "it was considered that this particular type was sold in insufficient quantities for the domestic price to provide an appropriate basis for the establishment of the normal value".[478] Consequently, the investigating authority disregarded all profitable (i.e., above-cost) sales that did not account for at least 10 per cent of the volume of all relevant domestic sales. Thus, the investigating authority determined that all domestic sales of any type of farmed salmon, irrespective of profitability, could be excluded from its calculation of normal value when the below-cost sales meeting the test set out in Article 2.2.1 accounted for more than 90 per cent of the volume of all relevant domestic sales. In the words of the EC, "where the overwhelming majority of [an investigated] company's sales

[477] See paras. 7.278 - 7.279.

[478] Provisional Regulation, Recitals 23-25. These findings were confirmed in the Definitive Regulation, Recital 11. See also, para. 7.240 above.

[were] made at a loss" the investigating authority found "the whole of the company's sales as not being made in the ordinary course of trade".[479]

7.312 The AD Agreement does not specifically address the question of whether profitable sales may be treated as not being made in the ordinary course of trade for the sole reason that they are made in low volumes. However, it does specifically address the implications of below-cost sales for ordinary course of trade determinations and the calculation of normal value. As we have already noted, Article 2.2.1 establishes a methodology for determining when below-cost sales may be treated as outside of the ordinary course of trade by reason of price.[480] Pursuant to this methodology, below-cost sales may be found to be outside of the ordinary course of trade, and thereby disregarded from the calculation of normal value, when three conditions are satisfied – the below-cost sales must be made: (i) within an extended period of time; (ii) in substantial quantities; and, (iii) at prices which do not provide for the recovery of all costs within a reasonable period of time.

7.313 To the extent that one of the conditions for finding that below-cost sales have not been made in the ordinary course of trade is that they be made in *substantial quantities*, Article 2.2.1 recognizes that the volume of below-cost sales may be determinative of the question whether such sales are made in the ordinary course of trade. To this end, footnote 5 explains that below-cost sales will be made in substantial quantities when they represent at least 20 per cent of the volume of transactions under consideration for the determination of normal value. When this threshold is not met, an investigating authority will not be entitled to treat the below-cost sales as outside of the ordinary course of trade by reason of price. In other words, when 80 per cent or more of an investigated party's domestic sales are made at above-cost prices, the remaining below-cost sales will not be considered to be outside of the ordinary course of trade, and must therefore be taken into account when determining normal value, unless of course, such below-cost sales can be disregarded for another reason.

7.314 When below-cost sales are made in substantial quantities, Article 2.2.1 provides that they may be treated as not being made in the ordinary course of trade only when they are made over an extended period and at prices which do not provide for the recovery of all costs within a reasonable period of time.

7.315 Thus, two of the implications of below-cost sales for ordinary course of trade determinations identified in Article 2.2.1 are that: (i) below-cost sales cannot be found to be made outside of the ordinary course of trade, by reason of price, when they are made in volumes that do not exceed 20 per cent of the relevant domestic sales; and (ii) below-cost sales may be found to be made outside of the ordinary course of trade only when all three of the conditions in Article 2.2.1 are satisfied. It is notable that the possibility of treating *both* below-cost and above-cost sales as not being made in the ordinary course of trade when below-cost sales exceed a certain volume (for example, 90 per cent) of domestic sales is not provided for in Article 2.2.1. Given that Article 2.2.1 is intended to address the implications of below-cost sales for ordinary course of trade determinations, we believe this to be a telling omission. Had the drafters of Article 2.2.1 considered that a large volume of below-cost sales could have implications for determining whether a low volume of above-cost sales could be found to be outside the ordinary course of trade, it could be expected that this would have been expressed in the text of the only provision of the AD Agreement that was specifically designed to address the implications of below-cost sales on ordinary course of trade determinations. This is even more so because through the operation of footnote 5, Article 2.2.1 does in fact specifically envisage that large volumes of above-cost sales will have implications for determining whether low volumes of below-cost sales may be found to be in the ordinary course of trade. Thus, the absence of any recognition of the possibility that large volumes of below-cost sales may imply that low volumes of above-cost sales could be treated as not being made in the ordinary course of trade suggests that the drafters did not

[479] EC, Opening Statement at the Second Substantive Meeting of the Parties, para. 58.
[480] *See*, paras. 7.258- 7.273.

envisage that a low volume of above-cost sales could be determinative of whether such sales were made in the ordinary course of trade.

7.316 We find support for this conclusion in Article 2.2. Read together with footnote 2, Article 2.2 provides that domestic sales constituting less than 5 per cent of the volume of export sales of the product under consideration shall not be considered to permit a proper comparison between export price and normal value, and must therefore be disregarded from the calculation of normal value. Thus, when domestic sales are made in low volumes relative to export sales, they cannot be used in the calculation of normal value. In our view, Article 2.2 demonstrates that when the drafters of the AD Agreement believed that the low volume of domestic sales should be taken into account for the purpose of calculating normal value, they specifically said so. And in doing so, we note that they did not distinguish between different volumes of profitable or non-profitable domestic sales.

7.317 Finally, we note that one of the justifications the EC advances for the less-than-10 per cent profitable sales test is that it provides "a complement to the less-than-20 per cent unprofitable rule" that is set out in footnote 5 to Article 2.2.1, and thereby "helps to achieve the goal of even-handedness that was identified by the Appellate Body".[481] In making this statement, we understand the EC to suggest that the application of Article 2.2.1 may result in findings that are not "even-handed" and "fair to all parties affected by an anti-dumping investigation".[482] We are not convinced that the drafters of Article 2.2.1 agreed to establish a rule that could itself only result in "even-handed" findings when applied in conjunction with another rule that does not appear elsewhere in the provisions of the AD Agreement. By agreeing to the rules in footnote 5, it is evident that the drafters of the AD Agreement recognized that a minimum volume of below-cost sales is not incompatible with sales being made in the ordinary course of trade. As such, the result achieved through the operation of footnote 5 is, in and of itself, fair and even-handed, and therefore does not require the application of any complementary rule to ensure that normal value is appropriately calculated.

7.318 Therefore, for all of the above reasons, we find that the less-than-10 per cent profitable sales test applied by the investigating authority in the investigation at issue is an impermissible means of determining whether domestic sales are in the ordinary course of trade. We recall that the investigating authority disregarded the actual profit margins on certain domestic sales of three of the ten investigated parties on the basis of the less-than-10 per cent profitable sales test. Because we have found that the less-than-10 per cent profitable sales test is not a permissible means of determining whether domestic sales are made outside of the ordinary course of trade, the investigating authority's decision to disregard the profit margin data of three of the ten investigated parties cannot be justified under the terms of Article 2.2.2. Thus, to the extent that the investigating authority did not rely upon the profit margin data pertaining to certain sales made by [[XXX]], [[XXX]] and [[XXX]] on the basis of the less-than-10 per cent profitable sales test, we find that the investigating authority acted inconsistently with the EC's obligations under Article 2.2.2 of the AD Agreement.

7.319 In the light of our finding in respect of Norway's claim under Article 2.2.2, we do not believe it is necessary, for the purpose of satisfactorily resolving this dispute, to also decide whether the investigating authority's application of the less-than-10 per cent profitable sales test was inconsistent with Article 2.2 of the AD Agreement. Therefore, on the grounds of judicial economy, we make no findings in respect of Norway's claim that the less-than-10 per cent profitable sales test was inconsistent with Article 2.2 of the AD Agreement.

[481] EC, Answer to Panel Question 85.
[482] Appellate Body Report, *US – Hot-Rolled Steel*, para. 147.

4. Alleged Inconsistency of the EC's Reliance on "Facts Available" in the Calculation of Grieg Seafood's Normal Value with Article 6.8 and Paragraphs 3 and 6 of Annex II of the AD Agreement

(a) Arguments of the parties

(i) Norway

7.320 Norway claims that the investigating authority relied on "facts available" to establish the constructed normal value for one of the investigated companies, Grieg Seafood AS ("Grieg"), without respecting the conditions governing the use of "facts available" set out in Article 6.8 and paragraphs 3 and 6 of Annex II. Norway's complaint relates to the investigating authority's establishment of the amounts used for filleting and finance costs in the calculation of Grieg's cost of production.

7.321 Norway submits that the AD Agreement distinguishes between primary source information obtained from the investigated company and secondary source information obtained from another source, and that secondary source information is referred to as "facts available" or "best information available". Thus, if an investigating authority does not use information submitted by an investigated company, it automatically uses secondary source information or "facts available", and must therefore comply with the conditions governing the use of such information in Article 6.8 and Annex II.

7.322 Norway alleges that the investigating authority did not respect the conditions in paragraphs 3 and 6 of Annex II when it used "facts available" to calculate Grieg's filleting costs because the information provided by Grieg to the investigating authority in response to the deficiency notice was verifiable, submitted in a timely fashion and could be used without undue difficulties. In particular, Norway argues that although the requested information was submitted after the investigating authority's verification of Grieg's initial questionnaire response at Grieg's premises in Norway, the investigating authority could have asked Grieg to provide additional data to assist it verify the submitted information, had it been considered unreliable. However, according to Norway, the investigating authority failed to do so. Moreover, Norway contends that there is no indication that the investigating authority even considered how the information submitted by Grieg could be verified. It simply decided not to accept it because the information had not been presented during the on-site investigation at Grieg's premises. Norway considers that the information on filleting costs was submitted in a timely fashion because it was provided approximately one week after the investigating authority's written disclosure of the position it had taken in respect of Grieg's cost of production, at a stage when the investigation was still ongoing. Furthermore, in Norway's view, the information submitted by Grieg could also be used without undue difficulties, and the investigating authority never provided an explanation why this was not the case.

7.323 Likewise, as regards the calculation of Grieg's finance costs, Norway argues that the investigating authority did not respect the conditions in paragraphs 3 and 6 of Annex II because the information provided by Grieg to the investigating authority was verifiable, submitted in a timely fashion and could be used without undue difficulties.

7.324 Finally, in response to the EC's arguments, Norway submits that the Panel does not have to resolve the interpretive question of how Article 9.4 of the AD Agreement is intended to apply in the event that all margins of dumping for investigated producers were calculated on the basis of "facts available", because the investigating authority calculated several margins of dumping in the investigation at issue without resorting to "facts available". Thus, the Panel need not address the question raised by the EC's arguments for the purpose of resolving the present dispute.

(ii) European Communities

7.325 In the first instance, the EC argues that it did not rely on "facts available" in determining the appropriate amount of filleting costs for the purpose of constructing Grieg's normal value. The EC contends that the conditions for resorting to "facts available" were not satisfied on the basis of the circumstances at issue, in particular, "because of the confused situation in which some of the information was in the hands of another company".[483] However, because the necessary information could not be obtained from Grieg, the EC argues that the investigating authority was entitled not to "invoke" "the particular process for arriving at conclusions on factual issues"[484] that is envisaged in Article 6.8. Thus, the EC argues that, in the particular circumstances of the investigation, the investigating authority was entitled to rely on information other than "facts available". In any case, the EC submits that even if the conditions for using "facts available" were established in respect to Grieg's filleting costs, an alternative to using "facts available" is contemplated under Article 6.8 because the text is only permissive in nature, not mandatory. In this regard, the EC contends that "if there is no alternative to using facts available when information is not forthcoming, investigations would reach an impasse regarding the application of Article 9.4 and the extension of an average margin to non-investigated exporters in situations where none of the investigated companies had cooperated".[485]

7.326 Secondly, the EC argues that the investigating authority did not act inconsistently with paragraph 3 of Annex II in assessing Grieg's filleting costs because, in its view, the information on filleting costs could not be verified once submitted after the verification conducted on Grieg's premises in Norway. Furthermore, the EC contends that there was no violation of paragraph 6 of Annex II because the inadequacies of Grieg's filleting cost information must have been apparent to Grieg in the light of the discussions held during the verification visit. The EC also argues that the language of paragraph 6 only requires that an investigating authority "should" (and not "shall") provide investigated parties with the reasons for not accepting information.

7.327 The EC contests Norway's claim in respect of finance costs by arguing that the issue before the Panel is not how it treated the evidence submitted by Grieg and whether it relied on "facts available". The EC asserts that Norway's complaint relates to the decision taken by the investigating authority to apply a particular calculation methodology, instead of relying on the actual data for these costs that was supplied by Grieg. In this regard, the EC argues that it did not reject Grieg's data, but simply took a decision to apply a particular benchmark to assess Grieg's costs, which it considered was of a commercial nature. Thus, the EC argues that it did not rely on "facts available" in determining the appropriate amount of finance costs for the purpose of constructing Grieg's normal value.

(b) Arguments of the third parties

(i) Korea

7.328 Korea asserts that Article 6.8 and paragraphs 3 and 6 of Annex II of the AD Agreement do not provide a *carte blanche* to an investigating authority conducting an anti-dumping investigation whenever it encounters less than optimal information from a foreign respondent. Instead, these provisions unequivocally provide conditions that need to be satisfied before the investigating authority applies the facts available standard. In particular, Korea notes that paragraph 3 of Annex II stipulates that all verifiable information that can be used in the investigation without undue difficulties should be taken into account by the investigating authority; and that paragraph 6 of Annex II, in turn,

[483] EC, FWS, para. 287; EC, Answer to Panel Question 20.
[484] EC, Answer to Panel Question 24.
[485] EC, FWS, footnote 165.

stipulates that if the investigating authority plans to apply facts available, it must inform the foreign respondent of the reason and offer another opportunity to provide the requested information within a reasonable period of time.

7.329 Korea argues that in the underlying investigation, the EC applied "facts available" in a manner that was inconsistent with these provisions and rejected the information submitted by Grieg. Given the circumstances and in the light of the communication between the investigating authority and Grieg, Korea believes that Grieg cooperated with the EC investigation in a reasonable manner.

7.330 Thus, Korea submits that the EC's rejection of the Grieg's information was unreasonable and unwarranted. The EC's recourse to "facts available", therefore, constituted a violation of Article 6.8 and paragraphs 3 and 6 of Annex II of the AD Agreement.

(c) Evaluation by the Panel

(i) Whether the investigating authority acted inconsistently with Article 6.8 and paragraphs 3 and 6 of Annex II when it calculated Grieg's filleting costs

7.331 Norway claims that the investigating authority relied on "facts available" to establish Grieg's filleting costs for the purpose of constructing normal value, without respecting the conditions governing the use of "facts available" set out in Article 6.8 and paragraphs 3 and 6 of Annex II. The EC acknowledges that the investigating authority did not determine Grieg's filleting cost on the basis of the information submitted by Grieg, and that it instead used another source of information to derive those costs. However, according to the EC, the investigating authority's actions were not inconsistent with Article 6.8 and Annex II of the AD Agreement for essentially two alternative reasons: first, the EC argues that the investigating authority's reliance on information not submitted by Grieg did not amount to using "facts available", within the meaning of Article 6.8[486]; and second, in any case, the EC argues that the investigating authority's conduct fully complied with paragraphs 3 and 6 of Annex II, thereby entitling it to rely upon "facts available".[487] Before turning to address Norway's claims, we believe it is useful to first set out some of the relevant facts surrounding the investigating authority's calculation of Grieg's filleting costs.

Facts

7.332 The investigating authority issued the investigated parties with the "exporters/producers" questionnaire for the purpose of collecting information relevant to its investigation on 24 November 2004.[488] On 15 December 2004, the EC faxed to Grieg a pre-verification letter confirming its intention to undertake a verification visit on the premises of Grieg on 10 and 11 January 2005.[489] The same letter reminded Grieg that the deadline for its completed questionnaire response was 3 January 2005. It requested Grieg to have "all costs and financial accounting records and supporting documents available, including all worksheets used to prepare the replies to the questionnaire and all schedules reconciling the data recorded in the questionnaires to the source data". It also provided a "non-exhaustive list of items which should be prepared and available" for the start of the verification visit comprising:

- "Reconciliations between the companies [sic] audited financial statements and the information submitted in the questionnaire response relating to sales quantities, sales values and costs of production of the product concerned.

[486] *See*, in particular, EC, FWS, paras. 256, 274, 287 and 290.
[487] EC, FWS, paras. 291-303.
[488] Exhibit EC-6.
[489] Exhibit EC-8.

- ... all incoming and outgoing invoices from 1 October 2003 to 30 September 2004, the inputs for the production of the product concerned or any other cost relating directly or indirectly to the product concerned.

- All documents relating to domestic and export sales, including shipping and payment documents and, where applicable, customs documents.

- Full details on production costs, overheads and SG&A expenses including production reports.

- The original contract documents.

- With regard to any allowances or adjustments eventually considered under Section G of the anti-dumping questionnaire, please be prepared to justify these in detail and have all relevant supporting evidence readily available."

7.333 On 8 March 2005, approximately two months after the on-site verification of Grieg's questionnaire reply, the investigating authority sent Grieg an "Information Note on Cost of Production" setting out its "preliminary assessment" of Grieg's cost of production.[490] In disclosing the "general methodology" applied by the investigating authority to calculate Grieg's cost of production, the Note stated that "[w]here no information [was] provided by the relevant company for certain costs or when these costs were not available, these have been obtained as an average from other sources according to the best information available".

7.334 The Information Note revealed that the investigating authority was of the view that no filleting costs had been reported because they could not be found in the accounts of Grieg Seafood Rogaland (the production company of the Grieg Seafood Group), [[XXX]]. The investigating authority rectified this apparent lack of information by calculating Grieg's filleting costs using "cost per unit information acquired from another co-operating producer in Norway", and adding [[XXX]] NOK/kg to Grieg's cost of production.[491]

7.335 On 16 March 2005, Grieg responded to the investigating authority's Information Note. Grieg explained that during the period of investigation, it had produced filleted products with a company called Triton, which was unrelated to the Grieg Seafood Group. Grieg's response attached a letter from Triton setting out the per kilogram filleting prices charged to Grieg for its services for the period 2003 and 2004. The letter noted that such prices were [[XXX]] a [[XXX]] between Grieg and Triton dated [[XXX]].[492] Grieg's response revealed that it considered its filleting costs for the period of investigation were [[XXX]] NOK/kg.[493]

7.336 In the Disclosure of its Provisional Determination, the investigating authority confirmed its "preliminary assessment" of Grieg's filleting costs. In addition, after referring to Grieg's response to the Information Note, the investigating authority noted that "the cost per kilo used may be re-examined during the definitive stage". Grieg responded to the investigating authority's Provisional Determination, repeating the comments already made in respect of filleting costs.[494]

7.337 The investigating authority's Definitive Determination confirmed the findings made at the provisional stage. The investigating authority recalled the findings made in the previous

[490] Information Note on Cost of Production, Exhibit NOR-55.
[491] Information Note on Cost of Production, Exhibit NOR-55.
[492] Response to Information Note on Production Costs, Exhibit NOR-56.
[493] Response to Information Note on Production Costs, Exhibit NOR-56.
[494] Response to EC Provisional Disclosure to Grieg, Exhibit NOR-57.

communications and disclosures to Grieg, stating additionally that after considering the information submitted by Grieg, it decided to confirm its findings because "at verification [Grieg] could not support the statements made at a later date".[495]

The assertion that the investigating authority did not rely on "facts available"

7.338 The EC does not contest that the investigating authority determined Grieg's filleting costs on the basis of information that was, in part, not submitted by Grieg. However, it argues that the investigating authority's actions did not amount to the use of "facts available", within the meaning of Article 6.8. In particular, the EC asserts that although Grieg eventually provided information in respect of its filleting costs, it did so in the form of a letter from another company, and not on the basis of information from its own accounts. The EC submits that this created a "confusing situation",[496] but one that could not justify resorting to "facts available" within the meaning of Article 6.8. Confronted with these facts, the EC argues that the only option for the investigating authority was to base Grieg's filleting costs on information from "another relevant source, one that [the investigating authority] could trust to give a proper commercial figure and which had been verified".[497]

7.339 As we understand it, the basis of the EC's assertion that the investigating authority did not rely on "facts available" when determining Grieg's filleting costs is the contention that it is possible, under Article 6.8, for an investigating authority to rely upon information other than "facts available" when an interested party has provided information to an investigating authority that falls short of what is necessary for it to make the required determination. More specifically, we understand the EC's defence to Norway's claim to be premised on the view that Article 6.8 envisages the possibility that an investigating authority may rely on information other than that submitted by an interested party in response to a request for information, even when the conditions for disregarding that information and using "facts available" under Article 6.8 have *not* been established.

7.340 We first turn to text of Article 6.8, which reads:

> "In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph." (Underline added).

7.341 Article 6.8 addresses the situation where "necessary information" for making "determinations" is held by an interested party, but not provided to the investigating authority within a reasonable period. In particular, Article 6.8 specifies that where an interested party refuses access to, or otherwise does not provide, "necessary information" within a reasonable period, or where an interested party significantly impedes the investigation, an investigating authority "may" make "determinations" on the basis of "facts available". We note that Article 6.8 contemplates no other possibilities. Thus, where "necessary information" is not forthcoming, an investigating authority "may" make " determinations" on the basis of "facts available".

7.342 Article 6.8 requires that the provisions of Annex II be observed in its application. Paragraph 1 of Annex II provides:

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[495] Definitive Disclosure to Grieg, 28 October 2005, Exhibit NOR-16.
[496] EC, FWS, para. 287.
[497] EC, FWS, para. 290.

> "As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry." (Underline added).

7.343 In establishing that investigating authorities should ensure that respondents receive proper notice of their right to use "facts available" in making determinations, paragraph 1 of Annex II provides important guidance on the meaning of the term "necessary information" that is found in Article 6.8. Specifically, pursuant to paragraph 1, investigating authorities should provide investigated parties with notice of the "information required" and the possibility that "if information is not supplied within a reasonable time", "determinations" may be made on the basis of "facts available". When read together with Article 6.8, this language suggests that "necessary information" refers to the specific information held by an interested party that is requested by an investigating authority for the purpose of making determinations.

7.344 We recall that in the investigation at issue, the investigating authority requested Grieg to provide information about its actual filleting costs in the "exporters/producers" questionnaire. This information was specifically required by the investigating authority for the purpose of determining Grieg's filleting costs in order to calculate Grieg's constructed normal value. Thus, the information on Grieg's actual filleting costs that was requested by the investigating authority was "necessary information" within the meaning of Article 6.8. We do not understand the EC to argue otherwise. It follows that the investigating authority's treatment of the information submitted by Grieg fell within the scope of Article 6.8 and Annex II.

7.345 Paragraph 3 of Annex II reads, in pertinent part:

> "All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made." (Underline added).

7.346 As an integral part of Article 6.8, paragraph 3 of Annex II identifies one circumstance when the conditions for resorting to "facts available" will *not* be established – namely, when the information that is provided by an interested party in response to a specific request from an investigating authority "is verifiable, ... appropriately submitted so that it can be used in the investigation without undue difficulties, ... supplied in a timely fashion, and, where applicable, ... supplied in a medium or computer language requested by the authorities". For present purposes, it is important to note that when the information submitted is of the character described in paragraph 3, it "should be taken into account when determinations are made". It follows that when the conditions for resorting to "facts available" have *not* been established, the specific information provided by an interested party in response to a request from an investigating authority must be taken into account in the investigating authority's determination. We find support for this conclusion in the following statements of the Appellate Body in *US – Hot-Rolled Steel*:

> "Thus, according to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances, four, conditions are satisfied. In our view, it follows that if these conditions are met, investigating authorities are not

> entitled to reject information submitted, when making a determination."[498] (Underline added.)

and the Panel in *US – Steel Plate*:

> "If, after considering the provisions of Annex II, and in particular the criteria of paragraph 3, the conclusion is that information provided satisfies the conditions therein, the investigating authority must use that information in its determinations, and may not resort to facts available with respect to that element of information. That is, the investigating authority may not conclude, with respect to that information, that "necessary information" has not been provided."[499] (Underline added).

7.347 Thus, we do not agree with the EC when it argues that Article 6.8 envisages the possibility that an investigating authority may rely upon information other than that submitted by an interested party in response to a specific request for information, even when the conditions for disregarding that information and using "facts available" under Article 6.8 have *not* been established. Such a view of how Article 6.8 and Annex II are intended to operate is misconceived. In our view, it is clear from the language of Article 6.8, when read in the light of paragraphs 1 and 3 of Annex II, that whenever an interested party submits specific information that an investigating authority has requested for the purpose of making a determination, and the conditions for resorting to "facts available" have not been established, the investigating authority will not be entitled to disregard the submitted information and use information from another source to make the determination.

7.348 To support its contention that the investigating authority did not rely on "facts available" in the present case, the EC also argues that even when the conditions for resorting to "facts available" are established, investigating authorities are nevertheless entitled *not* to rely upon "facts available" because Article 6.8 makes their use permissible and not mandatory. We agree with the EC that Article 6.8 does not require investigating authorities to use "facts available" when the conditions for resorting to "facts available" have been satisfied. However, in our view, the flexibility afforded to investigating authorities through the use of the word "may" in Article 6.8, when all conditions for using "facts available" have been satisfied, must be understood in the context of two possible choices: an investigating authority "may" use "facts available" to fill the information gap created by the lack of "necessary information" or, an investigating authority "may" *not* use "facts available", and to the extent possible, rely on the information submitted by the interested party that has resulted in the conditions for using "facts available" to be established. We consider that the text of Article 6.8 and Annex II permits no other outcome, in a situation where the conditions for using "facts available" have been satisfied.

7.349 Finally, according to the EC, an alternative to "facts available" or specific information submitted by an interested party must exist because if this were not the case, investigating authorities would be unable to calculate an average margin of dumping for non-investigated companies pursuant to Article 9.4 of the AD Agreement in situations where the margins of dumping for all investigated companies were determined through the use of "facts available". Article 9.4 describes how anti-dumping duties applied to imports from exporters or producers not included in a limited examination conducted pursuant to Article 6.10 must be calculated.[500] It envisages the application of two possible

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[498] Appellate Body Report, *US – Hot-Rolled Steel*, para. 81.

[499] Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India ("US – Steel Plate")*, WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, 2073, para. 7.55.

[500] The pertinent text of Article 9.4 provides:

> "When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

methodologies for this purpose, each subject to the qualification that "margins established under the circumstances referred to in paragraph 8 of Article 6" be disregarded from the calculation. According to the EC, if all margins established on the basis of "facts available" pursuant to Article 6.8 must be disregarded in calculating the anti-dumping duties applicable to companies not included in a limited investigation, the only way to determine such anti-dumping duties would be through recourse to information other than "facts available".

7.350 In *US – Hot-Rolled Steel*, the Appellate Body observed that Article 9.4 "does not expressly address the issue of *how* [anti-dumping duties applicable to non-investigated exporters or producers] should be calculated in the event that *all* margins are to be *excluded* from the calculation."[501] The Appellate Body described this apparent lack of guidance as a "*lacuna*" in the text of the AD Agreement.[502] However, on the basis of the particular questions raised in the appeal that was before it, the Appellate Body decided that it was not necessary to address how this *lacuna* might be overcome.[503]

7.351 We recall that the question that is before us under Norway's claim is whether the investigating authority relied on "facts available" to establish Grieg's filleting costs for the purpose of constructing normal value, without respecting the conditions governing the use of "facts available" set out in Article 6.8 and paragraphs 3 and 6 of Annex II. Norway does not claim that the investigating authority calculated anti-dumping duties for non-investigated parties on the basis of information that was neither "facts available" nor information submitted by the investigated parties. Thus, we believe that we are not directly called upon to resolve the question of how to overcome the *lacuna* in Article 9.4. In any case, we note that the specific problem raised by the existence of this *lacuna* is not about the sources for particular pieces of missing information, but rather the appropriate *methodology* that may be used to calculate anti-dumping duties applicable to non-investigated parties, where the methodologies explicitly provided for under Article 9.4 cannot be relied upon.

7.352 Thus, for all of the above reasons, we are not convinced by the arguments that the EC has advanced to substantiate the assertion that the investigating authority did not rely on "facts available" when it calculated Grieg's filleting costs. To the extent that the investigating authority considered that the conditions for using "facts available" had not been met, our assessment of Article 6.8 and Annex II implies that it should have used the data supplied by Grieg. The investigating authority was not entitled to use any other source of information to make its determination of Grieg's filleting costs, be that "facts available" or otherwise. On the other hand, even assuming that the conditions for using "facts available" had been satisfied, the only option available to the investigating authority under Article 6.8 and Annex II, if it did not want to use the information submitted by Grieg, was to use "facts available". On these bases, we therefore dismiss the EC's assertion that the investigating authority did not rely on "facts available" when it calculated Grieg's filleting costs.[504]

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any ... margins established under the circumstances referred to in paragraph 8 of Article 6. ...".

[501] Appellate Body Report, *US – Hot-Rolled Steel*, para. 126. Emphasis original.

[502] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 125 and 126.

[503] Appellate Body Report, *US – Hot-Rolled Steel*, para. 26.

[504] In this regard, we note that the Information Note on Cost of Production issued to Grieg on 8 March 2005 explained that the "general methodology" applied by the investigating authority "[w]here no information [was] provided by the relevant company for certain costs or when these costs were not available",

7.353 We now proceed to examine Norway's claim that the investigating authority used "facts available" without complying with the requirements of paragraphs 3 and 6 of Annex II.

> *Whether the investigating authority acted inconsistently with paragraph 3 of Annex II when it disregarded the information submitted by Grieg and used information from a third party to determine Grieg's filleting costs*

7.354 As already noted, Annex II of the AD Agreement forms an integral part of Article 6.8.[505] Thus, in order to fully comply with Article 6.8, an investigating authority's use of "facts available" must, in addition to satisfying the requirements of Article 6.8, be consistent with the rules set out in Annex II. Norway alleges that the investigating authority calculated Grieg's filleting costs on the basis of "facts available" without meeting the requirements of paragraph 3 of Annex II. This provision reads:

> "All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation." (Underline added.)

7.355 Paragraph 3 of Annex II directs investigating authorities to take all submitted information into account for the purpose of its determinations when it is: (i) "verifiable"; (ii) "appropriately submitted so that it can be used in the investigation without undue difficulties"; (iii) "supplied in a timely fashion"; and, where applicable, (iv) "supplied in a medium or computer language requested by the authorities". Thus, paragraph 3 of Annex II calls upon investigating authorities to take into account all information that satisfies three, or sometimes four, cumulative conditions when making determinations. It follows that where *all* of the conditions are satisfied, an investigating authority will not be entitled to reject information submitted when making determinations.[506] Norway's claim is focused on whether the information supplied by Grieg in respect of filleting costs satisfied the first three of these conditions. We must therefore examine whether the letter from Triton submitted by Grieg was "verifiable", "appropriately submitted so that it can be used in the investigation without undue difficulties" and "supplied in a timely fashion".

7.356 We recall that the only basis that the investigating authority gave in writing for rejecting the information submitted by Grieg in respect of filleting costs was that "at verification [Grieg] could not support the statements made at a later date".[507] The investigating authority rejected the filleting cost data submitted by Grieg in March 2005 because it was not presented to the investigators at the time of the on-the-spot investigation carried out in January 2005. We understand the EC to be arguing that this was a sufficient basis for the investigating authority to conclude that the information submitted by Grieg did not satisfy one or all of the first three conditions in paragraph 3 of Annex II.[508] In other words, the EC argues that the filleting cost information provided by Grieg was not "verifiable", "appropriately submitted so that it can be used in the investigation without undue difficulties" and/or

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was to calculate the relevant costs on the basis of "an average from other sources according to the best information available". Exhibit NOR-55. Underline added. In our view, this suggests that even the investigating authority itself believed that it used "facts available" when it calculated Grieg's filleting costs.

[505] *See*, para. 7.346.

[506] Appellate Body Report, *US – Hot-Rolled Steel*, para. 81; Panel Report, *US – Steel Plate*, para. 7.57.

[507] Definitive Disclosure to Grieg, 28 October 2005, Exhibit NOR-16.

[508] EC, FWS, paras. 294-298.

"supplied in a timely fashion", because it was submitted after the investigating authority had conducted an on-the-spot investigation at Grieg's premises.

- Whether Grieg's filleting cost information was "verifiable"

7.357 The ordinary meaning of the word "verifiable" is "able to be verified or proved to be true."[509] In *US – Steel Plate*, the Panel considered that "verifiable" information for the purpose of paragraph 3 of Annex II was information whose "accuracy and reliability ... can be assessed by an objective process of examination".[510] We find this to be a useful description of what is intended by "verifiable" information under this paragraph.

7.358 Although the possibility of conducting on-the-spot investigations to verify information submitted by an investigated company is explicitly provided for under Article 6.7 and Annex I of the AD Agreement, such investigations are not *required* under the AD Agreement. Moreover, as noted by the Panel in *US – Steel Plate*, pursuant to Article 6.6 of the AD Agreement, investigating authorities must in general satisfy themselves of the accuracy of the information upon which their findings are based, regardless of whether verification has taken place by means of an on-the-spot investigation.[511] It follows that on-the-spot investigations do not exhaust the ways in which an objective assessment of the accuracy and reliability of submitted information may take place. In other words, the AD Agreement recognizes that on-the-spot investigations are not the only way of understanding whether information is "verifiable".

7.359 Norway argues that the investigating authority took no steps to verify the information on filleting costs provided by Grieg. According to Norway, the investigating authority could have, for example, verified the data submitted by conducting a further on-the-spot investigation or by requesting Grieg to provide further information, such as invoices confirming costs stated in the letter from Triton.[512] The EC rejects both of Norway's suggestions. As regards the possibility of a second on-the-spot investigation, the EC argues that no request was ever made on the part of Grieg. In any case, the EC contends that a second visit to Grieg's premises would have been contrary to the investigating authority's normal practice and seriously disrupted the course of the investigation.[513] To have attempted to verify the submitted information by written means would, according to the EC, have been "a recipe for interminable delay".[514]

7.360 We recognize that for investigating authorities that choose to carry them out, on-the-spot investigations will be of fundamental importance to the task of assessing the accuracy and reliability of information which will later form the basis of their findings. We also acknowledge that it may be unreasonable to expect that an investigating authority conduct a second on-the-spot investigation in order to verify information submitted after an initial on-the-spot investigation has taken place.[515] However, in our view, the possibility of undertaking on-the-spot investigations cannot alone be determinative of the question whether submitted information is "verifiable". Because the AD Agreement envisages that there may be other ways to assess the accuracy and reliability of information, the mere fact that a piece of information may have been submitted after an on-the-spot investigation has taken place, does not mean that its accuracy and reliability cannot be objectively assessed through any other process of verification. This does not mean that all information submitted subsequent to an on-the-spot investigation will always be "verifiable". Ultimately, it may well be that

[509] New Shorter Oxford English Dictionary, Clarendon Press, 1993.
[510] Panel Report, *US – Steel Plate*, para. 7.71.
[511] Panel Report, *US – Steel Plate*, footnote 67.
[512] Norway, FWS, para. 426.
[513] EC, FWS, para. 296.
[514] EC, SWS, para. 101.
[515] Panel Report, *Korea – Certain Paper*, para. 7.52.

information submitted after an on-the-spot investigation has been conducted is not "verifiable". However, in our view, this must be a conclusion reached on the basis of a case-by-case assessment of the particular facts at issue, including not only the nature of the information submitted but also the steps, if any, taken by the investigating authority to assess the accuracy and reliability of the information.

7.361 We recall that the information submitted by Grieg in respect of its filleting costs took the form of a letter from an unrelated processing company called Triton, which Grieg had engaged to conduct its filleting operations. The letter from Triton reported the prices of the contracted filleting services and disclosed the existence of a [[XXX]] between Grieg and Triton dated [[XXX]].[516] Grieg submitted this information to the investigating authority eight days after receiving the Information Note on Cost of Production, and approximately two months after the investigating authority had conducted its on-the-spot verification of Grieg's questionnaire response. The Information Note was the first written communication from the investigating authority explaining that it considered Grieg to have failed to report filleting costs.[517] In the disclosure of its provisional findings, the investigating authority referred to the letter from Triton submitted by Grieg and noted that the issue "may be re-examined during the definitive stage". Finally, in the definitive disclosure, the investigating authority recalled once again the letter from Triton, but concluded that the information could not be accepted because "at verification [Grieg] could not support the statements made at a later date".

7.362 Thus, the facts surrounding the investigating authority's calculation of Grieg's filleting costs reveal that the investigating authority at no stage explored whether the accuracy and reliability of the information contained in the letter from Triton could be objectively assessed by any means other than an on-the-spot investigation. Although indicating at the time of its provisional findings that the issue might be re-examined, the investigating authority made no further requests, of a specific or general nature, for any additional information relating to Grieg's filleting costs. For instance, the investigating authority did not ask Grieg to demonstrate how the information in the letter from Triton could be reconciled with its annual accounts, which we understand were in the investigating authority's possession. Neither did it inquire into whether the information could have been verified by means of the [[XXX]] that had been in existence since [[XXX]]. The investigating authority made no attempt whatsoever to assess whether the submitted information was "verifiable". We do not understand the EC to argue otherwise.

7.363 Given the absence of any attempt by the investigating authority to assess whether the information submitted by Grieg was "verifiable", and in the light of the nature of the information submitted, as well as the fact that after receiving the information, the investigating authority had expressly indicated that the question of Grieg's filleting costs continued to be under active consideration, we do not believe there were sufficient grounds for the investigating authority to conclude, on an objective basis, that the information at issue was not "verifiable". In reaching this conclusion, we do not mean to say that the investigating authority would have found that the information was "verifiable", had it pursued the matter. Additional information may not have given the investigating authority any further comfort as to the accuracy and reliability of the information at issue, and the investigating authority may have legitimately concluded that the information was not "verifiable". Thus, our finding is focused on the lack of any attempt on the part of the investigating authority to even explore whether the information was "verifiable". In our view, the investigating authority's inaction meant that, in the particular circumstances of the investigation, there was an insufficient factual basis to conclude that the information submitted by Grieg was not "verifiable".

[516] Response to Information Note on Production Costs, Exhibit NOR-56.

[517] The EC asserts that the inadequacies of Grieg's response were pointed out to Grieg orally during the on-the-spot investigation. However, it has submitted no evidence to substantiate that any such oral communication actually took place.

- Whether Grieg's filleting cost information was "appropriately submitted so that it can be used in the investigation without undue difficulties"

7.364 In assessing whether the filleting cost information provided by Grieg was not "appropriately submitted so that it can be used in the investigation without undue difficulties", we find it helpful to refer to the following passage from the Panel's explanation of the meaning of this standard in *US – Steel Plate*:

> "In our view, "appropriately" in this context has the sense of "suitable for, proper, fitting". That is, the information is suitable for the use of the investigating authority in terms of its form, is submitted to the correct authorities, etc. More difficult is the requirement that the information can be "used without undue difficulties". "Undue" is defined as "going beyond what is warranted or natural, excessive, disproportionate". Thus, "undue difficulties" are difficulties beyond what is otherwise the norm in an anti-dumping investigation. This recognizes that difficulties in using the information submitted in an anti-dumping investigation are not, in fact, unusual. This conclusion is hardly surprising, given that enterprises that become interested parties in an anti-dumping investigation and are asked to provide information are not likely to maintain their internal books and records in exactly the format and with precisely the items of information that are eventually requested in the course of an anti-dumping investigation. Thus, it is frequently necessary for parties submitting information to collect and organize raw data in a form that responds to the information request of the investigating authorities. Similarly, it is frequently necessary for the investigating authority to make adjustments of its own in order to be able to take into account information that does not fully comply with its request. This is part of the obligation on both sides to cooperate, recognized by the Appellate Body in the *US – Hot-Rolled Steel* case." (Footnotes omitted).

7.365 Norway argues that Grieg's filleting cost information was "appropriately" submitted because it was presented to the investigating authority in response to a specific invitation on the part of the investigating authority to comment on the findings made in the Information Note on Cost of Production.[518] Furthermore, Norway submits that the filleting cost information could be used without "undue difficulties" because it was in the same form, and just as useable as, the per-unit filleting costs that the investigating authority had obtained from another producer.[519] The EC advances the same argument raised in respect of the question whether Grieg's filleting cost information was "verifiable" to support its contention that the information submitted by Grieg was not "appropriately submitted so that it can be used in the investigation without undue difficulties". As we understand it, the essence of the EC's argument is that the information was not "appropriately submitted" and could not be used "without undue difficulties" because it was submitted by Grieg *after* the on-the-spot investigation.[520]

7.366 We recall that Grieg provided the investigating authority with information on its filleting costs in its comments on the investigating authority's Information Note on Cost of Production. The information was submitted as one of several comments made by Grieg to the investigating authority's "preliminary assessment" of its cost of production. It was presented in the form of a short narrative paragraph describing Grieg's reliance on Triton to produce salmon fillets for the period of investigation, identifying the alleged level of filleting costs per kilogram, and referring to an attached letter from Triton confirming these costs. We cannot see how this information could be found by the investigating authority *not* to have been "appropriately" submitted on the basis of the facts that are before us. In particular, we note that the information was submitted in response to an invitation to

[518] Norway, FWS, para. 443.
[519] Norway, FWS, para. 444.
[520] EC, FWS, para. 295.

"comment" that was made by the investigating authority *after* the on-the-spot investigation. In this light, the fact that the information was provided after the on-the-spot investigation does not support a conclusion that the information was not "appropriately" submitted.

7.367 Likewise, we cannot see how the mere fact that Grieg's filleting cost information was submitted after the on-the-spot investigation means that it could not be used without "undue difficulties". Although we believe that the extent of the effort needed to assess the accuracy and reliability of information may play a role in understanding whether information supplied, particularly at a late stage of an investigation, can be used by an investigating authority without "undue difficulties", the facts that are before us do not support a conclusion that this was the case in the present investigation. As we have already noted, the AD Agreement contemplates that investigating authorities may verify information by different means, including but not limited to, on-the-spot investigations. Thus, the burden that may have been associated with conducting a second on-the-spot investigation to verify Grieg's filleting cost information does not necessarily mean that the information could not have been used without "undue difficulties" because there may well have been other options open to the investigating authority to satisfy itself of the accuracy and reliability of that information. In this regard, we recall that the investigating authority made no attempt to even explore the feasibility and/or practicality of any other verification options.

7.368 Thus, in the light of the facts that are before us, we find that there was an insufficient objective basis for the investigating authority to conclude that the filleting cost information submitted by Grieg was not "appropriately submitted so that it can be used in the investigation without undue difficulties".

- Whether Grieg's filleting cost information was "supplied in a timely fashion"

7.369 The condition that all information "supplied in a timely fashion" should be taken into account by an investigating authority is in essence a reflection of the rule in Article 6.8 that permits an investigating authority to resort to facts available if information is not provided "within a reasonable period".[521] The Appellate Body has observed that in considering whether information is submitted within a reasonable period of time for the purpose of Article 6.8 and Annex II, it may be relevant to take into account factors such as: "(i) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi) the number of days by which the investigated exporter missed the applicable time-limit."[522]

7.370 Norway argues that there is no basis for finding that Grieg did not submit the information on filleting costs in a "timely fashion". Norway notes that the information was submitted on 16 March 2005, in response to the investigating authority's Note on Costs of Production issued on 8 March 2005, before provisional findings and more than one year ahead of the final determination. In addition, Norway asserts that the investigating authority took account of comments and evidence submitted by the interested parties after provisional disclosure, and itself requested additional information that was used for the purpose of setting the minimum import prices, as late as December 2005.[523] The EC has not argued that the information provided was not timely in the sense that Grieg missed a specific deadline set for comments on the investigating authority's Information

[521] See Appellate Body Report, *US – Hot-Rolled Steel*, para. 83; Panel Report, *US – Steel Plate*, para. 7.76.
[522] Appellate Body Report, *US – Hot-Rolled Steel*, para. 85.
[523] Norway, FWS, paras. 434-437.

Note on Cost of Production. Rather, as we understand it, the EC contends that the information was not supplied in a timely fashion because it was supplied *after* the on-the-spot investigation.[524]

7.371 Grieg submitted the information on 16 March 2005, eight days after it had been invited to "comment" on the investigating authority's "preliminary assessment" of its costs of production. Nothing in the investigating authority's Information Note indicates that information submitted in response to its findings would not be taken into account, unless previously verified during the on-the-spot investigation. Indeed, the Information Note expressly states that the investigating authority would "continue[] to investigate", suggesting that it was open to receiving and considering additional information. The investigating authority's provisional findings, issued shortly after the submission of Grieg's filleting costs, likewise stated, specifically in respect of the filleting costs issue, that its findings "may be re-examined during the definitive stage", thus again suggesting that the investigating authority continued to actively consider the matter. Finally, we note that the investigating authority gathered additional information well after 16 March 2005 relating to various aspects of the investigation, including the appropriate levels of the minimum import prices.[525] In this light, and recalling that we have already found that there was not a sufficient factual basis for the investigating authority to find that Grieg's filleting cost information was not "verifiable" or "appropriately submitted so that it can be used in the investigation without undue difficulties", we find that the investigating authority could not have objectively concluded that Grieg's filleting cost information had not been supplied in a timely fashion.

7.372 Thus, for all of the foregoing reasons, we find that the investigating authority did not act consistently with Article 6.8 and paragraph 3 of Annex II when it disregarded the filleting cost information submitted by Grieg in its comments on the investigating authority's Information Note on Costs of Production, and instead determined Grieg's filleting costs on the basis of information from another source.

> *Whether the investigating authority acted inconsistently with paragraph 6 of Annex II when it disregarded the information submitted by Grieg and used information from a third party to determine Grieg's filleting costs*

7.373 In the light of our finding that the investigating authority acted inconsistently with Article 6.8 and paragraph 3 of Annex II when it calculated Grieg's filleting costs on the basis of "facts available", we consider that it is not necessary, for the purpose of resolving this dispute, to also address Norway's second claim under paragraph 6 of Annex II in respect of the investigating authority's calculation of Grieg's filleting costs. Paragraph 6 of Annex II provides:

> "If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefore, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of

[524] EC, FWS, para. 295.

[525] Letter from the Commission on developments following the Definitive Disclosure, 16 November 2005, Exhibit NOR-18; Information Note from the Commission on the Definitive MIP, 13 December 2005, Exhibit NOR-19. Furthermore, we note that the investigating authority accepted three adjustments to cost of production for diseases that were claimed by Grieg, based on information submitted at the same time that the information on filleting costs was provided to the investigating authority. Provisional Disclosure to Grieg, Exhibit NOR-58; Definitive Disclosure to Grieg, 28 October 2005, Exhibit NOR-16. The EC stated in its First Written Submission (para. 268) that these adjustments were "accepted as they were considered by the investigators to be justified and were verified on the spot". However, the EC has provided no evidence to substantiate the assertion that these claims were previously verified. In addition, the Disclosures to Grieg do not suggest that the disease claims were accepted because previously verified on-the-spot on Grieg's premises. Rather, the Provisional Disclosure reveals that the claims were accepted "[e]xceptionally, and only on a provisional basis". The Definitive Disclosure merely confirmed these findings.

> the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations."

7.374 As we read it, paragraph 6 of Annex II establishes what are essentially procedural obligations on an investigating authority that wishes to rely upon "facts available". Thus, in order to use "facts available" in a manner consistent with Article 6.8, paragraph 6 requires that an investigating authority inform the relevant interested party of the reasons why any requested evidence or information submitted has been rejected; give the interested party a reasonable period of time to provide further explanations; and set out the reasons for any rejection of such information in its published determinations. As we have found that the substantive basis of the investigating authority's reliance on "facts available" was flawed, we believe that it would do little to resolve this dispute or enhance the ability of the DSB to make sufficiently precise recommendations and rulings in this dispute, if we were to also make findings in respect of this part of Norway's claim. Therefore, on the grounds of judicial economy, we decline to make any findings in relation to Norway's claim that the investigating authority's reliance on "facts available" for the purpose of calculating Grieg's filleting costs was inconsistent with paragraph 6 of Annex II.

(ii) Whether the investigating authority acted inconsistently with the EC's obligations under Article 6.8 and paragraphs 3 and 6 of Annex II when it calculated Grieg's finance costs

7.375 Norway argues that the investigating authority acted inconsistently with Article 6.8 and paragraphs 3 and 6 of Annex II when it allegedly used "facts available" to calculate Grieg's finance costs, instead of relying on actual information submitted by Grieg.[526] In particular, Norway contends that the investigating authority rejected an interest rate figure that was derived from arm's length loan transactions and appropriately supplied, explained and documented by Grieg, without any explanation.[527] The EC argues that the investigating authority did not resort to "facts available" when calculating Grieg's finance costs because it did not reject the information supplied by Grieg. According to the EC, the investigating authority did not fail to accept Grieg's finance costs, but rather merely decided to apply an appropriate benchmark to calculate the amount of Grieg's finance costs. Thus, the EC argues that Norway confuses a point of law "(What is the appropriate criterion by which to measure the rate of interest?)" with one of fact "(What is the level of that rate of interest?)".[528]

7.376 Again, before addressing Norway's claim, we briefly set out some of the relevant facts relating to the investigating authority's calculation of Grieg's finance costs.

Facts

7.377 Grieg reported finance costs of an amount of NOK [[XXX]] in its initial reply to the EC's "exporters/producers" questionnaire.[529] In the Information Note on Cost of Production, the investigating authority affirmed that "[i]t was evident from an analysis of the Grieg Seafood Group accounts that finance costs ... had been understated." The investigating authority therefore deducted the reported cost and replaced it with a recalculated figure based on an interest rate of [[XXX]] per cent, taken from the 2003 accounts of the Grieg Seafood Group, which was applied to [[XXX]] (i.e. the salmon element) of interest bearing loans from Grieg Seafood Rogaland accounts of 2003. The new finance cost was assessed as NOK [[XXX]]. The investigating authority stated that its

[526] Norway, FWS, paras. 429-430, 438 and 446-447.
[527] Norway, FWS, paras. 406-413. Norway, Comments on the European Communities' Answers to Panel Questions 108 and 109.
[528] EC, FWS, para. 307.
[529] Exhibit NOR-59.

adjustment was intended to "bring finance costs of salmon into line with the cost of finance from the Grieg Seafood Group".[530]

7.378 In its response to the Information Note, Grieg contested the investigating authority's finance cost adjustment and provided a breakdown of its total finance costs for the period of investigation, which it asserted amounted to NOK [[XXX]], with only NOK [[XXX]] relevant to salmon production.[531] In respect of the interest paid on its outstanding debt, Grieg submitted a letter from its bank [[XXX]].[532] Grieg asserted that this information demonstrated that the average interest rate for the relevant period was [[XXX]]. In this regard, Grieg noted that interest rates in 2004 were [[XXX]] lower than in 2003, and requested that the investigating authority therefore base the finance cost figure on the 2004 accounts and not the 2003 accounts.[533]

7.379 In the Disclosure of its Provisional Determination, the investigating authority confirmed its "preliminary assessment" of Grieg's finance costs and noted that the arguments made in response to the Information Note "will be re-examined at the definitive stage once all required information has been collected. If extra information is required from your company we will inform you".[534] Grieg responded to the investigating authority's Provisional Determination, repeating and further substantiating the comments already made in respect of finance cost with further arguments and documentation, including auditor statements.[535]

7.380 The investigating authority's Definitive Determination confirmed the findings made at the provisional stage in respect of Grieg's finance costs being "understated". However, the investigating authority changed the methodology used to calculate them. Instead of using a figure derived from 2003 accounts, the investigating authority based its calculation of Grieg's finance costs on the average amount of Grieg's "interest bearing loans for the period 2001 to 2003" and the "average interest rate used from the Norwegian Central Bank" during the three-year period from 2001 to 2003, which amounted to 6.58 per cent.[536] This new methodology resulted in a final finance cost figure of NOK [[XXX]].

The assertion that the investigating authority did not rely on "facts available"

7.381 Initially, the EC argued that the issue in respect of Grieg's finance costs was not one of "quality of evidence", but rather the "subject of the evidence: the appropriate benchmark for valuing interest paid on inter-company loans". The EC submitted that the investigating authority was of the view that "the relationship between Grieg Seafood Rogaland and other companies to which it was related deprived the terms of the loan arrangement of commercial validity".[537] Thus, the EC explained that the interest rate reported in Grieg's audited accounts "clearly reflected a non-commercial relationship".[538]

[530] Information Note on Cost of Production, Exhibit NOR-55.
[531] Response to Information Note on Production Costs, Exhibit NOR-56. Grieg requested that this amount be reduced by the [[XXX]], resulting in a final adjusted finance figure of [[XXX]] NOK. See also, Grieg Seafood questionnaire reply, Exhibit NOR-59.
[532] Response to Information Note on Production Costs, Exhibit NOR-56.
[533] Response to Information Note on Production Costs, Exhibit NOR-56.
[534] Provisional Disclosure to Grieg, 22 April 2005, Exhibit NOR-58.
[535] Response to EC Provisional Disclosure to Grieg, Exhibit NOR-57.
[536] Definitive Disclosure to Grieg, 28 October 2005, Exhibit NOR-16.
[537] EC, FWS, para. 307.
[538] EC, SWS, para. 104.

7.382 In responding to a Panel question prompted by Norway's assertion that all of Grieg's loans were with unrelated companies,[539] the EC stated that the concern of the investigating authority was to establish "whether the interest rate on the loan was below commercial levels". According to the EC, "[s]ince the [investigating authority] did not doubt the genuineness of the loan, the issue of whether the lender was part of the parent company, or was independent of it, was not [a] matter that affected the calculation of Grieg's costs, and it was not pursued by the investigators."[540] The existence of any relationship between Grieg and the lender banks was not a factor considered by the investigating authority. Indeed, we see nothing in the investigating authority's disclosures to Grieg to suggest that it was at any stage concerned with the level of Grieg's reported finance costs because of any supposed "relationship between Grieg Seafood Rogaland and other companies to which it was related",[541] the existence of which in any event the EC no longer appears to assert.[542] Thus, in the words of the EC, the basis for the investigating authority's decision not to use Grieg's reported interest rate costs was that it considered them to be "cheap" relative to what it believed to be "commercial" rates of the Norwegian Central Bank.[543]

7.383 We recall that we have found that whenever an interested party submits specific information that an investigating authority has requested for the purpose of making a determination, and the conditions for resorting to "facts available" have not been established, the investigating authority will not be entitled to disregard the submitted information and use information from another source to make the determination.[544] In the present investigation, Grieg provided the investigating authority with information that was specifically requested by the investigating authority in the "exporters/producers" questionnaire for the purpose of determining the level of Grieg's finance costs.[545] The requested information was therefore "necessary information" within the meaning of Article 6.8. The investigating authority did not use the information specifically submitted by Grieg, but instead relied upon information from the Norwegian Central Bank and Grieg's "interest bearing loans for the period 2001 to 2003". In these circumstances, the investigating authority's use of information that was not specifically submitted by Grieg in response to its request for cost of production information could only be justified if the conditions for using "facts available" under Article 6.8 and Annex II were satisfied. Thus, we find that the EC's assertion that the investigating authority did not rely on "facts available" when it disregarded the information submitted by Grieg, and instead relied upon Norwegian Central Bank data and an average of Grieg's "interest bearing loans for the period 2001 to 2003", to determine Grieg's finance costs, is grounded on a misconceived understanding of the scope and operation of Article 6.8 and Annex II. We therefore dismiss the assertion that the investigating authority did not rely on "facts available" when it calculated Grieg's finance costs.

Whether the investigating authority acted consistently with paragraph 3 of Annex II when it disregarded the information submitted by Grieg and used information from the Norwegian Central Bank to determine Grieg's finance costs

7.384 Norway contends that the finance cost information provided by Grieg was verifiable, appropriately submitted so that it could be used without causing undue difficulties, and supplied in a

[539] Norway alleges that the only inter-company loan that existed was from Grieg to its parent company, which "generated income for Grieg". Norway, First Oral Statement, para. 100; Norway, Second Oral Statement, para. 67.

[540] EC, Answer to Panel Question 108.

[541] EC, FWS, para. 307.

[542] Thus, we are not here confronted with the situation where an investigating authority disregards financial costs on the grounds that those costs were unreliable because they were established on the basis of transactions between related parties or were otherwise not at arms' length.

[543] EC, Answer to Panel Question 25.

[544] *See*, para. 7.347.

[545] Exhibit NOR-59.

timely manner, within the meaning of paragraph 3 of Annex II. In particular, Norway argues that Grieg submitted detailed evidence of its finance costs, including certified and audited data as well as information confirmed by a letter from its bank. According to Norway, this information was "perfectly capable of being verified".[546] Norway asserts that the finance cost data consisted of a figure for finance costs for production of the product concerned during the period of investigation, information on the interest rates borne by Grieg during that period, and supporting evidence. In Norway's view, this information could not generate "difficulties beyond what is otherwise the norm in an anti-dumping investigation".[547] Finally, Norway argues that the information was supplied by Grieg in a timely manner because it was initially contained in Grieg's questionnaire reply, and because all other supplementary information to confirm the reported figure was submitted in response to the investigating authority's Information Note on Cost of Production and the Provisional Disclosure document.[548]

7.385 We recall that in order to fully comply with Article 6.8, an investigating authority's use of "facts available" must be consistent with the disciplines set out in Annex II. In the light of our previous observations on the conditions set out in paragraph 3 of Annex II,[549] and the arguments presented by Norway, we can find no evidence in the facts that are before us to indicate that the investigating authority considered that the finance cost information provided by Grieg was not verifiable, appropriately submitted so that it could be used without causing undue difficulties, and supplied in a timely manner, within the meaning of paragraph 3 of Annex II. The EC has not suggested otherwise. Indeed, in this regard, we note that the EC has presented no response at all to Norway's specific allegations in respect of the consistency of the investigating authority's resort to "facts available" with paragraph 3 of Annex II.

7.386 We therefore find that the investigating authority's reliance on "facts available" for the purpose of determining Grieg's finance costs was inconsistent with paragraph 3 of Annex II, and therefore also inconsistent with Article 6.8.

> *Whether the investigating authority acted consistently with paragraph 6 of Annex II when it disregarded the information submitted by Grieg and used information from the Norwegian Central Bank to determine Grieg's finance costs*

7.387 In the light of our finding that the investigating authority's reliance on "facts available" for the purpose of determining Grieg's finance costs was inconsistent with paragraph 3 of Annex II and Article 6.8, we consider that it is not necessary to also address Norway's claim under paragraph 6 of Annex II, in order to resolve the matter that is before us. We do not believe that making any findings under this part of Norway's claim would add anything to the ability of the DSB to make sufficiently precise recommendations and rulings in this dispute. Therefore, on the grounds of judicial economy, we decline to rule upon Norway's claim that the investigating authority's reliance on "facts available" for the purpose of calculating Grieg's finance costs was inconsistent with paragraph 6 of Annex II.

[546] Norway, FWS, paras. 429-430.
[547] Norway, FWS, paras. 446-447, citing Panel Report, *US – Steel Plate*, para. 7.72.
[548] Norway, FWS, para. 438.
[549] *See*, paras. 7.357-7.372.

5. Alleged Inconsistency of the EC's Determination of Margins of Dumping and Anti-Dumping Duties for Non-Investigated Companies with Articles 9.4(i) and 6.8, and Paragraph 1 of Annex II, of the AD Agreement

(a) Arguments of the parties

(i) Norway

Claims under Article 9.4(i) of the AD Agreement

7.388 Norway's claims under Article 9.4(i) of the AD Agreement relate to the margins of dumping that the investigating authority attributed to two categories of interested parties: all parties that responded to the investigating authority's "sampling questionnaire", but were not selected for its limited investigation (*non-investigated cooperating companies*); and all other parties that did not make themselves known to the investigating authority by responding to its "sampling questionnaire" (*non-cooperating companies*).

- Non-investigated cooperating companies

7.389 Norway claims that the investigating authority acted inconsistently with Articles 9.4(i) of the AD Agreement because it assigned a margin of dumping to *non-investigated cooperating companies* that resulted in the application of anti-dumping duties (an "all others rate"[550]) that exceeded the "ceiling" permitted by Article 9.4(i). Norway argues that Article 9.4(i) identifies the maximum limit or ceiling, which investigating authorities cannot exceed "when setting the all others rate for companies which were not individually examined".[551] According to Norway, this ceiling is established on the basis of the margins of dumping determined for investigated producers as follows: "first, the investigating authority must exclude margins established for sampled producers using facts available, zero margins and *de minimis* margins; and, second, the investigating authority must calculate the weighted average of the remaining margins of dumping".[552] Norway contends that the investigating authority did not respect these disciplines in its determination of the margin of dumping of the non-investigated cooperating companies, which it alleges was used for the purpose of establishing the amount of applicable anti-dumping duties. To this extent, Norway argues that the investigating authority "exceeded the ceiling in Article 9.4" when establishing the "all others rate" for the non-investigated cooperating companies.

7.390 Norway argues that the margin of dumping assigned by the investigating authority to non-investigated cooperating companies resulted in a greater than permitted "all others rate" for two reasons. First, Norway asserts it was greater than the weighted average of the margins of dumping that were finally determined for the individually investigated producers and published in the Definitive Regulation. In this regard, Norway notes that in its Definitive Disclosure, the investigating authority determined that the weighted average margin of dumping of the individually examined companies was 14.8 per cent. However, Norway contends that after Definitive Disclosure, the investigating authority made downward revisions to the individual margins of dumping of three of the examined producers. Thus, according to Norway, these revisions logically implied a decrease in the weighted average of the margins of dumping of the investigated companies. However, the investigating authority did not alter its findings, leaving the weighted average of the margins of dumping of the individually investigated companies in the Definitive Regulation at 14.8 per cent in its final determination.

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[550] Norway, FWS, para. 466; Norway, SWS, paras. 161 and 165.
[551] Norway, FWS, para. 466.
[552] Norway, FWS, para. 467.

7.391 The second reason why Norway considers that the margin of dumping assigned by the investigating authority to non-investigated cooperating companies was incorrectly calculated, and thereby resulted in the application of anti-dumping duties exceeding the "ceiling" in Article 9.4, is because it was allegedly determined without excluding the margin of dumping calculated for one of the investigated producers (Grieg Seafood) on the basis of "facts available".

7.392 Finally, Norway argues that the margin of dumping assigned to non-investigated cooperating companies was used for the purpose of establishing the level of applicable anti-dumping duties because it was central to the investigating authority's assessment of whether such duties could be based on the weighted average non-injury margin. In particular, Norway notes that the "fixed duty" applied by the investigating authority to non-investigated cooperating companies was based on the weighted average injury margin (determined to be 14.6 per cent) because it was found to be lower than the weighted average dumping margin for all individually investigated producers (determined to be 14.8 per cent). However, according to Norway, the proper consideration of the revised margins of dumping for three investigated producers, and the exclusion of Grieg's margin of dumping, would have reduced to 13.1 per cent the weighted average of the margins of dumping of the individually investigated producers.[553] Therefore, the investigating authority's incorrect assessment of the weighted average margin of dumping of the individually investigated companies resulted in the application of a "fixed duty" that was inconsistent with the requirements of Article 9.4(i).

- Non-cooperating companies

7.393 Norway claims that the investigating authority acted inconsistently with Article 9.4(i) because it attributed to *non-cooperating companies* a margin of dumping that exceeded the weighted average of the margins of dumping calculated for the individually investigated companies, excluding zero and *de minimis* margins and margins calculated on the basis of "facts available". In particular, Norway notes that the investigating authority attributed to *non-cooperating companies* a margin of dumping, which was the highest dumping margin established for the investigated producers – 20.9 per cent. According to Norway, this was significantly higher than the weighted average of the margins of dumping of the individually investigated companies, calculated in accordance with Article 9.4(i).

Claim under Article 6.8 and paragraph 1 of Annex II of the AD Agreement

7.394 Norway claims that the EC acted inconsistently with Article 6.8 and paragraph 1 of Annex II of the AD Agreement because it alleges that it improperly relied upon "facts available" to assign margins of dumping to non-cooperating Norwegian companies.[554] In particular, Norway asserts that the EC relied on "facts available" to deduce that non-cooperating companies dumped at a level that was at least that calculated for the investigated company that was found to be dumping the most, Grieg. Norway argues that the EC was not entitled to apply "facts available" to the non-cooperating companies, because it contends that Article 6.8 and paragraph 1 of Annex II of the AD Agreement, as interpreted by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* case, require investigating authorities to refrain from applying "facts available" to non-investigated parties that were not individually notified of the required information that was not received by the investigating authority.[555] The focus of Norway's claim is sixty-seven non-investigated companies, which according to Norway never received the notification required under paragraph 1 of Annex II.

[553] Norway, FWS, para. 476.
[554] Norway, FWS, paras. 483-491.
[555] Norway, FWS, para. 489, citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 259.

(ii) European Communities

Claims under Article 9.4(i) of the AD Agreement

7.395 The EC argues that Norway's claims in respect of the margins of dumping attributed to both *non-investigated cooperating companies* and *non-cooperating companies* are ill-founded because, in its view, Article 9.4 of the AD Agreement is not about the calculation of margins of dumping for companies left out of a limited examination, but rather the imposition of anti-dumping duties.[556]

7.396 In any case, the EC argues that the investigating authority's calculation of the weighted average of the margins of dumping of the investigated companies did not result in the application of anti-dumping duties that exceeded the "ceiling" in Article 9.4(i). First, according to the EC, the margin of dumping calculated for Grieg was not based on "facts available". As such, the investigating authority was perfectly entitled to include it in the calculation of the weighted average of the margins of dumping of the individually investigated companies. Secondly, the EC asserts that the minimum import prices ("MIPs") applied to the non-investigated companies were based on the normal values corresponding to non-injury level prices, not the weighted average of the investigated companies' normal values. Moreover, although acknowledging that the investigating authority failed to adjust the final margin of dumping attributed to non-investigated cooperating companies to account for the downward adjustments made to three of the individually investigated companies' margins of dumping, the EC contends that even with these adjustments, the MIPs imposed would be lower than the MIPs based on an adjusted weighted average of the investigated companies' normal values. Finally, the EC asserts that the levels of "fixed duty" applied to all non-investigated companies were not calculated on the basis of the weighted average of the dumping margins of the individually investigated companies, but rather the weighted average injury margin, which was lower than the former. In any case, the EC contends that the "fixed duty" is not an anti-dumping duty that falls within the scope of the AD Agreement.

Claim under Article 6.8 and paragraph 1 of Annex II of the AD Agreement

7.397 The EC does not dispute Norway's assertion that the investigating authority determined a margin of dumping for non-cooperating companies on the basis of "facts available". However, it questions whether Article 6.8 may be breached in a situation such as the present where although "facts available" were used to calculate the margin of dumping for non-cooperating companies, the final measures imposed were the same as those imposed on cooperating companies. To this extent, the EC argues that Norway's claim is merely "academic" because even if Norway could establish an infringement of Article 6.8 in respect of non-cooperating companies, such a finding would have no consequence as regards the legality of the anti-dumping measure that the EC has imposed.[557]

7.398 In any event, the EC contends that the investigating authority complied with Article 6.8 and paragraph 1 of Annex II because, as opposed to the situation in the *Mexico – Anti-Dumping Measures on Rice* case, the investigating authority did not investigate only those companies that were either identified in the petitioner's complaint or that themselves spontaneously contacted the investigating authority. The EC argues that the investigating authority contacted all of the companies in the Norwegian industry that it knew of, with the assistance of Norwegian Seafood Federation. In contacting these companies, the EC argues that the investigating authority provided them with a copy of the Notice of Initiation, which contained an explicit warning of the possible use of "facts available" in the event of non-cooperation. Thus, in essence, the EC asserts that the facts of the present case

[556] EC, FWS, paras. 313, 315 and 317.
[557] EC, FWS, para. 322.

were qualitatively different from those in *Mexico – Anti-Dumping Measures on Rice*, and for this reason, the investigating authority did not infringe Article 6.8 and paragraph 1 of Annex II.[558]

(b) Arguments of the third parties

(i) Japan

7.399 Japan invites the Panel to consider whether "facts available" may be applied to companies which were not identified in the course of the investigation. In particular, Japan's concern relates to the application of "facts available" to unidentified companies without respect for the necessary notification requirements provided for by the AD Agreement, for example in paragraphs 1 and 6 of Annex II of the AD Agreement.

7.400 Japan recalls that the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* found that putting exporters or producers on notice that "facts available" will be used is a precondition for the use of "facts available". According to Japan, this precondition can never be met in the case of unidentified exporters or producers, as an investigating authority cannot notify the exporter or producer it has not identified. The need to notify exporters as set forth *inter alia* in paragraphs 1 and 6 of Annex II to the AD Agreement, applies whenever "facts available" are used, whether based on information from the applicant or otherwise. However, in this case, the EC assigned to the unidentified exporters or producers a margin of dumping equal to the highest margin of an exporter individually calculated, a margin that was clearly based on the "facts available", and importantly, on a particularly negative set of "facts available".

(ii) United States

7.401 The United States asserts that the EC is not excused from complying with Article 6.8 and Annex II merely because it used the MIP as the basis for imposing antidumping duties on these companies. In the view of the United States, the obligation contained in Article 6.8 is not by its terms limited to determinations that are "determinative of the duty imposed", as the EC claims; rather, Article 6.8 provides that it applies to the use of "facts available" in "preliminary and final determinations, affirmative or negative".

(c) Evaluation by the Panel

(i) Claims under Article 9.4(i) of the AD Agreement

7.402 Before turning to evaluate Norway's claims, we believe it is useful to set out some of the pertinent facts surrounding the investigating authority's calculation of the margins of dumping and anti-dumping duties attributed to the non-investigated companies.

Facts

7.403 In its Definitive Regulation, the investigating authority decided to introduce a "double system of measures", composed of minimum import prices ("MIPs") and a "fixed duty", in response to arguments made by certain interested parties about the efficacy of only MIPs and in the light of "indications that some circumvention of the MIP [imposed following provisional findings]" had

[558] EC, FWS, paras. 324-326.

already taken place and "the potential which exists for compensatory arrangements" in the salmon market.[559]

7.404 Irrespective of its form, the investigating authority expressed the intention to set the "definitive duty" "at the level of the dumping or injury margins, whichever is the lower", in accordance with Article 9(4) of the EC's Basic Anti-Dumping Regulation.[560]

7.405 The MIPs were calculated for six different presentations of salmon: "[w]hole fish, fresh, chilled or frozen"; "[g]utted, head-on, fresh, chilled or frozen"; "[o]ther (including gutted, head-off), fresh, chilled or frozen"; "[w]hole fish fillets and fillet cut in pieces, weighing more than 300 g per fillet, fresh, chilled or frozen, skin on"; "[w]hole fish fillets and fillet cut in pieces, weighing more than 300 g per fillet, fresh, chilled or frozen, skin off"; and "[o]ther whole fish fillets and fillet cut in pieces, weighing more than 300 g or less per fillet, fresh, chilled or frozen".[561] For each presentation, the investigating authority calculated a "non-injurious MIP" – a price that would not result in injury to the domestic industry – and compared this to a corresponding "company-specific non-dumped MIP", calculated on the basis of "normal value, adjusted to the net free-at-Community-border price".[562] The investigating authority found the "non-injurious MIP" to be lower than the "non-dumped MIP" for each of the investigated producers in respect of each of the salmon presentations.[563] Thus, the MIPs were established at the level of the "non-injurious MIP" for each of the salmon presentations and applied equally to all producers from Norway, whether or not investigated.[564]

7.406 The fixed duty was calculated, in accordance with "Article 9(4) of the EC's Basic Anti-Dumping Regulation ... on the basis of the weighted average injury margin as this was found to be lower than the weighted average dumping margin". The weighted average injury margin was determined to be 14.6 per cent.[565] This was converted into a fixed EUR amount per kilogram for the six different presentations of salmon, and applied as the fixed duty.[566] The "weighted average dumping margin" was calculated on the basis of the "weighted average of the individual dumping margins" of the investigated parties and attributed to "[c]ompanies which co-operated, but which were not selected in the sample, and which are not related to any of the companies included in the sample".[567] The Definitive Regulation reveals that this margin was 14.8 per cent.

7.407 The "fixed duties" applied equally to all producers from Norway, whether or not investigated. However, they would only become payable when certain conditions were met. The intended operation of the fixed duties is explained in the Definitive Regulation in the following terms:

> "To ensure the effective respect of the MIP, importers should be made aware that when it is found following a post-importation verification that (i) the net free-at-Community-frontier price actually paid by the first independent customer in the Community (post-importation price) is below the net free-at-Community-frontier price, before duty, as resulted from the customs declaration; and (ii) the post-importation price is lower than the MIP, a fixed duty shall apply retrospectively for the relevant transactions, unless the application of the fixed duty plus the post-importation price lead to an amount (price actually paid plus fixed duty) which

[559] Definitive Regulation, Recital 136. The reasons for "double system of measures" is described in greater detail below, paras. 7.691 - 7.700 and 7.403 - 7.408
[560] Definitive Regulation, Recitals 129 (re MIPs) and 136 (re fixed duty).
[561] Definitive Regulation, Recital 132, Article 1(5).
[562] Definitive Regulation, Recital 129.
[563] Definitive Regulation, Recital 129.
[564] Definitive Regulation, Recital 133.
[565] Definitive Regulation, Recital 127.
[566] Definitive Regulation, Article 1(5).
[567] Provisional Regulation, Recital 38, confirmed in the Definitive Regulation, Recital 30.

> remains below the MIP. In such a case, an amount of duty equivalent to the difference between the MIP and the post-importation price shall apply. Customs authorities should inform the Commission immediately whenever indications of a misdeclaration are found."

7.408 Finally, we note that the investigating authority also determined a "residual margin", which it attributed to "exporters in Norway which did not cooperate or did not make themselves known",[568] that is, non-cooperating companies. This margin was set at the level of the highest individual dumping margin established for an investigated cooperating company, which turned out to be Grieg Seafood AS ("Grieg") with a margin of dumping of 20.9 per cent.[569] The residual margin was not used by the investigating authority for the purpose of establishing either the MIPs or the fixed duties.

Non-investigated cooperating companies

7.409 Norway argues that the margin of dumping assigned by the investigating authority to non-investigated cooperating companies resulted in the application of anti-dumping duties that were inconsistent with Article 9.4(i) because it did not represent the weighted average of the margins of dumping for the individually examined producers, excluding margins of dumping derived from "facts available", and was used for the purpose of establishing the anti-dumping duties applicable to non-investigated non-cooperating companies.

7.410 In the first instance, the EC argues that Norway's claim is misplaced because, in its view, Article 9.4(i) addresses the *imposition* of anti-dumping duties, and not the *determination* of margins of dumping for non-investigated parties. In other words, the EC argues that Norway's claim is limited to the allegation that the investigating authority acted inconsistently with Article 9.4(i) because it *determined* margins of dumping for non-investigated companies that were greater than the weighted average of the margins of dumping for all investigated parties, excluding margins based on "facts available". We do not understand Norway's claim to have this limited meaning. Overall, Norway's arguments reveal a concern with the "all others rate" calculated by the investigating authority for non-investigated cooperating producers.[570] In particular, Norway identifies the "fixed duty" as the focus of this concern.[571] Thus, we do not agree with the EC when it suggests that Norway's claim is not about whether the investigating authority imposed anti-dumping duties on non-investigated parties in accordance with Article 9.4(i). It is true that Norway calls into question the compatibility of the margin of dumping that was attributed to the non-investigated parties with Article 9.4(i). However, when considered in the context of the entirety of Norway's arguments, in particular, the assertion that the "all others rate" was determined through an assessment which took that margin into account, it is clear to us that Norway's submissions in respect of the calculation of the margin of dumping attributed to non-investigated cooperating companies serve to support its allegation that the "all others rate" did not satisfy the requirements of Article 9.4(i). We will therefore proceed to examine Norway's claim on the basis of this understanding. However, before doing so, we believe that a threshold question that we must resolve is whether the "fixed duty" that lies at the centre of Norway's claim is an anti-dumping duty that falls within the scope of the AD Agreement.

- Whether the "fixed duty" falls within the scope of the AD Agreement

7.411 The EC submits that the "fixed duty" adopted by the investigating authority is not a "specific action against dumping" within the meaning of Article 18.1 of the AD Agreement, and therefore cannot be subject to the disciplines of Article 9.4(i) of the AD Agreement. According to the EC, the

[568] Provisional Regulation, Recital 40, confirmed in the Definitive Regulation, Recital 31.
[569] Provisional Regulation, Recital 40, confirmed in the Definitive Regulation, Recital 31.
[570] Norway, FWS, para. 466; and Norway, SWS, paras. 161, 163 and 165.
[571] Norway, SWS, para. 165; Norway, First Oral Statement, para. 102.

"fixed duty" is a measure taken to address circumvention of the anti-dumping measures imposed on salmon imports, in particular, "designed to deter evasion of lawfully imposed anti-dumping duties ... [and] ... intended to enforce the basic level of duty, ... one which exporters and importers can avoid by respecting the rules."[572] The EC argues that the terminology or characterization applied to the "fixed duty" under its domestic laws should not be determinative of its characterisation under WTO law.[573]

7.412 Norway, on the other hand, argues that the "fixed duty" is an anti-dumping duty falling within the scope of the AD Agreement. In this regard, Norway points to the fact that Article 1(5) of the Definitive Regulation explicitly describes the "fixed duty" as a "fixed anti-dumping duty"; that it was calculated on the basis of a comparison between the weighted average margin of injury and the weighted average margin of dumping; and that it was adopted under a domestic legal basis that is specific to anti-dumping measures.[574]

7.413 Article 18.1 reads:

> "No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[24]
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>
> [24] This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate."

7.414 A measure may be characterised as a "specific action against dumping", within the meaning of Article 18.1, when it is both: (i) "specific" to dumping; and (ii) "against" dumping.[575] A measure that is "specific" to dumping is one that "may be taken only when the constituent elements of dumping ... are present".[576] Such a measure must be either explicitly or implicitly "inextricably linked to, or have a strong correlation with, the constituent elements of dumping".[577] To determine whether a measure is "against" dumping, "the design and structure of a measure" must be examined to determine whether it is "opposed to, has an adverse bearing on, or more specifically, has the effect of dissuading the practice of dumping or creates an incentive to terminate such practices"[578]. A measure that is not a "specific action against dumping" is not regulated by the AD Agreement nor Article VI of the GATT 1994.[579]

7.415 The description provided in the Definitive Regulation of the reason for the adoption of the "fixed duty" and its intended application suggests that it was employed to counter a perceived risk that the MIPs imposed on salmon imports could be circumvented through misdeclarations of the customs value.[580] To this end, the Definitive Regulation establishes that the "fixed duty" will be collected whenever post-importation verification shows that imports have been sold to the first independent customer at a net free-at-Community-border price that is below the net free-at-Community-border price, before duty, declared to customs and this is below the MIP, unless application of the "fixed duty" would not bring the import price to the level (or above the level) of the MIP. In other words,

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[572] EC, FWS, paras. 501-502.
[573] EC, Answer to Panel Question 41.
[574] Norway, First Oral Statement, paras. 158-161; Norway, SWS, para. 223.
[575] Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000* ("*US – Offset Act (Byrd Amendment)*"), WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, 375, para. 236.
[576] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 239.
[577] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, paras. 240 and 244.
[578] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 254.
[579] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, paras. 236 and 262.
[580] Definitive Regulation, Recital 136.

the "fixed duty" is intended to apply when the customs value of an import transaction has been understated such that the actual import price of the transaction is below the MIP. The "fixed duty" will not be collected when the post-importation verified import price is at or above the MIP.[581]

7.416 We recall that the MIPs were set by the investigating authority at prices that would remove the injury suffered by the EC domestic industry. Therefore, any price below the MIPs would continue to cause injury to the EC domestic industry. Moreover, because the non-injury price was lower than the non-dumped price, it follows that any price below the MIPs would also be at a level where dumping would continue to exist. Thus, it is clear to us that the "fixed duty" may only be collected when the constituent elements of dumping are present. This renders the "fixed duty" "specific" to dumping within the meaning of Article 18.1.

7.417 Next we examine whether the "fixed duty" is a measure "against" dumping. We note that the legal basis of the measure is Article 9(4) of the EC's Basic Anti-Dumping Regulation, which specifically identifies the amount of the anti-dumping duty that may be imposed by the investigating authority following a finding of dumping, injury and causation.[582] The Basic Anti-Dumping Regulation itself is intended to lay down detailed rules for the "protection against dumped imports from countries not members of the European Community".[583] In addition, we observe that the "fixed duty" was referred to in the Definitive Regulation as a "fixed anti-dumping duty"[584] and determined on the basis of a comparison between the weighted average injury margin and the weighted average dumping margin.[585] Thus, in our view, the "design and structure" of the measure is intended to oppose and dissuade the practice of dumping. This is also evident from the fact that the measure will not apply if actual import prices do not fall below the MIPs. Therefore, we find that the "fixed duty" is also a measure taken "against" dumping, within the meaning of Article 18.1.

7.418 In conclusion, we find that the "fixed duty" applied by the investigating authority is a "specific action against dumping" within the meaning of Article 18.1 of the AD Agreement. It is therefore subject to the disciplines of Article 9.4(i) of the AD Agreement, which we now examine.

- Whether the investigating authority acted inconsistently with Article 9.4(i)

7.419 We begin our evaluation of Norway's claim by reviewing the text of Article 9.4(i), which in pertinent part reads:

> "When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
>
> (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the

[581] We note that the "fixed duty" will also not be collected when the difference between the post-importation verified import price and the MIP is greater than the "fixed duty". In this case, the entire difference between the MIP and the post-importation verified import price will be collected. This fact does not change our analysis, because it is still clear that the only circumstances in which the "fixed duty" will be collected are when the post-importation verified prices are below the MIP.

[582] Definitive Regulation, Preamble and Article 1.

[583] EC, Basic Anti-dumping Regulation, Recitals 1-30, Document G/ADP/N/1/EEC/2 (2 July 1996).

[584] Definitive Regulation, Article 1(5).

[585] Definitive Regulation, Recital 136.

> weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,
>
> provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. ..."

7.420 Article 9.4 applies when investigating authorities have conducted a limited examination in accordance with Article 6.10 of the AD Agreement. In particular, Article 9.4 applies when an investigating authority has not determined an individual margin of dumping for each known exporter or producer, within the meaning of the first sentence of Article 6.10, and instead determined individual margins of dumping for a limited number of interested parties selected from the known exporters or producers, in accordance with the second sentence of Article 6.10.[586] In such cases, Article 9.4 specifies that the anti-dumping duty applicable to imports from the non-examined parties must not exceed either of two benchmarks: (i) the weighted average of the margins of dumping established for the examined parties, excluding zero and *de minimis* margins and margins calculated on the basis of "facts available"; or (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the examined parties and the export prices of the non-examined parties, excluding zero and *de minimis* margins and margins calculated on the basis of "facts available". Norway's claim relates to whether the anti-dumping duties applied by the investigating authority exceeded the first of these benchmarks, namely, the weighted average of the margins of dumping established for the examined parties, excluding zero and *de minimis* margins and margins calculated on the basis of "facts available".

7.421 In the present investigation, the anti-dumping duties applied by the investigating authority to non-investigated cooperating companies took the form of both minimum import prices (MIPs) and a fixed anti-dumping duty. Norway argues that the investigating authority relied on the weighted average margin of dumping for the individually investigated parties when setting the fixed duty. The EC disputes this, and argues that the fixed duty was derived instead from the weighted average injury margin, not the weighted average dumping margin for the investigated producers.

7.422 As we have already noted, the investigating authority stated that the "definitive duty" would be set at "the level of the dumping or injury margins, whichever is lower", in accordance with Article 9(4) of the EC's Basic Anti-Dumping Regulation.[587] Article 9(4) of the EC's Basic Anti-Dumping Regulation provides for the application of what is generally known as the "lesser-duty rule". It reads, in pertinent part:

> "The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry."[588]

7.423 The investigating authority applied the "lesser-duty rule" in setting both the levels of the MIPs and the fixed duty. In particular, as regards the "fixed duty", the investigating authority explained its methodology in the following terms:

> "In accordance with Article 9(4) of the basic Regulation, 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."[589]

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[586] Appellate Body Report, *US – Hot-Rolled Steel*, para. 115.
[587] Definitive Regulation, Recital 129.
[588] EC, Basic Anti-dumping Regulation, Article 9(4), Document G/ADP/N/1/EEC/2 (2 July 1996).

7.424 The investigating authority's explanation reveals that the "fixed duty" applied to non-investigated cooperating companies was based on the weighted average injury margin (calculated to be 14.6 per cent[590]) because it was lower than the weighted average margin of dumping for all investigated companies (which was found to be 14.8 per cent[591]). Thus, it is apparent that the weighted average margin of dumping for investigated parties played a key role in the investigating authority's determination of the duty to apply to non-investigated cooperating companies. The weighted average dumping margin was central and indispensable to the comparison made when applying the "lesser-duty rule". To this extent, the investigating authority's decision to set the fixed duty at the level of the weighted average injury margin was dependent upon the weighted average dumping margin that was determined for the individually investigated parties.

7.425 Norway argues that the weighted average margin of dumping that was relied upon by the investigating authority was overstated because it did not reflect the downward adjustments made to three individually investigated companies after the investigating authority's Definitive Disclosure. The EC acknowledges that it failed to adjust the 14.8 per cent figure for these downward revisions.[592] It follows that the weighted average margin of dumping of the investigated producers used for the purpose of identifying the level of the fixed duty should have been lower than the 14.8 per cent figure actually relied upon by the investigating authority.

7.426 In addition, according to Norway, the weighted average margin of dumping of the investigated producers that was used for the purpose of determining the level of fixed duty was calculated using the margin of dumping determined for Grieg, which Norway argues was based on "facts available". The EC does not deny that the investigating authority used Grieg's margin of dumping for this purpose, but argues that it was not based on "facts available". We recall that we have already found that the investigating authority's determination of the margin of dumping for Grieg did involve the use of "facts available".[593] Thus, the weighted average margin of dumping that was used for the purpose of setting the level of fixed duties was calculated using a margin of dumping that was based on "facts available". Furthermore, we note that Grieg's margin of dumping was 20.9 per cent, the highest of all investigated parties. Therefore, it must logically follow that the weighted average margin of dumping of the investigated producers would have been less than the 14.8 per cent figure, had the investigating authority not included Grieg's margin of dumping in its calculations. In this regard, we note that Norway has presented evidence which it argues demonstrates that the weighted average margin of dumping for the investigated companies would have been 14.1 per cent without the inclusion of Grieg's margin of dumping.[594]

7.427 We recall that pursuant to Article 9.4(i), anti-dumping duties applied to imports from non-investigated parties must not exceed the weighted average of the margins of dumping established for the investigated parties, excluding zero and *de minimis* margins and margins calculated on the basis of "facts available". In the present investigation, the fixed duty applied to the non-investigated parties was set at the EUR per kilogram equivalent of the 14.6 per cent weighted average margin of injury because this margin was found to be lower than the weighted average margin of dumping for the investigated parties. However, as the EC has acknowledged, the 14.8 per cent figure used as the weighted average margin of dumping for the investigated parties was overstated because it did not take into account the downward revisions to the margins of dumping of three individually examined producers. In addition, we have found that the investigating authority's calculation of the weighted

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[589] Definitive Regulation, Recital 136.
[590] Definitive Regulation, Recital 127.
[591] Definitive Regulation, Recital 32.
[592] EC, FWS, para. 312.
[593] *See*, para. 7.383.
[594] Exhibit NOR-68. According to Norway, this figure would be 13.1 per cent if also calculated to account for the revised margins of dumping for the three relevant investigated producers.

average margin of dumping for the investigated parties included Grieg's margin of dumping, which was the highest margin of dumping of all investigated producers and derived from "facts available". Thus, the basis of the investigating authority's finding that the margin of injury was lower than the margin of dumping, and therefore by implication, that the fixed duty applied to the non-investigated cooperating companies did not exceed the weighted average of the margins of dumping established for the investigated parties, excluding margins calculated on the basis of "facts available", was flawed.

7.428 In this light, to the extent that it determined the fixed duty on the basis of an assessment that relied upon a weighted average margin of dumping for investigated parties that (i) was overstated because it did not take into account downward revisions to the margins of dumping of three individually examined producers; and (ii) was calculated with reliance on a margin of dumping that was based on "facts available", we find that the investigating authority acted inconsistently with Article 9.4(i) of the AD Agreement.

Non-cooperating companies

7.429 Norway claims that the investigating authority acted inconsistently with Article 9.4(i) because it attributed to *non-cooperating companies* a margin of dumping that exceeded the weighted average of the margins of dumping calculated for the individually investigated companies, excluding zero and *de minimis* margins and margins calculated on the basis of "facts available". Unlike its claim in respect of non-investigated cooperating companies, Norway does not argue that the margin of dumping attributed to non-cooperating companies resulted in the application of an anti-dumping duty that exceeded the weighted average of the margins of dumping calculated for the individually investigated companies. Rather, Norway's claim is limited to the allegation that investigating authority's finding that non-cooperating companies dumped at a rate of 20.9 per cent was inconsistent with the benchmark set out in Article 9.4(i). Thus, Norway's claim is premised on the view that Article 9.4(i) governs the determination of margins of dumping for non-cooperating companies.

7.430 The EC contests Norway's allegation, arguing that Article 9.4(i) does not discipline the *determination* of margins of dumping for non-cooperating companies, but rather only the *imposition* of anti-dumping duties.

7.431 As we have already noted, Article 9.4(i) applies when an investigating authority has not determined an individual margin of dumping for each *known* exporter or producer, within the meaning of the first sentence of Article 6.10, and instead determines individual margins of dumping for a limited number of interested parties selected from the known exporters or producers, in accordance with the second sentence of Article 6.10. The focus of Article 9.4 is therefore on the "exporters or producers not included in the examination" that could have been *potentially* included in the selection of parties to investigate pursuant to the second sentence of Article 6.10. In our view, this does not include exporters or producers that did not identify themselves to the investigating authority for the purpose of being selected in the limited investigation because such exporters or producers could not have been potentially included in the selection of the parties to investigate. Thus, the disciplines in Article 9.4(i) apply only in respect of non-investigated parties that cooperated with the investigating authority for the purpose of selection of the parties that would be subject to a limited investigation. It does not apply in respect of parties that did not cooperate for this purpose.[595]

[595] We note that the principle that non-cooperating parties may be treated differently to cooperating parties is also recognized in paragraph 7 of Annex II of the AD Agreement, which provides that "[i]t is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate".

7.432 In the present investigation, the non-cooperating companies were identified as companies which "did not cooperate or did not make themselves known".[596] This may be contrasted with the non-investigated cooperating companies, which were identified as "[c]ompanies which cooperated, but which were not selected in the sample, and which are not related to any of the companies included in the sample".[597] It follows that the non-cooperating companies included any investigated company that did not cooperate in the investigation and any non-investigated company that did not make itself known to the investigating authority for the purpose of being selected in the limited investigation. We note that none of the investigated companies were found to be non-cooperating. Thus, the margin of dumping attributed to non-cooperating companies was assigned only to companies that *did not* make themselves known to the investigating authority for the purpose of being selected in the limited investigation.

7.433 In this light, we find that the investigating authority's attribution of a 20.9 per cent margin of dumping to non-cooperating companies does not fall within the scope of Article 9.4(i) of the AD Agreement. To this extent, Norway's claim that the investigating authority acted inconsistently with Article 9.4(i) is unfounded, and we therefore dismiss it.

(ii) Claim under Article 6.8 and paragraph 1 of Annex II of the AD Agreement

7.434 Norway claims that the EC acted inconsistently with Article 6.8 and paragraph 1 of Annex II of the AD Agreement because it alleges that the investigating authority improperly relied upon "facts available" to establish margins of dumping for the non-cooperating companies.[598] The EC does not contest that the investigating authority relied on "facts available" when it determined the margin of dumping for non-cooperating companies. However, it questions whether any breach of Article 6.8 occurred in the present investigation when the anti-dumping duties applied to the non-cooperating companies were not based on the margins of dumping that were determined for these companies. In any case, the EC contends that the circumstances of the investigation were such that the non-cooperating companies were given sufficient notice, within the meaning of paragraph 1 of Annex II.

7.435 The EC's response to Norway's claim raises one initial threshold question: whether the use of "facts available" for the calculation of a margin of dumping which is not determinative of the anti-dumping duty imposed may fall within the scope of Article 6.8 of the AD Agreement.

7.436 We recall that the text of Article 6.8 provides that "preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available" when certain conditions have been satisfied.[599] Although not defined, it is clear that the expression "preliminary and final determinations, affirmative or negative" refers to the determinations called for or contemplated under the AD Agreement, which include, for example, the "determination of dumping" under Article 2 and the "determination of injury" under Article 3. An investigating authority's "determination" of dumping therefore falls squarely within the scope of Article 6.8. We see nothing in the language of Article 6.8 to indicate that its scope should be limited only to "determinations" that are determinative of the level of anti-dumping duties that is actually applied by an investigating authority.

7.437 Thus, we are not convinced by the EC's contention that, in the present investigation, the investigating authority's establishment of the margins of dumping for the non-cooperating companies cannot be impugned under Article 6.8 and Annex II of the AD Agreement because it was not determinative of the level of anti-dumping duties applied to the non-cooperating parties. While the EC may consider Norway's claim to be "academic", we do not understand it to suggest that it is

[596] Provisional Regulation, Recital 40.
[597] Provisional Regulation, Recital 38.
[598] Norway, FWS, paras. 483-491.
[599] *See*, para. 7.340.

frivolous, or that Norway has not appropriately "exercised its judgement" as to whether the claim "would be fruitful" within the meaning of Article 3.7 of the DSU. In this regard, we recall that Article 3.7 of the DSU neither requires nor authorizes us to look behind Norway's decision to bring this claim and to question the exercise of its judgement.[600] Furthermore, we note that pursuant to Article 3.8 of the DSU, there is a presumption that benefits are nullified or impaired whenever a provision of the WTO Agreement has been violated. In the light of this presumption, it would be for the EC to show that any conduct of the investigating authority that we may find to be inconsistent with Article 6.8 has not nullified or impaired benefits accruing to Norway under the Agreement.[601] However, we note that the EC has failed to adduce any evidence in this respect.

7.438 We now turn to address the remainder of Norway's claim. However, before doing so, we briefly set out the pertinent facts surrounding the investigating authority's determination of the non-cooperating companies' margins of dumping.

Facts

7.439 The investigating authority's first notification of the consequences that non-cooperation could bring in the investigation was contained in the Notice of Initiation. This notification was published in the Official Journal on 23 October 2004, and read:

> "In cases in which any interested party refuses access to or does not provide the necessary information within the time limits, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made in accordance with Article 18 of the basic Regulation, on the basis of facts available."[602]

7.440 On 26 October 2004, the investigating authority met with a representative of the Norwegian Seafood Federation ("FHL"), who also acted on behalf of the Norwegian Seafood Association,[603] to discuss the initiation of the investigation. The FHL representative said that the two Associations would "collaborate under the informal title of 'the salmon project'" to streamline communications with the investigating authority. The representative signed for the receipt of "the initiation papers" comprising "a cover letter addressed to [the] Association, the sample questionnaire, the questionnaire intended for producers/exporters in relation to proceeding AD 487, relating to imports of farmed salmon from Norway, a list of producers/exporters."[604] The list of "producers/exporters" were those that had apparently already been contacted by the investigating authority.[605] The investigating authority asked the FHL representative to "check the provided list of exporters/producers in order to ensure that all relevant companies got the form". He was also "reminded that it [was] each compan[y's] responsibility to ask for forms if not received directly".[606]

7.441 The "sampling form" provided to the FHL explained that it was "designed to assist exporters/producers in submitting the required information to the Commission services as mentioned

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[600] Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States ("Mexico – Corn Syrup (Article 21.5 – US)")*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675, para. 74.

[601] Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy ("Argentina – Ceramic Tiles")*, WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, 6241, paras. 6.104-6.105.

[602] Exhibit EC-9, paragraph 8.

[603] *See*, *Note for the File*, 28 October 2004, Exhibit EC-55; *NSL Power of Attorney*, 22 November 2004, Exhibit EC-56.

[604] *See*, *Note for the File*, 28 October 2004, Exhibit EC-55.

[605] EC, Answer to Panel Question 88.

[606] *See*, *Note for the File*, 28 October 2004, Exhibit EC-55.

in the Notice of Initiation". It "encouraged" recipients to read the Notice of Initiation, which contained "[f]ull explanations of the procedures relating to" the proceeding.[607]

7.442 By e-mail of 2 November 2004, the FHL representative informed the investigating authority that another entity, the Norwegian Seafood Export Council, had decided to participate in the "salmon project" managed by the FHL. The e-mail explained that the "main task of the [salmon project was] to assist the industry and the organisations in all aspects when dealing with dumping and/or Safeguard question".[608] The e-mail also reveals that the FHL had found the list of "approx 160" producers and exporters provided by the investigating authority to the FHL at the meeting of 26 October 2004 to be "fairly complete" as regards exporters, but "incomplete" in respect of producers. The FHL therefore sent the "sampling form to an additional number of producers, tak[ing] into account that an eventual sample should have representativeness from north to south, smaller and bigger companies, and independent as well as integrated companies".[609] The e-mail lists the names, addresses and telephone numbers of 27 companies to whom the FHL sent the "sampling form".

7.443 In response to the request for information made in the Notice of Initiation, the investigating authority received information from 102 companies by the 8 November 2004 deadline.[610] These included the responses of 89 companies to the "sampling questionnaire", coordinated through the FHL.[611]

7.444 On 18 November 2004, the FHL sent an e-mail to the investigating authority referring to a meeting held with the investigating authority on 17 November 2004 and proposing ten companies for inclusion in the investigating authority's limited investigation. This e-mail also contained an "[a]lphabetical list of [157] Norwegian salmon farming companies, with addresses and number of licenses".[612]

7.445 The Provisional Regulation suggests that the investigating authority was, at that stage, under the impression that it had notified all known interested parties:

> "The Commission officially advised the complainant, Norwegian producers, traders, importers, suppliers and users known to be concerned, as well as associations known to be concerned and representatives of Norway, of the opening of the proceeding. Interested parties were given an opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation."[613]

7.446 The Provisional Regulation identified "non-cooperating companies" as companies "which did not cooperate or did not make themselves known". After reviewing "information available", the investigating authority concluded that such companies had not "dumped at a level lower than any of the companies included in the sample". Consequently, it determined that they should be attributed the highest margin of dumping calculated for an investigated producer at the provisional stage, that of Fjord Seafood AS, 37.7 per cent.[614] However, provisional anti-dumping duties were established at a rate of 24.5 per cent, the dumping margin determined for Follalaks AS, because this was lower than

[607] Exhibit NOR-38.
[608] Exhibit EC-64.
[609] Exhibit EC-64.
[610] Provisional Regulation, Recital 16.
[611] Exhibit NOR-38.
[612] Exhibits EC-4 and EC-52.
[613] Provisional Regulation, Recital 6.
[614] Provisional Regulation, Recitals 41, 42 and 139.

the weighted average of the margin of injury calculated by the investigating authority for all investigated producers.[615]

7.447 The Provisional Regulation lists 119 companies by name and specifically identifies the anti-dumping duty applicable to each. All companies not named in the 119 were treated as non-cooperating companies.[616]

7.448 Following the investigating authority's provisional determination, the FHL submitted a letter dated 4 May 2005 to the investigating authority complaining about the application of the 24.5 per cent duty on the non-cooperating companies and requesting a hearing with the investigating authority. The letter asserted that the salmon farmers "subject to the 24.5 per cent [duty] are small companies, some being family companies managed by husband and wife". The letter alleged that "many" of the companies treated as non-cooperating did not receive the "sample form", citing the following three main reasons:

> "Some of the companies are not members of the industry organisations in Norway and for that reason they did not receive information through such channels.
>
> They were not on the list of companies for which the Commission transmitted the sample form directly.
>
> Some of the companies report problems with internet connection or that the e-mail address used has not been correct, and that they consequently did not receive the sampling form."[617]

7.449 The letter from the FHL identifies 88 companies that were treated as non-cooperating, and asserts that 67 of these companies did not receive a "sampling form".[618] Norway has indicated that 33 of these companies were not members of the FHL or the NSL at the time that the "sampling form" was distributed.[619] Thus, 34 of the companies that did not receive the "sampling form" were members of the FHL at the time of its distribution.

7.450 The meeting requested by the FHL in its letter of 5 May 2005 apparently took place on 2 June 2005. Norway asserts that the FHL presented the investigating authority with individual powers of attorney for 64 of the 88 companies that were treated as non-cooperating.[620] The EC has not disputed Norway's assertion.[621] Attending that meeting were representatives of the FHL, the NSL, Mr. Trond S. Paulsen from the law firm Trond S Paulsen, and 28 companies. The record of this meeting that was submitted by Norway as evidence in this dispute indicates that, in addition to interventions by Mr Paulsen and the representative of the NSL, five companies also made statements, explaining their situations and offering to comply with any future requests for information from the Commission.[622]

7.451 Finally, as we have already noted, in the Definitive Regulation, the investigating authority attributed a margin of dumping of 20.9 per cent to the non-cooperating companies. This margin was set at the level of the highest individual dumping margin established for an investigated cooperating

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[615] Provisional Regulation, Recital 139.
[616] Provisional Regulation, Article 1(3).
[617] Exhibit NOR-152.
[618] Exhibit NOR-152.
[619] Norway, Answer to Panel Question 134.
[620] Norway, Answers to Panel Questions 135 and 136.
[621] European Communities, Comments on Norway's Answers to Panel Questions 135 and 136.
[622] Exhibit NOR-153. It is unclear from the record submitted by Norway exactly how many of the companies that attended the meeting were members of the FHL or the NSL.

company, Grieg. However, it was not used by the investigating authority for purpose of establishing either the MIPs or the fixed duties.[623]

Whether the investigating authority acted inconsistently with Article 6.8 and Annex II of the AD Agreement

7.452 We recall that pursuant to Article 6.8 of the AD Agreement, an investigating authority may use "facts available" for the purpose of making its preliminary and final determinations when any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation. In resorting to "facts available", the disciplines that are set out in Annex II must also be respected. Of particular relevance to Norway's claim are the rules set out in paragraph 1 of Annex II, which reads:

> "As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry."

7.453 Paragraph 1 of Annex II establishes two obligations on investigating authorities wanting to use "facts available" in their determinations: First, they must inform any interested party of the information that must be supplied during the course of a proceeding; and secondly, the party must be made aware of the consequences of not submitting requested information, in particular, the possibility that "facts available", including those presented in a complainant's application, could be applied. In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body explained these obligations in the following terms:

> "The last sentence of Article 6.8 provides that the provisions of Annex II shall be observed in the application of that paragraph. In particular, under the second sentence of paragraph 1 of Annex II, the investigating authorities should 'ensure' that an interested party is "aware" that, if the required information is not supplied within a reasonable time, "the authorities will be free to make determinations on the basis of facts available, *including those contained in the application for the initiation of the investigation by the domestic industry*." (emphasis added) The second sentence of paragraph 1 of Annex II conditions the use of facts from the petitioner's application on making the interested party "aware" that, if the information is not supplied by it within a reasonable time, the investigating authority will be free to resort to these facts available. In other words, an exporter shall be given the opportunity to provide the information required by the investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. An exporter that is unknown to the investigating authority—and, therefore, is not notified of the information required to be submitted to the investigating authority—is denied such an opportunity. Accordingly, an investigating authority that uses the facts available in the application for the initiation of the investigation against an exporter that was not given notice of the information the investigating authority requires, acts in a manner inconsistent with paragraph 1 of Annex II to the *Anti-Dumping Agreement* and, therefore, with Article 6.8 of that Agreement."[624] (Footnote omitted).

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[623] *See*, para. 7.408.
[624] Appellate Body Report, *Mexico – Anti-Dumping Measures on Beef and Rice*, para. 259.

7.454 The EC argues that the facts of the present investigation must be distinguished from those in *Mexico – Anti-Dumping Measures on Rice* case.[625] According to the EC, the situation in the present investigation is qualitatively different from that in the *Mexico – Anti-Dumping Measures on Rice* because the investigating authority in the latter case had notified only those exporting companies that had been identified in the petition, as well as two companies that had made themselves known. The Mexican investigating authority had undertaken no further effort to contact any other companies that might be concerned by its investigation. In contrast, in the investigation at issue, the EC argues that the investigating authority contacted all of the companies in the industry that it knew of, with the assistance of the FHL, which had received a copy of the "sampling questionnaire" and the Notice of Initiation setting out an explicit warning of the possible use of "facts available" in the event of non-cooperation.[626] To this end, the EC contends that the FHL served as a channel of communication between the investigating authority and Norwegian salmon producers and exporters, in particular, for the purpose of selecting the companies that would be examined.[627]

7.455 We agree with the EC that there are important differences between the actions of the investigating authority in *Mexico – Anti-Dumping Measures on Rice* and those of the investigating authority in the investigation at issue in the present dispute. However, these differences cannot change the nature of the obligation set out in paragraph 1 of Annex II. In this regard, we observe, as the Appellate Body did in *Mexico – Anti-Dumping Measures on Rice*, that pursuant to paragraph 1 of Annex II an interested party must not only be informed of the information required by an investigating authority for the purpose of its investigation, but it must also be given an opportunity to provide it before the investigating authority may resort to "facts available" within the meaning of Article 6.8. Thus, we must assess whether the investigating authority complied with these requirements, in the light of the particular facts and circumstances of the investigation at issue.

7.456 The investigating authority resorted to "facts available" in establishing the margin of dumping for "non-cooperating companies", which it defined as companies that "did not cooperate or did not make themselves known".[628] None of the investigated companies or companies that submitted a response to the investigating authority's "sampling form" were found not to have cooperated.[629] It follows that the "non-cooperating companies" attributed the margin of dumping based on "facts available" were companies that "did not make themselves known" to the investigating authority – that is, companies that did not respond to the investigating authority's request for information contained in the "sampling questionnaire".

7.457 The Provisional Regulation reveals that the investigating authority believed that it had informed all known interested parties of the opening of the proceeding. However, the evidence that is before us indicates that 67 of the companies treated as "non-cooperating" did not receive the "sampling questionnaire" or the Notice of Initiation, containing the investigating authority's request for information and warning about the possible use of "facts available" in the event of non-cooperation. The EC does not contest that the investigating authority was not aware of the existence of these 67 companies at the time it sent out the "sampling questionnaire" and when it subsequently selected the companies to examine. However, according to the EC, the investigating authority should not be faulted for relying on "facts available" in the present case because, in its view, the FHL had effectively undertaken to ensure that all relevant companies would be informed of the investigation.[630] Thus, the EC argues that by acting in consultation and through the FHL, the investigating authority

[625] EC, FWS, para. 327.
[626] EC, FWS, para. 324.
[627] EC, Answer to Panel Question 88.
[628] Provisional Regulation, Recital 40, Exhibit NOR-9.
[629] Provisional Regulation, Article 1(3), Exhibit NOR-9.
[630] EC, Answers to Panel Questions 88 and 110.

took all reasonable steps to bring both the investigation and the need to complete the "sampling questionnaire" to the attention of all the 67 companies.[631]

7.458 We note that the FHL informed the investigating authority that three industry Associations had decided to work together, under the informal title of "the salmon project", in order to streamline communications with the investigating authority and assist the Norwegian salmon industry in "all aspects when dealing with dumping ... questions". The investigating authority initially asked the FHL to check a list of "approx 160 companies" that it had already contacted "in order to ensure that all relevant companies got the [sampling] form". The FHL reviewed the list and reported that it was "fairly complete" as regards exporters, but "incomplete" in respect of producers. The FHL took the initiative of sending the "sampling form" to 27 "additional" producers. Subsequently, the FHL submitted the completed "sampling questionnaires" of 89 companies to the investigating authority by the 8 November 2004 deadline; and on 18 November, it submitted to the investigating authority its own proposal of companies to include in the investigation, including for this purpose, a list of "the Norwegian salmon farming companies, with addresses and number of licenses". In our view, these facts suggest that the FHL had not only presented itself to the investigating authority as the single voice and channel of communication for dealings with the three industry Associations, but also that it had decided to take an active role in contacting all Norwegian salmon producers it considered were "relevant" to the investigating authority's investigation.

7.459 Additional insights into the scope of the FHL's role in informing interested parties of the investigating authority's investigation can be found in its letter to the investigating authority of 4 May 2005. In this letter, the FHL notes that one of the reasons why "some" of 67 companies did not receive the "sampling questionnaire" was that "the companies are not members of the industry organisations in Norway and for that reason they did not receive information through such channels" (underline added). In other words, the FHL informed the investigating authority that "some" of the 67 companies did not receive the sampling questionnaire because they were not members of the Norwegian industry associations, and could not therefore be contacted by the associations. In our view, this implies that it was the FHL's own view that had such companies been members of the Norwegian industry associations, they would have been informed of the investigation and received a copy of the "sampling questionnaire". This suggests that the FHL had in fact assumed the role of informing all of the members of the associations it represented of the EC's investigation.

7.460 We recall that Norway has indicated that at the time of the selection of the companies that would form part of the investigating authority's limited examination, 33 of the 67 companies that did not receive the "sampling questionnaire" were not members of the FHL or the NSL. In the light of the statement made by the FHL in its letter of 4 May 2005, it follows that these companies could not have been contacted through the FHL. On the other hand, it also follows from the FHL's statement that it must have contacted or at least attempted to contact the remaining 34 companies that allegedly did not receive the "sampling questionnaire". If this were not the case, the FHL's revelation that "some" of the 67 companies did not receive the "sampling questionnaire" "for the reason that" they were not members of industry associations would not make sense.[632] In this regard, we note that another of the reasons advanced by the FHL to explain why certain companies did not receive a "sampling questionnaire" was that technical problems with internet connections or incorrect e-mail addresses

[631] EC, Answer to Panel Question 88.

[632] Such a conclusion is also supported by the statement made by Mr Paulsen at the meeting of 2 June 2005, where he explained that "[m]ost of [the companies concerned] were not [a]*sic* member of any trade or industry organization and, thus, did not receive the sample form through such channels." Exhibit NOR-153, para. 13.

hindered the distribution of the "sampling questionnaire". This suggests that FHL may also have had problems contacting its own members.[633]

7.461 On balance, we believe that the relevant facts and circumstances surrounding the investigating authority's selection of companies to investigate, demonstrate that the investigating authority did enough to comply with the requirements of paragraph 1 of Annex II, in respect of 34 of the 67 companies that did not allegedly receive a copy of the "sampling questionnaire". In the particular circumstances of the present investigation, we see no reason why, even in the absence of powers of attorney granted by all of the relevant companies to the FHL,[634] the investigating authority could not have relied upon the FHL to communicate its request for information and the warning about the possible use of "facts available" in the event of non-cooperation, to all members of the associations that it represented. The investigating authority acted in consultation with the FHL in selecting the companies to examine and also for the purpose of distributing the "sampling questionnaire" and Notice of Initiation. The FHL held itself out as the channel of communication between the investigating authority and three industry associations. It responded to the investigating authority's request to check the list of "approx 160 companies" already contacted, and actively pursued contacting additional producers when it considered the investigating authority's efforts were insufficient. The "sampling questionnaires" of 89 of 102 companies were submitted through the FHL. The FHL expressly indicated that certain allegedly non-cooperating companies had not received a "sampling questionnaire" because they were not members of the industry associations, implying that such companies would have received the relevant information had they been members. It also revealed that some of its members did not receive the "sampling questionnaire" because of technical problems affecting its transmission. And, finally, the FHL made representations on behalf of its members that had apparently not been contacted by the investigating authority after the stage of provisional findings, confirming its role as intermediary between its members and the investigating authority.

7.462 However, to the extent that 33 of the 67 companies that did not receive the "sampling questionnaire" were *not* members of any of the associations represented by the FHL, we find that the EC did not provide these companies with the relevant notices required under paragraph 1 of Annex II. Because these companies were unknown to the investigating authority (and not members of the FHL or NSL), they could not have received the relevant notices under paragraph 1 of Annex II. We see nothing in the facts that have been presented before us to suggest that the FHL had indicated that it would act as a channel of communication between the investigating authority and companies that were not part of the membership of the relevant industry Associations *at the time that the "sampling questionnaire" was being distributed.* Thus, to the extent that the investigating authority applied "facts available" for the purpose of establishing the margin of dumping of the 33 companies that did not receive a "sampling questionnaire" and which were not members of the FHL or the NSL, we find that it acted inconsistently with paragraph 1 of Annex II and therefore also Article 6.8 of the AD Agreement.

[633] That technical problems prevented the FHL from contacting some of its members was confirmed at the meeting of 2 June 2005, where Mr Paulsen revealed that "[s]ome of the companies experienced problems with internet connections or correct e-mail address and they, consequently, did not receive the sampling form from the FHL". Exhibit NOR-153, para. 13.

[634] We note that Norway argues that in the absence of powers of attorney from each of the 67 companies at issue, the investigating authority was required to contact and communicate with each on individually. Norway, Answers to Panel Questions 135 and 136.

F. ALLEGED INCONSISTENCY OF VARIOUS ASPECTS OF THE EC'S DETERMINATION OF CONSTRUCTED NORMAL VALUE WITH THE AD AGREEMENT

1. Alleged Inconsistency of the EC's Treatment of Non-Recurring Costs with Articles 2.1, 2.2 and 2.2.1.1 of the AD Agreement

(a) Arguments of the Parties

(i) Norway

7.463 Norway claims that the investigating authority acted inconsistently with Articles 2.1, 2.2 and 2.2.1.1 of the AD Agreement when it included a number of non-recurring costs ("NRCs") in the cost of production it calculated for three investigated companies, [[XXX]], [[XXX]] and [[XXX]]. Norway argues that costs of production are the expenses that a producer incurs to pay for the economic resources used to produce the like product sold during the period of investigation. According to Norway, in identifying costs of production for the purpose of constructing normal value, investigating authorities must, pursuant to the first sentence of Article 2.2.1.1, demonstrate a relationship between each element of cost and production of the like product. In Norway's view, the last sentence of Article 2.2.1.1 indicates that such a relationship may be found to exist between NRCs and production during the period of investigation only when NRCs "benefit future and/or current production".

7.464 Norway describes NRCs as costs that are not incurred on a repeated or regular basis, which do not necessarily affect production and sale of a good. Thus, Norway considers that NRCs do not all involve outlays that pay for resources used in current or future production, and should therefore not all be included in the cost of production. For instance, Norway submits that costs arising from the elimination of formerly productive resources through plant closures, severance payments and losses from impairment of assets, have no link with production activities and should therefore not be included in a producer's costs of production. Moreover, according to Norway, investigating authorities are not entitled to allocate the entire amount of NRCs incurred during the period of investigation, but must instead appropriately allocate a portion of such costs to the extent that they "benefit" production of the like product during the period of investigation or thereafter.

7.465 In respect of [[XXX]], Norway asserts that the upward adjustment for NRCs made by the investigating authority amounted to [[XXX]] of its cost of production for the period of investigation. According to Norway, this adjustment was comprised of one-third of the sum of certain NRCs incurred by [[XXX]] in the years 2002, 2003 and 2004. In total, the investigating authority added NOK [[XXX]] million to [[XXX]] cost of production, which was made up of adjustments for: (i) the write-down in the value of biomass due to deformity reported in [[XXX]] 2003 audited accounts; (ii) the write-down in the value of several production facilities including the [[XXX]] in 2003; and (iii) 24 "other items", including the "write down of assets on the closure of production facilities and various consequential costs, such as severance pay".[635] Norway asserts that the investigating authority failed to provide an adequate explanation for why it treated all of these NRCs as costs of production, and argues that, in any case, none of them benefited production and sale of salmon during the period of investigation or thereafter, and therefore, pursuant to Article 2.2.1.1, should not have been included in [[XXX]] cost of production.

7.466 As regards [[XXX]], Norway asserts that the upward adjustment for NRCs made by the investigating authority amounted to [[XXX]] of its cost of production for the period of investigation. Norway submits that the investigating authority made one single adjustment reflecting one-third of the amounts of losses resulting from [[XXX]] investment activities in the years 2002, 2003 and 2004.

[635] Norway, FWS, para. 831.

These losses comprised write-downs in the value of certain equity investments made by [[XXX]] in other companies, including companies that were not involved in the production and sale of salmon. Norway contends that [[XXX]] made detailed submissions to the investigating authority in respect of its investment losses, arguing that they should not be included in its cost of production. Norway asserts that the investigating authority failed to respond to these objections. In any case, Norway argues that the losses on [[XXX]] investments related to its investment business, and had nothing to do with production and sale of salmon. They should therefore not have been included in its cost of production for the period of investigation.

7.467 To the extent that it determined the amount of the NRC adjustments for [[XXX]] and [[XXX]] on the basis of a three-year average covering 2002 to 2004, Norway also claims that the investigating authority acted inconsistently with Article 2.2.1.1 and, consequently, Articles 2.1 and 2.2 of the AD Agreement. In particular, Norway argues that the three-year averaging approach fails to comply with Article 2.2.1.1 because it is not based on any rational link between the apportionment of costs and the production activities benefiting from those costs. In this regard, Norway contends that there is no rational relationship between the salmon growth cycle and the period during which a particular NRC will contribute to salmon production. Thus, for instance, according to Norway, a one-off severance payment to terminate employment has no relationship to the life of a salmon; nor is the salmon growth cycle relevant to either the annual revaluation of biomass or to operating losses incurred at a production plant in a given year.

7.468 Finally, in respect of [[XXX]], Norway challenges the investigating authority's adjustment for the write-down in the value of four smolt production facilities that were closed in December 2003. Norway submits that this adjustment resulted in increasing [[XXX]] cost of production by [[XXX]]. According to Norway, the smolt facilities at issue did not contribute to the production of salmon during the last three quarters of the period of investigation. Again, Norway contends that the investigating authority's response to the submissions made by [[XXX]] objecting to the treatment of these NRCs as costs of production was inadequate and did not explain why they could be used in the calculation of cost of production of salmon for the period of investigation. Norway notes that as opposed to the approaches used to calculate the NRC adjustments for [[XXX]] and [[XXX]], the investigating authority did not average the write-down value at issue over a three year period. Instead, it took the entire amount of this cost incurred in 2003 and added it to [[XXX]] cost of production. Norway contends that this inconsistency further invalidates the application of the three-year average methodology that was applied to [[XXX]] and [[XXX]].

7.469 Thus, for all of the above reasons, Norway claims that the EC's treatment of the NRCs reported by [[XXX]], [[XXX]] and [[XXX]] resulted in a determination of normal values that was inconsistent with Articles 2.1, 2.2 and 2.2.1.1 of the AD Agreement.

(ii) European Communities

7.470 The EC rejects Norway's claim that the investigating authority was not entitled to include all of the relevant NRCs of [[XXX]], [[XXX]] and [[XXX]] in their respective costs of production. According to the EC, the investigating authority's actions were in full compliance with Article 2.2.1.1 of the AD Agreement, and consequently, Articles 2.1 and 2.2.

7.471 The EC dismisses Norway's view that, under Article 2.2.1.1, NRCs can only be included in the cost of production when they measure resources expended to "benefit future and/or current production". The EC submits that this notion of when NRCs may form part of cost of production is too narrow to meet the requirement in Article 2.2.1.1 that costs be "reasonably associated" with production of the like product. Furthermore, the EC argues that the adjustments referred to in the last sentence of Article 2.2.1.1 will become necessary only when NRCs have not been allocated in the cost information referred to in the first two sentences of Article 2.2.1.1.

7.472 The EC contends that NRCs may be appropriately treated as part of the cost of production when they arise from the inherent risks associated with the continuing operations of a salmon business segment. According to the EC, a business segment is a "distinguishable component of an entity that is engaged in providing an individual product or service or group of related products and services and that is subject to risks and returns that are different from those of other business segments"[636] – a "complete and separate business activity". In the context of salmon farming, the EC argues that a business segment represents "all activities that are related to growing, harvesting and marketing salmon". Thus, the EC argues that the relevant distinction for the purpose of applying Article 2.2.1.1 relates to the concept of income or loss from continuing operations. In other words, to the extent that costs (including NRCs) relate to the inherent risks associated with the continuing operations of a business segment, they may be taken into account for the purpose of establishing the relevant cost of production. It is only extraordinary costs, which are by definition not related to the risks inherent in continuing operations, that should not be included in cost of production.

7.473 The EC asserts that in conformity with Article 2, the investigating authority followed this theory of cost of production and sought to determine the full cost of production for each of the investigated parties, taking into account all cost items related to the product concerned, wherever reported in the financial statements. Thus, the EC contends that the investigating authority was justified in making all of the adjustments that Norway challenges because each cost resulted from an inherent risk of conducting the salmon business.

7.474 As regards [[XXX]], the EC argues that the investigating authority was justified in making the biomass deformity adjustment because such deformity and loss of value was an inherent risk in the conduct of its salmon business. According to the EC, the write-down at issue was not based on a changed market valuation of the product, but rather the result of the fact that some biomass showed physical deficiencies. Thus, the EC argues that the adjustment of the value of the assets was a cost element of the salmon business, regardless of whether it affected the [[XXX]] cash flow position, i.e., regardless of whether [[XXX]] expended this sum or that the write-down did not reflect any outlay incurred by [[XXX]] for resources used directly in the production of salmon. In respect of the other NRCs, the EC argues that these costs all formed part of the salmon business because they related to ongoing efforts of rationalization which would benefit the salmon business by bringing efficiency gains in future years.

7.475 The EC explains that the investigating authority examined the salmon business of [[XXX]] as a business segment, and thereby treated all costs associated with this business segment, whether or not directly related to business transactions or financial participations, as NRCs that were integral to the salmon business. As regards [[XXX]] investments in companies that Norway alleges were not salmon related, the EC asserts that it could not accept such a claim because it was never substantiated.

7.476 The EC argues that the adjustment made to [[XXX]] cost of production reflected the evidence that was available to the investigating authority during the investigation. First, the EC notes that the trial balance for the period of investigation presented by [[XXX]] at the on-site verification showed an amount of NOK [[XXX]] as a depreciation cost. According to the EC, this information did not identify any write-down for the closure of smolt production facilities. Furthermore, the EC notes that a write-down would not normally be reported under regular depreciations of a company. In any case, according to the EC, the information that part of the regular depreciations in fact referred to write-downs following the closure of smolt facilities was revealed for the first time only in Norway's First Written Submission.

[636] EC, Answer to Panel Question 28, citing International Accounting Standard 14. Segment Reporting, 2005, para. 9, Exhibit EC-44.

7.477 Finally, the EC contends that the investigating authority was forced into choosing an allocation methodology for NRCs because the Norwegian exporting producers "deliberately underestimated" these costs and failed to report them in their questionnaire responses. According to the EC, the three-year averaging approach that was ultimately applied by the investigating authority to calculate the NRCs was rational because it reflected the project accounting method applied by some of the investigated companies. Pursuant to project accounting, all costs related to a specific generation of salmon are accumulated over the period from fertilisation of eggs to harvesting of adult salmon. The EC asserts that this period was typically three years. Thus, the EC argues that the use of the three-year average methodology was consistent with how the investigated companies treated the costs of salmon production in their own accounting systems.

(b) Arguments of the Third Parties

(i) United States

7.478 Without expressing an opinion on the specific facts at issue, the United States notes that many of the costs Norway discusses may be captured appropriately under the allocations referred to in the first sentence of Article 2.2.1.1 without the requirement of the last sentence that they "benefit future and/or current production".

(c) Evaluation by the Panel

7.479 As we understand it, Norway's challenge to the investigating authority's inclusion of a portion of the NRCs incurred by [[XXX]], [[XXX]] and [[XXX]] into their respective costs of production is based on essentially two arguments: first, that the NRCs at issue did not amount to costs of production; and, secondly, in respect of [[XXX]] and [[XXX]], the investigating authority was not entitled to allocate these costs to their respective costs of production through the application of a three-year average allocation methodology. Below, we address each of these arguments in turn.

(ii) Whether the NRCs at issue were appropriately counted as costs of production

7.480 The first basis for Norway's claim raises the question of the extent to which NRCs may be included in an investigated party's "cost of production". Although both parties argue that only costs "associated with production and sale" of the like product may be included in the calculation of "cost of production" for the purpose of constructing normal value, they present two fundamentally different views on the extent to which NRCs may be included in this calculation. According to Norway, the last sentence of Article 2.2.1.1 specifies that "solely those NRC that benefit current or future production can be allocated to the costs of production".[637] In other words, Norway reads Article 2.2.1.1 as requiring investigating authorities to exclude from the calculation of cost of production all NRCs which do not "benefit" current and/or future production. Thus, Norway contends that NRCs which do not "benefit" current and/or future production are not costs "associated with the production and sale of the product under consideration". On the other hand, the EC is of the view that the last sentence of Article 2.2.1.1 does not set the benchmark for when NRCs may be appropriately included in the cost of production. The EC argues that the opening words of the last sentence of Article 2.2.1.1 recognize that it is subject to the general principle that only "costs associated with production and sale" of the like product may be used in the calculation of cost of production. Thus, the EC contends that NRCs that do not "benefit current and/or future" production may nevertheless be included in the cost of production "if there are proper grounds to do so".[638]

[637] Norway, First Oral Statement, para. 205.
[638] EC, FWS, para. 621.

7.481 We start our examination of Norway's claim by considering the meaning of the term "cost of production". The expression "cost of production" first appears in the AD Agreement in Article 2.2, in the description of what is commonly known as constructed normal value. This provision does not explain what amounts to a "cost of production"; and no explicit description of "cost of production" can be found elsewhere in the AD Agreement. The dictionary definitions of the word "cost" include "[w]hat must be given in order to acquire, produce, or effect something; the price (to be) paid for a thing."[639] The word "production" may be understood to mean "[t]he action or an act of producing, making, or causing something; the fact or condition of being produced".[640] Thus, the ordinary meaning of the expression "cost of production" may be considered to be the price to be paid for the act of producing.

7.482 The calculation of costs of production for the purpose of determining whether below-cost sales made on the domestic market may be treated as not being made in the ordinary course of trade and for calculating constructed normal value is addressed in Article 2.2.1.1. This provision reads:

> "For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.[6]
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> [6] The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation."

7.483 The first sentence of Article 2.2.1.1 establishes that the data sources to be privileged when calculating an investigated party's cost of production shall "normally" be the records kept by that party, provided that such records: (i) are consistent with GAAP of the exporting country; and (ii) reasonably reflect the costs associated with the production and sale of the product under consideration. When the records kept by an investigated party evidence these characteristics, an investigating authority will "normally" be required to use them in the calculation of cost of production. In our view, the fact that GAAP-consistent records, which reasonably reflect costs "associated with the production and sale" of the like product, must "normally" be used to calculate cost of production, implies that the test for determining whether a cost can be used in the calculation of "cost of production" is whether it is "associated with the production and sale" of the like product. We understand that the Panel in *Egypt – Steel Rebar* came to a similar conclusion.[641]

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[639] New Shorter Oxford English Dictionary, Clarendon Press, 1993.
[640] New Shorter Oxford English Dictionary, Clarendon Press, 1993.
[641] Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey* ("*Egypt – Steel Rebar*"), WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, 2667, paras. 7.393 and 7.422.

7.484 The second sentence of Article 2.2.1.1 addresses the evidence that an investigating authority must consider for the purpose of the *allocation of costs*. To this extent, Article 2.2.1.1 presupposes that it may be necessary for an investigating authority to allocate costs in order to properly establish cost of production. No particular method of allocation is prescribed. However, investigating authorities are required to consider "all available evidence" on "proper allocation" methods, "including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized". In this regard, investigating authorities are called upon to pay "particular" attention to the allocation of "capital expenditures and ... development costs".

7.485 Both "capital expenditures and ... development costs" often involve large sums of money and can be of a short-term and non-recurring nature. A typical example of "capital expenditure" is a one-off purchase of plant and equipment assets intended for production activities. Similarly, one type of "development cost" is the expense related to the development of new technology for the purpose of launching a new product line in the future. The second sentence of Article 2.2.1.1 envisages that it may be necessary to establish "appropriate amortization and depreciation periods and allowances" for these costs. Typically, amortization and depreciation for "capital expenditures and ... development costs" involves the deduction of the cost incurred in acquiring capital or developing a new product over a specific period of time. Where the expenditure relates to the acquisition of an asset, the appropriate depreciation period will typically be the life of the asset, which may extend beyond the period of investigation. Thus, although the full amount of certain "capital expenditures and ... development costs" may be associated with production and sale of the like product over the life of the relevant productive assets, the second sentence of Article 2.2.1.1 recognizes that it would be inappropriate to include the full amount of such costs in an investigated party's cost of production. Instead, as we read it, Article 2.2.1.1 calls for an appropriate allocation of those costs so as to determine the extent to which they should be attributed to production and sale of the like product *during the period of investigation.*

7.486 We note that "capital expenditures and ... development costs" are not the only costs that may need to be appropriately allocated to production and sale of the like product in the period of investigation. In our view, it is clear that Article 2.2.1.1 applies in respect of any cost, including other NRCs, which it would be inappropriate to allocate in full to production and sale of the like product during the period of investigation. Moreover, allocation of costs may be necessary not only to spread costs over time, but also to ensure that costs incurred during the period of investigation are distributed between different products. Thus, costs may need to be allocated between the production and sale of the like product and a different product that is also produced and sold in the period of investigation.

7.487 We next turn to the last sentence of Article 2.2.1.1. This sentence establishes an obligation on investigating authorities to make appropriate adjustments to cost of production for "non-recurring items of cost which benefit future and/or current production" or for "circumstances in which costs during the period of investigation are affected by start-up operations", when not "already reflected in the cost allocations" that are contemplated under the second sentence. The first point to note about the last sentence is that it establishes a *conditional* obligation to make appropriate adjustments to cost of production for *two types* of cost: NRCs "which benefit future and/or current production"; and start-up costs. Furthermore, it is clear from the introductory clause of the last sentence that this obligation will come into play only when appropriate allocations for NRCs "which benefit future and/or current production" or start-up costs have *not* already been made pursuant to the second sentence of Article 2.2.1.1. Thus, we do not understand the last sentence of Article 2.2.1.1 to define the circumstances when NRCs (or start-up costs) may be properly "associated with production and sale" of the like product in the period of investigation. As far as NRCs are concerned, the last sentence of Article 2.2.1.1 merely recalls that NRCs "which benefit future and/or current production" must be properly accounted for either through the cost allocations envisaged under the second sentence of Article 2.2.1.1, or an appropriate adjustment. We are therefore not convinced by Norway's argument

that Article 2.2.1.1 specifies that "solely those NRC that benefit current or future production can be allocated to the costs of production".[642] In our view, Norway's interpretation misrepresents the obligation that is set out in the last sentence of Article 2.2.1.1.

7.488 We recall that Norway claims that the EC acted inconsistently with Article 2.2.1.1, and as a consequence, Articles 2.1 and 2.2 of the AD Agreement, because it alleges that the NRCs included by the investigating authority in the cost of production calculated for three investigated companies, [[XXX]], [[XXX]] and [[XXX]], did not involve outlays that pay for resources which *benefit* current and/or future production. However, we have found that the standard for determining whether or not NRCs may be properly counted as part of cost of production is whether they are "associated with the production and sale" of the like product during the period of investigation. Although the extent to which a NRC may benefit future and/or current production may be indicative of whether or not it is associated with production and sale of the like product in the period of investigation, we do not understand from the language of Article 2.2.1.1 that it should be considered to be determinative of this fact. Indeed, because the notion of costs "associated" with production is broader than costs that "benefit" production, it does not necessarily follow that costs which do not "benefit" production cannot be "associated" with production.[643] In any case, as we have already noted, the obligation established under the last sentence of Article 2.2.1.1 does not define when NRCs may be included in cost of production, but merely recalls that where no cost allocation has been made for NRCs which benefit future and/or current production, investigating authorities must make an appropriate adjustment. Thus, to the extent that Norway's claim against the investigating authority's treatment of the NRCs of [[XXX]], [[XXX]] and [[XXX]] is based on the contention that Article 2.2.1.1 requires that NRCs may *only* be included in the cost of production when they benefit future and/or current production,[644] we find that it is based on an incorrect interpretation of Article 2.2.1.1, and we therefore dismiss it. Norway's claims under Articles 2.1 and 2.2 of the AD Agreement are either consequential to its claim under Article 2.2.1.1 or dependent on the same reasoning used to support that claim. Accordingly, we find that they also cannot be substantiated.

(iii) Whether the investigating authority was entitled to calculate the NRC adjustments for [[XXX]] and [[XXX]] on the basis of a three-year average

7.489 The second ground for Norway's challenge to the investigating authority's inclusion of the NRCs of [[XXX]] and [[XXX]] in their respective costs of production is focused on the three-year average cost allocation methodology used to calculate the relevant adjustments. According to Norway, the cost allocations contemplated under Article 2.2.1.1 involve apportioning a given cost over time in accordance with the relationship between the cost at issue and production activities benefiting from those costs. In Norway's view, an allocation methodology must therefore establish a link between the cost at issue and production in specific years, something which it alleges the three-year average NRC allocation methodology applied by the investigating authority did not do. On the other hand, the EC argues that the three-year average cost allocations made by the investigating authority were consistent with Article 2.2.1.1 because they reflected the project accounting approach used by the investigated companies to collect and report their costs of production. The EC alleges that this accounting methodology involved accumulating costs associated with a specific generation of salmon over a period of three years. The EC argues that three years was the average amount of time needed to farm a salmon from a fertilized egg. As such, it was perfectly rational for the investigating authority to allocate NRCs on the basis of a three-year average.

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[642] Norway, First Oral Statement, para. 205.

[643] For instance, it could be argued that an expense that adversely effects production during the period of investigation does not "benefit" that production. However, such an expense might still be "associated" with the same production.

[644] See, e.g., Norway, FWS, paras. 803, 809-813; Norway, First Oral Statement, para. 205; Norway, Answer to Panel Question 62.

7.490 As we have already noted, although it envisages that cost allocations may be necessary in establishing cost of production, the second sentence of Article 2.2.1.1 does not prescribe the use of any particular cost allocation methodology. However, in settling on a particular approach, an investigating authority must consider "all available evidence" on "proper allocation", "including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized". We do not understand Norway to be arguing that the investigating authority acted inconsistently with Article 2.2.1.1 because it failed to consider "all available evidence" on "proper allocation". Instead, as we understand it, Norway's claim is based on the allegation that in allocating an amount of NRC corresponding to the three-year average of the NRCs incurred by [[XXX]] and [[XXX]] from 2002 to 2004, the investigating authority included costs which were not "associated with the production and sale" of the like product during the period of investigation in the companies' respective costs of production. Norway submits that there are various reasons for this, including the alleged lack of factual support for the main justifications advanced by the EC for the investigating authority's actions, namely, the view that the investigated companies reported their costs on the basis of project accounting, and the contention that the salmon production cycle lasts on average three years.

7.491 We agree with Norway that any allocation of cost performed for the purpose of establishing cost of production must not result in the inclusion of costs not "associated with the production and sale" of the like product during the period of investigation. In this respect, we believe the EC to be of the same view. Thus, the question that is before us is whether the three-year average cost allocation methodology applied by the investigating authority resulted in the allocation of more than the appropriate amount of NRCs "associated with the production and sale" of the like product during the period of investigation. We begin our consideration of this question by briefly summarising the facts surrounding the NRC adjustments applied to [[XXX]] and [[XXX]].

Facts

7.492 In the Definitive Regulation, the investigating authority explained that a number of investigated parties had taken issue with the inclusion of the full amounts of certain "extraordinary expenses applicable to the product concerned" in their respective costs of production in the provisional findings. These expenses related to "a number of company-specific costs, but typically included write-downs of tangible assets, closure of farming facilities, slaughtering and processing plants, and severance payments to employees".[645] One of the grounds upon which the investigating authority's actions were challenged was that the extraordinary costs – or NRCs – had allegedly not been appropriately allocated "over the true period of time to which they relate, e.g., the useful life of a processing plant when the extraordinary expense relates to such an asset".[646] In responding to this complaint, the investigating authority stated the following:

> "It is, however, true that allocation of the costs over a period of time would remove any undue effect caused by the timing of the decisions of the companies to report these costs. Ideally, all extraordinary costs reported for each separate asset should be allocated over the useful life of that asset to arrive at an average annual cost. However, it is to be noted that none of the companies concerned carried out this exercise. Instead, the Commission has decided to take the extraordinary costs reported by companies in the sample during the last three years, based on the most recently available financial statements, and to allocate one third of these costs to salmon production in the IP, on the basis of turnover. Three years was considered an

[645] Definitive Regulation, Recital 15.
[646] Definitive Regulation, Recital 15.

> appropriate time period as this is the average length of time that it takes to grow a salmon from a smolt to a harvestable salmon."[647]

7.493 Similar comments were made in the investigating authority's explanation of its treatment of NRCs in the Definitive Disclosures made to [[XXX]];

> "In line with the 3 year salmon generation approach, the Commission has decided that non-recurring costs should be assembled over a 3 years period and depreciated over the same period.
>
> For [[XXX]], non-recurring costs were based on the financial accounts 2002, 2003 and 2004: ...
>
> Depreciation over 3 years of [[XXX]] million NOK leads to an adjustment of [[XXX]] NOK per kg WFE." [648]

and to [[XXX]]:

> "As concerns your comments on the allocation of recurring extraordinary cost the Commission services take note of your comments concerning the extraordinary costs not being recurring costs.
>
> Therefore, the methodology of the calculation of these costs has been revisited. A three year average of this cost has been applied instead of the annual cost in order to find a reasonable basis to take into account of this cost and in order to distribute any non-recurring cost included in this item over a reasonable period of time. The resulting average of the reported extraordinary cost over the years 2002, 2003 and 2004 was [[XXX]] NOK."[649]

7.494 We recall that at the centre of the EC's justification for the investigating authority's allocation of the NRCs through the application of a three-year average is the assertion that "companies using project accounting based on salmon generations collect their cost information themselves over such an average period".[650] We note that this apparent justification cannot be found in the explanations of the methodology applied by the investigating authority that are set out in the Definitive Regulation or the Definitive Disclosures to [[XXX]] and [[XXX]]. The only rationale given in the Definitive Regulation and the Definitive Disclosures for allocating NRCs on the basis of a three-year average was that it reflected what the investigating authority considered to be the average length of time to grow a salmon from a smolt to a harvestable salmon or the average length of time to grow a salmon generation.

> *[[XXX]]*

7.495 The EC argues that the reason why the investigating authority calculated [[XXX]] NRC adjustment on the basis of a three-year average was because [[XXX]] reported its costs of production on the basis of project accounting. Norway contests this view, and argues that in fact [[XXX]] reported its cost of production in relation to costs incurred solely during the period of investigation.

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[647] Definitive Regulation, Recital 18.
[648] Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-28.
[649] Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-69.
[650] EC, FWS, para. 692.

7.496 The EC initially asserted that [[XXX]], like other companies, was "invited" to "use weighted average cost of production for all salmon generations that were harvested during the investigation period".[651] However, when asked by the Panel to substantiate its assertion, the EC noted that although the questionnaire did not explicitly require companies to report costs in this manner, "during the preparation of the questionnaire reply, companies [were] invited to contact case handlers ... for any further enquiries".[652] The EC argues that [[XXX]] "actively sought such contact and agreed on following the same approach that was followed during the safeguard investigation".[653]

7.497 That [[XXX]] made contact with the investigating authority to discuss how to report cost of production as it was preparing its reply to the questionnaire is confirmed in the comments made to the investigating authority's disclosure of provisional findings. These comments recalled that:

> "The Commission performed safeguard investigations (a mini investigation) in August to October 2004, and Fjord Seafood Norway was subject to this investigation. It was formally not part of AD 487, but the investigations were focusing on a similar calculation of Cost of Production as in AD 487, and the inspectors later confirmed that the two investigations (the safeguard investigation and the AD 487) were "closely linked". ...
>
> During December 2004 the inspectors confirmed that they wanted [[XXX]] to apply the same methodology as applied in the calculation of COP under the safeguard investigations, and a number of practical questions on how to calculate the COP, how to present the calculation, what to specify, what legal entities to include etc were agreed on with the inspectors, and confirmed in writing from the inspectors."[654]

7.498 The EC argues that the methodology that was "agreed" between [[XXX]] and the investigating authority was apparent from a document "presented by [[XXX]] during the verification for that investigation in October 2004..., in which it proposed that: four salmon generations should be selected as representative and that costs should be reported for these generations".[655] This particular document was submitted by the EC as Exhibit EC-68, which it named "[[XXX]] cost of production submission in Safeguard investigation". We have reviewed this particular exhibit. It presents a series of data relating to cost of production in table form. Part of this data relates to "rearing costs" presented by four "Projects". The document is titled "ODY Prod.cost.[[XXX]].xls – Cost of production", and is dated 3 January 2005. The words "Safeguard investigation" cannot be found in this document. Thus, it is not immediately apparent that the document was generated for the purpose of the safeguards investigation. Indeed, the date on the document suggests that it was prepared and presented by [[XXX]] during the verification visit conducted in the anti-dumping investigation. In any case, even if the same document had been presented in both the anti-dumping and safeguard investigations, in the absence of any narrative, the information that it discloses does not, on its own, confirm that it was intended to illustrate the accounting methodology that [[XXX]] applied in the anti-dumping proceeding.

7.499 The EC also argues that certain statements made by [[XXX]] elsewhere in its comments on the investigating authority's provisional findings support the view that [[XXX]] reported costs of production on the basis of project accounting. The full extracts of the relevant passages of [[XXX]] comments read as follows:

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[651] EC, Answer to Panel Question 12.
[652] EC, Answer to Panel Question 113.
[653] EC, Answer to Panel Question 113.
[654] [[XXX]], Response to Provisional Findings, 27 May 2005, Exhibit NOR-110.
[655] EC, Answer to Panel Question 112.

> "It was agreed that the [cost of production] calculation should be based on the project accounting system, where a substantial level of detail is available per site/production entity and where a "full cost calculation" is made on all biomass (including salmon) during production and up to the closing of the site after the sale of the fish. It was agreed on a "pragmatic" approach on the calculation of the harvesting costs including using the harvesting cost for a period deviating from the investigation period (IP), as a representative "per kg cost" of harvest for the IP. A similar pragmatic calculation was made for SGA costs. The extracts made from the project accounting system were made for the investigation period directly as this was found useful for the COP calculation, and this extract therefore retrieve data from two different accounting years. It was verified that the project accounting was the basis for the formal statutory accounts, which Fjord Seafood of course confirmed.
>
> When using the project accounting system for calculation of COP the issue of including finance costs is directly solved, as the project accounting generate finance costs on each production facility, the part of finance cost not allocated in the project accounting will be finance costs related to other assets, closed/sold plants, funding of historical losses etc, which are not part of the project accounting system, and should not be part of the "running production". Restructuring costs are not part of the project accounting system, and should not be part of the cost of production." [656]

7.500 We do not understand the above statements to demonstrate that [[XXX]] reported its costs of production for the period of investigation on the basis of project accounting, that is, the "weighted average cost of production for all salmon generations that were harvested during the investigation period". Although it is clear that [[XXX]] agreed to report cost of production "based on the project accounting system", the way that it did so was by using "extracts made from the project accounting system" "for the investigation period" "from two different accounting years". It does not necessarily follow that [[XXX]] reported the costs of salmon generations harversted during the period of investigation, reflecting the costs of salmon generations accumulated over three years, as would be the case under project accounting. In other words, the fact that [[XXX]] kept its financial accounts on the basis of project accounting does not necessarily mean that it also reported costs of production on the same basis.

7.501 The principles used by [[XXX]] to report its cost of production were explained in a presentation submitted to the investigating authority during the on-site investigation. This presentation was submitted by Norway as Exhibit NOR-184.[657] Although initially stating that the investigating authority had not received page five of this presentation,[658] the EC subsequently confirmed that the entire presentation including page 5 was before the investigating authority during the proceeding.[659] Having reviewed the contents of this exhibit, we believe that it supports the view that [[XXX]] did not report cost of production on the basis of project accounting, that is, the "weighted average cost of production for all salmon generations that were harvested during the investigation period". At page four of the presentation, the calculation of the cost of production is explained as follows:

> "For calculation of cost of production the following is done: (Volume = Production in period)
>
> + Stock per 30.09.04

[656] [[XXX]], Response to Provisional Findings, 27 May 2005, Exhibit NOR-110.
[657] Norway initially submitted page 5 of this presentation as Exhibit NOR-156.
[658] EC, Answer to Panel Question 31; EC, SWS, para. 229; EC, Second Oral Statement, para. 100.
[659] EC, Answer to Panel Question 112.

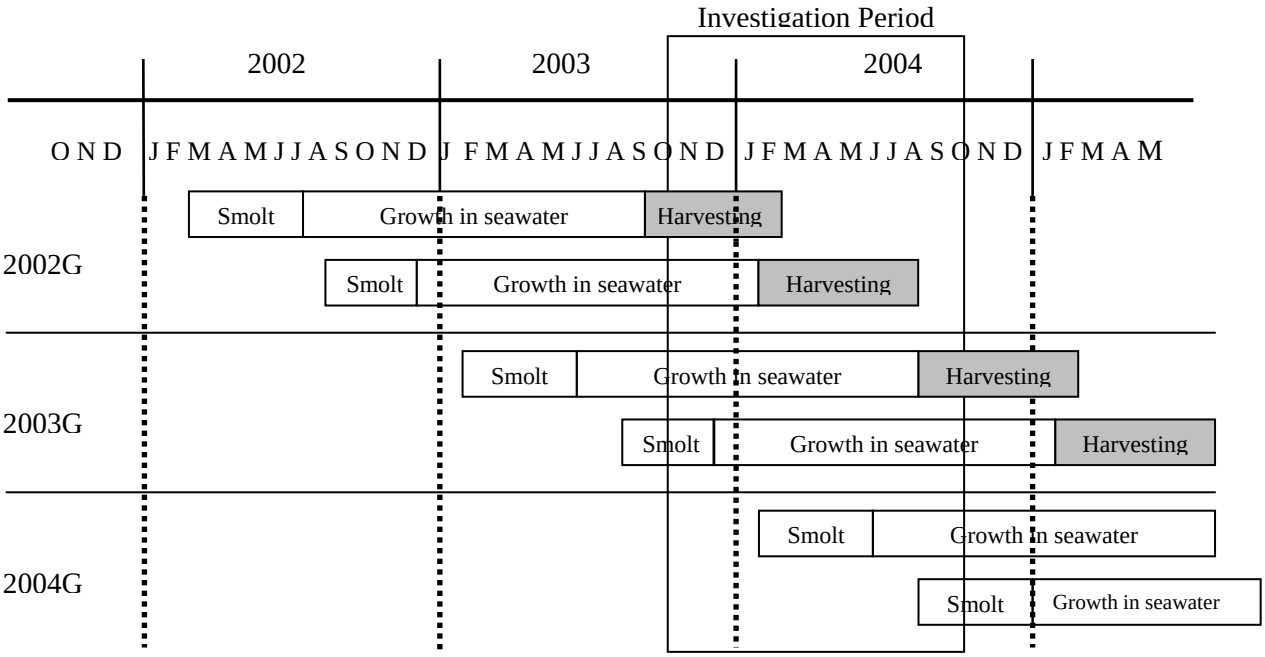
+ Harvested per 30.09.04
– Stock per 01.10.03
– Harvested before 01.10.03
= Produced volume, live weight

Project cost: Sum all cost that is booked on salmon projects in period.

From this we get total cost of production: Project cost / Production in period"

This calculation was explained diagrammatically on page five of presentation. We have reproduced this diagram below:

Cost of production – principle seawater
A: Total farming cost:



Principle for tracking cost of production

All cost for all active project in period (own specification) as nominator.
2002 generation – [[XXX]] projects, [[XXX]] salmon, [[XXX]] broodstock, [[XXX]] trout
2003 generation – [[XXX]] projects, [[XXX]] salmon, [[XXX]] broodstock
2004 generation – [[XXX]] projects, [[XXX]] salmon
[[XXX]] Unclosed 2000/2001 projects (*for balancing total*)
All production in period (salmon) as denominator.

7.502 As we understand the contents of the above pages from [[XXX]] presentation, this company's cost of production for the period of investigation was established on a per kilogram basis by calculating total cost booked *in the period of investigation* and dividing this by the total volume/weight of production in that *same period*. The total cost was established on the basis of the [[XXX]] salmon projects that were ongoing during the period of investigation. We recall that [[XXX]] expressly stated in its comments on the investigating authority's provisional findings that the cost extracts from its project accounting system used to calculate the cost of production covered two

accounting years.[660] It can be seen from the diagram that these two accounting years were 2003 and 2004. Had [[XXX]] reported costs of production on a project accounting basis, the diagram shows that it would have reported the costs of salmon generations harvested during the period of investigation, which would have reflected cumulated costs from *three* accounting periods – 2002, 2003 and 2004.

7.503 That [[XXX]] reported its costs of production on the basis of costs incurred for all active salmon projects *during the period of investigation*, and not project accounting, is confirmed by the methodology it used to derive the relevant volume of production. In this regard, [[XXX]] simply identified the total volume of "stock" and harvested salmon at the end of the period of investigation ("30.09.04") and subtracted the volume of "stock" and harvested salmon that existed at the beginning the period of investigation ("01.10.03"). Had [[XXX]] reported costs derived from project accounting, it would have been necessary to identify the volume of production corresponding to each of the salmon generations harvested during the period of investigation. However, this is not how the volume of production was determined.

7.504 Thus, for all of the above reasons, we are not convinced by the EC's assertion that [[XXX]] reported costs of production on the basis of project accounting. Our assessment of the facts that were before the investigating authority that the parties have submitted for our review indicates that [[XXX]] did not report the "weighted average cost of production for all salmon generations that were harvested during the investigation period". Instead, the evidence that has been presented before us indicates that [[XXX]] reported costs of production on the basis of costs incurred during the period of investigation in respect of active salmon projects, divided by the total volume of "stock" and harvested salmon during the period of investigation. Accordingly, we find that the factual underpinning of the EC's justification of the investigating authority's treatment of [[XXX]] NRCs cannot be substantiated.

7.505 In any case, we consider that even if [[XXX]] had reported its costs on the basis of project accounting, this alone would not be enough to justify the investigating authority's actions. As it has been explained to us during the course of this dispute, project accounting in the Norwegian salmon industry involves the accumulation of costs over the period it takes for a salmon farming project to be completed. The period of time over which such costs may be collected will naturally depend upon the duration of the salmon farming project – it may start at the moment an egg is fertilized and end with the harvesting of adult salmon, or it may begin with juvenile salmon (smolt). Furthermore, the duration of each project can be shortened or prolonged, depending upon, for example, the temperature of the water. Thus, the duration of salmon farming projects is variable. Nevertheless, according to the EC, on average, the period from egg to harvested salmon is 36 months.[661] Norway contests that 36 months is the average period for farming salmon from the stage of a fertilized egg.[662]

7.506 Irrespective of whether 36 months is the correct average length of time that it takes to farm salmon, the investigating authority's reliance on this period of time to determine the NRC adjustment for [[XXX]] implies that it considered that the full amount of the relevant NRCs incurred between 2002 and 2004 could be properly allocated to, and therefore "associated" with, production and sale of the like production over the same three year period. However, in our view, even if the correct average length of time to farm salmon were three years, it does not automatically follow that it would be appropriate to allocate all NRCs incurred during this period to salmon farming activities taking place over the same three year period. This is because the use of project accounting does not mean that all NRCs incurred during the course of a salmon generation relate exclusively to the farming activities

[660] *See*, paras. 7.499-7.500.
[661] EC, Answers to Panel Questions 31 and 119.
[662] Norway, FWS, para. 956; Norway, Comments on the EC's Answer to Panel Question 119.

that are undertaken in that period in respect of the same salmon generation. In this regard, we agree with Norway that the logic behind such an approach could lead to unreasonable results.

7.507 Although Article 2.2.1.1 does not prescribe any particular methodology for allocating NRCs to cost of production, the allocation method applied by an investigating authority must not result in the calculation of a cost of production that includes costs not "associated" with production and sale of the like product in the period of investigation.[663] It follows that in order to comply with Article 2.2.1.1, the allocation methodology that is applied must reflect the relationship that exists between the costs being allocated and the production activities to which they are "associated". For instance, companies will typically account for NRCs incurred in the acquisition of fixed assets by depreciating them over the productive life of those assets because of their use and relevance to production activities over this entire period. Moreover, in each case, the appropriate period of time may vary depending, *inter alia*, upon the particular type of asset being depreciated.

7.508 The NRC allocation made by the investigating authority to [[XXX]] cost of production included many different types of NRCs. These included (i) the write-down in the value of biomass due to deformity reported in [[XXX]] 2003 audited accounts; (ii) the write-down in the value of several production facilities including the [[XXX]] in 2003; and (iii) 24 "other items", including the "write down of assets on the closure of production facilities and various consequential costs, such as severance pay", reported in 2002 and 2003. We can find no statement in the investigating authority's findings to explain why the full amounts of all of these varying NRCs, either individually or collectively, should have been allocated over the life of one salmon generation, and in particular, over [[XXX]] operations between 2002 and 2004. In this regard, we recall that the Definitive Regulation reveals that the investigating authority recognized that its approach was not the best solution:

> "Ideally, all extraordinary costs reported for each separate asset should be allocated over the useful life of that asset to arrive at an average annual cost. However, it is to be noted that none of the companies concerned carried out this exercise."[664]

7.509 Thus, the "ideal" solution envisaged by the investigating authority was to allocate the NRCs "reported for each separate asset ... over the useful life of that asset". Because of the investigated parties' alleged failure to carry out such an allocation exercise, the investigating authority decided to apply another methodology. However, [[XXX]] did provide the investigating authority with information about the accounting principles it had applied for "significant accounting entries", which included information about usual depreciation periods for land and buildings, plant and equipment, fixtures and fittings, boats and farming licenses.[665] It also indicated that it treated assets as fixed assets only when the "useful economic lifetime exceeds three years".[666] The investigating authority's findings do not explain why this information was inappropriate and could not be used to determine how to allocate the relevant NRCs. In any case, regardless of the relevance of [[XXX]] reported accounting principles, we believe that it was incumbent on the investigating authority to at the very minimum explain why it was appropriate to allocate the relevant NRCs over a period of time that was equivalent to what the investigating authority considered to be the average period of time to farm salmon. However, we can find no such explanation, even in general terms, anywhere in the investigating authority's findings. Absent any such explanation, the approach undertaken by the investigating authority fails the test that is established under Article 2.2.1.1.[667]

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[663] *See*, para. 7.491.
[664] Definitive Regulation, Recital 18.
[665] [[XXX]] Questionnaire Response, Section F-1.6, Exhibit NOR-123.
[666] [[XXX]] Questionnaire Response, Section F-1.6, Exhibit NOR-123.
[667] *See*, paras. 7.491and 7.507.

7.510 For all of the above reasons, we find that the investigating authority acted inconsistently with Article 2.2.1.1 of the AD Agreement, when it adjusted [[XXX]] cost of production for NRCs calculated on the basis of a three-year average of NRCs incurred between 2002 and 2004. In the light of this finding, we believe that it is not necessary, for the purpose of resolving this dispute, to decide whether the investigating authority's treatment of [[XXX]] NRCs was also inconsistent with Articles 2.1 and 2.2 of the AD Agreement. Therefore, on the grounds of judicial economy, we make no findings in respect of this aspect of Norway's complaint.

[[XXX]]

7.511 In response to a question from the Panel, the EC revealed that [[XXX]] did not in fact report its costs of production on the basis of project accounting.[668] Rather [[XXX]] reported on the basis of conventional accounting for the period of investigation only. For the most part, the investigating authority used the cost information as it was reported by [[XXX]],[669] and determined cost of production on the basis of information derived from [[XXX]] annual accounts covering the last three months of 2003 and the first nine months of 2004, that is, the period of investigation. It was only [[XXX]] NRCs that were derived from data taken from outside of the period of investigation. These were based on the average of NRC amounts incurred over the years 2002, 2003 and 2004. Thus, the EC's initial justification of the investigating authority's use of a three-year average allocation methodology for NRCs (i.e., that it reflected the project accounting methods used by the investigated parties) cannot explain the investigating authority's treatment of [[XXX]] NRCs.

7.512 As we understand it, the EC justifies the investigating authority's conduct in respect of [[XXX]] by arguing that because "project accounting was the system applied to the great majority of exports examined" and because it considered project accounting to give "the most reliable indication of the financial performance of companies engaged in salmon production", the investigating authority was entitled to "view" data from companies applying conventional accounting over a three year period "where that was appropriate".[670] However, the EC has failed to specifically explain why it was "appropriate" to allocate the three-year average of [[XXX]] NRCs to its costs of production.

7.513 The reason given by the investigating authority in [[XXX]] Definitive Disclosure for its use of the three-year average allocation methodology was that it was considered to be "a reasonable basis to take into account of this cost and in order to distribute any non-recurring cost included in this item over a reasonable period of time." Although there is no mention in [[XXX]] Definitive Disclosure that the three year period was used because the investigating authority considered it to be the average period of time it takes to farm salmon, we understand from the Definitive Regulation that the three year period was chosen for this reason. This suggests that the investigating authority chose to allocate [[XXX]] NRCs on the basis of a three-year average in an effort to reflect a result that it perceived could be obtained for these costs through project accounting. However, we note that the EC does not argue that [[XXX]] annual accounts were "implicitly ... based on the project accounting methodology", as it does for [[XXX]] and [[XXX]].[671] Indeed, the EC explicitly recognizes that [[XXX]] annual accounts "did not incorporate the project accounting approach".[672] Thus, the investigating authority accepted that all of [[XXX]] costs, but for NRCs, could be established on the basis of the conventional accounting records provided by [[XXX]]. However, when it came to NRCs,

[668] EC, Answer to Panel Question 111.
[669] EC, Answer to Panel Question 111.
[670] EC, Answer to Panel Question 111. Norway contests that "project accounting was the system applied to the great majority of exports examined". For the present purposes, we believe it is not necessary for us to come a position on whether Norway is correct. But we note that to the extent that we have already found that [[XXX]] did not report its costs on the basis of project accounting, the EC's argument is weakened.
[671] EC, Answer to Panel Question 117(a) and (b).
[672] EC, Answer to Panel Question 117(c).

the investigating authority rejected what was reported in the conventional accounts, and chose to pursue an allocation methodology intended to reflect project accounting.[673]

7.514 We recall that in order to comply with Article 2.2.1.1, the allocation methodology that is applied by an investigating authority to determine cost of production must reflect the relationship that exists between the costs being allocated and the production activities to which they are "associated". In the present case, the NRCs that were averaged and included by the investigating authority in [[XXX]] cost of production were write-downs in the value of certain equity investments made by [[XXX]] in other companies, including companies that were not involved in the production and sale of salmon. We can see nothing inherent in these NRCs to suggest that it would be appropriate to allocate them over a period of time equivalent to the average duration of a salmon farming project. Therefore, it is not immediately apparent to us that the full amount of NRCs allocated by the investigating authority to [[XXX]] cost of production was "associated" with salmon farming activities over a period of exactly three years.

7.515 In explaining its findings in respect of its treatment of NRCs, the investigating authority stated only that "[t]hree years was considered an appropriate time period as this is the average length of time that it takes to grow a salmon from a smolt to a harvestable salmon."[674] This statement does not address the extent of any relationship between the allocated costs and [[XXX]] production activities. Notably, it provides no insight into *why* such costs should be allocated over the three-year period. Neither has the EC, in its response to Norway's claims, specifically explained why it was appropriate to allocate [[XXX]] NRCs on the basis of what it alleges was the average period of time needed to farm salmon. In the absence of any explanation of why it was appropriate to allocate the NRCs incurred by [[XXX]] in the years 2002 to 2004 over the same three years, we believe that the investigating authority's actions lacked an appropriate factual basis. The lack of any such explanation is particularly telling in the present case, because, as we have already noted, the investigating authority was prepared to accept all other costs used in the calculation of [[XXX]] cost of production from information reported through the application of conventional accounting methods. It was only in respect of NRCs that the investigating authority considered that the data submitted by [[XXX]] on the basis of conventional accounting was inappropriate. Accordingly, we find that in choosing to allocate the three-year average of the NRCs incurred by [[XXX]] in the years 2002 to 2004 to its cost of production for the period of investigation, the investigating authority acted inconsistently with Article 2.2.1.1 of the AD Agreement.

7.516 In the light of this finding, we do not believe it is necessary, for the purpose of resolving this dispute, to decide whether the investigating authority's treatment of [[XXX]] NRCs was also inconsistent with Articles 2.1 and 2.2 of the AD Agreement. Therefore, on the grounds of judicial economy, we make no findings in respect of this aspect of Norway's complaint.

[673] We understand this to be the case also from the EC's Answer to Panel Question 119, where it states: "The 36 month period was not applied to the companies that were applying project accounting. The accounts of such companied already reflected the actual growing periods of the salmon harvested during the investigation period, whether these periods were more or less than or equal to 36 months".

[674] Definitive Regulation, Recital 18.

2. Alleged Inconsistency of the EC's Treatment of Finance Costs With Article 2.2 of the AD Agreement

(a) Arguments of the Parties

(i) Norway

7.517 Norway claims that the investigating authority acted inconsistently with Article 2.2 of the AD Agreement when, in establishing the constructed normal values of three investigated companies, [[XXX]], [[XXX]] and [[XXX]], it allegedly adjusted their reported finance costs in a manner that inappropriately inflated each company's cost of production. According to Norway, the investigating authority's adjustments resulted in the inclusion of finance costs that were not "associated" with production and sale of salmon during the period of investigation because: (i) for all three companies, they represented the three-year average of the finance costs incurred by the investigated companies in preceding years instead of the actual finance costs incurred during the period of investigation; and (ii) in respect of [[XXX]] only, the finance cost adjustment included the write-down in the value of shares held by [[XXX]] in another company that was reported in [[XXX]] accounts in 2002, which Norway argues was not a finance cost but an investment loss.

7.518 Norway argues that by relying on a three-year average of the companies' finance costs, the investigating authority determined the average costs associated with funding production and sale during that entire three-year period, and not the finance costs associated with production and sale activities in the period of investigation. In this regard, Norway contends that the average of the finance costs incurred by a company over a three-year period does not provide an objective basis for making conclusions about finance costs in the period of investigation. Furthermore, because of the variation in the level interest rates between 2001 and 2004, Norway argues that the end-result of the investigating authority's approach was to significantly increase the finance costs of the relevant companies. Norway also alleges that the EC applied the methodology inconsistently as between investigated companies and in respect of the years used to determine the relevant finance costs. In the case of [[XXX]], the three-year period was 2001 to 2003; and, in the case of [[XXX]] and [[XXX]], the three-year period was 2002 to 2004. Finance costs were derived on the basis of a three-year average for no other companies.

7.519 Norway notes that, in calculating the three-year average for [[XXX]], the EC included among the finance costs, a loss of NOK [[XXX]] million that the [[XXX]] incurred in 2002 on the write-down of shares held in [[XXX]], a whitefish farming and processing company. Norway claims that this loss should have been excluded from the calculation of finance costs because it is an investment loss, not a finance cost arising from payments made by the [[XXX]] to service debt related to its own production of salmon. In addition, Norway argues that in its view, losses incurred by salmon producers on investments in other companies reflect a decline in the equity position of the investor company, but do not impact the production costs of salmon.

7.520 Thus, for all of the above reasons, Norway claims that the adjustment made by the investigating authority to the finance costs reported by [[XXX]], [[XXX]] and [[XXX]] resulted in the establishment of a cost of production and constructed normal value that was inconsistent with Article 2.2 of the AD Agreement.

(ii) European Communities

7.521 The EC argues that the investigating authority's calculation of the finance costs of [[XXX]], [[XXX]] and [[XXX]] on the basis of a three-year average was consistent with Article 2.2 of the AD Agreement because it reflected the project accounting practice that was normally followed by these companies in their current operations.

7.522 According to the EC, [[XXX]] and [[XXX]] did not report figures to the investigating authority using project accounting. Rather, the EC asserts that both companies completed the questionnaire applying an "alternative approach" using adjusted data for the period of investigation.[675] The investigating authority rejected the reported figures because of irreconcilable differences with the annual accounts, and resorted to establishing all but the finance costs for these companies on the basis of their annual accounts and trial balances pertaining to the relevant periods in 2003 and 2004. In the EC's view, these annual accounts were implicitly based on project accounting. Thus, the approach taken by the investigating authority to calculate finance costs on the basis of a three-year average was justified.

7.523 The EC advances a similar justification in respect of the investigating authority's calculation of [[XXX]] finance cost, with the only difference being that, according to the EC, [[XXX]] initially reported costs of production on the basis of project accounting. When the reported cost figures were rejected by the investigating authority, it then resorted to annual accounts covering the period of investigation, which the EC contends were based on project accounting. Reflecting this approach, finance cost was determined on the basis of a three-year average.

7.524 Finally, the EC argues that the final figures used to calculate [[XXX]] finance costs did not take into account the write-off value of the shares held by [[XXX]] in [[XXX]], and as such, that there is no factual basis to Norway's claim.

(b) Evaluation by the Panel

7.525 As a preliminary matter, we recall that we have already found that the investigating authority's calculation of [[XXX]] finance costs on the basis of "facts available" was inconsistent with Article 6.8 and paragraph 3 of Annex II of the AD Agreement.[676] In particular, we have concluded that the conditions for disregarding the finance cost data submitted by [[XXX]] in its questionnaire reply and resorting to "facts available" in the form of a three-year average of the Norwegian Central Bank's interest rates and [[XXX]] own [[XXX]] over the period 2001 to 2003, were not properly established. In this light, we believe that it is not necessary, in order to resolve this dispute, for us to decide whether the investigating authority's calculation of [[XXX]] finance costs was also inconsistent with Article 2.2 of the AD Agreement. Accordingly, on the grounds of judicial economy, we make no findings in respect of Norway's claim that the investigating authority acted inconsistently with Article 2.2 of the AD Agreement when it calculated [[XXX]] finance costs through the application of a three-year average of finance costs incurred between 2001 and 2003. Thus, in the sections that follow, the focus of our evaluation is on Norway's claims in respect of [[XXX]] and [[XXX]].

7.526 Norway argues that finance costs are recurring costs associated with funding debt that is used as part of the working capital invested in production and sale of a product. In its view, only finance costs incurred during the period of investigation can be "associated" with production and sale of salmon in the period of investigation. Thus, according to Norway, to the extent that any finance costs incurred outside of the period of investigation are taken into account in establishing the cost of production used to construct normal value for the period of investigation, reliance on that constructed normal value will be inconsistent with Article 2.2 of the AD Agreement. In essence, the EC's justification for calculating the relevant companies' finance costs on the basis of a three-year average is the same as its justification for using a three-year average allocation methodology to derive certain NRCs,[677] namely that it reflected the project accounting practice that was normally used by the investigated companies and implicitly incorporated in the annual accounts used by the investigating

[675] EC, Answer to Panel Question 111.
[676] *See*, paras. 7.375-7.386.
[677] *See*, paras. 7.477 and 7.489.

authority to determine the vast majority of the cost elements used in the calculation of the individual companies' costs of production.

7.527 We begin our evaluation of Norway's claim by reviewing the text of Article 2.2, which reads:

> "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits."[678]

7.528 Article 2.2 identifies the circumstances when an investigating authority may be entitled to determine the margin of dumping through a comparison between export price and: (i) the export price of the like product exported to a third country ("a comparable price of the like product when exported to an appropriate third country, provided that this price is representative"); or (ii) constructed normal value ("the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and profits"). As we have already observed, a cost may be used to calculate "cost of production" for the purpose of establishing constructed normal value when it is "associated" with production and sale of the like product during the period of investigation.[679] It follows that a comparison between export price and a constructed normal value that is derived from a "cost of production" calculated on the basis of costs that are *not* "associated" with production and sale of the like product during the period of investigation will be inconsistent with Article 2.2.

7.529 We recall that the practice of project accounting involves the accumulation of costs over the period it takes for a salmon farming project to be completed, typically lasting from fertilized egg to the harvest of adult salmon. Where farming activities take three years, as the EC asserts is the case on average in the Norwegian salmon industry, the costs accumulated through project accounting will be "associated" with the salmon harvested at the end of that three year period. Thus, it would be entirely accurate, in our view, to establish the "cost of production" of salmon harvested during the period of investigation on the basis of costs properly captured through project accounting. We do not understand the parties to disagree with this conclusion. However, the parties' views diverge in respect of the extent to which the investigating authority was entitled to calculate finance costs on the basis of a three-year average. Whereas Norway considers that there was no rational basis for the investigating authority to proceed in this manner, the EC argues that the practice of three-year project accounting normally pursued by the investigated parties justified the investigating authority's three-year average finance cost calculation methodology. Before turning to address the merits of the parties' arguments, we briefly summarize the information that can be found in the individual company disclosures and published determinations about the investigating authority's determination of the finance costs of [[XXX]] and [[XXX]].

(ii) Facts

7.530 The Definitive Disclosures to [[XXX]] and [[XXX]] reveal that the investigating authority rejected the two companies' reported finance costs and replaced these with figures determined on the basis of data relating to the three years from 2002 to 2004. In particular, for both companies, the investigating authority first totalled finance expenses at the group-wide level for the years 2002 to 2004. It then divided this figure by the total group-wide turnover for the same period, in this way

[678] Footnote omitted.
[679] *See*, para. 7.483.

arriving at an average finance ratio at the group level, again for the period 2002 to 2004. This ratio was then multiplied by each investigated company's turnover during the period of investigation. The resulting amount was the finance cost used by the investigating authority for the purpose of calculating cost of production and constructed normal value.[680]

7.531 The investigating authority explained its determination of both companies' finance costs on essentially the same terms:

> "Reference is made to paragraph (20) of the general disclosure. In the case of your company, financial expenses incurred in the years 2002 to 2004 by the group company were accordingly allocated to the salmon cost of production of the IP."[681]

7.532 Paragraph 20 of the General Disclosure Document related to the investigating authority's findings in respect of the write-down of licenses and financial expenses. It reads as follows:

> "For these reasons, the Commission confirms that these write-downs relate to expenses that are incurred and must be borne by the companies concerned. It is further confirmed that these costs should be attributed to the prime business activities including salmon farming, thus the claim is rejected. As with extraordinary expenses, it was also considered appropriate to have one third of all costs incurred by the relevant companies in the last three years allocated to salmon production, on the basis of turnover."[682]

7.533 The Definitive Regulation provides no additional insight into the investigating authority's calculation of the finance costs of [[XXX]] and [[XXX]].

(iii) Whether the investigating authority was entitled to calculate finance costs on the basis of a three-year average

7.534 The EC explains that initially, both [[XXX]] and [[XXX]] reported their costs of production using an "alternative approach" – an approach that followed neither project accounting or conventional accounting.[683] According to the EC, the investigating authority rejected the figures reported in their questionnaire replies "because of irreconcilable differences with the annual accounts".[684] Consequently, the investigating authority resorted to using [[XXX]] and [[XXX]] annual accounts, which it argues were "implicitly ... based on the project accounting methodology".[685] In making this statement, we understand the EC to be of the view that the annual accounts reflected costs incurred in farming different generations of salmon, from fertilized egg to harvested salmon. Because, in the view of the EC, three years is the average time it takes to farm one generation of salmon, it argues that the establishment of finance costs through the application of a

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[680] Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-45; Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-54. See also, [[XXX]] Worksheet, prepared by Norway, Exhibit NOR-130.

[681] Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-45; Definitive Disclosure to [[XXX]], 28 October 2005, Exhibit NOR-54. The statement in [[XXX]] disclosure identifies the [[XXX]] as [[XXX]]. No similar identification of the name of the [[XXX]] is made in Definitive Disclosure made to [[XXX]].

[682] General Disclosure Document, 28 October 2005, Exhibit NOR-67.

[683] EC, Answer to Panel Question 111. See also, Exhibit EC-37, where the EC indicates that both companies used "an alternative approach to allocate costs to the IP", reporting all costs ("eggs/smolt, feed, direct labour, vaccine/medications, other farming costs, harvesting costs, processing costs, selling expenses, general and administrative expenses, financial expenses, bad debts, NRC") on this basis.

[684] EC, Answer to Panel Question 117(a); and Exhibit EC-37.

[685] EC, Answer to Panel Question 117(a).

three-year average was rational, and produced a "result in all likelihood ... similar to the one that would have been found had reported costs been properly based on the companies' project accounting system and not been made on purpose for the investigation".[686] In other words, as we understand it, the EC argues that the investigating authority was justified in calculating the companies' finance costs on the basis of a three-year average because this reflected the nature of the figures the investigating authority had actually used to derive the other costs used in its determination of the cost of production.

7.535 Norway considers that the investigating authority was not entitled to determine finance costs on the basis of a three-year average because both [[XXX]] and [[XXX]] did not report their costs on the basis of project accounting. That is, according to Norway, [[XXX]] and [[XXX]] did not report the costs associated with the quantity of salmon *harvested* during the period of investigation. Instead, both companies reported costs associated with all salmon production activities undertaken during the period of investigation, including salmon growth and harvesting. As such, the relevant finance costs for the calculation of their costs of production were those reported by the companies in their questionnaire replies. Moreover, Norway argues that the investigating authority did not reject the cost of production figures reported by [[XXX]] and [[XXX]]. It contends that the EC used almost all reported data, rejecting only very few figures for which it made adjustments that Norway contests. To this end, Norway has presented a number of tables derived from information contained in the investigated parties' questionnaire replies and individual company disclosures to substantiate its assertions.[687] We have closely reviewed these tables and the information on which they are based and agree with Norway that the investigating authority did not reject the cost of production figures reported by [[XXX]] and [[XXX]].

[[XXX]]

7.536 [[XXX]] reported costs of production are set out in an Excel worksheet titled [[XXX]]. Norway submitted this worksheet as Exhibit NOR-132. The investigating authority's calculation of [[XXX]] cost of production can be found in Annex 3 of its Definitive Disclosure to [[XXX]], Exhibit NOR-45. The final cost of production per kilogram determined by the investigating authority is set out in the Excel worksheet titled [[XXX]], Annex 3, and is further relied upon in the worksheet titled "COP". It can be seen from the former of the two worksheets, that the investigating authority used 16 of the 18 cost of production figures reported by [[XXX]]. The two cost elements not relied upon relate to the investigating authority's adjustments for smolt costs and finance costs, which Norway contests.[688] Thus, the facts as they have been presented to us in this dispute do not support the EC's assertion that the investigating authority rejected [[XXX]] reported costs, and used another basis to derive its costs of production. Rather, the facts show that the investigating authority based its determination of [[XXX]] cost of production on all but two figures reported in [[XXX]] questionnaire response.

7.537 Moreover, the investigating authority's Definitive Disclosure also indicates that it did not rely upon only the quantity of salmon *harvested* during the period of investigation for the purpose of arriving at [[XXX]] per kilogram cost of production. The "COP" worksheet reveals that the investigating authority identified an amount of [[XXX]] kilograms as the "total quantity produced during the IP". This figure was derived from an amount of [[XXX]] kilograms, which had been reported by [[XXX]] and adjusted downwards by one per cent by the investigating authority. The amount of [[XXX]] kilograms can be found in the [[XXX]] worksheet, which shows that it is derived from the quantity of salmon harvested, *plus* "closing stock" *minus* "opening stock". We understand

[686] EC, Answer to Panel Question 117(b).
[687] Norway, Comments on EC Answer to Panel Question 117(a).
[688] Norway's claims in respect of the investigating authority's adjustments to reported smolt costs are addressed below at paras. 7.545-7.572.

that the reference to "stock" is a reference to "biomass", that is, salmon that are still in the growing stage and not yet ready to be harvested. Thus, the figure used for total production in the period of investigation was the sum total of harvested and non-harvested salmon in the period of investigation. In our view, this evidence supports the conclusion that: (i) [[XXX]] did not report its per kilogram costs of production on the basis of project accounting, but rather on the basis of all costs relating to its salmon farming activities over the period of investigation; and (ii) that the investigating authority calculated all but two of the costs used for the purpose of arriving at [[XXX]] per kilogram cost of production on the basis of information from the period of investigation.

[[XXX]]

7.538 The cost of production figures reported by [[XXX]] in section F-2-5 of its questionnaire response are set out in Exhibit NOR-133, page 2. This worksheet shows that [[XXX]] reported costs for the period of investigation on the basis of costs incurred in the years 2003 and 2004. The investigating authority's calculation of [[XXX]] cost of production is set out in the Definitive Disclosure, Exhibit NOR-54, Annex 3. The final cost of production per kilogram determined by the investigating authority is revealed in the Excel worksheet that is titled "COP". This amount is derived from another worksheet in the same Annex with the title [[XXX]]. All but three of the figures used in worksheet [[XXX]] to derive the per kilogram cost of production amount that is referred to in the worksheet titled "COP" are exactly the same as those reported by [[XXX]]. The only figures that differ are those relating to the contested adjustments made for finance costs, depreciation and the cost of smolt, which Norway contests.[689] Thus, as Norway alleges, 19 of 22 cost elements used by the investigating authority to determine [[XXX]] per kilogram cost of production came directly from [[XXX]] questionnaire response. We can therefore see no factual basis for the EC's assertion that the investigating authority rejected the figures reported in [[XXX]] questionnaire reply "because of irreconcilable differences with the annual accounts".[690]

7.539 As with [[XXX]], the Definitive Disclosure indicates that the investigating authority did not rely upon only the quantity of salmon *harvested* during the period of investigation for the purpose of arriving at [[XXX]] per kilogram cost of production. [[XXX]] reported its total quantity of production for the period of investigating using the same methodology applied by [[XXX]]. The [[XXX]] worksheet reveals that total production was derived from adding "closing biomass" to the total quantity of salmon "harvested during the period" and detracting "opening biomass". Thus, the figure reported for total production in the period of investigation was the sum total of [[XXX]] harvested and non-harvested salmon in the period of investigation. It can be seen from the same worksheet that the investigating authority used this figure as the basis for its calculations. Once again, we find that the evidence presented in the Definitive Disclosure supports the conclusion that: (i) [[XXX]] did not report its per kilogram costs of production on the basis of project accounting, but rather on the basis of an all costs relating to its salmon farming activities over the period of investigation; and (ii) that the investigating authority calculated all but three of the costs used for the purpose of arriving at [[XXX]] per kilogram cost of production on the basis of information from the period of investigation.

7.540 We recall that the EC's response to Norway's complaint is premised upon two key factual assertions: (i) that the investigating authority did not rely upon the data submitted by [[XXX]] and [[XXX]] because it could not be reconciled with their annual accounts; and (ii) that after rejecting the reported information, the investigating authority established each company's costs of production on the basis of information drawn from their annual accounts, which the EC argues implicitly incorporated project accounting. We can find no evidence to substantiate these assertions. Indeed, as

[689] Norway's claims in respect of the investigating authority's treatment of NRCs and adjustments to reported smolt costs are addressed, respectively, above at paras. 7.463-7.516, and below at paras. 7.545-7.572

[690] EC, Response to Panel Question 117(a); and Exhibit EC-37.

we have explained above, the facts we have reviewed indicate that the opposite to what the EC argues took place, actually occurred during the investigation. The investigating authority accepted almost all of the cost information reported by [[XXX]] and [[XXX]], and thereby based its determination of the companies' costs of production on data that was almost entirely reported by means of an "alternative approach" – an approach that according to the EC reflected neither conventional or project accounting. In this light, the EC's contention that the investigating authority was justified in calculating the companies' finance costs on the basis of a three-year average because this reflected the nature of the figures the investigating authority had relied upon to derive the other costs used in its determination of the cost of production cannot be substantiated. In other words, there is no factual basis to support the argument the EC has advanced to demonstrate that the finance costs calculated for [[XXX]] and [[XXX]] were "associated" with production and sale of the like product during the period of investigation.

7.541 Norway argues that the average of the finance costs incurred by a company over a three-year period does not provide an objective basis for making conclusions about finance costs "associated" with production and sale of the like product in the period of investigation. In our view, whether this is the case will very much depend upon the factual circumstances, and in particular, the methodology used to collect costs used in the calculation of cost of production. Where costs of production are derived through project accounting, and each project typically runs over three years, it seems to us that the determination of finance costs (or any other recurring cost) on the basis of a three-year average might well be an objective basis to *approximate* costs that would otherwise be reported through project accounting.[691] However, where costs of production are not derived through project accounting, the use of a three-year average to determine one element of those recurring costs could have distortive effects. This is particularly so when, as in the present case, the interest rates associated with funding debt in the preceding years are different from those existing in the period of investigation. In our view, in order to use a cost element derived on the basis of a three-year average in circumstances where almost all other cost elements used in the calculation of cost of production are determined through the use of a methodology that does not even implicitly reflect three-year project accounting, an investigating authority must properly explain its decision. The required "association" between a recurring cost derived on the basis of a three-year average and production of the like product in the period of investigation cannot be implied when the cost of production is determined on the basis of information relating to production activities in the period of investigation only.

7.542 We have found that almost all of the cost elements used in the calculation of the respective costs of production of [[XXX]] and [[XXX]] were determined on the basis of an "alternative approach" and therefore did not reflect three-year project accounting. Thus, for almost all relevant cost elements, the investigating authority was satisfied that data pertaining to the cost of harvesting and non-harvesting activities that took place solely within the period of investigation were properly "associated" with production and sale of the like product during the period of investigation. As such, we believe it was incumbent upon the investigating authority to explain why, in the light of its rejection of the companies' reported finance costs, it was appropriate to calculate finance costs on the basis of a three-year average. The required "association" between finance costs calculated on the basis of a three-year average and production of the like product in the period of investigation could not simply be implied. In this regard, we note that the only specific statement made by the investigating authority in respect of the methodology applied to determine [[XXX]] and [[XXX]] finance costs was that it was considered "appropriate to have one third of [the finance] costs incurred by the relevant companies in the last three years allocated to salmon production, on the basis of turnover". This does not explain how, in the light of the approach taken to determine almost all other

[691] However, we do not consider this to be the case in respect of non-recurring costs. As *non-recurring* costs, these must be appropriately allocated over a period of time that may be different from the lifetime of a "project". *See*, paras. 7.506-7.507.

cost elements, the three-year average finance costs were "associated" with production of the like product during the period of investigation.

7.543 Thus, for all of the above reasons, we find that there is no factual basis to support the EC's contention that the three-year average finance costs determined for [[XXX]] and [[XXX]] were "associated" with the production and sale of the like product during the period of investigation. To the extent that the investigating authority used these costs in the calculation of [[XXX]] and [[XXX]] "costs of production", it failed to properly establish the constructed normal values used for the purpose of determining the existence of dumping. Accordingly, we find that the investigating authority acted inconsistently with Article 2.2 of the AD Agreement.

7.544 We note that Norway also claims that the investigating authority acted inconsistently with Article 2.2 when it counted in the total amount of [[XXX]] finance costs for the period 2002 to 2004, a loss of NOK [[XXX]] million that the [[XXX]] incurred in 2002 on the write-down of shares held in [[XXX]].[692] Because we have found that the investigating authority erred in calculating [[XXX]] finance cost on the basis of the average of the finance costs incurred from 2002 to 2004, we consider that it is not necessary, for the purpose of resolving this dispute, to also address Norway's second complaint against the investigating authority's calculation of [[XXX]] finance costs. In our view, findings in respect of this element of Norway's complaint would do little to enhance the ability of the DSB to make sufficiently precise recommendations and rulings in this dispute. Accordingly, on the grounds of judicial economy, we make no findings in respect of Norway's claim that the investigating authority acted inconsistently with Article 2.2 of the AD Agreement when it included among the finance costs used to derive the three-year average of [[XXX]] finance costs, a loss of NOK [[XXX]] million that the [[XXX]] incurred in 2002 on the write-down of shares held in [[XXX]].

3. Alleged Inconsistency of the EC's Treatment of Smolt Costs With Articles 2.2 and 2.2.1.1 of the AD Agreement

(a) Arguments of the Parties

(i) Norway

7.545 Norway claims that the investigating authority acted inconsistently with Articles 2.2 and 2.2.1.1 of the AD Agreement when it made adjustments to the reported smolt[693] costs of three investigated companies, [[XXX]], [[XXX]] and [[XXX]], resulting in the inclusion of an amount of smolt costs in the calculation of the companies' respective costs of production that was not "associated" with production and sale of salmon during the period of investigation.

7.546 Norway argues that the investigating authority treated all smolt costs incurred by [[XXX]] and [[XXX]] as if related to the production of salmon in the period of investigation, when in fact they were related to both production during the period of investigation and production in the period immediately after the period of investigation. Norway submits that both [[XXX]] and [[XXX]] made documented submissions requesting the investigating authority to allocate their respective smolt costs to their costs of production in proportion to the salmon produced and sold during the period of investigation. However, according to Norway, the investigating authority failed to properly consider the two companies' representations, and summarily dismissed the proposed allocation methods because of the need for consistency in treatment between different producers. Norway argues that the costs should have been allocated to the producers' costs of production in proportion to the salmon produced and sold during the period of investigation. The investigating authority's failure to do so

[692] *See*, para. 7.519.

[693] Norway describes smolt as "juvenile salmon that take approximately 9 to 16 months to develop into harvestable salmon". Norway, FWS, para. 992.

inflated the companies' costs of production by NOK [[XXX]] for [[XXX]] and NOK [[XXX]] for [[XXX]]. Thus, Norway claims that the investigating authority's actions were inconsistent with Articles 2.2.1.1 and 2.2.

7.547 In respect of [[XXX]], Norway submits that the investigating authority improperly included in its cost of production: (i) an amount of NOK [[XXX]] million, representing the entire cost of smolt purchased in the last month of the period of investigation, which was not harvested until after the end of the period of investigation; and (ii) the cost of smolt sold to unrelated customers at arm's length prices during the period of investigation without deducting the revenue of NOK [[XXX]] million earned from those sales. Norway argues that [[XXX]] submitted substantiated requests for the investigating authority to exclude these amounts from its cost of production on various occasions. However, according to Norway, [[XXX]] submissions were rejected because the relevant information had not been presented at the time of the on-the-spot investigation. Norway contends that the inability to verify these costs on-the-spot lay with the investigating authority, and not [[XXX]]. Thus, Norway argues that the investigating authority's failure to accept the requested adjustments resulted in the inclusion of costs in [[XXX]] cost of production that were not "associated" with the production and sale of salmon during the period of investigation. The investigating authority's actions were therefore inconsistent with Article 2.2.

(ii) European Communities

7.548 The EC argues that there is no factual basis to Norway's claims in respect of [[XXX]] and [[XXX]] because the investigating authority remedied the matters raised by Norway between Definitive Disclosure and the Definitive Regulation. The EC argues that this is evidenced by the fact that the margins of dumping determined for these companies in the Definitive Regulation were lower than those contained in the Definitive Disclosure document.

7.549 As regards [[XXX]], the EC asserts that the approach taken by the investigating authority to determining smolt costs was affected by [[XXX]] failure to properly report its costs according to the project accounting methodology that it was supposed to have implemented. According to the EC, a valid project accounting methodology would have properly dealt with the two cost items at issue. However, the EC argues that [[XXX]] badly implemented the project accounting methodology. Therefore, the investigating authority had to use annual accounts to determine smolt costs, and these did not show that the smolt had been bought in the last month of the period of investigation, or that the alleged sale of smolt had actually taken place. For this reason, the EC asserts that the investigating authority could not have taken the approach advocated by [[XXX]] in respect of smolt costs, because although valid under the project accounting methodology, it could not be matched with an approach to calculating costs on the basis of annual accounts.

(b) Evaluation by the Panel

(i) [[XXX]] and [[XXX]]

7.550 We begin our evaluation of Norway's claims by first addressing the investigating authority's calculation of the smolt costs used in the determination of [[XXX]] and [[XXX]] cost of production. The EC argues that there is no factual basis to Norway's claims because it asserts that the investigating authority decided, between the stages of Definitive Disclosure and adoption of the Definitive Regulation, that it was appropriate to accept the adjustments requested by the two companies in respect of smolt costs.[694] Thus, in the view of the EC, the companies' final margins of dumping correctly excluded the relevant smolt costs from their cost of production. The EC explains the background to the investigating authority's decision in the following terms:

[694] EC, Answer to Panel Question 125.

> "In both cases, the companies had argued in their comments on disclosure and in hearings that certain adjustments should be made to the costs actually incurred during the investigation period. Pursuant to the hearings that took place after definitive disclosures, the investigating authorities accepted the claim on smolt quantities and costs and in the definitive Regulation correspondingly reduced the margins of dumping. In the case of [[XXX]] an additional correction was made regarding processing costs in order to remove a clerical error pointed out by the company."[695]

7.551 This is the only defence raised by the EC to Norway's claims in respect of these two companies. The EC does not, in the alternative, contest Norway's claim that the inclusion of the relevant smolt costs in the two companies' costs of production would be inconsistent with Articles 2.2 and 2.2.1.1 of the AD Agreement. Furthermore, as we have noted elsewhere,[696] the EC agrees with Norway that pursuant to Articles 2.2 and 2.2.1.1, only costs "associated" with production and sale of the like product during the period of investigation may be included in the calculation of cost of production. There is therefore no dispute between the parties as to whether the smolt costs were "associated" with production and sale of salmon during the period of investigation. Thus, the only question that is before us is whether the EC's assertions can be substantiated by the facts of the investigation.

7.552 Norway has consistently alleged that [[XXX]] and [[XXX]] were not provided with any evidence indicating that their claims in respect of smolt costs had been accepted. On the other hand, the EC has explained that "Norway should already possess all the information necessary to verify the correctness of the investigating authorities' statement, because the relevant data were disclosed to the companies".[697] When specifically asked to substantiate its factual assertions on the basis of "information and evidence that was before the investigating authority during the investigation", the EC responded by making the following statement:

> "The evidence of the EC authorities' decision is apparent in the margins of dumping determined for the two companies in the definitive Regulation, which are lower than those announced in the definitive disclosure."[698]

In the same reply, the EC also referred to the two companies' responses to the Definitive Disclosures.

7.553 It is true that [[XXX]] and [[XXX]] both raised the investigating authority's treatment of their reported smolt costs in their responses to the Definitive Disclosures. However, in each case, the smolt cost issue was only one of several aspects of the investigating authority's margin of dumping determination that was contested.[699] Thus, it is impossible to confirm by reference to the companies' responses to the Definitive Disclosure documents that the investigating authority accepted all or part of the smolt cost adjustment claims that had been made. Moreover, the fact that both [[XXX]] and [[XXX]] challenged various aspects of the investigating authority's cost of production calculations implies that the decrease in the margins of dumping between Definitive Disclosure and the Definitive Regulation might well have been due to the investigating authority's full or partial acceptance of any one or more of the companies' other complaints. The EC has not explained how its factual assertions

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[695] EC, Response to Panel Question 125.
[696] *See*, para. 7.491.
[697] EC, Opening Statement at the Second Substantive Meeting of the Parties, para. 107.
[698] EC, Response to Panel Question 125.
[699] [[XXX]] response to the Definitive Disclosure criticized various aspects of the investigating authority's calculation of its cost of production, including the amounts used for smolt costs, finance costs, SG&A costs and the quantity of salmon produced during the period of investigation. Exhibit NOR-136. Likewise, [[XXX]] response to the Definitive Disclosure contested various aspects of the investigating authority's calculation of its cost of production, including the amounts used for smolt costs, finance costs, depreciation costs, processing costs as well as the treatment of write-downs for biomass. Exhibit NOR-98.

are substantiated in the light of the various comments of the investigated parties on the investigating authority's determination of dumping that are set out in their responses to the Definitive Disclosures. Thus, the simple fact that the margins of dumping determined for the two companies in the Definitive Regulation are lower than those announced in the Definitive Disclosures does not support the EC's assertion that the investigating authority accepted the two companies' claims in respect of smolt costs.

7.554 There is therefore no factual basis to substantiate the EC's rejection of Norway's claim. Thus, on the basis of the facts that have been presented before us, we find that there is no evidence to conclude that the investigating authority accepted the requested smolt cost adjustments between Definitive Disclosure and adoption of the Definitive Regulation. In other words, there is no factual basis to support the EC's view that the investigating authority did not include the contested smolt costs in the calculation of [[XXX]] and [[XXX]] costs of production. In this light, and bearing in mind that the EC has accepted that the smolt costs at issue were not "associated" with production and sale of salmon during the period of investigation, we find that the investigating authority acted inconsistently with Articles 2.2 and 2.2.1.1 of the AD Agreement.

(ii) [[XXX]]

7.555 We next turn to address Norway's claims in respect of [[XXX]] requested smolt cost adjustments.

7.556 The EC contends that, consistent with its normal accounting practice, [[XXX]] initially reported its cost of production to the investigating authority on the basis of project accounting. According to the EC, such an approach, if properly implemented, would have accounted for both of the smolt cost adjustments at issue. However, the EC asserts that [[XXX]] reported figures could not be reconciled with its annual accounts, which indicated a higher level of costs than reported. As a consequence, the investigating authority was left with no alternative but to determine [[XXX]] cost of production on the basis of [[XXX]] annual accounts and trial balances covering the period of investigation.

7.557 While acknowledging that the cost of the NOK [[XXX]] million purchase of smolt should have been excluded from [[XXX]] cost of production for the period of investigation, had such costs been determined through project accounting, the EC argues that since project accounting was not used, this amount could not be deducted.[700] In this regard, the EC contends that the exclusion of these costs was not simply a matter of checking the invoice date of the smolt purchase and concluding that salmon grown from such smolt could not have been harvested during the period of investigation. It also required information about the extent to which smolt purchased before the period of investigation was harvested as salmon during the period of investigation. However, unlike [[XXX]] and [[XXX]], for whom the EC contends the investigating authority accepted similar smolt cost adjustments,[701] [[XXX]] did not apparently apply a tracking system that would have permitted the investigating authority to make the appropriate corrections.[702] In the absence of this information, the investigating authority was unable to verify the requested adjustment and therefore, in the EC's view, it was entitled to treat the costs reported in the annual accounts as "associated" with production and sale of salmon during the period of investigation.

7.558 Similarly, the EC argues that the effect of the NOK [[XXX]] million sale of smolt to unrelated parties on the costs of smolt for the period of investigation would have been properly

[700] EC, FWS, para. 708; EC, Opening Oral Statement at the Second Substantive Meeting of the Parties, para. 108.

[701] However, we recall that we have found that there is no evidence to support the factual assertion that the investigating authority accepted the smolt cost adjustments requested by [[XXX]] and [[XXX]].

[702] EC, Response to Panel Question 126.

accounted for had project accounting been used to determine [[XXX]] cost of production. However, because the requested adjustment could not be verified, the investigating authority was entitled to reject the adjustment.[703] Thus, as we understand it, the EC's defence to Norway's claim is centred on the contention that the requested adjustments could not be verified on the basis of the information contained in the annual accounts.

7.559 Norway notes that [[XXX]] presented its request for the two smolt cost adjustments in response to the investigating authority's Information Note on Cost of Production, which was the first time that [[XXX]] learned of the methodology the investigating authority intended to apply to determine its cost of production. Thus, Norway submits that [[XXX]] requested the adjustments at the earliest possible opportunity after the investigating authority had disclosed that it was including the smolt costs at issue in its calculation of [[XXX]] cost of production. Norway argues that there is no documented evidence that the investigating authority attempted to verify [[XXX]] claimed adjustments. Furthermore, according to Norway, if the investigating authority considered that it needed additional information, it could have asked [[XXX]] to provide it. However, it never made any such request. Thus, Norway argues that the EC's assertion that the investigating authority made no adjustment because it could not verify the information submitted by [[XXX]] is not credible.[704]

7.560 Before evaluating the merits of Norway's claim, we find it useful to first set out some of the key facts surrounding the investigating authority's rejection of the requested adjustments.

Facts

7.561 The Information Note on Cost of Production relating to [[XXX]] identified a number of deficiencies in [[XXX]] questionnaire reply, relating to "*inter alia*" SG&A costs, income statements, filleting costs and information about a related company. Overall, the investigating authority found that [[XXX]] reported cost of production "appeared only to reflect part of the cost incurred on the production of the product concerned".[705] It therefore rejected the reported costs and calculated [[XXX]] cost of production on the basis of "[[XXX]] Accounts for the IP", that is, using "[a]ll costs in [[XXX]] Accounts for the IP used as starting point".[706] The investigating authority then made five separate adjustments, one of which was a "cost deduction of 4 per cent [[XXX]] for production which did not relate to Salmon".[707]

7.562 In its response to the Information Note, [[XXX]] contested the NOK [[XXX] deduction made for non-salmon production activities.[708] [[XXX]] argued that the appropriate adjustment for non-salmon activities should have amounted to NOK [[XXX]], covering four separate items. Two of these were the smolt cost adjustments at issue in this dispute.[709] [[XXX]] submitted a statement from its auditor confirming their amounts as NOK [[XXX]] for the purchased smolt adjustment, and NOK [[XXX]] for the smolt sale adjustment.[710] The adjustments were explained by [[XXX]] in the following language:

> "c. The late smolt entry of 2004 in October is accounted for in September, and must therefore be adjusted (deducted). This will also correspond to the late smolt

[703] EC, FWS, para. 709; EC, Opening Oral Statement at the Second Substantive Meeting of the Parties, para. 108.
[704] Norway, Comments on EC Response to Panel Questions 93 and 126.
[705] Information Note on Cost of Production - [[XXX]], Exhibit NOR-55.
[706] Information Note on Cost of Production - [[XXX]], Exhibit NOR-55.
[707] Information Note on Cost of Production - [[XXX]], Exhibit NOR-55.
[708] [[XXX]], Response to the Information Note on Cost of Production, Exhibit NOR-56.
[709] [[XXX]], Response to the Information Note on Cost of Production, Exhibit NOR-56.
[710] [[XXX]], Response to the Information Note on Cost of Production, Exhibit NOR-56.

> entry of 2003 which is accounted for in October and therefore during the investigation period. The cost for this external smolt purchase is NOK, [[XXX]] mill.
>
> d. We have deducted NOK [[XXX]] mill from costs related to external sales in the smolt department. These costs are related to sale of a smolt group sold to a non-related customer, cost connected to cod fry facility, and cost connected to loss of fish in one of the hatchery that is now closed. Related income are eliminated on the income side."[711]

7.563 The investigating authority confirmed the findings made in the Information Note at the provisional stage, stating only that:

> "Your comments concerning the matters covered by adjustments 1 to 3 above, contained in your letter dated 16 March 2005, have been noted and will be re-examined at the definitive stage once all required information has been collected. If extra information is required from your company we will inform you."[712]

7.564 [[XXX]] responded to the investigating authority's provisional findings making the same arguments and providing the same auditor statements contained in the comments made to the Information Note. The explanations given for the adjustments was essentially the same:

> "c. The late smolt entry of 2004 in October is accounted for in September with NOK [[XXX]], and must therefore be adjusted (deducted). This will also correspond to the late smolt entry of 2003 which is accounted for in October 2003 and is therefore fully included in the reported data in the investigation period.
>
> d. We have deducted NOK [[XXX]] mill from costs related to external income in the smolt department. These costs are related to sale of a smolt group sold to a non related customer, cost connected to cod fry facility, and cost connected to loss of fish in one of the hatchery that is now closed. Corresponding income is eliminated in the accounts receivables."[713]

7.565 At the definitive stage, the investigating authority once again confirmed the findings made in the Information Note, stating that the [[XXX]] adjustment made to costs of production for costs not associated with the production of salmon would stand because the information used by [[XXX]] to challenge this adjustment "was not verified on spot".[714]

The adjustment for purchased smolt

7.566 The facts show that the investigating authority did not initially reject [[XXX]] adjustment of NOK [[XXX]] million for purchased smolt costs. At the provisional stage, the investigating authority noted [[XXX]] request and explained that it would re-examine the matter at the definitive stage of the investigation. Furthermore, it stated that if any additional information was required, [[XXX]] would be informed. No additional information was requested from [[XXX]]. At the definitive stage, the investigating authority rejected the requested adjustment because the information used by [[XXX]] to justify its claim had not been verified during the on-the-spot investigation conducted in January 2005.

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[711] [[XXX]], Response to the Information Note on Cost of Production, Exhibit NOR-56.
[712] [[XXX]], Provisional Disclosure Document, Exhibit NOR-58.
[713] [[XXX]], Response to Provisional Disclosure Document, Exhibit NOR-57.
[714] [[XXX]], Definitive Disclosure Document, Exhibit NOR-16.

7.567 The information verified during the on-the-spot investigation was essentially that contained in [[XXX]] questionnaire reply, parts of which have been submitted as evidence in this dispute. [[XXX]] costs of production were reported in a table attached to Section F of the questionnaire. This table was submitted by Norway as Exhibit NOR-59. On reviewing the data contained in this exhibit,[715] we find that an amount of NOK [[XXX]], representing "External purchase of [sic] smolt/fry" in "Salmon autumn 04", appears as an adjustment ("Adjustment [[XXX]]") to the reported costs of production. In addition, an amount of NOK [[XXX]] is booked for "External purchase of [sic] smolt/fry" relating to "Salmon autumn 03", and included in the reported costs for the period of investigation.

7.568 As we understand it, these figures match the adjustments described by [[XXX]] at point "c." of its comments on the investigating authority's disclosures. Although presented in the context of [[XXX]] own methodology for calculating costs of production, which was different from that applied by the investigating authority, it is clear to us that "Adjustment [[XXX]]" was intended to reduce [[XXX]] cost of production by the cost of purchased smolt incurred during the period of investigation which related to salmon harvested outside of the period of investigation. Thus, contrary to what Norway asserts, it was not the case that the investigating authority did not have an opportunity to verify the information underlying [[XXX]] requested adjustment during the on-the-spot investigation. Indeed, in reviewing [[XXX]] reported costs of production, the investigating authority would have been faced with *precisely the same* claim for an adjustment to properly account for the cost of purchased smolt not harvested in the period of investigation that it was later faced with in [[XXX]] comments on the disclosures.

7.569 We recall that the investigating authority rejected [[XXX]] reported costs of production because they "appeared only to reflect part of the cost incurred on the production of the product concerned".[716] The investigating authority found that they were "incomplete and understated".[717] Although there is no report indicating that the specific purchased smolt cost figure at issue was verified and rejected, we do not believe that this means that there is no evidence to show that the investigating authority was unable to verify the accuracy of that particular piece of data during the on-the-spot investigation. In our view, given the particular circumstances of this case, the investigating authority's overall view that [[XXX]] reported costs of production were deficient overall is enough to substantiate its conclusion that [[XXX]] purchased smolt cost adjustment could not be verified. In the light of the large volumes of data that an investigating authority must process during the course of an investigation, we do not believe that an investigating authority must explain, for each and every piece of cost data that is placed before it, why it may have rejected it, when it has reached a general conclusion about the quality of the reporting of costs overall, as it did in the present case.

7.570 Thus, we find that Norway has failed to establish that the investigating authority erred when it rejected [[XXX]] claimed adjustment for the cost of purchased smolt relating to salmon harvested outside of the period of investigation. Accordingly, we dismiss Norway's claim that the investigating authority acted inconsistently with Article 2.2 when it decided not to accept [[XXX]] NOK [[XXX]] million adjustment to its cost of production.

The adjustment for income from smolt sales

7.571 As with [[XXX]] purchased smolt cost adjustment, the investigating authority justified its rejection of [[XXX]] requested adjustment for income earned from sales of smolt to unrelated customers on the basis of the conclusion that the information used by [[XXX]] to justify its claim had not been verified during the on-the-spot investigation conducted in January 2005. However, unlike

[715] In particular, the Excel worksheet titled "COP-Section F".
[716] [[XXX]], Information Note on Cost of Production, Exhibit NOR-55.
[717] [[XXX]], Information Note on Cost of Production, Exhibit NOR-55.

the situation in respect of [[XXX]] claimed purchased smolt cost adjustment, we can find no evidence of an adjustment of this kind in the cost of production data first reported to the investigating authority. Neither has the EC pointed to where in, [[XXX]] questionnaire reply (or any other submission that was subject to the on-the-spot investigation), such an adjustment can be found or how the investigating authority attempted to verify it "on-the-spot". Thus, on the basis of the facts that are before us, we agree with Norway that the first time that the investigating authority was presented with [[XXX]] claim for a NOK [[XXX]] million adjustment to account for income earned from smolt sales was *after* it had issued its Information Note on Cost of Production. In other words, [[XXX]] requested adjustment for income earned from smolt sales was not before the investigating authority at the time of the on-the-spot investigation.

7.572 We recall that the EC has explained the investigating authority's actions in terms of its inability to match [[XXX]] requested adjustment with the information contained in its annual accounts. The EC has not argued that the investigating authority was justified in rejecting [[XXX]] requested adjustment because it was submitted *after* the on-the-spot investigation. In other words, the EC has not argued that the requested adjustment was rejected because too late to be verified on-the-spot. Rather, the focus of the EC's defence to Norway's claim is on the investigating authority's inability to verify the submitted data on the basis of annual accounts and trial balances. Thus, it follows from the EC's explanation of the investigating authority's conclusion in the Definitive Disclosure that the reason for rejecting [[XXX]] requested adjustment was that, at the time of the on-the-spot investigation, the information underlying the submitted data could not be verified. However, as we have noted above, [[XXX]] requested adjustment for income earned from smolt sales was not before the investigating authority at the time of the on-the-spot investigation. There is therefore no factual basis to support the investigating authority's conclusion that the requested adjustment "was not verified on spot",[718] in the sense that has been advanced by the EC. It follows that the investigating authority's rejection of [[XXX]] requested adjustment rested on a flawed assessment of the facts that were before it. Consequently, the investigating authority's conclusion that the unadjusted smolt costs were "associated" with production and sale of salmon during the period of investigation was also flawed. Thus, we find that the investigating authority acted inconsistently with Article 2.2 of the AD Agreement.

4. Alleged Inconsistency of the EC's Treatment of Selling, General and Administrative Expenses with Article 2.2.2 of the AD Agreement

(a) Arguments of the Parties

(i) Norway

7.573 Norway argues that Article 2.2.2 of the AD Agreement requires investigating authorities to calculate selling, general and administrative ("SG&A") expenses used in the construction of normal value on the basis of actual data pertaining to the production and sale of the like product in the ordinary course of trade. Norway claims that the investigating authority acted inconsistently with this obligation when it used adjusted SG&A amounts in the calculation of [[XXX]] constructed normal value instead of relying on [[XXX]] reported SG&A expenses, which represented the actual selling, general and administrative, expenses incurred by [[XXX]] during the period of investigation. Norway argues that the investigating authority failed to provide any explanation at all for its rejection of [[XXX]] reported G&A figures; and that the only stated reason for its rejection of the reported selling expenses was that they did not reflect what it considered should be the higher expense associated with making sales to unrelated domestic customers, compared with sales to related domestic customers. Norway argues that this explanation was inadequate because it failed to identify any specific selling

[718] [[XXX]], Definitive Disclosure Document, Exhibit NOR-16.

functions undertaken by [[XXX]] sales company that contributed to a difference in the amount of expenses incurred for sales transactions to related and unrelated customers.

7.574 In addition, Norway submits that the investigating authority treated [[XXX]] in a discriminatory fashion, without justification or explanation, because it accepted all SG&A expenses reported by companies such as [[XXX]], [[XXX]] and [[XXX]], while rejecting those reported by [[XXX]], even though, in its view, all of these companies reported such costs using the same allocation methodology and even, in the case of [[XXX]], sold to the same related domestic customer ([[XXX]]).

7.575 Finally, Norway claims that the investigating authority acted inconsistently with Article 2.2.2(iii) because the approach it applied to recalculate [[XXX]] SG&A expenses was not "reasonable". In this regard, Norway argues that the investigating authority's method of calculating [[XXX]] adjusted SG&A expenses resulted in the double counting of a substantial portion of the company's reported cost of production for salmon; failed to take into account SG&A costs already reported by [[XXX]]; and, did not address the perceived deficiency identified by the investigating authority as the reason for rejecting [[XXX]] reported SG&A expenses in the first place. In Norway's view, a method of accounting for SG&A expenses cannot be considered "reasonable" where it suffers from all these deficiencies and results in a substantial overstatement of a company's costs through double counting.

(ii) European Communities

7.576 The EC argues that the investigating authority was justified in rejecting the reported SG&A costs reported by [[XXX]], and that the alternative basis used to derive these costs was "reasonable", within the meaning of Article 2.2.2(iii) of the AD Agreement. According to the EC, the reported SG&A costs requested by [[XXX]] were understated because they related to domestic sales made in low quantities where economies of scale could not be achieved. As regards G&A expenses, the EC asserts that no documented evidence was presented to the investigating authority in either [[XXX]] submissions or during the on-site investigation to demonstrate that the G&A expenses allocated by the [[XXX]] to [[XXX]], which formed the basis of the figures reported by [[XXX]], were incorporated into its normal accounting system. In respect of selling expenses, the EC contends that the investigating authority was faced with a transfer pricing issue between related companies that it could not resolve by reference to a market benchmark. Thus, in order to resolve, what it argues, was the confusion surrounding [[XXX]] allocation of SG&A costs, the investigating authority used the "other operating expenses" item in the consolidated accounts of the [[XXX]] as a proxy for SG&A cost.[719] The EC argues that the investigating authority had no reason to believe that the consolidated accounts were not accurate. Therefore, there was no reason to suspect that there could be double-counting of costs charged by one group company to another.

(b) Evaluation by the Panel

7.577 We recall that the first sentence of Article 2.2.2 states in clear terms that the amounts for SG&A cost used in the calculation of constructed normal value "shall" be based on "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation".[720] Norway does not claim that the investigating authority acted inconsistently with this obligation because it failed to rely on data pertaining to sales in the ordinary course of trade. Rather, Norway's claim is, in the first instance, concerned with the justification (and alleged lack of reasons) provided by the investigating authority for its rejection of the reported SG&A costs.

[719] EC, FWS, para. 714.
[720] *See*, para. 7.298.

7.578 Norway asserts that the SG&A cost information submitted by [[XXX]] was derived from actual data taken directly from its audited accounts, maintained in accordance with Norwegian GAAP, reflecting allocation methods that companies in the [[XXX]] frequently used.[721] Thus, according to Norway, there was no basis to reject the reported information. On the other hand, the EC contends that the reported data understated actual SG&A expenses, and so the investigating authority was entitled to reject the reported costs and derive them through the use of an alternative methodology. Thus, as we understand it, the issue at the centre of the parties' dispute is essentially a factual one. It is therefore useful, before turning to assess the merits of the parties' arguments, to first set out some of the key facts surrounding the investigating authority's rejection of [[XXX]] reported SG&A costs.

Facts

7.579 In its reply to the investigating authority's questionnaire, [[XXX]] reported G&A and selling expenses separately, on a per kilogram basis, under the headings "Administrative cost" and "Sales and marketing cost".[722] The information was presented in table form, together with various other cost items reported for the purpose of determining [[XXX]] full cost of production.

7.580 The narrative section of [[XXX]] questionnaire reply explained that [[XXX]] was part of the [[XXX]] of vertically integrated companies active in the business of farming, slaughtering and packing salmon and trout. [[XXX]], the parent company, performed all administrative functions for the companies belonging to the [[XXX]]. The costs associated with these function were "allocated to the various profit centres".[723] According to Norway, this meant that the cost associated with the administrative functions performed by [[XXX]] were allocated according to a standard methodology to all of the companies in the [[XXX]].[724]

7.581 [[XXX]] questionnaire reply indicates that it made all of its sales of salmon through a related sales company, [[XXX]].[725] Almost all of the domestic sales made by [[XXX]] through [[XXX]] were to another related company [[XXX]].[726] The relationship between [[XXX]] and [[XXX]] was explained in the following terms:

> "One of our main customers is [[XXX]]. The mother company of [[XXX]], [[XXX]], holds 39 per cent of the shares of [[XXX]], the mother company of [[XXX]], and is therefore regarded as a company related to [[XXX]]. The salmon is sold on ordinary commercial terms to [[XXX]]."[727]

7.582 [[XXX]] received the same price obtained by [[XXX]] for its sales, which were for the most part made to [[XXX]]. [[XXX]] then invoiced [[XXX]] the cost of its selling services.[728]

7.583 In the Information Note on Cost of Production, the investigating authority rejected [[XXX]] reported SG&A costs and used instead a proxy for these costs derived from the 2003 Profit and Loss Account for the Group. The investigating authority explained its decision and the approach taken to calculate [[XXX]] SG&A expenses in the following terms:

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[721] Norway, FWS, paras. 1029, 1032, 1033 and 1045.
[722] [[XXX]], Questionnaire Reply, Excel file [[XXX]], Exhibit NOR-132 and Excel file [[XXX]], Exhibit NOR-138.
[723] [[XXX]], Questionnaire Reply, Exhibit NOR-139.
[724] Norway, FWS, para. 1030.
[725] [[XXX]], Questionnaire Reply, Exhibit NOR-139.
[726] [[XXX]], Questionnaire Reply, Exhibit NOR-141.
[727] [[XXX]], Questionnaire Reply, Exhibit NOR-139.
[728] [[XXX]], Questionnaire Reply, Exhibit NOR-141.

> "SGA costs were not reported in the format requested. In particular, no break-down was given on SGA relating to total turnover, product concerned sold on the domestic market and for export, to related and unrelated customers. Subsequently, SGA costs were re-assessed on the basis of the 2003 Profit and Loss Account of the Group Company (see table attached). In addition, a trader's mark-up was added to the SGA in order to cater for the activities of a trader involved in the export of the product concerned. The mark-up added (5 per cent) does not correspond to the costs actually incurred by [[XXX]] but constitutes an approximation (confidentiality reasons)."[729]

7.584 [[XXX]] contested these findings, arguing that the reported SG&A costs were established on an arm's length basis and presented in its audited accounts. It also contested the methodology applied to recalculate its SG&A costs, arguing *inter alia* that on the basis of data from its 2004 accounts, the investigating authority's methodology would result in the calculation of a negative SG&A expense.[730]

7.585 The investigating authority maintained its rejection of [[XXX]] reported SG&A costs in its provisional findings, but modified the methodology used to calculate the amounts used in the construction of [[XXX]] normal value. The investigating authority explained its decision as follows:

> "The principles of assessing SGA have not changed compared to the methodology set out in the information note. However, in order to allocate SGA to domestic sales to unrelated customers a re-assessment was made on the basis of the turnover ratio of unrelated sales against total sales. Details are contained in spreadsheet "SGA factor". In effect, the total amount of SGA incurred was allocated to unrelated sales only. For the purpose of determining provisional measures, this is considered a reasonable estimate of the SGA incurred on domestic sales to unrelated customers."[731]

7.586 Once again, [[XXX]] contested the investigating authority's findings, arguing that it was ignoring reported SG&A costs based on its audited accounts and applying an unreasonable methodology to recalculate them, which could result *inter alia* in triple counting certain costs.[732]

7.587 In the Definitive Disclosure provided to [[XXX]] the investigating authority continued to reject the reported SG&A costs, but changed, for a third time, the methodology applied to determine the relevant costs to use in the construction of [[XXX]] normal value. Thus, the investigating authority explained:

> "Selling, general and administrative costs have been re-assessed on the basis of "other operating expenses" borne by the group company. By taking recourse to this approach, it is ensured that the full SGA incurred are actually allocated on the product concerned. It is also noted that normal value is constructed on the basis of SGA applicable on domestic sales to unrelated customers. This SGA should be higher than the SGA incurred for sales to related customers ([[XXX]])."[733]

7.588 [[XXX]] maintained its objection to both the rejection of its reported SG&A costs as well as the revised methodology used to determine those costs. In particular, [[XXX]] argued that the use of the Group's consolidated "other operating expenses" resulted in using an SG&A amount that was 18 per cent of its cost of production in the construction of normal value. In addition, [[XXX]] submitted

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[729] [[XXX]], Information Note on Cost of Production, 8 March 2005, Exhibit NOR-142.
[730] [[XXX]], Comments on Information Note on Cost of Production, 16 March 2005, Exhibit NOR-129.
[731] [[XXX]], Provisional Disclosure Document, 22 April 2005, Exhibit NOR-143.
[732] [[XXX]], Comments on Provisional Disclosure Document, 27 May 2005, Exhibit NOR-134.
[733] [[XXX]], Definitive Disclosure Document, 28 October 2005, Exhibit NOR-45.

that several irrelevant cost elements (smolt cost, feed cost, overhead, other farming cost and processing cost) were included in the amount of consolidated "other operating expenses". As such, the use of "other operating expenses" as the benchmark for SG&A costs was bound to result in an unreasonably high outcome. [[XXX]] submitted a break-down of these various cost elements and an auditor's statement attesting to the correctness of the reported figures with Norwegian law and "good accounting practice".[734]

Norway's claim under Article 2.2.2 of the AD Agreement

- General and administrative expenses

7.589 We recall that in responding to Norway's claims in respect of the investigating authority's rejection of [[XXX]] reported G&A costs, the EC asserted that there was no documented evidence that the allocation of costs reported by [[XXX]] was incorporated in its normal accounting system nor that [[XXX]] was able to demonstrate that this was the case during the on-the-spot investigation.[735] Norway argues that this explanation of the investigating authority's rejection of [[XXX]] reported G&A costs amounts to "*ex-post* rationalization".[736] We agree.

7.590 Having reviewed the investigating authority's disclosures to [[XXX]], we can find no evidence to substantiate the EC's assertion that the reason why the investigating authority rejected [[XXX]] reported G&A costs was that [[XXX]] had failed to show that the cost allocations used to derive the reported figures were incorporated into its normal accounting system. The reason given for rejecting [[XXX]] reported SG&A costs in the Information Note on Cost of Production was simply that they "were not reported in the format requested".[737] The explanation provided in the provisional disclosure gives no further insight into the *reason* for rejecting [[XXX]] reported G&A costs. Likewise, the explanation set out in the definitive disclosure does not substantiate the EC's assertion that [[XXX]] failed to document the consistency of the allocation methodology used to report G&A costs with its annual accounts. Moreover, in response to a specific question from the Panel asking it to reconcile the asserted basis for the investigating authority's rejection of [[XXX]] reported G&A costs with the statements made by the investigating authority in the disclosures, the EC confirmed its view that [[XXX]] had failed to properly substantiate the allocation methodology applied, and in addition submitted that:

> "[[XXX]] was unable to demonstrate that the reported SGA expenses pertained to its domestic sales. The SGA expenses were understated since the domestic sales concerned low quantities where no economies of scale could play as compared to the situation on the important volume of export sales."[738]

7.591 However, in making the above statements and confirming its initial factual assertions, the EC did not refer to any piece of evidence or information that was before the investigating authority at the time of the investigation.

7.592 Thus, we find that there is no factual basis to support the EC's contention that the investigating authority rejected [[XXX]] reported G&A costs because it considered that no documented evidence was presented in either [[XXX]] submissions, or during the on-site investigation, to demonstrate that the G&A expenses allocated by the [[XXX]] to [[XXX]] were incorporated into its normal accounting system. There is therefore no basis to conclude that the

[734] [[XXX]], Comments on Definitive Disclosure Document, 8 November 2005, Exhibit NOR-136.
[735] EC, FWS, para. 711.
[736] Norway, SWS, para. 292.
[737] [[XXX]], Information Note on Cost of Production, 8 March 2005, Exhibit NOR-142.
[738] EC, Response to Panel Question 120.

investigating authority's rejection of [[XXX]] reported G&A costs rested on an unbiased and objective assessment of the facts before it. Accordingly, we find that in rejecting [[XXX]] reported G&A costs the investigating authority acted inconsistently with Article 2.2.2 of the AD Agreement.

- Selling expenses

7.593 Although the investigating authority's initial reason for rejecting [[XXX]] reported selling costs was that they had not been "reported in the format requested",[739] the Definitive Disclosure reveals that the investigating authority rejected [[XXX]] reported selling costs because it considered them to be an unreliable measure of selling costs to unrelated customers. This can be understood from the following statement:

> "It is also noted that normal value is constructed on the basis of SGA applicable on domestic sales to unrelated customers. This SGA should be higher than the SGA incurred for sales to related customers ([[XXX]])."[740]

7.594 Thus, the EC argues that the investigating authority was justified in rejecting [[XXX]] reported selling costs because it was confronted with a problem of "transfer pricing".[741]

7.595 The facts show that [[XXX]] made all of its domestic market sales through a related "sister" company [[XXX]], which in turn sold almost all of [[XXX]] salmon to a related customer [[XXX]]. [[XXX]] parent company, [[XXX]], held a 39 per cent interest in [[XXX]], which is the parent company of [[XXX]]. The price received by [[XXX]] for sales through [[XXX]] was the same as the price invoiced from [[XXX]] to [[XXX]]. [[XXX]] would invoice [[XXX]] the cost of administering its salmon sales to [[XXX]] and it was this cost that was reported by [[XXX]] as its selling expense.

7.596 Thus, the entire chain of sale from [[XXX]] to the final customer [[XXX]] involved the transfer of salmon, and the invoicing of costs and prices, from one related company to another. In particular, [[XXX]] paid its "sister" company [[XXX]] to sell its salmon, almost all of which was purchased by [[XXX]]. In return, [[XXX]] would receive the price obtained by [[XXX]] from [[XXX]]. [[XXX]] parent company owned 39 per cent of [[XXX]], which owned 100 per cent of [[XXX]]. In the light of the corporate relationships lying at the centre of [[XXX]] sales transactions, we cannot fault the investigating authority for suspecting that the invoiced costs and prices may not have been reliable. In this regard, we note that Article 2.3 of the AD Agreement explicitly envisages the possibility of finding export price information unreliable when it is derived from related-party transactions. Similarly, pursuant to Article 2.1, related-party transactions may be a basis for finding domestic sales outside of the ordinary course of trade.[742] We see no reason why the related-party nature of an investigated party's selling activities might not also affect the reliability of its reported selling costs.

7.597 Norway also argues that in rejecting [[XXX]] reported SG&A costs, the investigating authority treated [[XXX]] in a discriminatory fashion, without justification or explanation, compared with [[XXX]], [[XXX]] and [[XXX]], even though all of these companies apparently reported SG&A costs using the same allocation methodology as [[XXX]]. Furthermore, in the case of [[XXX]], Norway contends that not only was the allocation methodology the same, but also its sales of salmon were made to the same related customer [[XXX]].[743]

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[739] [[XXX]], Information Note on Cost of Production, 8 March 2005, Exhibit NOR-142.
[740] [[XXX]], Definitive Disclosure Document, 28 October 2005, Exhibit NOR-45.
[741] EC, FWS, para. 712; EC, SWS, para. 110.
[742] *See*, e.g., Appellate Body Report, *US – Hot-Rolled Steel*, para. 141.
[743] Norway, FWS, para. 1047.

7.598 We note that as far as selling costs are concerned, the investigating authority's rejection of [[XXX]] reported costs was not based on the methodology used to derive those costs, but rather the related-party nature of the sales transactions from which they were derived. Thus, the fact that the investigating authority accepted the reported SG&A costs of [[XXX]], [[XXX]] and [[XXX]], which were derived through application of the same methodology as [[XXX]], does not demonstrate that [[XXX]] was treated in a discriminatory fashion. Moreover, while it is true that [[XXX]] sold its salmon production to the related company [[XXX]], the facts that have been presented to us do not demonstrate that these sales were made through [[XXX]]. Indeed, the information that we have reviewed indicates that [[XXX]] sold *directly* to [[XXX]], without using the services of any intermediate seller.[744] To this extent, the facts surrounding [[XXX]] sales transactions, from which were derived its reported SG&A costs, were different from those underlying [[XXX]] reported selling costs. In this light, the investigating authority's rejection of [[XXX]] reported selling costs did not amount to discriminatory treatment compared with how the investigating authority treated [[XXX]].

7.599 Thus, on the basis of the facts that are before us, we consider that the investigating authority's conclusions about the reliability of [[XXX]] reported selling expenses did not result from an evaluation of facts that was biased or not objective. Therefore, we find that Norway has failed to establish that the investigating authority acted inconsistently with Article 2.2.2, first sentence, when it rejected [[XXX]] reported selling expenses.

Norway's claim under Article 2.2.2(iii) of the AD Agreement

7.600 Norway claims that, even if the investigating authority was entitled to reject [[XXX]] reported SG&A costs, the methodology applied to recalculate [[XXX]] SG&A costs was not "reasonable", and therefore inconsistent with Article 2.2.2(iii) of the AD Agreement. This provision reads:

> "For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:
>
> ...
>
> (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin."

7.601 We recall that after rejecting [[XXX]] reported SG&A costs, the investigated authority relied upon an allocation of costs from the "other operating expenses" reported in the [[XXX]] consolidated accounts. Norway notes that this methodology resulted in the addition of NOK [[XXX]] to [[XXX]] per kilogram cost of production, increasing the company's costs by almost 20 per cent.[745] In particular, Norway argues that according to the investigating authority' calculations, [[XXX]] "costs to sell *industrial grade* salmon to its customers in Norway were (1) *significantly greater* than the company's smolt costs, … (2) nearly 40 per cent of its salmon feed costs; and (3) *over three times*

[744] [[XXX]], Comments on Definitive Disclosure, 8 November 2005, Exhibit NOR-147; [[XXX]] Letter to the Commission on double counting of harvest costs, 20 March 2006, Exhibit NOR-148.

[745] Norway, SWS, para. 301.

[[XXX]] labor costs for growing salmon."[746] Norway believes there were essentially three problems with the methodology applied by the investigating authority:

> "First, it resulted in the double counting of the SG&A expenses already reported as part of [[XXX]] cost of production. Second, it involved the unfair inclusion of SG&A costs incurred within the [[XXX]] that were *not associated* with salmon produced by [[XXX]] (e.g., G&A costs incurred for smolt sold to unaffiliated customers). Third, and most importantly, by relying on the broad category of "*other operating expenses*" as a "proxy" for SG&A costs, the EC double counted a significant number of other operating costs items that had already been accounted for in [[XXX]] reported cost of production for salmon (e.g. costs for smolt, feed, harvesting, and other farming and processing operations)."[747]

7.602 The EC explains that the consolidated accounts do not tell which part of the SG&A cost originate from [[XXX]] or from the other group companies, because they describe the costs incurred for the group as a whole. Thus, assuming that the consolidated accounts had been properly prepared, and the EC argues that the investigating authority had no reason to doubt that this was the case, there would have been no double-counting of costs. Furthermore, the EC argues that there was no reason why the investigating authority should have reduced the costs allocated from the consolidated accounts by the SG&A costs originally reported by [[XXX]], because it contends that [[XXX]] reported SG&A costs were replaced by the consolidated SG&A costs.[748]

7.603 The investigating authority's calculation of [[XXX]] full cost of production, including SG&A cost was provided to [[XXX]] in the Definitive Disclosure. Annex 3 of this disclosure is an Excel file containing several worksheets. The investigating authority's final cost of production calculations are found in the worksheet with the title "COP". This worksheet shows that the per kilogram cost of production for head-on gutted salmon was determined by adding together "farming cost" of NOK [[XXX]], "wellboat cost" of NOK [[XXX]], "harvesting cost" of NOK [[XXX]] and "processing cost" of NOK [[XXX]]. To this was added SG&A cost of NOK [[XXX]]. The "full cost" of NOK [[XXX]] was then multiplied by a weight conversion ratio of 0.90, resulting in a final per kilogram cost of production of NOK [[XXX]].[749]

7.604 The same worksheet confirms that the amount of NOK [[XXX]] SG&A cost was derived from the consolidated accounts of the [[XXX]]. This is evidenced by the explicit cross-reference to the worksheet titled "Group results", which shows how the amount of NOK [[XXX]] was determined. Likewise, the "COP" worksheet reveals that the "farming cost" amount of NOK [[XXX]] was derived from information contained in the worksheet titled [[XXX]]. The [[XXX]] worksheet indicates that the "farming cost" amount of NOK [[XXX]] was made up of 12 different cost items. Among these was the amount of NOK [[XXX]] that [[XXX]] had reported as "Administrative cost".[750] The amount of NOK [[XXX]] that [[XXX]] had reported as "Sales and marketing cost", was excluded from the calculation of "farming cost", and cost of production.

7.605 Thus, our review of the investigating authority's calculation of [[XXX]] cost of production reveals that it failed to remove from its calculation of [[XXX]] cost of production part of the reported SG&A costs that it had refused to accept. In particular, although apparently rejecting [[XXX]] submission of G&A costs, these costs were nevertheless included in [[XXX]] cost of production. To the extent that the SG&A costs derived from [[XXX]] data were intended to act as a "proxy" for

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[746] Norway, Comments on EC Response to Panel Question 124. Emphasis original.
[747] Norway, SWS, para. 300.
[748] EC, FWS, para. 714; EC, Response to Panel Question 124.
[749] [[XXX]], Definitive Disclosure Document, Exhibit NOR-45.
[750] [[XXX]], Definitive Disclosure Document, Exhibit NOR-45.

selling, as well as G&A costs, the investigating authority's calculation of [[XXX]] SG&A costs rendered those expenses greater than what they should have been, in effect counting two amounts for G&A costs. In our view, a methodology for calculating SG&A that inflates SG&A costs above what they should have been cannot be "reasonable" within the meaning of Article 2.2.2(iii). Accordingly, we find that the investigating authority acted inconsistently with Article 2.2.2(iii) of the AD Agreement when it determined [[XXX]] SG&A costs on the basis of data pertaining to the [[XXX]] consolidated accounts without excluding the G&A costs originally reported by [[XXX]] from the calculation of its cost of production.

5. Alleged Inconsistency of the EC's Treatment of [[XXX's]] Purchased Salmon Costs with Articles 2.2 and 2.2.1.1 of the AD Agreement

(a) Arguments of the Parties

(i) Norway

7.606 Norway claims that the investigating authority's adjustment to [[XXX]] cost of production for purchased salmon costs was inconsistent with Articles 2.2 and 2.2.1.1 of the AD Agreement because it overstated [[XXX]] costs of production by NOK [[XXX]] million. In particular, Norway submits that the investigating authority improperly determined the cost of production of [[XXX]] by adding the company's costs of purchasing salmon from domestic producers (NOK [[XXX]] million) to its cost of production, without taking account of the revenue received (NOK [[XXX]] million) from the same domestic producers for slaughtering services performed by [[XXX]] in respect of the same purchased salmon. As a consequence, Norway argues that the investigating authority overstated [[XXX]] actual cost of purchased salmon (which was added to the cost of production) by NOK [[XXX]] million.

7.607 Norway submits that the investigating authority was fully aware of the NOK [[XXX]] million figure because it was reported in [[XXX]] questionnaire response as a deduction from the company's salmon processing costs. Moreover, Norway notes that the investigating authority even referred to this amount in its Definitive Disclosure for the purpose of establishing [[XXX]] slaughtering costs. Thus, according to Norway, the EC has no justification for asserting that the investigating authority was unfamiliar with the figure and that it could not be verified during the on-the-spot investigation conducted on [[XXX]] premises.

(ii) European Communities

7.608 Initially, the EC contested Norway's claim because, in its view, [[XXX]] never submitted the figure of NOK [[XXX]] million to the investigating authority. Subsequently, the EC acknowledged that the figure had been reported as a deduction from [[XXX]] costs of production, but argued that [[XXX]] was unable to justify the deduction during verification of its accounting records. Finally, after reconsidering its position and the data submitted by [[XXX]] during the investigation, the EC stated, in response to a Question from the Panel, that [[XXX]] purchases of live salmon and slaughtering activities for third parties could be isolated from its own-farming activities. Thus, the EC concluded that the "gross purchase costs of NOK [[XXX]], and harvesting/slaughtering revenue of NOK [XXX]] should be taken out of the results of [[XXX]], and the quantity of salmon should be limited to the farmed fish harvested during the investigation period".[751]

[751] EC, Answer to Panel Question 128.

(b) Evaluation by the Panel

7.609 As described in the above arguments section, the EC's response to Norway's claim in respect of the investigating authority's treatment of [[XXX]] purchase salmon costs has evolved during the course of this proceeding. We understand the EC's final position to be that expressed in its response to Panel Question 128, where it explicitly acknowledged that the investigating authority should not have included [[XXX]] slaughtering revenue of NOK [[XXX]] in its cost of production. In making this statement, we understand that the EC has accepted that the cost of production determined for [[XXX]] in the investigation was overstated by at least this same amount. In this light, and recalling our findings in respect of the obligations on investigating authorities when constructing normal value under Articles 2.2 and 2.2.1.1,[752] we uphold Norway's claim, and therefore find that the investigating authority acted inconsistently with these provisions when it added the amount of NOK [[XXX]], representing revenue from the slaughtering services provided by [[XXX]] to third parties, to its cost of production.

G. ALLEGED INCONSISTENCY OF THE EC'S INJURY DETERMINATION WITH ARTICLES 3.1, 3.2, 3.4, AND 3.5 OF THE AD AGREEMENT

1. Arguments of the Parties

(a) Norway

7.610 Norway raises three principal challenges to the EC's injury determination. First, Norway argues that the EC violated Articles 3.1 and 3.2, and consequently Article 3.5, because it failed to correctly determine the volume of **dumped** imports to be considered in its injury analysis. Second, Norway argues that the EC violated Articles 3.1.and 3.2, and consequently, Article 3.5, because it failed to adequately examine the existence of price undercutting. Finally, Norway argues that the EC violated Articles 3.1 and 3.4 because it failed to objectively examine price trends affecting EC producers.

7.611 With respect to the allegedly incorrect volume of imports, Norway asserts that Article 3.1 requires the investigating authority to examine objectively "the volume of the dumped imports", and that Article 3.2 requires an examination of whether there has been a "significant increase in dumped imports", while Article 3.5 requires that the authority must demonstrate that "the *dumped* imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury". Thus, Norway argues that under Article 3.5, it is the imports *found to be dumped* under Article 3.2 that must cause injury.

7.612 Norway asserts that, in the circumstance of this case, the dumping determinations made with respect to sampled producers could not be applied to non-sampled exporters, referring in this regard to the Appellate Body's decision in *EC – Bed Linen (21.5 – India)*, which held that while it is possible to rely on findings concerning dumping by sampled producers to draw conclusions concerning dumping by non-sampled producers, this is not always the case.[753] In Norway's view, the circumstances of this case are such that it is not possible to extrapolate from sampled producers to non-sampled companies, because of the different operations and cost structures of the companies sampled (production and exporting) and the non-sampled companies (exporting only). Since, Norway maintains, the dumping determinations regarding sampled exporting producers do not provide positive evidence that imports from non-sampled exporters are also dumped, the EC erred in treating all imports from Norway as

[752] *See*, paras. 7.483-7.487, 7.491 and 7.528.

[753] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India ("EC – Bed Linen (Article 21.5 – India)")*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965, para. 138.

dumped. Finally, Norway asserts that the EC was required to treat as non-dumped, and therefore exclude from its injury analysis, imports from Nordlaks, with respect to which it found a *de minimis* margin of dumping.

7.613 With respect to price undercutting, Norway observes that Article 3.1 requires that the investigating authority must examine "the effect of the dumped imports on prices" of the like domestic product, while Article 3.2 provides that the authority must consider whether there was "significant price undercutting" by the dumped imports. In Norway's view, the mere fact that imports have lower prices than like domestic products does not necessarily mean that the effect of the dumped imports is significant price undercutting, as the price difference could be explained by some other factor, such as a price premium enjoyed by domestic products. In this case, Norway notes that the EC found that the dumped imports undercut the price of the domestic product by 12 per cent. Norway argues that the EC failed to address, in the Definitive Regulation, the fact, which it had previously acknowledged in the disclosure of essential facts, that the domestic product enjoyed a price premium of 12 per cent. Thus, Norway argues, the price difference between the imported and domestic products simply reflects the usual price premium enjoyed by domestic products. Taking account of this price premium, Norway argues that there was no price undercutting.

7.614 Third, Norway argues that the EC erred in considering the price trends for the domestic industry. Norway notes that the EC examined the prices of the sampled domestic producers in Euros, and concluded that prices had dropped by 9 per cent. However, Norway maintains that this price "decrease" is a mathematical construct and stems entirely from an appreciation in the value of the Euro in comparison to the pound sterling over the period considered. Norway asserts that the EC was required to evaluate the evidence concerning price trends from the perspective of the sampled companies being examined, which incurred most of their costs in pounds sterling, and made 70 per cent of their sales in the UK, in pounds. Norway argues that, when prices trends are examined in pounds sterling, instead of a decline in prices, prices remained constant and did not fall.

(b) European Communities

7.615 The EC asserts that it acted appropriately in treating all imports from Norway as dumped in its injury analysis. The EC maintains that it was appropriate in the circumstances of this case to extrapolate from the findings of dumping for sampled companies (producing exporters) to non-sampled companies (including non-producing exporters). In this regard, the EC argues that non-producing, or independent, exporters essentially serve the same function as the exporting departments of exporting producers, and that therefore there is no reason to conclude that their experiences would be any different, and it was therefore appropriate to treat their exports as dumped on the basis of the evidence of dumping by sampled producers. The EC argues that the facts and circumstances at issue in the *EC-Bed Linen* dispute were very different from those in this case, and that these differences warrants a different outcome in this case. The EC points out that in *EC – Bed Linen (Article 21.5 - India)*, producers accounting for 53 per cent of the imports in the sample were found **not** to be dumping, and the only evidence of dumping was the evidence obtained from the sampled producers. In this case, the EC maintains that all of the sampled companies were found to be dumping (including one company having a *de minimis* dumping margin), and the examined producers accounted for 30 per cent of all imports. For the EC, the extrapolation from the sample to all imports was appropriate in this case, as there were no imports from sampled producers that were not dumped. Moreover, the EC maintains that among the imports from the sampled exporting producers, the EC also examined and included imports from those companies that exported to the Community via traders, and these imports also were found to be dumped.

7.616 The EC also maintains that it had other sources of information (besides the findings of dumping for the sampled producers) indicating that imports from the non-sampled companies were dumped. The EC notes that Eurostat data was used in the assessment of the imports from non co-

operating companies, which were not in the sample, and asserts that the price levels of the non-sampled companies were very similar to those of the sampled companies.[754] The EC asserts that it concluded that non-cooperating companies were not dumping less than the sampled companies, because there was no reason to distinguish, in the interpretation of the Eurostat data, between the sampled and non-sampled companies. Non-cooperating companies accounted for approximately 20 per cent of all the imports. For the EC, this implies that the investigating authority had positive evidence that approximately 50 per cent of all imports were dumped.

7.617 Finally, the EC maintains that the fact that Nordlaks had a *de minimis* dumping margin does not mean that it was not dumping, and therefore does not require that its imports be excluded from the injury analysis. The EC asserts that the concept of a *de minimis* dumping margin is a legal rule relevant in some situations under the AD Agreement, but not in this circumstance. The EC agrees that, in theory, if 95 per cent of the exports of sampled companies had zero or *de minimis* margins, that sample could not be the basis for an extrapolation that all imports from the country in question are dumped. However, it argues, Nordlaks' exports accounted for a small percentage of the volume of exports of the sampled companies, and this cannot be considered significant when all other companies included in the sample are dumping.

7.618 The EC maintains that it properly examined price undercutting. The EC asserts that Norway appears to be arguing that a failure to discuss the price premium in the Definitive Regulation is the problem. However, the EC maintains that it actually considered and examined the effect of the price premium and, having found that it was not a factor which could affect its price undercutting analysis, did not mention it in the Definitive Regulation. Thus, the EC asserts that Norway's argument is misconceived. The EC notes that the price premium was addressed in the disclosure, and that the premium was taken into account in calculating the non-injurious MIPs - to the benefit of Norwegian exporters, as it resulted in lower MIPs. Moreover, the EC maintains that the price premium does not play a role in a price undercutting analysis. For the EC, price undercutting is a "snapshot" of the market situation and reflects nothing but the real price differential. The EC also notes that, under Article 3.2 of the AD Agreement, price undercutting is not the only relevant factor in considering the effect of dumped imports on prices, and that in this case, the EC also established price depression and price suppression. Finally, the EC observes that the conclusion that 12 per cent price undercutting equals the usual price premium of 12 per cent is not mathematically correct.[755] The EC maintains, even under the Norwegian approach, there would still be 1.44 per cent price undercutting.

7.619 The EC observes that Norway's claim concerning the evaluation of price trends is based, factually and legally, on the proposition that pounds sterling was the operating currency of the companies examined in the sample. However, the EC asserts, Norway is incorrect on both the facts and the law. Moreover, the EC maintains that even if Norway were correct, this would not demonstrate a violation of Articles 3.1 and 3.4 in the EC's assessment of the domestic industry, as there is no legal obligation to examine prices in "operating currency". The EC maintains that the results of its analysis would have been the same regardless of which currency was used, so long as that use was consistent.[756] Moreover, the EC observes that a significant part of the transactions of the domestic industry took place in Euro, and those sales showed price declines.[757] Finally, the EC observes that even if there were no price decline, this would not mean that the assessment of the EC investigating authority violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement. Article 3.4 of

[754] Relying on Exhibit EC-10.

[755] The EC calculates that, assuming the price of EC product is 100 and the price of the Norwegian product 88 (i.e., 12 per cent price undercutting), the price premium should be calculated as 112 per cent of the price of the Norwegian product (i.e.,. 112 per cent of 88, or 98.56 per cent)

[756] See table, EC, FWS, para. 381.

[757] Exhibit EC-13.

the AD Agreement specifically provides that none of the factors listed in Article 3.4 shall be given decisive guidance in the examination of the dumped imports on the domestic industry.

2. Evaluation by the Panel

7.620 In our evaluation of Norway's claims regarding the domestic industry, we noted that whether the EC defined the domestic industry in a proper manner may well be decisive in the consideration of other claims in dispute, *i.e.*, subsidiary claims regarding initiation, as well as claims regarding injury and causation. We concluded by finding that the EC's approach to defining domestic industry in this case resulted in an investigation concerning a domestic industry that did not comport with the definition set forth in Article 4.1. Thus, it is clear to us that the EC analyzed the wrong industry in considering the issue of injury. In addition, the EC's examination of the volume, price effects, and impact of dumped imports is based on determinations regarding dumping which we have determined are inconsistent, in various ways, with the AD Agreement. Thus, it seems clear to us that the investigating authority's analysis of injury was not based on an objective examination of positive evidence concerning proper determinations of dumping and a proper definition of the domestic industry, and that the injury determination is therefore not consistent with the requirements of Article 3.1 of the AD Agreement. Nonetheless, the claims raised by Norway in this dispute relate to discrete elements of the investigating authority's analysis and determination that are capable of being assessed independently, and we will therefore consider them.[758]

(a) Volume of dumped imports

7.621 Norway raises two claims concerning the volume of dumped imports. The first of these concerns the EC's treatment of imports from Nordlaks, for which a *de minimis* margin of dumping was calculated, as dumped imports in making its injury determination. We begin by considering the meaning of the term "dumped imports" in the context of injury determinations under Article 3.

7.622 Article 3.1 provides:

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

Thus, Article 3.1, requires consideration of the volume, price, and consequent impact of **dumped** imports on the domestic industry. Articles 3.2, 3.4 and 3.5 set out more specific guidelines for the consideration of the volume, price effects, impact on domestic producers, and causation, and similarly require consideration of **dumped** imports.

7.623 Norway's claim that imports attributable to Nordlaks were wrongly treated as dumped in the EC's injury determination thus raises the question of the interpretation of the term "dumped imports" in Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement. Previous panel and Appellate Body decisions have made clear that dumping is a determination made with reference to a product from a particular

[758] We note that, in addition to making findings necessary to resolve the matter before it, a panel is required to "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." Article 11, DSU. The Appellate Body has stated that "[s]uch "other findings" could, for instance, relate to implementation, to the extent that such findings "will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements". Appellate Body Report, *European Communities – Export Subsidies on Sugar* ("*EC – Export Subsidies on Sugar*"), WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, para. 331.

producer/exporter.[759] Thus, it seems clear, and previous panels have concluded, that an investigating authority is entitled to consider all imports attributable to a producer found to be dumping as "dumped imports" in its analysis of injury.[760]

7.624 There is no dispute between the parties as to the relevant facts. The EC calculated a *de minimis* margin of dumping for Nordlaks,[761] and found that the amount of the definitive anti-dumping duty for Nordlaks shall be 0.0 per cent.[762] In its analysis of volume, price effects, impact on domestic producers, and causation, the EC considered all imports from Norway to be dumped, including imports attributable to Nordlaks. Thus, Norway's claim in this case raises the question, not previously resolved by any panel or the Appellate Body, whether imports for which a finding of *de minimis* dumping margins is made may be treated as "dumped imports" for purposes of injury analysis.[763]

7.625 We consider that imports attributable to a producer or exporter for which a *de minimis* margin of dumping is calculated may not be treated as "dumped" for purposes of the injury analysis in that investigation. Article 5.8 of the AD Agreement provides that there shall be "immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*". Thus, it is clear that no anti-dumping duties can be imposed on such imports. In our view, a finding of *de minimis* dumping margins is a finding that there is no legally cognizable dumping by the producer or exporter in question. If there is no legally cognizable dumping by a particular producer or exporter, as a result of a finding of *de minimis* margins, then it seems inescapable to us that imports attributable to such producer or exporter may not be treated as "dumped" imports for any aspect of that investigation. In our view, it would be illogical to treat such imports as "dumped" imports for purposes of the injury determination, when they cannot be considered as "dumped" for purposes of imposition of anti-dumping duties as a result of the investigation.

7.626 As noted above, this specific issue has not been resolved by any previous panel or the Appellate Body, but a number of panels have made statements suggesting that the answer to this question is as we have concluded. Thus, the Panel in *EC-Bed Linen*, observed, with respect to a producer for which *de minimis* margins were calculated that "imports attributable to such a producer/exporter may not be considered as "dumped" for purposes of injury analysis."[764] The subsequent *EC – Bed Linen (Article 21.5 – India)* Panel similarly commented that "the question of which imports are to be considered dumped is readily answered – 'dumped imports' are all imports attributable to producers or exporters for which a margin of dumping greater than *de minimis* is calculated."[765] The Panel in *Argentina – Poultry* agreed with these statements, finding that "the term "dumped imports" refers to all imports attributable to producers or exporters for which a margin of

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[759] Panel Report, *EC – Bed Linen*, para. 6.114, Appellate Body Report, *EC – Bed Linen*, para. 51.

[760] Panel Report, *EC – Bed Linen*, para. 6.136.

[761] Definitive Regulation, Recitals 32-33.

[762] Definitive Regulation, Article 1, para. 3.

[763] We note the EC's contention that whether Nordlaks' imports were excluded from the volume of dumped imports would not have made any significant difference on the facts of this case. Essentially, this is an allegation of harmless error, which is not cognizable in our evaluation of the investigating authority's determination. See, EC, FWS, para.352. Moreover, as we discuss above, Norway's claim raises a question of legal interpretation, which must be addressed before any consideration of the facts may be undertaken. If we conclude that imports from producers with a *de minimis* margin of dumping may not be treated as dumped imports for purposes of the injury analysis, then the volume of such imports is irrelevant. Conversely, the volume of imports can have no relevance in our analysis of the legal question. Since we do not consider the evidence concerning the volume of imports attributable to Nordlaks to be relevant to our analysis, we do not consider the information in Exhibit EC-12, relied on in this regard by the EC. *See also*, paras. 7.835 - 7.860.

[764] Panel Report, *EC – Bed Linen*, para. 6.138.

[765] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India ("EC – Bed Linen (Article 21.5 – India)")*, WT/DS141/RW, adopted 24 April 2003, para. 6.133.

dumping greater than *de minimis* has been calculated."[766] These statements lend support to our conclusion that imports for which a *de minimis* margin of dumping is calculated may not be treated as dumped for purposes of analysing injury.

7.627 The EC recognizes that the consequence of a finding of *de minimis* dumping is that no duties may be applied to the imports in question, as it has stated that it does not, as a matter of policy, impose anti-dumping duties on imports from producers with a *de minimis* margin.[767] The EC, however, argues that the non-imposition of duties is a different issue from the question whether a company with a *de minimis* margin of dumping is in fact dumping and injuring the domestic industry.[768] In the EC's view, while the inclusion of imports from companies with *de minimis* margins in the volume of "dumped" imports for injury analysis may, in some cases, be inappropriate, this was not such a case, and the exclusion of imports attributable to Nordlaks would not have had any significant effect on injury analysis.[769] We do not agree with the EC's view that the injury analysis is "a distinct part of the anti-dumping action and has to be considered on its own merits".[770] We can conceive of no rational basis on which the imports which are not legally cognizable as "dumped" because a *de minimis* margin has been calculated for the producer/exporter in question could be included in the volume of dumped imports taken into account in assessing the question of injury. In our view, the consequences from a determination that there is no legally cognizable dumping must be taken into account in the injury analysis.

7.628 Moreover, whether it is permissible to treat imports for which a *de minimis* margin is calculated as dumped for purposes of injury analysis when no anti-dumping duties can be imposed on them is not, in our opinion, a question of fact to be addressed on the basis of the circumstances in different investigations. Rather, we consider that the issue raises a question of interpretation of the term "dumped imports". We consider that an interpretation of "dumped imports" in Article 3 which would allow an investigating authority to include in the volume of dumped imports for purposes of injury analysis imports attributable to a producer/exporter for which a *de minimis* margin has been calculated is impermissible. As noted above, Article 5.8 requires termination of the investigation upon a determination of *de minimis* margins for imports from a particular foreign producer or exporter, and thus leads to the conclusion that there is no legally cognizable dumping. A consistent interpretation of the term "dumped" requires that such imports be excluded from the "dumped imports" considered in the analysis of injury (and causation, of course). We therefore conclude that the EC acted inconsistently with Articles 3.1 and 3.2 by treating imports attributable to Nordlaks as dumped in its injury analysis.

7.629 The second of Norway's claims with respect to the volume of dumped imports concerns the treatment of imports attributable to producers/exporters who were not individually examined in making the dumping determination ("unexamined exporters") as "dumped imports" for purposes of the injury determination under Article 3. Norway argues that an investigating authority may treat imports from unexamined exporters as dumped in its injury determination if there is evidence to support extrapolating from the selected examined producers to all imports, but asserts that the facts preclude such treatment in this investigation. Norway's argument is rooted in the fact that the enterprises selected for individual examination by the investigating authority for dumping consisted exclusively of Norwegian producers who also exported ("exporting producers"), while many of the unexamined exporters were exclusively exporters ("non-producing exporters"). Norway argues that findings of dumping for the examined exporting producers may not be relied upon as evidence as to whether imports from unexamined non-producing exporters were dumped, as the business activities,

[766] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.303
[767] The EC refers to this as a "long-standing EC policy". EC, Answer to Panel Question 34, para. 157.
[768] EC, Answer to Panel Question 34.
[769] EC, FWS, para. 352.
[770] EC, Answer to Panel Question 34.

cost structures, and pricing of these two groups are different. The EC, on the other hand, argues that extrapolation from the findings of dumping for the examined producers to all imports was appropriate in this case. The EC asserts that all examined producers were found to be dumping, a finding which covered 30 per cent of total imports from Norway, and maintains that this alone is sufficient to extrapolate to all imports. In addition, the EC asserts that other evidence supported the conclusion that imports from unexamined exporters were dumped, including the fact that, pursuant to Article 6.8, all imports from non-cooperating companies were found to be dumped. The EC points specifically to Exhibit EC-10, which it argues shows that price levels of the examined producers were very similar to those of the unexamined producers.[771]

7.630 Norway's argument in this regard is based on the same facts as its claim of error in the EC's decision to include in the limited examination only exporting producers, and not exporters that did not also produce salmon. We have found elsewhere in our report that the EC did not err in this regard and that therefore the selection of the companies was not, for that reason, inconsistent with Article 6.10 of the AD Agreement.[772] In our view, the fact that a number of the unexamined producers were non-producing exporters does not undermine the relevance of the findings of dumping for the examined producers as evidence that imports from unexamined producers are dumped for purposes of the injury analysis.[773] The purpose of limited examination in an anti-dumping investigation is to allow an investigating authority to draw conclusions about dumping for all foreign producers and exporters on the basis of a detailed examination of less than all of them. In our view, if the selection for limited examination is made consistently with the AD Agreement, then the investigating authority may treat the findings of dumping made with respect to that group of companies as evidence of dumping by all unexamined companies, regardless of possible differences between some or all of them and the examined companies. To do otherwise would limit the utility of Article 6.10 of the AD Agreement, as it would require the investigating authority to gather and consider information for unexamined producers, which it would not otherwise do as a result of a decision to conduct a limited examination, in order to be able to make individual judgments as to possible differences between the examined producers and unexamined exporters. In our view, there is no obligation to consider facts concerning the individual operations of unexamined exporters *per se* in order to decide the extent to which findings for the examined producers may be relied upon in drawing conclusions concerning whether imports attributable to unexamined exporters are dumped. Moreover, in our view, it would be illogical to accept the principle that conclusions about dumping can be based on the examined companies for purposes of the imposition of anti-dumping duties on unexamined companies, but not accept that those same conclusions about dumping may serve as evidence that imports attributable to unexamined exporters are dumped in the same investigation.

7.631 The question of treatment of imports attributable to unexamined producers was addressed by the Appellate Body in the *EC - Bed-Linen* implementation dispute. In implementing the original Panel and Appellate Body decisions in the *EC - Bed Linen* dispute, the EC re-examined the dumping determinations for examined producers, and found that three of the five producers examined were dumping, and two were not. The producers found not to be dumping accounted for 53 per cent of total imports of the five examined producers. In its injury analysis in the implementation context, the EC excluded the imports attributable to the two non-dumping producers from the volume of dumped

[771] Norway contests the propriety of this Exhibit, Norway First Oral Statement at para. 111, asserting that it contains information that the EC cannot demonstrate was before the investigating authority, was not made available under Article 6.4, was not disclosed under Article 6.9, and was not identified or mentioned in the published determinations, and supports impermissible *ex post* explanations for the EC's determination. We deal with these objections separately, at section VII.J.4, below.

[772] *See*, para. 7.181.

[773] In fact, in a case where, as here, the unexamined exporters source their exports from producers for which determinations of dumping were made, as they do not, themselves, produce the product they export, we can see no reason why those determinations of dumping would not be compelling evidence that the exports by non-producing exporters are dumped. *See*, footnote 339

imports in its injury analysis, but included all imports attributable to producers which were not in the group selected for limited examination. The Panel concluded that this was permissible.[774]

7.632 The Appellate Body reversed. The Appellate Body noted that there was no specified methodology for determining the volume of dumped imports, but stated that any such methodology must be based on positive evidence and an objective examination of relevant evidence. The Appellate Body concluded that the fact that producers accounting for 47 per cent of total imports attributable to examined producers were found to be dumping was not a sufficient basis to justify treating imports from unexamined producers/exporters as dumped for purposes of the injury analysis. The Appellate Body determined that an objective examination of that evidence alone could not lead to the conclusion that imports from unexamined producers were dumped,[775] and concluded that there must be other evidence to justify treating imports from unexamined producers as dumped for purposes of the injury investigation.[776] While a calculation of dumping margins for each individual producer/exporter was clearly not required, as Article 6.10 permitted limited examination, the Appellate Body considered that other evidence could be relied upon in determining whether imports from unexamined producers were dumped imports.[777]

7.633 We are troubled by the Appellate Body's decision in this regard. The Appellate Body's report indicates that an investigating authority may consider "different and additional evidence" to evaluate whether imports from unexamined producers are dumped for purposes of injury analysis. In this regard, the Appellate Body's Report refers to evidence "such as witness testimony and different types of documentary evidence about critical aspects of the market, conditions of competition, production characteristics, and statistical data relating to the volume, prices, and effects of imports" as evidence that may form part of the evidence an investigating authority may take into account "when determining, on the basis of an "objective examination" whether or not imports from non-examined producers are being dumped."[778] However, Article 2.1 of the AD Agreement makes clear that "a product is to be considered as being dumped" only if the export price is less than the normal value, and establishes detailed rules for that calculation. The Appellate Body has, in the context of sunset reviews, found that a determination of likelihood of dumping based on a dumping margin calculated using a methodology inconsistent with Article 2 of the AD Agreement is unacceptable.[779] Thus, it is unclear to us how such "other evidence" can provide a legally sound basis for a conclusion that imports attributable to unexamined producers are dumped. In our view, the fact that imports from unexamined producers are, under the AD Agreement, recognized as dumped for purposes of the imposition of anti-dumping duties, and that those duties may be collected in amounts limited by calculations made pursuant to Article 2 of the AD Agreement, does establish a legally sound basis for the treatment of those imports as dumped for purposes of the injury analysis.

7.634 Moreover, while the Appellate Body found, in *EC- Bed Linen*, that in a case where not all examined producers are found to be dumping, an investigating authority must consider other evidence in deciding the extent to which imports from unexamined producers may be treated as dumped for purposes of injury analysis, we do not see why the opposite should also be the case. That is, we see no reason why, if all examined producers are found to be dumping, an investigating authority should be required to consider "other evidence" that might indicate that imports from some unexamined

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[774] Panel Report, *EC-Bed-Linen (Article 21.5-India)*, para. 6.144.

[775] Appellate Body Report, *EC-Bed-Linen (Article 21.5-India)*, para. 132.

[776] Appellate Body Report, *EC-Bed-Linen (Article 21.5-India)*, para. 124. In that case, the EC had proffered no evidence, other than the determination with respect to the sampled producers, with respect to the question of dumping by unexamined exporters, and thus the Appellate Body did not go on to consider the whether there was a sufficient basis for the treatment of imports from unexamined producers as dumped.

[777] Appellate Body Report, *EC – Bed-Linen (Article 21.5-India)*, para. 129 and fn. 162.

[778] Appellate Body Report, *EC – Bed-Linen (Article 21.5-India)*, para. 129 and fn. 162.

[779] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 130.

producers are **not** dumped. This would again undermine the utility of Article 6.10, as it would require the investigating authority to consider evidence concerning companies not included in the limited examination. In our view, a finding that all imports attributable to examined producers are dumped may be treated as evidence that all imports attributable to unexamined producers are dumped for purposes of the injury analysis without a further examination of the nature of the operations of examined and unexamined producers.[780] Of course, in this case, the EC erred in concluding that all examined producers were dumping, as we have found above that the EC erred in treating imports from Nordlaks as "dumped imports". We have also found that the EC erred in the determination of the companies to be included in the group examined. Thus, not all examined sampled producers were found to be dumping, and to the extent that the EC extrapolated to all imports on the basis of a conclusion that all imports attributable to the examined producers were dumped, it erred.

7.635 Finally, we note the EC's argument that there was other evidence relied upon in determining the treatment of imports attributable to unexamined exporters as dumped. We can, however, discern nothing on the face of the Provisional or Definitive Regulation which supports the EC's argument that other evidence was considered at the time, or that any analysis was undertaken as to whether imports attributable to unexamined exporters were dumped. There is no reference to any consideration of other evidence or any discussion of whether to treat imports from unexamined producers as dumped. Paragraph 40 of the Provisional Regulation, cited by the EC in this regard, relates to the calculation of the dumping margin to be applied to "non-cooperating companies".[781] However, the mere fact of calculating a dumping margin to be applied to imports from these companies does not, in our view, demonstrate that the investigating authority considered, on the basis of that calculation, whether imports attributable to those companies were dumped for purposes of injury analysis. The EC also refers to Exhibit EC-10 in this regard. However, there is no indication that this information was considered by the investigating authority in order to justify a conclusion that all imports from unexamined exporters were dumped for purposes of the injury determination, and we have not taken it into account in our analysis.[782]

7.636 Therefore, we conclude that that the EC erred in treating imports attributable to a company for which a *de minimis* margin was calculated as dumped, and further erred in treating all imports from unexamined producers and exporters as dumped, in the context of its injury determination. As a result, the EC acted inconsistently with Articles 3.1 and 3.2 in considering the volume of dumped imports. We do not consider it necessary to address Norway's consequential claim of violation of Article 3.5, which is based on the same considerations addressed above. A finding of violation of Article 3.5 would add nothing to the resolution of this dispute, nor would it aid in any potential implementation, and therefore the exercise of judicial economy in this respect is warranted.

(b) Price undercutting and price trends

7.637 Norway's claims concerning the EC's examination of price undercutting are under Articles 3.1, 3.2, and 3.5 of the AD Agreement. Article 3.2 is at the core of Norway's argument, so we begin by considering the text of that provision, which states, in pertinent part:

> "With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by

[780] Moreover, a finding that all sampled producer/exporters were dumping is persuasive evidence of dumping by unexamined non-producing exporters, who are presumably exporting the products produced by the sampled companies found to be dumping.

[781] Defined as "exporters in Norway which did not cooperate or did not make themselves known" to the investigating authority. Provisional Regulation, para. 40.

[782] We note that we have, elsewhere in our report, declined to exclude Exhibit EC-10 from consideration in this dispute. See para. 7.846.

> the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance."

7.638 It is clear that the text of Article 3.2 provides no methodological guidance as to how an investigating authority is to "consider" whether there has been significant price undercutting. It is also clear that while the question of significant price undercutting must be considered, a finding of significant price undercutting is not necessary to a finding that dumped imports have had an effect on prices. In our view, price undercutting may be demonstrated by comparing the prices of the like product of the domestic industry with the prices of the dumped imports, as the EC did in this case. Where the prices of imports are lower than the domestic prices, it seems clear to us that there is, as a factual matter, price undercutting. The **significance** of any such undercutting would, in our view, be a question of the magnitude of such price difference, in light of other relevant information concerning competition in the domestic market between the imports and the domestic product, the nature of the product, and other factors. It is in this context that the question of a price premium may be relevant.

7.639 Where, as here, the investigating authority has found that the domestic product benefits from price premium over the imports, it seems to us that a conclusion of **significant** price undercutting could not be reached by an objective investigating authority without some consideration of that price premium. The EC suggests that, having referred to the price premium in the General Disclosure Document, it "might have actually considered and examined the effect of the price premium and, having found that it was not a factor which could affect its price undercutting analysis, did not mention it in the Definitive Regulation."[783] The EC then goes on to explain why, in its view, the existence of a price premium is irrelevant to the analysis of price undercutting, and can only be taken into account when considering the injury margin, as it purports to have done in this case.

7.640 Even assuming the EC is correct in its views concerning the irrelevance of a price premium, we can see nothing in either the General Disclosure Document or the Definitive Regulation which would indicate that the investigating authority actually considered whether, much less found that, the price premium was not a factor which could affect the price undercutting analysis. The General Disclosure Document identifies the price premium as "up to a maximum of 12 per cent", and concludes that this price premium should be taken into account in establishing the injury margin.[784] There is no further discussion of the price premium by the investigating authority, and the EC has brought nothing before the Panel indicating that the investigating authority considered the relevance of the price premium and concluded that it could not affect the price undercutting analysis. Merely that the price premium was taken into account in calculating the injury margin does not demonstrate that it was considered and deemed irrelevant to the evaluation of price undercutting. Having identified the existence of a price premium for the domestic product over the imports, we consider that an unbiased and objective investigating authority could not conclude, without explanation, that such price premium had no bearing on the issue of whether there was significant price undercutting. Thus, the investigating authority's finding of significant price undercutting is not consistent with the requirements of Articles 3.1 and 3.2.

7.641 Similar considerations govern our evaluation of Norway's arguments with respect to the adequacy and objectivity of the EC's consideration of price trends. Again, in light of the lack of guidance in the AD Agreement on criteria or methodology for an evaluation of price trends, there is no basis to conclude that the assessment of price trends in Euro is *per se* inconsistent with Articles 3.1 and 3.4. As with price undercutting, the price trends, whether calculated in Euro or pounds, are not

[783] EC, FWS, para. 358.
[784] Exhibit NOR-67, para. 122.

themselves decisive. Rather, they are relevant to an assessment of the condition of the domestic industry, and the issue of causation.

7.642 We are not persuaded by Norway's argument that an investigating authority is obligated to consider price trends in the "operating currency" of the domestic industry, which it alleges in this case to be pounds sterling. Domestic industries in the EC may operate in one or more of the currencies circulating in the EC. We can see no basis in the AD Agreement for the conclusion that the investigating authority must determine, for individual producers in the domestic industry, which is the "operating currency", and examine all aspects of the injury analysis in that currency. While in a particular case, this might be possible, if all domestic producer operate in the same currency, that possibility does not justify the conclusion that such analysis is required. As we have discussed elsewhere in our findings, the assessment of injury to the domestic industry is not based on separate examination of the individual members of that industry. Thus, it seems reasonable to us that an investigating authority would select a single currency in which to undertake its analysis. So long as that analysis is unbiased and objective, and based on positive evidence, we see no reason to disallow it. The investigating authority in this case considered all the relevant information in Euros, thus on a consistent basis.

7.643 We are unwilling to conclude that the requirement to consider positive evidence necessarily entails the conclusion that the **only** proper basis for an analysis of price trends is information in the same currency as the normal record-keeping of individual companies in the domestic industry. We simply cannot conclude that such detailed methodological rules can be, or were intended to be, derived from the general prescriptions in Article 3.1, and the relevant factors addressed in Articles 3.2 and 3.4 of the AD Agreement.

7.644 We do consider, however, that whatever determinations are made by an investigating authority, and whatever information is relied upon in making those determinations, must be carefully considered, and the conclusions adequately explained. Norway argues that the consideration of price trends in Euro masked the true situation of the domestic industry in this case,[785] and that this argument was made to the investigating authority during the investigation.[786] We can find no indication that the investigating authority even considered the possibility that price trends in Euro might not paint a relevant and accurate picture of the situation facing the domestic industry. Particularly where an issue like this has been brought to the attention of the investigating authority by interested parties, the failure to address it in any way leaves us unable to conclude that the determination made with respect to price trends was one that could be reached by an unbiased and objective investigating authority.

7.645 Thus, while we do not find any obligation for an investigating authority to choose one currency over another in conducting its examination of the information before it, there is an obligation to explain the relevance of the information to the determinations made. Particularly where, as in this case, arguments are made by parties that the currency used in the analysis may make a difference to that analysis, it would seem imperative that the investigating authority consider and resolve the issue before it makes factual findings based on the information before it. Thus, a failure by the investigating authority to even address the parties' arguments, and to resolve them, leaves us unable to conclude that the investigating authority's finding of declining prices is consistent with the requirements of Articles 3.1 and 3.4.

7.646 Therefore, we conclude that the EC's examination of the volume of dumped imports and price undercutting were not consistent with Articles 3.1 and 3.2 of the AD Agreement and its examination of price trends was not consistent with Articles 3.1, 3.2, and 3.4 of the AD Agreement. In the absence

[785] It is equally possible that converting all relevant data, including import prices, into pounds sterling, might mask the true situation of the domestic industry.

[786] Norway, FWS, para. 567, Exhibit NOR-49.

of adequate explanations for the findings on these factors based on the information before the investigating authority at the time, relied upon by the investigating authority in finding injury, we conclude that the finding of injury was not one that could be made by a reasonable investigating authority on the basis of the facts and arguments before it. We do not consider it necessary to address Norway's consequential claims of violation of Article 3.5, which are based on the same considerations addressed above. A finding of violation of Article 3.5 would add nothing to the resolution of this dispute, nor would it aid in any potential implementation, and therefore the exercise of judicial economy in this respect is warranted.

H. ALLEGED INCONSISTENCY OF THE EC'S CAUSATION DETERMINATION

1. Arguments of the Parties

(a) Norway

7.647 Norway argues that the EC violated Articles 3.1 and 3.5 of the AD Agreement in its causation determination by failing to ensure that injury caused by two other known factors – (1) the EC producers' increased costs of production, and (2) surging imports from Canada and the United States – were not improperly attributed to dumped imports. Norway asserts that Article 3.5 requires an investigating authority to establish that there is a "genuine and substantial" causal relationship between the dumped imports and the domestic industry's injury,[787] and that in establishing the existence of this relationship, Article 3.5 requires the investigating authority to avoid attributing injury to dumped imports that is, in fact, caused by other factors.

7.648 With respect to increased costs of production, Norway argues that the EC failed to address the argument that EC producers failed to reduce costs of production, and that those costs were a cause of injury to the domestic industry. Norway argues that the EC did not adequately examine developments in the EC industry's costs of production and that its analysis masked the fact that the domestic industry's costs of production rose significantly during the period considered, by examining price trends in euros, instead of pounds sterling, the relevant currency for the sampled producers. Norway maintains that because unit sales prices were constant in pounds sterling, while sales volumes increased by 7 per cent, the sampled producers' revenues must have increased during the period considered. However, during that same period, the profitability of the EC producers turned from positive to negative. For Norway, this suggests that losses sustained by the EC industry were caused by an increase in costs of production that outstripped the industry's increased revenues. Norway asserts that these increased costs were attributable, at least in part, to the efforts of three of the five sampled producers to transition to organic farming. Norway asserts that, if the EC industry's costs of production had not increased significantly during the period considered, the industry would have continued to make profits in pounds sterling. Norway asserts that the EC did not even acknowledge that the evidence showed that the EC producers' costs had increased considerably, did not assess the injurious effects of this development, and did not "separate and distinguish" these injurious effects from those attributable to dumped imports.

7.649 With respect to the increased imports from the United States and Canada, Norway notes that during the period investigated, the EC industry's market share declined from 2.98 to 2.77 per cent, while imports from all countries other than Norway rose from 15.5 to 19.4 per cent.[788] The market share of imports from Canada and the United States rose from a combined market share of 1.0 per

[787] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 132; see also Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities ("US – Wheat Gluten")*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717, para. 69.

[788] Provisional Regulation, Recital. 94 (Table 11).

cent, to 5.1 per cent, more than the EC industry's market share. In volume terms, Norway notes that imports from Canada and the United States were 31,564 ton during the period investigated, significantly more than the production of the EC industry (22,000 tons)[789]. Finally, Norway notes that the prices of imports from Canada were 36 per cent lower than the EC price, and the prices of imports from the United States were 39 per cent lower than the EC price. Thus, Norway maintains that imports of salmon from Canada and the United States had the capacity to cause material injury to the domestic industry. Norway argues that the EC dismissed the significance of this information, and specifically of the 560 per cent increase in imports from the Canada and the US, on the grounds that these imports consisted mostly of wild salmon, which, the EC found, did not compete with farmed salmon. Norway maintains that the EC offers no facts in support of these conclusions. Moreover, the EC import statistics do not separate farmed and wild salmon.[790] Thus, Norway argues, there was no basis for the EC to conclude that the surge in imports consisted of wild salmon. In addition, Norway asserts that evidence in the record contradicts the EC's conclusion that farmed and wild salmon do not compete. Thus, Norway maintains that the EC erred in dismissing Canadian and US imports as an "other factor" causing injury to the domestic industry.

(b) European Communities

7.650 With respect to Norway's claims under Article 3.5, the EC notes that the AD Agreement does not address how an investigating authority is to assess and "separate and distinguish" the injurious effects of dumped imports and other factors. The EC cites in this regard the decision of the Appellate Body stated in *US – Hot-Rolled Steel*:

> "We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the Anti-Dumping Agreement. What the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made."[791]

The EC asserts that what matters in the present case is whether the EC made a proper assessment and evaluation of the specific facts of this case. The EC notes that it examined at least seven known factors besides the volume of dumped imports and their effect on the state of the EC industry, and that Norway challenges its assessment of only two of these.

7.651 The EC asserts that it did consider and address the question of EC producer costs, referring to paragraph 108 of the Provisional Regulation. The EC maintains that it considered the production costs of both Norwegian and EC producers, and found that Norway enjoyed advantages in relation to certain costs and the EC producers enjoyed advantages in relation to other costs, but that there were no significant differences, and that both suffered losses. Thus, the EC maintains that it properly considered whether the EC industry's production costs were an other factor causing injury. In addition, the EC argues that Norway has failed to make a *prima facie* case that the domestic industry's production costs increased and thus contributed to injury. The EC points out that Norway refers to an increase of 14.9 per cent, but that this is calculated in pounds sterling, not the euro basis used by the EC – in euros, the increase in production costs was only 5.2 per cent. The EC notes that Norway's argument is counterfactual, asserting that if the EC industry's costs had not increased, it would have continued to make profits.[792] The EC points out that Norway has not given any reason to suggest that production costs should not have increased, and in the absence of such an argument, the facts

[789] Definitive Regulation, para. 38.
[790] Provisional Regulation, Recital. 96.
[791] Appellate Body Report, *US – Hot-Rolled Steel*, para. 224.
[792] Norway, FWS, para. 586.

demonstrate that EC producers' costs did increase, and profits turned to losses. The EC also notes that it found no significant differences between the production costs of the EC industry in comparison with Norwegian producers. Consequently, the EC maintains that Norway has not established that the EC did not properly examine the developments in production costs of the EC industry, and has not established that those developments caused or could have caused injury to the EC domestic industry.

7.652 The EC asserts that Norway's argument concerning the examination of imports from the US and Canada rests on an interpretation of Article 3.5 of the AD Agreement requiring that the evidence underlying every factual finding be cited, and that failure to do so makes any assessment of such facts a violation if Article 3.5 of the Anti-Dumping Agreement. The EC maintains that there is no support for such an extreme interpretation of Article 3.5. The EC argues that the considerations set out by the Appellate Body in *US - Softwood Lumber VI (Article 21.5-Canada)*[793] and relied upon by Norway relate to the analysis of conflicting evidence, while in this case, the EC investigating authority was not faced with conflicting evidence. In the absence of any legal requirement to explain each factual finding, the EC maintains that Norway's claim must fail.

7.653 The EC goes on to argue that Norway did not make a *prima facie* case that the EC determinations were incorrect. The EC first states that, in the course of judicial challenges to the measure, it discovered what it calls a "technical error" in the Provisional Regulation, concerning the volume of imports of salmon from the US and Canada, and provides, in Exhibit EC-15, the corrected information. The EC asserts that the corrected information shows that imports from the US actually decreased by 15 per cent, as did the market share of US salmon (from 5.2 per cent to 4 per cent). While imports from Canada increased from 2705 tonnes to 6940 tonnes (from 0.5 per cent to 1.1 per cent of market share), the EC asserts that these are negligible (referring to Article 5.8 of the Anti-Dumping Agreement). As a result, the EC argues that decreased imports from the US and Canada had a very little, effectively zero capacity to cause any injury to the EC domestic industry. The EC also argues that the error in the original data did not affect the assessment by the investigating authority of the effect of imports of salmon from the United States and Canada, which was based principally on the fact that the majority of those imports were of wild salmon, which does not compete with farmed salmon. The EC asserts that Norway has not challenged this conclusion, but rather attacks the EC for failing to explain what evidence supports it. The EC points out that Norway has not adduced any evidence that would contradict that conclusion, and maintains that the fact that the imports of salmon from the US and Canada consist of wild salmon are largely known, i.e. are industry knowledge, confirmed by publicly available data and by the Norwegian government itself. Similarly, the EC maintains that Norway has failed to demonstrate error in the conclusion that farmed and wild salmon are not interchangeable.

2. Evaluation by the Panel

7.654 As discussed above, we have found that the EC's approach to defining domestic industry in this case resulted in an investigation concerning a domestic industry that did not comport with the definition set forth in Article 4.1. As was the case in the context of injury, it is clear to us that the EC analyzed the wrong industry in considering the issue of causation. Nonetheless we consider it appropriate to make findings regarding Norway's claims. The claims regarding the investigating authority's consideration of "other factors" causing injury, albeit with respect to a wrongly defined domestic industry, are therefore addressed below.

7.655 We recall that it is our task to undertake a careful scrutiny of the EC's determination to assess whether the conclusions therein could be reached by an unbiased and objective decision maker, taking into account the facts that were before the investigating authority, and in light of the explanations given.

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

7.656 Turning to the substance of Norway's claims, Norway argues that the EC failed to consider the allegedly injurious impact on the domestic industry of two "known factors" - increased production costs, and imports of salmon from the United States and Canada – as possible causes of injury to the domestic industry, as required by Article 3.5 of the AD Agreement, which provides in pertinent part:

> "The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports."

Previous panel and Appellate Body decisions make it clear that while an investigating authority is required to consider the effects of other factors known to the investigating authority which may be causing injury to the domestic industry, there is no required method of analysis in undertaking that examination.[794]

7.657 Norway argues that the EC industry experienced significant increases in per unit costs of production, which explains why, despite an increase in sales volumes, and constant prices (measured in pounds sterling) the domestic industry incurred losses. Thus, Norway argues, had the industry's costs of production not increased during the period, it would have been profitable, and thus, the increase in costs was an important cause of injury to the domestic industry. Norway asserts that this argument was raised by interested parties during the investigation,[795] and that the EC acknowledged this when it noted that interested parties had contended that the failure of the domestic industry to reduce costs had contributed to injury.[796] However, Norway contends that the EC failed to address this issue.

7.658 The EC does not dispute that the domestic industry's costs increased,[797] although it does dispute the magnitude of that increase. Norway calculated the increase in pounds sterling as 14.9 per cent, and in Euros as 5.2 per cent.[798] The EC does not dispute these figures, but maintains that the proper calculation is in Euros, and that the increases in the cost of production "are less significant" on that basis.[799] We note, however, that there is no mention of the increase in production costs, in either currency, in either the Provisional or Definitive Regulation, and no discussion of the significance of that increase.

7.659 Rather, what is in the Regulations is a discussion of the effect of "smaller less efficient producers in the EC and high costs of production" – that is, a comparison between Norwegian salmon farmers' costs, and the EC industry's costs.[800] Based on a comparison, the EC found that while Norwegian producers had certain cost advantages, the EC industry had certain other advantages, that both were incurring significant losses, and that therefore the argument that EC producers were less efficient "was not substantiated and that this could not be cause of" injury.[801] In our view, this analysis simply does not address the argument that an increase in the EC industry's costs was a cause of the losses incurred by the industry.

7.660 The EC asserts that Norway has failed to make a *prima facie* case with respect to its argument that increased costs were a cause of injury to the EC industry, and that in order to do so, Norway

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[794] Appellate Body Report, *US – Hot-Rolled Steel, para. 178, Appellate Body Report, EC – Tube or Pipe Fittings*, para. 189, Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 154.
[795] Norway, FWS, para. 582.
[796] Norway, FWS, para. 581; Provisional Regulation, Recital 108.
[797] EC, FWS, para. 413 ("it has been established that the production costs did increase.")
[798] Norway, FWS, para. 585, Table 7.
[799] EC, FWS, para. 411.
[800] Provisional Regulation, Recital 108, Definitive Regulation, Recital 99.
[801] Provisional Regulation, Recital 108, Definitive Regulation, Recital 99.

would have to explain to the Panel why it believes costs should not have increased as they did.[802] We do not agree. Norway has demonstrated that the facts before the investigating authority showed that EC industry production costs increased, and that it was argued to the investigating authority that that increase in costs caused injury. The Provisional and Definitive Regulations do not address this contention. The EC has not brought forward any information that was before the investigating authority or analysis on this issue. In the absence of consideration of this argument, the EC has not demonstrated that an objective and unbiased investigating authority could have concluded that increased production costs were not causing injury to the domestic industry, and therefore that injury caused by this factor was not attributed to dumped imports. In these circumstances, our view is that Norway has demonstrated that the EC failed to comply with Article 3.5 of the AD Agreement.

7.661 With respect to the EC's consideration of imports from the US and Canada, Norway has challenged the EC's submission of exhibit EC-15, which presents "corrected" information on the volume of imports from the United States.[803] Norway asserts that the EC has acknowledged that the information post-dates the imposition of the measure, and thus was not before the investigating authority at the time it made its determination. Norway also asserts that the analysis presented by the EC on the basis of this information is different from that relied on in the Provisional and Definitive Regulations, and thus constitutes an impermissible *ex post* rationalization. The EC does not dispute that the information in these two exhibits was corrected **after** the Definitive Regulation was published, but rather argues that the correction of the data in question "does not affect the outcome of the determination", and asks us to take that into consideration in making our findings.[804]

7.662 We decline to consider the "corrected" information on the volume of US imports presented in Exhibit EC-15 (and the information in EC-14). Article 17.5(ii) of the AD Agreement provides that a panel shall examine the matter before it "based upon ... the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." It is clear, and the EC does not dispute, that the facts set out in the Exhibits were **not** available to the investigating authority at the time it made its determination. Indeed, it is clear that the investigating authority cited and relied upon different facts concerning the volume of imports from the United States, and the consequent information on rate of increase and changes in market share. We cannot, therefore, take into account the information in Exhibits EC-14 and EC-15 in our analysis of the EC's determination, as to do so would effectively require us to make our own findings on the basis of new evidence. This is clearly precluded by the applicable standard of review.[805]

7.663 Norway asserts that the EC erred in concluding that it was "unlikely that imports from [the United States and Canada] could have had a significant impact on the situation of the [EC] industry."[806] Norway argues that this conclusion was based on factual findings which are deficient, as there is no reference to any evidence in support of findings that the majority of salmon imports from Canada and the US are of wild salmon, and that wild and farmed salmon do not compete. Thus, Norway argues, the EC failed to properly assess the injurious effect of these imports, and failed to ensure that injury caused by these imports was not attributed to dumped imports. The EC argues that Article 3.5 of the AD Agreement does not require an investigating authority to cite to sources of its factual findings, and that Norway does not challenge the factual findings or adduce any evidence to contradict them. The EC notes that "the fact that the imports from the US and Canada consist of wild salmon are [sic] largely known (industry knowledge), confirmed by publicly available data and ... by

[802] EC, FWS, para. 413.

[803] Norway also challenges the EC's submission of exhibit EC-14, which presents information on injury factors such as market share reflecting the corrected data on the volume of US imports.

[804] EC, Answer to Panel Question 1, para. 30.

[805] *See*, para. 7.857.

[806] Definitive Regulation, Recital 86.

the Norwegian government itself".[807] The EC argues that, in any event, Norway failed to make a *prima facie* case that the investigating authority erred in its assessment of the effect of imports from the United States and Canada.

7.664 In evaluating this claim, we note first that we do not disagree with the view of the EC that an investigating authority is not obligated to cite or refer to every piece of evidence underlying its factual findings. However, that does not mean that the factual findings of the investigating authority must be accepted by the Panel unless the party challenging those findings adduces evidence that demonstrates that they are erroneous. The Panel's task is to "determine whether the authorities' establishment of the facts was proper, and whether its evaluation of those facts was unbiased and objective". In this case, Norway, as we understand its argument, contends that the EC's establishment of the "facts" in question, *i.e.*, that the majority of salmon imports from Canada and the US are of wild salmon, and that wild and farmed salmon do not compete, was improper as there is no explanation of, or reference to, any evidence upon which those facts could be established. In such a situation, the Panel cannot itself determine whether the investigating authority's factual findings are correct. Rather, the Panel must examine the information and arguments that were before the investigating authority in order to determine whether the investigating authority came to those findings on a proper basis.

7.665 It is undisputed that the relevant import statistics do not distinguish between wild and farmed salmon imports from the United States and Canada.[808] The EC has pointed to no information that was before the investigating authority which indicates what proportion of those imports was of wild salmon, and nothing that indicates that the majority was of wild salmon. Instead, the EC asserts that this fact is "industry knowledge", and confirmed by unspecified publicly available information, which the EC has not put before the Panel. The EC also notes that in a separate EC safeguard investigation concerning imports of salmon, Norway acknowledged that exports of salmon from the US and Canada are mainly of wild salmon.[809] Norway points out that both the United States and Canada produce farmed as well as wild salmon, and thus, the imports may well include some farmed salmon, which is again undisputed by the EC.[810] It thus seems clear to us that the proportion of imports from the United States and Canada consisting of wild salmon is a question of fact to which the answer is not self-evident.

7.666 The Provisional and Definitive Regulations both refer to "information gathered during the investigation" as the basis of the conclusion that the majority of imports from the United States and Canada were of wild salmon, but do not indicate what that information was or how it was considered by the investigating authority. The Panel asked the EC to "demonstrate what information in the file of this investigation" supports these conclusions.[811] In response to the Panel's question, the EC points to the information gathered in the separate safeguards proceeding, and argues that the basic facts cannot differ from one proceeding to the other, especially when those proceedings were conducted in parallel, and that the persons working on the anti-dumping investigation could not erase knowledge gained in the safeguards case. The EC also asserts that the investigating authority was in "intense contact with the representatives of the salmon industry", that it was "common industry knowledge", that the investigating authority "conducted a comprehensive internet research", and that in any event,

[807] EC, FWS, para. 441.
[808] Provisional Regulation, Recital 96, Definitive Regulation, Recital 84.
[809] EC, FWS, para. 441 and footnote 247.
[810] Norway has submitted public information concerning the volume of production of farmed and wild salmon in the United States and Canada in exhibit NOR-78. However, that information was not before the investigating authority, and we therefore do not consider it in our analysis, for the same reasons as set out above concerning exhibits-EC14 and EC-15.
[811] EC, Answer to Panel Question 37.

Norway never put any contrary evidence before the investigating authority, which could not "pursue any unsubstantiated assertion which lacks credibility on its face".[812]

7.667 While we do not and cannot decide whether, indeed, the majority of imports of salmon from the United States and Canada were of wild salmon, we do not consider that the investigating authority properly established that fact during the course of the investigation. We do not dispute that the persons working for the investigating authority in a particular anti-dumping dispute may have knowledge and information gained from sources other than information submitted by interested parties during an investigation – prior knowledge of a product, industry, or market, experience gained in other investigations, or other types of investigations, publicly available information, and "common knowledge" may also all play a part in an investigating authority's efforts to establish the facts in a particular investigation. However, in this case, such information is not reflected anywhere in the published determinations, and the information obtained from these efforts has not been brought before us in a form that demonstrates that it was available to and considered by the investigating authority in establishing the facts. We consider it imperative that there be some indication in the published determination, or at least some information on the matter in the files of the investigating authority which can be identified for a reviewing panel, on the basis of which that panel can determine how the facts were established, beyond the undisputed good faith and hard work of the staff of the investigating authority.

7.668 The same considerations apply to our examination of the EC's establishment of the fact that wild and farmed salmon are not interchangeable. Norway has pointed to information that was before the investigating authority that there was at least some competition between the two. The EC asserts that this information does not demonstrate error in its conclusions that wild salmon "practically" is not sold as a fresh product, but "mostly" as a canned product. However, in the absence of any indication as to what information was considered and any explanation of how the investigating authority assessed the relevant information, it is not possible for us to determine that the facts were properly established.

7.669 We therefore conclude that the EC failed to properly examine known factors other than the dumped imports which at the same time were causing injury to the domestic industry, and failed to ensure that the injuries caused by these other factors were not attributed to dumped imports, in violation of the requirements of Article 3.5 of the AD Agreement. Having found a violation of Article 3.5 in this respect, we do not consider it either appropriate or necessary to consider whether these same considerations constitute a violation of Article 3.1 of the AD Agreement, as to do so would not further the resolution of this dispute or serve as any guidance in the event of implementation.

[812] EC, Answer to Panel Question 37, paras. 170-172.

I. ALLEGED INCONSISTENCY OF THE EC'S DECISION TO APPLY MINIMUM IMPORT PRICES AND FIXED DUTIES WITH ARTICLE VI:2 OF THE GATT 1994 AND ARTICLES 9.1, 9.2, 9.3 AND 9.4 OF THE AD AGREEMENT

1. Alleged Inconsistency of the Imposition of Minimum Import Prices with Articles 9.1, 9.2, 9.3 and 9.4(ii) of the AD Agreement and Article VI:2 of the GATT 1994

(a) Arguments of the Parties

(i) Norway

7.670 Norway claims that the minimum import prices ("MIPs") imposed by the investigating authority on investigated and non-investigated parties were inconsistent with Articles 9.1, 9.2, 9.3 and 9.4(ii) of the AD Agreement and Article VI:2 of the GATT 1994. Norway argues that the investigating authority acted inconsistently with these provisions because: (i) the MIPs imposed on investigated parties were greater than their respective normal values; (ii) the MIPs imposed on non-investigated parties were greater than the weighted average of the normal values calculated for the investigated parties; and (iii) the MIPs imposed on investigated parties were greater than their respective margins of dumping.

The assertion that the MIPs were greater than the relevant normal values

- MIPs imposed on investigated parties were inconsistent with Article 9.2 of the AD Agreement and Article VI:2 of the GATT 1994

7.671 Norway argues that in order to comply with the requirement under Article 9.2 of the AD Agreement that anti-dumping duties be collected "in the appropriate amounts", an investigating authority must ensure that any MIPs imposed on individually investigated parties must not exceed their respective normal values. Furthermore, according to Norway, any MIPs imposed on individually investigated parties must not exceed their respective normal values because otherwise the anti-dumping duties imposed would be greater than necessary "to offset or prevent dumping" within the meaning of Article VI:2 of the GATT 1994. Norway contends that the EC failed to initially disclose the investigating authority's calculation of the MIPs despite being asked to do so, once by the Norway during consultations, and once by the Panel in Panel Question 39. According to Norway, it was only in its answer to Panel Question 130, following the second substantive meeting of the parties, that the EC dislcosed its calculations based on the nromal values disclosed by the EC to the investigated parties. Therefore, in its submissions to the Panel, Norway presented its own calculations based on the normal values disclosed by the EC to the investigated companies during the investigation. On the basis of these calculations, Norway asserts that the MIPs imposed by the investigating authority on the investigated parties were greater than their respective normal values. Thus, Norway claims that the MIPs imposed on the investigated parties were inconsistent with Article 9.2 of the AD Agreement and Article VI:2 of the GATT 1994.

7.672 Norway recalls that the MIPs applied to the investigated parties were based on the "non-injurious" MIPs established for six different presentations of salmon, because these were found by the investigating authority to be less than the corresponding "non-dumped" MIPs calculated for each of the individually investigated parties. However, according to Norway, the "non-dumped" MIPs that were used for this purpose were greater than the relevant normal values of the investigated parties because: (i) they were based on normal values adjusted to the CIF Community border level; and (ii) they were derived through the application of a three-year-average NOK/EUR exchange rate, instead of the exchange rate for the period of investigation. In Norway's view, these alleged methodological errors had the result of inflating the "non-dumped" MIPs above the appropriate

normal values, which thereby flawed the comparison between "non-injurious" and "non-dumped" MIPs.

7.673 Norway also contends that the investigating authority's calculation of the "non-dumped" MIPs was flawed because for five of the six presentations of salmon, it was based on costs of production derived from the application of "weight conversion factors" and not actual costs of production. Norway argues that a producer's actual costs of producing one presentation of salmon cannot necessarily be derived from the cost of producing another presentation simply by applying the standard "weight conversion factors". Moreover, Norway submits that the investigating authority did not use "standard" "weight conversion factors", and that as a consequence, the MIPs finally determined were considerably higher than those that would be obtained had the investigating authority used "standard" "weight conversion factors". To this extent, Norway argues that the "non-dumped" MIPs for these five presentations of salmon were greater than the investigated parties' respective normal values.

7.674 Finally, for one investigated party, Sinkaberg-Hansen, Norway argues that the EC acknowledged in response to a question from the Panel that the investigating authority's determination of dumping was unreliable, thereby invalidating the MIPs set for this company.

- MIPs imposed on non-investigated parties were inconsistent with Article 9.4(ii) of the AD Agreement and Article VI:2 of the GATT 1994

7.675 Norway argues that, pursuant to Article 9.4(ii) of the AD Agreement, MIPs imposed on non-investigated parties must not exceed the weighted average of the normal values of all of the investigated parties. Where this benchmark is surpassed, the MIPs will not only be inconsistent with Article 9.4(ii) but also Article VI:2 of the GATT 1994 because, according to Norway, they would result in the collection of anti-dumping duties greater than necessary "to offset or prevent dumping". Norway asserts that on the basis of its own calculations, the MIPs imposed on non-investigated parties were greater than the weighted average of the normal values of the investigated parties. As such, the MIPs imposed on the non-investigated parties were inconsistent with Article 9.4(ii) of the AD Agreement and Article VI:2 of the GATT 1994.

7.676 Norway recalls that the MIPs imposed on the non-investigated parties were based on the "non-injurious" MIPs established for six different presentations of salmon, because for each different presentation of salmon, these were found by the investigating authority to be less than the weighted average of the "non-dumped" MIPs of the investigated parties. To the extent that the "non-dumped" MIPs calculated for the investigated parties were flawed, Norway argues that the weighted average of the "non-dumped" MIPs of the investigated parties was also flawed. In addition, Norway argues that the weighted average of the "non-dumped" MIPs of the investigated parties was flawed for two other reasons: (i) because the "non-dumped" MIP calculated for Grieg was used in the calculation of the weighted average, and Grieg's normal value was allegedly calculated on the basis of "facts available"; and (ii) because, according to the EC's explanation of the investigating authority's methodology, an individually determined "non-dumped" MIP calculated for Seafarm Invest was used in the calculation of the weighted average, even though the Definitive Regulation reveals that the investigating authority did not calculate an individual margin of dumping for this company, and treated it in the same way as Marine Harvest.

The assertion that MIPs were greater than the relevant margins of dumping

7.677 Norway argues that Articles 9.1 and 9.3 of the AD Agreement, and Article VI:2 of the GATT 1994, require that any anti-dumping duties imposed on investigated parties cannot be greater than their respective margins of dumping. Where this is the case, any anti-dumping duty imposed

would not be collected in "the appropriate amount", and therefore also inconsistent with Article 9.2 of the AD Agreement.

7.678 Norway submits that the duty imposed on investigated parties through the contested MIPs may vary with individual export transactions, and could even equal the entire amount of the MIP ("in the theoretical event that the export price is just marginally above zero")[813]. As a result, Norway argues that the amount of anti-dumping duty that may be collected through the MIPs imposed by the investigating authority is not limited to the margin of dumping of any of the investigated parties. Norway argues that the EC should have adopted a "mechanism" to ensure that the MIPs applied could not result in the imposition of a duty that exceeds the maximum amount of *ad valorem* duty that it was entitled to impose. According to Norway, the absence of any such mechanism meant that the measure applied by the EC could not guarantee that the amount of duties imposed through the MIPs, when expressed as a percentage of the relevant export price, did not exceed the margins of dumping determined for the investigated parties. Thus, Norway claims that the EC acted inconsistently with Article VI:2 of the GATT 1994 and Articles 9.1 and 9.3, and as a consequence, also Article 9.2.

(ii) European Communities

The assertion that the MIPs were greater than the relevant normal values

7.679 The EC notes that the investigating authority calculated the MIPs in question on the basis of the non-injury price, not the normal values of the investigated parties. In doing so, the EC contends that the investigating authority assessed and confirmed that the MIPs imposed were below the investigated parties' "non-dumped" MIPs. The EC rejects Norway's calculation of the investigated parties' normal values showing that the vast majority of these were below the final MIPs imposed, arguing that Norway's figures are speculative and based on mere hypotheses. Thus, the EC rejects Norway's claim that it acted inconsistently with Article VI of the GATT and Articles 9.2 and 9.4 of the AD Agreement.

7.680 The EC explains that the methodology applied by the investigating authority to calculate the investigated parties' "non-dumped" MIPs for each presentation of salmon involved initially establishing the "non-dumped" MIP for one of the presentations, whole fish. The investigating authority did this by first identifying the full cost of production, including SG&A cost, for the most common presentation – chilled head-on salmon. The investigating authority then applied a "standard adjustment factor" of 0.9 to arrive at a cost of production for whole fish. It then added costs relating to shipment to the EC border, CIF level, as well as an amount for profit calculated at 8 per cent of the CIF value. For the five other presentations of salmon, the investigating authority determined the full cost of production by "applying the same standard adjustments" to each presentation. Once these were determined for each presentation, they were adjusted by adding shipping costs to CIF EC border and profit.

7.681 The EC justifies the investigating authority's adjustment to CIF level by arguing that it was necessary in order to bring the normal values to the level that is traditionally used by the EC to charge duties, and hence compare with the "non-injury" MIP, which was set at the same level. According to the EC, an alternative approach would be to set the MIPs at the actual normal value, and reduce the invoice price of imported salmon by an amount corresponding to transport and insurance costs. The EC argues that the result of this alternative, in terms of duty imposed under the MIP, would be the same as the approach adopted by the investigating authority. It argues, however, that it would considerably add to the cost and bother of passing goods through customs control.

[813] Norway, FWS, para. 662.

7.682 The "non-dumped" MIPs were initially derived in NOK. In order to compare them with the "non-injury" MIPs, the investigating authority applied a three-year-average exchange rate. The EC defends the investigating authority's use of the three-year-average exchange rate by arguing that the application of this exchange rate followed logically from the fact that the costs used to calculate the normal values were in part collected over the same three year period.

The assertion that MIPs were greater than the relevant margins of dumping

7.683 In essence, the EC argues that Article 9.4(ii) assumes that Members may impose anti-dumping duties in the form of MIPs set at the level of a normal value calculated during an anti-dumping investigation. According to the EC, the language of Article 9.4(ii) does not envisage an upper limit on the duty that may be collected through the application of MIPs. In this regard, the EC contends that all that the text of Article 9.4(ii) reveals is that the duty collected must be equivalent to the difference between the export price and the normal value. Nevertheless, the EC acknowledges that MIPs might on occasion result in the collection of a duty that exceeds the *actual* margin of dumping for a particular import transaction. However, in the EC's view, this is not an anomaly, because the same result may obtain when applying more conventional type of prospective anti-dumping duties. In both cases, the EC argues that the AD Agreement provides for the possibility of being reimbursed for duties collected in excess of the actual margins of dumping through the refund procedure established under Article 9.3.2.

7.684 The EC finds further support for its view that Article 9.4(ii) does not limit the amount of anti-dumping duty that may be collected through MIPs in the Panel's finding in the *Argentina – Poultry Anti-Dumping Duties* case. The EC argues that there is no significant difference between the facts in that case and those before the Panel in the present dispute. Thus, although the issue of the kind of cap suggested by Norway was not discussed in *Argentina – Poultry Anti-Dumping Duties*, the EC contends that the Panel's ruling in that case clearly established the legitimacy of MIPs and their consistency with the requirements of Article 9 of the AD Agreement.

7.685 The EC also argues that the requirement in Article 9.3 to ensure that the "amount of anti-dumping duty shall not exceed the margin of dumping as established under Article 2", does not refer to the margin of dumping determined in the original investigation, but rather the margin of dumping relating to import transactions made after the imposition of measures, calculated for the purpose of a duty refund proceeding under Article 9.3.2. According to the EC, if this were not the case, there would be no recourse for an importer to claim duty refund in a situation where the exporter no longer dumped after the imposition of measures. Thus, the EC argues that the MIPs imposed on the investigated parties cannot be found to be inconsistent with Article 9.3 for the sole reason that, at certain price levels, they result in the collection of anti-dumping duties, which when expressed in *ad valorem* terms, are greater than the margin of dumping calculated in the original investigation. For the same reason, the EC argues that the MIPs cannot be found to be inconsistent with the respective requirements in Article VI:2 of the GATT 1994 and Article 9.1 of the AD Agreement to ensure that "an anti-dumping duty [is] not greater in amount than the margin of dumping" or "the amount of the anti-dumping duty to be imposed be the full margin of dumping or less".

(b) Arguments of the third parties

(i) China

7.686 China considers that the MIPs imposed by the EC were inconsistent with the AD Agreement because, with six different MIPs, the EC did not impose "a single anti-dumping duty" against "a single product" in a single investigation. According to China, there should be only one duty imposed for each product investigated against each exporter/producer concerned. In China's view, the wording of various provisions of the AD Agreement (Articles 2.1, 6.10, 9.1, 9.2 and 9.3) demonstrates that the

drafters intended a strict corresponding relationship between a product (singular form), a margin of dumping (singular form), an exporter/producer (singular form), and an antidumping duty (singular form). Thus, China submits that once an investigating authority has defined "a product", i.e., the product under consideration, it is required to determine "an individual margin of dumping" for "a known exporter or producer" and impose "an anti-dumping duty" against such a product and such an exporter/producer.

(ii) Japan

7.687 Japan does not challenge the right of a WTO Member to assess and collect anti-dumping duties through the imposition of prospective normal values and a non-injurious MIP, as applied by the EC in the case at hand. However, Japan takes issue with the alleged lack of transparency in respect the EC's calculation of the level of the MIP. In addition, Japan doubts the consistency of the duty collection system applied by the EC with the obligations of Article VI of GATT 1994 and the AD Agreement not to impose duties in excess of the margin of dumping found to exist.

7.688 Japan considers that the lack of transparency evident in the EC's calculation of the MIPs is more than simply a problem of procedure. In the absence of a reasoned and adequate explanation of the determination made, the conclusion of the EC that the non-injurious MIPs did not exceed the level of the non-dumped MIPs, and that it therefore complied with its obligation under the AD Agreement, becomes a mere assertion. In the absence of an adequate and reasoned explanation, no meaningful review by a Panel is possible.

7.689 Japan notes that Articles 9.1 and 9.3 of the AD Agreement and Article VI .2 of GATT 1994 make clear that an authority is not allowed to impose a duty in excess of the margin of dumping found to exist. In the light of this obligation, Japan believes it is incumbent upon the authorities to demonstrate through a reasoned and adequate explanation that the level of the duty imposed did not exceed the level of the margin. Japan invites the panel to examine whether the EC can be found to have met its obligation under Articles 9.1 and 9.3 of the AD Agreement and Article VI .2 of GATT 1994 in the absence of a clear and objective basis for the calculation of such duties.

(iii) United States

7.690 Consistent with Articles 9.1 and 9.3, the amount of any anti-dumping duty may not exceed the margin of dumping. Article VI:2 of the GATT 1994, read in conjunction with Article VI:1, provides that the margin of dumping is the price difference when a product is being introduced into the commerce of the importing country at a price less than normal value. Article 9.4 of the AD Agreement recognizes that a Member may utilize a prospective normal value system of assessing antidumping duties. Assuming Norway's description of the EC's minimum import price ("MIP") system is accurate, and based on the EC's description in its own submission, the system appears to operate in a similar fashion to a prospective normal value system. To the extent that the EC used MIPs that exceed properly established normal values, the antidumping duties calculated on the basis of such MIPs would exceed the margin of dumping. If this is the case, such action would be inconsistent with Article VI:2 of the GATT 1994, and Articles 9.1, 9.2, 9.3 and 9.4 of the AD Agreement.

(c) Evaluation by the Panel

(i) Facts

7.691 Before turning to address Norway's claims, we believe it is useful to briefly set out the pertinent facts surrounding the investigating authority's calculation of the MIPs for the investigated and non-investigated parties.

7.692 We recall that, except for one company that obtained a *de minimis* margin of dumping, the investigating authority established MIPs in respect of six different presentations of salmon at the same levels for all investigated and non-investigated parties. These MIPs were based on the "non-injurious" MIPs calculated for the different presentations of salmon, because these were found to be lower than each investigated party's "non-dumped" MIPs for the corresponding salmon presentations.[814]

7.693 The Definitive Regulation reveals that the "company-specific non-dumped" MIPs that were compared with the "non-injurious" MIPs were calculated on the basis of "normal value, adjusted to the net free-at-Community-border price".[815] However, neither the Definitive Regulation nor any of the individual company disclosures explain how the investigating authority determined the "company-specific non-dumped" MIPs for each of the individual presentations of salmon. The EC has explained that this involved a number of steps, which we understand to be the following: First, for each investigated party, the investigating authority calculated a "non-dumped" MIP for one type of presentation, whole fish. To do this, the EC identified the actual cost of production, including SG&A cost, calculated for *another* presentation, chilled head-on salmon, and adjusted this by a "standard adjustment factor" of 0.9.[816] The EC has not explained what it means by a "standard adjustment factor". However, we understand that the EC is referring to what is described in the Definitive Regulation as the "weight conversion factors, as contained in Council Regulation (EC) No 772/1999".[817] Our understanding from the information contained in Council Regulation (EC) No 772/1999 and the parties' responses to Panel Question 130, is that "weight conversion factors" are factors that may be used to convert the weight of one salmon presentation into another.[818] For instance, the weight conversion factor of 0.9 for chilled head-on salmon means that 90kg of chilled head-on salmon has a whole fish weight of 100kg. Thus, it follows from the EC's explanation that in the investigation at issue, for each investigated party, the investigating authority did not determine the full cost of production of whole fish salmon on the basis of actual data relating to the production of whole fish. Instead, the investigating authority derived these production costs by applying a weight conversion factor to the actual production costs determined for chilled head-on salmon.

7.694 The Definitive Regulation confirms that the investigating authority used "weight conversion factors" when establishing the MIPs. However, it also reveals that "[w]ith regard to the whole fish fillets and fillets cut in pieces, processing costs were taken into account".[819] The EC has not explained how such processing costs were taken into account. Norway asserts that the fact that the investigating authority took processing costs into account when determining the MIPs for "whole fish fillets and fillets cut in pieces" means that it did not apply the "standard" weight conversion factors set out in Council Regulation (EC) No 772/1999 to all presentations covered by the MIPs. We agree with Norway that the langauge in the Definitive Regulation appears to support this assertion.

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[814] A more detailed explanation of the rationale underlying the investigating authority's decision to base the MIPs on "non-injurious" prices is set out above, paras. 7.403 - 7.408.

[815] Definitive Regulation, Recital 129.

[816] EC, Answer to Panel Question 130.

[817] Definitive Regulation, Recital 132.

[818] EC, Answer to Panel Question 130; Norway, Comments on the European Communities' Answer to Panel Question 130. Council Regulation (EC) No 772/1999 of 30 March 1999 imposing definitive anti-dumping and countervailing duties on imports of farmed Atlantic salmon originating in Norway and repealing Regulations (EC) No 1890/97 and (EC) No 1891/97, Official Journal L101/1, 16 April 1999. Paragraph 17 of Regulation 772/1999 states that the weight conversion factors used in that investigation are set forth in the Notice of Initiation of that investigation. The Notice of Initiation reveals the following weight conversion factors: "Gutted head-on" salmon – "0,90"; "Gutted head-off" salmon – "0,80"; "whole fish fillets above 300 gm each" – "0,65"; and "other fillets or fillet portions normally weighing 300 gm or less" – "0,56", Official Journal C400/4, 22 December 1998.

[819] Definitive Regulation, Recital 132.

7.695 After it had derived the cost of production for whole fish salmon, the investigating authority next adjusted this amount to account for transport expenses related to shipping the relevant salmon presentation from Norway to the EC border at the level of CIF. The EC has not explained whether the transport costs applied were actual costs incurred by the relevant investigated party, for example, on its export sales, or whether it used some other basis for calculating these costs.

7.696 The investigating authority then added a figure representing an amount of profit of 8 per cent on the CIF adjusted price. We note that the investigating authority used the same percentage profit margin when constructing normal value.[820]

7.697 Finally, in order to compare the "non-dumped" MIPs with the "non-injurious" MIPs, the investigating authority converted the "non-dumped" MIPs expressed in NOK into "non-dumped" MIPs expressed in EUR on the basis of a three year average exchange rate covering 2002, 2003 and the period of investigation. The investigating authority explained that it believed it was appropriate to use a three year average exchange rate because "a number of important costs which [were] included in the normal value [were] incurred over [the] production cycle" of salmon, which the investigating authority considered to have an average duration of three years.[821]

7.698 The EC has submitted the following table to accompany its explanation of how the investigating authority calculated the final "non-dumped" MIPs for each investigated party in respect of *one presentation* – whole fish:[822]

NOK

Company	**Volume Exported to EU (kg WFE)**	**Final COP WFE Ex-W**	**Transport + Tax + Miscellaneous cost per unit**	**CIF Turnover**	**CIF per unit**	**Non-dumped MIP**
Fjord Seafood	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]
Marine Harvest	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]
Grieg Seafood	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]
Stolt Seafarm	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]
Follalaks	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]
Hydroteck	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]
Pan Fish	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]
Seafarm Invest	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]
Weighted Average	**[[XXX]]**			**[[XXX]]**	**[[XXX]]**	**[[XXX]]**

[820] Provisional Regulation, Recital 30.
[821] Definitive Regulation, Recital 130.
[822] Exhibit EC-77.

Euro (1 Euro = 7.942 NOK, three year average)

Company	Volume Exported to EU (kg WFE)	Final COP WFE Ex-W	Transport + Tax + Miscellaneous cost per unit	CIF Turnover	CIF per unit	Non-dumped MIP
Fjord Seafood	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]
Marine Harvest	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]
Grieg Seafood	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]
Stolt Seafarm	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]
Follalaks	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]
Hydroteck	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]
Pan Fish	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]
Seafarm Invest	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]	[[XXX]]
Weighted Average	**[[XXX]]**			**[[XXX]]**	**[[XXX]]**	**[[XXX]]**

7.699 We note that the MIP imposed in the Definitive Regulation on all investigated and non-investigated parties in respect of "whole fish, fresh, chilled or frozen" salmon was EUR 2.80 per kg. The above table shows that all of the "non-dumped" MIPs calculated for the investigated parties were greater than the MIP imposed in the Definitive Regulation. Likewise, the above table indicates that the weighted average of the company-specific non-dumped MIPs for whole fish was also above EUR 2.80 per kg.

7.700 The EC has not provided a similar table or explanation in respect of the "non-dumped" MIPs calculated for all of the other salmon presentations. However, it argues that "[s]ince the figures for other presentations are the result of applying the same standard adjustments that were used in the calculations of the cost of production, the same result necessarily follows for them".[823] We understand this statement to mean that the "company-specific non-dumped" MIPs calculated for all other presentations were based on a cost of production derived using "weight conversion factors", adjusted for shipping costs to the EC and a profit margin of 8 per cent.

(ii) Allegation that the MIPs imposed on the investigated parties were inconsistent with Article 9.2 of the AD Agreement and Article VI:2 of the GATT 1994

7.701 As we understand it, the system of MIPs imposed by the investigating authority results in the collection of anti-dumping duties through the application of a "prospective reference price" which the EC argues was less than the normal value. The Definitive Regulation explains that each time a presentation of salmon is imported at a price below the relevant MIP for that presentation, the amount of anti-dumping duty collected would be equivalent to the "difference between the actual price and the minimum import price".[824] Thus, the MIP for each separate salmon presentation acts as a "prospective reference price", which may result in the collection of variable amounts of anti-dumping duty, depending upon the difference between the export price and the MIP.

[823] EC, Answer to Panel Question 130.
[824] Definitive Regulation, Recital 133.

7.702 Norway argues that Article 9.2 of the AD Agreement and Article VI:2 of the GATT 1994 require that MIPs imposed on investigated parties not exceed the respective normal values of those investigated parties. According to Norway, the MIPs imposed by the investigating authority in the present investigation were, for various reasons, greater than the normal values of the individually investigated parties. The EC shares Norway's view that MIPs imposed on investigated parties must not exceed their respective normal values. However, according to the EC, the MIPs imposed by the investigating authority in the present investigation were lower than the respective normal values of the investigated parties.

7.703 Norway's claim is focused on the *level* of MIPs set by the investigating authority for the six different salmon presentations for all investigated parties. Although the collection of variable anti-dumping duties on the basis of a "prospective normal value" or an equivalent or lower MIP is permissible under the AD Agreement,[825] there is no explicit guidance in the GATT 1994 or the AD Agreement on the *maximum* level at which the "prospective normal value" or MIP must be set for *investigated parties*. In this regard, the parties agree that the relevant benchmark is the respective normal values of the investigated parties.[826] According to Norway, this flows from the obligation in Article 9.2 to collect anti-dumping duties in the "appropriate amounts", when read together with various other provisions, including Articles 2.1 and 9.4 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994.

7.704 Article 9.2 of the AD Agreement is one of several provisions in Article 9 addressing the "Imposition and Collection of Anti-Dumping Duties". One of its requirements is that any anti-dumping duties imposed must be collected "in the appropriate amounts". However, Article 9.2 does not explain how to determine the "appropriate" amounts of any anti-dumping duty to be collected. The dictionary definitions of the word "appropriate" include "specially suitable (for, to); proper, fitting".[827] This suggests that the "appropriate" amount of anti-dumping duty is the amount of duty that is "proper" or "fitting" in the context of an anti-dumping investigation.

7.705 Article VI:2 of the GATT 1994 reveals that the purpose of imposing and collecting anti-dumping duties is to "offset or prevent dumping". This principle is reflected in Article 9.1 of the AD Agreement, which provides that an anti-dumping duty may only be imposed when "all requirements for the imposition have been fulfilled". It follows that the "appropriate" amount of anti-dumping duty must be an amount that results in offsetting or preventing dumping, when all other requirements for the imposition of anti-dumping duties have been fulfilled. Dumping is defined in both Article VI:1 of the GATT 1994 and Article 2.1 of the AD Agreement, in essentially the same terms, as the introduction of a product into the commerce of another country at a price which is "less than its normal value". Thus, to the extent that an anti-dumping duty may be imposed to offset or prevent dumping, it follows that it may only be collected when the price of the imported product is *less* than its normal value. No anti-dumping duty may be imposed (and therefore collected) when the price of an imported product is above its normal value. To this extent, normal value constitutes a point of reference for determining when anti-dumping duties may or may not be imposed and collected.

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[825] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.359; Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") ("US - Zeroing (EC)*"), WT/DS294/R, adopted 9 May 2006, para. 7.206; and Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("*US – Zeroing (Japan)*"), WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report, WT/DS322/AB/R, paras. 7.201, 7.205-7.206.

[826] Norway, FWS, paras. 643-651; Norway, Answer to Panel Questions 69 and 90; EC, Answer to Panel Question 90; EC, Oral Statement at the Second Substantive Meeting of the Parties, para. 71.

[827] New Shorter Oxford English Dictionary, Clarendon Press, 1993.

7.706 All this suggests that normal value must also be determinative of the "appropriate" amount of anti-dumping duty that may be collected in the context of the application of a MIP. Thus, it would not be "appropriate" to collect anti-dumping duties through the imposition of a MIP that was greater than normal value, because this would imply that anti-dumping duties could be collected even when export price was above the normal value. Therefore, it follows that when collecting anti-dumping duties through application of a MIP, the "appropriate" amount of anti-dumping duty pursuant to Article 9.2 must be one where the *maximum* level of the MIP imposed on an investigated party is its normal value.

7.707 We find important contextual support for this conclusion in Article 9.4. Article 9.4 explicitly recognizes that a "prospective normal value" may be applied for the purpose of collecting anti-dumping duties from parties not included in a limited investigation undertaken pursuant to Article 6.10. To this end, Article 9.4(ii) establishes that for such non-investigated parties, an investigating authority will be entitled to apply anti-dumping duties in an amount not greater than the "difference between the weighted average normal value of the selected exporters or producers and the export prices" of the non-investigated parties. Article 9.4(ii) thereby sets the maximum level of the "prospective normal value" that could be applied to non-investigated parties at the weighted average of the normal values of the investigated parties. In our view, it would make sense to consider that essentially the same benchmark – normal value – should be equally relevant when applying a "prospective reference price" to investigated parties. In this regard, we find the last sentence of Article 9.4 to be particularly instructive. This sentence reads:

> "The authorities shall apply *individual* duties or *normal values* to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6." (Emphasis added).

7.708 Thus, the last sentence of Article 9.4 explicitly recognizes that the benchmark for a MIP applied to any individual exporter or producer that has provided information of the kind that could result in the calculation of an individual margin of dumping in accordance with Article 6.10.2, may be equivalent to its "individual ... normal values".

7.709 For all of the above reasons, we therefore conclude that in order to comply with the requirement in Article 9.2 of the AD Agreement that anti-dumping duties be collected in the "appropriate amounts", Members imposing MIPs on investigated parties must ensure that they do not exceed their respective normal values.

> *Whether the MIPs imposed on investigated parties were greater than their respective normal values*

7.710 We understand Norway to have argued that the MIPs imposed on the investigated parties exceeded their individual normal values for essentially four reasons: First, because for one company, Sinkaberg-Hansen, Norway contends that the EC has practically admitted that the "non-dumped" MIPs were based on a determination of dumping that was unreliable. Secondly, Norway asserts that the "non-dumped" MIPs were set at CIF Community border levels, thus raising them above the respective normal values. Thirdly, to the extent that it used a three-year average exchange rate, instead of the exchange rate for the period of investigation, to convert the "non-dumped" MIPs expressed in NOK to EUR, Norway submits that the investigating authority inflated those MIPs. And fourthly, because in calculating the "non-dumped" MIPs, the investigating authority used "weight conversion factors" instead of actual costs of production for five of the six presentations of salmon.

7.711 Below, we address the merits of each of Norway's assertions in turn. However, before doing so, we recall that the MIPs established by the investigating authority were based on the "non-

injurious" MIPs, because these were found to be lower than the "non-dumped" MIPs. The level of the "non-dumped" MIPs was therefore critical to the investigating authority's decision to set the MIPs equal to the "non-injurious" MIPs. Thus, to the extent that we may find any flaw in the investigating authority's calculation of the "non-dumped" MIPs that could potentially have caused them to be overstated, we believe that the factual basis for the investigating authority's conclusion that the "non-dumped" MIPs were lower than the "non-injurious" MIPs must also be flawed, rendering the imposition of the latter on the investigated parties inconsistent with the obligation under Article 9.2 to collect anti-dumping duties in the "appropriate amounts". In our view, it is neither necessary nor permitted, under the standard of review set out in Article 17.6 of the AD Agreement, for us to determine whether any error in the calculation of the "non-dumped" MIPs could in actual fact render the "non-dumped" MIPs lower than the "non-injurious" MIPs. In this regard, we believe that it would be sufficient, in order to conclude that the investigating authority has not satisfied the obligation set out in Article 9.2, to find that the factual basis upon which the investigating authority took the decision to base the MIPs on the "non-injurious" MIPs was erroneous.

- The "non-dumped" MIPs calculated for Sinkaberg-Hansen

7.712 In the table submitted by the EC to explain how the investigating authority calculated the "non-dumped" MIPs for each of the investigated parties, the EC did not include the figures for two companies, Nordlaks and Sinkaberg-Hansen. The explanation for not including Nordlaks was that it was determined to have a *de minimis* margin of dumping in the investigation, and therefore not subject to anti-dumping measures. However, the EC explained that it had not disclosed how Sinkaberg-Hansen's "non-dumped" MIPs had been calculated because, "in the light of the claims made by Norway", it considered that Sinkaberg-Hansen's data "gave rise to doubts" about the investigating authority's "calculation of the company's cost of production".[828] Thus, the EC communicated that "the finding of dumping for Sinkaberg cannot presently be regarded as reliable", noting that it would "continue to reconsider expeditiously the relevant data and when that process is completed will take whatever action is appropriate regarding the measure and regarding the position of Sinkaberg in particular".[829]

7.713 As of the time of writing this report, the EC has not communicated the results, if any, of its reconsideration of the position of Sinkaberg-Hansen. In any case, we understand the EC's statement to be an admission that the investigating authority erred in determining Sinkaberg-Hansen's costs of production during the investigation. In particular, we take the EC's statement to mean that it has accepted that the investigating authority erred when it included Sinkaberg-Hansen's revenue from slaughtering services provided to third companies in the calculation of its cost of production for the purpose of determining constructed normal value.[830] Thus, to the extent that the cost of production for each investigated company was a central element of the investigating authority's calculation of the company-specific "non-dumped" MIPs, we find that by overstating Sinkaberg-Hansen's cost of production, the investigating authority also overstated the corresponding "non-dumped" MIPs.

- Adjustment of the normal value to the CIF Community border level

7.714 We recall that the investigating authority constructed normal value for most if not all of the domestic sales of the investigated parties, on the basis of each investigated party's manufacturing costs, SG&A costs and a profit margin of 8 per cent.[831] However, the "non-dumped" MIPs were not strictly set at the levels of the investigated parties' constructed normal values. Rather the "non-

[828] EC, Answers to Panel Questions 128 and 130.
[829] EC, Answer to Panel Question 128.
[830] Our findings in respect of Norway's claims concerning the investigating authority's calculation of Sinkaberg Hansen's constructed normal value are set out above, paras. 7.609.
[831] Provisional Regulation, Recitals 26 and 30.

dumped" MIPs were derived by adding transport and insurance expenses relating to the shipment of salmon presentations from Norway to the CIF Community border level, to the full cost of production, and then adding an amount of 8 per cent of this figure, representing the margin of profit.

7.715 The EC does not argue that the "non-dumped" MIPs were strictly equal to the investigated parties' normal values. However, as we understand it, the EC contends that the adjustment made to bring the normal value to the CIF Community border level was merely made for administrative convenience. In essence, the EC argues that because the export price of any salmon presentation imported to the EC would be assessed by the EC customs authorities for the purpose of collecting anti-dumping duties at the CIF Community border level, it makes administrative sense to set the MIP at a normal value adjusted to the CIF Community border level.[832] In this manner, there would be no need to reduce the CIF invoice price of imported salmon for transport and insurance costs incurred between Norway and the Community border. Thus, the EC argues that the "result in terms of the duty imposed under the MIP would be the same, but the process would considerably add to the cost and bother of passing goods through customs control".[833]

7.716 As we have already noted, the MIPs imposed by the investigating authority will result in the collection of variable amounts of anti-dumping duty, depending upon the difference between the export price and the MIP of the relevant presentation of salmon.[834] Because a MIP must be set at a price that does not exceed the normal value, it follows that the collection of variable anti-dumping duties implies the continued existence of dumping. Under Article 2.4 of the AD Agreement, the comparison between export price and normal value that is required to determine the existence of dumping must be made between prices *at the same level of trade*, normally the ex-factory level. Thus, in normal situations, an investigating authority will adjust export price to the ex-factory level and compare this to a normal value that is also adjusted to the ex-factory level. Alternatively, in situations outside of the norm, it may be appropriate to compare export price with normal value at a level of trade that is different from ex-factory, for example, at the level of distributors. In our view, the principle that export price and normal value be compared at the same level of trade is of equal relevance and importance to the assessment of variable anti-dumping duties through the application of a MIP. However, unlike the situation when such a comparison is necessary for the purpose of determining the existence of dumping, the AD Agreement provides no guidance on how any adjustments to export price and/or normal value must be made in this context. For instance, there is no indication of the appropriate level of trade that an investigating authority must use to assess the relevant amount of duty. Neither is there any guidance on whether adjustments should be made in advance of importation, when setting the MIP, or at the time of importation, when assessing the amount of duty. In this light, we believe that the AD Agreement leaves investigating authorities with a degree of discretion to make the adjustments considered to be most appropriate, in the light of all relevant circumstances, provided that these do not result in the distortion of the relevant export price or normal value.

7.717 In the present investigation, the investigating authority decided that the most appropriate adjustment to make would be one that brought the "non-dumped" MIP to the level of trade of the CIF Community border, because EC customs authorities traditionally assess *ad valorem* anti-dumping duties at this level. In doing so, we note that the investigating authority did not add the CIF adjustment figure to the normal value calculated for each investigated party, but only to the cost of production. Thus, instead of adding transport and insurance costs to the normal value (cost of production plus profit), the investigating authority added these costs to the cost of production. The investigating authority then added a further amount representing 8 per cent of the *CIF adjusted cost of*

[832] EC, SWS, paras. 191-192; EC, Oral Statement at the Second Substantive Meeting of the Parties, para. 71.
[833] EC, Oral Statement at the Second Substantive Meeting of the Parties, para. 71.
[834] *See*, para. 7.701.

production, as profit, to arrive at the "non-dumped" MIP. Obviously, 8 per cent of the CIF adjusted cost of production is greater than 8 per cent of the cost of production. As such, the "non-dumped" MIP derived by the investigating authority was in fact greater than the sum of the normal value calculated for the purpose of the determination of dumping plus the transport and insurance costs. In other words, the figure that would result after the removal of transport and insurance costs from the "non-dumped" MIP would be greater than the normal value. To this extent, the adjustment applied by the investigating authority resulted in overstating normal value. For this reason, we consider that the "non-dumped" MIPs determined by the investigating authority exceeded the appropriate benchmark.

- Conversion of the "non-dumped" MIPs into EUR using a three year average exchange rate

7.718 Norway argues that the investigating authority was not entitled to use a three-year average exchange rate covering the years 2002, 2003 and the period of investigation when converting the "non-dumped" MIPs into EUR for the purpose of comparison with the "non-injurious" MIPs and arriving at the MIPs finally imposed. Norway notes that during this three-year period, the EUR appreciated by 11.6 per cent against the NOK. Thus, by using the lower three-year average exchange rate, instead of the exchange rate for the period of investigation, Norway submits that the investigating authority effectively overstated normal value in EUR by 5.2 per cent.[835]

7.719 In the present investigation, the investigating authority explained that it chose to apply a three-year average exchange rate to determine each of the investigated parties' "non-dumped" MIPs because "a number of important costs which [were] included in the normal value" were incurred over a production cycle for salmon that was on average three years.[836] In other words, the investigating authority chose to apply a three-year average exchange rate because "a number" of the costs used to construct normal value were calculated on the same basis.

7.720 According to the EC's own explanation of the methodology applied by the investigating authority to determine the costs of production of the investigated parties,[837] a three-year average was used to determine one of 12 items of cost (NRCs) used in the calculation of the cost of production of three investigated parties; and one of ten items of cost (finance costs) used in the calculation of the cost of production of five investigated parties. For two investigated parties, all cost elements were derived from data relating to operations undertaken during the period investigation. Thus, the three-year average approach to calculating costs was not applied uniformly to all investigated parties; and only in respect of a very small proportion of the number of cost items used in the determination of eight of the 10 investigated parties' costs of production. In contrast, the three-year average exchange rate was applied to convert all cost elements of the "non-dumped" MIPs into EUR for all ten investigated parties.

7.721 We recall that we have found that the investigating authority's use of a three-year average to calculate the NRCs of [[XXX]] and [[XXX]] and the finance costs of [[XXX]] and [[XXX]] was inconsistent with the AD Agreement.[838] Thus, to the extent that the investigating authority justified the use of a three-year average exchange rate in the calculation of the "non-dumped" MIPs on the basis of its adoption of the same approach to the calculation of the underlying costs, we find that the EC's defence to Norway's claim cannot be sustained. Moreover, even assuming *arguendo* that the use of a three-year average exchange rate were appropriate, we do not believe the application of such a methodology to *all* cost elements of *all* investigated parties could be justified in the present case, given that only one of many cost elements used in the determination of eight investigated parties'

[835] Norway, FWS, para. 633.
[836] Definitive Regulation, Recital 130, Exhibit NOR-11.
[837] Exhibit EC-37.
[838] *See*, paras. 7.510, 7.515 and 7.543.

costs of production was calculated on the basis of a three-year average, and that none of the cost elements of two of the investigated parties were determined on this basis. Thus, we find that the investigating authority's use of a three-year average exchange rate resulted in overstating the "non-dumped" MIPs calculated for the investigated parties.

- Weight conversion factors used to derive cost of production

7.722 For five of the six presentations of salmon the investigating authority determined the investigated parties' "non-dumped" MIPs by applying "weight conversion factors" to derive the relevant costs of production (i.e., manufacturing and SG&A cost), and then adjusting these to the CIF Community border level and adding a amount for profit.

7.723 Once again, we recall that the maximum level at which it is permissible to set a MIP imposed on investigated parties, in order to comply with Article 9.2, is the normal value used for the purpose of determining the existence of dumping. Rules governing the calculation of normal value can be found in Article 2 of the AD Agreement. Depending upon the particular circumstances of an investigation, investigating authorities may determine normal value on the basis of one of three prices: (i) the "comparable price, in the ordinary course of trade, for the like product" sold on the domestic market;[839] (ii) the "comparable price of the like product when exported to an appropriate third country";[840] or (iii) the "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".[841] Guidance on how to calculate costs of production, SG&A expenses and profits can be found in Articles 2.2.1.1 and 2.2.2. These provisions provide that the starting point should always be actual cost data and information reported by the investigated party. However, in certain situations, investigating authorities may have recourse to other sources of information. For instance, Article 2.2.2(iii) indicates that when the amounts for SG&A expenses and profit cannot be based on actual data relating to sales made in the ordinary course of trade, an investigating authority may derive these data through the use of "any other reasonable method". Article 6.8 and Annex II of the AD Agreement permit an investigating authority to use "facts available" to fill a gap created when information necessary for it to make a determination is not forthcoming from an investigated party. Thus, the AD Agreement does not exclude the possibility that an approach which *approximates* an investigated party's costs of production may, in certain circumstances, be appropriate. Therefore, we see no reason why the application of "weight conversion factors" of the kind applied by the investigating authority in the present investigation must be *per se* impermissible.

7.724 Likewise, although the facts appear to demonstrate that the investigating authority did not rely upon "standard" weight conversion factors when deriving the "non-dumped" MIPs for all of the presentations,[842] we do not consider that this alone is enough to show that the "non-dumped" MIPs were flawed. There may well be good reasons for choosing to apply weight conversion factors that result in a higher MIP than would otherwise be the case through the application of "standard" weight conversion factors. Therefore, in the same way that we consider it is possible, in certain circumstances, under the AD Agreement to rely upon "standard" weight conversion factors, it may also be possible to apply weight conversion factors that are different from the "standard".

7.725 We note that Norway has brought numerous detailed claims in this dispute relating to the investigating authority's calculation of constructed normal value for the investigated parties. However, Norway has not brought any specific claim under Articles 2 or 6.8 of the AD Agreement against the investigating authority's use of the "weight conversion factors" for the purpose of

[839] Article 2.1.
[840] Article 2.2.
[841] Article 2.2.
[842] See, para.7.694.

calculating the investigated parties' costs of production for five presentations of salmon. Moreover, we note that in its comments on the EC's explanation of the methodology applied by the investigating authority to derive the "non-dumped" MIPs, Norway explicitly identified "two objections" to the use of weight converions factors: First, that they depart from a "cost-based approach to calculating the normal value plus CIF"; and secondly, that the weight conversion factors applied by the investigating authority were not "standard".[843] However, in raising these objections, Norway has not explained why the investigating authority was required under the AD Agreement to apply a "cost-based approach" when deriving the production costs of the different salmon presentations, or use only "standard" weight conversion factors. We recognize that the EC's disclosure of the details underlying the calculation of the "non-dumped" MIPs only in response to Panel Question 130, following the second substantive meeting of the parties, rendered Norway's task of constructin its arguments more difficult. However, we do not understand Norway to argue that it is for this reason that we must find the use of weight conversion factors resulted in a flawed calculation of the "non-dumped" MIPs.[844] Thus, while it may be true that the investigating authority did not follow a cost-based approach in arriving at the costs of production for five of the six salmon presentations, and while it certainly appears that it did not apply "standard" weight conversion factors for all presentations of salmon, Norway has not established that the investigating authority's approach was inconsistent with any of the disciplines for calculating normal value under the AD Agreement. For this reason, we cannot fault the investigating authority's calculation of the "non-dumped" MIPs simply because of the fact that for five of the six presentations of salmon, it derived the relevant costs of production through the application of "weight conversion ratios".

- Conclusion

7.726 In summary, we have found that:

(i) For one investigated party, Sinkaberg-Hansen, the investigating authority incorrectly calculated the "non-dumped" MIPs for all six presentations of salmon because it erred in the calculation of this company's cost of production;

(ii) For all investigated parties, the "non-dumped" MIPs for all presentations of salmon were greater than their respective normal values because they were inappropriately adjusted to the CIF Community border level;

(iii) For all of the investigated parties, the "non-dumped" MIPs for all presentations of salmon were overstated because of the use of a three year average exchange rate to convert these prices from NOK to EUR, despite the fact that only very few costs used in the calculation of these prices were derived from information averaged over the same three-year period; and

(iv) Norway has not established that the investigating authority was not entitled to use "weight conversion factors" in establishing the costs of production used for the purpose of calculating the "non-dumped" MIPs for five of the six presentations of salmon.

7.727 We recall that the MIPs established by the investigating authority were based on the "non-injurious" MIPs, because these were found to be lower than the "non-dumped" MIPs. To the extent

[843] Norway, Comments on the European Communities' Answers to Panel Questions 130 and 131.

[844] We note that Norway also challenges the investigating authority's alleged failure to provide a reasoned and adequate explanation of its MIP calculations under Article 12 of the AD Agreement. Our views on this claim are set out at para. 7.834.

that we have found that the "non-dumped" MIPs calculated by the investigating authority were greater than the relevant normal values, greater than what they should have been or derived through the application of a flawed methodology, the investigating authority's finding that the "non-injurious" MIPs were less than the "non-dumped" MIPs rested on a flawed factual basis. Thus, in imposing the MIPs on the investigated parties at the level of the "non-injurious" MIPs, the investigating authority did not act consistently with the obligation to ensure that anti-dumping duties must be collected in the "appropriate amounts", within the meaning of Article 9.2 of the AD Agreement.

7.728 We note that Norway has not asserted any basis for its allegations that the MIPs are inconsistent with Article VI:2 that is independent of its allegations of inconsistency with Article 9.2. Accordingly, and in the light of our finding that the investigating authority acted inconsistently with the EC's obligations under Article 9.2, we consider that it is not necessary, in order to resolve this dispute, to make any findings in respect of Norway's claim that the investigating authority's MIPs were also inconsistent with Article VI:2 of the GATT 1994. We therefore decline to do so, on the grounds of judicial economy.

(iii) Allegation that the MIPs imposed on the non-investigated parties were inconsistent with Article 9.4(ii) of the AD Agreement and Article VI:2 of the GATT 1994

7.729 Norway argues that the MIPs imposed on non-investigated parties were inconsistent with Article 9.4(ii) of the AD Agreement and Article VI:2 of the GATT 1994 because they exceeded the weighted average of the normal values of the investigated parties. We begin our evaluation of Norway's claim by reviewing the text of Article 9.4(ii), which reads in relevant part:

> "When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> > (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
> >
> > (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,
>
> provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6."

7.730 As we have already noted,[845] Article 9.4(ii) requires investigating authorities applying a "prospective normal value" to ensure that any amount of anti-dumping duty collected from non-investigated parties does not exceed the difference between the "weighted average normal value of the selected exporters or producers" and the export price of the non-investigated parties. The *proviso* in Article 9.4 indicates that "margins established under the circumstances referred to" in Article 6.8 must be disregarded "for the purpose of this paragraph". In our view, this implies that the margins of dumping calculated on the basis of "facts available" within the meaning of Article 6.8 must be excluded when setting the benchmark for duty collection in accordance with either Article 9.4(i) *or* (ii). If the exclusion of such margins were only required in respect of duty collection pursuant to Article 9.4(i), we do not see why the drafters of the provision would have explicitly stated that the

[845] *See*, para. 7.707.

proviso was intended to operate for the purpose of the *entire* paragraph. Moreover, we note that the *proviso* is expressed in the same sentence that includes the two methodologies described in Article 9.4(i) and (ii).

7.731 In the context of Article 9.4(ii), Norway argues that the exclusion of margins of dumping established on the basis of "facts available" means that normal values that have been calculated on the basis of "facts available" must be disregarded in setting the appropriate level of the applicable MIP because normal values "are an integral part of the calculation of margins".[846] We agree. Whenever "facts available" are used to determine an investigated party's normal value, the margin of dumping that is determined for that party will be established on the basis of "facts available", within the meaning of Article 6.8. Thus, the requirement that "facts available" margins be disregarded for the purpose of setting the "prospective normal value" referred to in Article 9.4(ii) means that any normal values of investigated parties calculated on the basis of "facts available" must be excluded from the calculation of the "weighted average normal value of the selected exporters or producers". To this extent, we find that Article 9.4(ii) sets the maximum level of the "prospective normal value" that may be imposed on non-investigated parties at the weighted average of the normal values of the investigated parties, excluding any normal values calculated for investigated parties on the basis of "facts available" within the meaning of Article 6.8.

7.732 Norway asserts that the MIPs imposed on the non-investigated parties did not meet this standard. First, for the same reasons that we have explained and addressed in the previous section, Norway argues that the "non-dumped" MIPs calculated for each of the investigated parties exceeded their respective normal values. As such, the weighted average of the "non-dumped" MIPs must have necessarily also exceeded the weighted average of the investigated parties' respective normal values. Secondly, Norway argues that the weighted average of the "non-dumped" MIPs of the investigated parties was flawed because: (i) it was calculated in part on the basis of the individual "non-dumped" MIP determined for Seafarm Invest, even though the Definitive Regulation reveals that the investigating authority did not calculate an individual margin of dumping for this company, and treated it in the same way as another company, Marine Harvest; and (ii) it was calculated in part on the basis of the normal value determined for Grieg Seafood through the application of "facts available".

7.733 We note that the Definitive Regulation does not indicate whether the investigating authority actually compared the "non-injurious" MIPs with the weighted average of the "non-dumped" MIPs calculated for each of the investigated parties for each presentation of salmon. The EC has not argued that the investigating authority actually undertook any such assessment. However, the EC argues that, on the basis of the "non-dumped" MIPs that were determined for the investigated parties, as well as the relevant volume and CIF turnover data, the weighted average of the "non-dumped" MIPs of the investigated parties for each presentation of salmon was greater than each corresponding "non-injurious" MIP.[847]

Reliance on the "non-dumped" MIPs calculated for investigated parties

7.734 We recall that the investigating authority's finding that the "non-injurious" MIPs were less than the "non-dumped" MIPs calculated for each of the investigated parties was deficient because the "non-dumped" MIPs were greater than the relevant normal values, greater than what they should otherwise have been and because derived through the application of a flawed methodology.[848] It follows that there is no objective factual basis to support the EC's contention that the "non-injurious" MIPs were less than the *weighted average* of the "non-dumped" MIPs determined for the investigated

[846] Norway, Comments on the European Communities' Answers to Panel Questions 130 and 131.
[847] EC, Answer to Panel Question 130.
[848] *See*, para. 7.727.

parties for each presentation of salmon. In other words, because the weighted average of the "non-dumped" MIPs for investigated parties did not amount to the weighted average of the normal values of the investigated parties, there is no objective factual basis for concluding that the "non-injurious" MIPs were lower than the weighted average of the normal values of the investigated parties. Thus, we find that the investigating authority failed to comply with the obligation in Article 9.4(ii) of the AD Agreement to ensure that any MIPs imposed on non-investigated parties did not exceed the weighted average of the normal values of the investigated parties.

Reliance on the "non-dumped" MIPs calculated for Seafarm Invest

7.735 In its response to Panel Question 130, the EC explained that the investigating authority calculated individual "non-dumped" MIPs for all presentations of salmon for Seafarm Invest. Exhibit EC-77 shows that these "non-dumped" MIPs were different from those calculated for Marine Harvest. However, we can find no evidence of the investigating authority having actually determined a company-specific margin of dumping (normal value or export price) for Seafarm Invest. On the contrary, the investigating authority's Definitive Disclosure to Seafarm Invest noted that it had decided to treat this company in the same way as Marine Harvest.[849] Moreover, the Definitive Regulation shows that Seafarm Invest was attributed the same margin of dumping as Marine Harvest, 11.2 per cent. Thus, to the extent that it is based upon the unsubstantiated calculation of separate "non-dumped" MIPs for Seafarm Invest, the EC's contention that the weighted average of the "non-dumped" MIPs calculated for all of the investigated parties was greater than the "non-injurious" MIPs for each of the presentations of salmon, rests on a flawed factual basis. In other words, to the extent that the EC's calculation of the weighted average of the "non-dumped" MIPs for investigated parties relies in part on the "non-dumped" MIPs of Seafarm Invest, which cannot be substantiated on the basis of the evidence that is before us, that figure cannot amount to the weighted average of the normal values of the investigated parties. There is therefore no objective factual basis for concluding that the "non-injurious" MIPs were lower than the weighted average of the normal values of the investigated parties. Thus, we find that the investigating authority failed to comply with the obligation in Article 9.4(ii) of the AD Agreement to ensure that any MIPs imposed on non-investigated parties did not exceed the weighted average of the normal values of the investigated parties.

Reliance on the "non-dumped" MIPs calculated for Grieg Seafood

7.736 We have found elsewhere in this report that the investigating authority determined Grieg Seafood's filleting and finance costs, and thereby Grieg's constructed normal value, on the basis of "facts available", in a manner that was inconsistent with Article 6.8 and paragraph 3 of Annex II.[850] The EC's explanation of the investigating authority's methodology for calculating the investigated parties' "non-dumped" MIPs confirms that the cost components of Grieg's constructed normal value that were impermissibly derived from "facts available" were used to establish its "non-dumped" MIPs.

7.737 We recall that when setting MIPs for non-investigated parties at the level of the weighted average of the normal values of the investigated parties, investigating authorities must ensure that they disregard normal values determined on the basis of "facts available".[851] The EC has argued that the weighted average of the "non-dumped" MIPs for the investigated parties, including those of Grieg, was greater than the "non-injurious" MIPs for all presentations of salmon. For this reason, the EC submits that the MIPs imposed on non-investigated parties were consistent with Article 9.4(ii). However, to the extent that the weighted average of the "non-dumped" MIPs calculated by the EC included the "non-dumped" MIPs for Grieg, we believe that the comparison made by the EC is

[849] Exhibit NOR-85.
[850] *See*, paras. 7.372 and 7.336.
[851] *See*, para. 7.731.

flawed. This is because the inclusion of Grieg's "non-dumped" MIPs means that the weighted average of the "non-dumped" MIPs of the investigated parties that the EC relies upon does not represent the weighted average of the normal values of the investigated parties that is referred to in Article 9.4(ii). Thus, the conclusion that the MIPs imposed on non-investigated parties were consistent with Article 9.4(ii) is erroneous because there is no objective basis to find that they were lower than the weighted average of the investigated parties' normal values, *excluding all normal values calculated on the basis of "facts available"*. To this extent, we find that the MIPs established for the non-investigated parties were inconsistent with Article 9.4(ii).

Conclusion

7.738 We have found that there is no objective factual basis to support the conclusion that the MIPs imposed on non-investigated parties were lower than the weighted average of the normal values of the investigated parties, excluding normal values calculated on the basis of "facts available", for the following reasons:

(i) the weighted average of the "non-dumped" MIPs of the investigated parties did not amount to the weighted average of the normal values of the investigated parties, because the "non-dumped" MIPs used for this purpose were greater than the relevant normal values, greater than what those normal values should have otherwise been and derived through the application of a flawed methodology;

(ii) the weighted average of the "non-dumped" MIPs of the investigated parties did not amount to the weighted average of the normal values of the investigated parties, because it includes the "non-dumped" MIPs allegedly calculated for Seafarm Invest which cannot be substantiated on the basis of the evidence that is before us; and

(iii) the weighted average of the "non-dumped" MIPs of the investigated parties did not amount to the weighted average of the normal values of the investigated parties, because it includes the "non-dumped" MIPs calculated for Grieg Seafood on the basis of "facts available".

7.739 For all of the foregoing reasons, we find that the MIPs imposed on the non-investigated parties were inconsistent with Article 9.4(ii). Once again, we note that Norway has not asserted any basis for its allegations that the MIPs are inconsistent with Article VI:2 that is independent of its allegations of inconsistency with Article 9.4(ii). Accordingly, and in this light, we do not consider it is necessary, in order to resolve this dispute, to make any findings in respect of Norway's claim under Article VI:2 of the GATT 1994. We therefore decline, on the grounds of judicial economy, to make a finding on whether the MIPs imposed on non-investigated parties were also inconsistent with Article VI:2 of the GATT 1994.

(iv) Allegation that the MIPs imposed on the investigated parties were inconsistent with Articles 9.1, 9.2 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994

7.740 Norway contends that Articles 9.1 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 require that, when imposing measures on the basis of MIPs, investigating authorities must ensure that the amount of duty collected does not exceed the margin of dumping calculated in the original investigation. Thus, according to Norway, in imposing a system of measures based on MIPs on the investigated parties, the EC should have applied a mechanism to ensure that the collection of a duty greater than the *ad valorem* equivalent of the margin of dumping from the original

investigation was not possible. In Norway's view, the EC's failure to do so, meant that it acted inconsistently with these provisions.

7.741 The EC argues that anti-dumping duties collected from investigated parties on the basis of a MIP do not need to be capped at the *ad valorem* equivalent of the margin of dumping calculated in the original investigation. In this regard, the EC submits that investigating authorities applying MIPs to investigated parties are entitled to collect anti-dumping duties in the amount of the difference between the MIP that is imposed and the relevant export price of the transactions being assessed. The EC finds support for this in Article 9.4(ii), which specifically envisages that the total duty amount to be collected from *non-investigated parties* through the application of a MIP should be the difference between the weighted average normal values of the investigated parties and the export price of the relevant non-investigated party. In addition, the EC argues that the "margin of dumping" that is referred to in Article 9.3 is the "margin of dumping" that is determined for imports on which anti-dumping duties have already been charged, in the context of a refund proceeding under Article 9.3.2. Thus, according to the EC, the obligation under Article 9.3 to collect anti-dumping duties in an amount which does not exceed the "margin of dumping as established under Article 2" does not refer to the margin of dumping in the original investigation, but to the margin of dumping determined for the purpose of a refund proceeding.

7.742 In essence, we understand Norway to be arguing that in the context of the application of a MIP system to collect anti-dumping duties from *investigated parties*, the maximum amount of duty that may be collected is set at the difference between the individual normal values of the investigated parties and their individual export prices, *provided that this difference does not exceed the ad valorem equivalent of the margin of dumping calculated in the original investigation*. In other words, Norway contends that there is a cap on the amount of duty that may be collected through the use of the application of a MIP from an investigated party at the level which corresponds to the margin of dumping calculated in the *original investigation*.

7.743 As we have noted elsewhere in this report, Article 9 regulates the imposition and collection of anti-dumping duties. Pursuant to Article 9.3, investigating authorities must ensure that the amount of the anti-dumping duty collected does not "exceed the margin of dumping as established under Article 2". In our view, this obligation reflects Article VI:2 of the GATT 1994, which provides that anti-dumping duties may be levied on any dumped product in an amount "not greater ... than the margin of dumping in respect of that product". The parties argue that Article 9.3 of the AD Agreement applies equally to all duty collection systems, including those relying on a "prospective normal value" or allegedly equivalent MIP, as is the case in the present dispute. We agree, and believe that the same may be said for Article VI:2 of the GATT 1994. Moreover, to the extent that the AD Agreement is intended to implement Article VI of the GATT 1994, we consider Article 9.3 to be particularly instructive in identifying the circumstances when the obligation under Article VI:2 will be satisfied.

7.744 The modalities for ensuring compliance with Article 9.3 are set out in three sub-ordinate paragraphs. The first of these, Article 9.3.1, addresses duty assessment in the context of *retrospective* systems of duty collection. Retrospective duty assessment systems operate by virtue of the assessment of final liability for the payment of anti-dumping duties on a retrospective basis, that is, after imports have been undertaken. In *US – Zeroing (Japan)*, the Appellate Body explained that the obligations on investigating authorities operating such systems include the requirement to:

> "ensure that the total amount of anti-dumping duties collected from all the importers of [the product under consideration] does not exceed the total amount of dumping

> found in *all* sales made by the exporter or foreign producer, calculated according to the margin of dumping established for that exporter or foreign producer ... ."[852]

7.745 The Appellate Body made this observation in the context of its assessment of whether the collection of anti-dumping duties on imports made on a transaction- or importer-specific basis involved the calculation of margins of dumping.[853] In this regard, we note that it is well established that duty collection or assessment proceedings take place *after* the imposition of an anti-dumping measure, and relates to import sales made over a period of time which starts and finishes *beyond* the period of investigation used in the original investigation. Thus, the Appellate Body's reference to the "total amount of dumping found in *all* sales by the exporter or foreign producer" must necessarily refer to the amount of dumping corresponding to the margin of dumping calculated for sales made *after* the original investigation. Therefore, the Appellate Body's statement does not support the view that the "margin of dumping" that is relevant for the purpose of determining the maximum amount of anti-dumping duty that may be collected under Article 9.3 in a retrospective duty assessment system must correspond to the *ad valorem* equivalent of the margin of dumping calculated in the *original investigation*.

7.746 Article 9.3.2 explains how investigating authorities may go about ensuring that the amount of anti-dumping duty does not exceed the "margin of dumping as established under Article 2" when the amount of anti-dumping duty is assessed "on a prospective basis". Article 9.3.2 reads:

> "When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision." (Emphasis added.)

7.747 It is instructive for present purposes to note that Article 9.3.2 requires that investigating authorities assessing the amount of anti-dumping duty "on a prospective basis" must, on request, refund any duty collected in excess of the "actual margin of dumping". Arguably, the same requirement applies to prospective normal value systems of duty assessment.[854] As the Panel in *Argentina – Poultry Anti-Dumping Duties* observed, the dictionary definitions of the word "actual" include "existing now; current".[855] Like that panel, we also consider that this terminology indicates that investigating authorities operating prospective normal value systems must, on request, provide for a refund of duties paid in excess of the margin of dumping prevailing "*at the time the duty is collected*".[856] In other words, Article 9.3.2 establishes a mechanism for ensuring that the maximum amount of anti-dumping duty that may be collected when duty is assessed on the basis of a prospective normal value is equivalent to the margin of dumping determined for the sales that are subject to duty assessment.

7.748 Thus, to the extent that the operation of Articles 9.3.1 and 9.3.2 is intended to result in the final collection of anti-dumping duties in amounts corresponding to the levels of dumping found on the export transactions that are subject to duty assessment, it follows that the "margin of dumping" for

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[852] Appellate Body Report, *US – Zeroing (Japan)*, para. 156.
[853] Appellate Body Report, *US – Zeroing (Japan)*, paras. 152-156.
[854] Panel Report, *US – Zeroing (Japan)*, para. 7.204; Appellate Body Report, *US – Zeroing (Japan)*, paras. 159-160.
[855] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.361.
[856] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.361. Emphasis added.

the purpose of Article 9.3 cannot be limited to the "margin of dumping" established during the *original investigation*.[857] We find additional contextual support for this conclusion in Article 9.4(ii), which as we have previously explained, explicitly sets the maximum limit on the amount of anti-dumping duties that may be collected from *non-investigated parties* through the application of a prospective normal value or equivalent MIP at the difference between the weighted average normal values of the investigated parties and the export price of the relevant non-investigated party. We see no reason why an investigating authority should not be entitled to collect anti-dumping duties in the same way through the application of a prospective normal value or equivalent MIP to *investigated parties*. In this respect, we understand the Appellate Body to be of the same view:

> "In a prospective normal value system, the authorities announce in advance a prospective normal value that applies to future entries of a given product and anti-dumping duties are assessed on the basis of the difference between this "prospective normal value" and the prices of individual export transactions for that product."[858]

7.749 For all of the above reasons, we find that the obligation in Article 9.3 to ensure that anti-dumping duties are not collected in excess of the "margin of dumping as established under Article 2" does not require that any anti-dumping duties collected not exceed the margin of dumping calculated in the *original investigation*. Thus, in the specific context of prospective normal value systems of duty assessment, such as the one applied by the EC in the present investigation, we do not believe that Article 9.3 prevents investigating authorities from collecting anti-dumping duties from investigated parties in excess of the *ad valorem* equivalent of the margin of dumping calculated in the original investigation, when such an amount of duty represents the difference between an investigated party's normal value and the export price of the transaction subject to duty assessment. On this basis, we find that Norway has failed to establish that the EC acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 because of its failure to adopt a mechanism, in the operation of the MIPs it imposed, which ensured that an anti-dumping duty greater than the *ad valorem* equivalent of the margin of dumping from the *original investigation* could not be collected.

7.750 We note that Norway has also claimed that the MIPs adopted by the investigating authority were inconsistent with Article 9.1 of the AD Agreement. Norway makes essentially the same arguments in support of this claim presented to substantiate its claims under Articles 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. Article 9.1 reads:

> "The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry". (Underline added.)

7.751 The focus of Norway's claim is on the underlined language.[859] As we understand it, Norway argues that through this language Article 9.1 establishes that investigating authorities are entitled to "impose" anti-dumping duties that are *less* than the full margin of dumping, but in no case can an investigating authority "impose" duties that *exceed* the full margin of dumping. Irrespective of the question whether the language Norway relies upon actually establishes any *obligation* to ensure that

[857] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.361.
[858] Appellate Body Report, *US – Zeroing (Japan)*, footnote 367.
[859] Norway, FWS, para. 658.

anti-dumping duties reflect the "full margin of dumping or less",[860] we recall that we have found that pursuant to Article 9.3, the margin of dumping that is relevant for the purpose of the collection of anti-dumping duties is that prevailing at the time of duty assessment. As such, even if Article 9.1 were an appropriate legal basis to bring the claim that is before us, our findings in respect of Article 9.3 imply that the MIPs established by the investigating authority were not inconsistent with Article 9.1. We therefore dismiss Norway's claim under Article 9.1 of the AD Agreement.

7.752 Finally, we understand Norway's claim in respect of Article 9.2 to be consequential and dependent upon its claims under Articles 9.1 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. In the light of our findings in respect of Norway's core claims, we also dismiss Norway's consequential claim under Article 9.2.

2. Alleged Inconsistency of the Imposition Of Fixed Duties with Articles 9.1, 9.2 and 9.3 of the AD Agreement

(a) Arguments of the Parties

(i) Norway

7.753 Norway submits that the fixed duties imposed by the investigating authority are anti-dumping duties that fall within the scope of the AD Agreement, and therefore subject to the disciplines of Articles 9.1, 9.2 and 9.3.[861] Relying on the same arguments advanced in support of its contention that Articles 9.1 and 9.3 of the AD Agreement prohibit the imposition of MIPs that result in the collection of anti-dumping duties greater than margins of dumping calculated in the original investigation,[862] Norway argues that any fixed duties applied to investigated parties must also not exceed the respective margins of dumping determined in the original investigation. Thus, in setting the fixed duties for the investigated parties in the present proceeding, Norway contends that the investigating authority was obliged under Articles 9.1 and 9.3 of the AD Agreement to ensure that they did not exceed the respective margins of dumping calculated in the original investigation. However, according to Norway, for certain price ranges, the fixed duties imposed by the investigating authority could in fact be greater than the margins of dumping determined for five of the investigated parties during the original investigation. To this extent, Norway claims that the fixed duties imposed by the investigating authority were inconsistent with Articles 9.1 and 9.3 of the AD Agreement, and as a consequence, also Article 9.2.

(ii) European Communities

7.754 The EC argues that the fixed duties do not fall within the scope of the AD Agreement because they do not amount to "specific action against dumping" within the meaning of Article 18.1 of the AD Agreement.[863] In any case, in so far as the fixed duties imposed on the investigated parties may result in the collection of anti-dumping duties greater than those permitted under Article 9 of the AD Agreement, the EC submits that the inconsistency would be justified under Article XX(d) of the GATT 1994. In this regard, the EC notes that the fixed duties are necessary to secure compliance with the anti-dumping measures imposed on salmon imports, as well as the obligations under ordinary customs law of the 27 EU Member States for importers to make truthful declarations regarding the value of goods that they are entering into the EC. Thus, the EC contends that the fixed duties fall

[860] Arguably, the first sentence of Article 9.1 could be read as suggesting that the only obligation it imposes is to ensure that the two decisions that are referred to therein are taken "by the authorities of the importing Member".

[861] Norway's arguments in this respect have already been summarised above at para. 7.409.

[862] *See*, paras. 7.677-7.678.

[863] The EC's arguments in this respect have already been summarised above at para. 7.408.

within the terms of Article XX(d) of GATT 1994 because they are "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement".

(b) Evaluation by the Panel

7.755 As we have outlined elsewhere in this report,[864] the fixed duties imposed by the investigating authority formed part of the "double system of measures" applied at the end of the original investigation to all imports of salmon from Norway. A fixed amount of duty equivalent to the weighted average injury margin of 14.6 per cent was calculated for all six presentations of salmon, and applied equally to imports of salmon from all Norwegian producers, whether or not investigated. The fixed duties would only become payable when certain conditions are met. In summary, as explained in the Definitive Regulation, the fixed duty will be payable when "it is found following post-importation verification" that the "net free-at-Community frontier price actually paid by the first independent customer in the Community" (the "actual price") is both below the price declared to customs *and* below the relevant MIP, provided that the payment of the fixed duty would result in a final import price at or above the MIP.[865]

7.756 We note that Norway has not challenged the legality of the "double system of measures" – that is, Norway has not challenged the investigating authority's imposition of *both* MIPs and fixed duties. Rather, Norway's complaint in respect of the fixed duties is confined to the assertion that for certain price levels, the fixed duties collected will exceed the margins of dumping calculated for five of the investigated parties during the original investigation. In particular, Norway's claim is focused on the situations when the payment of the fixed duty would have this result and the final import price after payment of the duties would be above the MIP. Norway presents the following table to explain and substantiate its factual assertions:[866]

	Product (all fresh, chilled, or frozen)	**MIP (€)**	**Actual Price (€)**	**Fixed Duty (€)**	***Ad Valorem* Equiv.**	**Fjord**	**Marine Harvest**	**Seafarm Invest**	**Stolt Sea Farm**	**Sinkaberg Hansen**
1	Whole fish	2.80/kg	2.41/kg (L)	0.40/kg	16.6%	15.0%	11.2%	11.2%	10.0%	2.6%
		2.80/kg	2.79/kg (H)	0.40/kg	14.3%	15.0%	11.2%	11.2%	10.0%	2.6%
2	Gutted, head-on	3.11/kg	2.67/kg (L)	0.45/kg	16.8%	15.0%	11.2%	11.2%	10.0%	2.6%
		3.11/kg	3.10/kg (H)	0.45/kg	14.5%	15.0%	11.2%	11.2%	10.0%	2.6%
3	Other fish, fresh, chilled or frozen	3.49/kg	3.00/kg (L)	0.50/kg	16.7%	15.0%	11.2%	11.2%	10.0%	2.6%
		3.49/kg	3.48/kg (H)	0.50/kg	14.4%	15.0%	11.2%	11.2%	10.0%	2.6%
4	Fillets of more than 300 g, skin on	5.01/kg	4.29/kg (L)	0.73/kg	17.0%	15.0%	11.2%	11.2%	10.0%	2.6%
		5.01/kg	5.00/kg (H)	0.73/kg	14.6%	15.0%	11.2%	11.2%	10.0%	2.6%

[864] *See*, paras. 7.691-7.700.
[865] *See*, paras. 7.691-7.700.
[866] Norway, FWS, para. 679.

	Product (all fresh, chilled, or frozen)	**MIP (€)**	**Actual Price (€)**	**Fixed Duty (€)**	***Ad Valorem* Equiv.**	**Fjord**	**Marine Harvest**	**Seafarm Invest**	**Stolt Sea Farm**	**Sinkaberg Hansen**
5	Fillets of more than 300 g, skin off	6.40/kg	5.48/kg (L)	0.93/kg	17.0%	15.0%	11.2%	11.2%	10.0%	2.6%
		6.40/kg	6.39/kg (H)	0.93/kg	14.6%	15.0%	11.2%	11.2%	10.0%	2.6%
6	Fillets of less than 300g	7.73/kg	6.62/kg (L)	1.12/kg	16.9%	15.0%	11.2%	11.2%	10.0%	2.6%
		7.73/kg	7.72/kg (H)	1.12/kg	14.5%	15.0%	11.2%	11.2%	10.0%	2.6%

(L) = the lowest "actual price" at which the payment of the fixed duty would be necessary and result in a final import price above the MIP.
(H) = the highest "actual price" at which the payment of the fixed duty would be necessary and result in a final import price above the MIP.

7.757 The EC has not specifically contested the information contained in this table. Indeed, it is our understanding that the EC acknowledges that for certain price ranges, the application of the fixed duties could result in the collection of anti-dumping duties that exceed the margins of dumping calculated for the above-mentioned investigated parties in the original investigation. However, the EC defends this result by arguing, firstly that the fixed duties are not anti-dumping duties falling within the scope of the AD Agreement, and secondly, that, in any case, even if the fixed duties could result in a violation of Article 9 of the AD Agreement, they are nevertheless justified under the terms of the general exception set out in Article XX(d) of the GATT 1994.

7.758 We recall that we have already found that the investigating authority's imposition of the fixed duties amounted to "specific action against dumping" within the meaning of Article 18.1 of the AD Agreement.[867] As such, the fixed duties are subject to the disciplines of Article 9. We therefore first turn to address Norway's claim that the fixed duties were inconsistent with Articles 9.1 and 9.3 because of the fact that, for certain price ranges, they result in the collection of anti-dumping duties greater than the margins of dumping determined for five of the investigated parties during the original investigation.

7.759 We note that Norway's claim is premised on the same view of how Article 9.3 disciplines the imposition and collection of anti-dumping duties that it advanced in respect of its claim relating to the MIPs imposed by the investigating authority on the investigated parties.[868] Namely, Norway contends that the obligation on investigating authorities not to collect an amount of anti-dumping duty that exceeds the "margin of dumping as established under Article 2" implies that investigating authorities are not entitled to impose any measures that result in the collection of anti-dumping duties that exceed the margin of dumping determined for investigated parties in the *original investigation*. In other words, Norway sees the margin of dumping determined for investigated parties during the original investigation as a cap on the maximum amount of anti-dumping duties that may be imposed on investigated parties in duty collection proceedings.

7.760 We recall that we have already addressed Norway's arguments in respect of Article 9.3, and rejected them.[869] In particular, we have determined that the obligation in Article 9.3 to ensure that anti-dumping duties are not collected in excess of the "margin of dumping as established under Article 2" does not prohibit an investigating authority from imposing and collecting anti-dumping duties in excess of the margin of dumping calculated in the *original investigation*. In the specific

[867] *See*, paras. 7.411-7.418.
[868] *See*, paras. 7.677-7.678.
[869] *See*, paras. 7.740-7.749.

context of duty assessment conducted "on a prospective basis", which is the situation that is before us at present as regards the application of the fixed duties, what is important in terms of compliance with Article 9.3 (and Article 9.1[870]) of the AD Agreement is that any duties imposed and collected on investigated parties do not exceed the *actual* margin of dumping determined on the sales that are subject to duty assessment. In essence, this follows from the fact that pursuant to Article 9.3.2, investigating authorities must refund any duty collected in excess of the "actual margin of dumping" for sales that are subject to duty assessment.[871]

7.761 Thus, we find that Norway's claim that the fixed duties imposed by the investigating authority were inconsistent with Articles 9.1 and 9.3 of the AD Agreement cannot be upheld. Consequently, we also dismiss Norway's claim in respect of Article 9.2 of the AD Agreement, which we understand to be entirely dependent upon its claims under Articles 9.1 and 9.3 of the AD Agreement.

J. ALLEGED INCONSISTENCY OF THE EC'S CONDUCT OF THE PROCEEDINGS WITH ARTICLES 6.2, 6.4, 6.9, 12.2 AND 12.2.2 OF THE AD AGREEMENT

1. Alleged Inconsistency with Articles 6.4 and 6.2

(a) Arguments of the parties

(i) Norway

7.762 Norway claims that the EC acted inconsistently with Articles 6.4 and 6.2 of the AD Agreement because it failed to disclose non-confidential information contained in the record of the investigation. Norway argues that Articles 6.2 and 6.4 require an investigating authority to provide access to all relevant information in the non-confidential record of the investigation, and that the EC failed to do so, as demonstrated by the fact that a number of documents that had been filed by interested parties were missing from the non-confidential record that was accessible at the EC Commission's premises. Norway refers in this regard to its letter of 4 August 2006, in which it outlined the circumstances surrounding the EC's alleged failure to disclose all non-confidential documents in the record. Norwegian officials inspected the non-confidential record at the offices of the EC, and concluded that numerous documents of whose existence Norway was aware were not in the record. Norway notes that the EC did not provide a master list or index to the non-confidential record on the basis that there is no requirement to do so in the AD Agreement. Annex 3-A to Norway's letter of 4 August 2006 lists all the documents that were included in the non-confidential record.[872] Annex 3-B to that letter lists 68 documents that Norway knows, or has reason to believe, were submitted in the investigation but that were missing from the record it was permitted to inspect.[873] Because Norway does not know what documents were submitted to the EC, the list provided in Annex 3-B is indicative and not an exhaustive list of documents that were not disclosed to Norway. Norway maintains that the missing documents cover all aspects of the investigation, including the investigation of both dumping and injury. Norway asserts that the information in these documents is relevant to the presentation of Norwegian parties' interests.

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[870] We believe our discussion on the relevance of Article 9.1 to Norway's claim in respect of the MIPs to be equally pertinent to Norway's claim in respect of the fixed duties.

[871] *See*, para. 7.747.

[872] Exhibit NOR-13.

[873] Exhibit NOR-13. Norway lists the following categories of documents as missing: (a) sampling forms and questionnaire responses provided by EC domestic producers; (b) questionnaire responses (or other communications) from EC "importers users and processors"; (c) questionnaire responses (or other communications) from EC "users' associations"; (d) all submissions by the Government of Norway; (e) all submissions by FHL; and (f) numerous submissions by all ten sampled Norwegian companies and by a related company that was requested to provide a questionnaire response. Norway, FWS, para. 700 and footnotes 558-561.

7.763 Norway also argues that certain exhibits presented by the EC to the Panel in this case contain information that was not before the investigating authority, and must therefore be excluded from this dispute. In the alternative, Norway argues that if the Panel concludes that this information was before the investigating authority, the EC violated Article 6.4 by failing to disclose that information to Norway.[874]

(ii) European Communities

7.764 The EC considers that Norway's claims regarding alleged lack of access to relevant non-confidential information during the investigation are based on a fundamental misunderstanding of the law, and fail to take into account that Norway was granted access on numerous occasions to all relevant non-confidential information during the entire duration of the investigation. The EC points out that Norway's arguments refer to a lack of access to the "non-confidential" or "public" record, without describing what that "record" is. The EC notes that the word "record" is in neither Article 6.2 nor Article 6.4. For the EC, these provisions do not impose any obligation on WTO members to establish a "record" of all information submitted by any interested party during the investigation, and in particular, Article 6.4 does not regulate how a Member stores, manages, distributes internally, or otherwise processes such information. In support of its view in this regard, the EC points to the fact that proposals (by Norway) in the current negotiations on the AD Agreement would specifically provide for such record-keeping requirements.

7.765 The EC also asserts that Article 6.4 does not require the investigating authority to fully disclose all (non-confidential) documents submitted to all other interested parties, as it specifically provides that information must be disclosed to interested parties if it is "relevant to the presentation of their cases". For the EC, this means that the investigating authority may decide to which information access should be granted. In any event, the EC emphasizes that it provided repeated and timely opportunities for Norway to have access to all relevant information on numerous occasions. Norwegian authorities reviewed the non-confidential files on six dates,[875] and the EC made available to Norway all the non-confidential information it had gathered as of each of those dates. The EC investigating authority did not engage into any assessment of whether or not requested information was relevant to Norway's case or not. The EC asserts that the fact that documents are not in Norway's files does not prove that Norway was not granted access to all the non-confidential documents in the investigation.

7.766 The EC maintains that it had no obligation to show the 68 "missing" documents referred to by Norway. The EC argues that simply because Norway knows they were submitted does not mean that they were relevant, non-confidential, and used by the investigating authority. The EC maintains that there were valid reasons for not including these documents in the investigation files, *inter alia*: lack of a non-confidential version, subject matter not relevant to exporters, or government-to-government correspondence.[876] The EC maintains that the fact that Norwegian representatives did not find 68 "irrelevant or confidential or not used documents" when they inspected the files does not demonstrate a violation of Article 6.4

[874] Norway refers specifically to Exhibits EC-2, EC-10, EC-12, EC-13, EC-14, EC-15, and EC-16. Norway, SWS, para. 228.

[875] 22 December 2004; 12 January 2005; 18 May 2005; 28 and 29 November 2005; and 23 December 2005.

[876] EC, SWS, paras. 243-246.

(b) Arguments of third parties

(i) United States

7.767 Regarding Norway's claim relating to the proper interpretation and application of Articles 6.2 and 6.4 of the AD Agreement, the United States notes that Article 6.2 provides that "all interested parties shall have a full opportunity for defence of their interests," and Article 6.4 provides in relevant part that "authorities shall whenever practicable provide timely opportunities to see all information that is relevant to the presentation of their cases, that is not confidential . . ., and that is used by the authorities in an anti-dumping investigation." The US observes, with respect to the EC's assertion that "the investigating authority may decide on which information access should be granted or not"[877] that, as the EC concedes, relevance must be assessed from the perspective of the interested party presenting its case.[878] The US considers that the EC's assertion that "the investigating authority may not disclose information it has received from one interested party to another interested party, unless it is relevant for the preparation of the latter's case,"[879] is not supported by the text of Article 6.4, which contains an affirmative obligation to disclose information in certain circumstances, not a prohibition against such disclosure. The US argues that Article 6.4 establishes a rule regarding when an authority must disclose information, and not when it must withhold information.

(c) Evaluation by the Panel

7.768 We begin our analysis by considering the text of Article 6.4 of the AD Agreement, which provides:

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

This provision plainly and unambiguously requires an investigating authority, "whenever practicable" to provide "timely" opportunities for any interested party to see "all information" that is "relevant" to the presentation of its case, that is not confidential, and that is "used" by the investigating authority.

7.769 It seems clear to us that the timeliness of the opportunities must be assessed by reference to the right of the interested parties to prepare presentations on the basis of the information seen. It is similarly clear to us that whether particular information is relevant is not determined from the investigating authorities' perspective, but with reference to the issues to be considered by the investigating authority under the AD Agreement.[880] Thus, information which relates to issues which the investigating authority is required to consider under the AD Agreement, or which it does, in fact, consider, in the exercise of its discretion, during the course of an anti-dumping investigation, presumptively falls within the scope of Article 6.4.[881] Clearly, an investigating authority may not allow interested parties to see information which is properly treated as confidential under the

[877] EC, FWS, para. 531.
[878] EC, FWS, para. 531.
[879] EC, FWS, para. 531.
[880] We find support for this conclusion in the views of the Appellate Body in *EC – Tube and Pipe Fittings*, paras. 145-146.
[881] We thus reject the view of the EC that, in the context of whether information is relevant to the presentation of an interested party's case, "the investigating authority may decide on which information access should be granted". EC, FWS, para. 531.

AD Agreement.[882] Finally, the question of whether information is "used" by the investigating authority cannot, in our view, be assessed from the perspective of whether the information is specifically referred to or relied upon by the investigating authority in its determination. If the investigating authority evaluates a question of fact or an issue of law in the course of an anti-dumping investigation, then, in our view, all information relevant to that question or issue that is before the investigating authority must necessarily be considered by the investigating authority, in order to make an objective and unbiased decision. Consequently, it seems clear to us that whether information is "used" by the investigating authority must be assessed by reference to whether it forms part of the information relevant to a particular issue that is before the investigating authority at the time it makes its determination.[883]

7.770 We note that the EC contests strongly Norway's reliance on the concept of a "record" in the investigation, arguing that this word does not appear in the AD Agreement, and that there are no obligation on WTO Members concerning how to organize the administrative details of an anti-dumping investigation. The EC considers that each Member "may choose the appropriate method of ensuring that it complies with its WTO obligations", and that nothing in the AD Agreement governs the "internal housekeeping prerogatives of a Member.[884] We do not disagree. As the EC points out, there are no specific requirements governing how a WTO Member organizes and maintains its files, how it receives and processes information and submissions, or how it ensures that it complies with its obligations under the AD Agreement.[885] However, it is this latter aspect that we must assess – whether the EC has complied with its obligations under Article 6.4 of the AD Agreement. If we find that it has not, it will not be because it failed to organize its documentary information and investigative files in a particular way, but because we have concluded that, however it organized such matters, it failed to substantively comply with the obligation to provide timely opportunities for interested parties to see all relevant, non-confidential information relevant to the presentation of their cases.

7.771 The EC has not contended that the 68 documents listed in Exhibit NOR-13 were, in fact, among the information seen by Norwegian representatives when granted access to non-confidential information during the course of the investigation. Rather, the EC disputes the implication that it had an obligation to show these documents to Norway. The EC admits that these documents were submitted to the investigating authority,[886] but considers that the investigating authority is not required to include in the investigation files all documents submitted, and is only required to provide access under Article 6.4 to information it has included in the investigation files. The EC asserts that to require otherwise would be "at odds with the functions of the investigating authority to determine whether or not submitted documents are relevant or not for the investigation, whether they are confidential and whether they should be used by the investigating authority."[887] We cannot agree. In our view, unless information submitted to the investigating authority is rejected, that information must remain in the investigating authorities' files, and if it is relevant, not confidential, and used by the investigating authority, as discussed above, interested parties must be given timely opportunities to see it.

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[882] Except to the extent that disclosure is made pursuant to protective orders, as provided for in footnote 17 of the AD Agreement.

[883] We find support for this conclusion in the views of the Appellate Body in *EC – Tube and Pipe Fittings*, para. 147.

[884] EC, FWS, para. 523.

[885] The lack of such specific requirements is not surprising, given the various legal and administrative structures pursuant to which Members operate their anti-dumping systems.

[886] EC, FWS, para. 241, referring to the "frustration of a WTO Member not to find documents, that it knows to have been submitted, also in the investigation file of an investigating authority", para. 242, referring to asserted grounds "for not including the 68 documents into the investigation files."

[887] EC, SWS, para. 241.

7.772 With these principles in mind, we consider the specific allegations made by Norway in this case. Norway has listed 68 documents[888] it is aware were submitted to the investigating authority, which were not among the information which Norwegian representatives saw when given the opportunity to see information during the investigation.[889] The EC responds that there were various reasons why the 68 documents were not included in the investigation files. The EC has not identified which particular documents were not included for which reasons, but has defended its position on the basis of more general arguments.[890]

7.773 First, the EC asserts that a number of the documents were submitted by exporters, and contained confidential information, but that no non-confidential version was provided by the submitting exporter, in violation of Article 6.5.1 of the AD Agreement. Therefore, the investigating authority did not include it in the files made available to interested parties under Article 6.4. While we are concerned that the failure of parties to submit non-confidential versions of documents provided to the investigating authority may result in limitations on the rights of interested parties to see information as provided for in Article 6.4, there is no claim in this dispute that the EC wrongly treated information as confidential.[891] Article 6.4 clearly excludes confidential information from the information which must be made available for interested parties to see, and therefore, to the extent that information in the 68 documents was confidential, we conclude that the EC did **not** violate Article 6.4 by failing to provide timely opportunities for interested parties to see such confidential information.

7.774 Next, the EC asserts that other documents related to the question of "Community interest", which does not correspond to any provision in the AD Agreement, and thus is not relevant to exporters. As discussed above, in our view, information pertaining to any issue that is considered and decided by the investigating authority, even one which is not specifically required to be considered and decided under the AD Agreement, is to be considered "relevant" within the meaning of Article 6.4. Thus, to the extent that information in the 68 documents was not confidential, but related to the question of "Community interest", we conclude that the EC violated Article 6.4 by failing to provide timely opportunities for interested parties to see such information.[892]

7.775 With respect to a letter from Dr. Jaffa, document No. 34 in Annex 3-B to Exhibit NOR- 13, the EC argues that it was not germane to the investigation or determinations. The EC asserts that Dr. Jaffa was not an interested party, did not represent any interested party, made representations to

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[888] Norway contends that the missing documents fell into four categories and contained information as follows: 1) sampling replies and questionnaire replies of sampled and non-sampled EC producers, with attachments; 2) submissions of EC "users" and "user" associations on the "deepened investigation on Community interest"; 3) documents submitted by sampled and non-sampled Norwegian companies, including sampling forms, and comments on the authority's Information Notes and disclosures; and, 4) communications from other parties, including FHL and the Government of Norway, on dumping. Norway's SOS, para. 105.

[889] In this regard, we note that we accept the representations of Norway as to what was in the investigation files and seen by its representatives, and what documents it was aware had been submitted but were not seen, as described in Exhibits NOR-13, NOR-90, NOR-91, NOR-88, and NOR-89. The EC has brought forward no evidence that contradicts those representations, and we discount the unsupported suggestion that there may have been mistakes made in copying the files seen. EC, FWS, para. 535.

[890] In addition, Norway asserts that information in a series of exhibits presented to the Panel is not properly before us, or, if it was in the investigation files and is therefore properly before us, was not among the information which Norwegian representatives saw when given the opportunity to see information during the investigation. Norway's allegations in this regard are addressed below, at paras. 7.835 - 7.860.

[891] Nor is there any claim concerning the apparent lack of non-confidential summaries of some confidential information submitted to the investigating authorities.

[892] We note that the EC has not argued that this information was not "used" by the investigating authority.

EC authorities (to which a reply was made as a matter of courtesy),[893] and continued to make unsolicited observations, including the letter in question, the substance of which was doubtful as to its nature and accuracy, and no "non-limited" version was provided for the file accessible to parties. The EC states the investigating authority was "uncertain whether it could discard the letter right away" and left the question open "given that the issues raised were issues regarding domestic production". The investigating authority requested representatives of the EU Salmon Producers Group to comment on Dr. Jaffa's letter on a provisional basis, and later decided not to consider the letter pertinent to the investigation, and informed Dr. Jaffa that he was not considered to be an interested party.[894] We can find nothing in this recounting of events that would provide a basis for declining to provide opportunities for interested parties to see this document. It clearly contained information regarding a relevant issue, domestic production, there is no contention that it was confidential, and in our view, the fact that the investigating authority requested representatives of the domestic industry to comment on it demonstrates that it was used by the investigating authority. There is no indication that the investigating authority rejected Dr. Jaffa's submission as irrelevant, untimely, or for any other reason. Thus, we conclude that the EC violated Article 6.4 by failing to provide timely opportunities for interested parties to see Dr. Jaffa's letter.

7.776 Finally, the EC asserts that 15 of the documents referred to by Norway are *Notes Verbales* of the Norwegian government, that were treated as "government-to-government correspondence, not to be included in the file."[895] The EC contends that, should Norway (an interested party in the investigation) have wanted them to be included in the file, it should have produced non-confidential versions of them. However, there is no indication that the Government of Norway requested confidential treatment of these submissions, nor is there any contention by the EC that the investigating authority considered them to be confidential under Article 6.5 of the AD Agreement. Nor has the EC argued that the information in these *Notes Verbales* is irrelevant, or was not used by the investigating authorities. In these circumstances, we conclude that the EC violated Article 6.4 by failing to timely provide opportunities for interested parties to see such information.

7.777 Having found that the EC violated Article 6.4 by failing to provide timely opportunities for interested parties to see all non-confidential information relevant to the presentation of their cases, we do not consider it either necessary or appropriate to address Norway's claim, based on the same facts and arguments, under Article 6.2 of the AD Agreement. A finding under Article 6.2 would be exclusively a consequence of our findings under Article 6.4, and would therefore add nothing to the parties' understanding of the obligations under the AD Agreement, or to the ability of the European Communities to comply with our decision in the context of implementation.

2. Alleged Inconsistency with Articles 6.9 and 6.2

(a) Arguments of the parties

(i) Norway

7.778 Norway claims that the EC failed to disclose the essential facts that formed the basis for the EC's decision to impose duties, as required by Article 6.9, and thereby deprived Norway of a full opportunity to defend its interests, as required by Article 6.2. Norway asserts that the disclosure by the EC consisted of a draft of the Definitive Regulation that largely fails to refer to any facts forming

[893] We note that Dr. Jaffa similarly made unsolicited representations to the Panel in this proceeding, two of which we made available to parties and third parties for comment. As discussed elsewhere in our decision, we did not rely on the information in Dr. Jaffa's submissions in our findings. See above paras. 1.12 - 1.13.

[894] EC, Answer to Panel Question 45, paras. 202-206.

[895] EC, SWS, para. 246.

the basis for the EC's determination. Specifically, Norway argues that, in the disclosure documents that the EC provided to the investigated Norwegian producers, as well as to the other interested parties, it failed to disclose the essential facts related to key elements of the EC's decision, such as: definition of the product concerned; definition of the domestic industry; dumping; injury; causation and non-attribution; and the remedy.

7.779 Norway maintains that the aim of disclosure is to "actually disclose to the interested parties the essential facts which, being under consideration, are anticipated by the authorities as being those which will form the basis for the decision whether to apply definitive measures."[896] Moreover, Norway maintains that the investigating authority must actively identify the facts on which it will rely in making its determination. In this case, the EC made two disclosures by sending disclosure documents to interested parties. Norwegian producers received disclosure documents with annexes, some of which were identical for all investigated producers, while other annexes were specific to each producer. The "general" disclosure document consisted of a draft of the Provisional or Definitive EC Regulation, while additional specific annexes addressed the calculation of dumping for each producer, and the injury margin analysis. Subsequent to the Definitive Disclosure in October 2005, the EC sent additional documents to the investigated parties, including an information note on "developments" following the Definitive Disclosure, which addressed "concerns" regarding the minimum import price (MIP) for fillets, and finally a subsequent information note regarding the definitive MIPs for fillets.

7.780 Norway sets out a series of specific examples of how the EC failed to make adequate disclosure with respect to (i) the dumping determination; (ii) injury – definition of the domestic industry; (iii) causation and non-attribution; and, (iv) the determination of minimum import prices (MIPs).

7.781 With respect to the dumping determination for some producers, Norway complains that, after the definitive disclosure, the EC re-assessed the facts and made changes to the determination set out in draft in the disclosure, but did not undertake any further disclosure (dumping margin for producers PFN, Hydroteck and Sinkaberg-Hansen, which changed between the Definitive Disclosure and the Definitive Regulation). Norway also argues that the EC failed to disclose that, at both the provisional and definitive stages, it rejected the company-specific information submitted by Hydroteck and recalculated the company's SG&A costs.

7.782 Norway claims that the EC failed to disclose to the interested parties the essential facts under consideration concerning its determination of the scope of the domestic industry for purposes of its injury determination. Norway asserts that the definitive disclosure documents do not refer to any documents or facts that substantiate the EC's determination – rather, Norway maintains that instead of disclosing the essential facts underlying its determinations, the EC has simply disclosed its determinations.

7.783 Similarly, Norway asserts that the EC failed to disclose the essential facts underpinning its determination with respect to the evaluation of imports from Canada and the US as an "other factor" causing injury. Specifically, Norway argues that the EC failed to disclose any facts or references to facts concerning import figures for wild salmon from Canada and the US, the circumstances of competition between wild and farmed salmon, prices of wild salmon, etc.

7.784 Finally, Norway argues that the EC failed to disclose essential facts in connection with the minimum import prices (MIPs). In this regard, Norway notes that the EC recalculated the MIPs for fillets after the definitive disclosure, and sent the interested parties an information note, which Norway asserts failed to specify which particular documents and which facts in the record are relevant for the EC's revised determination.

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[896] Panel Report, *Argentina – Ceramic Tiles*, para. 6.125.

7.785 Norway takes the view that, when an investigating authority violates Article 6.9, it also violates Article 6.2 of the AD Agreement. Norway recalls that Article 6.9 refers to the ability of interested parties to "defend their interests", while Article 6.2 requires that interested parties be given full opportunity for the defence of their interests *throughout the anti-dumping investigation*. As a result, any violation of the disclosure obligation in Article 6.9 entails a violation of Article 6.2.

(ii) European Communities

7.786 With respect to Norway's claim under Article 6.9, the EC observes that that provision requires the investigating authority to "inform all interested parties of the essential **facts** under consideration which form the basis for the decision" (emphasis added), while Norway's arguments are based on an alleged duty to disclose **evidence**. The EC considers that it is not required that the investigating authority support every factual finding with a reference to the supporting evidence, for example by citing the relevant statistics, form or other document which is material for the fact. There is no duty to specifically identify in the disclosure document the source on which the assembled facts are based. Rather, the EC maintains that the obligation to disclose essential facts is satisfied by a simple reference to them.

7.787 The EC goes on to address, in detail, the essential facts it disclosed to the parties prior to the final determination. The EC refers to the standard of review, noting that Norway's arguments enter into the area of factual assessments, which are for the investigating authorities to make in the first instance, and that the Panel should be cautious in assessing whether a fact was essential and therefore to be disclosed before imposition of the measure. The EC notes that it disclosed to all interested parties, including the Government of Norway, a draft of the Definitive Regulation on 28 October 2005, which explained all the relevant factors of the investigation, sometimes incorporating by reference more detailed findings from the provisional stage. The EC considers it plain that the essential facts regarding the dumping determination, injury to the domestic industry, causation and non-attribution and remedy determination are all set out therein. The EC provided at the same time replies to individual exporters and shared the individual calculations relevant to their situation with them.

7.788 With respect to Norway's claims concerning the alleged failure to disclose the re-assessment of dumping margins that changed between the definitive disclosure and Definitive Regulation, the EC asserts that nothing in Article 6.9 requires that there be additional disclosure relating to any re-assessment in view of the comments received in response to a disclosure, or an individual explanation of the re-assessment to an interested party after the adoption of the definitive measure. The EC refers in this regard to the text of the first sentence of Article 6.9, which provides that disclosure shall take place "before a final determination is made". Thus, the EC acknowledges that it corrected its definitive dumping margin found for PFN, Hydroteck and Sinkaberg-Hansen but considers that no further disclosure under Article 6.9 was required. Nonetheless, the EC notes that telephone exchanges and/or hearings held between definitive disclosure and publication made clear the reasons for the adjustments with respect to these three companies.

7.789 With respect to the disclosure regarding the domestic industry, the EC maintains that Norway's dissatisfaction with the failure to disclose "documents that support or substantiate the EC's assertions" is without legal basis, as there is no requirement in Article 6.9 of the AD Agreement to disclose to Norway the evidentiary support of the EC's factual findings.

7.790 Similarly, with respect to the consideration of imports from Canada and the United States, the EC again argues that Norway's complaint that there was "no reference to any documents and facts in the record" substantiating the EC's statements is without legal basis. In addition the EC notes that several interested parties had questioned the EC's interpretation of the information on these imports after disclosure, and the EC explained its decision in the Definitive Regulation, a draft of which was

provided in the general disclosure. Thus, the EC considers it "devoid of any purpose" to claim non-disclosure of essential facts under Article 6.9 of the AD Agreement.

7.791 With respect to the MIPs, the EC reiterates that there was no obligation to provide any further disclosure after the disclosure of 28 October 2005, and therefore Norway's claim in this regard must be rejected. Moreover, the EC notes that, on a purely voluntary basis, the EC sent out an information note concerning the changes in the definitive MIP on 13 December 2005, which additional MIP disclosure informed the parties that their latest information in reply to the definitive disclosure had been assessed before taking a final decision.

7.792 Finally, the EC argues that there is no reason for the Panel to conclude that a violation of Article 6.9 of the AD Agreement automatically triggers a breach of Article 6.2, as the first violation would already require action to bring the measure into conformity with the AD Agreement.

(b) Evaluation by the Panel

7.793 There is no dispute about the facts surrounding the EC's disclosure of essential facts. An initial disclosure was made prior to the imposition of provisional measures, on 22 April 2005.[897] On 28 October 2005, approximately three months before the Definitive Regulation was adopted, the EC sent definitive disclosure documents to interested parties. These consisted of a letter and annexes, some of which were identical for all interested parties receiving the disclosure, others of which were specific to the individual interested parties receiving them. All interested parties received a draft of the Definitive Regulation, while individual interested parties also received, *inter alia*, specific disclosure documents regarding calculation of dumping margins and injury factors. All interested parties were given an opportunity to make representations to the investigating authority following the disclosure. Subsequent to the October 2005 disclosure, the EC sent interested parties further communications, including an information note on certain developments subsequent to the disclosure regarding the minimum import prices for fillets, and a subsequent communication regarding the definitive minimum import prices for fillets. The Definitive Regulation, which was issued on 17 January 2006, states that "oral and written comments submitted by the interested parties were considered and, where appropriate, taken into account for the definitive findings."[898]

7.794 In evaluating Norway's claims, we must consider first the text of Article 6.9 of the AD Agreement, which provides:

> "The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests."

The obligations of this provision are quite straightforward – the investigating authority shall inform interested parties of "essential facts under consideration" prior to making a final determination, but in sufficient time for the interested parties to defend their interests.

7.795 Norway asserts that the EC failed to disclose essential facts in numerous instances, but limits its claim to four examples: essential facts concerning (1) dumping; (2) definition of the domestic industry; (3) causation and non-attribution of injury to other factors; and (4) the remedy, that is, minimum import prices. With respect to the first and last of these, dumping and the remedy, Norway's arguments regarding alleged failure to disclose essential facts are based on the fact that the Definitive Regulation is different from the draft of that regulation disclosed in October 2005.

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[897] We do not understand Norway to have made any claims regarding this disclosure.
[898] Definitive Regulation, para. 6.

7.796 Norway suggests that the facts that are essential to a particular determination depend on the substance of that determination, and that, for instance, the facts essential to a determination of injury are different from the facts essential to a determination of no injury. Therefore, Norway argues, "if an authority changes its mind about the substantive character of a determination it proposes to make, this will likely entail a "change" in the essential facts supporting the new determination."[899] We do not agree. We consider that "essential facts under consideration which form the basis of the decision whether to apply definitive measures" are not only those facts that **support** a determination, but rather are the body of facts essential to any determination that are being considered in the process of analysis and decision-making by the investigating authority. Thus, in our view, the essential facts to be disclosed under Article 6.9 are not affected by the substance of the determination an investigating authority may ultimately make. Indeed, they cannot be, as the essential facts to be disclosed are those "under consideration which form the basis of the decision" – that is, the disclosure of essential facts precedes the decision. Thus, at the time of the Article 6.9 disclosure, no decision has yet been taken, and, it seems to us, the disclosure of essential facts may not enable an interested party to foresee the ultimate decision.

7.797 We consider that Norway errs in arguing that Article 6.9 requires an investigating authority to provide an additional disclosure, as in our view, the essential facts do not change simply because the ultimate determination of the investigating authority is not that which was intimated in the disclosure. Merely that the EC chose to provide information to interested parties subsequent to the definitive disclosure[900] does not establish that there was an obligation to do so – the AD Agreement establishes the minimum rights that must be afforded interested parties in an anti-dumping investigation, but does not preclude a Member from affording additional rights, so long as in doing so it does not violate some provision of the AD Agreement.

7.798 The Panel's decision in *Guatemala – Cement II* does not suggest otherwise. In that case, the investigating authority disclosed essential facts prior to a provisional determination of, *inter alia*, threat of material injury. The investigation continued, with additional facts gathered, and ultimately a final determination of material injury was made. The Panel found that disclosure of the essential facts prior to the preliminary determination was "clearly inadequate" to satisfy Article 6.9.[901] Given that different and additional facts, relating to different and additional factors under the AD Agreement must be considered by an investigating authority in finding threat of material injury, and present material injury, it seems clear to us that the essential facts under consideration prior to the provisional determination were different from those under consideration at the time of the definitive determination. Here, however, the investigating authority did not make a different determination regarding dumping, but rather reassessed the facts before it, and revised its calculations resulting in a different dumping margin than that foreshadowed in the disclosure.

7.799 How an investigating authority undertakes to disclose the essential facts does not change the nature of the obligations under Article 6.9. The second sentence of Article 6.9 makes clear that the disclosure of essential facts must be in sufficient time to allow parties to defend their interests. In our view, this must entail the possibility that, whatever decision may have possibly been foreseen or foreseeable at the time of disclosure, the ultimate decision may be a different one, based on the defence of parties' interests following that disclosure. Clearly, the investigating authority must, in making its decision whether to apply definitive measures, take into account whatever information or argument parties submit subsequent to disclosure to defend their interests. The alternative would render meaningless the right of parties to receive disclosure of essential facts in sufficient time to

[899] Norway, Answer to Panel Question 71, para. 239.
[900] EC, FWS, para. 555.
[901] Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico ("Guatemala – Cement II")*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295, para. 8.228.

defend their interests. However, we do not consider that this possible change of outcome triggers a requirement for additional disclosure under Article 6.9. Thus, the fact that the EC undertakes disclosure by providing a draft definitive regulation does not mean that, should the investigating authority ultimately issue a determination that differs in some respect from the draft, an additional disclosure is required. Such a change in the ultimate determination is presumably what is envisioned by the right given to parties to defend their interests after the disclosure. The manner in which the EC chooses to provide disclosure does not limit the investigating authority's obligation to take into account comments and information submitted by interested parties after disclosure, and the concomitant possibility that the investigating authority may issue a definitive regulation that differs, even in material respects, from that provided in draft form as part of the Article 6.9 disclosure.

7.800 With respect to dumping, Norway asserts that the margin of dumping determined for three Norwegian producers, PFN, Hydroteck, and Sinkaberg-Hansen, changed in the interval between the disclosure and the Definitive Regulation, without there having been "any additional disclosure of the essential facts supporting [the] modified dumping determination."[902] Thus, Norway appears to treat the disclosure of the draft definitive regulation almost as if it were a determination of dumping, modified subsequently as revealed in the Definitive Regulation. In Norway's view, this situation demands, under Article 6.9, a further disclosure of essential facts because, in its view, the essential facts leading to the imposition of measures on these companies changed.[903] In our view, as discussed above, Article 6.9 does not require more than one disclosure prior to the imposition of definitive measures.[904]

7.801 These same considerations apply with respect to Norway's arguments in connection with the disclosure of essential facts relating to the minimum import prices. In this case, following the October 2005 disclosure, the EC recalculated the minimum import price for fillets, and informed interested parties of the newly calculated minimum import prices on 13 December 2005. In that communication, the investigating authority indicated that in light of comments received, it had verified and cross-checked the information available, including information provided by parties in response to the definitive disclosure, and on that basis, recalculated the minimum import prices, and provided a table setting forth those prices.[905]

7.802 In our view, this sequence of events demonstrates precisely the purpose of Article 6.9. Following the definitive disclosure, the investigating authority received further information which prompted it to a re-consideration and adjustment of its views, resulting in a different determination that than indicated in the draft definitive regulation at the time of the Article 6.9 disclosure. Norway's argument would presumably require the investigating authority to disclose whatever new information was provided, on the premise that the different result demonstrates that the new information constituted "essential facts" within the meaning of Article 6.9. Article 6.9 would then mandate a further opportunity for interested parties to defend their interests, and an endless stream of disclosures and comments could ensue. Norway's position would result in an impossible situation for investigating authorities, which must complete the investigation within the time limits set out in Article 5.10 of the AD Agreement. Norway suggests that this could only happen because the investigating authority decided that different facts were essential to its determination, and that

[902] Norway, FWS, para. 725.
[903] Norway, FWS, para. 727.
[904] This is not to be understood to mean that **any** disclosure, at any time prior to the imposition of definitive measures, will satisfy the requirements of Article 6.9. There may well be circumstances, such as those addressed by the Panel in *Guatemala – Cement (II)*, in which a disclosure is found not to satisfy those requirements. However, in our view, merely because a definitive measure is different from that foreshadowed in or anticipated on the basis of the disclosure does not necessarily mean additional disclosure should have been made before that different determination is issued.
[905] Exhibit NOR-19.

disclosure of these previously undisclosed essential facts is required. As discussed above, Norway's view confuses the essential facts with the facts supporting the decision.[906]

7.803 Based on the foregoing, we conclude that the EC's disclosure of essential facts regarding dumping by PFN, Hydroteck, and Sinkaberg-Hansen, and regarding the minimum import prices, was not inconsistent with Article 6.9 of the AD Agreement. As Norway's claim of violation of Article 6.2 is dependent on its claim of violation of Article 6.9, which we have rejected, we find no violation of Article 6.2.

7.804 Norway's arguments concerning alleged failure to disclose essential facts concerning the definition of domestic industry and causation and non-attribution raise a different question. In these examples, Norway asserts that the EC failed to refer, in the disclosure, to "any document or fact that supports or substantiates any of the EC's assertions" regarding the scope of the domestic industry, and failed to disclose "any documents and facts on the record substantiating the EC's statements" regarding wild salmon imports from the United States and Canada and lack of competition between wild and farmed salmon.[907]

7.805 The word "fact" is defined variously as "Truth; reality" and "A thing known for certain to have occurred or to be true; a datum of experience" and "A thing assumed or alleged as a basis for inference" and "Events or circumstances as distinct from their legal interpretation."[908] In our view, essential facts to be disclosed under Article 6.9 may qualify under any of these meanings of the word fact. We consider that the purpose of disclosure under Article 6.9 is to provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts.[909]

7.806 Norway appears to be of the view that the investigating authority must disclose the underlying evidence on which it has relied, or will rely, in reaching factual conclusions. We do not agree. It is clear that Article 6.9 requires disclosure of "essential facts" that are "under consideration" and "which form the basis for the decision whether to apply definitive measures." This requirement is not necessarily satisfied by the disclosure of the investigating authorities' conclusions on issues of fact that must be resolved before a decision to apply definitive measures is taken. Neither, however, does Article 6.9 require disclosure of all the evidence and information that is before the investigating authority.[910] Indeed, one Panel has specifically held that access to the files of the investigating authority does not satisfy the requirements of Article 6.9, as parties given such access would not know which facts were essential and under consideration.[911]

7.807 As already indicated above, we consider that "essential facts under consideration which form the basis of the decision whether to apply definitive measures" are the body of facts essential to the determinations that must be made by the investigating authority before it can decide whether to apply

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[906] We note that in our view, the ability of interested parties to defend their interests in subsequent review before domestic tribunals, as provided for in Article 13 of the AD Agreement, is irrelevant to the issue here. The Article 6.9 disclosure is a procedural right accorded interested parties in furtherance of the general right to defend their interests during the anti-dumping proceeding.

[907] Norway, FWS, para. 736.

[908] New Shorter Oxford English Dictionary, Clarendon Press, 1993.

[909] This follows from the second sentence of Article 6.9, which establishes the timing of the disclosure, as "in sufficient time for the parties to defend their interests."

[910] We note that Article 6.4 establishes the right of interested parties to see all relevant, non-confidential information used by the investigating authorities. Thus, to interpret Article 6.9 to require disclosure of evidence would to some extent establish a redundancy.

[911] Panel Report, *Argentina – Ceramic Tiles*, para. 6.129.

definitive measures. That is, they are the facts necessary to the process of analysis and decision-making by the investigating authority, not only those that support the decision ultimately reached.

7.808 We do not consider that every element of factual evidence considered by the investigating authority must be disclosed, or that every fact disclosed must be footnoted to the specific source information before the investigating authority. We can see nothing in Article 6.9 which would require any particular form of disclosure, or any particular degree of precision in tying facts to the information before the investigating authority. While it would certainly be useful for the investigating authority to indicate to interested parties the information before the investigating authority on which a disclosed essential fact is based, we cannot conclude that this is required.

7.809 Turning to the specific examples of alleged failure to disclose essential facts, Norway argues that the EC failed to disclose the identities of the 15 EC producers constituting the domestic industry, the identities of the excluded related producers, what the volume of production of related producers (individual or collective) was, facts or documents providing the basis for the volume of production of the domestic industry, the identities of the "silent" producers, whether their production volume was included in domestic production, and which companies were excluded from the definition of the domestic industry and their production volume, individual and collective.[912] It is undisputed that the Definitive Regulation with regard to the definition of the domestic industry is identical to the disclosure provided in October 2005. Norway's argument is that this disclosure was of the determination, and not the facts underlying the determination. It seems clear to us that the essential facts forming the basis for the EC's definition of the domestic industry[913] are set out in the Definitive Regulation, which describes the factual basis on which the EC defined the domestic industry. Merely that the evidence or information from which the investigating authority derived that factual basis is not set out does not establish a violation of Article 6.9. Thus, we find no violation of Article 6.9 in this regard. As Norway's claim of violation of Article 6.2 is dependent on its claim of violation of Article 6.9, which we have rejected, we find no violation of Article 6.2.

7.810 With respect to the essential facts relating to causation and non-attribution, Norway asserts that the disclosure did not contain any facts or reference to facts concerning import statistics for wild salmon from Canada and the United States, competition between wild and farmed salmon, predominance of sales of wild salmon in tins or cans, lower prices for wild salmon, and taste differences between wild and farmed salmon. As with the definition of domestic industry, there is no dispute that the Definitive Regulation is identical to the disclosure on this issue. Again, it seems clear to us that the essential facts forming the basis for the EC's conclusion that imports from Canada and the United States were not a cause of injury to the domestic industry are set out. We have, elsewhere in this decision, found that the EC's conclusion in this regard is not consistent with the requirements of the AD Agreement. However, that finding does not necessarily mean that the essential facts were not disclosed – it simply means that the conclusion was not one that could be reached by an objective and unbiased investigating authority on the basis of those facts. Thus, we find no violation of Article 6.9 in this regard. As Norway's claim of violation of Article 6.2 is dependent on its claim of violation of Article 6.9, which we have rejected, we find no violation of Article 6.2.

[912] Norway, FWS, para. 735.

[913] We note our conclusion elsewhere in this report that the EC's approach to defining the domestic industry in this case resulted in an investigation concerning a domestic industry that did not comport with the definition set forth in Article 4.1 of the AD Agreement.

3. Alleged Inconsistency with Articles 12.2 and 12.2.2

(a) Arguments of the parties

(i) Norway

7.811 Norway's third claim is that the EC violated Article 12.2 and 12.2.2 because it failed to provide a reasoned and adequate explanation for a number of its findings and conclusions. Norway considers that the EC's published determination – the Definitive Regulation – is characterized by a general failure to explain how the facts in the record support the factual and legal determinations. Norway first sets out its view of the obligation to provide a reasoned and adequate explanation imposed by Article 12.

7.812 Norway asserts that these provisions require the investigating authority to provide a *reasoned and adequate explanation*, among others, of how the evidence in the record supports the authority's determination, citing *US – Softwood Lumber VI (Article 21.5 – Canada)*,[914] and that the explanation must demonstrate in a "clear and unambiguous" manner that the substantive conditions for imposition of trade remedy measures have been satisfied, citing *US – Line Pipe*.[915]

7.813 Norway sets out examples of how, in its view, the EC failed to comply with those obligations in its determinations of: (1) the product under consideration and the domestic industry; (2) the margin of dumping for companies for whom the definitive margin differed from the disclosed margin; (3) the causal link; and (4) the level of the MIPs.

7.814 Norway recalls its claim that the EC failed to make a proper determination of the product under consideration, and argues that its substantive arguments also demonstrate that the EC's statement of reasons for the determination of the "product under consideration" fails to provide any explanation of the "evidentiary path" that led the EC to its conclusion with regard to the four criteria it used to assess likeness, namely, physical characteristics, production process, substitutability, and end uses. In particular, Norway contends that the EC has not explained how the facts in the record support its conclusions.

7.815 Second, Norway recalls its claim that the EC improperly defined the domestic industry under Article 4.1, and asserts that the EC's determination on that issue failed to set forth a reasoned and adequate explanation for many of the elements that make up this determination.

7.816 With respect to the dumping determination, Norway considers that there are many examples of the EC's failure to explain its dumping determinations for the ten sampled companies. For instance, Norway recalls that the definitive disclosure for PFN revealed a dumping margin of 24.5 per cent, but in the Definitive Regulation, the EC revised its determination to 17.7 per cent. Norway asserts that the EC must have accepted some of PFN's arguments, but that the Definitive Regulation sets out no reasons for the change. Norway notes that the EC also failed to provide any reasons for changes to the dumping margins for Hydroteck and Sinkaberg-Hansen that occurred between the Definitive Disclosure and the Definitive Regulation.

7.817 With respect to the causation determination, Norway recalls its claims of violation of Articles 3.1 and 3.5 of the AD Agreement, and offers examples of the EC's alleged failure to provide a reasoned and adequate explanation for its price undercutting and "non-attribution" analysis. These relate to the failure to address the price premium, referred to in the general disclosure, in the Definitive Regulation, the dismissal of the argument that any injury sustained by the EC industry was

[914] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 98.
[915] Appellate Body Report, *US –Line Pipe*, para. 217

caused by an increase in the industry's costs of production without adequate explanation, and the failure to provide a proper explanation of why imports from Canada and the United States were not another factor causing material injury to the domestic industry.

7.818 With respect to the MIPs, Norway recalls its arguments that the EC's determination of the level of the MIPs violated Article VI:2 of the GATT 1994 and Article 9 of the AD Agreement, and asserts that those arguments reflected that the EC's determination did not provide a reasoned and adequate explanation of how the EC arrived at the values for the various MIPs. Specifically, Norway maintains that the EC does not disclose any explanation of how it calculated the "non-dumped" MIPs or the "non-injurious" price of the Community industry of the like product.

(ii) European Communities

7.819 Regarding Norway's claims under Article 12, the EC maintains that the Definitive Regulation complies with the requirements of that Article, and that Norway is attempting to impose an exaggerated legal standard in this context. The EC notes that Article 12.2 of the AD Agreement requires an investigating authority to provide "in sufficient detail the findings and conclusions reached on all issues of fact and law", and that Article 12.2.2 of the AD Agreement spells out what is meant by sufficient detail for final determinations. The EC argues that Norway contorts the language of this provision to give the impression that the " sufficient detail" as mentioned in Article 12.2. is left undefined, and then advances a standard of "sufficiency" which goes well beyond the three criteria mentioned in Article 12.2.2.

7.820 In the EC's view, Article 12.2 of the AD Agreement is satisfied when an investigating authority provides the information that it considers relevant, and the reasons that it held to be decisive for its findings. The EC recognizes that an investigating authority may err on some matters of fact or law, but suggests that such errors could be attacked under the substantive provisions of the AD Agreement, while the procedural provision, Article 12.2, is only at issue when an investigating authority fails to provide relevant information on matters of fact or law, when it does not put forward any reasoning in support of them, or simply ignores the arguments presented by interested parties. The EC also notes that Norway fails to take into account the obligation to protect confidential information, which is set out in Article 12.2.2 itself.

7.821 With respect to the determination regarding selection of the product under consideration, the EC recalls its view that Article 2.6 is irrelevant to this issue, and asserts that it was therefore under no obligation to undertake the detailed explanation Norway considers to have been necessary. The EC maintains that it was simply required to describe its selection of the subject product as farmed salmon, however presented, which it did adequately in the Provisional Regulation.

7.822 The EC considers that, while Norway may disagree with the EC's conclusion, it is sufficient, as it identifies the four criteria that are found to constitute the common strain of farmed salmon – i.e., the relevant issues of law and fact, it draws a conclusion from the facts, and explains that no comments were made concerning that conclusion, obviating the need for further discussion in the Definitive Regulation.

7.823 With respect to the domestic industry determination, the EC considers that the information concerning production by the domestic industry, and the producers it considered to be part of that industry, is clearly set out in the Provisional and Definitive Regulations, and that Norway's emphasis on the question of filleting-only operations is the basis for its dissatisfaction with the EC's explanation. The EC maintains that the exclusion of certain producers is set out in paragraph 39 of the Definitive Regulation, and that this is adequate reasoning to explain why the EC considered that the 15 complaining producers constituted the domestic industry on the basis that their production

accounted for a major proportion of total domestic production. While Norway may disagree with the EC's conclusions, the EC considers it undeniable that it has provided reasons for its decisions.

7.824 The EC recognizes that the Definitive Regulation does not address the reasons for the modification of the dumping margins with regard to three Norwegian exporters (PFN, Hydroteck and Sinkaberg-Hansen), but maintains that to do so would have disclosed confidential industrial data, which is prohibited. Consequently, the EC was not only justified but also required under the AD Agreement not to provide specific information on the reasons why and how exactly it had modified the dumping margin of several Norwegian exporters after definitive disclosure. The EC notes, however, that it did explain its determination to the three exporters individually - verbal notifications to PanFish and Hydroteck were followed by short e-mails after the publication, while a lengthy telephone-conference was held with Sinkaberg-Hansen prior to the publication.

7.825 Turning to the causation determination, the EC points out that the price premium issue relates to injury, and not causation, and that the EC addressed this question in the general disclosure, but did not do so in the Definitive Regulation. The EC reiterates its view that the price premium for Community industry is not relevant for the calculation of price undercutting, and that therefore, the Definitive Regulation did not have to refer to this element.

7.826 With respect to the alleged "dismissal" of the arguments related to the EC industry's costs of production, the EC notes that the alleged lack of explanation is in the Provisional Regulation, which is governed by Article 12.2.1, which is not the subject of any claim in this dispute, and is therefore not properly before the Panel.

7.827 With respect to the alleged lack of evidence to support the determination that imports from Canada and the US were not an "other factor" causing material injury, the EC asserts that, as explained in recitals 85 and 86 of the Definitive Regulation, imports from the US and Canada consisted mostly of wild salmon, which was not the product concerned and therefore immaterial for the causation analysis. The EC maintains that such straightforward reasoning is adequate. With respect to the MIPs, the EC maintains that it explained its choice for the MIPs in recitals 127 to133 of the Definitive Regulation. The method of calculation was particularly set out in recitals 130 to 133. The EC considers that the explanation is sufficiently detailed to reveal how the EC calculated the relevant data.

(b) Evaluation by the Panel

7.828 Article 12.2 of the AD Agreement provides:

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

Article 12.2.2 of the AD Agreement provides:

> "A public notice of conclusion … of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty … shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the

> requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6".

7.829 Norway alleges that the EC violated these provisions by failing to provide a reasoned and adequate explanation for many of its findings. Norway considers that the Definitive Regulation generally fails to explain how the facts in the record support the factual and legal determination. Specifically, Norway asserts that the EC's determination fails to provide a reasoned and adequate explanation of the determinations of (1) product under consideration; (2) domestic industry; (3) dumping; (4) causation; and (5) the level of minimum import prices.

7.830 With respect to Norway's claim concerning the alleged failure to provide a reasoned and adequate explanation for the determination of the product under consideration, we have concluded elsewhere in our decision that the EC did not act inconsistently with the AD Agreement in not limiting the scope of the product under consideration to "like" products. Thus, we concluded that the EC was not required to make the determination proposed by Norway on the basis of the analysis argued by Norway. In our view, it follows from our finding that there is no violation of Article 12 in the fact that the EC did not provide an explanation of an analysis and determination it was not required to make. The Definitive Regulation sets forth the conclusions of the investigating authority as to the product under consideration. To the extent that Articles 12.2 and 12.2.2 require an explanation of aspects of the determination not required by the AD Agreement, we consider that the Definitive Regulation contains an adequate explanation of this aspect of the EC's determination.

7.831 With respect to Norway's claim regarding the definition of the domestic industry, we have found elsewhere in our decision that the EC's approach to defining the domestic industry in this case resulted in an investigation concerning a domestic industry that did not comport with the definition set forth in Article 4.1 of the AD Agreement. We note that our finding in this regard was based principally on the definition of the domestic industry as set out in the Provisional and Definitive Regulations. Having found error in this regard, the question of whether the notice of the definition of the domestic industry is "sufficient" under Article 12.2 is immaterial. We consider that, where there is a substantive inconsistency with the provisions of the AD Agreement, it is neither necessary nor appropriate to consider whether there is a violation of Article 12, as the question of whether the notice is "sufficient" under Articles 12.2 and 12.2.2 is immaterial.[916]

7.832 With respect to Norway's claim regarding dumping, Norway asserts that there are "many examples of the EC's failure to explain its dumping determinations for the ten sampled companies",[917] and refers, as the single example in support of its claim, to the change in the dumping margins for three companies as set out in the Definitive Regulation from those set out in the disclosure under Article 6.9. Norway alleges that the Definitive Regulation does not explain the reasons for the change in the dumping margins calculated for PFN, Hydroteck, and Sinkaberg-Hansen, that PFN argued that the calculation in the definitive disclosure was flawed, and that the Definitive Regulation fails to state

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[916] We find support for our position in the views of the Panel in *EC-Bed Linen*,

> "A notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless. Further, in our view, it is meaningless to consider whether the notice of a decision that is substantively inconsistent with the requirements of the AD Agreement is, as a separate matter, insufficient under Article 12.2. A finding that the notice of an inconsistent action is inadequate does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the AD Agreement."

Panel Report, *EC-Bed Linen*, para. 6.259.

[917] Norway, FWS, para. 769.

the reasons for the acceptance or rejection of arguments made by PFN, Hydroteck, and Sinkaberg-Hansen. We have found elsewhere in our decision that the EC's determination of dumping for these companies was inconsistent with Articles 2.2, 2.2.1.1, 2.2.2 and 2.2.2(iii). Having found error in this regard, the question of whether the notice of those determinations is "sufficient" under Article 12.2 is immaterial. We consider that, where there is a substantive inconsistency with the provisions of the AD Agreement, it is neither necessary nor appropriate to consider whether there is a violation of Article 12, as the question of whether the notice is "sufficient" under Articles 12.2 and 12.2.2 is immaterial.[918]

7.833 With respect to Norway's claim regarding causation, Norway offers three examples of the EC's alleged failure to provide a reasoned and adequate explanation for its price undercutting and "non-attribution" determinations.[919] Norway alleges that the Definitive Regulation does not address the question of a price premium,[920] does not address the argument that increased costs of production were a cause of injury to the domestic industry, and does not provide a proper explanation for the conclusion that imports from Canada and the United States were not a cause of injury. We have found elsewhere in our decision that these elements of the EC's determinations of injury and causation were inconsistent with Articles 3.1, 3.2 and 3.5 of the AD Agreement. Having found error in this regard, the question of whether the notice of either the preliminary or affirmative determination of injury is "sufficient" under Article 12.2 is immaterial. We consider that, where there is a substantive inconsistency with the provisions of the AD Agreement, it is neither necessary nor appropriate to consider whether there is a violation of Article 12, as the question of whether the notice of either a preliminary or final determination is "sufficient" under Articles 12.2 and 12.2.2 is immaterial.[921]

7.834 Finally, with respect to Norway's claim regarding the level of minimum import prices, Norway asserts that the determination did not provide a reasoned and adequate explanation of how the EC arrived at the values for the various minimum import prices.[922] Specifically, Norway argues that the EC failed to disclose how it calculated the non-dumped minimum import prices and non-injurious price of the EC industry for the like product. We have found elsewhere in our decision that the EC's determination of the level of the minimum import prices was inconsistent with Articles 9.2 and 9.4(ii). Having found error in this regard, the question of whether the notice of that determination is "sufficient" under Article 12.2 is immaterial. We consider that, where there is a substantive inconsistency with the provisions of the AD Agreement, it is neither necessary nor appropriate to consider whether there is a violation of Article 12, as the question of whether the notice is "sufficient" under Articles 12.2 and 12.2.2 is immaterial.[923]

4. Allegedly Inadmissible Exhibits Submitted to the Panel

7.835 At the first meeting of the Panel with the Parties, Norway raised objections to seven exhibits submitted by the EC in connection with its first written submission. Norway asserts that these exhibits are inadmissible in this proceeding, because they contain "data and evidence that is not part of the record of investigation."[924] Norway raised specific objections to Exhibits EC-2, EC-10, and EC-12 – EC-16.[925] Norway argues that these exhibits contain new evidence, not contained in either the report of the investigating authority, or in the investigation record, and that the Panel may not take

[918] Panel Report, *EC– Bed Linen*, para. 6.259.
[919] Norway, FWS, para. 773.
[920] We note that Norway's substantive claim of violation with respect to the question of a price premium was raised under Articles 3.1, 3.2, and 3.5, and is discussed in the portion of our decision referring to the injury determination.
[921] Panel Report, *EC – Bed Linen*, para. 6.259.
[922] Norway, FWS, para. 777.
[923] Panel Report, *EC– Bed Linen*, para. 6.259.
[924] Norway, First Oral Statement, para. 7.
[925] Norway, First Oral Statement, paras. 8-12.

such new evidence into consideration in this dispute. Norway relies in this respect on Article 17.5 of the AD Agreement, and *US – Countervailing Duty Investigation on DRAMS*, where 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*."[926] Norway notes that panels have held that they can "*not examine any new evidence* that was not part of the record of the investigation."[927]

7.836 The Panel requested the EC to indicate whether the information in the challenged exhibits was in the files of the anti-dumping investigation, and on what basis the EC demonstrated that this information was before the investigating authority at the time it made its decision.[928] In its response, the EC asserted that all the relevant information was before the investigating authority, and that this was "largely apparent from the measure at issue itself and the public nature of some of the information", as well as "photocopies of extracts from the questionnaire responses, verification or disclosure documents."[929] The EC then gave further specific comments with respect to each of the seven contested exhibits.

7.837 As we have previously noted, in our assessment of the matter before us, we must limit our review to the "facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member", in accordance with Article 17.5(ii) of the AD Agreement. This does not mean, in our view, that we are limited to the information actually set forth or specifically referenced in the determination at issue. We find support for this view in the Appellate Body's report in *US – Countervailing Duty Investigation on DRAMS*, where it rejected the view that an investigating authority could not defend its determination on the basis of information contained in the record that was before it at the time of the determination, but not specifically cited or discussed in that determination.[930] While the Appellate Body was considering a countervailing measure under the Agreement on Subsidies and Countervailing Measures, which does not contain a provision similar to Article 17.5(ii), we consider that the same conclusion applies with equal force in the context of review of an anti-dumping measure.

7.838 We also are of the view that Article 17.5(ii) does not preclude a party from organizing information in a different presentation or format for submission to the Panel than was before the investigating authority, in response to the particular allegations of error and arguments at issue in the dispute. We note in this respect the view of the Panel in *EC-Bed Linen*, that "the form of the document, (*i.e.*, a new document) does not preclude us from considering its substance, which comprises facts made available to the investigating authority during the investigation".[931]

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[926] Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea ("US – Countervailing Duty Investigation on DRAMS")*, WT/DS296/AB/R, adopted 20 July 2005, para. 161. Emphasis added.

[927] Panel Report, *Guatemala - Cement II*, para. 8.19. Emphasis added. *See also* Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy*"), WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report, WT/DS98/AB/R, DSR 2000:I, 49, para. 7.30; Appellate Body Report, *US – Wheat Gluten*, para. 161; Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan ("US – Hot-Rolled Steel ")*, WT/DS184/R, adopted 23 August 2001, para. 7.6, quoted also in Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada ("US – Softwood Lumber VI ")*, WT/DS277/R, adopted 26 April 2004, 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 – Steel Rebar*, para. 7.21; Panel Report, *US – Wool Shirts and Blouses*, para. 7.21.

[928] EC, Answer to Panel Question 1.

[929] EC, Answer to Panel Question 1, para. 3.

[930] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 161-165.

[931] Panel Report, *EC – Bed Linen*, para. 6.43.

7.839 Thus, in deciding whether the contested exhibits are properly before us for our consideration in this dispute, we must determine whether the **information** in those exhibits was before the investigating authority at the time it made its determination. If it was, then even if now presented in a different format, our view is that we may not exclude it from our consideration. However, if the information, in any form, was not demonstrably before the investigating authority at the time it made its determination, then we consider it appropriate to exclude it from our consideration in this proceeding.

7.840 We turn now to the specific exhibits objected to by Norway.

- Exhibit EC-2 consists of six articles from "Intrafish", dating from August 2001, March 2002, April 2002, May 2002, September 2002, and September 2004, printed from the Internet on 17 October 2006.

7.841 The EC recognizes that these articles were printed in 2006, but notes that the date of publication of each was prior to the investigating authority's determination. The EC presents evidence that it subscribes to Intrafish,[932] and asserts that the investigating authority monitored this service throughout the investigation, and that these documents were in the public domain. Thus, the EC argues, the fact that the articles were printed in 2006 is immaterial. The EC submitted this exhibit in support of the statement in paragraph 15 of the Provisional Regulation that changes in the Norwegian industry enabled the investigating authority to calculate dumping margins based on data from producers. The EC argues that this assertion does not have to be justified, as it does not concern any issue of law, but rather a question of whether a particular approach to calculating dumping margins was possible as a practical matter. Moreover, the EC argues that this issue is not raised in Norway's request for establishment. The EC also notes that Norway does not contest the substance of the articles. The EC asserts that a number of reasons explain why the articles are not referred to in the Provisional Regulation, including the need to translate such regulations into the 20 official languages, and associated technical and administrative requirements, which impose pressure to produce texts that are succinct and not over-burdened with extraneous references, which in any event the EC argues are not required by the AD Agreement.

7.842 Norway contends that the fact that information is publicly available does not make that information part of the investigation record, and that while the EC may have shown that it subscribed to Intrafish, it has not shown that the entire archive of articles from Intrafish are part of the file of every investigation into fish products conducted by the EC. Norway argues that the EC has also failed to show that the articles in question were part of the record of *this investigation*, and were considered by the authority as part of that decision-making process.[933] Norway notes that this exhibit relates to its claim that the EC was required by Article 6.10 of the AD Agreement to include independent exporters in the sample.

7.843 We can find no basis to conclude that the six articles in Exhibit EC-2 were actually before the investigating authority at the time of its determination. We do not question that the EC subscribed to Intrafish, nor that staff of the EC investigating authority monitored that service, and informed themselves as to events in the seafood industry. As we have noted elsewhere in our decision, persons working for the investigating authority in a particular anti-dumping dispute may have knowledge and information gained from sources other than information submitted by interested parties during an investigation – prior knowledge of a product, industry, or market, experience gained in other

[932] Exhibit EC-27, consisting of an internal EC Commission note dated 27 May 2004 recording the subscription and its relevance for the anti-dumping proceeding.

[933] Norway also argues that the articles in question were not made available for Norway's representatives, not shown to Norway when Norway inspected the non-confidential record of the investigation in November as required by Article 6.4, and were not disclosed as essential facts as required by Article 6.9.

investigations, or other types of investigations, publicly available information, and "common knowledge" may all play a part in an investigating authority's efforts to establish the facts in a particular investigation. However, in our view, in order for such information to be put before a Panel to support an argument in dispute settlement, such information must be reflected in the published determinations, or at a minimum in other documents in the files of the investigating authority **and** brought before us in a form that demonstrates that it was available to and considered by the investigating authority in establishing the facts. In this case, the Provisional Regulation clearly references changes in the structure of the Norwegian salmon industry. Presumably, the investigating authority had some basis for this reference. But we cannot simply accept that these six articles were that basis. The presentation of articles printed from the Internet long after the investigation was completed does not, to us, demonstrate that the information in those articles was before, and considered by, the investigating authority in establishing the facts. The fact that the information in question is in the public domain does not change our view in this regard. Clearly, a great deal of information in the public domain may be relevant in a particular anti-dumping investigation. A reviewing panel cannot, in our view, simply accept that all such information was, in fact, before the investigating authority and considered, without some contemporaneous evidence of that fact. We therefore consider it appropriate to exclude this exhibit from our consideration.[934]

- Exhibit EC-10 contains data on (1) export volumes, (2) turnover, and (3) export prices for sampled producers, non-sampled producers, and producers that were deemed "non-cooperating".

7.844 The EC argues that this exhibit is not provided to the Panel as "evidence" but is rather "an explanation (in tabular format) that forms an integral part of the text of the EC's first written submission, placed in an Exhibit for the convenience of the Panel"[935]. The EC argues that the contents of this exhibit are "entirely based on information that was before the investigating authority, and particularly Eurostat data (which is also in the public domain)."[936] The EC explains how official Eurostat data, is "generally extracted" by the investigating authority at the beginning of an investigation, generating an EXCEL spread sheet, which may contain thousands of lines. The EC submits Exhibit EC-28, containing the first and last pages of the Eurostat data extracted in this case on 23 February 2005.[937] The EC asserts that in this case it was necessary to express the data in "whole fish equivalent" (WFE), a process never contested by Norway. The EC submits Exhibit EC-29, a worksheet that is part of the same EXCEL file, which shows some of the figures that appear in Exhibit EC-10, and explains how the remainder of the figures were derived. The EC also used information from questionnaire responses in preparing Exhibit EC-10. The EC relied on Exhibit EC-10 in support of its argument that it had other sources of information for the conclusion that non-sampled companies were also dumping.

7.845 Norway argues that the distinction drawn by the EC between "evidence" and "explanation" is irrelevant, the relevant question being whether particular information was before the investigating authority. Norway contests the admissibility of two aggregate figures shown in this exhibit. Norway argues that the fact that the figures are taken from public Eurostat data is immaterial, as not all public information is necessarily among the information gathered by the investigating authority. Norway asserts that the EC has not demonstrated that these two figures were part of the record. Norway points out that the figures on which other extrapolations were based do not appear in the EC's determination,

[934] We note that this does not mean that we have found that the EC erred in stating that the Norwegian industry was undergoing reconstruction – a question of fact on which we have found it unnecessary to rule, in light of our decision on Norway's claim under Article 6.10.

[935] EC, Answer to Panel Question 1, para. 17

[936] EC, Answer to Panel Question 1, para. 18

[937] The EC offered to submit the entire document, should the Panel wish. We are satisfied that the investigating authority did extract the information indicated in EC-28 during the course of the investigation.

were not disclosed under Article 6.9, and were not among the information made available pursuant to Article 6.4. Norway argues that the allegedly publicly available data was manipulated on the basis of a number of choices made by the EC for purposes of this proceeding. Moreover, no interested party was ever in a position to comment on these figures. Moreover, even accepting that the aggregate figures were before the investigating authority, Norway argues that the remainder of the data in EC-10 were not, except for turnover for sampled producers. Rather, Norway asserts, the remaining data are based on extrapolations from other figures, based on choices and allocations of data that result in new volume and turnover figures for non-sampled producers and non-cooperating producers that were not part of the record, and that such manipulation of the data may not be considered by the Panel.

7.846 With respect to Exhibit EC-10, we note that, as discussed above, the fact that Eurostat data are publicly available does not, in our view, demonstrate that such information was before the investigating authority during the investigation. However, we are satisfied that the investigating authority did, in fact, extract relevant information from the Eurostat data for purposes of this investigation, and that this information was before the investigating authority. While it is clear that the information in EC-10 was not before the investigating authority in the form in which it was submitted to the Panel, we are satisfied that the information has not been impermissibly manipulated, but rather has been compiled and presented in a more useful form to support the EC's arguments. We therefore decline to exclude it from our consideration in this dispute. We note, however, that we did not rely on this information in making our decision on the issue in connection with which it was submitted.

7.847 We understand from the parties' arguments that the Eurostat data in question was not included in the files made available to interested parties pursuant to Article 6.4. In response to questioning from the Panel, the EC acknowledged that public information used by the investigating authority is covered by Articles 6.4 and 6.9 of the AD Agreement.[938] The EC went on to argue, however, that it was not required to disclose publicly available data, as this would not be practical, although extractions and details could be produced in response to specific requests at the time of the investigation.[939] We do not agree. In our view, if an investigating authority obtains relevant public information during the course of its investigation, from whatever source, that information must be among the information interested parties are given opportunities to see, pursuant to Article 6.4, and may need to be disclosed as essential facts pursuant to Article 6.9. We do not mean to suggest that every scrap of public information known by the staff of the investigating authority must be in the files of the investigation. But certainly, public information that is specifically obtained for the purposes of a particular investigation must, we believe, be in those files, and must be made available for interested parties to see pursuant to Article 6.4, as it clearly forms part of the information relevant to a particular issue that is before the investigating authority at the time it makes it determination.[940] We therefore consider that the EC violated Article 6.4 by failing to provide timely opportunities for the interested parties to see the Eurostat information obtained for purposes of the investigation.

7.848 Moreover, such public information may constitute part of the essential facts that must be disclosed under Article 6.9. In our view, information concerning the volume and value of imports of Norwegian salmon, falls within the scope of "essential facts" which are to be disclosed under Article 6.9. The disclosure documents do contain information on the volume and value of imports of Norwegian salmon, although not necessarily in the form presented in Exhibit EC-10. The fact that the EC has, in making its arguments to this Panel in response to Norway's allegations of error, relied on a sub-set of that information that was not disclosed in that form does not, in our view, suffice to demonstrate a violation of Article 6.9. Article 6.9 requires disclosure of essential fact that form the basis of the investigating authorities' decision whether to impose definitive measures. It does not

[938] EC, Answer to Panel Question 94, para. 22.
[939] EC, Answer to Panel Question 94, para. 26.
[940] See above VII.J.1(c).

require an investigating authority to predict what allegations of error it might have to answer in future dispute settlement and disclose the specific information in the specific form on which it might in the future rely in responding to those allegations. Therefore, we consider that the fact that the specific information as set out in Exhibit EC-10 was not disclosed does not constitute a violation of Article 6.9.

- Exhibit EC-12 contains data on the level of dumped imports from Norway that excludes imports from one of the sampled companies.

7.849 The EC argues that, like Exhibit EC-10, this exhibit was provided to the Panel not as "evidence" but as "an explanation (in tabular format) that forms an integral part of the text of the EC's first written submission, placed in an Exhibit for the convenience of the Panel."[941] The EC argues that the information in this exhibit is based on the same Eurostat data as Exhibit EC-10, and explains how the information in this exhibit corresponds to the Eurostat data, as well as data from Nordlak's questionnaire response.

7.850 Norway again asserts that the distinction between "evidence" and "explanation" is irrelevant. Norway argues that some of the data in Exhibit EC-12 is new, based on a manipulation of data in the record, rather than the cited sources directly. Norway argues that these computations involve choices in how they were made, which in Norway's view have a significant impact on the conclusions drawn. Norway also argues that the purpose of the information presented is to present facts supporting a different conclusion than that reached by the investigating authority – a conclusion excluding imports from Nordlaks that were included in the investigating authorities' determination. Finally, Norway argues that this information was also not in the files made available to its representatives, and was not disclosed pursuant to Article 6.9.

7.851 The views expressed above in our consideration of Exhibit EC-10 also apply here. We are satisfied that the investigating authority did, in fact, extract relevant information from the Eurostat data for purposes of this investigation, and that this information was before the investigating authority. While it is clear that the information in EC-12 was not before the investigating authority in the form in which it was submitted to the Panel, we are satisfied that the information has not been impermissibly manipulated, but rather has been compiled and presented in a more useful form to support the EC's arguments. We therefore decline to exclude it from our consideration in this dispute. We note, however, that we did not rely on this information in making our decision on the issue in connection with which it was submitted. As we found with respect to Exhibit EC-10, we conclude that the EC violated Article 6.4 by failing to provide timely opportunities for the interested parties to see the Eurostat information obtained for purposes of the investigation, but consider that the fact that the specific information in Exhibit EC-12 was not disclosed does not constitute a violation of Article 6.9.

- Exhibit EC-13 contains data on the proportion of sales made by the EC salmon industry in the United Kingdom.

7.852 The EC argues that, like Exhibits EC-10 and EC-12, this exhibit was provided to the Panel not as "evidence" but as "an explanation (in tabular format) that forms an integral part of the text of the EC's first written submission, placed in an Exhibit for the convenience of the Panel."[942] The EC argues that the information in this exhibit is based on questionnaire responses of EC producers, which were unquestionably before the investigating authority, including transaction-by-transaction listings, as well as information from sampled Norwegian producers, all of which are confidential. The EC relied on this exhibit in support of its argument concerning consideration of price trends.

[941] EC, Answer to Panel Question 1, para. 22.
[942] EC, Answer to Panel Question 1, para. 26.

7.853 Norway objects to this exhibit on the basis that although it may be based on data that was before the authority, the original data has been transformed into a new set of facts through manipulation. Norway argues that a defending Member cannot manipulate data in the record in this way, and thereby establish new facts that were not previously known. Norway also alleges that whether the investigating authority had before it data on UK and non-UK sales is contradicted by a statement in the Provisional Regulation, which notes that the UK market cannot be isolated from the overall EC market in evaluating changes in consumption.[943] Finally, Norway argues that this information was also not in the files made available to its representatives, and was not disclosed pursuant to Article 6.9.

7.854 With respect to Exhibit EC-13, we have no doubt that it is based on information that was before the investigating authority, as Norway does not dispute that it was derived from questionnaire responses from EC and Norwegian producers. In our view, the statement in the Provisional Regulation does not demonstrate that the investigating authority did not have information on UK and non-UK sales by the domestic producers. That statement rejects the possibility of considering declining consumption in one part of the domestic market as a cause of injury when consumption as a whole was increasing – it says nothing about the existence of data for particular sales. The fact that the EC has, in making its arguments to the Panel, sorted data in a way that it had not done during the investigation does not demonstrate that the underlying information was not before the investigating authority. Such a reformulation of the information before the investigating authority may give rise to questions as to the adequacy of the analysis of the issue in question at the time of the determination, and whether the arguments presented to a reviewing Panel constitute *post hoc* rationalizations, but those are not the questions to be addressed in deciding whether the information in the exhibit may be considered by a panel. We are satisfied that the investigating authority did have before it the information reflected in EC-13, albeit not in the form in which it was submitted to the Panel, and we are satisfied that the information has not been impermissibly manipulated, but rather has been compiled and presented in a different form to support the EC's arguments. We do not consider that an investigating authority must have before it at the time of its determination information organized in a form that will be later deemed useful in supporting its arguments in later dispute settlement. We therefore decline to exclude it from our consideration in this dispute. We note, however, that we did not rely on this information in making our decision on the issue in connection with which it was submitted.

- Exhibit EC-14 contains a table entitled "injury data with Corrected US/Canadian Imports"

- Exhibit EC-15 contains a table entitled "Imports originating in other third countries (corrected data)"

7.855 The EC argues that, as it explained in its first written submission, the data on imports of salmon from the United States and Canada set out in the Provisional Regulation were incorrect. The EC submitted the corrected figures in Exhibit EC-15, and based on those figures, submitted Exhibit EC-14 to support the contention that the error in the data does not affect the outcome of the determination, and asks the Panel to take that into consideration when making its findings. The EC acknowledges that the correction of the technical error regarding salmon imports from the US and Canada post-dates the measure at issue.

7.856 Norway argues that the EC, by stating that the correction post-dates the measure explicitly confirms that, at least part of the data in those exhibits is new and was not before the investigating authority. As a result, Norway asserts, the data is inadmissible. Norway also argues that, based on the corrected data, the EC presents analysis different from that originally undertaken by the

[943] Provisional Regulation, Recital 101.

investigating authority, and that for the Panel to consider this data would require an impermissible *de novo* review. Finally, Norway argues that this information was plainly not made available to the parties during the investigation, contrary to Articles 6.2 and 6.4, and not disclosed, contrary to Article 6.9.

7.857 It is clear, and the EC does not dispute, that the facts set out in these two Exhibits were **not** available to the investigating authority at the time it made its determination. Indeed, it is clear that the investigating authority cited and relied upon different facts concerning the volume of imports from the United States and Canada, and the consequent information on rate of increase and changes in market share. We may not, in our examination of the anti-dumping measure, take into account facts that were not before the investigating authority when it made its decision. Therefore, we consider it appropriate to exclude these exhibits from our consideration.

- Exhibit EC-16 contains data concerning salmon imports from the United States.

7.858 The EC asserts that Exhibit EC-16 is the same previously referred to public Eurostat data that was before the investigating authority. The EC argues that the use of these data is evident from the comparison of domestic and imported salmon prices reflected in the Definitive Regulation at paragraphs 83-86. The EC relies on exhibit EC-16 in connection with its arguments on non-attribution of injury to imports from Canada and the United States.

7.859 Norway argues that the mere fact that the data in Exhibit EC-16 were taken from public Eurostat data does not demonstrate that it was part of the investigation record. Norway asserts that the EC has not demonstrated that the data, as organized in the exhibit, was before the authority during the investigation. Moreover, Norway argues, the exhibit relies on import statistics to demonstrate that imports of salmon from the United States consists mostly of wild salmon, despite the fact that the investigating authority specifically stated that "import statistics do not distinguish between farmed salmon and wild salmon".[944] Finally, Norway argues that this information was also not in the files made available to its representatives, and was not disclosed pursuant to Article 6.9.

7.860 The views expressed above in our consideration of Exhibit EC-10 also apply here. We are satisfied that the investigating authority did, in fact, extract relevant information from the Eurostat data for purposes of this investigation, and that this information was before the investigating authority. We are satisfied that the information has not been impermissibly manipulated, but rather has been compiled and presented in a more useful form to support the EC's arguments. That the EC is relying on this exhibit to support an argument that may be in some respect contradictory to statements in the Provisional and Definitive Regulations goes to the persuasiveness of those arguments, but is not relevant to whether or not the information in question may be considered by the Panel. We therefore decline to exclude it from our consideration in this dispute. We note, however, that we did not rely on this information in making our decision on the issue in connection with which it was submitted. As we found with respect to Exhibit EC-10, we conclude that the EC violated Article 6.4 by failing to provide timely opportunities for the interested parties to see the Eurostat information obtained for purposes of the investigation, but consider that the fact that the specific information as set out in Exhibit EC-16 was not disclosed does not constitute a violation of Article 6.9.

[944] Provisional Regulation, Recital 96, Definitive Regulation, Recital 84.

VIII. CONCLUSIONS AND RECOMMENDATION

A. CONCLUSIONS

8.1 In light of the findings we have set out in the foregoing sections of our Report, we conclude that the European Communities acted inconsistently with:

(i) Article 4.1 of the AD Agreement because its approach to defining the domestic industry in this case resulted in an investigation concerning a domestic industry that did not comport with the definition set forth in Article 4.1 of the AD Agreement, and consequently

- Article 5.4 of the AD Agreement in determining support for the application for initiation on the basis of information relating to a wrongly-defined domestic industry, and

- Articles 3.1, 3.4 and 3.5 of the AD Agreement in undertaking injury and causation analyses on the basis of information relating to a wrongly-defined domestic industry;[945]

(ii) Article 6.10 of the AD Agreement because it failed to include Salmar in the ten companies selected for investigation pursuant to the second limited investigation technique described in the second sentence of Article 6.10;[946]

(iii) Article 2.2.2 of the AD Agreement when it disregarded actual domestic profit margin data pertaining to domestic sales of eight investigated companies, and actual SG&A data pertaining to domestic sales of one investigated company, on the basis of the low volume of those sales (5 per cent representative sales test);[947]

(iv) Article 2.2.2 of the AD Agreement when it disregarded actual domestic profit margin data pertaining to domestic sales of three investigated companies on the basis of the less-than-10 per cent profitable sales test;[948]

(v) Article 6.8 and paragraph 3 of Annex II of the AD Agreement when it disregarded the filleting cost information submitted by Grieg Seafood AS and inappropriately resorted to "facts available";[949]

(vi) Article 6.8 and paragraph 3 of Annex II of the AD Agreement when it disregarded the finance cost information submitted by Grieg Seafood AS and inappropriately resorted to "facts available";[950]

(vii) Article 9.4(i) of the AD Agreement because it imposed a fixed amount of anti-dumping duty on non-investigated cooperating companies on the basis of a flawed finding that the weighted average "injury margin" was less than the

[945] Para. 7.124.
[946] Para. 7.205.
[947] Para. 7.309.
[948] Para. 7.318.
[949] Para. 7.372.
[950] Para. 7.386.

weighted average margin of dumping calculated for the investigated companies;[951]

(viii) Article 6.8 and paragraph 1 of Annex II of the AD Agreement because it applied "facts available" for the purpose of establishing the margin of dumping of 33 of 67 companies that did not receive the "sampling questionnaire" and which were not members of the FHL or the NSL;[952]

(ix) Article 2.2.1.1 of the AD Agreement when it made upward adjustments to the costs of production of [[XXX]] and [[XXX]] to account for NRCs on the basis of a three-year average of the NRCs incurred for each company between 2002 and 2004;[953]

(x) Article 2.2 of the AD Agreement because it calculated the finance costs used in the determination of the costs of production of [[XXX]] and [[XXX]] on the basis of a three-year average of the finance costs incurred between 2002 and 2004, thereby failing to properly establish these companies' constructed normal values;[954]

(xi) Article 2.2 and 2.2.1.1 of the AD Agreement because the EC rejected smolt cost adjustments to [[XXX]] and [[XXX]] cost of production and could not demonstrate that the investigating authority accepted these adjustments between Definitive Disclosure and adoption of the Definitive Regulation;[955]

(xii) Article 2.2 of the AD Agreement because it rejected the adjustment for income earned on the sale of smolt during the period of investigation that was requested by [[XXX]];[956]

(xiii) Article 2.2.2 of the AD Agreement because it rejected [[XXX]] reported G&A costs;[957]

(xiv) Article 2.2.2(iii) of the AD Agreement because it applied a methodology that involved double-counting and was thereby not "reasonable" to determine [[XXX]] SG&A costs;[958]

(xv) Articles 2.2 and 2.2.1.1 of the AD Agreement when it added revenue earned by [[XXX]] from slaughtering services provided to third parties to its cost of production;[959]

(xvi) Articles 3.1 and 3.2 of the AD Agreement because in finding material injury it treated imports attributable to a company for which a de minimis margin

[951] Para. 7.428.
[952] Para. 7.462.
[953] Paras. 7.510 and 7.515.
[954] Para. 7.543.
[955] Para. 7.554
[956] Para. 7.572.
[957] Para. 7.592.
[958] Para. 7.605.
[959] Para. 7.609.

was calculated, and all imports from unexamined producers and exporters, as dumped;[960]

(xvii) Articles 3.1 and 3.2 of the AD Agreement because in finding material injury it failed to take into account the price premium enjoyed by domestic salmon products in considering whether there was significant price undercutting;[961]

(xviii) Articles 3.1 and 3.4 of the AD Agreement because in finding material injury it failed to take into account arguments alleging a distortive effect of using EUR, instead of GBP, in determining price trends and thereby failed to provide an adequate explanation of its finding of declining prices;[962]

(xix) Article 3.5 of the AD Agreement because it failed to properly examine known factors other than the dumped imports which at the same time were causing injury to the domestic industry, and failed to ensure that injuries caused by these other factors were not attributed to dumped imports;[963]

(xx) Article 9.2 of the AD Agreement when it imposed MIPs on the investigated companies on the basis of a flawed finding that the "non-injurious" MIPs were less than the investigated companies' respective normal values, thus failing to ensure that anti-dumping duties were collected in the "appropriate amounts";[964]

(xxi) Article 9.4(ii) of the AD Agreement because there was no objective factual basis to support the conclusion that the MIPs imposed on non-investigated companies were lower than the weighted average of the normal values for the investigated parties;[965]

(xxii) Article 6.4 of the AD Agreement by failing to provide timely opportunities for interested parties to see:

- all non-confidential information contained in 68 documents which were relevant to the presentation of their cases,[966]
- a letter received from Dr. Jaffa,[967]
- 15 *Notes Verbales* submitted to the investigating authority by the Norwegian government,[968] and
- relevant Eurostat information obtained by the investigating authority for purposes of the investigation.

8.2 In light of the findings we have set out in the foregoing sections of our Report, we conclude that the European Communities did *not* act inconsistently with:

[960] Paras. 7.636 and 7.646.
[961] Paras. 7.640 and 7.646.
[962] Paras. 7.645 and 7.646.
[963] Para. 7.669.
[964] Para. 7.727.
[965] Para. 7.739.
[966] Para. 7.774.
[967] Para. 7.775.
[968] Para. 7.776.

(i) Articles 2.1 and 2.6 of the AD Agreement with respect to the product under consideration, nor as a consequence, Articles 2.1, 3.1, 3.2, 3.4, 3.5, 3.6, 5.1 and 5.4 of the AD Agreement;[969]

(ii) Articles 3.1, 3.4 and 3.5 of the AD Agreement by having had recourse to sampling in making its injury determination;[970]

(iii) Article 6.10 of the AD Agreement in excluding all non-producing exporters from the selection of companies to investigate pursuant to the second limited investigation technique described in the second sentence of Article 6.10;[971]

(iv) Article 6.10 of the AD Agreement for not having included Bremnes in the ten companies selected for investigation pursuant to the second limited investigation technique described in the second sentence of Article 6.10;[972]

(v) Articles 2.2 and 2.2.1 of the AD Agreement in excluding the domestic sales of certain investigated companies from the determination of normal value, on the grounds that they were outside of the ordinary course of trade by reason of price;[973]

(vi) Article 9.4(i) of the AD Agreement in attributing a 20.9 per cent margin of dumping to non-cooperating companies;[974]

(vii) Article 6.8 and paragraph 1 of Annex II of the AD Agreement in applying "facts available" for the purpose of establishing the margin of dumping of 34 of 67 companies that did not receive the "sampling questionnaire" and which were members of the industry associations represented by the FHL;[975]

(viii) Articles 2.1, 2.2 and 2.2.1.1 of the AD Agreement in making adjustments to the costs of production of [[XXX]], [[XXX]] and [[XXX]] for certain NRCs;[976]

(ix) Article 2.2 of the AD Agreement in rejecting the adjustment for the cost of purchased smolt relating to salmon harvested outside of the period of investigation that was requested by [[XXX]];[977]

(x) Article 2.2.2 of the AD Agreement in rejecting [[XXX]] reported selling expenses;[978]

(xi) Articles 9.1, 9.2 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by not adopting a mechanism to ensure that the MIPs imposed on investigated parties could not result in the collection of anti-dumping duties

[969] Para. 7.76.
[970] Para. 7.129.
[971] Para. 7.181.
[972] Para. 7.195.
[973] Para. 7.279.
[974] Para. 7.433.
[975] Para. 7.461.
[976] Para. 7.488.
[977] Para. 7.570.
[978] Para. 7.599.

in excess of the *ad valorem* equivalent of those parties' respective margins of dumping calculated in the original investigation;[979]

(xii) Articles 9.1, 9.2 and 9.3 of the AD Agreement because of the fact that at certain price levels, the fixed anti-dumping duties imposed on investigated parties could result in the collection of anti-dumping duties in excess of the *ad valorem* equivalent of those parties' respective margins of dumping calculated in the original investigation;[980]

(xiii) Article 6.4 of the AD Agreement by failing to provide timely opportunities for interested parties to see confidential information contained in 68 documents;[981]

(xiv) Articles 6.2 and 6.9 of the AD Agreement with respect to disclosure of the essential facts regarding:

- dumping by PFN, Hydroteck and Sinkaberg-Hansen, and minimum import prices,[982]

- the definition of the domestic industry, causation and non-attribution;[983] and

(xv) Article 12.2 and 12.2.2 of the AD Agreement in setting forth its conclusions as to the product under consideration in the Definitive Regulation.[984]

8.3 Finally, in light of the findings we have set out in paragraphs 8.1 (iv)-(vi), (ix), (x) and (xvi)-(xxii), we make no findings, based on judicial economy, in respect of Norway's claims under:

(i) Article 2.2 of the AD Agreement, in respect of the less-than-10 per cent profitable sales test applied by the EC to determine whether domestic sales are made outside of the ordinary course of trade;[985]

(ii) Paragraph 6 of Annex II of the AD Agreement, in relation to the EC's reliance on "facts available" for the purpose of calculating the filleting costs of Grieg Seafood AS;[986]

(iii) Paragraph 6 of Annex II of the AD Agreement, in relation to the EC's reliance on "facts available" for the purpose of calculating the finance costs of Grieg Seafood AS;[987]

(iv) Articles 2.1 and 2.2 of the AD Agreement, as regards the upward adjustments made to the costs of production of [[XXX]] and [[XXX]] for NRCs on the basis of the three-year average of NRCs incurred between 2002 and 2004;[988]

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[979] Paras. 7.749-7.752.
[980] Para. 7.761.
[981] Para. 7.773.
[982] Para. 7.803.
[983] Paras. 7.809 and 7.810.
[984] Para. 7.830.
[985] Para. 7.319.
[986] Para. 7.373.
[987] Para. 7.387.

(v) Article 2.2 of the AD Agreement, in relation to the EC's inclusion of a loss of NOK [[XXX]] million that the [[XXX]] incurred in 2002 on the write-down of shares held in [[XXX]] into its calculation of [[XXX]] finance costs;[989]

(vi) Article 3.5 of the AD Agreement, as regards the EC's consideration of dumped imports, price undercutting and pricing trends in its finding of injury;[990]

(vii) Article 3.1 of the AD Agreement, in relation to the EC's determination of causation;[991]

(viii) Article VI:2 of the GATT 1994, in relation to the imposition of the MIPs on both investigated and non-investigated parties at the level of the "non-injurious" MIPs;[992]

(ix) Article 6.2 of the AD Agreement, as regards the failure to provide timely opportunities for interested parties to see all non-confidential information relevant to the presentation of their cases;[993] and

(x) Articles 12.2 and 12.2.2 of the AD Agreement, in relation to the sufficiency of the notice given to interested parties of the definition of the domestic industry, the preliminary or final determinations of injury and causation, the level of the minimum import prices, as well as the sufficiency of the explanation pertaining to the determination of dumping.[994]

B. RECOMMENDATION

8.4 Pursuant to Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the European Communities has acted inconsistently with the provisions of the AD Agreement, it has nullified or impaired benefits accruing to Norway under that Agreement.

8.5 We recommend that the Dispute Settlement Body request the European Communities to bring its measure into conformity with its obligations under the AD Agreement.

8.6 Norway requests that the Panel suggest that the EC implement the recommendations and rulings of the DSB by withdrawing the contested measures. Norway argues that the Panel would be justified in making such a suggestion in the present case because of the nature and scope of the EC's violations of the AD Agreement and of the GATT 1994.[995]

8.7 The EC does not address Norway's specific request in respect of the implementation of the recommendations and rulings of the DSB.[996]

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[988] Paras. 7.510 and 7.516.
[989] Para. 7.544.
[990] Paras. 7.636 and 7.646.
[991] Para. 7.669.
[992] Paras. 7.728 and 7.739.
[993] Para. 7.777.
[994] Paras. 7.831-7.834.
[995] Norway, FWS, para. 1081.
[996] EC, FWS, paras. 717-727.

8.8 Article 19.1 of the DSU provides:

> "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations". (Footnote omitted.)

Thus, a panel must ("shall") recommend that a Member found to have acted inconsistently with a provision of a covered agreement "bring the measure into conformity", but has discretion to ("may") suggest ways in which a Member could implement that recommendation. Clearly, however, a panel is not required to make a suggestion should it not deem it appropriate to do so, and in fact, most panels have not made such suggestions.

8.9 In this case, we exercise our discretion to not make any suggestions concerning ways in which the EC could implement our recommendation to bring its measure into conformity.

ANNEX A-1

Request for Consultations by Norway and Addendum

WORLD TRADE ORGANIZATION

WT/DS337/1
G/L/766
G/ADP/D64/1
22 March 2006
(06-1287)

Original: English

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

Request for Consultations by Norway

The following communication, dated 17 March 2006, from the delegation of Norway to the delegation of the European Communities and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the European Communities ("EC") pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Article 17 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*Anti-Dumping Agreement*") with respect to Council Regulation (EC) No. 85/2006 of 17 January 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of farmed salmon originating in Norway.[1] This measure confirms, and incorporates reasoning from, Commission Regulation (EC) No. 628/2005 of 22 April 2005,[2] as amended by Commission Regulation (EC) No. 1010/2005 of 1 July 2005.[3]

Norway considers that the measure is inconsistent, at least, with the following provisions of the *Anti-Dumping Agreement* and the GATT 1994:

1. Article 5.4 of the *Anti-Dumping Agreement* because the EC initiated the investigation without ensuring that the application for an investigation was "made by or on behalf" of the relevant "domestic industry", as defined in Article 4.1 of that *Agreement*;

2. Article 6.10 of the *Anti-Dumping Agreement* because the EC determined an individual margin of dumping for a selection of producers that neither constituted a statistically valid sample nor represented the largest percentage of the volume of exports from Norway that could reasonably be

[1] Official Journal of the European Union, L15/1, published 20 January 2006.
[2] Official Journal of the European Union, L104/5, published 23 April 2005.
[3] Official Journal of the European Union, L170/32, published 1 July 2005.

investigated; and because the EC failed to determine an individual margin of dumping for each of the producers included in the defective sample;

3. Articles 2.1 and 2.2 of the *Anti-Dumping Agreement* because the EC examined the sufficiency of domestic sales in the ordinary course of trade on the basis of sub-categories of the like product;

4. Articles 2.1, 2.2 and 2.2.1 of the *Anti-Dumping Agreement* because the EC excluded certain domestic sales as not in the ordinary course of trade by reason of price and/or volume without respecting the conditions in those provisions;

5. Articles 2.1, 2.2 and 2.2.1.1 of the *Anti-Dumping Agreement*, and Article VI:1 of the GATT 1994, because of the EC's failure to determine the normal value for the like product on the basis of the costs of production plus a reasonable amount for administrative, selling and general costs, and for profits;

6. Article 2.2.2 of the *Anti-Dumping Agreement* because the EC rejected actual profits data due to the low volume of domestic market sales of the like product and/or sub-categories of that product; and because the EC substituted an imputed profits margin that is not consistent with the conditions set forth in that provision;

7. Article 6.8 and Annex II of the *Anti-Dumping Agreement* because the EC determined normal value for certain individually examined companies on the basis of facts available without respecting the conditions set forth in those provisions, *inter alia*: failing to inform the relevant companies of the information required; failing to inform them of deficiencies in information provided; and failing to provide them with an opportunity to remedy deficiencies within a reasonable period.

8. Article 6.8 and Annex II, and Article 9.4, of the *Anti-Dumping Agreement* because the EC determined a residual margin of dumping on the basis of facts available for certain companies not individually examined that the EC treated as "non-cooperating";

9. Article 6.8 and Annex II, and Article 9.4, of the *Anti-Dumping Agreement* because the EC determined the weighted average ("all others rate") and the residual margin of dumping for companies not individually examined using margins of dumping previously determined for individually examined companies using facts available;

10. Article 3.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 because the EC failed to make a determination of injury, on the basis of positive evidence, relating to the relevant domestic industry, as defined in Article 4.1 of the *Anti-Dumping Agreement*; and Article 6.10 of that *Agreement*, if applicable to injury determinations, because the EC made a determination of injury solely for selected domestic producers without complying with the conditions in that provision;

11. Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* because the EC failed to make an objective examination, on the basis of positive evidence, of the volume of dumped imports from Norway because the EC treated all imports from Norway as dumped; and of price undercutting by Norwegian imports because of a failure to examine the substantial price premium Scottish and Irish farmed salmon enjoy over Norwegian farmed salmon;

12. Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* because the EC failed to make an objective examination, on the basis of positive evidence, of the factors having a bearing on the state of the domestic industry, including those listed in Article 3.4;

13. Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* because the EC failed to make an objective examination, on the basis of positive evidence, that dumped imports are, through the effects of dumping, causing injury; and because the EC failed to ensure that injury caused to the domestic industry by other factors was not attributed to dumped imports;

14. Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994, because the EC imposes variable anti-dumping duties by reference to minimum import prices ("MIPs") in an amount that is not limited or related to the margin of dumping; because the MIPs exceed normal value; because the MIPs are determined using a flawed methodology, including incorrect whole fish equivalent conversion factors, excessive amounts for processing costs and profits, and the use of three-year average exchange rates;

15. Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994, because in certain circumstances the EC imposes variable and fixed anti-dumping duties that exceed the margin of dumping;

16. Article 9.4 of the *Anti-Dumping Agreement* because the EC imposes variable and fixed anti-dumping duties on companies that are not individually examined without respecting the conditions in that provision;

17. Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* because the EC failed to provide timely opportunities for all interested parties to see all non-confidential information relevant to the defense of their interests;

18. Article 6.5.1 of the *Anti-Dumping Agreement* because the EC failed to ensure the provision of summaries of confidential information relating to the domestic industry or, where provided, failed to give summaries in sufficient detail to enable a reasonable understanding of the substance of that information;

19. Articles 6.2 and 6.7, and Annex I, of the *Anti-Dumping Agreement* because the EC failed to respect the procedures for on-the-spot investigations;

20. Articles 6.2 and 6.9 of the *Anti-Dumping Agreement* because the EC failed to inform interested Norwegian parties in timely manner, and in some cases at all, of the essential facts forming the basis for the decision to apply definitive measures, thereby depriving them of the opportunity to defend adequately their interests;

21. Articles 12.2 and 12.2.2 of the *Anti-Dumping Agreement* because the EC failed to set forth, in sufficient detail, the findings and conclusions reached on all issues of fact and law material to the determinations of dumping, injury and causation, as well as to the determination the various MIPs; and

22. In consequence, Articles 1 and 18.1 of the *Anti-Dumping Agreement* because an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of the GATT 1994 and in accordance with the provisions of the *Anti-Dumping Agreement*.

The EC's measure, therefore, nullifies and impairs benefits accruing to Norway under the *Anti-Dumping Agreement* and the GATT 1994.

We look forward to receiving your reply to the present request and to fixing a mutually convenient date for consultations.

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WORLD TRADE ORGANIZATION

WT/DS337/1/Add.1
G/L/766/Add.1
G/ADP/D64/1/Add.1
30 March 2006
(06-1464)

Original: English

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

Request for Consultations by Norway

Addendum

The following communication, dated 27 March 2006, from the delegation of Norway to the delegation of the European Communities and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

On 17 March 2006, Norway requested consultations with the European Communities ("EC") with respect to Council Regulation (EC) No. 85/2006 of 17 January 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of farmed salmon originating in Norway.[1] With respect to this same measure, my authorities have instructed me to clarify the legal basis for Norway's complaint. This clarification supplements, and must be read with, Norway's initial request for consultations.

The EC has determined that farmed Atlantic salmon constitutes a single product, whether or not the farmed salmon consists of whole fish or filleted portions of varying sizes and form. Norway considers that, by virtue of this product determination, the EC's measure is inconsistent, *inter alia*, with the following provisions of the *Anti-Dumping Agreement*:

1. Article 5 of the *Anti-Dumping Agreement*, including Articles 5.1, 5.2, 5.3 and 5.4, because the EC improperly initiated an investigation into a single product that, for purposes of the obligations in this *Agreement*, consists of more than one product;

2. Article 2 of the *Anti-Dumping Agreement*, including Articles 2.1 and 2.6, because the EC made dumping determinations for a single product that, for purposes of the obligations in this *Agreement*, consists of more than one product;

3. Article 3 of the *Anti-Dumping Agreement*, including Articles 3.1, 3.2, 3.4, 3.5 and 3.6, because the EC made an injury determination in relation to the EC domestic industry producing a single product that, for purposes of the obligations in this *Agreement*, consists of more than one product; and,

[1] WT/DS337/1.

4. Article 9 of the *Anti-Dumping Agreement*, including Articles 9.1, 9.2 and 9.4, because the EC imposed anti-dumping duties on imports of a single product that, for purposes of the obligations in this *Agreement*, consists of more than one product.

Norway wishes to emphasize that the issue of the product scope of the EC's measure is also relevant to several claims that are identified in Norway's initial request for consultations.

We look forward to receiving your reply to the present request and to fixing a mutually convenient date for consultations.

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ANNEX A-2

Request for the Establishment of a Panel by Norway

WORLD TRADE ORGANIZATION

WT/DS337/2
30 May 2006

(06-2613)

Original: English

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

Request for the Establishment of a Panel by Norway

The following communication, dated 29 May 2006, from the delegation of Norway to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 17 March 2006, Norway requested consultations with the European Communities ("EC") pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Article 17 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*Anti-Dumping Agreement*") with respect to Council Regulation (EC) No. 85/2006 of 17 January 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of farmed salmon originating in Norway.[1] This measure confirms, and incorporates reasoning from, Commission Regulation (EC) No. 628/2005 of 22 April 2005,[2] as amended by Commission Regulation (EC) No. 1010/2005 of 1 July 2005.[3]

On 27 March 2006, Norway supplemented its initial request for consultations with a clarification of the legal basis for the request. The initial and supplemental requests for consultations of 17 March 2006 are to be read together.

Consultations were held on 12 May 2006 with a view to reaching a mutually satisfactory solution. These consultations failed to resolve the dispute.

Therefore, Norway respectfully requests, pursuant to Articles 4 and 6 of the DSU, Article XXIII:2 of the GATT 1994, and Article 17.4 of the *Anti-Dumping Agreement*, that the Dispute Settlement Body (DSB) establish a Panel to examine this matter. Norway asks that a special DSB meeting be held on 9 June 2006 to consider this request. Norway further requests that the Panel have standard terms of reference, as set out in Article 7.1 of the DSU.

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[1] Official Journal of the European Union, L15/1, published 20 January 2006.
[2] Official Journal of the European Union, L104/5, published 23 April 2005.
[3] Official Journal of the European Union, L170/32, published 1 July 2005.

Norway considers that the measure is inconsistent with, at least, the obligations of the EC under the following provisions of the *Anti-Dumping Agreement* and, where specified, the GATT 1994:

1. Article 5, including Articles 5.1, 5.2, 5.3 and 5.4, because, by determining that the product under consideration is fresh, chilled or frozen farmed salmon, whether or not filleted, the EC improperly initiated an investigation into a single product that consists of more than one product.

2. Article 5.4 because the EC initiated the investigation without ensuring that the application for an investigation was "made by or on behalf" of the relevant "domestic industry", as defined in Article 4.1 of that *Agreement*.

3. Article 2, including Articles 2.1 and 2.6, because the EC made dumping determinations for a single product (fresh, chilled or frozen farmed salmon, whether or not filleted) that consists of more than one product.

4. Article 6.10 because the EC determined an individual margin of dumping for a selection of producers that neither constituted a statistically valid sample nor represented the largest percentage of the volume of exports from Norway that could reasonably be investigated; and because the EC failed to determine an individual margin of dumping for one of the producers included by the EC in the defective sample.

5. Articles 2.1, 2.2 and 2.2.1 because the EC excluded certain domestic sales as not in the ordinary course of trade by reason of price and/or volume without respecting the conditions in those provisions, in particular the duty to ensure that below-cost sales are rejected solely if prices do not provide for the recovery of all costs within a reasonable period of time.

6. Articles 2.1, 2.2 and 2.2.1.1, and Article VI:1 of the GATT 1994, because the EC failed to determine the normal value for the like product on the basis of each individually examined company's costs of production ("COP") plus a reasonable amount for administrative, selling and general ("SG&A") costs, and for profits, in particular by virtue of improper adjustments to the COP and SG&A costs reported by individually examined companies. The Commission also made clerical errors in its calculations of constructed normal value.

7. Article 2.2.2 because the EC rejected actual data pertaining to production and sales in determining amounts for profits and SG&A costs due to the low volume of domestic market sales of the like product and/or sub-categories of that product.

8. Article 6.8 and paragraphs 1, 3, 5, 6 and 7 of Annex II because the EC determined normal value for certain individually examined companies, in part, on the basis of facts available. In so doing, the EC failed to respect the conditions set forth in these provisions governing the use of facts available. In particular, the EC: failed to inform the relevant companies of the information required; failed to use verifiable information submitted in timely manner, even though this would not have presented undue difficulties; failed to inform them of the reasons for the rejection of information submitted; failed to provide them with an opportunity to provide further explanations within a reasonable period; failed to state, in the published determinations, reasons for rejection of the evidence and information submitted by these individual companies; and failed to take into account information submitted.

9. Article 6.8 and paragraph 1 of Annex II, and Article 9.4, by improperly applying facts available in establishing the "residual" margin of dumping that was assigned to producers and exporters that were not individually examined.

10. Article 3, including Articles 3.1, 3.2, 3.4, 3.5 and 3.6, because the EC's injury determination is made in relation to an EC domestic industry producing a single product (fresh, chilled or frozen farmed salmon, whether or not filleted) that consists of more than one product. By failing to determine the product under consideration properly, the EC failed to examine and make an injury determination with respect to the separate EC domestic industries producing the like products.

11. Articles 3.1, 3.4 and 3.5 and Article VI:1 of the GATT 1994 because the EC failed to make a determination of injury for the relevant domestic industry, as defined in Article 4.1 of the *Anti-Dumping Agreement*. This claim has several components:

    (a) The EC limited the EC domestic industry to certain producers of farmed salmon that cooperated fully in the investigation and that supported the complaint. The EC improperly excluded from the EC domestic industry unrelated allegedly non-cooperating producers and unrelated non-supporting producers.

    (b) The EC examined injury to the EC domestic industry in relation to a sample of 5 EC growers of farmed salmon that did not constitute the EC producers as a whole of the like product, or a majority of them. In so doing, the EC violated Article 6.10 of the *Agreement*, if applicable to injury determinations, because the EC made a determination of injury solely for selected domestic producers without complying with the conditions in that provision.

    (c) The EC failed to include EC producers as a whole of filleted products, or a major proportion of them, in the EC domestic industry.

12. Articles 3.1 and 3.2 because the EC failed to make an objective examination, on the basis of positive evidence, of price undercutting by Norwegian imports because of a failure to examine the substantial price premium enjoyed by Scottish and Irish farmed salmon over Norwegian farmed salmon.

13. Articles 3.1 and 3.4 because the EC failed to make an objective examination, on the basis of positive evidence, of the factors having a bearing on the state of the domestic industry, including those listed in Article 3.4.

14. Articles 3.1 and 3.5 because the EC failed to make an objective examination, on the basis of positive evidence, that dumped imports are, through the effects of dumping, causing injury; and because the EC failed to ensure that injury caused to the domestic industry by other factors was not attributed to dumped imports.

15. Article 9, including Articles 9.1, 9.2 and 9.4, because the EC failed to impose anti-dumping duties on imports of a single product and instead imposed remedies at six different levels on different products.

16. Articles 9.1, 9.2 and 9.3, and Article VI:2 of the GATT 1994, because the EC imposes variable anti-dumping duties by reference to minimum import prices ("MIPs") in an amount that is not limited by the margin of dumping determined for individually examined companies; because the MIPs exceed the normal value determined for individually examined companies; and because the MIPs are determined using a flawed methodology.

17. Articles 9.1, 9.2 and 9.3, and Article VI:2 of the GATT 1994, because in certain circumstances the EC imposes variable and fixed anti-dumping duties that exceed the margin of dumping determined for individually examined companies.

18. Article 9.4 because the EC established a weighted average margin of dumping for cooperating companies that were not individually examined using margins of dumping previously determined for certain individually examined companies using facts available. The EC's weighted average margin of dumping is also tainted by calculation errors.

19. Articles 6.2 and 6.4 because the EC failed to provide timely opportunities, and in some cases any opportunity, for interested parties to see non-confidential information.

20. Article 6.5.1 because the EC failed to ensure the provision of non-confidential summaries of confidential information relating to the domestic industry or, where provided, failed to give summaries in sufficient detail to enable a reasonable understanding of that information.

21. Articles 6.2 and 6.7, and paragraph 7 of Annex I, because the EC failed to respect the procedures for on-the-spot investigations, in particular, it failed to inform companies of further verifiable information that was needed.

22. Articles 6.2 and 6.9 because the EC failed to inform interested Norwegian parties in timely manner, and in some cases at all, of the essential facts forming the basis for the decision to apply definitive measures, thereby depriving them of the opportunity to defend adequately their interests.

23. Articles 12.2 and 12.2.2 because the EC failed to set forth, in sufficient detail, the findings and conclusions reached on all issues of fact and law material to the determinations of dumping, injury and causation, as well as to the determination of the various MIPs.

The EC's measure, therefore, nullifies and impairs benefits accruing to Norway under the *Anti-Dumping Agreement* and the GATT 1994.

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ANNEX A-3

Working Procedures for the Panel

1. In its proceedings the Panel shall follow the relevant provisions of the Dispute Settlement Understanding (DSU). In addition, the following working procedures shall apply.

2. The panel shall meet in closed session. The parties to the dispute, and interested third parties, shall be present at the meetings only when invited by the Panel to appear before it.

3. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. The Panel may adopt special procedures for the protection of certain confidential information as an annex to these working procedures, following consultation with and opportunity for comment by the parties on any proposed procedures.

5. Before the first substantive meeting of the Panel with the parties, the parties to the dispute shall transmit to the Panel written submissions in which they present the facts of the case and their arguments.

6. At its first substantive meeting with the parties, the Panel shall ask Norway to present its case. Subsequently, and still at the same meeting, the European Communities will be asked to present its point of view.

7. All third parties which have notified their interest in the dispute to the Dispute Settlement Body shall be invited in writing to present their views during a session of the first substantive meeting of the Panel set aside for that purpose. All such third parties may be present during the entirety of this session.

8. Formal rebuttals shall be made at a second substantive meeting of the parties. The European Communities shall have the right to take the floor first, to be followed by Norway. The parties shall submit, prior to that meeting, written rebuttals to the panel.

9. The Panel may at any time put questions to the parties and to the third parties and ask them for explanations either in the course of the substantive meeting or in writing. Answers to questions shall be submitted in writing by the date(s) specified by the Panel.

10. The parties to the dispute and any third party invited to present its views shall make available to the Panel and the other party or parties a written version of their oral statements, preferably at the end of the meeting, and in any event not later than the day following the meeting. Parties and third parties are encouraged to provide the Panel and other participants in the meeting with a provisional written version of their oral statements at the time the oral statement is presented.

11. In the interest of full transparency, the presentations, rebuttals and statements shall be made in the presence of the parties. Moreover, each party's written submissions, including responses to questions put by the Panel, shall be made available to the other party or parties.

12. The parties shall endeavour to provide the Secretariat with executive summaries of the claims and arguments contained in their written submissions and oral presentations. These executive summaries will be used by the Secretariat only for the purpose of assisting the Secretariat in drafting a

concise arguments section of the Panel report so as to facilitate timely translation and circulation of the Panel report to the Members. They shall not serve in any way as a substitute for the submissions of the parties. The summaries of the first written submission and rebuttal written submission shall be limited to 10 pages each, and the summaries of the oral statements at the meetings will be limited to 5 pages each. The Panel will determine a page limit for executive summaries of parties' responses to questions, if necessary and as appropriate. Third parties are requested to provide the Panel with executive summaries of their written submissions and oral presentations, of no more than 5 pages each. The executive summaries shall be submitted to the Secretariat, preferably within ten days of the original submission or oral statement concerned. Paragraph 18 shall apply to the service of executive summaries.

13. A party shall submit any request for a preliminary ruling not later than its first submission to the Panel. If Norway requests such a ruling, the European Communities shall submit its response to the request at a time to be determined by the Panel in light of the request. If the European Communities requests such a ruling, Norway shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure will be granted upon a showing of good cause.

14. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except for evidence necessary for purposes of rebuttals or answers to questions. Exceptions to this procedure will be granted upon a showing of good cause. The other party shall be accorded a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

15. To facilitate the maintenance of the record of the dispute, and to maximize the clarity of submissions, in particular the references to exhibits submitted by parties, parties shall sequentially number their exhibits throughout the course of the dispute. For example, exhibits submitted by Norway could be numbered NOR-1, NOR -2, etc. If the last exhibit in connection with the first submission was numbered NOR -5, the first exhibit of the next submission thus would be numbered NOR -6. The parties are encouraged to submit exhibits in electronic format, *i.e.*, on a CD-ROM, if possible.

16. The parties and third parties to this proceeding have the right to determine the composition of their own delegations. The parties and third parties shall have responsibility for all members of their delegations and shall ensure that all members of the delegation act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to confidentiality of the proceedings. Each party and third party shall provide a list of the members of its delegation before or at the beginning of the substantive meetings with the Panel.

17. Following issuance of the interim report, the parties shall have two weeks to submit written requests to review precise aspects of the interim report and to request a further meeting with the Panel. The right to request such a meeting must be exercised at that time. Following receipt of any written requests for review, if no further meeting with the Panel is requested, each party shall have one week to submit written comments on the other party's written request for review. Such comments shall be strictly limited to comments on the other party's written request for review.

18. The following procedures regarding service of documents shall apply:

(a) Each party shall serve its submissions directly on the other party. Each party shall, in addition, serve its first written submission on all third parties. Each third party shall serve its submissions on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each submission to the Panel.

(b) The parties and third parties shall provide their submissions to the Secretariat by 5:30 p.m. on the due dates established by the Panel, unless a different time is set by the Panel.

(c) The parties and third parties shall provide the Panel with eight (8) paper copies of their submissions. All of these copies shall be filed with the Dispute Settlement Registrar, Mr. Ferdinand Ferranco (office number 3154).

(d) At the time that they provide the paper versions of their submissions, the parties and third parties shall also provide to the Panel electronic versions of all submissions, in a format compatible with that used by the Secretariat, either on a CD-ROM or diskette or as an e-mail attachment. E-mail attachments shall be sent to the Dispute Settlement Registry (DSRegistry@wto.org) with copies to Mr. Andrea Mastromatteo (andrea.mastromatteo@wto.org) and Ms. Judith Czako (judith.czako@wto.org).

(e) The Panel will endeavour to provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

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ANNEX A-4

Additional Working Procedures of the Panel Concerning Business Confidential Information

The following procedures apply to all business confidential information (BCI) submitted in the course of the Panel process.

19. Any information that was treated as confidential in the course of the EC's anti-dumping investigation (AD 487) at issue in the Panel process, and that is not otherwise available in the public domain, shall be submitted as BCI in this Panel process, unless the person that provided the information in the course of the EC's anti-dumping investigation (AD 487) agrees otherwise.

20. Employees of the European Communities, of the Governments of EC Member-states, and of the Government of Norway, may have access to BCI submitted in this Panel process. Parties may give access to BCI to outside advisors acting on behalf of the Party in this Panel process, provided that the Parties shall provide the Secretariat, and the other Party, with a list of the names and affiliation of such outside advisors. In no circumstances shall an employee, officer or agent of an enterprise engaged in the production, export or import of the products concerned in this dispute be given access to BCI (except BCI of the enterprise in question).

21. Employees of the Secretariat and Panel Members may have access to BCI submitted in this proceeding.

22. Third Parties to this Panel process shall receive non-confidential versions of the first submissions of the Parties to the Panel. Employees of the Governments of Canada; China; Hong Kong, China; Japan; Korea and the United States, and outside advisors under the terms set forth in paragraph 2, may request access to BCI contained in the first submissions of the Parties to the Panel for the purpose of participating effectively in the Panel proceeding. The Panel shall decide whether to grant access to such BCI in consultation with the Parties. In the absence of a showing of good cause, any such Third Party access to BCI will take place on the premises of the WTO Secretariat. Third Parties shall be entitled to review, but not to copy, the BCI accessed on the premises of the WTO Secretariat. Third Parties granted access to BCI through this paragraph will be given an additional period, if needed, to allow them to comment on BCI.

23. A Party or Third Party submitting BCI in any written submission (including in any exhibits) shall mark the cover and/or first page of the document containing any such information with the words "Contains Business Confidential Information". The specific information in question shall be enclosed in double brackets, as follows: [[xx.xxx.xx]] and the notation "Contains Business Confidential Information" shall be marked at the top of each page containing the BCI. A non-confidential version, clearly marked as such, of any written submission (including any exhibits) containing BCI, shall be submitted to the Panel within three working days after the submission of the confidential version containing the BCI. In the case of an oral statement containing BCI, the Party or Third Party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. A written non-confidential version of an oral statement containing BCI shall be submitted within a day after the statement has been made. Non-confidential versions of both oral and written statements shall be redacted in such a manner as to convey a reasonable understanding of the substance of the BCI deleted therefrom.

24. Any BCI information that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

25. As required by Article 18.2 of the DSU, a Party or Third party having access to BCI submitted in this Panel process shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Any information submitted as BCI under these procedures shall only be used for the purposes of this dispute and for no other purpose. Each Party and Third Party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.

26. The Panel engages not to disclose in its Report any information designated as BCI under these procedures. The Panel may, however, make statements of conclusion based on such information.

27. After the conclusion of the Panel process, and within a period fixed by the Panel, each Party shall return all documents in its possession submitted as BCI in the Panel process to the Party that originally submitted the BCI. Alternatively, a Party may certify in writing to the other Party that all such documents have been destroyed. This obligation is without prejudice to the confidential information separately obtained by the EC and stored in its own record of the anti-dumping investigation (AD 487) at issue in the Panel process. The Secretariat may retain one copy of the documents containing the BCI for the archives of the WTO.

28. Submissions containing information designated as BCI under these procedures will be included in the record forwarded to the Appellate Body in the event of any appeal of the Panel's Report.

29. At the request of a Party, the Panel may apply these procedures or an amended form of these procedures, to protect information that does not fall within the scope of the information set out in paragraph 1.