BEFORE THE WORLD TRADE ORGANIZATION

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

WT/DS337

FIRST WRITTEN SUBMISSION

NORWAY

NON-CONFIDENTIAL VERSION

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TABLE OF ABBREVIATIONS USED IN THIS SUBMISSION

Abbreviation	Description
AFBs	antifriction bearings
Amendment to the Provisional Regulation	Commission Regulation (EC) No 1010/2005 of 30 June 2005 amending Regulation (EC) No 628/2005 imposing a provisional anti-dumping duty on imports of farmed salmon originating in Norway. Exhibit NOR-10.
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
BCI	business confidential information
COP	costs of production
Definitive Regulation	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. Exhibit NOR-11.
Definitive Safeguard Regulation	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. Exhibit NOR-7.
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
EC	European Communities
EUSPG	European Union Salmon Producers Group
FHL	Norwegian Seafood Federation
GAAP	Generally Accepted Accounting Principles
GATT 1994	*General Agreement on Tariffs and Trade 1994*
HOG	head-on gutted
IP	period of investigation
MIP	minimum import price

Abbreviation	Description
NCB	Norwegian Central Bank
NIBOR	Norwegian inter-bank offered rate
NOK	Norwegian Kroner
NRC	non-recurring costs
NSL	Norwegian Seafood Association
NV	normal value
PFN	Pan Fish Norway AS
Provisional Regulation	Commission Regulation (EC) No. 628/2005 of 22 April 2005 imposing a provisional anti-dumping duty on imports of farmed salmon originating in Norway (OJ L104/5, 23 April 2005), as amended by Commission Regulation (EC) No. 1010/2005 of 1 July 2005 (OJ L170/32, 1 July 2005). Exhibit NOR-9.
SG&A	selling, general & administrative costs
Termination Regulation	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. Exhibit NOR-5.
TNOK	Thousands of Norwegian Kronor
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
Vienna Convention	*Vienna Convention on the Law of Treaties*
WFE	whole fish equivalent

I. INTRODUCTION

A. *Background*

1. Norway's exports of salmon products to the European Communities ("EC") are an important part of its international trade, with a value of approximately 1 billion euros in 2004, and 1.2 billion euros in 2005.[1] This constituted around 30 percent of the total value of Norway's exports of fish products for both these years.

2. The EC has a most-favored-nation bound tariff rate of 2 percent on imports of the salmon products subject to the contested anti-dumping measure. However, Norway's exports of these products to the EC have long been subject to trade protection measures that undermine the benefits of the EC's tariff concession in the Uruguay Round. Since 1989, trade protection measures have almost continuously been in place or threatened against this trade. In other words, the EC's bound tariff has been supplemented by trade protection measures in one form or another for *most of the past 17 years*.[2]

3. The first anti-dumping complaint was filed by Scottish salmon growers in 1989. The European Commission ("Commission") proposed anti-dumping measures in 1990, but the measures were not implemented. Instead, a system of minimum import prices was introduced in 1991, abolished in 1992, reintroduced in 1993, and abolished again in 1994. In 1995, a new system of minimum import prices was introduced and, in 1996, a new complaint was filed by Scottish growers alleging both dumping and subsidization. Following an investigation, the EC imposed anti-dumping and countervailing duties on imports of salmon products from Norway.[3] The EC subsequently accepted a "price undertaking" with a common minimum import price for all participating Norwegian companies.[4] This system

[1] In volume terms, exports were 380,572 tonnes (whole fish equivalent or "WFE") in 2004 and 405,724 tonnes in 2005.

[2] In addition, on 8 March 2004, the EC imposed definitive anti-dumping duty of 19.9 percent on imports of large rainbow trout from Norway (Council Regulation (EC) No 437/2004 of 8 March 2004 imposing definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of large rainbow trout originating in Norway and the Faeroe Islands). Farmed rainbow trout from Norway competes in the same market as farmed salmon products. Exhibit NOR-1.

[3] Council Regulation (EC) No. 1890/1997 of 26 September 1997 imposing a definitive anti-dumping duty on imports of farmed Atlantic salmon originating in Norway and Council Regulation (EC) No 1891/97 of 26 September 1997 imposing a definitive countervailing duty on imports of farmed Atlantic salmon originating in Norway – Council Declaration. Exhibits NOR-2 and NOR-3.

[4] Commission Decision 97/634/EC of 26 September 1997 accepting undertakings offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of farmed Atlantic salmon originating in Norway, and Corrigendum to Commission Decision 97/634/EC. Exhibit NOR-4.

lasted until the anti-dumping and countervailing duties were revoked in May 2003.[5] 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.

4. However, 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 safeguard measures[6] that were confirmed by definitive measures in February 2005.[7] Chile and Norway immediately sought consultations with the EC regarding the definitive safeguard measures.[8] These measures were withdrawn by the EC on 23 April 2005 – just 2 months after it had adopted them.[9] 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.[10] This dispute concerns the definitive version of those measures, which were imposed on 17 January 2006.[11]

5. The chronology tells a story of long-term protection granted by the EC to its salmon growers using the full range of trade remedy measures. The chronic need for protection stems from the inefficiencies of a minority of small-scale Scottish growers that account for around 12 percent of all salmon grown in the EC.[12] This is well illustrated in the present dispute because the EC domestic industry – as defined by the EC – is tiny. It consists of just

[5] 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

[6] 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.

[7] 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.

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

[9] 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.

[10] 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.

[11] 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.

[12] 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.

15 salmon growers that employ 221 persons, and have a market share in the EC of just 2.77 percent.[13] These producers must compete in the EC market with other, more efficient Scottish and Irish producers, some of which are part of transnational companies; and they must also compete with imports from efficient producers located elsewhere, with Norway being the largest supplier to the EC.[14] The result has been a persistent call for protection.

6. The timing of the EC's seamless switch from safeguard to anti-dumping measures, on 23 April 2005, highlights that the EC took great care to ensure that its domestic industry was not left unprotected, with the EC even pursuing parallel safeguard and anti-dumping investigations.[15] The link between these two investigations was reinforced in statements to the Norwegian press by Mr. Fritz-Harald Wenig, Director of Trade Defence measures at the Commission. Speaking on 19 November 2004 about the pressure from certain EC Member States and Norway to withdraw the safeguard measures, Mr. Wenig said:

> … we'll drop this [safeguard] case, and go for broke on the dumping inquiries. … We anticipate finding a dumping margin of 20-25 per cent. And in this instance the decision is made purely by the Commission. Then the Commission is in the driver's seat.[16]

In the same report, Mr. Wenig is quoted as saying that he is "happy that Chile … is let off the hook" if the safeguards measures are withdrawn.

7. As predicted by Mr. Wenig, the EC imposed provisional measures on 22 April 2005 with a weighted average rate of 22.5 percent.[17] The definitive measures imposed in January 2006 confirmed these measures, with a weighted average rate of 14.8 percent. Mr. Wenig's predictions are all the more remarkable because they were made before the Commission had selected its sample of Norwegian companies for the anti-dumping investigation, and long before it received questionnaire responses in January 2005.

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[13] Definitive Regulation, paras. 65 (market share) and 72 (employment).
[14] Provisional Regulation, para. 56.
[15] The EC initiated its anti-dumping investigation on imports of farmed salmon from Norway on 23 October 2004 on the basis of a complaint by the European Union Salmon Producers Group ("EUSPG"), a minority association of a few Scottish and Irish salmon growers. At that time it was still conducting its safeguards investigation, which was initiated on 6 March 2004 and ended on 6 February 2005, when definitive safeguard measures were imposed. Provisional Regulation, paras. 1 and 4.
[16] Intrafish News, "EC to decide on Norwegian salmon dumping case", 19 November 2004. Exhibit NOR-12.
[17] Provisional Regulation, para. 22.

8. A WTO Member's desire to protect its domestic industry must be accompanied by a rigorous respect for the multilateral rules governing the imposition of measures that may exceed the bound tariff. In this dispute, Norway considers that the EC has failed to respect many of the substantive and procedural requirements in the GATT 1994 and the *Anti-Dumping Agreement* governing the imposition of anti-dumping duties.

9. Virtually every aspect of the Definitive Regulation involves an inconsistency with WTO rules. 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 started. Further, two of the fundamental building blocks for the entire investigation – the "product" and the "domestic industry" – are flawed, and even 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.

10. On top of these substantive violations, the EC also paid scant regard to the requirements of transparency 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 that formed the basis for its decision to impose definitive measures.

11. 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.[18] 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.

12. 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

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

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.

B. *Overview of Norway's Submission*

13. Norway's first written submission is organized under the following headings:

- Introduction
- Standard of review
- Scope of the product under consideration
- Scope of the domestic industry
- Dumping (excluding costs adjustments)
- Injury
- Causation
- Minimum import prices and fixed duties
- Procedural violations
- Dumping – cost adjustments

14. In **Section II** of this submission, Norway recalls the ***standard of review*** applicable to the Panel's work. The Panel must not conduct its own investigation, but must subject the EC's determinations to "critical and searching" scrutiny. The Panel must ensure that the EC

has provided a reasoned and adequate explanation for its determinations that explains, among others, how the facts in the record support those determinations.

15. In **Section III**, Norway turns to its claim that 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. 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.

16. In **Section IV**, Norway addresses the EC's definition of the EC ***domestic industry***. Having defined the "product" – albeit improperly – to include a range of products from whole fish to 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. However, it excluded the entire EC processing industry that produces filleted products, but does not grow salmon. In addition, the EC improperly excluded several other entire categories of salmon growers. After all these exclusions, the entire EC industry comprised just 15 salmon growers, 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.

17. In **Section V**, Norway turns to the EC's ***dumping determinations***. Norway makes five separate claims in this section. The *first* is that 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, and 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*.

18. The *second* claim on dumping is that, 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*.

19. The *third* claim on dumping is that, 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. 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.

20. *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.

21. The *fifth* claim in the dumping section is that 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*. Further, in determining the "residual" margin, the EC improperly had recourse to facts available under Article 6.8 and Annex II of the *Anti-Dumping Agreement*.

22. In **Section VI**, Norway challenges three aspects of the EC's ***injury determination***. *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, on the basis of a sample that included only producers, the EC assumed that imports from all non-producing exporters were dumped. 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.

23. *Second*, the EC concluded that dumped imports were undercutting the EC industry's prices by 12 percent. However, in reaching this conclusion, the EC ignored the fact that EC salmon products enjoy a price premium in the marketplace of 12 percent. Taking account of this price premium, there was no price undercutting.

24. *Third*, the EC examined the prices of a sample of five Scottish producers in euros, and concluded that prices had dropped by 9 percent. For these Scottish producers, the evaluation of prices must be in pounds sterling because their costs are incurred in that currency, as are the vast majority of their sales. In pounds sterling, prices remained *constant* and did *not* fall. The use of euros, therefore, distorted the injury determination.

25. In **Section VII**, Norway claims that, in its ***causation determination***, the EC failed to ensure that injury caused by two factors – (1) EC producers' increased costs of production, and (2) surging imports from Canada and the United States – were not improperly attributed to dumped imports. *First*, the EC masked the fact that the domestic industry's costs of production rose significantly during the period considered because it examined price trends in euros, instead of pounds sterling. The increased costs wiped out the industry's increased revenues, and were a major cause of injury.

26. *Second*, the EC dismissed the significance of a 560 percent 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. Indeed, the EC 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 contradicts the EC's unsubstantiated conclusion that farmed and wild salmon do not compete.

27. **Section VIII** concerns Norway's claims regarding the ***minimum import prices*** ("MIPs"). The EC's MIPs are a form of variable anti-dumping duty imposed on the basis of a reference price. Under WTO rules, that reference price may not exceed normal value. However, for many investigated producers, for some or all of the MIP product categories, the MIPs do exceed the individually determined normal values. The MIPs also exceed the weighted average normal value. Further, the amount of duties imposed by reference to the MIPs is not limited to the margin of dumping.

28. **Section IX** concerns Norway's claims regarding the ***fixed duties*** imposed by the EC. The EC's fixed duties – which are distinct from the MIPs – exceed the margin of dumping for a number of investigated producers.

29. In **Section X**, Norway contends that the EC violated its ***procedural obligations*** under Articles 6 and 12 of the *Anti-Dumping Agreement*. 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.[19] *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 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.

30. **Section XI** contains a further claim relating to the determination of normal value for the ***dumping determination*** for six individually examined 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. Norway's claims in this Section address a number of these adjustments that have a significant effect on the individual margins of dumping, in one case eliminating it entirely.

31. **Section XII** sets forth Norway's ***conclusions***.

[19] Letter from Norway to the Panel, 4 August 2006, Annex 3-A. Exhibit NOR-13.

II. STANDARD OF REVIEW

32. The Panel's role is to review determinations made by the EC's investigating authority in imposing anti-dumping measures under the Definitive Regulation. In this Section, Norway summarizes the standard of review that the Panel must apply in deciding whether the EC has acted inconsistently with WTO law.

33. According to the Appellate Body, "measures challenged under the *Anti-Dumping Agreement*… are to be scrutinized in accordance with the standard of review expressly prescribed in Article 17.6 of the *Anti-Dumping Agreement*, along with Article 11 of the DSU."[20] With respect to factual matters, Article 17.6(i) provides 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. (emphasis added)

34. Although the text of Article 17.6(i) is couched in terms of an obligation on *panels*, it defines, in effect, when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement*.[21] If the standard of a "proper" "establishment of the facts" and of an "unbiased and objective" evaluation have *not* been met, the authority acted inconsistently with the *Anti-Dumping Agreement*.[22] The Appellate Body also held that the requirement for panels to assess the facts pursuant to Article 17.6(i) and Article 11 "clearly necessitates an *active review or examination* of the pertinent facts".[23]

35. In a recent dispute, the Appellate Body comprehensively reviewed the standard of review that applies to claims under the *Anti-Dumping Agreement*:

> 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 in the record and the explanations given by the authority in its published report. A panel must examine

[20] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 91.
[21] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[22] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[23] Appellate Body Report, *US – Hot-Rolled Steel*, para. 55. Emphasis added.

> whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. … 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".[24]
>
> … it will often be appropriate, or necessary, for a panel "to examine the sufficiency of the evidence supporting an investigating authority's conclusion ... by looking at each individual piece of evidence". … [A] panel must also, with due regard to the approach taken by that authority, examine how the totality of the evidence supports the overall conclusion reached.[25]
>
> Finally, we observe that it is in the nature of anti-dumping and countervailing duty investigations that an investigating authority will gather a variety of information and data from different sources, and that these may suggest different trends and outcomes. The investigating authority will inevitably be called upon to reconcile this divergent information and data. However, the evidentiary path that led to the inferences and overall conclusions of the investigating authority must be clearly discernible in the reasoning and explanations found in its report.[26]

36. In summarizing the standard of review, the Appellate Body also stated that a panel must examine whether the authority has provided a "reasoned and adequate explanation" of "how individual pieces of evidence can be reasonably relied on in support of particular inferences, and how the evidence in the record supports its factual findings"; and, also, how the facts in the record, rather than conjecture, provide a basis for the authority's determinations.[27]

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

[25] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 94, citing Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 145. Underlining added.

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

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

37. The Appellate Body, therefore, placed the investigating authority's explanation in the published determination at the very heart of a panel's review of anti-dumping measure. The explanation is the means for a Member to demonstrate to interested parties, other WTO Members, domestic courts and WTO panels, that it has complied with the substantive conditions governing the imposition of anti-dumping duties.

38. The explanation must, therefore, be subjected to "critical and searching review" by a panel in the light of the evidence in the record. The panel must review whether the authority has explained: how it "treated" the evidence before it; how it established "the evidentiary path" that led from the facts in the record to its findings and conclusions; and, therefore, how the evidence in the record supports the authority's findings and conclusions.

39. In the EC's comments on the proposed BCI Procedures, the EC vigorously opposed the destruction of BCI submitted to the Panel. It argued that "the EC must be in a position for many years after the dispute to ascertain, if necessary, *precisely what happened and why*".[28] In examining the EC's published determinations, this same standard applies. Norway and the Panel must be able to understand from the EC's explanation in the Provisional and Definitive Regulations "*precisely what happened and why*" when the EC made its determinations.

40. Bald, unsubstantiated assertion is 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*."[29] 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.[30]

41. In sum, the investigating authority must provide an explanation that does not leave the reader guessing either why the authority made its determinations or what evidence in the record supported those determinations. If an authority fails to explain itself adequately, it cannot demonstrate that it has respected the substantive requirements of the *Anti-Dumping Agreement* governing those determinations.

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[28] Letter from the EC to the Panel, 6 September 2006.
[29] Appellate Body Report, *US – Steel Safeguards*, para. 326. Emphasis added.
[30] Appellate Body Report, *US – Line Pipe*, para. 217.

42. Norway places a great deal of emphasis on the EC's duty to provide a reasoned and adequate explanation because a recurring feature of the Provisional and Definitive Regulations is a complete failure by the EC to meet the most basic standards of transparency in its explanation. As Norway outlines below, the EC systematically failed to explain how the facts in the record supported its findings and conclusions. It routinely fails even to "refer" to the facts that support its conclusions, far less explain how it " treated" those facts in making its determinations.[31] The evidence that was "gathered" by the authority is not explained nor is the EC's process of "reconciling" the inevitable divergences in that evidence.[32] The "evidentiary path" that led the EC to its conclusions is shrouded in mystery. In sum, a careful reader of the EC's determination has no understanding how or why the EC reached its findings and conclusions.

43. Finally, with respect to interpretive matters, Article 17.6(ii) requires that the Panel interpret the provisions of the *Anti-Dumping Agreement* "in accordance with customary rules of interpretation of public international law", which are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*").[33] Under Article 17.6(ii), the Panel is also "obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the *Anti-Dumping Agreement* which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the *Vienna Convention*."[34]

[31] Appellate Body Report, *US – Steel Safeguards*, para. 326; Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[32] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.
[33] Appellate Body Report, *US – Hot-Rolled Steel*, para. 57.
[34] Appellate Body Report, *US – Hot-Rolled Steel*, para. 57. Original emphasis.

III. THE EC'S DETERMINATIONS OF THE "PRODUCT UNDER CONSIDERATION" VIOLATED THE *ANTI-DUMPING AGREEMENT*

A. *Introduction*

44. A fundamental feature of any anti-dumping investigation is the investigating authority's determination of the imported "product under consideration". All other determinations in the investigation flow from the selection of that product. The "product under consideration" ultimately governs the determination of "dumping". The composition of the "domestic industry" examined in the injury determination is a direct consequence of the determination of the "product under consideration" because it is defined by reference to the product under investigation. Even the investigating authority's right to initiate an anti-dumping investigation depends on its "product" determination. The application for initiation must provide evidence relating to the "product", and the domestic industry supporting the application must be producers of that product.

45. In this dispute, the EC has determined that a disparate group of salmon products from whole fish to small, skinned fillets constitute a single "product under consideration". In so doing, the EC has failed to ensure that the different products are all "like", as required by Articles 2.1 and 2.6 of the *Anti-Dumping Agreement*. Given the fundamental importance of the "product" determination, the consequences of the EC's improper determination are far reaching. In sum, the EC has improperly:

- initiated a single investigation for products that are not all "like", thereby distorting the examination of the right to initiate and violating Articles 5.1 and 5.4 of the *Anti-Dumping Agreement*,

- made a single "dumping" determination for products that are not all like, thereby distorting that determination and violating Article 2.1 of the *Agreement*; and,

- made a single injury determination purportedly for a single domestic industry producing a single product, whereas there are two domestic industries producing different products, thereby distorting the injury determination and violating Article 3.1, 3.2, 3.4, 3.5 and 3.6 of the *Agreement*.

These errors deprive the EC's definitive anti-dumping measure of legal basis.

46. In sub-section B, Norway will provide an overview of the EC's determinations. In sub-section C, it will examine the obligations in the *Anti-Dumping Agreement* governing the determinations of the "product" and the EC's violation of those obligations. In Section IV of this submission, Norway turns to review the obligations governing the determination of the "domestic industry" and their violation by the EC.

B. *Overview of the EC's Determinations*

47. There are two aspects to the EC's determination that are relevant to Norway's claims regarding the "product" scope of the EC's investigation. The first is, obviously, the contested "product" determination itself, which finds that everything from whole fish to small, skinned fillets constitute a single product. The second is the EC's findings that the EC fish farming industry, which grows salmon and produces whole gutted fish, is separate from the EC fish processing industry, which produces filleted salmon products. The EC's finding that separate industries use separate production processes to produce different products is a powerful indication that the EC incorrectly determined that whole gutted fish and filleted products are a single product.

(i) Product Under Consideration

48. The EC determined that the "product concerned" and the "like product" is:

> … farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen. This 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.[35]

49. As the six different minimum import prices ("MIPs") demonstrate, this "product" includes:

- whole fish;
- head-on-gutted ("HOG") fish;
- "other" (including in particular gutted, head off);

[35] Provisional Regulation, paras. 10 and 12. Emphasis added.

- whole fish fillets and fillets cut into pieces of any size, weighing more than 300 grams per fillet, skin on;

- whole fish fillets and fillets cut into pieces of any size, weighing more than 300 grams per fillet, skin off; and

- fillets weighing less than 300 grams, cut into pieces of any size, with skin on or off.[36]

50. The "product" is, therefore, broadly defined to encompass harvested fish in unprocessed form as well as processed filleted products; however, it excludes "further processed types" of salmon, such as smoked or canned salmon.

51. The EC's explanation for the determination of the "product" is given in three short sentences:

> Based on [1] the *physical characteristics*, [2] the *production process* and [3] the *substitutability* of the product from the perspective of the consumer, it was found that all farmed salmon constitutes a single product. The different presentations all serve [4] 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 purpose of the proceeding.[37]

52. The EC does not explain how the evidence in the record supports this conclusion. It does not even refer to a single fact that supports this conclusion. The EC has failed to explain how it treated the relevant evidence and how it reconciled the divergences in that evidence. In sum, the EC does not even attempt to set forth the evidentiary path that led it to is conclusion.

(ii) <u>"Domestic Industry" – Growers of Farmed Salmon</u>

53. The EC determined that the EC "*domestic industry*" consisted of a group of fifteen producers that originally filed a complaint seeking the initiation of an anti-dumping investigation:

[36] Article 1(5) of the Definitive Regulation. The product as defined therein is covered by 6 different customs nomenclature codes, and 33 different control numbers in the Taric-system.
[37] Provisional Regulation, para. 11. Emphasis added.

> The complaining Community producers are therefore deemed to constitute the Community industry.[38]

54. All fifteen complaining producers are *growers* of salmon that produce predominantly whole and gutted fish.[39] An unknown number of these growers produced an unspecified volume of filleted products that is believed to be small.[40] The sum total of the EC filleted production included in the price undercutting examination was a *meager 2.8 tonnes*, which is just 0.05 percent of the total EC production included in that examination.[41]

55. None of the complainants comprising the domestic industry is a *processor* of farmed salmon that produces filleted products but does not grow salmon. The EC has a very large processing industry that, according to an EC processors' association, transforms "*several hundred thousand tonnes*" of farmed salmon annually.[42]

56. In other words, the EC treats the domestic industry as *growers* of salmon, whether or not they produce fillets; and it excludes from the "domestic industry" the *processors* that produces filleted products but do not grow salmon.

57. As a result, although the EC defined the "product under consideration" to include everything from whole fish to small skinned fillets, its examination of the EC's "domestic industry" almost *entirely excluded* EC producers of filleted products. Indeed, far from including the EC producers of filleted products in the EC domestic industry, the EC treats them as part of a *separate "downstream", "processing" or "users" industry*.[43]

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[38] Definitive Regulation, paras. 39 and 40.
[39] The complainant was the EU Salmon Producers Group ("EUSPG"). The members of the group are listed in Annex 1 of the complaint. *See* Exhibit NOR-14.
[40] The EC provides no information on the production of filleted products by the EC domestic industry, as that industry is defined by the EC. The company websites of Wester Ross Salmon and West Minch Salmon suggest that these companies currently produce filleted products (www.wrs.co.uk and www.west-minch-salmon.co.uk). According to Loch Duart's questionnaire response, it purchases filleted products produced by another company and re-sells them. Exhibit NOR-15.
[41] *See* the Definitive Disclosure for Grieg Seafood, 28 October 2005, Annex 6. Exhibit NOR-16. This disclosure shows that the EC industry sold a total of just 2,837 kg of product category S/C/d/2 (*i.e.* superior quality, fresh or chilled, fillet with skin on, weighing between 2 and 3 kg). No other disclosures include production of EC filleted products in the price undercutting examination, although several other Norwegian producers exported other types of filleted products for which no pricing comparison was made with EC filleted products.
[42] Letter from Syndicat Saumon et Truite Fumés to the EC, 26 May 2005. Exhibit NOR-17. Unofficial translation from French original.
[43] Provisional Regulation, paras. 68, 123, 126; Definitive Regulation, paras. 103, 114 and 118.

58. Thus, for purposes of determining whether the domestic industry supported initiation of an investigation and for purposes of the injury determination, EC producers of filleted products are *not* treated as "producers" of the "like product", but are "users" of it. The EC, thereby, distinguishes between two separate industries – the "fish farming industry" and the "fish processing sector" – that produce separate products.[44]

59. The dichotomy between the growing/harvesting and processing industries is evident throughout the EC's analysis, beginning with its description of the interested parties, continuing through the injury determination, and ending with the consideration of the interests of industrial "users".

60. In the *description of the interested parties*, the EC identifies three categories of interested parties: Community *producers*; Norwegian *exporters*; and Community *importers, processors and users*.[45] The interested parties listed as "Community producers" are all complaining growers of salmon. Although the product under consideration includes filleted products, none of the listed producers is a processor that produces filleted products but does not grow salmon. Instead, processors are listed as a separate category of interested parties that are "users" of the product.

61. In the *injury determination*, the EC examined a number of factors by reference to a sample of five EC producers, all of which are growers of salmon.[46] Even though the EC has a very sizeable filleting industry, none of the sampled companies is a producer of filleted products that does not also grow salmon. Instead, these processors are treated as "users" that form part of a downstream industry.

62. Several passages regarding the injury determination confirm that the EC's focus was virtually exclusively on growers of farmed salmon, as opposed to processors. For example, in describing the *geographic location* of Community producers, the EC states "that large scale *farming* of farmed salmon in the Community is confined to the United Kingdom

[44] Definitive Regulation, paras. 111, 112 and 118.
[45] Provisional Regulation, para. 7.
[46] As noted in para. 54 above, the precise number of the growers that also produce fillets is unknown but the injury disclosure documents reveal that a total production of 2.8 tonnes of EC filleted products was included in the price undercutting examination, which is just 0.05 percent of the total EC production included in that examination.

(Scotland) and Ireland".[47] No mention is made of the fact that large scale production of filleted products occurs in several other EC Member States, including Denmark, France, Germany and Poland.

63. In considering *production capacity*, the EC finds that "farmed salmon production in the European Community is effectively limited by government licenses specifying the maximum amount of *live fish which may be held in the water*".[48] In the same paragraph, the EC also refers to the "physical fish-holding capacity of the cages". The discussion of production capacity, therefore, centres exclusively on the regulatory and physical limitations on the *growing of live fish*. No mention is made of the production capacity of Community processors.

64. In examining *stocks*, the EC observes that "farmed salmon is practically not stocked by the Community industry, but *sold immediately after harvesting to downstream industries*".[49] In this phrase, the Community industry is identified as the producers of harvested fish and the "harvesting" industry is distinguished from the "downstream industries" that produce, among others, fillets.

65. In essence, therefore, even though the EC determined that the "product under consideration" encompasses many different salmon products, it examined solely the growing industry and failed to examine the "downstream" industry that produces filleted products. There is, thus, a profound mismatch between the scope of the "product" and the scope of the "domestic industry". Whereas the "product" is defined broadly to include filleted products, the "domestic industry" is defined narrowly to exclude producers of filleted products that are not also growers.

(iii) <u>EC Processing Industry – Producers of Filleted Products</u>

66. The EC consistently treated the EC processing industry as a separate industry from the EC salmon growing industry. The growers were found to be part of the EC domestic industry, whereas the processors were found to be part of a separate users industry.

[47] Provisional Regulation, para. 52.
[48] Definitive Regulation, para. 63.
[49] Provisional Regulation, para. 68.

67. Although the EC provided no information of the size of the EC processing industry, Norway believes it to be very significant. As noted in paragraph 55, an association of Community processors contrasted:

> – on the one hand, the importance of "Community growers", as defined in the [Provisional Regulation], which produce 20,000 tonnes of salmon (approximately 15% of total Community production by our estimates),
>
> – and, on the other hand, the economic importance of the companies that use salmon in the Community, which process several hundred thousand tonnes (filleting, smoking and ready-made dinners).[50]

68. Consistent with the EC's findings, this remark confirms that processors see themselves as part of a separate industry from growers, and also that the EC processing industry is large and economically important within the EC. The statement also highlights that the EC processing industry produces filleted products, which are part of the investigated product.

69. After finding that the EC salmon *growing* industry is injured, the EC examined whether the imposition of anti-dumping duties would be in the general Community interest. As part of that examination, the EC addressed the interests of processors of farmed salmon. This separate examination of the processing industry demonstrates powerfully that processors that do not grow salmon are excluded from the "domestic industry". The separate examination is coupled with statements expressly distinguishing "the fish farming industry" from "the Community processing industry".[51] In keeping with this distinction, the EC repeatedly refers to processors as "users" of the product, rather than producers.[52]

70. The EC highlights a number of differences between the farming industry and the processor/user industries. For example, in the Definitive Regulation, the EC refers to arguments made by interested parties regarding "the *low employment in the Community*

[50] Letter from Syndicat Saumon et Truite Fumés to the EC, 26 May 2005. Exhibit NOR-17. Unofficial translation from French original.
[51] *See* Definitive Regulation, paras. 111 and 118.
[52] Provisional Regulation, paras. 112, 123, 126, 128 and Definitive Regulation, paras. 7, 100, 103, 107, 111, 114, 115, 116, 117, 121 and 122.

industry on the one hand and the *high employment in the user industries* on the other hand".[53] On this point, the EC found that the farming industry employed just 221 persons in the IP, but "around 7,500 workers are employed directly in the *salmon processing sector* in the Community."[54] Thus, the EC made separate findings regarding employment in the EC growing industry and the EC processing industry.

71. Importantly, the EC found that the EC fish farming industry and the EC processing industry have conflicting interests. The finished product produced by the fish farming industry constitutes the primary "raw material" input for processors.[55] The EC found that farmed salmon produced by the fish farming industry represents "around 48-54%" of processors' total costs.[56] In consequence, the EC acknowledged that the "worries expressed by the users industry [regarding the imposition of duties on farmed salmon] are legitimate as they fear a negative impact of the proposed measures on their costs leading to a reduced profitability."[57]

72. The EC recognizes, therefore, that processors benefit from low priced whole and HOG fish, whereas the fish farming industry does not. Indeed, in the investigation period ("IP"), the low prices of whole fish resulted in losses to the EC farming industry but processors benefited from low-priced raw materials and profits. Specifically, the EC found that the Community growing industry was loss-making on EC sales during the IP.[58] In contrast, processors were found to have profits of 5 – 12 percent. The EC added that processors profits can be higher "in good times" when the price of the "raw material" – *i.e.* farmed salmon – is low.[59]

73. The EC confirmed during the investigation that the products manufactured by the EC fish processing sector include filleted products. On 16 November 2005, the EC requested interested parties to comment on proposals for revising the MIPs with respect to filleted

[53] Definitive Regulation, para. 103.
[54] Definitive Regulation, paras. 72 and 112. The Syndicat Saumon et Truite Fumés estimated that the EC salmon processing industry employs some 20,000 persons across the EC. Letter from Syndicat Saumon et Truite Fumés to the EC, 26 May 2005. Exhibit NOR-17.
[55] Definitive Regulation, para. 113.
[56] Definitive Regulation, para. 113.
[57] Definitive Regulation, para. 114. This statement identifies the EC salmon processing industry as a "users industry", which is distinguished from the EC domestic industry.
[58] Definitive Regulation, para. 71.
[59] Definitive Regulation, para. 113.

products.[60] In that letter, the EC stated that certain processors claimed that, "particularly for fillets", the proposed MIPs did "not take full account of the processing costs involved".[61] On 13 December 2005, the EC issued an *Note Concerning the Definitive MIP*.[62] The Note states that the previously proposed MIPs "did not include the extra costs and profits which were incurred at the level of the processing of the fillets".[63] The Note continues that revised MIPs were calculated to include, among others, "processing costs" and "other costs related to processing".[64] The Note also stated that verification visits were conducted at the premises of Community processors and processors' associations.[65] This demonstrates that the EC found that filleted products were the product of the EC processing industry, which is treated as a separate "downstream" industry.

74. In sum, the EC consistently distinguishes between "the Community industry" that grows and harvests farmed salmon, and another "downstream", "users industry" that processes it, among others, into filleted products. The EC expressly recognizes that the output product of the farming industry – whole and HOG fish – is the input product for the processing industry, which transforms that input into different processed products, including fillets.

(iv) Summary of the Mismatch Between the Scope of the "Product" and the Scope of the "Domestic Industry"

75. The EC's determinations regarding the "product" and the "domestic industry" are tainted by the following contradictions:

- Ostensibly, the EC determined that whole/HOG farmed salmon and filleted salmon products constitute a single product;

- The EC nonetheless found that there are two separate upstream and downstream industries that produce two separate products: the first produces

[60] Information Note from the Commission on Developments Following the Definitive Disclosure, 16 November 2005. Exhibit NOR-18.
[61] Information Note from the Commission on Developments Following the Definitive Disclosure, 16 November 2005, third bullet point. Exhibit NOR-18.
[62] Information Note from the Commission on the Definitive MIP, 13 December 2005. Exhibit NOR-19.
[63] Information Note from the Commission on the Definitive MIP, 13 December 2005, para. 4. Exhibit NOR-19.
[64] Information Note from the Commission on the Definitive MIP, 13 December 2005, para. 5. Exhibit NOR-19.
[65] Information Note from the Commission on the Definitive MIP, 13 December 2005, para. 3. Exhibit NOR-19.

whole/HOG fish and the second uses that product to produce filleted products of various sizes (and other processed salmon products);

- The EC determined that the EC salmon growing industry constituted the "domestic industry" producing the "like product", and it found that this industry was injured by imports of dumped farmed salmon from Norway;

- The EC excluded the EC salmon processing industry from the "domestic industry", and it found that processors have interests that conflict with the interests of growers.

76. There is, therefore, a serious mismatch between the EC's determination of the scope of the "product" and the "domestic industry" producing that product. Whereas the "product" is defined broadly to include filleted products, the "domestic industry" is defined more narrowly to exclude producers of filleted products that do not also grow salmon. Producers of filleted products are not only treated as part of a separate industry, they are regarded as producers of a separate downstream product. These findings regarding the separation of the processing industry suggest strongly that the EC improperly determined that filleted products are part of a single product together with whole/HOG fish.

C. *The EC's Determination of the Product Scope of the Investigation Violated Articles 2, 3 and 5 of the Anti-Dumping Agreement*

(i) Overview of Norway's Claims on the Product Scope

77. In the previous section, Norway has outlined the mismatch between the EC's determination of the scope of the "product under consideration" and of the "domestic industry" producing that product. In this section, Norway claims that the source of this mismatch lies in the EC's failure to define the "product" scope of the investigation correctly. In essence, Norway claims that the EC's findings in this investigation demonstrate that whole and HOG fish are a single product produced by the salmon growing industry; and filleted products are a separate product produced by a separate industry. Instead of combining these different products into a single investigation, the EC was obliged to initiate separate investigations to establish whether these separate products were dumped.

78. Thus, Norway claims that the EC's determination of the "product under consideration" violates provisions of Articles 2, 3 and 5 of the *Anti-Dumping Agreement* because it includes a broad range of products that do not constitute a single "product" for purposes of Articles 2.1 and 2.6.

79. As noted in paragraph 44, the authority's determination of the "product" is central to an anti-dumping investigation. For example, the following consequences flow from that determination:

- The "product under consideration" determines the "like product".
- Before initiating an investigation under Article 5, the investigating authority must verify that the investigation has sufficient support from domestic producers of the "like product".
- In a dumping determination under Article 2, the authority compares the export price of the "product under consideration" and the normal value of the "like product".
- In an injury determination under Article 3, the authority examines the impact of dumped imports on domestic producers of the "like product".
- Finally, if duties may be imposed under Article 9, the "product under consideration" determines which imports are subject to anti-dumping duties.

80. Thus, each of the key steps in an anti-dumping action – initiation, the dumping and injury determinations, and duty imposition – are ultimately governed by the determination of the "product under consideration". The EC's flawed product determination, therefore, has far-reaching consequences for this entire anti-dumping action.

81. Norway wishes to emphasize that its dispute with the EC regarding the proper "product" scope of the measure at issue would not be resolved if the Panel exercised judicial economy with respect to Norway's "product" claims and addressed Norway's "domestic industry" claims. Because of the fundamental importance of the "product" determination to all aspects of an anti-dumping action (initiation, determinations of dumping, injury and

causation, and imposition of duties), the EC's implementation obligations would be very different if the "product" scope were found to violate the *Anti-Dumping Agreement*.

(ii) Ordinary Meaning of the Term "Product Under Consideration"

82. Under Article 3.2 of the DSU and Article 17.6(ii) of the *Anti-Dumping Agreement*, the Panel is duty bound to interpret the provisions of the *Anti-Dumping Agreement* "in accordance with customary rules of interpretation of public international law." These rules are codified, among others, in Article 31 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"), which requires that a treaty be interpreted in accordance with the ordinary meaning of the terms, read in the context and in light of the object and purpose.[66]

83. Norway will, therefore, review the relevant treaty text, context, and object and purpose relating to the term "product under consideration", and also explain how the EC misapplied the term in this case.

(a) *Relevant Text: the investigated products must all be like*

84. Norway begins its analysis of the "product under consideration" with the definition of "dumping" in Article VI:1 of the GATT 1994. Under that provision, dumping arises when an exported product is "introduced into the commerce of another country at less than *its* normal value". The word "its" in this phrase is a possessive pronoun highlighting that, in principle, dumping occurs when the price of an exported product is lower than the home market price of the *very same product* ("*its* normal value"). In other words, a dumping determination involves a comparison of the prices of a *specific product* in two different markets to establish whether there is international price discrimination.[67] In an investigation, an authority makes a single, overall dumping determination pertaining to the specific product at issue, as required by Article 6.10 of the *Anti-Dumping Agreement.*

85. The *Anti-Dumping Agreement* requires a very high standard of similarity between two products before an authority can compare their prices and make a single determination with respect to them. Under Article 2.1 of the *Anti-Dumping Agreement*, the comparison must be

[66] Appellate Body Report, *US – Gasoline*, page 16.
[67] Discrimination arises in the event that a specific thing (i.e. the product) is treated differently in comparable situations (i.e. sold at different prices in the home and export markets).

made between the prices of an exported product – referred to as the "product under consideration"[68] – and a "like product". Article 2.6 defines the "like product" 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. (Emphasis added)

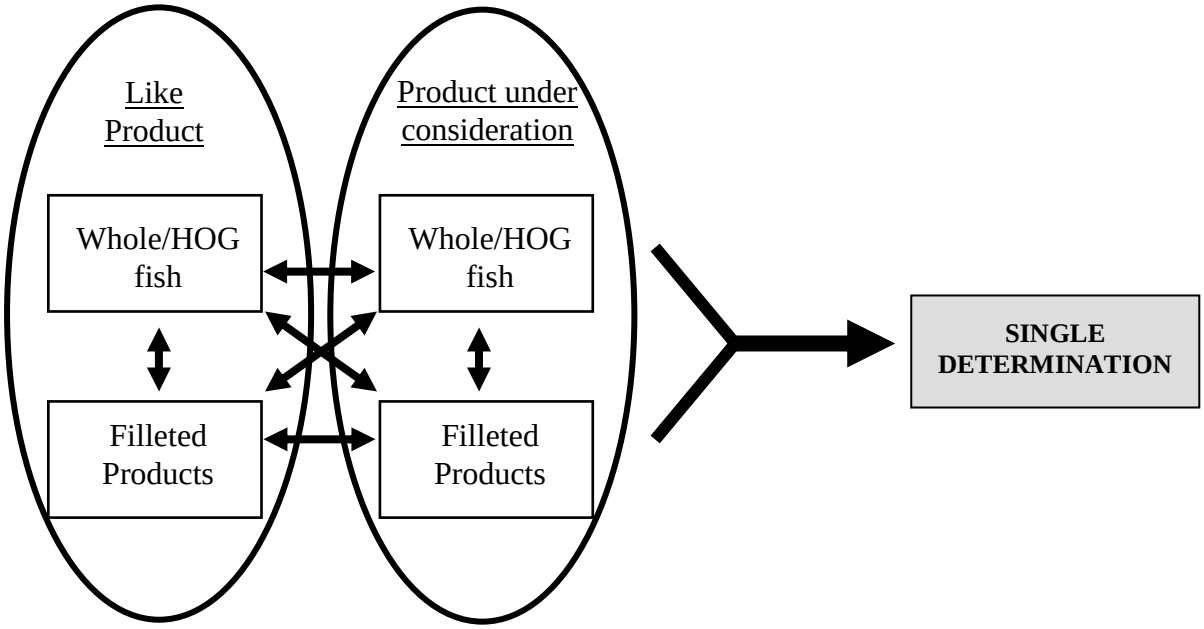
86. Accordingly, the pricing comparison must, in principle, be made between home and exported products that are "*identical*". The word "identical" is further defined to mean "alike *in all respects*". Article 2.6, therefore, requires a comparison between the price of a specific exported product and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

87. By way of exception, in the event that there are *no* identical products, Article 2.6 permits an authority to determine "dumping" through a comparison between a product's export price and the domestic price of a "closely resembling" product. However, in that event, the requirement for "close resemblance" still ensures that the products are sufficiently similar to enable a valid comparison, and a single dumping determination, for the two products.

88. In this dispute, the EC determined that the product under consideration includes both whole/HOG fish products and filleted products. Where an authority wishes to group multiple products together in a single investigation, Article 2.6 requires that *any* given category of "like product" must be "like" *each and every* category of the product under consideration. Article 2.6 contains no exception, or other qualifying language, that allows an authority to establish likeness with respect to one category of the product under consideration, but not with respect to other categories. The products subject to comparison must, in principle, be "alike in all respects" or, at least, "closely resembling" so that a single determination can be made with respect to them.

[68] The term "the product under consideration" appears four times in that *Agreement*, always in the singular (*see* Article 2.2.1.1; Article 2.6 (twice) and footnote 2).

89. In other words, in assessing whether the conditions for likeness in Article 2.6 are met, the investigated products must be assessed as a whole, and not just by sub-product category.[69] The following diagram illustrates the "vectors" of likeness that must be respected, under Article 2.6, using the products at issue in this dispute by way of example.



90. Accordingly, if the EC wished to initiate a single investigation into the dumping of a single product comprising whole/HOG fish *and* filleted products – and make a *single, overall determination* for that product – it was required to demonstrate that the various categories of the like product are all "like" the various categories of the product under consideration. In the diagram, the various products in the two circles must all be like. Thus, (1) the domestic whole/HOG fish products must be "like" the exported whole/HOG fish products (*horizontal* arrow); (2) the domestic filleted products must be "like" the exported filleted products (*horizontal* arrow); (3) the domestic whole/HOG fish products must be "like" the exported filleted products (*diagonal* arrow); and (4) the domestic filleted products must be "like" the exported whole/HOG fish products (*diagonal* arrow). As a logical consequence of the diagonal lines, the whole/HOG fish products and filleted products must also be like (*vertical* lines). Moreover, Article 2.6 requires that the like product be "*identical*" to the product under consideration, unless an identical product is absent.

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

91. Significantly, *the EC itself recognized* that it was required to demonstrate that the different salmon products concerned constituted a single product. It, therefore, set out to determine that there was single product on the basis of four criteria: (1) physical characteristics, (2) the production process, (3) substitutability and (4) end uses.[70] Norway *agrees* with the EC that these are appropriate criteria for ascertaining whether different products constitute a single product under consideration.

92. However, for the reasons set forth in sub-section (iii) below, the EC's explanation that the different products at issue constitute a single product falls short of the requirements of the *Anti-Dumping Agreement*. Whole/HOG fish products are not "identical" to and do not even "closely resemble" filleted products, and there is no basis for combining them in a single investigation and making a single dumping determination for them. The EC should, therefore, have initiated separate investigations into these products.

93. If an authority were permitted to group together products that are not all alike – i.e. ignoring the diagonal lines in the diagram – a single dumping determination for the different products would not provide an *objective basis* for concluding that each of the different products is dumped.

94. For example, an authority could compare the prices of whole/HOG fish products, and establish that they are dumped. Separately, it could compare the prices of filleted products, and establish that they are *not* dumped. The authority then combines the results of its different comparisons to produce a *single* determination for *all* the investigated products. Overall, it concludes that the investigated products *are* dumped. Subsequently, it imposes anti-dumping duties on both whole/HOG fish products and filleted products.

95. Because the two groups of products are not "like", the authority's single, overall determination does not reflect an apples-to-apples comparison between one product's export price and that product's ("its") normal value, as required by Article VI:1, and Articles 2.1 and 2.6. In short, when combined determinations are made for non-like products, it is no longer possible to conclude that a given product within the group is dumped because, in the overall determination, the dumping of one product masks the fact that the other product is not dumped.

[70] Provisional Regulation, para. 11.

96. Importantly, in the example above, the overall determination is distorted because it suggests that filleted products are dumped, when they are not. In fact, the pricing of filleted products is not unfair and cannot be "condemned" under the GATT 1994. Further, even if the two non-like products were both dumped, the level of dumping may differ. If a combined dumping determination were permissible, and a single duty imposed on the different products, imports of one would bear higher duties than is appropriate.

97. The consequences of this distortion are exacerbated when the *producers* of the two non-like products are *not the same*. In that event, the producers of one product (e.g. filleted products) could be subjected to anti-dumping duties simply because the producers of a different product (e.g. whole/HOG fish products) have engaged in unfair pricing.

98. In contrast, under Norway's interpretation, if all the investigated products subject to a single determination must be like, such distortion *never* occurs because the dumping determination results from an apples-to-apples comparison between the export price of a product and that product's normal value.

(b) *Context: an apples-to-apples comparison of the product under consideration and the like product must be possible*

99. The context includes Article 2.4.2 of the *Anti-Dumping Agreement*. The first method of comparison in Article 2.4.2 confirms that the group of products under investigation must all be alike. Article 2.4.2 sets forth three methods of comparing the price of the "product under consideration" and the price of the "like product". The first comparison method refers to "*a comparison* of *a* weighted average normal value with *a* weighted average of prices of all comparable export transactions". This language envisages "a" single comparison between a single normal value and a single export price for the product as a whole.

100. If the authorities could define the product under consideration to include products that are not all alike, it would be impossible to undertake a single comparison for the product to determine whether the product is exported at less than its normal value. Instead, separate determinations would be *required* for each like product. The *Anti-Dumping Agreement* cannot, however, be interpreted in this way because it renders impossible the single comparison for the "product" under investigation as a whole that is expressly envisaged in Article 2.4.2.

101. It is, of course, true that the authorities can elect to sub-divide the investigated product into models for purposes of comparison. However, in that event, the different models cannot involve different products that are not like. Rather, as the Appellate Body held in *EC – Bed Linen*, the models must all be sub-categories of a group of products that meet the definition of likeness:

> Having defined the product at issue and the 'like product' on the Community market as it did, the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not 'comparable'. All types or models falling within the scope of a 'like' product must necessarily be 'comparable', and export transactions involving those types or models must therefore be considered 'comparable export transactions' within the meaning of Article 2.4.2.[71]

102. In consequence, if the investigating authority wishes to sub-divide the investigated product into models in the course of making its single, overall dumping determination, it must, nonetheless, ensure likeness within the entire group of sub-products that constitutes the investigated product. Because the different models of a product are all like, it is permissible for the authority to combine the multiple comparison results to produce an individual margin for the product as a whole.

(c) *Context: injury must be determined in relation to distinct production activities*

103. Article 3 of the *Anti-Dumping Agreement* also forms part of the context and further confirms Norway's interpretation. In an injury determination, the investigating authority examines whether imports of the dumped "product under consideration" are causing injury to the "the domestic producers as a whole of the like products". The text of Article 3 indicates that the inquiry establishes whether the *production activities* of these domestic producers are injured by dumped imports. Ultimately, anti-dumping duties are imposed to protect the producers' investment of resources in these production activities. The product scope of an investigation is, therefore, closely related to the production activities of the domestic industry seeking protection. In this investigation, the producers seeking protection were growers of farmed salmon, not the EC processing industry.

[71] Appellate Body Report, *EC – Bed Linen*, para. 58.

104. Under Articles 3.2, 3.4 and 3.5, an investigating authority must evaluate data pertaining to a wide range of factors affecting the economic situation of the domestic industry producing the like product. In evaluating that data, the authority must take care to ensure that it isolates data relating to the production activities that would be protected by anti-dumping duties. An authority must establish that these activities are injured and, in so doing, it should not examine data pertaining to different production activities. To that end, Article 3.6 states:

> 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. (Emphasis added)

105. This provision obliges the authorities to base their examination of the domestic industry on data pertaining solely to production of the like product, where that is possible. According to the text, the separate production of separate products is indicated by the existence of separate production processes for those products. Article 3.6, therefore, assumes that, generally, different products are produced from different production processes.

106. This reading of Article 3.6 is borne out by two GATT panel reports. The panels in *US – Wine and Grapes* and *Canada – Beef* both considered Article 6:6 of the Tokyo Round *Subsidies Code*, a provision worded identically to Article 3.6. Like the present dispute, both GATT disputes involved raw and processed agricultural products. In the first dispute, the products were wine-grapes and wine and, in the second, cattle and manufactured beef. In both disputes, the "product under consideration" was the processed agricultural product. Both panels found that the "domestic industry", therefore, included the producers of the processed product, but not producers of the raw product. An important consideration for the panels was the separation of the production processes used to produce, respectively, the raw agricultural product and the processed agricultural product. The separation of these processes indicated that two separate industries existed and that they produced products that were not like.

107. The panel in *US – Wine and Grapes* considered that:

> … a *separate identification of production of wine-grapes from wine in terms of Article 6:6 was possible* and that *therefore in fact two separate industries existed* in the United States – the growers of wine-grapes on the one hand and the wineries on the other.[72]

108. Thus, the separation of the production processes was a crucial indicator for the panel in deciding that there were, "*therefore*", separate industries producing different products. The panel agreed that these "two separate industries" produced two different products – wine-grapes and wine – that were not "like".[73] The panel found that, when the separate identification of production processes was possible, it was not relevant to inquire into "the economic interdependence between the industries producing the raw materials or components and industries producing the final product".[74] The panel also held that there was "no basis for the contention that the two products had to be considered as 'like products', and consequently the industries concerned to be one and the same" just because, for some purposes, the raw and processed agricultural products were both regarded as "primary products".[75]

109. The panel in *Canada – Beef* reached the same conclusion. It noted that "Article 6:6 defines more exactly the production process that is to be considered when assessing the effect of subsidized imports on 'domestic producers … of the like products'."[76] In particular, Article 6:6 "indicates a *preference for narrowing the analysis of injury to those production resources directly engaged in making the like product itself*."[77] This panel, therefore, recognized explicitly the link between the product scope of an investigation, and the productive activities and "resources" seeking protection. Moreover, the panel acknowledges the preference in the treaty for narrowing the inquiry to the product(s) resulting from a separate production process.

110. Finally, 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.[78] Thus, consistent with Article 3.6, where two products

[72] GATT panel report, *US – Wine and Grapes*, para. 4.3. Emphasis added. *See* also para. 4.2.
[73] GATT panel report, *US – Wine and Grapes*, para. 4.2.
[74] GATT panel report, *US – Wine and Grapes*, para. 4.5.
[75] GATT panel report, *US – Wine and Grapes*, para. 4.2.
[76] GATT panel report, *Canada – Beef*, para. 5.3.
[77] GATT panel report, *Canada – Beef*, para. 5.3. Emphasis added.
[78] Appellate Body Report, *US – Lamb*, footnote 55.

result from separate production processes that indicates that the products are *not* produced by a single industry and are not a single product.

111. The EC itself recognized the importance of the "production process" because it found that this was a key criterion to be examined in deciding whether whole/HOG fish products and filleted products constituted a single product under consideration.[79]

112. The *Anti-Dumping Agreement* requires a separate evaluation of different production activities because the producers utilizing one production process may be injured when the producers using a different process are not. The separate examination, therefore, ensures that the situation of producers engaged in different production activities is objectively examined to establish whether the producers warrant protection. A combined examination of producers undertaking different activities could distort the examination.

113. In this dispute, for example, the EC established that the producers of whole/HOG fish products and the producers of filleted products are part of *separate* industries that have *different* production processes. A separate examination of the injury factors for each group of producers may suggest that one industry is injured, when the other is not. For example:

- for any given injury factor, the situation of the two industries may differ, e.g. one may be suffering declining sales and incurring losses, while the other enjoys increased sales and profits.

- the conclusions to be drawn with respect to particular injury factors may differ from one industry to the other, e.g. acceptable profit levels may be different for investment in two separate production activities;

- because of the differences in production activities, the interests and incentives of the two groups of producers may conflict, e.g. upstream producers may profit from dumped imports of an input product whereas downstream domestic producers of that product may be harmed by those imports;

- the overall economic health of two industries may, therefore, be quite different, i.e. one industry may be injured when the other is not; and,

[79] Provisional Regulation, para. 11.

- even assuming that the industries are both injured, the causes of that injury may be quite different.

114. As a result, if the authorities were permitted to combine different products (e.g. all farmed salmon products), produced by different industries using different production processes, into a broad "single" product produced by a "single" industry, the combined injury determination could very well be distorted. The individual and collective significance of the injury factors for each industry would be masked, and the authorities would fail to make an objective examination of the situation of each industry.

115. The result could be that duties are imposed on a product manufactured by an industry that is not injured simply because a separate industry, producing a different product, is injured. As a result, duties would afford protection to producers that do not deserve it. Accordingly, by expanding the product scope of an investigation, an authority could make an injury determination, and impose protective duties, where that would be impossible if the products and industries were examined separately.

116. This objection to overly broad product determinations is similar to the objections in paragraph 96 above. That is, when non-like products are combined, the overall dumping determination may conclude that a product is dumped, when it is not; equally, when separately identifiable industries producing separate products are combined, the overall injury determination may conclude that an industry is injured, when it is not.

117. Both of these consequences are contrary to the object and purpose of the *Anti-Dumping Agreement*, which is to permit the imposition of duties *solely* when they are justified to afford protection to a domestic industry injured by imports of a product that is dumped.

(d) *Norway's Interpretation is Consistent with the Practice of the USDOC and the USITC*

118. Norway notes that the investigating authorities in the United States review whether the exported product identified in the petition by the U.S. domestic industry is comprised of more than one "product under consideration", and, in turn, whether there is more than one corresponding "like product" produced in the United States.

119. In the leading case, involving antifriction bearings ("AFBs"), the United States Department of Commerce ("USDOC") found that the petition covered *five separate imported products*.[80] As a result, it conducted *five separate investigations*, and made *five separate determinations*, with respect to the *five separate products*.[81]

120. In the AFBs investigation, the USDOC responded to a claim that there should be a presumption that only one kind of merchandise (i.e. product) will be named in a petition. The USDOC noted that "petitioners frequently combine cases on various countries together in one document. Nevertheless, where petitioners . . . include more than one class or kind [of merchandise] within one petition, the [USDOC] treats the investigation of each class or kind of merchandise as a separate investigation . . . ."[82] Thus, the investigating authority recognized that a petitioner does not have a freehand in defining the product under consideration.

121. In making its determination on the scope of the product under consideration, the USDOC relied on the following criteria:

> (1) The general physical characteristics; (2) the ultimate use; (3) the expectations of the ultimate purchaser; (4) the channels of trade; and (5) the manner of advertising and display.[83]

122. In reviewing the physical characteristics of the AFBs, the USDOC found that the "shape of the rolling element (in ball, cylindrical, needle, and spherical roller bearings) or the sliding contact surfaces (in spherical plain bearings) determined or limited the AFB's key functional capabilities (*e.g.*, load and speed)."[84] The USDOC explained that "these capabilities established the boundaries of the AFB's ultimate use and customer expectations. We believe that these factors are the critical ones in determining that five classes or kinds of

[80] Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, 54 Fed. Reg. 18992 (May 3, 1989). Exhibit NOR-20.
[81] Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, 54 Fed. Reg. at 18997. Exhibit NOR-20.
[82] Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, 54 Fed. Reg. at 19000. Exhibit NOR-20.
[83] Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, 54 Fed. Reg. at 18998-99. Exhibit NOR-20.
[84] Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, 54 Fed. Reg. at 18999. Exhibit NOR-20.

merchandise exist in these investigations."[85] The USDOC, therefore, gave decisive importance to physical differences that affect end uses and consumer expectations.

123. With regard to the remaining two criteria – channels of distribution and advertising – the USDOC "acknowledge[d] that these may be generally the same for many of the AFBs under investigation."[86] However, it stated: "[w]e do not believe . . . that similarity in channels of distribution and advertising, alone, is sufficient reason to treat the subject merchandise as a single class or kind of merchandise when significantly more important dissimilarities exist with respect to physical characteristics, ultimate uses, and expectations of the ultimate user."[87]

124. In the injury phase of the investigation, the USITC also made a product determination, applying similar criteria to those used by the USDOC.[88] It determined that there were six "like products" produced in the United States, five of which overlapped with those identified by the USDOC.[89] The USITC made a *separate* injury determination for the industry producing each of the six like products, concluding that three of the domestic industries were injured and three were not.[90] As a result, anti-dumping duties were imposed solely with respect to three of the six products.[91]

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[85] Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, 54 Fed. Reg. at 18999. Exhibit NOR-20.
[86] Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, 54 Fed. Reg. at 18999. Exhibit NOR-20.
[87] Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, 54 Fed. Reg. at 18999. Exhibit NOR-20.
[88] Factors that the USITC considers include: (1) physical characteristics and uses, (2) interchangeability of the products, (3) channels of distribution, (4) customer and producer perceptions of the products, (5) the use of common manufacturing facilities and production employees and, where appropriate, (6) price. *Torrington v. United States*, 14 C.I.T. 648, 652 (Ct. Int'l Trade 1990), *aff'd* 938 F.2d 1278 (Fed. Cir. 1991). Exhibit NOR-21. No single factor is dispositive, and the USITC may consider other factors it deems relevant based upon the facts of a particular investigation. *See* Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, Inv. Nos. 303-TA-19 and 20; 731-TA-391-399 (Final), USITC Pub. No. 2185, at 15 (May 1989). Exhibit NOR-22.
[89] Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, Inv. Nos. 303-TA-19 and 20; 731-TA-391-399 (Final), USITC Pub. No. 2185, at 17. Exhibit NOR-22.
[90] Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, Inv. Nos. 303-TA-19 and 20; 731-TA-391-399 (Final), USITC Pub. No. 2185, at 8-9. Exhibit NOR-22.
[91] *See, for example*, Antidumping Duty Order: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany, 54 Fed. Reg. 20900 (May 15, 1989). Exhibit NOR-23.

125. In another investigation, concerning magnesium from Canada, the USDOC concluded "that pure and alloy magnesium are two distinct classes or kinds of merchandise."[92] The USDOC noted that "the addition of alloying elements to pure magnesium clearly results in products with different physical characteristics."[93] Further, "[w]hile much of the production process for pure and alloy magnesium is the same, the final stage in the production of alloy magnesium is more costly, requiring alloy furnaces for the addition of alloying agents and more controlled conditions throughout the remaining production process."[94] Thus, the differences in the production processes were given prominence by the USDOC.

126. The USDOC further found that because of "the different ultimate uses of pure and alloy magnesium, along with their lack of interchangeability, it follows that customers have different expectations for the two metals… ." [95]

127. As a result, the USDOC concluded that "[a]lthough there is evidence that the channels of distribution for these two products are similar, the product characteristics, ultimate uses, and expectations of the customer show that pure and alloy magnesium are two distinct classes or kinds of merchandise."[96] Having defined the products at issue in this manner, the USDOC concluded that there was insufficient evidence that alloy magnesium was dumped, and this portion of the investigation was terminated.[97] The USITC also found that there were two like products in the United States.[98]

128. In this dispute, the EC accepted that it was required to determine that the different salmon products at issue constitute a single product under consideration. Moreover, as discussed below, the EC's determination that the different products constitute a single product was based on criteria similar to those used by the USDOC and the USITC. However,

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[92] Pure and Alloy Magnesium from Canada: Final Affirmative Determination; Rescission of Investigation and Partial Dismissal of Petition, 57 Fed. Reg. 30939 (July 13, 1992). Exhibit NOR-24.
[93] Pure and Alloy Magnesium from Canada: Final Affirmative Determination; Rescission of Investigation and Partial Dismissal of Petition, 57 Fed. Reg. 30939. Exhibit NOR-24.
[94] Pure and Alloy Magnesium from Canada: Final Affirmative Determination; Rescission of Investigation and Partial Dismissal of Petition, 57 Fed. Reg. 30939. Exhibit NOR-24.
[95] Pure and Alloy Magnesium from Canada: Final Affirmative Determination; Rescission of Investigation and Partial Dismissal of Petition, 57 Fed. Reg. 30939. Exhibit NOR-24.
[96] Pure and Alloy Magnesium from Canada: Final Affirmative Determination; Rescission of Investigation and Partial Dismissal of Petition, 57 Fed. Reg. 30939. Exhibit NOR-24.
[97] Pure and Alloy Magnesium from Canada: Final Affirmative Determination; Rescission of Investigation and Partial Dismissal of Petition, 57 Fed. Reg. at 30939-40. Exhibit NOR-24.
[98] Magnesium from Canada, Inv. Nos. 701-TA-309 and 731-TA-528 (Remand), USITC Pub. No. 2696, at 6 (Nov. 1993). Exhibit NOR-25.

the EC failed to explain how the facts of record support its determination, particularly in view of the fact that:

- there are obvious and important physical differences between, for example, whole/HOG fish and small, skinned fillets;
- the production processes used to produce these products are different – with filleting a costly additional step;
- the products do not have the same channels of distribution;
- their uses are not the same;
- the products are not interchangeable; and,
- consumers do not have the same expectations of a whole/HOG fish and a small filleted portion.

(e) *Conclusion*

129. In sum, therefore, Norway submits that the term "product under consideration" in Article 2.1 of the *Anti-Dumping Agreement* refers to a single product or to a group of products all of which are "like" within the meaning of Article 2.6. This reading is based on the ordinary meaning of these provisions, read in light of the context of Article VI:1 of the GATT 1994 as well as Articles 2.4.2, 3.6 and 6.10 of the *Anti-Dumping Agreement* and of the object and purpose of that *Agreement*. As a result, to make a single determination, an investigating authority must demonstrate, on the basis of facts in the record, that the different products under consideration included in an investigation are all "like".

130. It is bears repeating that this determination is crucial to the entire investigation because everything in the investigation flows from it. The right to initiate an investigation is heavily influenced by the product determination because the domestic producers of the like product must support initiation. If the product scope changes, support for initiation may disappear. Similarly, if different products are combined within a single investigation, dumping may be found for a product that is not dumped. Equally, if the producers of

different products are lumped together in a single injury determination, an industry may be found to be injured when it is not.

(iii) The EC's Product Determination Violates the *Anti-Dumping Agreement* because the Product Under Consideration Includes Different Products that are Not All Like

131. With this interpretive background in mind, Norway turns to the EC's product determination. That determination is flawed because it has combined products that are not sufficiently alike to constitute a single "product under consideration". Specifically, the EC has combined into a single product under consideration whole fish, HOG fish, and processed filleted fish products, when neither the EC's explanation nor the facts of record support the conclusion that these are all like. As a result, the EC violated Articles 2.1 and 2.6 of the *Anti-Dumping Agreement* in its product determination. In consequence, it also violated Articles 5.1 and 5.4 in initiating an investigation into an invalid product; it violated Article 2.1 in its dumping determination; and it violated Articles 3.1, 3.2, 3.4, 3.5 and 3.6 in its injury determination.

(a) *The EC Failed to Provide a Valid Basis for its Determination of the "Product" Scope of the Investigation*

132. In paragraph 48 above, Norway reproduced the EC's determination of the product scope of the investigation to the effect that "all farmed salmon constitutes a single product".[99] In paragraph 51, Norway reproduced, in full, the EC's explanation for this determination. In that explanation, the EC relies on four criteria in support of its conclusion: (1) physical characteristics, (2) production process, (3) substitutability and (4) end uses. These criteria are similar to those applied by the USDOC and the USITC, as discussed in the previous section.

133. As noted, Norway agrees with the EC that these criteria are appropriate in assessing whether different products may be grouped together as a single "product under consideration". These factors have been endorsed by the Appellate Body in the context of Article III of the GATT 1994 as a means of ascertaining whether products are "like".[100] In

[99] Provisional Regulation, para. 11. "Based on the *physical characteristics*, the *production process* and the *substitutability* of the product from the perspective of the consumer, it was found 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 purpose of the proceeding."

[100] Appellate Body Report, *EC – Asbestos*, para. 101.

addition, the Appellate Body has relied on the tariff classification of the products as a criterion for assessing likeness.[101] Further, as the Appellate Body held, the production processes of the products are also relevant to the determination.[102]

134. The EC has wholly failed to demonstrate that the facts in the record of the investigation support its conclusion with respect to these criteria. The EC offers *no* factual support whatsoever for its conclusion and, instead, relies on bald, unsubstantiated assertion. 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*."[103] The EC's explanation falls far below the standards that investigating authorities must meet. In the following sub-sections, Norway reviews the EC's explanations regarding each of the criteria in light of the evidence in the record and the EC's own factual findings.

(a)(i) *Physical Characteristics*

135. With respect to *physical characteristics*, the EC failed to explore important differences between the different products that it concluded constitute a single product. There are significant physical differences between whole/HOG fish – including head, skin, and tail, that can weigh up to eight kilograms – and skinned filleted products that can weigh as little as a 100 grams or less. These products are neither identical nor closely resembling, within the meaning of Article 2.6.

136. The major physical differences are also important to the analysis of other factors: the products must be produced using different production processes; the physical differences affect the substitutability and end uses of the products; and they alter consumers' expectations with respect to the different products.

137. The EC was well aware of the physical differences between the different products. Indeed, in Article 1(5) of the Definitive Regulation the EC provided a description of these differences sufficient to sub-divide the allegedly single product into six different product categories, each subject to a different minimum import price. Notably, instead of applying a *single remedy* to a supposedly *single product*, the EC imposed *six different remedies* on *six*

[101] Appellate Body Report, *EC – Asbestos*, para. 101.
[102] Appellate Body Report, *US – Lamb*, footnote 55.
[103] Appellate Body Report, *US – Steel Safeguards*, para. 326. Emphasis added.

different products. The EC's need to impose six remedies on six products demonstrates that there is not one single investigated product.

138. The EC had before it evidence demonstrating the physical differences between the different products that it treated as a single product. One of the sampled companies, Pan Fish Norway ("PFN"), submitted marketing materials with pictures demonstrating the obvious differences in physical characteristics between whole fish products and fillet products.[104] The documentation includes three separate brochures devoted to "Salmon and Trout", "Fillets" and "Smoked and Marinated Products".

139. The *first brochure*, entitled "Salmon and Trout", has a picture of two gutted whole fish, with head and tail, presented in a box on ice. The brochure does not specify whether the fish are salmon or trout, or one of each. An educated eye is required to perceive the physical differences between the HOG salmon and trout. The caption reads: "Superior and ordinary quality fresh gutted, frozen gutted head on/head off." The right hand side of the brochure lists ten Pan Fish companies involved in the supply of this product.

140. The *second brochure*, entitled "Fillets", has pictures of several different filleted products, including a whole fillet and various fillet portions. The brochure reads:

> From processing locations in Norway, Scotland, Canada and Chile. The Pan Fish Group offers a wide range of salmon fillets and portions. The product rang (sic) include: different trimmings; portions; tails.

The right hand side provides a list of five Pan Fish companies engaged in the supply of the fillet products, one of which is not listed on the "Salmon and Trout" brochure.

141. The *third brochure*, entitled "Smoked and marinated products", has pictures of packaged and unpackaged smoked and marinated products. The brochure states:

> From processing locations in Norway, Scotland, Canada and Chile. The Pan Fish Group offers a wide range of smoked and marinated products: whole fillets; presliced fillet (marine or sashimi slice); smoked portion; retail packs (marine or sashimi slice); tenderloin fillet".

The right hand side lists five Pan Fish companies engaged in the supply of these products, two of which are unique to this product group.

[104] Questionnaire reply from PFN, 30 December 2004, Section B.2-5. Exhibit NOR-26.

142. These brochures depict plainly the physical differences between the different types of fish products. Further, whole/HOG salmon and trout – which the EC concluded were *not* a single product – are treated by Pan Fish as a single product category for marketing purposes that is distinct from the two "processed" product categories. This suggests that consumers regard these salmon and trout products as part of a single product category.

143. The brochure on fillets – which is treated as a single product category – shows that filleted products themselves come in a range of shapes and sizes. A comparison of the pictures in the first and second brochures suggests strongly that the end uses of a whole/HOG fish and filleted products are unlikely to be the same; nor are consumers likely to have the same expectations of the two product categories.

144. Further, the fact that the products are grouped into these three distinct categories for marketing purposes suggests that consumers regard the categories as separate. Further, the fact that – even within a single corporate group – different companies are involved in the supply of the three different product categories suggests that they are produced by different production processes and industries. Two of these categories, including fillets, are described as resulting from "processing".

145. Norway also submits a memorandum from a leading industry analyst, Kontali Analyse, that discusses the characteristics of filleted products. Kontali points out that there is a wide of range of filleted products.[105] Fillets can be skin on or off; scales on or off; normal or deep skinned; brown muscle removed; collar bone on or off; belly bones on or off; belly and/or back fins on or off; belly fat on or off; back fat on or off; pin bone in or out; tail piece on or off; portioning by weight, length and/or width; longitudinally cut into loin and belly parts; centre cut; including or excluding tail portion; or tail portion only. Moreover, because of the physical differences among filleted products, Kontali points out that different filleted products have different end uses and prices. The analysis provided by Kontali – which confirms that filleted products are a separate product category from whole/HOG fish – provides precisely the type of examination of the basic facts regarding the product that the EC failed to make.

[105] Kontali Analyse Memorandum, 15 December 2005. This memorandum was submitted to the EC by FHL with its Comments on the Information Note on the Definitive MIP, of 16 December 2005. Exhibit NOR-27.

146. These considerations suggest that whole/HOG fish products and filleted products do not constitute a single product from the perspective of physical properties, end uses and consumer expectations.

147. The EC's determination addresses none of these issues. In particular, the EC's simply assumes what is patently not the case: whole/HOG fish do not have the same physical properties as filleted products.

(a)(ii) *Production Processes*

148. A particularly glaring omission in the EC's explanation is the unsubstantiated statement that the "*production process*" – the EC refers to a singular process – of the different salmon products somehow supports the conclusion that these products all constitute a single product. The EC fails to provide any indication of how the facts in the record support this conclusion. Norway has been unable to identify any evidence in the record that supports the view that whole/HOG fish products and filleted fish products result from a single production process. To the contrary, *as the EC itself found*, these products result from separate production processes that are produced by two different industries.

149. The separation of the production processes is strikingly shown by the fact that the EC treats the "fish farming industry" and the "fish processing sector" are separate industries that it examines in different parts of its determination.[106] The farming industry constitutes the EC domestic industry producing the like product that is analyzed in the injury determination.[107] In contrast, EC salmon processors are found to be part of a "downstream" "user industry" that is analyzed as part of the "Community interest".[108]

150. With respect to the farming industry, the EC determined that whole fish are the output product of a production process in which smolt are the input; these smolt are grown at sea into harvestable fish, which are slaughtered and gutted.[109] The productive assets include cages and feeding systems; boats; and facilities to slaughter and gut the fish. The EC refers to this process as "salmon farming". The EC's examination of the EC domestic industry

[106] *See, for example*, Definitive Regulation, para. 124.
[107] *See, for example*, Definitive Regulation, para. 78.
[108] *See* Definitive Regulation, paras. 111 ff; Provisional Regulation, paras. 122 ff.
[109] Definitive Regulation, paras. 18 and 63.

focuses exclusively on companies engaged in "salmon farming" to the exclusion of companies that are engaged only in the production of filleted products.

151. Highlighting the differences between the salmon farming and processing industries, the EC finds that the *input products* for the processing industry – whole/HOG fish – are the *output products* of the farming industry.[110] The productive assets of the processing industry involve a dedicated facility for filleting. The output is filleted fish products of a variety of sizes, both with skin on and off. Production facilities can be located anywhere and are often some distance inland from the sea location where salmon are farmed. In Norway's case, most of the HOG salmon that it produces is exported, and processed in other countries. The physical separation of the farming and processing facilities underscores that entirely different production processes are used to produce whole fish and fillets.

152. Furthermore, it is evident from the Definitive Regulation that the labor forces engaged in producing whole/HOG fish and filleted products are different. The EC found that the EC salmon farming industry employs 221 persons, whereas the EC salmon processing industry employs 7,500.[111] Although the processing industry produces products in addition to filleted products (e.g. smoked salmon), the dedicated workforces employed in the farming and processing industries are different.

153. The evidence in the record also demonstrates that the cost per kilogram of producing filleted products is higher than the cost of producing whole/HOG fish.[112] Thus, as with the USDOC's determination regarding pure and alloy magnesium, the production of filleted products "is more costly" than the production of whole fish.[113] The marked difference in the cost of producing the investigated products evidences the fact that they are produced using different production processes with different costs.

154. Equally, the EC found that the profitability levels in the two industries differ. The primary cost in producing filleted products is the whole/HOG fish input, which represents "48-54%" of costs, with profits in excess of 12% "in good times".[114] During the period

[110] Definitive Regulation, paras. 113 and 114.
[111] Definitive Regulation, paras. 72 and 112.
[112] *See, for example*, Annex 3 of the Definitive Disclosures to Fjord Seafood, Grieg and Sinkaberg, 28 October 2005. Exhibits NOR-28, NOR-16 and NOR-29.
[113] *See* para. 125 above.
[114] Definitive Regulation, para. 113.

considered in the investigation (2001 to the IP), when salmon farmers were incurring losses, the EC processing industry was profitable.[115] Thus, in the same period and with the same market conditions, one industry had good performance and the other poor. The cost structure and financial performance of the two industries is, therefore, also different, highlight again that the industries are separate.

155. The EC's determination, therefore, includes numerous findings confirming that the production processes for salmon farming and salmon processing are different. Yet, in its product determination, without explanation, the EC relied on the "production process" to conclude that they involve a single product. The EC fails to refer to a single fact in support of its conclusion that the alleged similarity of the "production process" of whole/HOG fish products and filleted products implies that there is a single product.

(a)(iii) *Substitutability and End Uses*

156. The third and fourth factors that the EC relied upon are the *substitutability* of the products from the perspective of the consumer and their *end uses*.[116] Despite concluding that the end uses of all the investigated products are "the same", the EC fails even to identify what those end uses are. Further, even though the EC relied upon the alleged substitutability of the products, the EC fails to identify: the consumers of each of the products; the chains of supply; the channels of distribution; and the prices at which the products are sold.

157. In sum, the EC does not explain how the facts in the record support its conclusions regarding the alleged substitutability of the products or the alleged identity of the end uses. In fact, worse than not explaining its conclusion, the EC's other findings in the Provisional and Definitive Regulations contradict the conclusion.

158. It is unlikely in the extreme that most consumers would be utterly indifferent faced with a choice between whole/HOG fish and small filleted portions. At the industrial level, the assertion that whole fish and filleted products have "the same" end uses is contradicted by the fact that the EC also finds that whole fish is the primary raw material used as an input to make filleted products.[117] From the perspective of the salmon processing industry – a major consumer of whole/HOG fish – these two products are not substitutes for the filleted products

[115] Definitive Regulation, paras. 71, 113 and 114.
[116] Provisional Regulation, para. 11.
[117] Definitive Regulation, paras. 113 and 114.

it manufactures. Indeed, it is absurd to suggest that processors would incur the high cost of producing fillets if whole fish already served "the same" end use equally well.

159. Moreover, it is also highly doubtful that the consumers of filleted products would regard whole fish as a fully substitutable alternative. Some filleted products will be further processed by industrial users, for example, into ready-made salmon dinners or smoked salmon.[118] Again, if whole fish could simply be substituted to serve these end uses, processors would not incur the cost of producing filleted products. Other filleted products are sold at the retail level, where consumers are unlikely to perceive a whole/HOG fish as fully substitutable for a small, skinned fillet.

160. In considering substitutability and the inter-changeability of end uses, prices are an important factor. In that regard, the EC's MIPs are instructive. The EC established MIPs for a series of six different products, from whole fish to small skinned fillets. The lowest MIP for this allegedly single product is €2,80 per/kg, whereas the highest is almost three times as much, at €7,73 per/kg.[119] The substantial difference in the prices that consumers are willing to pay for whole fish products and filleted products raises serious doubts regarding the degree of substitutability of these products and also the "sameness" of their end uses.

161. Again, the EC's explanation of its product determination fails to address any of these questions. Nor does the EC provide any facts in support of its conclusions that the various products are all substitutable and have "the same" end uses.

(a)(iv) *Tariff Classification*

162. The table of MIPs in Article 1(5) of the Definitive Regulation highlights a further failing in the EC's determination. The final column of the table provides the tariff classification for the different products. As the table shows, the products subject to the MIPs are classified under separate tariff headings. Under the Harmonized System of Tariff Nomenclature ("HS"), fresh and chilled Atlantic salmon with bones are classified under code "030212"; frozen Atlantic salmon with bones is classified under code "030322"; fresh and

[118] *See* Letter from Syndicat Saumon et Truite Fumés to the EC, 26 May 2005, which states that processors produce ready-made dinners (Exhibit NOR-17) and letter from FHL to the EC, 16 December 2005 (Exhibit NOR-27).

[119] Definitive Regulation, Article 1(5). The lowest price is for whole fish and the highest price is for filleted products of less than 300g.

chilled fish fillets are classified under code "030410"; and frozen fish fillets are classified under "030420". Thus, whole/HOG fish are treated separately from filleted products under the HS. The EC's failure to explain why these products constitute a single product, despite the different tariff classifications, is striking because tariff classification is an accepted criterion in WTO law for determining the likeness of products.[120]

(b) *Conclusion*

163. In conclusion, the EC found that the "product under consideration" extended from whole fish to small, skinned filleted products. The EC purported to base this determination on four factors: physical characteristics, production process, substitutability and end uses. However, besides listing the factors allegedly examined, and stating its conclusions baldly, the EC failed to support its determination by reference to any facts. Indeed, the EC's entire three sentence "explanation" of the product determination does not refer to a single fact in support of that determination. The EC notably failed to explain why the different products constituted a single product, notwithstanding: the obvious physical differences that led even the EC to impose six different MIPs on an allegedly single product; the EC's own findings that the different products were produced by different industries using different production processes; the fact that products have different end uses, prices and consumers, and also different tariff treatment. These considerations were in the record before the EC and, indeed, emerge from the EC's own determination.

164. It is worth recalling that, to justify its product determination, the EC was required to provide a "reasoned and adequate explanation" addressing, among others, how the facts in the record provided a basis for the product determination; the EC could not merely rely on allegation and conjecture.[121] The EC failed to meet this minimum standard.

165. Absent adequate explanation of how the facts support the determination, the EC's conclusion that six products constitute a single "product under consideration" is deprived of legal basis under Articles 2.1 and 2.6 of the *Anti-Dumping Agreement*.

[120] Appellate Body Report, *EC – Asbestos*, para. 101.
[121] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 99.

(iv) The EC's Improper Product Determination Vitiates the Initiation of the Investigation, as well as the Dumping and Injury Determinations

166. Because of its fundamental importance to the investigation, three far reaching consequences result from the EC's flawed "product" determination:

- the EC violated Article 5.1 and 5.4 of the *Anti-Dumping Agreement* by initiating an investigation on the basis of a flawed "product" determination;
- the EC violated Article 2.1 of the *Agreement* by making dumping determinations on the basis of a flawed product determination; and,
- the EC violated Articles 3.1, 3.2, 3.4, 3.5 and 3.6 of the *Agreement* by making an injury determination on the basis of a flawed product determination.

(a) *The EC's Improper Product Determination Vitiates the Initiation of the Investigation under Articles 5.1 and 5.4 of the Anti-Dumping Agreement*

167. Article 5.1 of the *Anti-Dumping Agreement* provides that "an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry." Under Article 5.4, an investigation may be initiated solely if there is sufficient support among domestic producers of the "like product". Accordingly, before initiation, an investigating authority must determine the investigated "product", and define the "domestic industry", so that it can ensure that an investigation has the support of that industry, as required by Article 5.4.

168. The product scope of an investigation has considerable repercussions for an authority's ability to initiate an investigation. For example, whereas the domestic industry producing one product might support initiation (*e.g.* EC salmon farmers producing whole/HOG fish), a different industry producing a different product might not (e.g. EC salmon processors producing filleted products). By altering the product scope of an investigation, an investigating authority might, therefore, determine that there is sufficient support for the initiation of an investigation that could not otherwise be initiated. The "product under consideration" must, therefore, be properly defined.

169. In this dispute, the product scope of the investigation includes a group of products that are not all like. By defining the product in this way, the EC violated Article 5.1 because it improperly initiated a single investigation into the alleged dumping of a product that, in fact, constitutes several products. It also violated Article 5.4 because the EC did not verify that the domestic industries producing each separate like product at issue supported the initiation of the investigation.

170. The proper course for the EC was to assess whether there was support for separate investigations into smaller categories of products that are all alike – as the USDOC did in the AFBs and magnesium investigations mentioned above. The EC is not, therefore, precluded from separately investigating injurious dumping of all the products that it treated as a single product under consideration. However, before doing so, the EC must satisfy the requirements of Article 5.4 separately for each product; and, if initiation is permissible, the EC would have to make separate dumping and injury determinations pertaining to the each product and domestic industry concerned.

(b) *The EC's Improper Product Determination Vitiates the Dumping Determination under Article 2.1 of the Anti-Dumping Agreement*

171. Norway has set forth at length its interpretation of Article 2.1 and related provisions in paragraphs 84 to 117. Under Article 2.1, an investigating authority determines whether the investigated product is "dumped". It does so by comparing the export price of a given product with the normal value of that same product ("its normal value) or a like product. A separate dumping determination must be, therefore, be made for each separate product that is not like the other investigated products. As explained in paragraph 96, if an authority made a single determination for a group of products that are not all alike, it may well conclude that one of the products is dumped when, in fact, it is not. Or, even if all products are dumped, the authority's combined approach fails to determine the differences in the level of dumping of each separate product. In short, by making a combined determination, the authority fails to establish the existence and amount of dumping of each of the separate products.

172. In this dispute, the EC did precisely this. The product scope of the investigation comprised several different products that are not all like, within the meaning of Article 2.6 of the *Anti-Dumping Agreement*. The EC made a combined dumping determination that covered all these products. However, in making this determination, the EC could not show

that the export price of a given investigated product (e.g. filleted products) is less than that specific product's normal value. The EC's combined dumping determination could well mask the fact that some of the investigated products are not dumped. Alternatively, even if all the products were dumped, the combined margin of dumping may be higher than the margin, in fact, attributable to one or more of the products covered by the determination.

173. By making a combined determination covering several products that are not all like, the EC violate Article 2.1.

(c) *The EC's Improper Product Determination Vitiates the Injury Determination under Article 3 of the Anti-Dumping Agreement*

174. Under Article 3.1 of the *Anti-Dumping Agreement*, an investigating authority determines whether the domestic producers of the "product" are collectively injured. Again, as explained in paragraphs 103 to 117, the product scope of the investigation is a key determinant of this determination. If the product scope is altered, the group of domestic producers that must be examined under Article 3 is also altered. In short, the definition of the domestic industry is totally dependent on the definition of the product scope. Thus, if an authority has improperly defined the product scope, the determination under Article 3 is necessarily vitiated.

175. The EC's injury determination under Article 3.1 is, therefore, vitiated because it is premised on an improper product definition. For the same reason, the EC's evaluation under Articles 3.2, 3.4 and 3.5 was also vitiated. The EC also failed to conduct its injury determination on the basis of data pertaining to the separately identifiable production processes used by salmon farmers and salmon processors, as it was required to do under Article 3.6.

D. *Conclusion*

176. For the reasons stated in this Section, the EC's determination of the "product under consideration" violated Articles 2.1 and 2.6 of the *Anti-Dumping Agreement*; in consequence, the EC also violated:

- Articles 5.1 and 5.4 of the *Agreement* by initiating an investigation on the basis of a flawed "product" determination;

- Article 2.1 of the *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 *Agreement* because it examined injury to a domestic industry defined on the basis of a flawed product determination.

IV. THE EC'S DETERMINATION OF THE "DOMESTIC INDUSTRY" VIOLATED THE *ANTI-DUMPING AGREEMENT*

A. *Introduction*

177. Although the EC defined the "product under consideration" in improperly broad terms, it defined the EC "domestic industry" in improperly narrow terms. The "product" scope of the investigation extends from whole salmon to small, skinned fillets. The domestic industry must, therefore, include producers of whole/HOG fish and also producers of filleted products. Moreover, to be included in the industry, a producer need not produce both categories of product, but may produce one or the other.

178. In fact, the EC "domestic industry" included solely 15 fish farmers that grow salmon, and sell predominantly whole/HOG fish.[122] The EC industry does not include any processors that produce filleted products without also growing salmon. The EC has, therefore, almost entirely excluded EC producers of filleted products from the EC industry. As noted, in paragraph 55, the EC has a large processing industry that transforms "*several hundred thousand tonnes*" of farmed salmon annually.[123] This industry has been excluded from the domestic industry, even though the filleted products it produces are part of the investigated product.

179. There is, therefore, a fatal mismatch between the determinations of the "product" and the "domestic industry". 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".

180. In addition, in defining the "domestic industry", the EC also improperly excluded six other entire categories of domestic producer that it was not entitled to exclude. Further, even after excluding all these categories of domestic producers, the EC examined certain injury factors solely with respect to a sample of five domestic producers.[124] The EC, thereby, improperly excluded a further ten domestic producers from the domestic industry.

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[122] *See* paras. 53 to 74 above. The total volume of EC filleted products included in the examination of price undercutting, was 2.8 tonnes, which is 0.05% of the total EC production included in that examination. Definitive Disclosure to Grieg Seafood, 28 October 2005, Annex 6. Exhibit NOR-16.

[123] Letter from Syndicat Saumon et Truite Fumés to the EC, 26 May 2005. Exhibit NOR-17. Unofficial translation from French original.

[124] Definitive Regulation, para. 45.

181. On the basis of these exclusions, Norway claims that the EC's determination of the scope of the "domestic industry" suffers from three flaws:

- *First*, the EC improperly excluded from the domestic industry several categories of domestic producer that it was required to include in the industry, pursuant to Article 4.1 of the *Anti-Dumping Agreement*.
- *Second*, 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.
- As a consequence of these two violations:
  - the EC failed to establish that the initiation of the investigation was made by or behalf the proper domestic industry, as required by Article 5.4 of the *Agreement*; and,
  - the EC failed to determine that the proper domestic industry was injured, pursuant to Articles 3.1, 3.4 and 3.5 of the *Agreement*.
- *Third*, the EC's determination of injury violated Articles 3.1, 3.4 and 3.5 of the *Anti-Dumping Agreement* because the EC examined certain injury factors solely in relations to a sample of the domestic industry, which is not permitted.

182. In sub-section B, Norway provides an overview of the EC's domestic industry determinations. In sub-section C, it examines the obligations in the *Anti-Dumping Agreement* governing the determination of the "domestic industry" and the EC's violation of those obligations.

B. *Overview of the EC's Determination of the Domestic Industry*

183. The EC's determination of the "domestic industry" is described, in part, in paragraphs 53 to 65 above. In sum, the EC excluded seven entire categories of producer from the industry, before deciding that industry comprised just 15 EC growers of farmed salmon that supported the complaint. The EC's findings are partly set forth in the Provisional Regulation and partly in the Definitive Regulation. Norway, therefore, presents an overview of both, including relevant data to the extent that the EC provided any.

(i) Findings in the EC Provisional Regulation

184. The investigation was initiated following an application filed by the EU Salmon Producers' Group ("EUSPG") on 7 September 2004 ("Complaint").[125] The EUSPG is an association of 22 EC growers of farmed salmon.[126] The Complaint states that the total EC production of farmed salmon, including production of related producers, was 181,000 tonnes in 2003.[127] The Complaint states that *unrelated* EC producers produced 33,000 tonnes and that the *Complainants' own production is 30,000 tonnes.*[128]

185. In the Provisional Regulation, the EC states that, during the IP, farmed salmon was produced by three different groups of EC producers:

- "Community producers which were not related to Norwegian exporters or importers and which were complainants or explicitly supported the complaint" ("supporters");
- "Community producers which were not related to Norwegian exporters or importers, and which did not take a position on the complaint ('silents')"; and
- "Several other producers which were found to be related to Norwegian exporters or importers ('related')"

186. The EC found that the supporters "had produced around 20,000 tonnes of salmon during the IP."[129] It stated that "[t]his represents around 90% of the estimated total Community production of the product concerned", which is considered to constitute a major proportion of Community production.[130] These figures suggest that the EC domestic industry, as defined by the EC, produced a total of 22,222 tonnes, although this is not stated. Strikingly, 22,222 tonnes is *just 12.2 percent of the total Community production* of 181,000 tonnes referred to in the Complaint.[131]

187. The EC does not explain whether the production figures given for the EC domestic industry are based on the production of all six products corresponding to the six different MIPs, or only on some of them. Indeed, the EC never states the volume of EC production of

[125] Exhibit NOR-14.
[126] *See* Section B.1(a) and Annex 1 of the EUSPG Complaint. Exhibit NOR-14.
[127] *See* Section B.1(b), page 3, of the EUSPG Complaint. Exhibit NOR-14.
[128] *See* Section B.1(a), page 5, of the EUSPG Complaint. Exhibit NOR-14.
[129] Provisional Regulation, para. 45.
[130] Provisional Regulation, para. 45.
[131] In the Definitive Safeguard Regulation, para. 51, the EC gives total EC production of 190,903 tonnes in 2003. 22,222 tonnes is only 11.6 percent of 190,903 tonnes.

the six product categories subject to individual MIPs. It is, therefore, impossible for the reader to know the EC's basis for calculating total EC production. Also, the EC did not identify the number of the supporters; it did not identify the number of the silents nor state their collective production volume; and, it did not identify the related parties nor their collective production volume.

188. Further, the production of the unrelated EC domestic industry – 22,222 tonnes – is fully 11,000 tonnes, or *50 percent*, less than the Complainant's stated volume for production by unrelated EC producers, namely, 33,000 tonnes.[132] The EC *never* addresses this discrepancy.

189. "In view of the large number of producers of farmed salmon in the Community", the EC examined *certain* injury factors on the basis of a sample of six supporting EC producers, whereas it examined *other* injury factors on the basis of a sample of just five out of fifteen producers.[133] The Provisional Regulation states that the "accumulated production" of the five sampled EC producers "was 8 300 tonnes during the IP, or around 37% of the estimated total Community production of farmed salmon".[134] These figures suggest a total Community production of 22 432 tonnes, i.e. slightly more than the 22,222 tonnes suggested by other figures in the Provisional Regulation.

190. The EC's provisional findings on the domestic industry may be summarized in tabular form as follows:

[132] *See* para. 184 above.
[133] Provisional Regulation, para. 47.
[134] Provisional Regulation, para. 48.

Table 1: Overview of the EC's Provisional Industry Determination

Provisional Regulation	Volume (t)	Percentage
Total Production by the domestic industry[135]	(1) 22,222 (2) 22,432	100%
15 Complaining Producers	20,000	(1) 90.0% (2) 89.2%
5 Sampled Producers	8,300	(1) 37.4% (2) 37.0%
EC Processors	Unknown	Unknown
Silent Producers	Unknown	Unknown
Related Producers	Unknown	Unknown

(ii) Findings in the EC Definitive Regulation

191. In the Definitive Regulation, the EC defined the domestic industry in three steps. *First*, it excluded an unspecified number of producers that it considered were related to Norwegian exporters or producers, giving limited reasoning for the exclusion of *five* un-named related companies.[136] *Second*, after excluding related producers, it determined that "the estimated total Community production of the product concerned was around 22,000 tonnes during the IP."[137] Thus, the total volume of Community production was similar to the total volume found in the Provisional Regulation (i.e. 22,000t *versus* 22,222t or 22,432t). Again, the volume of production by unrelated producer's is a fraction of the total production by all EC producers, which the Complainant's stated as 181,000 tonnes.[138]

192. *Third*, the EC identified the producers constituting the EC industry. In so doing, it concluded that an *unspecified number* of EC producers, with an *unspecified volume* of production, could not be included in the industry because they:

- "did not produce salmon any longer";
- "did not produce [salmon] during the IP";
- "exclusively produced certain [unspecified] types of salmon";

[135] These are the two different figures for total EC production implied by the EC's Provisional Regulation. *See* para. 189 above.
[136] Definitive Regulation, para. 37.
[137] Definitive Regulation, para. 38.
[138] *See* Section B.1(b), page 3, of the EUSPG Complaint. Exhibit NOR-14.

- "fell into receivership during the IP"; or,
- "did not provide data in the format requested".[139]

In consequence, the EC found that "only data supplied by 15 Community producers which were complainants or which explicitly supported the complaint could be taken into account for the definition of the Community industry."[140]

193. The EC industry, therefore, includes solely *certain* of the "*supporters*" group.[141] The names of the 15 companies are not provided in the Definitive Regulation. The EC did not mention the "silent" EC producers that did not support the complaint that were mentioned in the Provisional Regulation.

194. According to the EC, the supporting producers "produced around 18,000 tonnes of salmon during the IP", which "represents around 82% of the estimated total Community production of the product concerned".[142] The EC found that this "constitutes a major proportion of the Community production" and the 15 complaining producers were, therefore, "deemed to constitute the Community industry".[143] The volume of production of the domestic industry for the IP was, therefore, found to be 10% lower in the Definitive Regulation, as compared with the Provisional Regulation (i.e. 18,000t *versus* 20,000t). This difference is not explained. Moreover, the EC again fails to explain why the production by unrelated producers in the EC domestic industry – 22,000 tonnes – is *fully 40 percent lower* than the complaining producers' statement in the Complaint that unrelated producers produced 33,000 tonnes and that the complainants themselves produced 30,000 tonnes.[144]

195. For purposes of examining certain injury factors,[145] the EC analyzed data pertaining to a sample of five of the fifteen Community producers.[146] The EC stated that recourse to sampling was necessary "in view of the large number of producers of farmed salmon in the

[139] Definitive Regulation, para. 39.
[140] Definitive Regulation, para. 39.
[141] The supporters and silents are defined in para. 185 above.
[142] Definitive Regulation, para. 40.
[143] Definitive Regulation, para. 40.
[144] *See* para. 184 above.
[145] Definitive Regulation, para. 46(a). The following injury factors were examined at the level of the sample: sales prices, stocks, profitability, return on investment, cash flow, investments, ability to raise capital, and wages.
[146] Definitive Regulation, paras. 48 and 49. The five companies were Hoove Salmon Ltd; Loch Duart Ltd; Orkney Seafarms; West Minch Salmon Ltd/Sidinish Salmon Ltd; and Wester Ross Salmon. All these companies are Scottish.

Community".[147] The EC concluded that the production of the five sampled producers "was around 48% of the Community industry's production of farmed salmon supporting complaint".[148] The EC "confirmed" that this sample "was based on the largest representative volume of production that could be reasonably investigated".[149]

196. Norway understands from this formulation that the five sampled producers, therefore, produce 48% of 18,000 tonnes, i.e. 8,640 tonnes. The sample, therefore, represents "around" 39% of the total Community production, as defined by the EC. The five sampled producers' volume of production for the IP was, therefore, found to be slightly higher in the Definitive Regulation, as compared with the Provisional Regulation (i.e. 8,640t *versus* 8,300t). Again, this difference is not explained.

197. The EC stated that the "core production of the Community producers remained conventional salmon"; however, it found that an *unspecified number* of EC producers produce an *unspecified volume* of "organic salmon".[150] The EC found that "*organic salmon should be disregarded in this investigation* given that organic salmon has in general a higher cost of production and a higher sale price.[151] In consequence, "all the injury factors" were examined "by excluding organic salmon from the analysis".[152]

198. The exclusion of organic from the investigation raises a number of questions. *First*, although the product scope of the investigation specifically excluded wild salmon, it included organic salmon.[153] The producers and production of organic salmon must, therefore, be included in the domestic industry. *Second*, in excluding organic salmon, the EC failed to explain what criteria were used to identify conventional and organic salmon production. *Third*, it also failed to state whether the total production of the EC domestic industry of 18,000 tonnes, and the production of the five sampled companies of 8,640 tonnes, included or excluded organic salmon. *Fourth*, the EC did not explain how it separated financial and production data pertaining to conventional and organic salmon for any producers that

[147] Definitive Regulation, para. 41.
[148] Definitive Regulation, para. 50.
[149] Definitive Regulation, para. 50.
[150] Definitive Regulation, para. 43.
[151] Definitive Regulation, para. 43. Emphasis added
[152] Definitive Regulation, para. 43.
[153] Definitive Regulation, para. 10. Conventional and organic farmed salmon have the same tariff treatment.

produced both. As far as Norway can tell, in the Provisional Regulation, the EC included EC production of organic salmon in the domestic industry.

199. The EC also entirely excluded from the domestic industry *all* EC producers of the filleted products that are part of the product under investigation, with minor exceptions for growers included in the EC industry that also appear to produce a small volume of filleted products.[154] As set forth in paragraphs 53 to 74 above, the EC defined the domestic industry to include 15 growers of salmon. The non-growing producers of filleted products are found to be part of a separate "downstream", "users" industry. These downstream producers are excluded from the domestic industry, even though they produce filleted products.

200. The EC's definitive findings on the domestic industry may be summarized in tabular form as follows:

Table 2: Overview of the EC's Definitive Industry Determination

Definitive Regulation	**Volume (t)**	**Percent**
Total production by the domestic industry	22,000	100%
15 Complaining Growers	18,000	81.8%
5 Sampled Growers	8,640	39.3%
EC Processors	Unknown	Unknown
5 referenced related producers	Unknown	Unknown
"Silents" and other excluded producers (see para. 192)	Unknown	Unknown
EC organic salmon	Unknown	Unknown
EC conventional salmon	Unknown	Unknown

(iii) Other Relevant Facts Regarding the Domestic Industry

201. On 6 February 2004, the Governments of Ireland and the United Kingdom ("UK") requested the initiation of a safeguards investigation concerning imports of farmed salmon

[154] The total volume of EC filleted products included in the examination of price undercutting, was 2.8 tonnes, which is 0.05% of the total EC production included in that examination. Definitive Disclosure to Grieg Seafood, 28 October 2005, Annex 6. Exhibit NOR-16.

into the EC.[155] In its application, the UK Government provided a list of 70 producers of farmed salmon in Scotland, including related and unrelated producers.[156] The UK Government also lists 17 salmon growers that supported its application, including four of the five companies included in the sample of the EC domestic industry.[157] The Irish Government refers to "large-scale farming" of salmon in Ireland, but does not list the number of producers in Ireland.

202. On 26 May 2003, the EC terminated certain anti-dumping and countervailing measures imposed on imports of farmed salmon from Norway, Chile and the Faeroe Islands.[158] In those proceedings, the EC examined injury to the domestic industry on the basis of a sample of 17 EC salmon growers, whereas in this investigation the entire EC domestic industry was just 15 producers and the sample comprised only five EC producers.[159]

203. In the light of the EC's determinations regarding the "domestic industry", Norway now turns to the obligations in the *Anti-Dumping Agreement* and the EC's violations of those obligations. Norway claims that the EC improperly defined the scope of the domestic industry by excluding several categories of producer and by failing to make a determination for producers accounting for a major proportion of total output. In consequence, the EC (1) initiated the investigation without verifying that it had the support of the proper "domestic industry", in violation of Article 5.4 of the *Anti-Dumping Agreement* and (2) made an injury determination for an improper domestic industry under Articles 3.1, 3.4 and 3.5.

[155] *See* Commission Regulation (EC) No 1447/2004 of 13 August 2004 imposing provisional safeguard measures against imports of farmed salmon, para. 1(1). Exhibit NOR-6.
[156] *See* Application by the Government of the United Kingdom for safeguard measures, 6 February 2004, Annex 2. Exhibit NOR-30.
[157] *See* Application by the Government of the United Kingdom for safeguard measures, 6 February 2004, Annex 7. Exhibit NOR-30. The list includes Loch Duart Ltd; Orkney Seafarms; West Minch Salmon Ltd/Sidinish Salmon Ltd; and Wester Ross Salmon; it does not include Hoove Ltd.
[158] Termination Regulation. Exhibit NOR-5.
[159] Termination Regulation, para. 160. Exhibit NOR-5.

C. *The EC's "Domestic Industry" Determination Violates Article 4.1 of the Anti-Dumping Agreement and Vitiates the Initiation of the Investigation and the Injury Determination*

(i) Ordinary Meaning of the Term "Domestic Industry"

(a) *Relevant text: the sole category of producers that can be excluded from the domestic industry is related producers*

204. Article 4.1 of the *Anti-Dumping Agreement* provides a definition of the term "domestic industry" that applies "[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 …

205. Article 4.1 defines the domestic industry in relation to two elements: "producers" and the "products" that they produce. In *US – Lamb*, interpreting the term "domestic industry" in the *Agreement on Safeguards*, the Appellate Body held that "'producers' are those who grow or manufacture an article; 'producers' are those who bring a thing into existence."[160] It added that the meaning of the term "producers" is qualified by the second element of the definition, namely, "like products" in Article 4.1. This term identifies the specific products that must be produced by a "producer" in order to qualify for inclusion in the "domestic industry".

206. In *US – Cotton Yarn*, interpreting the term "domestic industry" in the now defunct *Agreement on Textiles and Clothing*, the Appellate Body noted that the importance of the qualification added by the second element is such that the definition of the "domestic industry" is "product-oriented and not producer-oriented".[161] Consistent with this statement, the definition of the "domestic industry" in Article 4.1 "focuses exclusively on the producers of a very specific group of products."[162]

207. In terms of Article 4.1, 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". Although certain domestic producers

[160] Appellate Body Report, *US – Lamb*, para. 84.
[161] Appellate Body Report, *US – Cotton Yarn*, para. 86.
[162] Appellate Body Report, *US – Lamb*, para. 84.

may be excluded from the domestic industry under the "major proportion" approach, the *Agreement* places limits on the authority's discretion in this regard.

208. The sole category of producers that can be entirely excluded from the industry is "related" producers, within the meaning of Article 4.1(i). The *Anti-Dumping Agreement* does not authorize the exclusion of any other entire category of producers from the domestic industry. It is not permissible for an authority to expand the terms of the exception in Article 4.1(i) by deliberately excluding other categories of producer that the authority creates for its own purposes, as the EC did in this case (e.g. silents, organic producers, fillet producers, and producers of "certain unspecified types"). Nor is it permissible under Article 4.1 for an authority to confine the domestic industry to just one category of producers, the complaining producers, as the EC also did in this case.

209. Instead, the broad definition of the "domestic industry in Article 4.1 ensures that the group of domestic producers that comprises the "domestic industry" includes producers from *all segments of the industry*, except related producers. Any determinations made with respect to the "domestic industry" are, therefore, representative of that industry as a whole.

(b) *Context confirms that the domestic industry must defined broadly in an even-handed manner*

210. The context provided by Articles 3 and 5 confirms that the "domestic industry" must be defined in a manner that reflects the totality of that industry. Article 3.1 requires that the investigating authority conduct an "objective examination" of the economic state of the "domestic industry" on the basis of "positive evidence". Panels and the Appellate Body have consistently held that, in making this examination, authorities must respect "the basic principles of good faith and fundamental fairness."[163] In *EC – Bed Linen (India - 21.5)*, the Appellate Body ruled that an "objective examination" requires authorities to reach a result that is "*unbiased*, *even-handed*, and *fair*."[164] In *US – Hot-Rolled Steel*, the Appellate Body found that it would not be "even-handed" for investigating authorities:

[163] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 114; Panel report, *EC – Tube or Pipe*, para. 7.226; Panel report, *US - Softwood Lumber VI*, para. 7.28.
[164] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 133. Emphasis in original.

> to conduct their investigation in such a way that it becomes *more likely* that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured.[165]

211. The Appellate Body also opined, in that appeal, that "an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation."[166] This statement applies with particular force to favoritism directed towards the complainants in an investigation, for example, by limiting the domestic industry to these producers, as the EC did.

212. In making an "objective examination" of injury, Article 3.1 requires the authority to examine the effect of dumped imports "on domestic producers" of the like product. Article 3.4 provides that the examination of the "domestic industry" must include an evaluation "of all relevant economic factors and indices having a bearing on the state of the industry". Under Article 3.5, "*all* relevant evidence" must be examined to demonstrate a causal relationship between dumped imports and "injury to the domestic industry". Article 3.6 requires further that the effect of dumped imports be assessed in relation "to the domestic production of the like product".

213. The open-ended, unqualified references in these provisions to "domestic producers", "domestic production", and the "domestic industry", emphasize that the authority is obliged to make determinations that reflect the overall situation of the entire domestic industry, not simply a segment of it. This is borne out by the authority's duty to examine "all" relevant factors and evidence. An authority cannot, therefore, purposefully structure the domestic industry in such a way that it fails to examine the situation of identifiable categories of producers and segments of the industry.

214. The comprehensive character of an injury determination is consistent with the fact that it is one 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.

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[165] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196. Emphasis added.
[166] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193. Emphasis added.

215. 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.[167] 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*."[168] 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".[169] Thus, an investigating authority cannot single out particular parts of the domestic industry for investigation, to the exclusion of other parts.

216. This ruling is significant because it demonstrates that the requirements of objectivity in Article 3 impose contextual constraints on how the investigating authority defines the "domestic industry" under Article 4.1. The authority cannot define the industry "on a selective basis" that involves examination of just "one part" of the industry.[170] Nor can it define the industry in such a way that an injury determination becomes "more likely" or such that it "favours the interests of any interested party".[171]

217. Article 5 also provides relevant context for interpreting the term "domestic industry". Pursuant to Article 5.4, an authority must conduct "an examination of the degree of support for, or opposition to [an] application [for an anti-dumping investigation] expressed by domestic producers of the like product". An investigation can be initiated solely if it is made "by or on behalf of the domestic industry", as that term is defined in Article 5.4. In essence, an authority must ensure that the domestic producers expressly supporting the complaint account for more than 50 percent, by volume, of those producers that express a view on the application, either in support or opposition; and, the supporters must also account for, at the least, 25 percent, by volume, of "*total production* of the like product produced by the domestic industry" (emphasis added).

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[167] Appellate Body Report, *US – Hot-Rolled Steel*, para. 214.
[168] Appellate Body Report, *US – Hot-Rolled Steel*, para. 190. Emphasis added.
[169] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.
[170] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 190 and 211.
[171] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 193 and 196.

218. This provision expressly envisages that the domestic industry includes: domestic producers that "*support*" the investigation; those that "*oppose*" it; and also those that *do not "express a view"*. An authority cannot, therefore, define the domestic industry under Article 4.1 solely by reference to one of these groups, for example, the supporters of an investigation. Moreover, in satisfying the 25 percent threshold, an authority must take into account the "*total* production of the like product". Again, this indicates that the analysis must take into account the production of all domestic producers, except related parties for which an express exception is made.

219. In examining the degree of support for an investigation under Article 5.4, an investigating authority must also act objectively, without bias, and even-handedly. To paraphrase the Appellate Body in *US – Hot-Rolled Steel*, the authority "must focus on the 'totality' of the domestic industry", and not selectively include just "one part, sector or segment" of that industry.[172]

220. To focus on one part of the industry would risk favoring the interests of the included producers possibly to the prejudice of foreign producers and exporters. For example, if an authority excludes certain categories of producer from the domestic industry, the verification of the level of support for an investigation necessarily becomes proportionately easier because the size of the domestic industry is diminished. This is especially so if the authority excludes all producers other than the supporters of an investigation.

221. Footnote 13 of the *Anti-Dumping Agreement*, which is attached to Article 5.4, provides strong contextual support for Norway's position. Specifically, in the context of assessing whether the domestic producers support initiation of an investigation, footnote 13 provides:

> In the case of *fragmented* industries involving an *exceptionally large number of producers*, authorities may determine support and opposition by using *statistically valid sampling techniques*. (Emphasis added)

222. This provision indicates that, *generally*, support for an investigation must be measured by reference to all domestic producers. However, where the number of domestic producers is "*exceptionally* large, sampling is permitted under Article 5.4. As a result of this

[172] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 190, 196 and 211.

express authorization, the authority may define the domestic industry in relation to a sub-group of the industry. In that event, however, the sample must be "statistically valid". This ensures that, even when certain domestic producers are excluded from the industry under Article 5.4, the domestic producers included in the industry must nonetheless reflect the "totality" of that industry, not just a "part" of it.

(c) *Conclusion*

223. In sum, therefore, the domestic industry must include producers as a whole of the like product or a major proportion of them. The composition of the domestic industry must also permit an objective and even-handed examination of that industry for purposes of initiation of the investigation and the determination of injury. The authority cannot, therefore, structure the domestic industry in a manner that favors the interests of any particular group of producers. Instead, the domestic industry must reflect the "totality" of the producers making up the industry, and not just certain parts, sectors or segments of that industry.[173] Accordingly, Article 4.1 does not permit the exclusion by the authority of any category of producers created by the authority, other than "related" parties, because these excluded producers could have interests or economic performance different from that of the producers included in the industry.

(ii) <u>The EC Failed to Respect the Definition of the "Domestic Industry" in Article 4.1 of the *Anti-Dumping Agreement*</u>

224. In this dispute, the EC has failed to determine the "domestic industry" consistently with Article 4.1 because, *first*, it improperly excluded defined categories of producer from the domestic industry and, *second*, in any event, it failed to include in the domestic industry domestic producers accounting for a major proportion of production. *Third*, the EC also failed to make a determination of injury for the domestic industry it defined because it examined a sample of that industry, when the *Agreement* does not authorize the use of sampling for this purpose.

[173] Appellate Body Report, *US – Hot-Rolled Steel*, para. 190. Emphasis added.

(a) *The EC Improperly Excluded Categories of Domestic Producers of the Like Product*

225. The EC's determination of the "domestic industry" is fundamentally flawed because it has excluded several categories of producers that must, in principle, be included in that industry under Article 4.1 of the *Anti-Dumping Agreement*. Specifically, the EC defined the domestic industry as a group of 15 producers that were either complainants or expressly supported the Complaint (i.e. all were "supporters").[174] 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;[175]
- producers that fell into receivership during the IP;[176]
- producers/production of organic salmon;[177] and,
- producers that did not provide data in the format requested or were otherwise deemed not to have cooperated fully.[178]

226. Article 4.1 does not authorize an investigating authority to exclude any categories of producer, "except" for related parties. Thus, other than related parties, the EC was not entitled to exclude any other entire categories of producer from the investigation. In this case, the cumulative effect of the exclusions is egregious because, ultimately, the EC excluded all producers, other than certain of the complainants. The segment of the domestic industry that is defined as the domestic industry, and included in the investigation, therefore, corresponds to those that seek protection. By narrowing the examination of domestic producers in this way, the EC determination fails to meet the most basic standards of fairness because it privileges the interests of the complainants. Through the definition of the domestic industry, the EC violated Article 4.1 of the *Anti-Dumping Agreement*, as well as various provisions of Articles 3 and 5.

[174] Definitive Regulation, para. 39.
[175] Definitive Regulation, para. 39.
[176] Definitive Regulation, para. 39.
[177] Definitive Regulation, para. 43.
[178] Definitive Regulation, para. 39.

227. Norway will now review separately each of the excluded categories and explain the violations that result from the particular exclusion.

(a)(i) *Producers of filleted products that do not also grow salmon*

228. Norway claims that the EC's product determination was overly broad and should not have included whole fish and filleted products within a single product. However, having defined the product as it did, the EC could not simultaneously exclude the producers of filleted products from the domestic industry. Under Article 4.1, these producers are very much part of the domestic industry, whether they also grow salmon or not.

229. The EC defined the domestic industry to include 15 salmon farmers, all of which grow salmon. Subject to very minor exceptions, the EC excluded all EC producers of fillets from the domestic industry.[179] The EC failed to include in the EC domestic industry any producers of filleted products that do not also grow salmon. Thus, for purposes of defining the domestic industry, the EC *agreed* with Norway that filleted products should have been excluded from consideration in the investigation. By excluding the producers of filleted products from the domestic industry, the EC violated Article 4.1 of the *Anti-Dumping Agreement*.

230. The exclusion of fillet producers from the domestic industry also violates the rules on initiation of an investigation in Article 5.4 of the *Agreement*. By excluding fillet producers from the industry, the EC failed to examine whether the application for an investigation is made "by or on behalf of" the proper domestic industry, as required by Article 5.4. Also, through this exclusion, the EC reduced the apparent size of the industry, thereby making it easier to satisfy the thresholds in Article 5.4. The ease with which the EC could initiate the investigation was enhanced because the segment of the industry that the EC decided to include in the domestic industry was centered on the complainants themselves.

231. The EC's failure to establish that the proper domestic industry supported the investigation deprives the contested measure of any legal basis. In essence, from the very outset, there was no legal basis for the investigation that led to the contested measure.

[179] *See* paras. 53 to 74 above.

232. By excluding fillet producers from the domestic industry, the EC also *never* satisfied the conditions in Articles 3.1, 3.4 and 3.5 of the *Anti-Dumping Agreement* governing the imposition of measures to protect these producers. In sum, the EC wholly failed to examine whether an important segment of the industry was injured and, if so, whether that injury was caused by dumped imports. Norway notes, however, that, in the EC's examination of the Community interest, the EC found that the fish processing sector was profitable and that the industry earns greater profits when imports of its input materials, whole and HOG fish, are low.[180] Thus, in principle, the impact of any dumping would *benefit* producers of filleted products. These producers would, therefore, not appear to be injured by dumped imports consisting largely of HOG fish.[181]

233. Although the EC failed to examine whether fillet producers are injured, it ensured that these producers are well protected by the measures through the imposition of rather high MIPs on filleted products.[182] In fixing the level of the MIPs on filleted products, the EC took into account the EC processors' costs of producing filleted products and also conducted on-site verifications to confirm these costs. The inclusion of EC processors for purposes of establishing a remedy to protect them stands in stark contrast to the exclusion of these same processors from the domestic industry for purposes of initiation of the investigation and the injury determination.

(a)(ii) *Producers that did not expressly support the Complaint (i.e. "silents")*

234. In the Provisional Regulation, the EC identified silent producers as a separate category of producers.[183] These producers were all excluded from the domestic industry. The EC's explanation of this exclusion is not adequate because it failed to state the number

[180] Definitive Regulation, paras. 113 to 117.
[181] The EC found that 92.0 percent of dumped imports were HOG fish. *See* para. 638, Table 9.
[182] The importance that the EC attached to protecting these producers was evident at the end of the investigation. On 16 November 2005, the EC issued a note requesting comments on a proposal to apply MIPs to additional filleted products. It did so, it said, to address concerns of processors. *See* Exhibit NOR-18. In the Definitive Regulation, the EC raised the MIP for certain filleted products by 28 percent. The highest MIP under the provisional regime was 6.00€/kg for small fillets of 300g or less. The MIP for the same product under the Definitive Regulation is 7.73€/kg. In the Definitive Regulation, the EC also introduced an additional category of MIP of 6.40€/kg for filleted products of more than 300g, with skin off. Previously, this product was subject to a MIP of 4.99€/kg. The price increase is 28 percent in both cases. *See* Article 1(4) of the Provisional Regulation, as amended by Commission Regulation (EC) No 1010/2005 of 30 June 2005 amending Regulation (EC) No 628/2005 imposing a provisional anti-dumping duty on imports of farmed salmon originating in Norway (Exhibit NOR-10).
[183] Provisional Regulation, para. 43.

and identity of the producers that remained silent and what volume of production was thereby excluded from the domestic industry. It is, therefore, impossible for Norway to appreciate the significance of this exclusion for the investigation.

235. In the Provisional or Definitive Regulations, the EC failed to demonstrate that the silent producers' production of farmed salmon was included in the total production of the EC domestic industry. *First*, the silent producers were not included in the domestic industry, indicating logically that their production is *not* included in that industry's production levels. *Second*, the EC failed to state in the Regulations whether these producers' production was, indeed, included in the domestic industry's total volume of production, despite the exclusion of these producers from that industry. *Third*, the EC failed to provide sufficient data in the Regulations on the production levels of the silent producers to enable Norway (or anyone else) to ascertain whether the silent producers' production was, or was not, included in the domestic industry's total volume of production. Under Article 4.1, there is no basis for wholly excluding this category of producers from the domestic industry.

236. Under Article 5.4, an authority cannot initiate an investigation, unless the producers supporting initiation account for, at least, 25 percent, by volume, of the "total production of the like product produced by the domestic industry". In demonstrating that this threshold was met, the EC was obliged to include the production of all silent producers in the "total". It has not demonstrably done so. The EC, thereby, violated Article 5.4 of the *Anti-Dumping Agreement*.

237. The EC also violated Articles 3.1, 3.4 and 3.5 by excluding silent producers from the domestic industry because this exclusion deprived its injury examination of objectivity. The silent producers are not necessarily in the same situation as the supporters of the complaint. As the Appellate Body held in *US – Hot-Rolled Steel*, "[d]ifferent parts of an industry may exhibit quite different economic performance during any given period."[184] It is perfectly possible that the reason that the silent producers remained silent was because they were not suffering injury as a result of import competition. By privileging the domestic producers that support a complaint, and excluding those that do not, an authority conducts a one-sided injury "examination" that favors the situation and, therefore, the interests of the complainants. This is not an objective examination. In addition, under Articles 3.4 and 3.5, the EC also failed to

[184] *See* Appellate Body Report, *US – Hot-Rolled Steel*, para. 204. *See also* para. 205.

consider "all" relevant evidence having a bearing on the domestic industry because it purposefully excluded evidence relating to silent producers.

(a)(iii) *Producers that exclusively produced certain types of salmon*

238. The EC states that it excluded an entire category producers on the grounds that they produced some, but not all, types of the like product. The EC's explanation of this ground of exclusion is totally inadequate. The EC fails to state: the number and identity of the producers it excluded on these grounds; which products they produced; and why, in the EC's view, their limited product range justified excluding the producers from the domestic industry.

239. The EC's exclusion of producers not producing all types of the product suggests, logically, that the 15 producers included in the domestic industry *did* produce all types of the like product. However, the EC's explanation makes it impossible to compare the range of products produced, respectively, by the included and excluded producers because the EC fails to state which products are produced by each group.

240. Contrary to the logical implications of the EC's determination, to Norway's knowledge, most producers included in the domestic industry did not produce all types of the product because they did not produce filleted products. Thus, by the EC's own logic, *virtually every single EC producer* should have been *excluded* from the domestic industry. The EC's explanation does not address the differential treatment of the many EC producers that do not produce all types of the like product.

241. In any event, to be included in the domestic industry, Article 4.1 does not require that a domestic producer produce *all* types of the like product. The fact that a producer produced solely certain types of salmon is not a ground, within Article 4.1, for excluding that producer from the domestic industry.

242. The EC fails to explain whether the production of the producers producing some product types was included in the total production of the domestic industry for purposes of initiation of the investigation under Article 5.4. The EC has, therefore, failed to demonstrate in its report that it complied with the requirements of Article 5.4 in initiating the investigation.

243. The exclusion of producers that produced only certain types of the like product also violates the requirements in Articles 3.1, 3.4 and 3.5 to conduct an objective examination of injury. The EC purposefully excluded from its examination evidence pertaining to part of the domestic industry. It is possible that this excluded segment has a different economic performance from the remainder of the industry. For example, the producers may produce types of the product that are more profitable than other types of the product. The EC, thereby, failed to consider "all" relevant evidence pertaining to the state of the domestic industry and the causes of any injury.

(a)(iv) *Producers/production of organic salmon.*[185]

244. The EC states that, for purposes of examining injury factors relating to the sample of five producers, the production of "organic" salmon was "disregarded in this investigation".[186] The explanation is that the sales prices and production costs of organic salmon are higher than for "conventional" salmon.[187] The EC states that the "core production of the Community producers remained conventional salmon".

245. Norway objects to the wholly inadequate manner in which the exclusion of organic production is explained. The EC does not state:

- how it defined "organic" and "conventional" production methods;
- what the relative production costs and sales prices of "organic" and "conventional" farmed salmon were;
- the factual basis for these conclusions;
- which of the five sampled producers produced organic salmon;
- how much organic and conventional salmon was produced by the producers concerned;
- how the EC separated data pertaining to organic and conventional salmon; and,
- what the impact of excluding organic salmon was on the determination.

[185] Definitive Regulation, para. 43.
[186] Definitive Regulation, para. 43.
[187] Definitive Regulation, para. 43.

246. It also appears from the Definitive Regulation that the EC concluded that none of the five sampled companies produced *exclusively* organic salmon because, otherwise, the size of the sample would have been reduced. That is, the EC concluded that all five sampled companies produced some conventional salmon.

247. Although Norway has not been granted access to any evidence in the record submitted regarding the "organic" production of the five sampled companies, Norway submitted in the investigation that the entire production of three of the sampled companies – Loch Duart, West Minch and Wester Ross Salmon – is not conventional.[188] Norway relied on statements made by the companies on their websites and also on public statements by officers of the companies.

248. Norway informed the EC that the three companies have been awarded the RSPCA[189] "Freedom Food" label.[190] To receive this label, producers must meet stringent requirements relating to: the treatment of fish (husbandry; stock density; feeding; disease; administration of medicines; slaughter) and the environmental impact of fish farming (effect on natural environment and other species; fallowing of sites; water quality; discharge of waste).[191] West Minch also has approval from the Soil Association, which is the United Kingdom's "largest organic certification body"[192] and from Bio Suisse, a leading Swiss organic label.[193]

249. On its website, Loch Duart describes its "unique 'best practice' production system", including: "lower stocking densities"; special "feeding regime"; "no growth promoters or anti-biotics"; "no anti-foulants"; all feed is "from sustainable non-GM sources"; and all "stock is traceable".[194] Loch Duart assets that "the overall objective is to create as natural a life-cycle as possible".[195] Loch Duart states that its production is "low-volume high quality".[196]

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[188] Note Verbale from Norway to the EC, of 27 May 2005, Annex 3. Exhibit NOR-31.
[189] Royal Society for the Prevention of Cruelty to Animals ("RSPCA").
[190] Note Verbale from Norway to the EC, of 27 May 2005, Annex 3. Exhibit NOR-31. Section of the Loch Duart website, at http://www.lochduart.com/freedomfood.htm. Exhibit NOR-32. Section of the Wester Ross Salmon website, at http://www.wrs.co.uk/rspca-freedom-foods.html. Exhibit NOR-33.
[191] RSPCA Welfare Standards for Farmed Atlantic Salmon. Exhibit NOR-34.
[192] *See* http://www.soilassociation.org/certification.
[193] *See* http://www.bio-suisse.ch/en/home.php.
[194] Section of the Loch Duart website, at http://www.lochduart.com/bestpractice.htm. Exhibit NOR-35.
[195] Section of the Loch Duart website, at http://www.lochduart.com/bestpractice.htm. Exhibit NOR-35.
[196] Section of the Loch Duart website, at http://www.lochduart.com/bestpractice.htm. Exhibit NOR-35.

250. Wester Ross Salmon also describes how its production methods are "different", referring to "lower stocking densities"; "handling methods to ensure absolute minimal stress"; and "humane slaughter".[197] Wester Ross explains that processors, retail outlets and restaurants "can differentiate" its salmon "using the Freedom Food logo.[198] It appears from the websites for Loch Duart and Wester Ross Salmon that the entire production of both companies has been approved for Freedom Food status.

251. In the case of West Minch, the managing director announced on 19 April 2005, just months after the close of the IP and during the investigation, that the company had completed a transition to full organic production.[199]

252. As a result, even assuming that the EC was entitled to exclude organic/non-conventional production from the investigation (*quod non*), Loch Duart, West Minch and Wester Ross Salmon should have been entirely excluded. This would have reduced the sample to two producers.

253. Although it is not clear, it appears that the exclusion of organic salmon "in this investigation" was, in fact, an exclusion that applied solely when the EC assessed the injury factors examined at the level of the sample.[200] Thus, the EC seems to have *included* organic production in its examination of the other injury factors examined at the level of the fifteen complaining producers. Even assuming that the EC were entitled to disregard organic salmon (*quod non*), it has done so in an arbitrary and inconsistent fashion.

254. The exclusion of organic salmon also represents another contradiction between the scope of the product and the scope of the industry. Unlike wild salmon, organic farmed salmon is part of the investigated product, as defined by the EC; EC producers of organic farmed salmon are, therefore, part of the domestic industry under Article 4.1. Moreover, the grounds of exclusion (higher production costs and sales prices[201]) are factors that the EC, presumably, weighed up when it concluded that all farmed salmon constitutes a single

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[197] Section of the Wester Ross Salmon website, at http://www.wrs.co.uk/rspca-freedom-foods.html. Exhibit NOR-33.
[198] Section of the Wester Ross Salmon website, at http://www.wrs.co.uk/rspca-freedom-foods.html. Exhibit NOR-33.
[199] Section of the Aquaculture Communications Group website, at http://www.aquacomgroup.com/index.cfm?fuseaction=main.dspReadImportNews&ID=445. Exhibit NOR-36.
[200] Definitive Regulation, para. 43.
[201] *See* para. 244 above.

product. In any event, the EC violated Article 4.1 of the *Anti-Dumping Agreement* by excluding organic farmed salmon production from the domestic industry.

255. In addition, the EC also violated Articles 3.1, 3.4 and 3.5 of the *Agreement*, which oblige the EC to examine objectively "all" relevant evidence relating to the situation of the domestic industry, including producers of organic salmon. In its statement of the grounds of exclusion, the EC admits that the economic performance of non-conventional producers differs from the performance of conventional producers due to higher production costs and higher prices. Also, given that non-conventional salmon apparently commands higher market prices, non-conventional producers might not be injured by imported conventional salmon. Instead of examining these factors, the EC simply excluded them. The EC's treatment of farmed organic salmon, therefore, amounts to a complete failure to examine relevant evidence and factors relating to injury and creates a potential bias in the composition of the domestic industry.

(a)(v) *Producers that did not provide data in the format requested or were otherwise deemed not to have cooperated fully*[202]

256. Finally, the EC excluded from the domestic industry any producers that did not cooperate fully in the investigation. The specific ground of exclusion is that certain producers failed to "provide data in the format requested".[203]

257. Again, the level of transparency is wholly inadequate. The EC failed to state: the number and identity of the producers excluded on these grounds; the specific information not provided in the format requested; the perceived formatting deficiencies of the information; why the failure to use the format requested rendered the information unuseable; and the steps taken to obtain information that would be deemed useable. Absent an adequate explanation, it is impossible to appreciate the significance of the alleged failure to provide information in the format requested.

258. In any event, 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

[202] Definitive Regulation, para. 39.
[203] Definitive Regulation, para. 39.

Annex II of the *Anti-Dumping Agreement* provides a mechanism to overcome deficiencies in the information provided.

259. Thus, the mere fact that submitted information was not "in the format requested" by the EC does not, on its own, justify rejection of the information. The EC was obliged to use imperfect information pursuant to Annex II. If that was impossible, it was obliged to give the party an opportunity to remedy the perceived deficiencies. If the information nonetheless could not be used, it was obliged to state fully the reasons for rejection of the information. The EC's explanation states baldly that unidentified producers failed to provide unidentified information in an unidentified format. It does not address any of the outlined requirements in Annex II, which could justify the rejection of the information. Accordingly, the EC was not entitled under the *Anti-Dumping Agreement* to reject the information in question.

260. Even assuming that the EC was entitled to exclude certain *information* from the investigation, neither Article 6.8 nor Article 4.1 permits an authority to exclude a *producer* from the investigation on these grounds. To the contrary, the logic of Article 6.8 is that the producer remains part of the investigation and the authority is given the means to overcome any deficiencies in the information submitted by a particular producer.

261. The EC, therefore, violated Article 4.1 of the *Anti-Dumping Agreement* by excluding certain domestic producers from the domestic industry on the ground that they failed to supply information in the requested format.

262. As with the other categories of excluded producer, the EC also violated Article 5.4 by failing to explain whether it included the production of non-cooperating companies in the "total production of the like product produced by the domestic industry". Again, the exclusion of this category from the domestic industry suggests that these producers would not have formed part of the analysis for purposes of initiation. The EC fails to explain whether, for purposes of initiation, this category of producers was considered to form part of the domestic industry. Equally, the exclusion of non-cooperating producers deprives the examination of injury of objectivity, under Article 3.1, because the EC failed to consider any evidence relating to the situation of these producers.

263. In sum, EC's exclusion of all categories of producer, other than certain complaining producers, violated Article 4.1 because that provision does not permit the "domestic industry"

to be defined in a manner that privileges the interests of the complainants. Article 4.1 defines the "industry" in neutral terms in a manner that ensures that determinations reflect the totality of the industry, not just a part of it. The definition of the domestic industry must, therefore, reflect all parts of the industry, not just parts actively selected by the authority. In consequence, the EC also violated Articles 3.1, 3.4 and 3.5 because it failed to make an objective examination of the impact of dumped imports on the domestic industry.

(b) *The EC's Failed to Ensure that the EC Domestic Industry Accounted for a "Major Proportion" of EC Production*

264. As outlined in paragraphs 204 to 209, under Article 4.1, the domestic industry must include, at least, domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production of" the like product. The initiation of the investigation under Article 5 and the injury determination under Article 3 must be based on an examination of that industry.

265. After excluding seven entire categories of producer, the EC was left with a group of fifteen complaining producers that fully cooperated in the investigation as constituting the "domestic industry". The EC finds that this definition of the "domestic industry" is permissible because these producers account for "a major proportion" of total EC production.[204]

266. In the previous section, Norway claims that the exclusion of several entire categories of producer violated Article 4.1, as well as Articles 3.1, 3.4 3.5, and 5.4, whether or not the remaining group of producers constitutes a "major proportion" of domestic production.

267. In this section, Norway argues that, in any event, after excluding seven entire categories of producers, the EC has not shown that the remaining group of domestic producers constitute a "major proportion" of total domestic production. For this reason also the EC has violated Article 4.1, as well as Articles 5.4, and 3.1, 3.4 and 3.5.

[204] Definitive Regulation, para. 40.

268. In this dispute, the EC found that: total domestic production constituted 22,000 tonnes; the 15 producers in the EC's industry produced 18,000 tonnes; and the five sampled produced 8,640 tonnes.[205]

269. However, the EC failed to substantiate its finding that the 15 producers accounted for a "major proportion" of total production by reference to sufficient facts. In particular, the EC failed to specify the volume of production of each of the seven excluded categories of producers. Nor did it specify whether the production of these categories was included in the 22,000 tonnes of total domestic production. The EC also failed to specify how the 22,000 tonnes is broken down among the six product categories subject to individual MIPs. Notably, the EC has not disclosed the production level of the EC domestic industry that produces filleted products. Norway believes that the production of this industry is excluded from the 22,000 tonnes because this industry was found to be a separate "downstream", "users" industry.[206] Norway recalls that this industry employed 7,500 persons – that is, 34 times as many people as the EC industry (221 persons).[207] Further, according to an EC processors' association, this industry transforms "*several hundred thousand tonnes*" of farmed salmon annually.[208] Its production is, therefore, likely to be very significant.

270. In any event, absent an adequate explanation of the facts relating to each of the excluded categories of producer, it is impossible to verify the EC's conclusion that the privileged group of 15 complaining producers included in the industry accounted for "a major proportion" of total domestic production. The EC has, therefore, failed to demonstrate how the facts in the record, if any, support its conclusion.

271. Accordingly, even if the EC were entitled selectively to exclude entire categories of producers, it has failed to demonstrate that its definition of the domestic industry satisfies the requirement of Article 4.1. Because of the improper definition of the domestic industry, the EC has also violated Article 5.4 because it failed to ensure that initiation of the investigation was supported by the proper domestic industry; and it also failed to make a determination of injury for the proper domestic industry under Articles 3.1, 3.4 and 3.5.

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[205] *See* para. 200 above.
[206] Provisional Regulation, paras. 68, 123, 126; Definitive Regulation, paras. 103, 114 and 118.
[207] Definitive Regulation, paras. 72 and 112. *See* para. 70 above.
[208] Letter from Syndicat Saumon et Truite Fumés to the EC, 26 May 2005. Exhibit NOR-17. Unofficial translation from French original.

(c) *The EC Improperly Made an Injury Determination with Respect to a Sample of EC Producers*

272. As explained in paragraph 195, the EC examined certain injury factors at the level of a sample of five companies because of "the large number of producers of farmed salmon in the Community".[209] Thus, having reduced the domestic industry to just fifteen producers – by eliminating seven entire categories of domestic producers – the EC considered that it still could not examine data relating to those producers. Instead, the EC eliminated yet another ten producers from the inquiry, conducting an important part of its injury examination for just *five* producers.

273. The *Anti-Dumping Agreement* does not permit a Member to engage in sampling of the domestic industry for purposes of an injury determination. As the Appellate Body held in *US – Hot-Rolled Steel*, Article 3 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*."[210] In that dispute, the USITC conducted an aggregate injury examination for all producers as well as an in-depth examination in relation to the merchant market producers. It did not conduct an equivalent examination the producers whose production is used captively. The failure to do so violated Article 3.

274. In this dispute, the EC focused its examination of "microeconomic or performance-related injury" factors on five producers, with *no* examination whatsoever of these factors in relation to the other ten producers. Nor did the EC consider aggregate data for all producers in its examination of these injury factors. The EC's injury determination is, therefore, even more deficient than the United States' determination in *US – Hot-Rolled Steel* because, whereas the United States made an aggregate examination together with an in-depth examination of one industry segment, the EC conducted solely an examination of a part or segment of the industry for certain injury factors. As the Appellate Body held, that is not permissible.

275. Footnote 13 of the *Anti-Dumping Agreement*, which is attached to Article 5.4, provides contextual support for Norway's position because, for limited purposes, it permits

[209] Definitive Regulation, paras. 41 and 46(a). The following "microeconomic or performance-related injury indicators" were examined at the level of the sample: sales prices, stocks, profitability, return on investment, cash flow, investments, ability to raise capital, and wages.
[210] Appellate Body Report, *US – Hot-Rolled Steel*, para. 190. Emphasis added.

the use of sampling when examining the domestic industry. Specifically, in the context of assessing whether the domestic producers support initiation of an investigation, footnote 13 provides:

> In the case of fragmented industries involving an exceptionally large of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

276. This provision is significant for several reasons. *First*, it shows that, when the drafters intended to permit the use of sampling in the examination of the domestic industry, they did so expressly. Thus, pursuant to footnote 13, sampling of the domestic authority is permitted solely in the context of assessing the "support and opposition" for/to initiation of an investigation. Footnote 13 does not authorize the use of sampling in any other context. Article 6.10 of the *Anti-Dumping Agreement* provides another example of the drafters making express provision for sampling. Under that provision, an authority may use sampling for purposes of making *dumping* determinations for the producers and exporters in the *exporting* country. Also, in both footnote 13 and Article 6.10, the drafters set forth expressly *when* an authority can resort to sampling and *how* the sample should be structured.

277. Thus, the drafters included two express provisions in the *Anti-Dumping Agreement* authorizing specific forms of sampling in carefully defined circumstances. However, under Article 3, there is no equivalent language that authorizes the use of sampling in an injury determination. Absent such express authorization, there is no basis for permitting sampling under Article 3. Rather, as the Appellate Body held in *US – Hot-Rolled Steel*, an injury determination must be made with respect to "the *totality* of the 'domestic industry' and *not simply on one part, sector or segment of the domestic industry*."[211] The EC has, therefore, violated Article 3 by engaging in sampling of the domestic industry for purposes of its injury determination; in so doing, it failed to make an injury determination with respect to the totality of the domestic industry.

278. *Second*, footnote 13 sets forth stricter conditions on *when* sampling of the domestic industry can occur than does Article 6.10 with respect to the dumping determination. Under Article 6.10, sampling is permitted when the "number of exporters, producers, importers or types of products is *so large* as to make a determination *impracticable*". In contrast, under

[211] Appellate Body Report, *US – Hot-Rolled Steel*, para. 190. Emphasis added.

footnote 13, sampling of the domestic industry is permitted solely in the case of "*fragmented* industries involving an *exceptionally* large number of producers". The words "fragmented" and "exceptionally" indicate that sampling of the domestic industry is permitted solely in *extra*-ordinary situations. Thus, even when footnote 13 permits a determination on the basis of sampling, it limits recourse to sampling to unusually fragmented industries.

279. *Third*, footnote 13 also sets forth stricter requirements than Article 6.10 on *how* sampling of the domestic industry should be conducted. Under Article 6.10, a sample may be *either* "statistically valid" *or* it may include "the largest percentage of the volume of the exports from the [exporting] country in question which can reasonably be investigated." In contrast, under footnote 13, the sample *must* be "statistically valid". There is no other choice for the authority. This requirement ensures that any sample of the domestic industry is fully representative of the industry. This reinforces the Appellate Body's conclusion that determinations regarding the domestic industry must be made with respect to the "totality" of the industry, not just a part of it.

280. Even if Article 3 could be interpreted to confer an implied right to sample (*quod non*) in an injury determination, the conditions governing sampling would be drawn from footnote 13, as it is the sole provision in the *Anti-Dumping Agreement* that authorizes sampling of the domestic industry in the importing country. In that regard, the EC has not explained how an industry comprising fifteen producers is "fragmented" nor how fifteen producers constitute "an exceptionally large of producers". Notably, in 2003, in the Termination Regulation, in the context of the very same domestic industry, the EC also resorted to sampling; but in that case the EC's sample included seventeen producers.[212] That is, the sample included *two producers more than the entire domestic industry in this dispute*. Given that the EC sampled seventeen companies in 2003, there is no basis for concluding that sampling is necessary for the examination of an industry of just fifteen producers. Thus, even if footnote 13 somehow applied to Article 3, the EC would not have met the requirements of that provision.

281. In conclusion, by engaging in sampling of the domestic industry, the EC has failed to make an injury determination, under Articles 3.1, 3.4 and 3.5, with respect to the domestic industry, even as the EC defined that industry.

[212] *See* para. 202 above.

D. *Conclusion*

282. For the reasons stated in this Section, the EC's determination of the "domestic industry" violated Article 4.1 of the *Anti-Dumping Agreement* because of the impermissible exclusion of several categories of domestic producers. In consequence, the EC also violated:

- Article 5.4 of the *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 *Agreement* because it failed to make an objective examination of injury with respect to a properly defined domestic industry.

283. In addition, the EC's determination of injury violated Articles 3.1, 3.4 and 3.5 of the *Anti-Dumping Agreement*, because the EC examined certain injury factors solely in relation to a sample of the domestic industry, which is not permitted.

V. THE EC VIOLATED THE *ANTI-DUMPING AGREEMENT* IN MAKING ITS DUMPING DETERMINATION

284. Norway makes five claims concerning the EC's determination of dumping. *First*, Norway shows that the EC violated Article 6.10 by incorrectly selecting a sample confined to Norwegian producers, and excluding non-producing exporters, that did not constitute the largest percentage of the volume of Norwegian exports. *Second*, Norway demonstrates that the EC breached Articles 2.2 and 2.2.1 of the *Anti-Dumping Agreement* because, in determining that particular domestic sales were made outside the ordinary course of trade, the EC failed to demonstrate that the prices of these sales do not permit the recovery of costs within a reasonable period of time.

285. *Third*, when it constructed normal value, the EC erred in rejecting actual sales data for administrative, selling and general costs (SG&A) and for profits, using instead data from other sources, contrary to Article 2.2.2 of the *Anti-Dumping Agreement*. *Fourth*, the EC violated Article 6.8 and Annex II of the *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. *Fifth*, the EC incorrectly determined a weighted average margin of dumping and a separate "residual" margin of dumping for non-sampled producers and exporters, thereby violating Article 9.4 of the *Anti-Dumping Agreement*, and in the determination of the residual margin, also had recourse to facts available in a manner that violates Article 6.8.

286. In sub-section XI below, Norway also argues that the EC violated Article 2.2 and 2.2.1.1 by making improper adjustments to the costs of production, and SG&A costs of six of the investigated producers. These adjustments increased the constructed normal value for the companies and, thereby, increased the dumping margin.

A. *The EC's Selection of the Sample of Norwegian Producers Violated Article 6.10 of the Anti-Dumping Agreement*

(i) Introduction

287. The EC's selection of the sample of ten Norwegian producers that were individually examined for purposes of the dumping determination violated Article 6.10 of the *Anti-Dumping Agreement*. This is because the EC failed to include in the sample the Norwegian

producers and exporters with the largest percentage of the volume of exports to the EC that could reasonably be investigated.

(ii) Overview of the EC's Determination

288. The EC received responses to a preliminary questionnaire ("sampling form") from 102 Norwegian companies indicating that they produced, exported, or otherwise traded farmed salmon.[213] The EC found that the number of companies was too large for each company to be individually examined and, therefore, decided to limit its investigation to a sample of ten companies.[214] The EC described its methodology for composing the sample in the following manner:

> [A] sample of companies, *with the largest export volumes to the EC* was chosen, in consultation with the Norwegian authorities […] The sample *comprises the ten largest Norwegian exporting producers* representing almost 80% of the total export volume to the Community of all co-operating exporting producers.[215] (emphasis added)

289. However, contrary to what the EC suggests, its sample does not include the "companies with the largest export volumes to the EC". Instead, the EC's sample includes only *three of the ten* companies with the largest volume of exports to the EC.

290. The EC incorrectly states that the sample comprises the ten largest "exporting producers". The EC defined an "exporting producer" as a producer that made sales to the EC either directly or via *unrelated exporters*. However, producers that sell *domestically* to unrelated exporters do *not* themselves *export*. Thus, the EC considered any producer for inclusion in the sample, provided that part of its production was exported. In fact, the EC itself recognized that the sample comprises six producers and only four so-called exporting producers.[216]

291. The following table shows a ranking of Norwegian producers and exporters with the largest volume of exports to the EC during the IP, in descending order. The ranking is in

[213]Provisional Regulation, para. 16. Norway has copies of the confidential sampling replies of 90 companies. These are annexed as Exhibits NOR-38 (89 sampling replies submitted by FHL to the Commission, 8 November 2004) and NOR-37 (Sampling reply from Marine Harvest to the Commission, 8 November 2004, and corrected sampling reply from Marine Harvest to the Commission, 26 November 2004).
[214]Provisional Regulation, para. 17.
[215]Provisional Regulation, para. 17. This statement was "confirmed" in the Definitive Regulation, para. 10.
[216]*See* Communication from the Commission to FHL and NSL on identification of sampled companies, of 22 November 2004. Exhibit NOR-39.

relation to all other Norwegian producers and exporters that submitted sampling forms to the EC. The companies in the grey shaded boxes were included in the EC sample.

Table 3: Largest Producers and Exporters by Volume of Exports to the EC in the IP

		Interested Party	EC Exports (kg)
1	P[217]	Marine Harvest Norway	[[xx.xxx.xx]]
2	P	Fjord Seafood	[[xx.xxx.xx]]
3	E	Hallvard Lerøy	[[xx.xxx.xx]]
4	P	Salmar	[[xx.xxx.xx]] [[xx.xxx.xx]][218]
5	E	Norway Royal Salmon	[[xx.xxx.xx]]
6	E	Sekkingstad	[[xx.xxx.xx]]
7	E	Aalesundfisk	[[xx.xxx.xx]]
8	P	Pan Fish Norway	[[xx.xxx.xx]]
9	E	Coast Seafood	[[xx.xxx.xx]]
10	E	Norwell	[[xx.xxx.xx]]
11	E	Seaborn	[[xx.xxx.xx]]
12	P	Stolt Seafarm	[[xx.xxx.xx]] [[xx.xxx.xx]]
13	P	Nordlaks Oppdrett	[[xx.xxx.xx]] [[xx.xxx.xx]]
14	E	Gaia Seafood	[[xx.xxx.xx]]
15	P	Bremnes Seashore	[[xx.xxx.xx]]
16	P	Follalaks	[[xx.xxx.xx]] [[xx.xxx.xx]]
17	P	Grieg Seafood	[[xx.xxx.xx]] [[xx.xxx.xx]]
18	E	Fresh Marine Company	[[xx.xxx.xx]]
19	P	Seafarm Invest	[[xx.xxx.xx]] [[xx.xxx.xx]]

[217](P) refers to the category of "exporting producers" as defined by the EC. (E) designates the category of independent exporters.
[218] "SF" refers to information provided in the sampling form. *See* para. 292 below.

20	E	Christiansen Partner	xx.xxx.xx]]
21	P	Sinkaberg-Hansen	[[xx.xxx.xx]] [[xx.xxx.xx]]
22	P	Hydroteck	[[xx.xxx.xx [[xx.xxx.xx]]

292. Exhibit NOR-40 provides an explanation for the figures given in this table. However, in general terms, for *non-sampled companies*, the volume was provided in the sampling form. The same holds true for *some sampled producers* (Marine Harvest, Fjord and PFN). However, for the *other sampled producers*, the volume given in the sampling form was lower than the volume relied on by the EC in making its dumping determination. In one case, there is no sampling form (Stolt Seafarm). For these sampled producers, Norway has used the volume in the dumping determination because this is *favorable to the EC* in considering whether the sampled producers' volume of exports is the largest that could reasonably have been examined by the EC. Norway assumes, therefore, that the EC obtained additional information, prior to composing the sample, showing that these companies had higher volumes of exports to the EC than was stated in the sampling forms. In the case of Salmar, Norway has used the figure that Salmar would have provided to the EC had the EC asked for it. Salmar's situation is described in detail in paragraphs 322 to 326 below.

293. Table 1 demonstrates that the EC's sample of ten producers falls far short of containing the ten Norwegian companies with the largest volume of exports to the EC. Out of the ten largest companies by export volume, the EC's sample contains only three of the top ten companies – namely, Marine Harvest, Fjord Seafood and PFN. The remaining seven companies making up the EC sample are ranked between 12th and 22nd. Specifically, the EC's sample excluded six exporters and one producer with exports to the EC that were far larger than those of the sampled producers. As a result, the EC's sample includes companies with exports to the EC that were as much as five times smaller than some of the larger excluded companies.[219] The EC's sample, therefore, covers only a fraction of the export

[219]For instance, the export volume of [[xx.xxx.xx]] (included) is less than 20 per cent of the export volume of [[xx.xxx.xx]] (excluded).

volume that the EC would have examined had it composed the sample consistently with Article 6.10, that is, on the basis of the largest volume of exports to the EC.[220]

294. Further, even assuming that the EC was entitled to exclude all exporters from the investigation, the EC's sample does not include the ten producers with the largest volume of exports to the EC, because the EC left Salmar and Bremnes out of the sample.

295. As demonstrated by Table 4 below, the EC's sample does not include the largest volume of the exports that could reasonably have been examined in the investigation. By excluding the six cooperating exporters and one cooperating producer[221] with larger volumes of exports to the EC than seven of the sampled producers,[222] the EC substantially reduced the export share covered by the sample, namely, from 54.9% to 37.2% of Norway's total exports to the EC.

Table 4: Statistics on the EC's Sample and on the Correct Sample

	Volume (kg)	**Share of Exports from Norway to EC[223]**
Top 10 Exporters and Producers	198,920,991	54.9%
EC Sample	134,842,859	37.2%

(iii) The EC Violated Article 6.10 of the *Anti-Dumping Agreement* by Failing to Examine the Largest Percentage Volume of Norway's Exports to the EC

296. 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). In both cases, the EC failed to examine the

[220]The total export volume of the ten largest exporting entities is 198,920,991 kg, whereas the EC sample covers a total of 118,749,087 kg.
[221] Hallvard Lerøy AS, Norway Royal Salmon AS, Salmar, Sekkingstad AS, AS Aalesundfisk, Coast Seafood AS, Norwell AS. (*See* Table 1 above)
[222] Follalaks AS, Grieg Seafood AS, Hydroteck AS, Nordlaks Oppdrett AS, Seafarm Invest AS, Sinkaberg-Hansen AS and Stolt Sea Farm AS. (*See* Table 1 above)
[223]The share of Norwegian exports to the EC has been calculated by dividing the aggregate volume of either the Top 10 Exporters and Producers, or the EC sample, by 362,492,000 kg. This figure represents the total volume of imports from Norway to the EC, as set out in para. 54 of the Provisional Regulation.

largest volume of the exports to the EC that could reasonably have been examined. Norway examines these two claims in turn.

(a) *The EC Improperly Excluded All Independent Exporters*

(a)(i) *The Importance of Exporters to the Norwegian Industry*

297. The Norwegian salmon industry consists of three different categories of company: (1) independent farmers who sell on the domestic market to traders that in turn sell domestically or export; (2) integrated companies producing and exporting salmon; and (3) independent traders that do not produce salmon but purchase it for sale on domestic and export markets ("exporters").

298. The EC's sample included companies from the first two categories (i.e. six producers and four exporting producers). However, despite Norwegian requests for non-producing exporters to be included in the sample, the EC excluded them all.[224] As a result, the EC excluded six exporters from the sample that individually account for far greater volumes of exports to the EC than some of the producers included in the sample.[225]

299. Independent exporters are a key constituent of the Norwegian salmon industry, with very considerable exports from Norway to the EC.[226] As the table in paragraph 291 demonstrates, the majority of the largest entities exporting from Norway are independent exporters.

300. Due to differences in the business activities of producers and exporters, the cost structure and pricing behavior of these two segments of the industry is different. Exporters do not incur any production-related costs, such as smolt, feed, veterinary expenses, well-boats and slaughtering costs. Rather, they incur costs by purchasing salmon from a range of producers. Thus, generally, their costs are not tied to one particular producer but averaged across the prices paid to all the producers from which they source salmon. Exporters' SG&A costs and profit margins are also likely to be different from those of producers because the

[224] *See* Letter from FHL to the Commission of 24 November 2004. Exhibit NOR-47.
[225] Hallvard Lerøy, Norway Royal Salmon, Sekkingstad, Aalesundfisk, Coast Seafood and Norwell (*see* Table 1 above).
[226] FHL Memorandum of 11 April 2005, para. 3.1 (Exhibit NOR-48). Letter from FHL to the Commission of 8 November 2005, para. 38 (Exhibit NOR-49).

focus of their business is on selling high volumes. Norway's independent exporters are known for their low costs.[227]

301. In previous investigations, the EC has acknowledged this fact and insisted on including exporters in the sample. In a 1997 anti-dumping investigation, the EC stated:

> … one of the specific features of the Norwegian salmon industry is the *strict distinction* which is maintained between the growers (commonly referred to as 'farmers') who produce salmon, and the traders (commonly referred to as 'exporters') who sell it domestically and for export. Farmers normally sell all their output to Norwegian exporters and are generally not aware of the final destination of the product.[228]

302. The EC also found:

> The two activities [farming and trading of salmon] *are clearly distinct from an operational point of view*. … It is also noted that farmers and exporters in Norway are *organized in separate trade associations, are subject to distinct legal and financial requirements and often defend divergent business interests*.[229] (emphasis added)

303. Consistent with these findings, the EC created

> … two separate representative samples of six farmers and six exporters [which] were selected by the Commission in consultation with, and with the consent of, the parties concerned, in accordance with Article 17(1) and (2) of the Basic Regulation. [230]

304. In May 2003, in the Termination Regulation, the EC confirmed the distinction between salmon farmers and exporters:

> As was the case at the time of the investigation which led to the imposition of the original measures (original investigation), it was found that *a strict distinction* in functions is maintained between the farmers who grow the salmon and the traders (exporters) who sell it domestically and for export. It was therefore decided to have two samples, one for farmers and one for exporters.[231]

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[227] FHL Memorandum of 11 April 2005, para. 3.1 (Exhibit NOR-48). Letter from FHL to the Commission of 8 November 2005, para. 38 (Exhibit NOR-49).
[228] Regulation (EC) No. 1890/97, para. 13. Exhibit NOR-2.
[229] Regulation (EC) No. 1890/97, para. 13. Exhibit NOR-2.
[230] Regulation (EC) No. 1890/97, para. 4. Exhibit NOR-2.
[231] Termination Regulation, para. 35 (emphasis added). Exhibit NOR-5.

305. In September 2003, the EC also created separate samples of Norwegian "farmers" and Norwegian "traders" in an anti-dumping investigation of Norwegian large rainbow trout. In that investigation, the EC again acknowledged the distinction between farmers and exporters:

> … a clear distinction in functions exists between farmers (producers) who produce large rainbow trout and traders (exporters) who sell it domestically and for export. …
>
> Exporters generally act independently of the producers in that the prices at which they sell the product concerned do not systematically bear a direct relationship to the costs incurred by the producers in the farming of large rainbow trout.[232]

Yet, despite recognizing the importance of independent exporters as recently as September 2003, the EC excluded them all from this investigation, initiated in October 2004.

306. The EC asserts that there have been "changes in the structure" of the industry justifying the exclusion of exporters, but it does not explain what these changes were.[233] However, between 1997, 2003, and the initiation of this investigation in 2004, there were no significant changes to the structure of the industry that would support the complete exclusion of all exporters from the investigation. Even in this investigation, the EC recognized that "most Norwegian producers of farmed salmon sold the product concerned to the Community via traders".[234]

307. The EC also justifies the selection of producers alone on the grounds that "it was possible to arrive at both a normal value and an export price at the level of the producer."[235] This is not correct. In fact, because several producers did not export to the EC, the EC relied on the export prices of *an unrelated exporter*. The exporter's prices were neither known to nor controlled by the producer. The exporter's prices were not even disclosed to the producer during the investigation. Thus, the EC compared a *producer's* normal value – based on the producer's costs of production – with an *exporter's* export prices. Yet, the EC refused to use the exporter's own normal value – and its different cost of production – for this comparison.

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[232] Regulation (EC) No. 1628/2003, paras. 14 and 15. Exhibit NOR-50.

[233] Provisional Regulation, para. 15.
[234] Provisional Regulation, para. 15.
[235] Definitive Regulation, para. 15.

(a)(ii) *Article 6.10 Does Not Permit the Exclusion of Exporters From the Investigation*

308. By excluding exporters from the scope of this investigation, the EC violated Article 6.10 of the *Anti-Dumping Agreement*.

309. Article 6.10 requires an investigating authority, as a rule, to "determine an individual dumping margin for *each known exporter or producer*" of the like product in the exporting country. Exceptionally, however, where the "number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable", the authority may choose to "limits its examination", that is, to examine only a sample of "interested parties or products".

310. Article 6.10 permits an investigating authority to compose a sample of "interested parties" in two alternative ways. The authority may limit the investigation "to a reasonable number of interested parties" using "samples that are statistically valid". Alternatively, the authority may limit the investigation "to the largest percentage of the volume of the exports from the country in question that can reasonably be investigated".

311. Norway understands that the EC elected to use the second option because it stated that it had chosen "a sample of companies with the largest export volumes to the EC".[236] The EC also decided that it could "reasonably investigate" ten interested parties. Norway does not suggest that the EC could reasonably have examined more interested parties. However, having made this decision, the EC was obliged to investigate the *ten interested parties with the largest possible volume of exports from Norway to the EC*. The EC failed to do so, because it sampled only three of the ten interested parties with the largest exports to the EC; and it, therefore, excluded seven of the ten largest exporters to the EC from the sample. The EC, therefore, examined considerably less than the largest percentage of exports from Norway that it could reasonably investigate.

312. The EC took the view that Article 6.10 permitted it to exclude from the investigation – and, therefore, from the sample – an entire category of Norwegian interested party, namely exporters that do not produce salmon. Further, the volume of these exporters was disregarded

[236]Provisional Regulation, para. 17. There is also no mention in the Provisional and Definitive Regulations of a determination that the sample was "statistically valid".

in establishing whether the export volume included in the sample was the "largest possible percentage of the volume of … exports" to the EC.

313. Nothing in Article 6.10 supports the view that one category of interested parties can simply be excluded from the investigation of dumping. Under Article 6.10, an authority must, as a rule, determine an individual margin of dumping "for *each* known *producer or exporter*". The general rule established in this provision places producers and exporters on an equal footing in an investigation, requiring an authority to determine an individual margin for both. Although the authority is entitled to depart from the general rule by engaging in sampling, nothing in the text permits an authority to exclude one or other category from the investigation.

314. The second sentence of Article 6.10 sets forth the rules governing the composition of a sample. Under the first sampling option, the text requires the use of a "reasonable number of *interested parties* or products". The term "interested parties" is defined in Article 6.11 as, among others, "an *exporter* or *foreign producer* or the importer of a product subject to investigation." The general reference to "interested parties", therefore, indicates that exporters and producers must both be considered for inclusion in the sample. The use of this term offers no support for the view that an authority can examine producers alone, to the exclusion of exporters (or *vice versa*).

315. The second sampling option is also neutral with respect to the investigation of producers and exporters. Under this option, the authority must ensure that the sample comprises the largest volume of "exports *from the [exporting] country*". The focus is, therefore, on the overall volume of exports at a "*country*" level, irrespective of whether the sampled parties are producers or not. Nothing in the text suggests that overall exports from a country can be assessed by the authority after excluding all of the country's exporters from the investigation. Indeed, given that the focus is on the level of a "country's" *export* activity and not its *production* activity, it would be absurd to permit the exclusion of *exporters*. As this investigation shows, in some countries, exporters may be responsible for a significant volume of exports, whereas producers selling locally are not in control of the exports of the product. The EC's reading, therefore, frustrates the whole basis for the second sampling option.

316. The EC's interpretation could also give rise to distortions that make affirmative dumping determinations more likely. The Appellate Body has emphasized that investigating authorities are not entitled to conduct an investigation in such a way that it becomes "more likely" that they will make dumping or injury determinations.[237] By excluding an entire category of interested party – which could have higher export prices, lower domestic prices or lower costs of production – an authority may well make a dumping determination more likely. That is not permissible, because it is not even-handed and fair.

317. For example, in this investigation, the Norwegian Salmon Federation informed the EC that, generally, exporters have lower costs than producers because they have different business activities.[238] The EC itself has recognized this fact.[239] Given that the EC constructed normal value on the basis of costs, the exclusion of exporters could, therefore, have had a material influence on the outcome of the dumping determinations. The sample consisted of producers that have relatively higher costs.[240] Thus, the EC's dumping determination was based on parties with a higher constructed normal value to the exclusion of those that could have had a lower normal value.

318. Article 9.4 of the *Anti-Dumping Agreement* also supports the interpretation of Article 6.10 proposed by Norway. Article 9.4 permits an authority to impose anti-dumping duties on *non-sampled parties* on the basis of the dumping determinations made with respect to the *sampled parties*. Moreover, the determinations made for the sampled producers determine the ceiling of the duties that can be imposed on non-sampled companies. Given that the dumping determinations made for sampled parties affect non-sampled parties, an authority must act even-handedly in selecting the sample, and consider all categories of interested party for inclusion in the sample.

(a)(iii) *Conclusion*

319. For these reasons, the EC's decision to exclude non-producing exporters from the investigation rests on an impermissible interpretation of Article 6.10 of the *Anti-Dumping Agreement*. As a result of this exclusion, the EC's sample does not comprise "the largest

[237] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142; Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.
[238] FHL Memorandum of 11 April 2005, para. 3.1. Exhibit NOR-48.
[239] *See* paras. 301 to 305 above.
[240] The EC's improper increases to these costs in addressed in Section XI below.

percentage of the volume of the exports from the country in question that can reasonably be investigated". The EC determined that it could reasonably examine ten interested parties. However, as shown by the table in paragraph 291, the EC's sample does not include the ten producers and exporters with the largest volume of exports to the EC.

(b) *The EC Excluded Two Large Producers*

320. Even assuming that an investigating authority may properly exclude *all* exporters from the investigation, *quod non*, the EC violated Article 6.10 by not including the producers with the largest volume of exports to the EC in the sample.

321. To recall, the EC decided to consider any producers for inclusion in the sample, provided a portion of its production was exported to the EC directly or via unrelated exporters.[241] The EC was, therefore, required to investigate the producers with the largest volume of exports to the EC. In fact, the EC failed to respect its own improper standards, because it failed to investigate two producers with among the largest exports to the EC.

(b)(i) *The Exclusion of Salmar*

322. The EC excluded Salmar from the sample even though it is the third largest producer of salmon products exported to the EC. As shown in Table 1, Salmar accounted for exports of [[xx.xxx.xx]] kg to the EC during the IP. Salmar's exports to the EC are larger than those of eight of the ten sampled producers, in some cases by as much as five times.[242] In fact, as Table 1 shows, Salmar should have been included in the sample whether it is confined to producers alone or must, as Norway claims, also include exporters.

323. In its sampling form, the EC requested that the interested parties provide the volumes "sold on the domestic market" and, separately, those "sold for export to EU25". The sampling form did not clarify that respondents should treat their domestic sales as exports if the sale was made to an unrelated domestic purchaser that resold the product for export to the EC. Because Salmar sold all of its production domestically, it replied, logically, that its domestic sales were [[xx.xxx.xx]] kg and its exports to the EC were zero. One of the sampled producers, Sinkaberg-Hansen, did the same thing.

[241] Provisional Regulation, para. 16.
[242] Hydroteck AS with an export volume of [[xx.xxx.xx]] kg and Sinkaberg-Hansen AS with an export volume of [[xx.xxx.xx]] kg, respectively.

324. Nonetheless, the EC was well aware of Salmar and its importance within the Norwegian industry. With the approval of Salmar, the Norwegian Salmon Federation and the Government of Norway both urged the EC to include Salmar in the sample given its size and significance in the Norwegian industry. The significance of Salmar was also obvious to the EC in view of the massive volume of domestic sales it reported. Given the importance of the EC market to Norwegian producers, and given that the EC knew that many producers sell domestically to exporters, the EC must have known that a portion of Salmar's production went to the EC. Indeed, even if only a fraction of that production went to the EC, the volumes would still likely have exceeded the export volumes of the smallest producers included in the sample, such as Sinkaberg.

325. Moreover, if the EC was unaware of the high volume of Salmar's exports to the EC via unrelated exporters – which seems unlikely – it is solely because the EC did not ask Salmar for this information. Despite the fact that the EC based its sampling decision on the volume of exports to the EC made *via unrelated exporters*, its sampling form did not specifically request this information. Further, although the EC asked follow up questions to certain companies,[243] it did not ask Salmar for further information to clarify the volume of its domestic sales that were exported to the EC by unrelated exporters. Indeed, despite discussing the inclusion of Salmar with the Norwegian Salmon Federation at a meeting in Brussels on 17 November 2004,[244] the EC never suggested that Salmar could not be included in the sample on the ground that it had no exports to the EC.

326. The CEO of Salmar, Mr. Leif Inge Nordhammer, testifies that, if the EC had asked for information on the volume of Salmar's exports to the EC via unrelated exporters, Salmar could have obtained that information from the unrelated exporters concerned, indicating a volume of [[xx.xxx.xx]] kg.[245]

327. The EC, therefore, violated Article 6.10 of the *Anti-Dumping Agreement* by failing to include Salmar in the sample, whether or not the EC was entitled to exclude exporters from the sample.

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[243]The EC requested further information from a number of Norwegian companies, among others, enquiring whether a company: was a producer of farmed salmon; part of a group producing farmed salmon in Norway; related to companies that produce farmed salmon in Norway; and the volume of production of related companies. *See, for instance*, the e-mail of 16 November 2004 from EC to Seafarm Invest. Exhibit NOR-51.
[244] *See* Communication from the Commission to FHL and NSL, of 22 November 2004. Exhibit NOR-39.
[245]*See* Affidavit by Mr. Leif Inge Nordhammer, CEO of Salmar. Exhibit NOR-42.

(b)(ii) *The Exclusion of Bremnes Seashore*

328. The EC also excluded Bremnes Seashore from the sample, even though it is the seventh largest producer of salmon products exported to the EC, with exports of [[xx.xxx.xx]] kg during the IP.[246] The EC was certainly well aware of Bremnes because, in the sampling form, the company declared this volume as its exports to the EC during the IP. Bremnes' volume of exports is larger than that of five of the ten sampled producers, and is much more than double the volumes of Hydroteck and Sinkaberg that the EC investigated. Thus, even under the EC's flawed approach of investigating solely producers, the exclusion of Bremnes from the sample was inconsistent with Article 6.10 of the *Anti-Dumping Agreement*.

(b)(iii) *Conclusion*

329. If the EC had included Salmar and Bremnes in its sample of producers, the sample would have covered 41.4 percent of Norway's exports to the EC, rather than just 37.2 percent as it did with the sample it selected.[247] By not including those two producers in the sample, the EC failed to satisfy the requirement of Article 6.10 of the *Anti-Dumping Agreement* that its sample include "the largest percentage of volumes of the exports" to the EC that could reasonably be investigated.

(iv) Conclusion

330. In sum, because the EC excluded all non-producing exporters from the sample and, thereby, failed to include in the sample the ten interested parties with the largest volume of exports to the EC, the EC violated Article 6.10. of the *Anti-Dumping Agreement*.

331. Further, even assuming that the EC could exclude from the sample all exporters which were not also producers, *quod non*, the EC violated Article 6.10 of the *Anti-Dumping Agreement* because it failed to include in the sample two producers, Salmar and Bremnes, with the third and seventh largest volume of exports to the EC. Thus, even by the EC's own improper interpretation of Article 6.10, the EC violated that provision.

[246] Sampling reply from Bremnes Seashore to the Commission, 8 November 2004. Exhibit NOR-38.
[247] In the Provisional Regulation, para. 54, the EC stated that the total volume of exports of the product concerned from Norway to the EC was 362,492,000 kg.

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*

(i) Introduction

332. The EC violated Articles 2.2 and 2.2.1 of the *Anti-Dumping Agreement* because, in deciding that it could construct normal value for five companies, it discarded below-cost sales without first determining that the sales were made at prices that failed to provide for the recovery of costs within a "reasonable period of time". As a result, the EC did not properly establish that it was entitled to resort to constructed normal value under Article 2.2.

333. Norway, first, provides an overview of the conditions in Articles 2.2 and 2.2.1 that must be met before an authority can construct normal value. Norway then demonstrates that the EC failed to satisfy these criteria.

(ii) The EC's Obligations under Articles 2.2 and 2.2.1 of the *Anti-Dumping Agreement*

(a) *Overview of Articles 2.2 and 2.2.1 of the Anti-Dumping Agreement*

334. Article 2.1 of the *Anti-Dumping Agreement* provides that "dumping" is determined on the basis of a comparison between the export price of a product and the domestic sales price of the like product when sold "in the ordinary course of trade".

335. Article 2.2 identifies two circumstances in which a comparison cannot be made with the price in domestic sales made "in the ordinary course of trade". These are where: (1) there are *no* domestic sales in the ordinary course of trade or (2) the volume of those sales is *too low* to permit a proper comparison with export price.[248] In either of these circumstances, an authority is permitted to construct normal value on the basis of costs of production plus an amount for selling, general and administrative ("SG&A") costs and for profits; or the authority may determine normal value on the basis of sales in a third country market.

336. For purposes of assessing whether there is a sufficient volume of sales in the ordinary course of trade under Article 2.2, Article 2.2.1 of the *Anti-Dumping Agreement* sets forth circumstances in which an investigating authority may treat domestic sales transactions as *not*

[248] In terms of footnote 5 of the *Anti-Dumping Agreement*, sales of the like product for consumption in the domestic market are normally considered as sufficient if they constitute 5 percent or more of the sales of the product under consideration to the importing Member.

being in the ordinary course of trade *by reason of price*. These transactions may be disregarded under Article 2.2 in assessing the sufficiency of sales in the ordinary course of trade. Article 2.2.1 is worth quoting in full:

> 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* [footnote omitted] *determine* that such sales are made [1] within an *extended period of time*[4] [2] in *substantial quantities*[5] and [3] 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. (emphasis added)

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[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.

337. Thus, Article 2.2.1 authorizes an investigating authority to treat below-cost domestic sales as not in the ordinary course of trade "if" the authority "determine[s]" that three cumulative conditions are met. Under these conditions, below-cost sales must be 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.

338. Under Article 2.2.1, unless these three conditions are all met, below-cost sales must be treated as made in the ordinary course of trade. In that event, an authority must include the below-cost sales in the volume of sales in the ordinary course of trade for purposes of assessing whether normal value can be constructed under Article 2.2. The three cumulative conditions, therefore, serve to distinguish those below-cost sales that *are* in the ordinary

course of trade (which must be included under Article 2.2) from those that are *not* (which may be excluded).

339. Norway notes that Article 2.2.1 requires that the authority "*determine*" that the cumulative conditions are all met. In *US – Corrosion-Resistant Steel*, the Appellate Body stated that "the dictionary definitions of ['determine'] include '[c]onclude from reasoning or investigation, deduce' as well as '[s]ettle or decide (a dispute, controversy, etc., or a sentence, conclusion, issue, etc.) as a judge or arbiter'".[249] According to the Appellate Body, "determinations" by an investigating authority must be set forth in adequately reasoned conclusions that explain, among others, how the facts support the determination.[250]

340. Thus, pursuant to Article 2.2.1, where an authority discards sales as not being in the ordinary course of trade by reason of price, it must set forth a determination – supported by a reasoned and adequate explanation – demonstrating that the three conditions in that provision have been met.

(b) *Cost Recovery under the Third Condition in Article 2.2.1 of the Anti-Dumping Agreement*

341. In this dispute, Norway claims that the EC discarded certain below-cost sales as not being in the ordinary course of trade, without determining that the *third* condition in Article 2.2.1 was satisfied. The first two conditions in Article 2.2.1 are not at issue.

342. As described in paragraph 337, the third condition permits the exclusion of sales from the ordinary course of trade only if the authority determines that the sales prices do not provide for cost recovery "within a reasonable period of time". This condition recognizes that goods may be sold at a price that is below per unit costs when these costs are measured over a *shorter* period of time, but nevertheless at a price that is above per unit costs when measured over a *longer*, "reasonable" period. The third condition, therefore, acknowledges that a producer's costs fluctuate over time.

343. There are many reasons why below-cost prices could allow for cost recovery within a reasonable period of time. It could be because production volumes are low during a particular period due to a cyclical downturn. As a result, per unit fixed costs are high during

[249] Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 110.
[250] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5– Canada)*, para. 98. *See* Section II above.

the downturn. However, the sales price may be sufficiently high to recover costs over a reasonable period of time when production volumes increase. Another example could be where a producer incurs high marketing costs during the IP to improve market share. The temporarily higher marketing costs may push per unit costs above the market price during the IP. However, the price may be sufficiently high to recover costs averaged over a reasonable period of time.

344. Thus, by permitting cost recovery over a "reasonable period of time", Article 2.2.1 ensures that below-cost sales are not treated as being outside the ordinary course of trade simply because costs were measured during a period when they were unusually high.

345. Norway now examines the duration of the "reasonable" period in light of the relevant text and context. The relevant dictionary meaning of "reasonable" is "[o]f such an amount, size, number, etc., as is judged to be appropriate or suitable to the circumstances or purpose."[251] This suggests that reasonableness is a relative concept that must be understood in light of the particular circumstances. The Appellate Body has interpreted the term "reasonable period" in this way in the *Anti-Dumping Agreement*:

> The word "reasonable" implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is "reasonable" in one set of circumstances may prove to be less than "reasonable" in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time … should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation.
>
> In sum, a "reasonable period" must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of "reasonableness", and in a manner that allows for account to be taken of the particular circumstances of each case.[252]

346. The "flexibility and balance" inherent in the term "reasonable" dictate that the duration of the "reasonable period of time" may vary from investigation to investigation, depending, among others, on factors relating to the product, the producer or exporter, and the industry at issue. In each case, the authority must determine the duration of the appropriate "reasonable" period.

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[251] *The Oxford English Dictionary*, J.A. Simpson and E.S.C. Weiner (eds.) (Clarendon Press, 1989, 2nd ed.), Volume XIII, page 291 (2nd column). Exhibit NOR-52.
[252] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 84 and 85.

347. The context supports the view that the duration of the reasonable period is not fixed by the treaty. The first condition in Article 2.2.1 for excluding sales from the ordinary course is that they must be made "within an *extended* period of time". Footnote 4, which is attached to the term "extended period", provides that the "extended period of time should *normally be one year* but shall in no case be less than six months." An "extended" period is, therefore, given a "normal" duration in the text.

348. Article 2.2.1, therefore, refers to two different time-periods using two different words – "extended" and "reasonable". In footnote 4, the drafters defined the "normal" duration of the "extended" period but they provided no equivalent language to define the "normal" "reasonable" period. Had the drafters intended the two periods to be of identical duration, they would have used identical wording to define each period, and they would have applied footnote 4 to the term "reasonable" period. However, they did not. The rules of treaty interpretation require that the textual differences regarding these two periods be reflected in different meanings for the terms "extended" and "reasonable".

349. The absence of a defined duration for a "reasonable" period – in contrast with the expression of a defined "normal" duration for an "extended" period – suggests that there is no pre-defined "normal" "reasonable" period.

350. The context in the last sentence of Article 2.2.1 also indicates that the *minimum* permissible duration of the "reasonable" period equals the duration of the investigation period ("IP"). That sentence provides:

> 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. (emphasis added)

351. This provision envisages one particular situation in which cost recovery is deemed to occur within a reasonable period. That situation is where the sales prices are "above" the "weighted average per unit costs for the period of investigation". In that event, the sales "*shall be*" treated as "in the ordinary course of trade". Thus, if prices are above average costs for the IP, the prices are deemed to recover costs. In that event, the authority cannot exclude the sales from the ordinary course, for example, by determining that a "reasonable" period is

shorter than the IP. The second sentence does not, however, define the "reasonable" period exhaustively and, in particular, does not address the maximum duration of that period.

352. In sum, under Article 2.2.1, the authority must make a reasoned determination of the reasonable period in light of the circumstances of the investigation, taking into account, for example, the product, the producer or exporter, and the industry concerned.

(iii) The EC Failed to Determine that Sales Excluded from the Ordinary Course Were Not Made at Prices Providing for Cost Recovery within a Reasonable Period of Time

353. Norway submits that the EC violated Article 2.2.1 of the *Anti-Dumping Agreement* by excluding sales from the ordinary course without determining that these sales were made at prices that fail to provide for the recovery of costs within a "reasonable period", as required by Article 2.2.1. Norway will review the EC's determination, before explaining the EC's failure to respect Article 2.2.1.

(a) *Overview of the EC's Determination*

354. In deciding whether domestic sales were not in the ordinary course of trade by reason of price, the EC applied a profitability test at the level of sub-types of the product.[253] Under that test, the EC proceeded in two stages. In the *first stage*, the EC determined whether an individual sales price to an unrelated party was equal to or above the company's average cost of production ("COP") for the sub-type of the product and, on that basis, calculated the percentage of profitable sales made to unrelated parties as a proportion of total sales. Second, the EC calculated the weighted average price of each sub-type of the product and compared it to the COP for that sub-type.

355. In the second stage, with the information obtained in the first stage, the EC determined which one of three alternative methods it would use to calculate normal value for a particular product sub-type using the following criteria:

- normal value was calculated on the basis of *all sales* where: (1) the volume of profitable sales exceeded 80 percent of the total sales volume *and* (2) the weighted average price was equal to or above the COP;[254]

[253] The EC's profitability test is set forth in the Provisional Regulation, paras. 22 to 26.
[254] Provisional Regulation, para. 23.

- normal value was calculated on the basis of *all profitable sales* where the volume of profitable sales was 10 per cent or more of the total sales volume, even where the weighted average price was below COP;[255] and,

- normal value was *constructed*, and *all sales were rejected* by reason of price, where the volume of profitable sales represented less than 10 per cent of the total sales volume.[256]

356. The EC applied this profitability test to five companies that it determined had a sufficient volume of domestic sales, pursuant to Article 2.2 and footnote 2 of the *Anti-Dumping Agreement*. For four of the five companies, for all products types, the EC rejected all domestic sales as not in the ordinary course by reason of price, and constructed normal value; for the fifth company, the EC did the same for all but one product type.[257]

(b) *The EC Failed to Determine that Costs Could Not Be Recovered within a Reasonable Period*

357. The EC violated Article 2.2.1 because it did not "determine" that the five companies' rejected domestic sales were made at prices that did not provide for a recovery of all costs within a reasonable period of time. As a result, the EC improperly rejected domestic sales as not in the ordinary course.

358. To recall, a determination must be set forth in reasoned conclusions that explain adequately how the authority arrived at the determination on the basis of the facts in the record.[258] The explanation must leave nothing "merely implied or suggested; it must be clear and unambiguous [as well as] straightforward".[259]

[255] Provisional Regulation, para. 24. Calculating normal value based only on profitable sales has the effect of increasing normal value and pushing up the dumping margin.
[256] Provisional Regulation, para. 25.
[257] Provisional Regulation, para. 29. For three other companies, the EC constructed normal value because the volume of domestic sales was insufficient, pursuant to Article 2.2 and footnote 2 of the *Anti-Dumping Agreement*. The EC did not apply the profitability test to these companies. *See* Definitive Disclosure to Fjord Seafood, 28 October 2005, Annexes 2 and 3 (Exhibits NOR-28); Definitive Disclosure to Marine Harvest, 28 October 2005, Annex 3, Worksheet "dumpcalcdef" (Exhibit NOR-53); and Definitive Disclosure to PFN, 28 October 2005, Annex 2 (Exhibit NOR-54). For two further companies, the EC did not calculate a provisional margin; *see* Provisional Regulation, para. 37. The EC determined an individual margin for one of these companies in the Definitive Regulation, constructing normal value for all product types on the grounds that the company made no sales of the like product in the ordinary course of trade for any of the product types. *See* Definitive Disclosure to Sinkaberg, 28 October 2005, Annex II, page 2. Exhibit NOR-29.
[258] *See* para. 339 above.
[259] Appellate Body Report, *US – Line Pipe*, paras. 194 and 217; Appellate Body Report, *US – Steel Safeguards*, paras. 296 and 442.

359. The EC's profitability test simply does not mention the "recovery" of costs "within a reasonable period". It does not state the duration that it determined was the "reasonable period" in this investigation. Much less does the EC provide an unambiguous explanation of why the prices of the sales it discarded did not provide for the recovery of costs within that period. It is not acceptable for a required determination to be set forth implicitly, without a reasoned and adequate explanation. By failing to set forth a determination regarding the cost recovery condition, the EC violated Article 2.2.1.

360. Even if "implicit" determinations were permissible under the *Anti-Dumping Agreement* (*quod non*), the EC has not made any implicit determination regarding cost recovery. No part of the EC's profitability test verifies that below-cost sales prices do not provide for cost recovery within a reasonable period. Norway will briefly examine the three different aspects of the test set forth in paragraph 355 above.

(b)(i) *The "weighted average price test" does not constitute a cost recovery test*

361. One aspect of the EC's profitability test involved determining whether the weighted average price of all sales of a product sub-type was below the cost of production for the IP.[260] This "weighted average price test" does not establish that below-cost prices failed to provide for cost recovery within a reasonable period.

362. Under this test, the EC assesses whether costs are recovered *within the period of investigation*. It, therefore, *assumes* that the "reasonable period" under Article 2.2.1 *necessarily equals* the IP. As a matter of treaty interpretation, this assumption is unwarranted. If the "reasonable period" and the "period of investigation" were necessarily to be equated, the drafters would not have chosen different words to refer to them. Or, at the least, they would have added text, for example a further footnote, to clarify that the two periods were necessarily equal. They did not do so.

363. Instead, as set out in paragraphs 345 to 352, the "reasonable period" is a flexible concept that varies according to the circumstances of the investigation. Thus, under Article 2.2.1, before discarding sales as not in the ordinary course, the EC was obliged to consider whether – "in the light of all the facts and circumstances" – prices provided for the recovery

[260] *See* para. 355 above, first bullet.

of costs within a "reasonable" period.[261] A mechanistic assumption that the "reasonable period" equals the "period of investigation" does not meet this requirement.

364. Furthermore, the EC's weighted average price test is, in fact, set forth in footnote 5 as a means for determining compliance with the *second* condition in Article 2.2.1, namely that below-cost sales are made in "substantial quantities".[262] In Article 2.2.1, the "substantial quantities" condition is separate and distinct from the *third* condition regarding cost recovery within a reasonable period. Moreover, the drafters did not provide that the weighted average test in footnote applies equally to the third condition in Article 2.2.1. The independent character of these conditions must be respected.

(b)(ii) *The 10 % and 80 % volume tests do not constitute cost recovery tests*

365. The other aspects of the EC's profitability test involve establishing whether the proportion of profitable sales of a product sub-type exceeds defined thresholds, namely 10 percent and 80 percent of total sales of that sub-type.[263] Again, these "volume tests" do not verify whether below-cost sales are made at prices that do not provide for cost recovery within a reasonable period.

366. Under the volume tests, the EC simply establishes a *ratio* of the *quantity* of profitable sales to the *quantity* of loss-making sales. The volume tests are, therefore, related to the quantity of below-cost sales. This is confirmed by footnote 5, which also sets forth a volume test for demonstrating compliance with the "substantial quantities" condition.[264] Again, if the drafters had intended to equate the "substantial quantities" and the "cost recovery" conditions, they would not have included them as separate conditions in Article 2.2.1.

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[261] *See, by comparison,* Appellate Body Report, *US – Hot-Rolled Steel,* para. 89.

[262] *See* para. 337 above. Footnote 5 provides that:

> 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. (emphasis added)

[263] *See* para. 355 above, first, second and third bullet points.

[264] Footnote 5 provides that sales are made in "substantial quantities" if the volume of below-cost sales is at least 20 percent of total sales.

367. Furthermore, a volume test is inapt to demonstrate compliance with the cost recovery condition in Article 2.2.1. In considering whether prices provide for cost recovery within a "reasonable" period, an authority must examine at least two factors: *first*, the amount by which sales prices are below cost and, *second*, the possible evolution of costs within the reasonable period. Merely establishing the overall proportion of loss-making sales during the IP provides no indication, whatsoever, with respect to these factors.

368. For example, a volume test could show that the proportion of loss-making sales is 90 percent, with the remaining 10 percent of sales sold at a profit. Without further information, these data do not demonstrate that the below-cost prices fail to provide for cost recovery within a reasonable period. It could be that, despite the very large volume of loss-making sales, the extent of the loss is very small, and there is a reasonable prospect that costs will soon decline slightly. In these circumstances, the prices of the large volume of loss-making sales could well provide for cost recovery within a reasonable period.

369. The EC's volume tests are not, therefore, a means of determining that below-cost sales are made at prices that do not provide for cost recovery within a "reasonable period of time", within the meaning of Article 2.2.1.

(iv) Conclusion

370. In this dispute, the EC has discarded virtually all of the domestic sales of five companies as not in the ordinary course of trade by reason of price, without satisfying the conditions in Article 2.2.1 of the *Anti-Dumping Agreement*. Specifically, the EC failed to determine that below-cost domestic sales were made at prices that did not provide for the recovery of costs within a "reasonable period of time". As a result, the EC did not establish that it was entitled to discard any of the five companies' sales as not in the ordinary course of trade. The EC, therefore, violated Article 2.2.1. of the *Anti-Dumping Agreement*.

371. In consequence, the EC improperly determined, under Article 2.2, that it could construct normal value, for some or all product types, for the five companies. In short, in deciding that there were either no sales of the like product in the ordinary course trade or that the volume of those sales was too low to permit a proper comparison, the EC improperly excluded below-cost sales from its assessment, without determining that it was entitled to do so under Article 2.2.1. The EC, therefore, also violated Article 2.2.

C. *The EC Violated Article 2.2.2 of the Anti-Dumping Agreement by Rejecting Actual Data Relating to Selling, General and Administrative Costs and Profits Because of the Low Volume of Sales*

(i) Introduction

372. The EC resorted to constructed normal value for determining the dumping margins of all ten investigated producers. Article 2.2 of the *Anti-Dumping Agreement* provides that constructed normal value equals the cost of production plus reasonable amounts for SG&A costs and for profits. In several instances, in calculating amounts for SG&A costs and profits, the EC refused to use actual sales data as reported by the investigated producers because the volume of those sales was too low. The rejection of actual SG&A and profits data violates Article 2.2.2 of the *Anti-Dumping Agreement*, because this provision does not permit the rejection of actual sales data on the grounds that the sales volume is too low.

373. Norway reviews the EC's determination before setting forth the EC's violation of its obligations under Article 2.2.2 of the *Anti-Dumping Agreement*.

(ii) Overview of the EC's Determination

374. In the questionnaire responses, the investigated producers submitted amounts for SG&A costs and for profits on the basis of actual sales data. To decide whether these data could be used to construct normal value, the EC examined whether the amounts submitted were based on what it called "reliable" data.[265] A key component of the EC's reliability test assessed whether the data pertained to sufficiently large volumes of domestic sales. For at least eight producers, for some or all product types, the EC rejected the amounts submitted for profits as unreliable and, for one company, it rejected the submitted SG&A costs.[266] In so doing, the EC improperly rejected actual data pertaining to sales in the ordinary course of trade on the ground that the volume of those sales was too low. Norway reviews separately the EC's findings on rejection of actual profits data and SG&A data.

[265] Provisional Regulation, para. 26.

[266] The EC rejected the actual SG&A data in the case of Hydroteck. *See* Definitive Disclosure to Hydroteck, 28 October 2005, Annex 2, section 2.1 under the heading "Selling, general and administrative costs (SGA)". Exhibit NOR-45. With regard to profits, it appears that the EC rejected the actual data for all the sampled companies. *See* the Provisional Regulation, para. 30, as definitively confirmed by the Definitive Regulation, para. 11.

(a) *Rejection of Actual Profits Data Due to Low Volume Sales*

375. For profits, the EC's reliability test involved the same two step "representativeness" and "profitability" tests that the EC had applied to decide whether it could construct normal value under Article 2.2.[267]

376. *First*, the EC considered whether the actual profit margin reported by the investigated companies pertained to a "*representative*" volume of domestic sales.[268] The EC considered that domestic sales were representative when "the total domestic sales *volume* of each exporting producer *was at least 5%* of its total export sales to the Community" (emphasis added).[269] If domestic sales were less than 5 percent of export sales, the EC rejected producer's actual profits data because of the low volume of sales.[270] As far as Norway understands, this "representativeness" test is the same test that EC applied, under footnote 2 of Article 2.2, in determining whether the *volume of domestic sales was too low* to use actual sales to determine normal value.

377. *Second*, for companies with "representative" sales, the EC applied a "*profitability*" test to determine whether there were sufficient domestic sales in the ordinary course of trade.[271] Under this test, the EC rejected the producer's actual profits data *if the volume of profitable sales amounted to less than 10 percent of the total volume of sales*.[272] In that event, the EC, considered that there were *no sales in the ordinary course of trade* that could provide actual sales data. For example, if profitable domestic sales in the ordinary course of trade amounted to just 9 percent of total domestic sales, the EC rejected all these sales. The EC then determined the amount for profits by recourse to an alternative method under Article 2.2.2(iii) that did not rely on the producer's actual profits data.[273]

378. In application of these tests, the EC concluded that, for at least eight producers, there were no sales in the ordinary course of trade or the volume of sales was too low to permit a

[267] Provisional Regulation, paras. 22 to 25 set forth the "representativeness" and "profitability" tests. With respect to the amount for profits in constructing normal, para. 27 states "[f]or 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. For this purpose, the methodology set out in recital 22 to 25 was applied."
[268] Provisional Regulation, paras. 26 and 27. The "reliability" test used in the Provisional Regulation was confirmed in the Definitive Regulation, para. 11.
[269] Provisional Regulation, paras. 19 and 21.
[270] Provisional Regulation, para. 19.
[271] Provisional Regulation, para. 27.
[272] Provisional Regulation, para. 25.
[273] Provisional Regulation, para. 28.

proper comparison, for some or all product types, either because the volume of domestic sales was not sufficiently "representative" or because the volume of profitable sales was below the 10 percent threshold. In either case, the EC rejected actual sales data because of the low volume of sales to which it pertained.

379. Instead of using actual profits data, the EC applied a profit margin of 8% of turnover, under Article 2.2.2(iii), on the ground that this "was considered the minimum level that would be achievable for a viable industry."[274]

(b) *Rejection of Actual SG&A Costs Data Due to Low Volume Sales*

380. In contrast to the EC's explanation regarding the rejection of actual profits data, the EC does not explain in either the Provisional or the Definitive Regulation how it assessed whether the *actual SG&A data* reported by investigated producers could be used for purposes of Article 2.2.2. In the Provisional Determination, the EC stated only the conclusion of its analysis, namely, that the company-specific information provided by the investigated producers could be used "provisionally" to determine the amount for SG&A costs in order to construct normal value.[275] In the Definitive Determination, the EC confirmed this finding.[276]

381. However, the Provisional and Definitive Regulations incorrectly suggest that the EC accepted the actual SG&A data reported by *all* the investigated producers. In fact, the EC rejected the actual SG&A data for one investigated company, PFN. In PFN's company-specific definitive disclosure, the EC stated:

[[xx.xxx.xx.[277]]] (emphasis added)

382. Thus, contrary to the misleading statement in the Regulations, the EC improperly rejected actual SG&A data for PFN, because the volume of domestic sales was deemed to be too low and because, from this, the EC concluded that none of the domestic sales were in the ordinary course of trade. For PFN, the EC calculated an amount for SG&A costs on the basis of the SG&A costs of other producers, under Article 2.2.2(ii).

[274] Provisional Regulation, para. 30: The Definitive Regulation, para. 11, confirmed "the provisional conclusions […] as set out in recitals 19 to 31 of the Provisional Regulation".
[275] Provisional Regulation, para. 31 ("For determination of a reasonable amount for SG&A, the Commission considered that the company specific information provided by exporting producers could provisionally be used at this stage…").
[276] Definitive Regulation, para. 11.
[277] Definitive disclosure to PFN, 28 October 2005, Annex II, pages 2-3, heading "Selling, General and Administrative Expenses. Exhibit NOR-54.

383. Finally, Norway notes the striking contrast between the EC's treatment of actual profits data and actual SG&A data. The EC rejected the reported actual profits data for at least eight producers because the data was not "reliable" due to the low volume of domestic sales or the low volume of profitable domestic sales. However, at the same time, for most producers, the EC accepted the reported actual SG&A costs which were, presumably, based on exactly the same domestic sales transactions that apparently provided "unreliable" profits data. Thus, when it came to profits, the domestic sales *did not meet* the EC's understanding of the conditions in Article 2.2.2; yet, when it came to SG&A, these same sales *did meet* those conditions. The EC does not explain how or why this discrepancy arose.

(iii) The EC Violated Article 2.2.2 of the *Anti-Dumping Agreement* by Rejecting Actual Sales Data Because of the Low Volume of Sales

(a) *The EC's Obligations under Article 2.2.2 of the Anti-Dumping Agreement*

384. Article 2.2 provides that, in defined circumstances, an investigating authority may construct normal value on the basis of costs of production in the country of origin plus a reasonable amount for SG&A costs and for profits. Article 2.2.2 sets forth rules governing the calculation of amounts for SG&A costs and for profits. It provides in relevant part:

> 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. (emphasis added)

385. Thus, in determining amounts for SG&A costs and for profits, the authority is obliged to ("*shall*") use actual data provided it pertains to "sales in the ordinary course of trade". Thus, like paragraph 6 of Annex II, Article 2.2.2 reflects "a clear preference" in the *Anti-Dumping Agreement* for the use of "first-hand information" that is submitted by the investigated producers and exporters.[278]

386. In this dispute, Norway claims that the EC improperly rejected actual sales data under Article 2.2.2 on the ground that the volume of domestic sales to which the sales data related was too low. In sum, the EC concluded that actual sales data could not be used if:

[278] Panel report, *Mexico – Rice*, para. 7.238.

- domestic sales amounted to less than 5 percent of export sales of a particular product sub-type; or

- profitable domestic sales amounted to less than 10 percent of total domestic sales of a product sub-type.

387. In both cases, the EC's test is based on the low volume of sales from which the actual data has been derived. The panel and 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. They 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*.[279]

388. In other words, they 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. The panel and the Appellate Body, therefore, recognized that low-volume domestic sales cannot, by reason of the volume, be treated as not in the ordinary course of trade.

389. The dispute in *EC – Tube or Pipe Fittings* also concerned an anti-dumping measure imposed by the EC. In that anti-dumping investigation, the EC calculated SG&A costs and profits, under Article 2.2.2, on the basis of actual data *pertaining to the low volume of domestic sales that it had concluded was insufficient for determining normal value* under Article 2.2. Thus, the EC adopted a position contrary to the position it took in the salmon investigation.

390. In *EC – Tube or Pipe Fittings*, Brazil claimed, under Article 2.2.2, that the EC had improperly relied on "low volume" sales, given that the EC had concluded that the sales volume was too low "to 'permit a proper comparison' of prices under Article 2.2".[280]

391. For its part, the EC "admit[ted] that it used data relating to 'low volume' sales in establishing the profit margins under the chapeau of Article 2.2.2" but argued "that this approach is envisaged by the chapeau of Article 2.2.2, which requires (and permits) solely the

[279] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 97.
[280] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 87

exclusion of sales not made 'in the ordinary course of trade' in establishing the amounts for profit and SG&A in constructing normal value."[281]

392. On appeal, the EC rightly emphasized the difference in language between Article 2.2 and Article 2.2.2. Norway believes that the EC's own arguments are worth quoting in full:

> The text of Article 2.2 separately identifies "low-volume" sales and sales not made "in the ordinary course of trade", thereby distinguishing the two types of sales. The chapeau of Article 2.2.2, however, expressly excludes data relating to sales not made "in the ordinary course of trade", but makes no mention of data relating to low-volume sales, indicating that it places no restriction on the inclusion of such sales. Similarly, the European Communities states that sub-paragraphs (i) and (ii) of Article 2.2.2, which relate to the construction of normal value, do not mention the exclusion of data relating to low-volume sales.
>
> The European Communities argues that there is a rational explanation for excluding non-representative sales from a normal value based on sale *prices*, while at the same time including them in a normal value that is *constructed*. Typically, the dumping margin for a product is calculated by determining a weighted average of the dumping margins for different versions of the like product on the basis of the volume and the price of *export* sales. If the domestic sales volume for a particular version is small, there is a greater risk of atypical prices affecting the calculation, because prices from those low-volume sales will be weighted according to the *export* sales of the product rather than the domestic sales. In contrast, the relative volume of *domestic* sales (in the exporting country) of different versions of a like product is taken into account in the construction of normal value because SG&A and profit data from all versions of the like product are weight-averaged according to domestic sales. Thus, the fact that a small volume of one version of the product is sold at atypical prices will have a correspondingly small effect on the profit margin used in constructing normal value. The European Communities argues that this rationale for the different treatment of low-volume sales under Articles 2.2 and 2.2.2 is illustrated by the present case, where the effect of including the data in question would be to alter the profit margin, and therefore the dumping margin, by only one hundredth of one percent.[282]

393. The panel and the Appellate Body agreed with the EC. The panel held that:

> … a Member is not permitted to exclude actual data – on a basis other than not being made in the ordinary course of trade – from the calculation under Article 2.2.2. In contrast to the Article 2.2 chapeau, there is no explicit exclusion, in

[281] Panel report, *EC – Tube or Pipe Fittings*, para. 7.122.
[282] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 41.

> the Article 2.2.2 chapeau, of data relating to sales the volume of which was so low as not to permit a proper comparison.[283]

394. The Appellate Body also found:

> If actual SG&A and profit data for sales in the ordinary course of trade do exist for the exporter and the like product under investigation, an investigating authority is obliged to use that data for purposes of constructing normal value; it may not calculate constructed normal value using SG&A and profit data by reference to different data or by using an alternative method.[284]
>
> In contrast to Article 2.2, the chapeau of Article 2.2.2 explicitly excludes only sales outside the ordinary course of trade. The absence of any qualifying language related to low volumes in Article 2.2.2 implies that *an exception for low-volume sales should not be read into Article 2.2.2*"[285] (emphasis added).

395. Thus, at the urging of the EC, the panel and the Appellate Body held that, under Article 2.2.2, SG&A costs and profits must be based on a low volume of domestic sales, provided these are in the ordinary course of trade. Moreover, because of the distinction between low-volume sales and sales not in the ordinary course, an authority cannot treat a low volume of domestic sales as not in the ordinary course of trade simply because the volume of sales is low.

(b) *The EC's Failure to Respect the Obligations in Article 2.2.2*

396. In this dispute, despite the position it took in *EC – Tube or Pipe Fittings*, the EC read an exception for low volume domestic sales into Article 2.2.2. The EC discarded actual SG&A and profits data, and resorted to an alternative calculation method, solely on the grounds that domestic sales were less than 5 percent of export sales or that the volume of profitable domestic sales was less than 10 percent of total sales. Under Article 2.2.2, the EC was not entitled to reject actual sales data, and resort to an alternative calculation method, solely for these volume-related reasons. Nor could the EC conclude that there were no domestic sales in the ordinary course of trade simply because the volume of those sales was too low. Instead, Article 2.2.2 required the EC to determine whether there were *any* sales in the ordinary course of trade included among:

[283] Panel report, *EC – Tube or Pipe Fittings*, para. 138.
[284] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 97.
[285] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 98.

- the low volume of domestic sales that did not meet the 5 percent "representativeness" test set forth in paragraph 376 above; and

- the low volume of profitable domestic sales that did not amount to 10 percent of total domestic sales under the "profitability" test set forth in paragraph 377 above.

397. If there were *any* sales in the ordinary course among these low-volume sales, the EC was obliged to base the amounts for SG&A costs and profits on actual data pertaining to these sales. The EC did not take these steps and simply resorted to the alternative methodologies in Articles 2.2.2(ii) and (iii), without properly establishing that there were no sales in the ordinary of trade.

(iv) Conclusion

398. For these reasons, the EC violated Article 2.2.2 of the *Anti-Dumping Agreement* because the EC calculated the amounts for SG&A costs and for profits on the basis of an alternative methodology set forth in Articles 2.2.2(ii) and (iii), without properly determining that these amounts could not be based on actual data pertaining to sales in the ordinary course of trade.

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 One Sampled Company*

(i) Introduction

399. The EC established normal value for Grieg Seafood AS ("Grieg") on the basis of constructed normal value. In determining Grieg's COP and SG&A costs, the EC resorted to facts available. However, in so doing, the EC failed to respect the conditions governing the use of facts available in Article 6.8 and Annex II of the *Anti-Dumping Agreement*. In particular, 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.

400. In the following two sub-sections, Norway first provides an overview of the EC's determination regarding the use of facts available for Grieg (sub-section (ii)); and second, sets out its arguments that, by having recourse to facts available, the EC violated the provisions of Annex II and, therefore, Article 6.8 of the *Anti-Dumping Agreement* (sub-section(iii)).

(ii) Overview of the EC's Determination

401. The EC used facts available for two elements of the constructed normal value for Grieg, namely, to calculate: (a) *filleting costs*; and (b) its *finance costs*.

(a) *Grieg's Filleting Costs*

402. In the Information Note on Cost of Production ("Information Note") of 8 March 2005, the EC indicated that, in its view, no filleting costs were included in the accounts of Grieg Seafood Rogaland (the salmon farming company within the Grieg Seafood Group).[286] On this ground, the EC added an additional amount for filleting costs to Grieg's COP. To establish this additional amount, the EC used "cost per unit information acquired from another co-operating producer in Norway" ("the other producer").[287] According to the EC, the filleting costs of this unnamed other producer were [[xx.xxx.xx]] NOK/kg.

403. In its comments on the Information Note, Grieg explained that, during the IP, it had not produced any filleted products of its own. Rather, Grieg's filleted products had been manufactured by an unrelated processing company, called Triton.[288] Grieg considered that it had properly reported filleting costs and that, in any event, its per unit filleting costs were lower than those added by the EC. Grieg supplied the EC with a letter from Triton confirming the prices that Triton had charged Grieg, during the IP, for producing filleted products.[289] On this basis, Grieg calculated that its average cost of producing filleted products was [[xx.xxx.xx]] NOK/kg, that is, markedly lower than the figure obtained by the EC from the other producer.

[286] Cost of Production Information Note to Grieg, 8 March 2005. Exhibit NOR-55.
[287] Cost of Production Information Note to Grieg, 8 March 2005, point 4. Exhibit NOR-55.
[288] Grieg's Comments on the Cost of Production Information Note, 16 March 2005, page 3. Exhibit NOR-56. This explanation was reiterated in Grieg's Comments on the Provisional Disclosure of 27 May 2005, after the Commission disregarded it for the purposes of its provisional determination of 22 April 2005. Exhibit NOR-57.
[289] Grieg's Comments on the Information Note on Cost of Production, 16 March 2005, Enclosure 6. Exhibit NOR-56.

404. In the Provisional Disclosure to Grieg, the EC persisted in relying on the costs of the other producer, but added that "the cost per kilo used may be re-examined during the definitive stage".[290] However, despite Grieg's continued objections, at the stage of the Definitive Determination, the EC rejected the information submitted by Grieg, without any further examination, on the grounds that "at the verification [Grieg] could not support the statements made at a later date."[291] In the Definitive Regulation issued on 17 January 2006, the EC did not even mention the rejection of the information and evidence on filleting costs submitted by Grieg Seafood.

405. In sum, the EC took the view that Grieg did not report filleting costs and informed the company of this perceived deficiency, for the first time, in March 2005 – long after the verification visit in January 2005. In March, as soon as Grieg was informed of the perceived deficiency, it provided the EC with additional information. In October 2005, the EC rejected the information submitted by Grieg in March, when first requested, because it had not been verified in January, and then instead resorted to adverse facts available.

(b) *Grieg's Finance Costs*

406. In its questionnaire reply,[292] Grieg indicated that the finance costs incurred by Grieg Seafood Rogaland for the production of farmed salmon amounted to [[xx.xxx.xx]] NOK.

407. In the Information Note, the EC took the view that "[i]t was *evident* from an analysis of the Grieg Seafood Group accounts that finance costs within the […] accounts [of Grieg Seafood Rogaland] had been understated".[293] On the basis of this assertion, which it never further substantiated, the EC rejected the information on finance costs as submitted by

[290] Provisional Disclosure to Grieg Seafood, Annex II, point 4. Exhibit NOR-58.
[291] Definitive Disclosure to Grieg Seafood, 28 October 2005, Annex II. Exhibit NOR-16. The verification visit that the Commission referred to in this statement had taken place on 10 and 11 January 2005. The on-the-spot verification visits to the premises of the ten sampled Norwegian producers took place between 5 and 20 January 2005, starting just two days after the deadline for submitting questionnaire responses and well in advance of the issuance of the Provisional Regulation. No further verification visits to Norwegian sampled producers took place after January 2005.
[292] Grieg's questionnaire reply, 3 January 2005, Attachment 9, Worksheet DMCOP. Exhibit NOR-59. Grieg submitted revised versions of Worksheet DMCOP, the latest on 11 January 2005, which is also provided in Exhibit NOR-59.
[293] Information Note on Cost of Production to Grieg of 8 March 2005 (Exhibit NOR-55). Provisional Disclosure to Grieg of 22 April 2005, Annex II (Exhibit NOR-58)

Grieg.[294] The EC therefore re-calculated Grieg's finance costs and established that they amounted to [[xx.xxx.xx]] NOK. For this calculation, the EC used an interest rate of [[xx.xxx.xx]] percent that was taken from the accounts for [[xx.xxx.xx]]. The EC also used data from the year 2003, rather than from the investigation period.[295]

408. In response, Grieg explained that its reported finance costs were not understated, as alleged by the EC. Grieg pointed out that EC had based its evaluation of finance costs on figures for 2003 only; however, nine out of the twelve IP months were in 2004, and the interest level in Norway had fallen dramatically by about 3 percent between 2003 and 2004 to an average for the IP of 3.5 percent.[296] Moreover, the average interest rate on Grieg Seafood Rogaland's debt was not the same as the average interest rate on the debt of the entire Grieg Seafood Group. Grieg Seafood provided details on the breakdown of the finance costs sustained by Grieg Seafood Rogaland during the IP, and provided supporting evidence.

409. In particular, Grieg explained that:

- the total finance costs borne by Grieg Seafood Rogaland during the IP amounted to [[xx.xxx.xx]] NOK;[297]
- [[xx.xxx.xx;]][298] and
- [[xx.xxx.xx]]:
  - [[xx.xxx.xx]];
  - [[xx.xxx.xx]]; and
  - [[xx.xxx.xx]]. [299]

[294] Information Note on Cost of Production to Grieg of 8 March 2005 (Exhibit NOR-55); Provisional Disclosure to Grieg of 22 April 2005, Annex II (Exhibit NOR-58); and Definitive Disclosure to Grieg Seafood of 28 October 2005, Annex II (Exhibit NOR-16).
[295] Cost of Production Information Note to Grieg, 8 March 2005 (Exhibit NOR-55) The EC reiterated these findings in the Provisional Disclosure to Grieg Seafood of 22 April 2005 (Exhibit NOR-58).
[296] Grieg's Comments on the Information Note on Cost of Production, 16 March 2005, page 3 (Exhibit NOR-56).
[297] Grieg's Comments on the Information Note on Cost of Production, 16 March 2005, page 3 and Enclosure 5, point 2. Exhibit NOR-56; reiterated in Grieg's Comments on the Provisional Disclosure, 27 May 2005, page 9. Exhibit NOR-57.
[298] Grieg's Comments on the Information Note on Cost of Production, 16 March 2005, page 3. Exhibit NOR-56.
[299] Grieg's Comments on the Information Note on Cost of Production, 16 March 2005, page 3. Exhibit NOR-56.

410. Grieg commissioned its auditors to verify the accuracy of the amount of the net finance costs incurred by Grieg Seafood Rogaland for all products during the IP, *i.e.* [[xx.xxx.xx]] NOK, and submitted their' findings.[300] Grieg also provided confirmation from its main lender, the bank Sandnes Sparebank, of the interest paid to it during the IP ([[xx.xxx.xx]] NOK), and the interest rate applied to each *tranche* of this payment, *i.e.* [[xx.xxx.xx]].[301] Finally, it provided the 2004 accounts of Grieg Seafood Rogaland,[302] as well as extracts from the accounts of the Grieg Seafood Group and Grieg Seafood Rogaland for both 2003 and 2004.[303]

411. For purposes of its final determination, the EC changed the methodology used to re-calculate the finance costs of Grieg Seafood.[304] It stated that finance costs were based on the average level of "the interest bearing loans for the period 2001 to 2003". As the applicable interest rate, the EC no longer used the rate of the Grieg Seafood Group, but instead used the "average interest rate used from the Norwegian Central Bank" during the three-year period from 2001 to 2003, namely 6.58%. This interest rate was almost double the documented rate applied to Grieg Seafood Rogaland's loans during the IP. Based on this methodology, the EC calculated Grieg Seafood Rogaland's finance costs as [[xx.xxx.xx]] NOK.[305]

412. The EC did not explain why it changed the methodology between the Preliminary and the Definitive Disclosure. In its Definitive Disclosure, the EC did not even mention, let alone address, the explanations and further evidence submitted by Grieg. The Definitive Regulation is also completely silent on the EC's decision to reject the information submitted and its decision to use facts available to establish Grieg Seafood's finance costs.

413. In summary, the EC rejected a figure supplied, explained and documented by the investigated producer. Instead, it had recourse to facts available without explaining why and,

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[300] *See* point 2 of the auditors' "Report on actual findings" in Enclosure 5 to the Grieg's comments on the Information Note on Cost of Production, 16 March 2005. Exhibit NOR-56.
[301] Grieg's comments on the Information Note on Cost of Production, Enclosure 2,16 March 2005. Exhibit NOR-56.
[302] Grieg had submitted the 2003 accounts for the Grieg Seafood Group and Grieg Seafood Rogaland as attachment 12 to the questionnaire reply (Exhibit NOR-60). At the time of submitting the questionnaire reply, on 3 January 2005, the 2004 accounts were not yet available.
[303] Grieg's Comments on the Provisional Disclosure, 27 May 2005. Exhibit C (Exhibit NOR-57).
[304] Definitive Disclosure to Grieg, 28 October 2005, Annex II, pages 1 and 2. Exhibit NOR-16
[305] According to the EC the use of a three year average for calculating finance costs was "because of the 3 year cycle for producing salmon to harvest weight." Definitive Disclosure to Grieg of 28 October 2005, Annex II. Exhibit NOR-16.

by using facts available, established an amount for finance costs that was more than double the amount reported by the company.

(iii) The EC Violated Article 6.8 and Annex II of the *Anti-Dumping Agreement* in Using Facts Available for Grieg

414. The *Anti-Dumping Agreement* sets strict limits on the authorities' right to resort to facts available. Article 6.8 provides:

> 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 facts available. The provisions of Annex II shall be observed in the application of this paragraph.

415. Thus, an investigating authority may resort to facts available *solely if* an interested party: (1) fails to provide necessary information within a reasonable period; or (2) significantly impedes the investigation.[306] The role of Article 6.8 is thus to allow investigating authorities to overcome "the dilemma in which [they] might find themselves – they must base their calculations of normal value and export price on some data, but the necessary information may not have been submitted."[307]

416. According to the Appellate Body, Annex II is "incorporated by reference into Article 6.8".[308] Annex II contains a number of paragraphs that set out detailed requirements, regulating, among others, the circumstances in which an authority may resort to facts available, and the steps that the authority must take before resorting to facts available. A violation of one of the paragraphs in Annex II entails a violation of Article 6.8 itself. In this dispute, the EC violated:

- paragraph 3 of Annex II, because the EC failed to take into account information submitted by Grieg that it was required to take into account; and
- paragraph 6 of Annex II, because the EC failed to take the procedural steps laid down in that provision when it had decided to resort to facts available;

[306] *See* the Appellate Body Report in *US – Hot Rolled Steel*, para. 177.
[307] Panel report, *Egypt – Rebar*, para. 7.146.
[308] Appellate Body Report, *US – Hot Rolled Steel*, para. 75. *See* also: Panel report, *US – Steel Plate*, para. 7.56 ("the provisions of Annex II are mandatory […] because of the obligation to observe them set out in Article 6.8"); and Panel report, *Egypt – Steel Rebar*, para. 7.152 (to the effect that the phrase "shall be observed" in Article 6.8 indicates that the parameters set out in Annex II "must be followed").

417. The EC's violations of each of these provisions will be examined in turn below.

(a) *The EC Violated Paragraph 3 of Annex II by Resorting to Facts Available*

418. Paragraph 3 of Annex II ("paragraph 3") provides:

> 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.

419. Thus, the investigating authority must examine whether information:

- is *verifiable*;
- was submitted in a *timely fashion*; and
- can be used *without undue difficulties*.

420. When these criteria are met, "the investigating authority may not conclude that 'necessary information' has not been provided" but must, instead, take the information into account.[309]

(a)(i) *Grieg's Information on Filleting and Finance Costs Was "Verifiable"*

421. The first criterion laid down in paragraph 3 of Annex II is that "verifiable" information must be used, subject to certain other conditions. This criterion implies that an investigating authority cannot reject information whose "accuracy and reliability" can be "assessed by an objective process of examination" and which is "capable of being verified".[310]

422. The panel in *US – Steel Plate* observed that "verifiable" information need not, in fact, be the subject of an *on-the-spot* verification.[311] The panel noted that investigating authorities are not obliged to conduct an on-the-spot verification, provided they satisfy themselves as to the accuracy of the information they use.[312] Thus, the panel said, "even in the absence of on-

[309] Panel report, *US – Steel Plate*, para. 7.55.
[310] Panel report, *US – Steel Plate*, para. 7.71.
[311] Panel report, *US – Steel Plate*, footnote 67.
[312] Panel report, *US – Steel Plate*, footnote 67.

the-spot verification", information is verifiable and, in practice, is verified by authorities.[313] The panel in *Guatemala – Cement II* also found that information that was not verified on-the-spot can nonetheless be verifiable.[314] An on-the-spot verification is, therefore, just *one way* for an authority to verify information, but it is not the *only* way.

- Filleting Costs

423. In the present case, because the EC considered that its questionnaire response on filleting costs was deficient, Grieg submitted information on 16 March 2005 on those costs – as the EC requested in its letter accompanying the Information Note on Costs of Production of 8 March 2005.[315] The accuracy of that information was confirmed by an accompanying letter from Triton, Grieg's supplier of filleting services.

424. The EC rejected the information in the provisional determination but suggested that it would be "re-examined" prior to the definitive determination.[316] However, in the Definitive Disclosure, the EC rejected the information on the grounds that "at the verification [Grieg] could not support the statements made a later date".[317] Thus, despite requesting additional information on filleting costs on 8 March 2005, and despite suggesting that it would undertake further examination, the EC rejected information submitted on 16 March because it could not verify the information on-the-spot on 10 and 11 January.

425. The EC, therefore, assumes that information is "verifiable" solely when it can be verified *on-the-spot*. However, as the panels in *US – Steel Plate* and *Guatemala – Cement (II)* held, information is "verifiable" without the need for an on-the-spot verification. Thus, the fact that information was not verified in January does not mean that the information could not be verified in March. The EC's conception of the verifiability of information was improperly narrow.

426. The EC does not indicate what steps, if any, it took to verify the information submitted by Grieg on 16 March 2005, despite its suggestion that it would "re-examine" the information. Norway notes that, *subsequent* to the Provisional Determination on 22 April

[313] Panel report, *US – Steel Plate*, footnote 67.
[314] Panel report, *Guatemala – Cement II*, para. 8.252.
[315] Grieg's Comments on the Information Note on Cost of Production, 16 March 2005, page 3 and Enclosure 6. Exhibit NOR-56.
[316] Provisional Disclosure to Grieg Seafood, Annex II, point 4. Exhibit NOR-58.
[317] Definitive Disclosure to Grieg Seafood, Annex II, point 4. Exhibit NOR-16.

2005, the EC conducted further *on-the-spot verifications* at the premises of six EC salmon processors and processors' associations.[318] Norway is not aware of any further on-the-spot visits conducted in Norway after the Provisional Determination. Short of an on-the-spot visit, the EC could also have requested further information from Grieg to confirm the accuracy of the filleting costs submitted, assuming for some unexplained reason that the EC considered that letter from Triton was not credible. For example, it could have requested invoices confirming the costs. There is no indication that the EC even considered methods for verifying the information that Grieg submitted.

427. Norway also notes that the EC's failure to verify the information on filleting costs on-the-spot in January stems from the fact that the EC did not provide Grieg with advance notice that it needed further information on filleting costs – as it "should" have done under Annex I, paragraph 7, of the *Anti-Dumping Agreement*. Grieg's questionnaire response was filed on 3 January; on-the-spot verifications began in Norway on 5 January; for Grieg, verification took place on 10 and 11 January; and, the EC gave Grieg no advance notice that it required further information on filleting costs. The letter from Triton on filleting costs was submitted by Grieg on 16 March 2005 in response to an EC letter of 8 March 2005. Thus, even if the EC had given Grieg just seven days notice prior to the on-the-spot verification that it wished to confirm its filleting costs, Grieg could very likely have provided the letter from Triton at the verification visit.

428. In any event, the information Grieg submitted on filleting costs was "verifiable", within the meaning of paragraph 3 of Annex II, and the EC has not offered any reasons to suggest the contrary.

- Finance Costs

429. Norway now turns to Grieg's finance costs. To recall, in response to the Information Note and the provisional determination, Grieg submitted considerable information on its finance costs. However, the EC did not provide any reasons, at all, for the rejection of that information. The EC, instead, simply informed the company of how it had re-calculated its finance costs using interest rates from the Norwegian Central Bank. The absence of reasons is particularly striking, given the quantity of information submitted by the company between

[318] Definitive Regulation, para. 7.

the Information Note and the Definitive Disclosure. The EC simply acted as if Grieg had never taken the time and trouble to submit the information.

430. The information submitted by Grieg was perfectly capable of being verified and the EC has never suggested otherwise. To confirm the accuracy of the information it provided, Grieg submitted detailed evidence, including certified and audited information as well as information confirmed by a letter from the company's bank.[319] The EC could have verified the accuracy of Grieg's information using that evidence. Moreover, had the EC considered that other steps were necessary to verify the information, it could have taken them. However, it did not do so, choosing instead to ignore the information.

(a)(ii) *Grieg Submitted Information on Filleting and Finance Costs in a Timely Manner*

431. The second criterion laid down by Annex II(3) is that, for information submitted by a party to be taken into account, it must be "supplied in a timely fashion". In *US – Hot Rolled Steel*, the Appellate Body examined this timeliness criterion.[320] The Appellate Body, first, noted that "'timeliness' under paragraph 3 must be read in light of the collective requirements, in Articles 6.1.1 and 6.8, and in Annex II, relating to the submission of information by interested parties."[321] It considered that "in a timely fashion" in paragraph 3 was a reference to a "reasonable period" in Article 6.8 or "a reasonable time" in paragraph 1 of Annex II. In other words, "investigating authorities should not be entitled to reject information as untimely if the information is submitted within a reasonable period of time."[322]

432. The Appellate Body went on to reason that "[t]he word 'reasonable' implies a degree of flexibility that involves consideration of all the circumstances of a particular case."[323] Therefore, "a "reasonable period" must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of 'reasonableness', and in a manner that allows for account to be taken of the particular circumstances of each case."[324]

[319] *See* para. 408 above.
[320] Appellate Body Report, *US – Hot Rolled Steel,* paras. 82-90.
[321] Appellate Body Report, *US – Hot Rolled Steel,*, para. 82.
[322] Appellate Body Report, *US – Hot Rolled Steel,*, para. 83.
[323] Appellate Body Report, *US – Hot Rolled Steel,*, para. 84.
[324] Appellate Body Report, *US – Hot Rolled Steel,*, para. 85.

433. It added that, when the investigating authority considers the timeliness of information, it must be mindful both of "the rights of the investigating authorities to control and expedite the investigating process," as well as of "the legitimate interests of the parties to submit information and to have that information taken into account", and it must achieve a "balance" between the two.[325] In *US – Hot-Rolled Steel*, the Appellate Body recognized that information is not submitted late simply because it is filed after the deadline for questionnaire responses.[326]

- Filleting Costs

434. Grieg submitted information on its filleting costs on 16 March 2005 in response to the EC's Information Note on 8 March 2005. In the provisional disclosure, on 1 April 2005, the EC noted that the information "may be re-examined during the definitive stage."[327] Thus, shortly after Grieg had submitted the information, the EC did not consider that it had been submitted too late to be considered. To the contrary, the EC suggested that it would examine the information.

435. Norway considers that the information was submitted in a timely fashion, taking account of the interests of the authority and Grieg. The start of the investigation was conducted pursuant to an extremely tight schedule imposed for the questionnaire response and the on-the-spot verification. The EC notified the Norwegian producers of their inclusion in the sample on 24 November 2004.[328] The deadline for the questionnaire responses was 3 January 2005, despite repeated pleas for the EC to take into account the demands at that time

[325] Appellate Body Report, *US – Hot Rolled Steel,* para. 86.
[326] In that case, two individually examined Japanese producers had not provided necessary information on a weight conversion factor in their questionnaire replies. The USDOC had, therefore, determined the weight conversion factor for the two companies on the basis of facts available. After the expiry of the deadline for the questionnaire replies, and after the publication of the preliminary dumping determination, in which facts available were used, the two companies found and submitted the necessary weight conversion factors, as a correction to their questionnaire replies. USDOC informed them that these conversion factors had been rejected as untimely because they had been submitted beyond the deadlines for responses to the questionnaires (paras. 64-69). The Appellate Body found that "USDOC acted inconsistently with Article 6.8 of the *Anti-Dumping Agreement* through its failure to consider whether, in the light of all the facts and circumstances, the weight conversion factors submitted by [the two companies concerned] were submitted within a reasonable period of time" (para. 70).
[327] Provisional Disclosure to Grieg Seafood, Annex II, point 4. Exhibit NOR-58.
[328] *See* the notification of inclusion in the sample sent to Grieg, 24 November 2004. Exhibit NOR-61.

of closing the year-end accounts and the festive period.[329] The EC began its verification visits as early as 5 January 2005 – just two days after the filing of the questionnaire responses – and verified Grieg on 10 and 11 January.[330]

436. However, following verifications in Norway, the investigation continued for some time. The provisional determination was made more than three months after the on-the-spot verification[331] and the EC's final determination was made more than one year later.[332] The EC gathered much additional information *after* conducting verifications in Norway:

- Interested parties commented on the provisional disclosure in May 2005 and on the definitive disclosure in October 2005, and the EC took account of the comments and evidence submitted with them.

- The EC itself requested additional information with respect to the level of the MIPs on 16 November 2005 and, again, on 13 December 2005.[333] The MIPs relating to filleted products were increased on the "basis" of the information submitted at that time.[334] Strikingly, whereas the EC refused to use Grieg's information on filleting costs – submitted in March 2005 – the EC increased the definitive MIPs in reliance on information from EC processors regarding filleting costs that was submitted as late as November and December 2005.

- As noted in paragraph 426, the EC carried out on-the-spot verifications at the premises of six EC processors and processors' associations after the provisional determination in April 2005.

[329] *See* letter from Grieg to the Commission of 10 December 2004 and the Commission's reply of 20 December 2004 (Exhibit NOR-62); letter from Sinkaberg to the Commission of 14 December 2004 (Exhibit NOR-65); and letters from the Commission to Sinkaberg of 14 and 15 December 2004 (Exhibits NOR-64 and NOR-66).
[330] The EC acceded to none of the Norwegian producers' requests to delay the date of their verification visit. *See* the documents cited in footnote 329 above.
[331] The EC adopted its provisional determination on 22 April 2005.
[332] The EC adopted its final determination on 17 January 2006.
[333] Letter from the Commission on developments following the Definitive Disclosure, 16 November 2005 (Exhibits NOR-18) and Information Note from the Commission on the Definitive MIP, 13 December 2005 (Exhibit NOR-19).
[334] *See* Information Note from the Commission on the Definitive MIP, 13 December 2005. Exhibit NOR-19.

- In the Definitive Regulation, the EC made a great virtue of the fact that, following the provisional determination, it had "deepened the investigation" by conducting further inquiries and collecting additional information.[335]

437. In sum, the EC has not suggested that the information submitted by Grieg on 16 March 2005 in relation to filleting costs was not timely and, in the circumstances of this investigation, there is no basis for it to do so.

➢ Finance Costs

438. The same is also true of the information submitted by Grieg on finance costs. The figure for finance costs that the EC refused to use was originally submitted in the questionnaire reply itself. Grieg submitted the statements from its bank and from its auditors on 16 March 2005 and it submitted its 2004 accounts on 27 May 2005.[336] The additional evidence submitted by Grieg was intended to confirm the original figure.[337] As noted, the EC itself continued to pursue a "deepened" investigation, soliciting fresh information until the middle of December 2005, long after Grieg had submitted further evidence on its finance costs. The EC has not suggested that Grieg's information was not submitted in timely fashion and there is, again, no basis for it to do so in all the circumstances of this investigation.

(a)(iii) *Grieg Submitted Information on Filleting and Finance Costs that Could be Used in the Investigation without Undue Difficulties*

439. The third criterion under paragraph 3 is comprised of two elements: first, the information must be appropriately submitted; and, second, the information must be capable of use by the investigating authorities without undue difficulty. It is only if the investigating authority demonstrates that this criterion has *not* been fulfilled that it can resort to facts available.

[335] Definitive Regulation, paras. 34, 48 and 52.
[336] Grieg's Comments on the Information Note on Cost of Production, 16 March 2005, Enclosure 2 (Exhibit NOR-56), and Grieg's Comments on the Provisional Disclosure, 27 May 2005, Exhibit D (Exhibits NOR-57).
[337] Grieg submitted one correction to the original figure because, at the time of submitting the questionnaire reply, Grieg Seafood Rogaland had not yet booked part of its interest income from other companies in the Group. *See* Grieg's Comments on the Provisional Disclosure, 27 May 2005, page 9. Exhibit NOR-57.

440. Both these elements were examined by the panel in *US – Steel Plate*. With regard to the requirement that information be "appropriately submitted", that panel considered that the term "'appropriately' in this context has the meaning 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."[338]

441. With regard to the second element, *i.e.* whether the information can be used without undue difficulties, the panel in *US – Steel Plate* considered that:

> it is not possible to determine in the abstract what 'undue difficulties' might attach to an effort to use information submitted. […] [T]he question of whether information submitted can be used in the investigation "without undue difficulties" is a highly fact-specific issue. Thus, […] it is imperative that the investigating authority explain, as required by paragraph 6 of Annex II, the basis of a conclusion that information which is verifiable and timely submitted cannot be used in the investigation without undue difficulties.[339]

442. The "usability" of information, therefore, turns on the circumstances of the investigation and the nature of the information. As with the assessment of timeliness, the authority must seek to strike a "balance" between its own interests, those of the foreign producers and exporters, and those of the domestic producers. Moreover, the authority must explain why information cannot be used.

- Filleting Costs

443. Grieg submitted information to the EC on its filleting costs on 16 March 2005 as part of its comments on the Information Note on Costs of Production. The EC specifically invited comments from Grieg on that Note and stated in the letter accompanying the Note that it would "continue to investigate this case". The information was, therefore, "appropriately submitted" as part of the EC's investigation.

444. The information submitted consisted of an average cost per kilo ([[xx.xxx.xx]] NOK/kg) that could be multiplied by the known volume of filleted products. This information was just as useable as the per-unit filleting costs ([[xx.xxx.xx]] NOK/kg) that the EC had obtained from the other producer. From a practical and technical perspective, there are no difficulties with using Grieg's information. Moreover, Norway recalls that the EC

[338] Panel report, *US – Steel Plate*, para. 7.72.
[339] Panel report, *US – Steel Plate*, para. 7.74.

made significant use of information submitted in November and December 2005 by EC processors on their own costs of producing filleted products when it increased the MIPs for filleted products.[340]

445. The EC has provided no explanation why the use of Grieg's information on filleting costs would cause undue difficulties. In Norway's view, the information could be used without any difficulties at all.

- Finance Costs

446. Grieg submitted its finance costs as part of its original questionnaire response.[341] Similarly, Grieg submitted further explanations in response to the Information Note on 16 March 2005 and in its Comments on the Provisional Disclosure on 27 May 2005. This information was, therefore, all "appropriately submitted".

447. The information consisted of a figure for finance costs for production of the product concerned during the IP, information on the interest rates borne by Grieg Seafood Rogaland during that period, and supporting evidence. The EC has not offered any explanation as to why the use of this information presented undue difficulties. In any event, Norway fails to see how use of this information could generate "difficulties beyond what is otherwise the norm in an anti-dumping investigation."[342]

(a)(iv) *Conclusion*

448. Prior to resorting to facts available, the EC did not establish that the information submitted by Grieg Seafood on filleting and finance costs: was not verifiable; was not submitted in a timely fashion; and was not submitted in the appropriate manner so that it could be used without undue difficulties. The EC has, therefore, failed to establish a right to reject the information submitted by Grieg. By rejecting Grieg's information in these circumstances, the EC violated paragraph 3 of Annex II and, therefore, Article 6.8 of the *Anti-Dumping Agreement.*

[340] *See* the Information Note concerning the Definitive MIP of 13 December 2005. Exhibit NOR-19.
[341] Questionnaire reply from Grieg of 3 January 2005, Attachment 9, Worksheet DMCOP, and revised version of DMCOP submitted on 11 January 2005. Exhibit NOR-59.
[342] Panel report, *US – Steel Plate*, para. 7.72.

(b) *The EC Violated Paragraph 6 of Annex II by Resorting to Facts Available*

449. Pursuant to paragraph 6 of Annex II ("paragraph 6"),

> If evidence or information is not accepted, *the supplying party should be informed forthwith of the reasons therefor*, and should have *an opportunity to provide further explanations within a reasonable period*, due account being taken of the time limits of 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*. (Emphasis added)

450. Paragraph 6 of Annex II reflects "a clear preference" in the *Anti-Dumping Agreement* for the use of "first-hand information" that is submitted by the investigated companies.[343] The panel in *Mexico - Rice* stated that "as paragraphs 1, 3, 5 and 7 of Annex II … clearly show, all the information provided by the parties, even if not ideal in all respects, should to the extent possible be used by the authorities, and in case secondary source information is to be used, the authorities should do so with special circumspection".[344]

451. Before the investigating authority can take the exceptional step of rejecting "first-hand information" information submitted by an interested party, paragraph 6 requires that the authority "inform" the party of the "reasons" for rejection and give the party an "opportunity" to remedy the perceived deficiency in the submitted information. If the interested party fails to cure the deficiencies, the definitive "reasons" for rejection must be included in the *published determinations*. The reasons must be sufficiently detailed to also allow a panel to determine whether the authority was entitled to reject the information under Article 6.8 and paragraph 3 of Annex II. As set forth below, the EC violated both these requirements.

(b)(i) *The EC Failed to Inform Grieg of the Reasons for Not Accepting Information and Failed to Provide Grieg with an Opportunity to Provide Further Explanations*

- Filleting Costs

[343]Panel report, *Mexico – Rice*, para. 7.238. A number of other provisions in the *Anti-Dumping Agreement* express the same preference. For instance, Article 2.2.1.1 stipulates that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation". Article 6.6 requires the authorities to "satisfy themselves as to the accuracy of the information supplied by interested parties", so as to ensure that this information can be used. The entire provision of Article 6.7 relating to on-the-spot investigations is premised on the idea that authorities will verify information submitted by the investigated parties. so that this information can be used in the investigation.

[344]Panel report, *Mexico – Rice*, para. 7.238.

452. In the case of Grieg's filleting costs, the EC indicated in the Information Note on 8 March 2005 that it considered that the information originally submitted by Grieg was insufficient. In that Note, the EC invited Grieg to comment, among others, on the EC's recourse to filleting costs obtained from another producer. Yet, when Grieg immediately took advantage of the opportunity to provide further explanation of its filleting costs through the submission of additional information, the EC rejected the information because it had not been verified on-the-spot in January 2005.

453. The EC, thereby, reduces to a nullity the opportunity for Grieg to provide further explanations regarding information that is not accepted, as required by the first sentence of Annex II(6). Any information that Grieg submitted *after* the invitation to comment made on 8 March 2005 could not, by definition, have been verified in January of that year. The EC, therefore, violated Annex II(6), and Article 6.8 of the *Anti-Dumping Agreement*.

- Finance Costs

454. The EC rejected the information Grieg originally reported on finance costs on the ground that "it was *evident*" that that Grieg's cost figure was "understated".[345] The assertion that information is "understated" is a conclusion, not a statement of the "reasons" that led the EC to this conclusion. The assertion does not enable the supplying party to know the "reasons" why the authority does not accept the information submitted and, therefore, deprives the supplying party of a meaningful opportunity to address the perceived deficiencies in the information originally submitted. Therefore, the EC violated the requirements in the first sentence of Annex II(6) to provide "reasons" for not accepting information and to provide an "opportunity" to give further information. In consequence, the EC also violated Article 6.8 of the *Anti-Dumping Agreement*.

(b)(ii) *The EC Failed to State the Reasons for Rejection in the Published Determinations*

455. Finally, paragraph 6 provides that if, despite the opportunities given to the parties concerned to provide further information, the parties' information is ultimately rejected, the investigating authority must state the reasons "in any published determinations." However, in this dispute, the Definitive Regulation does not explain why the EC rejected information

[345] *See* para. 407 above.

submitted by Grieg on filleting and finance costs.[346] These issues are simply not mentioned in the Regulation. Accordingly, the EC violated the second sentence of Annex II(6), and Article 6.8 of the *Anti-Dumping Agreement*.

(b)(iii) *Conclusion*

456. The EC failed to inform Grieg of the reasons for not accepting submitted information and it failed to provide an opportunity for Grieg to give further explanations, as required by the first sentence of Annex II(6). Furthermore, in the published determinations, the EC failed to explain the reasons for rejection of Grieg's information on these issues, as required by the second sentence of Annex II(6). As a result, the EC violated Annex II(6) and, therefore, Article 6.8 of the *Anti-Dumping Agreement*.

(iv) Conclusion

457. For the reasons set out above, the EC violated paragraphs 3 and 6 of Annex II to the *Anti-Dumping Agreement* in resorting to facts available for one of the sampled producers. As a result, the EC also violated Article 6.8 of the *Anti-Dumping Agreement*.

E. *The EC Violated Articles 6.8 and 9.4, and Annex II, of the Anti-Dumping Agreement in Determining Margins of Dumping for Non-Sampled Companies*

(i) Introduction

458. As set out in sub-section V.A above, the EC did not calculate an individual margin of dumping for all Norwegian producers and exporters of the investigated product. Instead, pursuant to Article 6.10 of the *Anti-Dumping Agreement*, the EC resorted to sampling, conducting an individual examination of dumping only for those ten companies.[347] The EC then assigned dumping margins to the remaining, non-sampled, Norwegian producers and exporters.[348] In so doing, the EC violated, *first*, Article 9.4 of the *Anti-Dumping Agreement*, because it exceeded the maximum margin allowed for non-sampled companies under that provision; and, *second*, Article 6.8 and Annex II because it resorted to facts available for non-sampled companies without respecting the conditions in those provision.

[346] *See* the Provisional Regulation, the Amendment to the Provisional Regulation and the Definitive Regulation. Exhibits NOR-9, NOR-10 and NOR-11.
[347] *See* Provisional Regulation, para. 17 (confirmed by Definitive Regulation, para. 10) and Definitive Regulation, paras. 29 to 33.
[348] *See* Definitive Regulation, paras. 30 to 32.

(ii) Overview of the EC's Determination

459. The EC attributed different dumping margins to two different groups of non-sampled companies, which it referred to in the Provisional Regulation as "non-sampled companies" and "non-cooperating companies".[349]

460. *First*, with respect to "*non-sampled companies*" that were deemed to have "*co-operated*" in the investigation, the EC stated that it assigned a margin of dumping equal to the "weighted average of the individual dumping margins" determined for sampled producers.[350] For the sake of convenience, Norway refers to these as "Category A" companies.

461. In the *Definitive Disclosure*, the EC found that the weighted average margin attributable to Category A companies was *14.8 percent*.[351] Between the Definitive Disclosure and the Definitive Regulation, the EC revised downwards the individual margins of dumping determined for three sampled producers: (1) PFN's margin was reduced from 24.5 percent in the Definitive Disclosure to 17.7 percent in the Definitive Regulation; (2) Hydroteck's margin was reduced from 21.0 percent to 18.0 percent; and (3) Sinkaberg-Hansen's margin was reduced from 2.9 percent to 2.6 percent.[352] None of the individual margins of dumping increased following the Definitive Disclosure.

462. Given the reductions in individual margins for three sampled producers, the weighted average of the individual margins should also have decreased between the Definitive Disclosure and the Definitive Regulation. However, despite the reductions, the EC did *not* alter the weighted average margin determined for Category A companies. Thus, in the *Definitive Regulation*, the EC again assigned Category A companies a dumping margin of *14.8 percent*, exactly as it had done in the Definitive Disclosure.[353] As a result, in the Definitive Regulation, the EC assigned Category A companies a weighted average margin based on margins from the Definitive Disclosure that the EC had, in the meantime, reduced.

[349] Provisional Regulation, headings 3.6.2 and 3.6.3.
[350] Provisional Regulation, paras. 38 and 39. The list of companies in Article 1(3) of the Provisional Regulation indicates that there are 88 Category A companies.
[351] General Disclosure of 28 October 2005, para. 32. Exhibit NOR-67.
[352] General Disclosure of 28 October 2005, para. 32. Exhibit NOR-67.
[353] Definitive Regulation, para. 32.

463. *Second*, under the heading "*non-cooperating companies*", the EC assigned a dumping of margin of 20.9 percent to an unspecified number of non-sampled companies.[354] The EC referred to this margin as the "residual margin" and stated that it was the "highest dumping margin established for a cooperating company", namely Grieg.[355] The non-sampled companies that received this margin were those that the EC considered "did not cooperate or did not make themselves known".[356] Besides indicating that some companies failed to make themselves known, the EC did not clarify how these companies had failed to cooperate. Norway refers to the non-sampled, non-cooperating companies as Category B companies.

464. The EC stated that in order to calculate the dumping margin for Category B companies, it first established the level of cooperation. For this purpose, the EC relied on data from Eurostat and on "the actual data received from exporting producers in Norway which indicated their willingness to be included in a sample". The EC concluded, on the basis of "information available", that Category B companies did not dump at a level lower than any of the companies in the sample. The EC "consequently" set the dumping margin for Category B companies at 20.9 percent, the level of the highest dumping margin established for a cooperating investigated producer.[357]

(iii) The EC Violated Article 9.4 of the *Anti-Dumping Agreement* in Establishing the Dumping Margin for Non-Sampled Companies

465. In cases where an investigating authority has recourse to sampling, Article 9.4 of the *Anti-Dumping Agreement* provides that:

> … 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,

[354] Definitive Regulation, para. 32.
[355] Provisional Regulation, para. 41 and Definitive Regulation, para. 31.
[356] Provisional Regulation, para. 40 and Definitive Regulation, para. 31
[357] Provisional Regulation, paras. 40 and 41, and Definitive Regulation, para. 31.

> 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 […].

466. Thus, Article 9.4 "identifies a maximum limit, or ceiling,"[358] which investigating authorities *cannot* exceed when setting the all others rate for companies which were not individually examined.

467. Under Article 9.4(i), this ceiling is established on the basis of the margins of dumping determined for the sampled producers: 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.

468. In the present case the EC violated Article 9.4, because in establishing the margin of dumping that it attributed to non-sampled companies, it exceeded the ceiling in Article 9.4. In particular, the EC exceeded this ceiling:

- for Category A companies, by failing to base the weighted average margin of dumping on the individual dumping margins that were established in the Definitive Regulation for the sampled producers;
- for Category A companies, by failing to exclude from the calculation of the weighted average the margin of dumping established for Grieg using facts available; and
- for Category B companies, by assigning to these companies the highest dumping margin established for a sampled company as opposed to the overall weighted average margin.

469. Norway examines these three violations in turn.

(a) *The EC Failed to Base Its Determination of the Weighted Average Dumping Margin for "Cooperating" Non-Sampled Companies on the Definitive Margins of Dumping Determined for the Sampled Producers*

470. The EC violated Article 9.4 of the *Anti-Dumping Agreement* because it failed to determine the weighted average margin of dumping for non-sampled companies in Category A on the basis of the individual margins of dumping established in the Definitive Regulation for the sampled producers.

[358] Appellate Body Report, *US – Hot Rolled Steel*, para. 116.

471. In the Definitive Disclosure, the EC determined a margin of dumping of 14.8 percent for Category A companies. After the Definitive Disclosures, the EC made downward revisions to the individual margins of dumping for three sampled producers.[359] These revisions logically imply a decrease in the weighted average of those three margins, plus the remaining seven unchanged individual margins. However, the EC did not alter the weighted average margin, leaving it at 14.8 percent in the Definitive Regulation. This margin is, therefore, higher than it should be.

472. By failing to determine the weighted average dumping margin for Category A companies on the basis of the individual dumping margins established in the Definitive Regulation, the EC violated Article 9.4 of the *Anti-Dumping Agreement*.

(b) *In Determining the Weighted Average Dumping for "Cooperating" Non-Sampled Companies, the EC Failed to Exclude a Margin Established Using Facts Available*

473. The EC also violated the *proviso* to Article 9.4, which requires that the investigating authority exclude from the weighted average margin of dumping any margins established for sampled producers using facts available. According to the Appellate Body, this part of the *proviso* seeks to prevent companies that "were *not* asked to cooperate in the investigation" from being prejudiced by shortcomings relating to the information provided by investigated companies.[360]

474. In the present case, the EC established Grieg's margin of dumping, in part, on the basis of facts available.[361] Specifically, the EC rejected data provided by Grieg on its filleting and finance costs and, instead, relied on facts available. As a result, the EC was obliged to exclude Grieg's margin from the weighted average margin assigned to Category A companies. Grieg's margin of dumping is 20.9 percent, which is the highest margin determined for an individually examined producer.

475. Despite a request at consultations, the EC has declined to disclose its calculation of the weighted average margin of dumping determined for Category A companies. In the absence of disclosure of the EC's own calculations, Norway has calculated a weighted

[359] *See* para. 461 above.
[360] Appellate Body Report, *US – Hot Rolled Steel*, para. 123.
[361] *See* sub-section V.D above.

average margin that *excludes* Grieg's margin of dumping. Norway also excluded Nordlaks's *de minimis* margin because the *proviso* in Article 9.4 requires its exclusion. Norway further excluded Seafarm Invest from the calculation because the EC failed to calculate an individual margin for this sampled producer and, instead, assigned to it Marine Harvest's margin of 11.2 percent.[362]

476. According to Norway's calculations, the *exclusion* of Grieg's margin reduces to 13.1 percent the weighted average of the relevant individual margins of dumping established in the Definitive Regulation. Even using the incorrect margins of dumping in the Definitive Disclosure for Hydroteck, PFN and Sinkaberg, the weighted average excluding Grieg is 14.1 percent. These average margins are both less than the 14.8 percent assigned to Category A companies in the Definitive Regulation.[363]

477. The EC, therefore, violated Article 9.4 of the *Anti-Dumping Agreement* by including Grieg's margin in the determination of the weighted average margin of dumping assigned to Category A companies.

(c) *The EC Assigned to So-Called "Non-Cooperating" Non-Sampled Companies the Highest Dumping Margin Established for a Sampled Company*

478. Further yet, the EC violated Article 9.4 by attributing to the Category B companies a margin of 20.9 percent, which was the highest dumping margin established for a sampled producers, namely Grieg.[364]

479. Under Article 9.4, the margin attributed to non-sampled companies cannot exceed the weighted average of the dumping margins established for the sampled producers, subject to the exclusion of zero and *de minimis* margins and margins calculated using facts available. In this dispute, the EC determined that a weighted average margin of 14.8 percent. In fact, according to Norway's calculations, the weighted average should be 13.1 percent.[365] In either event, the margin of 20.9 percent assigned to the Category B companies is far in excess of the weighted average permitted under Article 9.4.

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[362] *See* Definitive Disclosure to Seafarm Invest, 28 October 2005, Annex 2. Exhibit NOR-85. Even if Seafarm Invest were *included* in the calculation, the weighted average margin would be lower because Seafarm Invest's assigned margin, at 11.2 percent, is lower than the weighted average of either 13.1 or 14.8 percent.
[363] *See* Table on Weighted Average Margin for Non-Sampled Producers and Exporters. Exhibit NOR-68.
[364] *See* the factual summary in para. 463 above.
[365] *See* para. 476 above.

480. The EC's justification for this higher margin is that the Category B companies failed to cooperate in the investigation. As set forth in more detail in the next sub-section, Norway disputes that the non-sampled companies in Category B failed to cooperate in the investigate. In any event, Article 9.4 does not permit the authority to assign a higher margin to a non-sampled company than the "ceiling" of the weighted average that is set forth in that provision. The text of Article 9.4 sets forth no exception that justifies the EC's determination for these companies.

481. Thus, the EC violated Article 9.4 also by attributing to Category B companies a margin in excess of the ceiling mandated by that provision.

(d) *Conclusion*

482. The EC violated Article 9.4 of the *Anti-Dumping Agreement* in establishing the dumping margin for non-sampled companies. With respect to "cooperating" non-sampled companies, the EC failed to base its determinations of the weighted average dumping margin on the definitive dumping margins determined for the sampled producers (Category A). Furthermore, with respect to these companies, the EC also failed to exclude a margin established using facts available. Finally, the EC incorrectly assigned non-sampled companies that "did not cooperate or did not make themselves known" the highest dumping margin established for a sampled producer (Category B).

(iv) <u>The EC Violated Article 6.8 and Annex II(1) of the *Anti-Dumping Agreement* in Establishing the Dumping Margin for Non-Sampled Companies That Did Not Make Themselves Known</u>

483. As set forth in paragraphs 463 and 464 above, the EC resorted to facts available to establish the margin of dumping for Category B companies. Specifically, on the basis of Eurostat data, the EC concluded that these companies were dumping at the same level as the sampled company with the highest margin. The EC stated that certain of the companies failed to cooperate because they did not make themselves known following initiation and, for other companies, the EC did not explain the nature of the non-cooperation.

484. The EC published the notice of initiation of the investigation in the Official Journal of the European Union. That notice requested that Norwegian producers and exporters make themselves known to the Commission. It also sent that notice, among others, to known

producers and exporters; an association of producers and exporters; and the Government of Norway. Norway understands that the companies in category B did not receive the notice of initiation from the EC nor did they receive any other notice requesting information that the EC required them to produce.

485. Under Article 6.8, an investigating authority is permitted to have recourse to facts available solely when an interested party:

> refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation […].

486. "Necessary information" for purposes of Article 6.8 is "information which is requested by the investigating authority and which is relevant to the determination to be made."[366]

487. Article 6.8 also provides that the conditions in Annex II of the *Anti-Dumping Agreement* must also be respected before an authority resorts to facts available in making determinations. In particular, paragraph 1, insists that the authority "specify in detail the information required from any interested party" and ensure that the interested party be "aware that if the information is not supplied within a reasonable time", the authority may use facts available.

488. In *Mexico – Rice*, a very similar factual situation arose to this dispute.[367] The investigating authority sent a notice of initiation to: certain known exporters; an association of exporters; and the respondent WTO Member. Subsequently, the authority assigned a "residual margin" to other exporters on the grounds that they did not make themselves known to the authority. The residual margin was higher than the weighted average margin of the investigated companies. The exporters subject to the residual margin did not receive any notice from the authority of the information required from them; nor were they made aware that the authority could use facts available if they failed to provide requested information.

[366] Panel report, *US – Hot Rolled Steel*, para. 7.55.
[367] Appellate Body Report, *Mexico – Rice*, para. 235 ff.

489. The Appellate Body ruled that, pursuant to Article 6.8 and Annex II(1), the authority could not apply facts available to the exporters that were not investigated and not notified of the required information.[368]

490. In the present case, the EC did not investigate the non-sampled companies in Category B and it did not provide these companies with any notice of the information that the EC sought from them, as required by Article 6.8 and Annex II(1). Nor did it make the companies "aware" that facts available could be used if they failed to provide requested information.

491. The EC, thereby, violated Article 6.8 and Annex II(1) by resorting to facts available with respect to the Category B companies.[369]

(v) Conclusion

492. The EC violated Articles 6.8 and 9.4, and Annex II, of the *Anti-Dumping Agreement* in determining margins of dumping for non-sampled companies. The EC violated:

- 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 (Category A);

- 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 (Category A);

- 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 (Category B); and,

[368] Appellate Body Report, *Mexico – Rice*, para. 259.
[369] As noted by the Appellate Body in *Mexico –Rice*, "[a]n 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" (Appellate Body Report, *Mexico – Rice*, para. 259).

- 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" (Category B).

F. *Conclusion*

493. In this Section, Norway has demonstrated that the EC's dumping determination violated the *Anti-Dumping Agreement*. In particular, the EC violated:

- Article 6.10 of the *Anti-Dumping Agreement* by failing to examine the largest percentage volume of Norway's exports to the EC

- 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;

- Article 2.2.2 of the *Anti-Dumping Agreement* by improperly rejecting actual data relating to SG&A costs and profits because of the low volume of the sales to which the data pertained;

- Article 6.8, Annex II(3) and Annex II(6) of the *Anti-Dumping Agreement* by using facts available to determine normal value for one sampled producer (Grieg) without respecting the conditions in these provisions; and,

- Articles 6.8 and 9.4, and Annex II(1), of the *Anti-Dumping Agreement* in determining margins of dumping for non-sampled companies.

VI. THE EC'S INJURY DETERMINATION VIOLATED ARTICLE 3 OF THE *ANTI-DUMPING AGREEMENT*

494. Norway challenges the EC's injury determination in three respects. *First*, Norway will argue that the EC violated Articles 3.1 and 3.2, and in consequence, Article 3.5, because it failed to determine correctly the volume of dumped imports from Norway. *Second*, Norway demonstrates that the EC violated Article 3.1 and 3.2, and, inconsequence, Article 3.5, because it did not adequately examine the existence of price undercutting by Norwegian Exports. *Third*, the EC failed objectively to examine price trends affecting EC producers, contrary to Articles 3.1 and 3.4 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*

(i) Introduction

495. Norway requests that the Panel find that the EC violated Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* because, in examining the volume of dumped imports, the EC incorrectly treated *all* imports from Norway as dumped. By so doing, Norway claims that the EC failed to make an "objective examination", on the basis of "positive evidence", of the volume of dumped imports. By consequence, the EC also violated Article 3.5 of the *Anti-Dumping Agreement*.[370]

496. Norway will provide an overview of the relevant EC determinations, before setting forth its claims under Articles 3.1, 3.2, and 3.5 of the *Anti-Dumping Agreement*.

(ii) Overview of the EC's Determination

497. In paragraph 54 of the Provisional Regulation, the EC provided a table showing figures for the "volume of the *imports* from Norway", without stating whether these imports were *dumped* or not. The EC then stated:

> The above table shows that the volume of imports of farmed salmon from Norway increased by 35% during the period considered. The increase was as high as 31% between 2001 and 2003 and it further increased by 3% between 2003 and the IP. In other words, while consumption increased by nearly 80 000 tonnes during the period considered, Norwegian exporters

[370] *See also* Section VII.B describing the obligations under Article 3.5 of the *Anti-Dumping Agreement*.

> were able to increase their sales on the Community market by 93 000 tonnes, which represents more than the total increase of consumption.[371]

498. The EC did not provide any separate statement or analysis of the volume of *dumped* imports. In the Definitive Regulation, the EC merely "confirmed" these provisional findings, without adding any further figures or reasoning.[372]

499. In view of the EC's explanation, Norway assumes that the EC treated all imports from Norway as dumped. This view is supported by paragraph 59 of the Provisional Regulation, which refers to "the surge of *dumped* imports on the Community market evidenced in [paragraph 54]". As noted, in paragraph 54, the EC provides figures for the *totality* of imports from Norway. Thus, when referring to the "surge of dumped imports", the EC referred to a figure reflecting *all* imports from Norway. Accordingly, the EC treated all imports by both sampled and non-sampled companies as dumped. Moreover, in making its causation determination, the EC relied "in particular" on its finding that all imports from Norway were dumped.[373]

(iii) The EC Improperly Treated All Imports From Norway as Dumped

500. Before describing the EC's violation of Articles 3.1, 3.2, and 3.5 of the *Anti-Dumping Agreement*, Norway reviews the EC's obligations under these provisions.

(a) *The EC's Obligations Under Articles 3.1, 3.2, and 3.5 of the Anti-Dumping Agreement*

501. The *Anti-Dumping Agreement* establishes a strict discipline on an investigating authority's injury determination, including its examination of the volume of dumped imports. The key provision in this respect is Article 3.1, which 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*. (footnote omitted, emphasis added)

[371] Provisional Regulation, para. 55.
[372] Definitive Regulation, para. 54
[373] Provisional Regulation, paras. 92 and 93, as confirmed by the Definitive Regulation, para. 99.

502. In *Thailand – H-Beams*, the Appellate Body characterized Article 3.1 as an "overarching provision" regarding the Member's "fundamental, substantive obligation" concerning the determination of injury.[374]

503. With respect to the term "positive evidence", the Appellate Body in *US – Hot-Rolled Steel* defined that term to refer to evidence that is "affirmative", "objective", "verifiable", and "credible".[375] As regards an "objective examination", the Appellate Body stated that the term "objective" indicates that the examination "must conform to the dictates of the basic principles of good faith and fundamental fairness".[376] The Appellate Body also ruled that an "objective examination" requires the authorities to reach a result that is "*unbiased, even-handed*, and *fair*."[377] In *US – Hot-Rolled Steel*, the Appellate Body found that it would not be "even-handed" for investigating authorities:

> … to conduct their investigation in such a way that it becomes *more likely* that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured.[378]

504. In that appeal, the Appellate Body opined that fairness precludes an investigating authority from "*favouring the interests* of any interested party, or group of interested parties, in the investigation."[379]

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

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[374] Appellate Body Report, *Thailand – H-Beams*, para. 106.
[375] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.
[376] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193 (footnote omitted).
[377] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 133 (emphasis in original).
[378] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196 (emphasis added).
[379] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193 (emphasis added).

(b) *The EC Had No Positive Evidence to Determine that All Imports from Norway Were Dumped*

506. The EC lacked "positive evidence" for its conclusion that *all* imports from Norway were dumped. There are two reasons for this: *first*, the EC's determination that imports from *sampled producers* were dumped did not provide positive evidence that imports from *non-sampled independent exporters* were also dumped; and *second*, the EC failed to take into account the fact that imports from one sampled company, Nordlaks, were not dumped. Norway examines these issues separately.

(b)(i) *The EC Had No Evidence that Imports from Independent Exporters Were Dumped*

507. By treating all imports from Norway as dumped, the EC *assumed* that imports from non-sampled companies were all dumped. In fact, the EC even assigned a dumping margin to cooperating non-sampled companies of 14.8 percent, equal to the weighted average margin of the sampled producers.[380] Thus, imports from all non-sampled companies were treated as dumped because imports from the majority of the sampled producers were determined to be dumped.

508. Norway claims that, in the circumstances of this investigation, the dumping determinations made with respect to the sampled *producers* did not provide "positive evidence" that imports from non-sampled *exporters* were also dumped. In this investigation, the EC could not simply extend conclusions reached regarding sampled producers to non-sampled exporters. Because the EC did precisely this, it failed to make an "objective examination", on the basis of "positive evidence", of the volume of dumped imports from non-sampled companies.

509. Norway recalls that, in *EC – Bed Linen (21.5 – India)*, the Appellate Body ruled that, in certain circumstances, an authority that has examined a sample of producers or exporters may extrapolate from its conclusion regarding the sampled producers when it determines the volume of dumped imports of non-sampled companies.[381]

510. The Appellate Body's reasoning in *EC – Bed Linen (21.5 – India)* shows that the extent to which determinations regarding sampled producers can be extended to non-sampled

[380] Definitive Regulation, para. 32.
[381] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 137.

companies depends, among others, on the composition of the sample. The Appellate Body stated that, where a sample is based on the largest volume of exports – as in this dispute[382] – "*we do not exclude the possibility*" that evidence regarding dumping by the sampled producers and exporters could be used to draw conclusions regarding dumped imports from the non-sampled companies.[383] The Appellate Body's heavily qualified formulation recognizes that, in some circumstances, it might well *not* be "possible" to extrapolate from sampled producers to non-sampled companies.

511. This conclusion is in keeping with the fact that the relevance for non-sampled companies of conclusions reached regarding sampled producers must take into account the composition of the sample, and the differences between the sampled and the non-sampled companies. In sum, the authority must have an objective basis for assuming that evidence regarding dumping by sampled producers applies equally to non-sampled companies.

512. In this dispute, the EC's dumping determinations regarding sampled *producers* do not provide "positive evidence" that imports from non-sampled *exporters* are also dumped. The reason is that the EC's sample consisted exclusively of *producers* of salmon, to the deliberate exclusion of independent *exporters* of salmon.[384] Specifically, the EC itself acknowledged that the sample consisted of six producers that do not themselves export salmon and four integrated producer-exporters.[385]

513. However, as explained in Section V.A on sampling, the Norwegian salmon industry includes a third major category of companies: independent traders that do not produce salmon but purchase it for sale on domestic and export markets.[386] Independent exporters are a key constituent of the Norwegian salmon industry, with very considerable exports from Norway to the EC. Norway claims in Section V.A that the EC was obliged to include exporters in the sample of investigated Norwegian companies.

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[382] Norway recalls its claim, in Section V.A, that the composition of the EC's sample violated Article 6.10 of the *Anti-Dumping Agreement*, because the EC was not permitted to exclude independent exporters from its sample and because it did not include in the sample the largest percentage of the volume of exports.
[383] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 138.
[384] *See* Section V.A above.
[385] *See* letter from the EC to FHL and NSL, 22 November 2004. Exhibit NOR-39.
[386] *See* para. 297 above and the references therein, for instance, Regulation (EC) No. 1890/1997, para. 12 and Termination Regulation, para. 35. Exhibits NOR-2 and NOR-5.

514. In paragraph 300, Norway explained that due to differences in the business activities of producers and exporters, the cost structure and pricing behavior of these two segments of the industry is different. The exporters do not incur farming costs but, instead, incur costs by purchasing salmon from different producers. Because exporters focus on selling high volumes, they are also likely to have different SG&A costs and profit margins. Independent exporters are also known for their low costs.[387] As a result, dumping determinations made with respect to *producers* do not provide a valid basis for concluding that imports from *exporters* are also dumped.

515. In paragraphs 301 - 305, Norway also explained that in anti-dumping investigations of farmed salmon in 1997 and 2003, the EC recognized the "strict distinction" between the "activities" of producers and exporters "from an operational point of view".[388] It also acknowledged that they "are subject to distinct legal and financial requirements and often defend divergent business interests".[389] As a result, it concluded these separate segments of the Norwegian salmon industry that required separate investigation.[390]

516. As recently as September 2003, the EC created separate samples of Norwegian "farmers" and Norwegian "traders" in an anti-dumping investigation of Norwegian large rainbow trout. Among others, the EC found that:

> Exporters generally act independently of the producers in that the prices at which they sell the product concerned do not systematically bear a direct relationship to the costs incurred by the producers in the farming of large rainbow trout.[391]

517. Even in this investigation, the EC recognized that "most Norwegian producers of farmed salmon sold the product concerned to the Community via traders".[392] Thus, the *EC itself* has recognized that producers and exporters constitute distinct segments of the Norwegian industry, with different activities, costs and pricing behavior. Moreover, until this investigation, the EC has always concluded that these differences require separate investigation.

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[387] FHL memorandum, 11 April 2005, in FHL letter to the Commission, 13 April 2005. Exhibit NOR-48.
[388] Regulation (EC) No. 1890/1997, paras. 12 and 13. Exhibit NOR-2. *See also* Termination Regulation, para. 35. Exhibit NOR-5.
[389] Regulation (EC) No. 1890/1997, para. 13. Exhibit NOR-2.
[390] Regulation (EC) No. 1890/1997, para. 4. Exhibit NOR-2.
[391] Regulation (EC) No. 1628/2003, paras. 14 and 15. Exhibit NOR-50.
[392] Provisional Regulation, para. 15.

518. Yet, in this investigation, despite Norwegian requests, the EC refused to include non-producing exporters in the sample.[393] Instead of examining whether *exporters* were indeed dumping, the EC *assumed* that they were because imports from certain *producers* were found to be dumped. However, given the differences between producers and exporters – which have been recognized by the EC – there was no valid basis for this assumption.

519. In that regard, Norway notes that, although the EC contended that "it was possible to arrive at both a normal value and an export price at the level of the producer", it did not do so.[394] In fact, because several producers did not export to the EC, the EC relied on the export prices of the unrelated exporter that exported their produce. Thus, the EC compared a *producer's* normal value – based on the producer's costs of production – with an *exporter's* export prices. Yet, the EC refused to use the exporter's own normal value – and different costs of production – for this comparison.

520. Accordingly, in the circumstances of this investigation, the EC's evidence and determinations that the sampled *producers* were dumping did not constitute "affirmative", "objective", "verifiable", and "credible" evidence that independent *exporters* were also dumping.[395] There is no valid basis for the mechanistic extension to exporters of conclusions reached about producers given the significant differences between them. Rather, absent individual examination of exporters, there was no "positive evidence" that imports from exporters were dumped.

521. The assumption that all imports from exporters were dumped also lacked "objectivity", under Article 3.1. To recall, imports from independent exporters amounted to a full 55 percent of all imports from Norway during the IP. By assuming that all of these exports were dumped, the EC made it more likely that it would find that dumped imports had injured the EC domestic industry, thereby favoring the interests of EC producers. This also prejudiced, in particular, the interests of exporters who are now subject to anti-dumping measures, even though none of them was ever found to be dumping on the basis of positive evidence.

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[393] Provisional Regulation, paras. 15 and 17. *See* Letter from FHL to the Commission, 24 November 2004. Exhibit NOR-47.
[394] Definitive Regulation, para. 15.
[395] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

522. The EC could easily have secured "positive evidence" with respect to independent exporters by including them in the sample. Indeed, as set forth in Section V.A, if the EC had complied with its obligations under Article 6.10 of the *Anti-Dumping Agreement*, it would have included exporters in the sample. First, if the sample had been "statistically valid", it would have included independent exporters because they account for 55 percent of trade with the EC; and, second, if the sample had covered the Norwegian companies with the largest volume of exports, it would have included the six independent exporters that are among the top ten Norwegian exporters.

(b)(ii) *The EC Treated All Imports as Dumped Even Though It Found That One Company in the Sample Was Not Dumping*

523. Another flaw permeates the EC's conclusion that all imports from Norway were dumped. The EC examined a sample of ten producers and found that nine were dumping. For one producer, Nordlaks, the EC found a *de minimis* dumping margin. Thus, the EC was bound to treat the imports from that company as non-dumped. However, as set forth in paragraphs 497 to 499, in the Definitive Regulation the EC provided figures and reasoning to the effect that *all* imports from Norway were dumped. The EC did not state anywhere in the Definitive Regulation that it had *subtracted* from the total volume of Norwegian imports the quantity of imports attributable to Nordlaks. The Definitive Regulation, therefore, improperly overstated the volume of dumped imports.

524. The EC then compounded its mistake when it extrapolated from the sampled to the non-sampled companies. To recall, despite the fact that less than 100 percent of imports from sampled producers were dumped, the EC treated *all* imports from non-sampled companies as dumped. There is not a shred of evidence to support the EC's conclusion that 100 percent of imports from non-sampled companies were dumped. By making this assumption, in the absence of "positive evidence", the EC has failed to make an "objective examination" of the volume of dumped imports.

525. As a consequence of the EC's improper examination of the volume of dumped imports, the EC also violated Article 3.5 of the *Anti-Dumping Agreement* in its causation determination.[396] This is because, in finding that imports from Norway were causing

[396] See also Section VII.B describing the obligations under Article 3.5 of the *Anti-Dumping Agreement*.

material injury to the domestic industry, the EC relied "in particular" on its finding that all imports from Norway were dumped.[397]

(iv) Conclusion

526. The EC violated Articles 3.1, 3.2, and 3.5 of the *Anti-Dumping Agreement* because it treated all imports from Norway as dumped for purposes of its injury and causation determination. This conclusion is not based on "positive evidence" or an "objective examination" because:

- the EC assumed that its determinations regarding sampled producers could be mechanistically extended to non-sampled independent exporters, without positive evidence that imports from these exporters are dumped; and,
- the EC failed to exclude from the volume of dumped imports: (1) the quantities imported from Nordlaks and (2) a portion of imports from non-sampled companies equal to Nordlaks' share of the sampled producers' imports.

B. *The EC Violated Articles 3.1, 3.2 and 3.5 of the Anti-Dumping Agreement in its Examination of Price Undercutting*

(i) Introduction

527. The EC failed objectively to examine the undercutting effect of the dumped imports on the prices of EC salmon products, as required by Articles 3.1 and 3.2 of the *Anti-Dumping Agreement*. By consequence, the EC violated also Article 3.5 of the *Anti-Dumping Agreement*.[398] In particular, in the Definitive Regulation, the EC failed to address the fact that EC producers enjoy a considerable price premium over the prices of imported Norwegian salmon.

528. 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 percent.[399] The EC also found that dumped imports had undercut the price of the domestic products by 12 percent. Therefore, the price difference established between the imported and domestic products simply reflects the usual price premium enjoyed by domestic products. By failing to examine the 12 percent price premium in the Definitive Regulation, and simply relying on

[397] Provisional Regulation, paras. 92 and 93, as confirmed by the Definitive Regulation, para. 99.
[398] *See also* Section VII.B describing the obligations under Article 3.5 of the *Anti-Dumping Agreement*.
[399] General Disclosure, para. 122. Exhibit NOR-67.

price undercutting of 12 percent, the EC has failed to conduct an objective examination of the "effect" of dumped imports on prices in the EC market. The EC has failed to consider whether there is significant price undercutting, as required by Article 3.2, because it did not account for the usual price premium.

529. Norway will describe the pertinent parts of the EC's determination and then set forth the EC's violations of Articles 3.1, 3.2, and 3.5 of the *Anti-Dumping Agreement*.

(ii) Overview of the EC's Determination

530. In the Definitive Regulation, the EC concluded that the "average undercutting margin, when expressed as a percentage of the Community industry's prices, was established at around 12 %, i.e. there was, as at the provisional stage, substantial undercutting."[400]

531. In the (definitive) General Disclosure, which mirrors almost exactly the Definitive Regulation,[401] the EC also stated that the level of price undercutting was 12 percent.[402] However, in addition, it stated:

> At the definitive stage, it has also been found that *the Community industry can sell at a certain price premium by comparison to Norwegian products, up to a maximum of 12%*. Therefore, it was considered that *this price premium should be taken into account when establishing the injury margin*. In this respect, the level of the minimum import price has been based on the findings and methodology as set out here above.[403]
> (emphasis added)

532. In other words, the EC found in one part of the General Disclosure that domestic products enjoyed a price premium of 12 percent over imported products and, in another part of the Disclosure, it found that imports undercut the price of domestic product by 12 percent. Thus, the difference in prices between imported and domestic products *equals* the usual price premium enjoyed by domestic salmon products. The contradiction in the General Disclosure between the 12 percent price undercutting and the 12 percent price premium was pointed out to the EC by the FHL, which argued that "the average actual undercutting should be 0%".[404]

[400] Definitive Regulation, para. 57.
[401] The General Disclosure document is simply a draft of the Definitive Regulation.
[402] General Disclosure, para. 57. Exhibit NOR-67.
[403] General Disclosure, para. 122. Exhibit NOR-67.
[404] FHL and NSL's Comments on the Definitive Disclosure, 8 November 2005, para. 38. Exhibit NOR-49.

533. Strikingly, one of the very few differences between the General Disclosure and the Definitive Regulation is that the above-quoted passage regarding the price premium disappeared. It does not feature in the Definitive Regulation; nor is there any other reference to the usual price premium. In contrast, the finding on the level of price undercutting remained unchanged. Thus, the EC response to the arguments of FHL was simply to delete the reference to 12 percent price undercutting and not examine this factor at all.

534. In addition to the finding in the Definitive Disclosure, several interested parties submitted that EC salmon products enjoy a price premium over imported products. For instance, an EC processing company, Aqua Group Laschinger, submitted:

> The market for European salmon is limited *because it is placed in the premium segment*.[405] (emphasis added)

and,

> European salmon is used for the *premium product range*.[406] (emphasis added)

535. SIF France, another EC processor, stated:

> Due to more production efficiency in Norway the products from Norwegian origin salmon can be used for less expensive products where *no premium is added for origin*. The fact that the *Norwegian salmon is cheaper than Scottish or Irish salmon* has made it possible to maintain the image that the *more expensive Scottish and Irish salmon* is better quality.[407] (emphasis added)

536. Loch Duart, a Scottish producer, stated with respect to the Label Rouge label under which its salmon products are sold:

> The Label Rouge brand can sustain a 10-15% premium …[408]

and,

> Loch Duart produces salmon which is different from the standard Norwegian salmon … These are clear points of difference to the consumer

[405] Letter from Laschinger to the EC, 20 May 2005, page 3. Exhibit NOR-70.
[406] Letter from Laschinger to the EC, 20 May 2005, page 6. Exhibit NOR-70.
[407] Questionnaire reply from SIF France, date uncertain, Section E 3, page 12. Exhibit NOR-71.
[408] Questionnaire reply from Loch Duart, 20 December 2004, Section K.1b-5. Exhibit NOR-15.

> which lead to a better tasting salmon *commanding a higher sales value*.[409] (emphasis added)

537. Finally, another EC producer, Orkney Sea Farms, stated:

> We sell salmon of the highest quality and therefore *are able to command a premium for the product*.[410] (emphasis added)

538. Thus, as the EC's findings in the General Disclosure suggest, the record of the investigation shows that EC salmon products command a price premium over imported Norwegian salmon products.

(iii) The EC Failed to Examine Objectively Price Undercutting

539. The EC violated Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* because it did not conduct an "objective examination" based on "positive evidence" of whether there was significant price undercutting by the imported products. Specifically, in the Definitive Regulation, the EC failed to take into account the usual price premium enjoyed by EC salmon products in examining the price difference between domestic and imported products. By so doing, the EC overlooked the fact that, in the EC's Definitive Disclosure, the usual price premium equaled the alleged price undercutting.

540. Norway summarizes, first, the EC's obligations under Articles 3.1 and 3.2 of the *Anti-Dumping Agreement*. In paragraphs 501 to 504, Norway sets out the general requirements governing an injury determination, namely, the duty to make determinations on the basis of "positive evidence" and an "objective examination". To recall, an "objective examination" must be conducted "without favouring the interests of any interested party";[411] and it must be "even-handed" and "fair", and not make an injury determination "more likely".[412] It must also yield an "accurate and unbiased picture" of the domestic industry.[413]

541. With respect to price undercutting, Article 3.1 provides that the investigating authority must examine "the effect of the dumped imports on prices" of the like domestic product. Article 3.2 adds that the authority must consider whether there was "significant

[409] Questionnaire reply from Loch Duart, 20 December 2004, Section B-5. Exhibit NOR-15.
[410] Questionnaire reply from Orkney Sea Farms, 1 December 2004, Section "F2 Price Setting". Exhibit NOR-72.
[411] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[412] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.
[413] Appellate Body Report, *Mexico – Rice*, paras. 180 and 181.

price undercutting" by the dumped imports. Thus, the authority must compare the prices of imported and domestic products to establish whether the "effect" of the dumped imports is significant price undercutting.

542. 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. The price difference could be explained by some other factor, such as a price premium enjoyed by domestic products. In that case, the "effect" of the dumped imports is not "significant price undercutting".

543. The examination of price undercutting cannot, therefore, be a mechanistic comparison to ascertain whether imports have lower prices than domestic products. Instead, if there is a price difference, the authority must examine any evidence that the difference is explained by factors, other than dumped imports, that affect price comparability.

544. In *EC – Tube or Pipe*, the panel considered that, in examining price undercutting under Article 3.2, an investigating authority must take into account factors, such as "differences in costs" of production or "market perception" of consumers, that affect the price relationship between domestic and imported products.[414]

545. Contextual support for this interpretation of Article 3.2 of the *Anti-Dumping Agreement* can be found in Article 6.5 of the *SCM Agreement*. That provision states in relevant part:

> For the purpose of paragraph 3(c), *price undercutting* shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, *due account being taken of any other factor affecting price comparability*. (emphasis added)

546. Thus, Article 6.5 of the *SCM Agreement* stipulates that investigating authorities examining price undercutting must examine any factors that affect price comparability. In *Indonesia – Autos*, in examining price undercutting under the *SCM Agreement*, the panel analyzed physical differences between the domestic and imported products that could affect

[414] Panel report, *EC – Tube or Pipe*, para. 7.293.

prices. The panel also considered that due allowance must, in principle, be made for non-physical differences, such as brand image.[415]

547. In sum, in conducting an examination of price undercutting under Articles 3.1 and 3.2 of the *Anti-Dumping Agreement*, an investigating authority must take into account any factors that affect the comparability of imported and domestic prices. Under these provisions, if imported products have generally lower prices than domestic products, for example because of consumer perceptions, the authority must take into account that factor.

548. In this dispute, the EC found that the average margin of undercutting during the period of investigation was 12 percent. However, interested parties, including EC producers and processors, submitted that EC salmon products command a price premium over Norwegian imports due to consumer perceptions. Significantly, in the General Disclosure, the EC found that EC products enjoy a 12 percent price premium over imported products.[416] Thus, the price undercutting found in the Definitive Regulation *equals* the usual price premium set forth in the General Disclosure. In terms of these figures, Norwegian salmon products entered the EC market, during the IP, at a price that was fully consistent with the usual price difference between domestic and imported products. However, in the Definitive Regulation, the EC eliminated the reference to the 12 percent price premium, and wholly failed to examine the significance of the price premium.

549. The EC's examination of price undercutting, therefore, fails to give an "accurate and unbiased picture" of the price relationship between domestic and imported products.[417] The EC concludes that the 12 percent price differential between domestic and imported products involves price undercutting by the dumped imports. However, in making this finding, the EC ignores a known factor that explains this price differential through the price premium enjoyed

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[415] The panel stated:

> [W]hile the record clearly demonstrates the existence of *differences in physical characteristics between the models in question*, Indonesia has presented little if any evidentiary support for their proposition concerning non-physical differences (such as brand image or after-sales service) between the models. … *[T]he record does not show that there are any significant non-physical differences for which due allowance must be made*, much less any differences that could account for the extent of the differences in price between the [various car models at issue].
>
> (Panel report, *Indonesia – Autos*, para. 14.253.)

[416] General Disclosure, para. 122. Exhibit NOR-67.

[417] Appellate Body Report, *Mexico – Rice*, paras. 180-181.

by domestic products. As a result, the "evidence" of 12 percent price undercutting is not in the least "credible". Further, by ignoring the usual price premium, the EC favored the interests of EC producers, prejudiced Norwegian producers, and made an injury determination "more likely".[418]

550. In short, deleting factual findings contained in the General Disclosure, and ignoring evidence in the record, does not constitute an "objective examination" of price undercutting that is "fair" and "even-handed" with respect to all interested parties.

551. As a consequence of the EC's inadequate examination of price undercutting, the EC also violated Article 3.5 of the *Anti-Dumping Agreement* in its causation determination.[419] This is because, in finding that imports from Norway were causing material injury to the domestic industry, the EC relied on its finding of significant price undercutting.[420]

(iv) Conclusion

552. For these reasons, by failing to examine the price premium that domestic salmon products command over imported products, the EC improperly examined the "effect of the dumped imports on prices" of EC salmon products and improperly concluded that there was "significant price undercutting". As a result, the EC improperly examined the effect of dumped imports on the EC domestic industry under Article 3.5. The EC, thereby, violated Articles 3.1, 3.2, and 3.5 of the *Anti-Dumping Agreement* .

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*

(i) Introduction

553. Norway submits that the EC violated Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* because, in making its injury determination, the EC failed properly to evaluate price trends as "relevant economic factors" that were "having a bearing on the state of the industry".

554. The EC's failure in this regard resulted from the fact that it examined the prices of the EC domestic industry in euros and not pounds sterling, which was the operating currency of

[418] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[419] *See also* Section VII.B describing the obligations under Article 3.5 of the *Anti-Dumping Agreement*.
[420] Provisional Regulation, para. 93, as confirmed by Definitive Regulation, para. 99.

the Scottish companies that were investigated. As a result, the pricing data relied on by the EC suggested that the EC industry's prices declined when, in fact, in pounds sterling they remained stable. The EC, therefore, failed to conduct an "objective examination" of "positive evidence" relating to the prices affecting the domestic industry, in violation of Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*.

(ii) Overview of the EC's Determination

555. As part of the injury determination, the EC assessed the evolution of the EC industry's prices at the level of a sample of five Scottish companies, all of which have their operations in Scotland and keep their accounts in pounds sterling.[421] The EC concluded that:

> …[i]n the period 2001 to the IP *the Community industry's average sales prices decreased by 9%*. The main price decrease occurred between 2002 and 2003.[422] (emphasis added)

556. The EC stated the average sales prices in euros and the 9 percent decline in those prices was a measure of the fall in prices in that currency.

557. The EC acknowledged that numerous "injury indicators" showed positive trends during the period considered, including: production, production capacity, sales volume, employment, productivity, stocks and investments.[423] Nevertheless, the EC concluded that these positive trends were offset by a number of negative trends in other indicators, of which the decrease in average sales prices was an important one.[424]

558. The EC used the 9 percent decline in prices to contend that an increase in the sales volume – usually a positive factor for an industry – was, in fact, a negative development. According to the EC, the concurrent increase in the EC industry's sales volumes magnified the effect of the perceived drop in unit sales prices, which "led to a significant fall in profitability."[425]

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[421] Provisional Regulation , para. 72. Definitive Regulation, para. 65 and Table 2. The five companies are: Hoove Salmon, Loch Duart, Orkney Sea Farms, West Minch Salmon and Wester Ross Salmon.
[422] Definitive Regulation, para. 68.
[423] Definitive Regulation, paras. 61 to 63, 65, 66, 74 (and Provisional Regulation, para. 80) and 76 (and Provisional Regulation, paras. 68 and 78).
[424] Definitive Regulation, para. 78. Those other indicators displaying negative trends were, for instance, market share, profitability, and employment.
[425] Definitive Regulation, para. 80.

(iii) The EC Failed Objectively to Evaluate Price Trends

559. Norway recalls, briefly, the EC's obligations under Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*. As set out in paragraphs 501 to 504, Article 3.1 requires an investigating authority to make "an objective examination" of the domestic industry on the basis of "positive evidence", that is evidence that is "affirmative", "objective", "verifiable" and "credible."[426] The panel in *Mexico – Rice* held that "positive evidence is in the first place evidence which is *material to the case at hand*, in other words it is to be *relevant and pertinent with respect to the issue to be decided*."[427] An "objective examination" is "*unbiased*, *even-handed*, and *fair*."[428] An investigating authority cannot "favour[] the interests of any interested party" nor make an injury determination "more likely".[429] An injury examination must also yield an "accurate and unbiased picture" of the domestic industry.[430]

560. Article 3.4 requires an investigating authority to evaluate "all relevant economic factors and indices having a bearing on the state of the industry". In *Thailand – H-Beams*, the Appellate Body held that the investigating authority must evaluate all of the 15 factors listed in Article 3.4.[431] In addition, because the list is not exhaustive, the authority must also evaluate any other relevant factors bearing on the industry.

561. Turning to the facts of this case, Norway notes that, consistently with Article 3.4, the EC evaluated trends in the EC industry's prices. Article 3.4 expressly requires the authority to examine "factors affecting domestic prices". Moreover, Article 3.1 requires an examination of the "effect" of dumped imports on "prices in the domestic market".

562. An examination of the domestic industry's prices could, in theory, be conducted in any currency. However, as the panel in *Mexico – Rice* stated, the evidence examined must be "material", "relevant and pertinent to the issue to be decided".[432] In order to examine the

[426] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.
[427] Panel report, *Mexico – Rice*, para. 7.55 (emphasis added). The Appellate Body agreed with this statement. Appellate Body Report, *Mexico – Rice*, para. 165.
[428] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 133 (emphasis in original).
[429] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 193 and 196 (emphasis added).
[430] Appellate Body Report, *Mexico – Rice*, paras. 180-181.
[431] Panel report, *Thailand – H-Beams)*, paras. 7.216-7.256, as upheld in the Appellate Body report, *Thailand – H-Beams*, para. 125.
[432] Panel report, *Mexico – Rice*, para. 7.55 (emphasis added). The Appellate Body agreed with this statement. Appellate Body Report, *Mexico – Rice*, para. 165.

impact of price developments on the state of domestic producers, an authority must examine prices in the operating currency of those producers. This currency is "material" to their economic situation and is, therefore, relevant and pertinent to the issue.

563. In this investigation, the EC industry is overwhelmingly dominated by Scottish producers. The EC chose, therefore, to evaluate prices at the level of a sample of five Scottish companies. The EC was required to evaluate the evidence from the perspective of these Scottish companies. All five Scottish producers had the entirety of their operations in Scotland. These companies incur most, if not all, of their costs – for example, for labor, feed, veterinary costs and utilities – in pounds sterling. All five companies keep their accounts in pounds sterling. They report revenues, costs, and the consequent profits and losses in that currency.[433] Their share capital is denominated in pounds sterling and they, therefore, make returns to shareholders in that currency. Moreover, more than 70 percent of the companies' sales are made in the United Kingdom and denominated in pounds sterling. Even for sales that are not denominated in pounds sterling, the material currency for examining price trends is pounds sterling because the companies must meet their costs and make shareholder returns in that currency. Thus, for the Scottish companies, prices trends in pounds sterling are, therefore, "material" to their financial performance and overall economic situation.[434]

564. To recall, the EC concluded that the sampled producers' prices declined by 9 percent in euros during the period considered. However, when prices trends are examined in pounds sterling, a totally different picture emerges. The average unit price of the five sampled Scottish producers was £1.88 in 2001 and was £1.88 during the IP. Thus, instead of a decline in prices, prices remained constant. The reason that different results were obtained by the EC when using euros is that the euro appreciated by approximately 9 percent relative to the pound sterling from 2001 to the IP.[435] The EC never mentioned this fact.

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[433] *See* the 2003 and, in some cases, 2004 financial statements for the five sampled Scottish companies, obtained from the Companies House, Edinburgh, Scotland. Exhibit NOR-73.

[434] Norway notes that, although the EC producers were requested by the EC to provide data in their operating currency, Loch Duart and Wester Ross Salmon reported their data in Euros. West Minch did not indicate expressly whether it was reporting its data in pounds sterling or in Euros; however, the questionnaire reply as a whole suggests that data was reported in pounds sterling.

[435] This means that, for that period, a constant price expressed in pounds sterling would convert to a euro price that was 9 percent lower in the IP than it was in 2001. Thus, the price of £1.88 converted into €3.03 in 2001, whereas in the IP, the same pound sterling price translated to just €2.77.

565. Examining the sampled producers' prices for the entire period considered with the pound sterling/euro exchange rate used by the EC shows the following:

Table 5: Evolution of EC Industry's Sales Prices

	2001	**2002**	**2003**	**IP**
Average unit sales prices €/kg[436]	**€3.03**	€3.00	€2.64	**€2.77**
Average unit sales prices £/kg	**£1.88**	£1.89	£1.83	**£1.88**
Exchange rates EUR to GBP[437]	**0.622**	0.629	0.692	**0.679**

566. In other words, in pounds sterling, the five Scottish producers received the *same* average price during the IP as they did in 2001; they did not experience a drop in prices in their operating currency. As a result, irrespective of prices in euros: the sampled producers' per unit revenues did not suffer because of price declines; nor did price declines impair the companies' ability to meet their costs of production; and, finally, price declines did not contribute to losses in the companies' operating currency.

567. The EC's use of euros, therefore, gave an inaccurate picture of price trends that masked the fact that, from the perspective of the sampled producers, prices were constant. This distortion was pointed out to the EC by the FHL, which explained that the EC's analysis of prices was vitiated by the use of the wrong currency.[438] FHL even provided the EC with a table showing exactly the same price developments in pounds sterling that are shown in the table in paragraph 565. FHL asserted bluntly that:

> … the use of EUR is equal to introducing a random external factor that in this case is *truly distorting the results*.[439] (emphasis added)

568. The EC chose to ignore those comments and, in the Definitive Regulation, persisted in using euros. In its examination, the EC never acknowledged that the sampled producers suffered no price declines in their operating currency.

[436] Definitive Regulation, Recital 65, Table 2.
[437] Questionnaire for producers in the European Community, Annex III, "Exchange Rate Table". Exhibit NOR-74.
[438] FHL and NSL's Comments on the Definitive Disclosure, 8 November 2005, paras. 43 ff. Exhibit NOR-49.
[439] FHL and NSL's Comments on the Definitive Disclosure, 8 November 2005, para. 43. Exhibit NOR-49.

569. The EC's evaluation of price trends is misleading because it artificially created a price decrease of 9 percent that the sampled producers never actually experienced. From the perspective of the sampled producers, the evidence was not material, relevant or pertinent to their situation. Nor did it provide an "affirmative", "objective" and "credible" picture of their financial performance.[440] By suggesting that there were price declines when there were none, the EC's examination also made an injury determination "more likely".[441] In sum, the examination is not "unbiased, even-handed, and fair."[442]

570. The distorted character of the evaluation of price trends also influenced the EC's evaluation of other factors. In evaluating sales volumes, the EC acknowledged that the sampled producers had enjoyed increased sales.[443] However, as noted in paragraph 558, the purported price decline was used to turn the industry's increased sales volumes from a positive development into a negative one. The EC found that, because of declining unit prices, the increased sales volumes contributed to larger losses. However, because the EC's underlying premise regarding declining prices was wrong, its evaluation of increased sales volumes was also vitiated.

571. Finally, Norway notes that, because unit sales prices were constant in pounds sterling and because sales volumes increased, the sampled producers' revenues must have increased during the period considered. 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. Norway returns to this issue in Section VII in its claims on causation under Article 3.5.

(iv) Conclusion

572. By failing to examine the price trends of the EC industry in the operating currency of the investigated companies, the EC failed:

- to evaluate properly relevant economic factors and indices having a bearing on the state of the industry, as required by Article 3.4 of the *Anti-Dumping Agreement*; and

[440] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.
[441] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196 (emphasis added).
[442] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 133 (emphasis in original).
[443] Definitive Regulation, para. 66.

- to make an objective examination of injury on the basis of positive evidence, as required by Article 3.1 of that *Agreement*.

D. *Conclusion*

573. For these reasons, the EC's injury determination violated the *Anti-Dumping Agreement*. In particular, the EC failed properly to:

- determine the volume of dumped imports in violation of Articles 3.1 and 3.2 and, in consequence, Article 3.5;
- examine price undercutting in violation of Articles 3.1 and 3.2 and, in consequence, Article 3.5;
- evaluate objectively price trends affecting EC producers, in violation of Articles 3.1 and 3.4.

VII. 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

A. *Introduction*

Norway claims that the EC violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* in its determination that "there is a causal link between the dumped imports and the material injury suffered by the Community industry".[444] Norway claims that the EC failed to ensure that injury caused by factors other than dumped imports was not improperly attributed to dumped imports. Specifically, Norway argues that the EC failed to conduct a proper assessment of the injury caused to the domestic industry by two factors other than dumped imports:

- increases in the EC industry's costs of production; and,
- imports of salmon from the U.S. and Canada.

574. Before examining these issues in turn, Norway reviews the EC's obligations under Article 3.5, which are relevant to both issues.

B. *The EC's Obligations Under Article 3.5 of the Anti-Dumping Agreement*

575. 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.[445] In establishing the existence of this relationship, Article 3.5 prevents an investigating authority from attributing injury to dumped imports that is, in fact, caused by other factors. Article 3.5 provides, in relevant 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*. (emphasis added)

576. Interpreting this provision, the Appellate Body ruled:

> This obligates investigating authorities in their causality determinations not to attribute to dumped imports the injurious effects of other causal

[444] Provisional Regulation, para. 110, confirmed in the Definitive Regulation, para. 99.
[445] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 - Canada)*, para. 132; *see* also Appellate Body Report, *US – Wheat Gluten*, para. 69.

factors, so as to ensure that dumped imports are, in fact, "causing injury" to the domestic industry. In *US – Hot-Rolled Steel* we described the non-attribution obligation as follows:

> … In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve *separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports*. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties. (emphasis added)
>
> …
>
> … [I]n order to comply with the non-attribution language in [Article 3.5], investigating authorities must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors.

Non-attribution therefore requires separation and distinguishing of the effects of other causal factors from those of the dumped imports so that injuries caused by the dumped imports and those caused by other factors are not "lumped together" and made "indistinguishable".[446]

577. Thus, as part of its causation analysis, the EC was obliged to examine the effects of factors other than dumped imports that were known to be causing injury to the domestic industry. As part of that analysis, the authority must properly assess injury caused by other factors, "separating and distinguishing" the injurious effects of those factors and the effects of dumped imports. In this investigation, the EC violated these obligations.

[446] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 228.

C. *The EC Failed Properly to Assess the Injurious Effects of the EC Industry's Increased Costs of Production*

(i) Overview of the EC's Determination

578. Interested parties raised the EC industry's high costs of production as a factor, other than dumped imports, that was causing injury to the EC industry during the IP. In the causation analysis in the Provisional Regulation, under the heading "Effect of other factors", the EC rejected this argument:

> It was argued that [(1)] the *Norwegian industry has lower production costs than the Community producers* and that this, and [(2)] *a failure by the Community producers to reduce production costs*, is a reason for increased imports and serious injury. On the basis of the information available, it was found that whilst Norway enjoys advantages in relation to certain costs (e.g. medicines, feed, environmental regulatory cost), the Community producers enjoy advantages in relation to others (e.g. labour). Overall, it is noted that whilst the Community producers are incurring significant losses in the current market, so too are Norwegian producers, as evidenced inter alia by Norwegian government data and the dumping investigation. It was therefore provisionally found that *the argument that Community producers were less efficient than the Norwegian exporters was not substantiated* and that this could not be a cause of the injurious situation of the Community industry.[447]

In the Definitive Regulation, the EC confirmed the conclusions in the Provisional Regulation, without expanding on them.[448]

579. Thus, according to the EC, two arguments were made regarding the effect of costs of production on injury to the EC industry: (1) Norwegian producers have lower costs than EC producers; and (2) EC producers failed to reduce costs of production. The EC rejected these arguments concluding that these factors "could not be a cause of the injurious situation of the Community industry".

580. The EC's rejection of the arguments made, in fact, addresses solely the first of them, namely, the relative efficiency of Norwegian and EC producers. Despite acknowledging an argument that the EC industry had failed to reduce its costs, the EC did not examine developments in the EC industry's costs of production.

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[447]Provisional Regulation, para. 108.
[448]Definitive Regulation, para. 99.

(ii) The EC Improperly Assessed the EC Industry's Increased Costs of Production

581. There are several reasons to conclude that the EC knew that increased costs of production were a factor simultaneously causing injury to the EC industry. The most obvious is that the EC itself acknowledged that interested parties had contended that the EC industry's failure to "reduce" costs had contributed to the industry's injured state.

582. This factor was also explicitly raised by FHL in a submission on 8 November 2005. In that submission, FHL suggested that an "answer" to explain EC industry's "large financial losses" was the industry's "*increase in cost of production*".[449] Using data in the EC's Definitive Disclosure, FHL calculated the increase in the EC industry's costs of production in both euros and pounds sterling, and compared it with unit prices. This comparison showed that unit costs increased rapidly during the period considered, considerably exceeding prices for most of the period. FHL provided the EC with the following table:

[449] FHL and NSL's Comments on the Definitive Disclosure, 8 November 2005, para. 61. Exhibit NOR-49.

Table 6: Evolution of the EC's Industry's Costs of Production

	2001	**2002**	**2003**	**IP**		**Source**[450]
Average Unit Sales Price	**€3.03**	**€3.00**	**€2.64**	**€2.77**	A	Para. 65
Profitability on EC Sales	+8%	-7%	-9%	-5%	B	Para. 70
Unit Cost of Production	**€2.79**	**€3.21**	**€2.88**	**€2.91**	C	=A/(1+B)[451]
Exchange Rate	0.62	0.63	0.69	0.68	D	Central Bank of the Netherlands[452]
Average Unit Sales Price	**£1.88**	**£1.89**	**£1.83**	**£1.88**		=A*D
Unit Cost of Production	**£1.73**	**£2.02**	**£1.99**	**£1.98**		=C*D

583. On the basis of this information, FHL asserted that:

> The increase in cost of production in the Community caused in reality the declining trend in some main economic indicators pertaining to the Community industry. … Thus, the real reason for the problems experienced by the Community industry was raising costs.[453]

584. In addition, the record includes evidence from the EC producers themselves confirming that their costs increased considerably during the period considered. The EC asked EC producers to provide data on their revenues and costs of production.[454] Thus, the EC envisaged that costs of production should be examined, and gathered relevant data for

[450] FHL's source refers to paragraphs in the Definitive Disclosure. However, the same information is provided in the same paragraphs of the Definitive Regulation. The only change is that the profitability in euros in 2002 is 6.9 percent in the Definitive Regulation, not 7 percent. However, the unit COP in euros is correctly stated as €3.21.

[451] FHL's table contains a typographical error, stating that the formula is "A/(1-B)".

[452] The exchange rates provided by FHL are the same as the exchange rates that the EC requested interested parties to use for conversions between euros and pounds sterling with rounding to two decimal points. The precise rates that the EC requested interested parties to use were: 0.622 (2001); 0.629 (2002); 0.692 (2003); and 0.679 (IP). *See* para. 565 above.

[453] FHL and NSL's Comments on the Definitive Disclosure, 8 November 2005, paras. 61 and 62. Exhibit NOR-49.

[454] Questionnaire for producers in the EC, in particular Section E – Sales and Section H – Cost of Production. *See, for example,* the Questionnaire reply from Hoove Salmon, date uncertain. Exhibit NOR-75.

that examination. The table below summarizes non-confidential data provided by the sampled EC producers regarding their per unit costs:

Table 7: Increased Costs of Production of the Sampled EC Producers

Cost of Production (2001 – IP)[455]		
	GBP	**EUR**
Hoove[456]	+ 15.0%	+5.3%
Loch Duart[457]	+19.0%	+9.0%
Orkney Sea Farms[458]	+20.9%	+10.8%
Wester Ross[459]	-0.7%	-9.0%
West Minch Salmon[460]	+20.0%	+9.9%
Average[461]	+14.9%	+5.2%

585. The evidence in the record, therefore, demonstrates that – whether measured in pounds sterling or euros – there were significant increases in the per unit costs of production for four of the five sampled EC producers during the period considered.[462] In pounds sterling, the increases were between 15 and 21 percent, with an average for all five producers of 14.9 percent. The significant increase in costs explains why, despite constant prices in pounds sterling and an increase of 7 percent in sales volumes, the EC industry incurred

[455] It appears that the value used by all the sampled producers was average cost per tonne (labelled either "unit cost per ton" or, in the case of West Minch Salmon, "average cost per tonne"). The cost of production figures include SG&A cost, as reported by the EC companies in the "cost of production" table in the EC questionnaire.
[456] *See* Questionnaire reply from Hoove Salmon, Table 20 (Cost of Production), line "unit cost per ton". Exhibit NOR-75. Hoove reported its data in GBP.
[457] *See* Questionnaire reply from Loch Duart, 20 December 2004, Table 20 ("cost of production"), line "unit cost per ton". Exhibit NOR-15.
[458] *See* Questionnaire reply from Orkney Sea Farms, 1 December 2004, Table 20 ("cost of production"), line "unit cost per ton". Exhibit NOR-72.
[459] *See* Questionnaire reply from Wester Ross, date uncertain, Table 20 ("cost of production"), line "unit cost per ton". Exhibit NOR-76. The percentage change is between 2001 and 2003, as the questionnaire reply does not disclose the value for the IP. Wester Ross reported its data to the EC in Euros.
[460] *See* Questionnaire reply from West Minch, 22 December 2004, Section D-1, line "Average cost/tonne" Exhibit NOR-77. West Minch's questionnaire response is entitled "Safeguard Questionnaire" and appears to have been originally filed as a questionnaire response in the safeguard investigation preceding the anti-dumping investigation. West Minch appears to have subsequently updated this reply for purposes of the anti-dumping investigation. West Minch reported its figures for the period 2000 – IP. West Minch did not state expressly whether it reported its figures in pounds sterling or in Euros. The replies suggest, however, that the reporting currency was pounds sterling.
[461] Norway has calculated a simple average because it does not have the sufficient data to calculate a weighted average.
[462] For the reasons set forth in Section VI.C, Norway considers that the material data for examining the situation of the sampled Scottish companies, under Article 3 of the *Anti-Dumping Agreement*, is in pounds sterling, because that is the operating currency of these companies. The differences in the data regarding costs of production demonstrate further that exchange rate movements can distort developments in the economic performance of the domestic industry. This highlights the need for the authority to examine data in the operating currency of the producers concerned to ensure that the data is material and relevant.

losses. In essence, the producers' higher sales revenues were more than eliminated by increased costs.

586. Viewed from another perspective, *if the EC industry's costs of production had not increased significantly during the period considered, the industry would have continued to make profits of 8.0 percent in pounds sterling*.[463] Instead, because costs of production increased by so much, the EC industry ceased to be profitable and incurred losses, despite increased revenues. Even measured in euros, the increase in costs is an important cause of injury. The EC found that euro prices fell by 9 percent to €2.77/kg during the period considered. If costs had remained at €2.79/kg during this period, the industry would have broken even, with losses of just 0.7 percent.[464] Thus, increased unit costs were an important cause of injury.

587. In sum, the data in the record shows that FHL correctly argued that injury was, in large part, caused by an increase in the EC industry's costs. However, despite FHL's argument, and despite the evidence in the record, the EC entirely failed to assess the injurious effects of the increase in EC producers' costs of production. Instead, the EC dismissed this issue by stating that EC producers were no more inefficient than Norway's producers, without explaining how the evidence supported this conclusion.

588. In so doing, the EC did not even acknowledge that the evidence it had collected showed that the EC producers' costs had increased considerably. Far less did the EC assess the injurious effects on this development, and "separate and distinguish" these injurious effects from those attributable to dumped imports. The complete absence of analysis on this point violates Article 3.5 of the *Anti-Dumping Agreement* because the EC has not properly examined a factor other than dumped imports that was known to be causing injury to the domestic industry.

589. The EC's failure to address this issue also violates Article 3.1 because the injury and causation determinations were not based on an "objective examination" of the facts in the record. By failing to examine the increase in costs of production, the EC overlooked the

[463] *See* para. 582. In 2001, unit sales prices were £1.88/kg and unit costs were £1.73/kg. The profit margin is 8.0 percent. In the IP, prices were also £1.88/kg. Thus, if costs had not increased, profits would have been 8.0 percent.
[464] *See* para. 582.

injurious effects of a factor within the control of the EC industry and, instead, provided an analysis that attributed the injury to the dumped imports. This is hardly a fair and even-handed examination of the causes of injury.

(iii) Conclusion

590. The EC failed properly to asses the injurious effects of the EC's increased costs of production. The EC, thereby, violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*.

D. *The EC Failed Properly to Assess the Injurious Effects of Imports of Salmon from Canada and the United States*

(i) Relevant Facts in the Record

591. Before outlining the EC's determination, and then the EC's violation of Article 3.5, Norway notes a number of facts in the record that are pertinent to the injurious effects caused by imports from the Canada and United States.

592. *First*, during the period considered, the EC industry's market share declined from 2.98 to 2.77 percent. In contrast, the market share of imports from all third countries, other than Norway, rose from 15.5 to 19.4 percent.[465] The market share of imports from Canada and the United States rose sharply during the period considered. In 2001, they had a combined market share of 1.0 percent, whereas in the IP this had risen to 5.1 percent – considerably in excess of the EC industry's market share.

593. *Second*, in volume terms, imports from Canada and the United States amounted to 31,564 tonnes in the IP, which is *43 percent more than the EC industry's entire volume of production* in the IP (22,000 tonnes[466]). During the period considered, imports from the United States increased by almost five times[467] and imports from Canada by 10 times.[468] Indeed, the increase in imports from these two countries alone (25,960 tonnes) exceeds the EC industry's total volume of production (22,000 tonnes).

[465] Provisional Regulation, para. 94 (Table 11).
[466] Definitive Regulation, para. 38.
[467] From 5,011 to 24,624 tonnes. (Provisional Regulation, para. 94, Table 11)
[468] From 593 to 6,940 tonnes. (Provisional Regulation, para. 94, Table 11)

594. *Third*, the average import price of all third country imports was €2.23/kg.[469] In the case of Canada, the average price in the IP was €1.77/kg;[470] and for the United States, the price was €1.69/kg. In contrast, the average EC price was €2.77/kg and the average Norwegian price was €2.64/kg.[471] Thus, the price of Canada's imports was 36 percent lower than the EC price; and in the case of the United states, the discount was 39 percent.

595. Thus, from the perspective of market share, volumes and prices, imports of salmon from Canada and the United States had the capacity to cause material injury to the domestic industry.

(ii) Overview of the EC's Determination

596. The EC examined the effect of imports originating in third countries, other than Norway, as another causal factor.[472] The EC concluded that "imports into the Community from other third countries could not be a determining reason for the material injury suffered by the Community industry."[473] In the Definitive Regulation, the EC confirmed that conclusion.[474]

597. The EC considered separately imports from Canada and the United States, on the one hand, and imports from Chile and the Faroe Islands, on the other hand.[475] With respect to imports from the United States and Canada, the EC stated that available import statistics "do not distinguish between farmed salmon and wild salmon".[476] Norway recalls that the EC expressly excluded wild salmon from the product scope of the investigation.[477] Nevertheless, despite the absence of statistics, the EC concluded "on the basis of information gathered during the investigation", that it:

> … appears that *the vast part of imports from [the United States] and Canada consists most [sic] of wild salmon*, so that it is unlikely that

[469] Provisional Regulation, para. 94 (Table 11).
[470] Provisional Regulation, para. 94, Table 11.
[471] Provisional Regulation, para. 58, Table 4 and para. 69, Table 6.
[472] Provisional Regulation, paras. 94 - 99.
[473] Provisional Regulation, para. 99.
[474] Definitive Regulation, para. 99.
[475] Provisional Regulation, paras. 96 and 97, respectively. Definitive Regulation, paras. 84-86 and 87-88, respectively.
[476] Provisional Regulation, para. 96.
[477] Provisional Regulation, para. 10. Confirmed in para. 8 of the Definitive Regulation.

> imports from these two countries could have a significant impact on the situation of the Community industry.[478] (emphasis added)

The EC did not disclose which evidence in the record supported this conclusion, much less did the EC explain how that evidence supported the conclusion.

598. In the Definitive Regulation, the EC addressed arguments put forward by interested parties contesting the EC's interpretation of the data relating to salmon imports from Canada and the United States. In rejecting these arguments, the EC emphasized that the interested parties contested the interpretation of the data, rather than the data itself.[479] It noted again that its data did not distinguish between wild and farmed salmon.[480]

599. Responding to the arguments about the interpretation of the data, the EC found that:

> … the *taste of wild salmon is significantly different* from that of farmed salmon. More importantly, the investigation showed that contrary to farmed salmon, *wild salmon is practically not offered in the market for sale as a fresh product but it is mostly sold in tins and cans*. It is clear that *these products are not directly competing with each other on the market*. This explains why *the price of wild salmon is lower* compared to farmed salmon and why these products are not interchangeable for users and consumers.[481] (emphasis added)

The EC added that none of the interested parties had submitted evidence "with regard to the alleged interchangeability of wild and farmed salmon".[482]

600. The EC then went on to reiterate that:

> … *the majority of imports from the USA and Canada consists of wild salmon*, which, as explained above, is *cheaper* than and *not interchangeable with farmed salmon*. In view of the findings made … above, it is unlikely that imports from these two countries could have had a significant impact on the situation of the Community industry.[483] (emphasis added)

[478] Provisional Regulation, para. 96.
[479] Definitive Regulation, para. 84.
[480] Definitive Regulation, para. 84.
[481] Definitive Regulation, para. 85.
[482] Definitive Regulation, para. 85.
[483] Definitive Regulation, para. 86.

601. Thus, despite the massive increase in very low priced imports of salmon from Canada and the United States, the EC concluded that these imports were not causing injury to the EC industry.

(iii) The EC Improperly Assessed the Injurious Effects of Imports of Salmon from Canada and the United States

602. The EC's conclusion that imports of salmon from Canada and the United States are not causing injury to the EC industry is premised on several factual findings:

- first, the "majority" of imports from these countries consist of wild salmon and not farmed salmon;[484]
- second, wild salmon does not compete with farmed salmon[485] because:
  - the taste of wild and farmed salmon differs significantly;[486]
  - wild and farmed salmon have different end uses, with wild salmon sold "mostly" in tins and cans, and not as a fresh product;[487] and
  - wild salmon is "cheaper" than farmed salmon.[488]

603. These factual findings are crucial to the EC's analysis of the injurious effects of salmon imports from Canada and the United States. However, there are a number of deficiencies in these findings. In particular, the EC does not provide a reasoned and adequate explanation of "how the evidence in the record supports its factual findings".[489] Norway recalls the Appellate Body's statement that a reasoned and adequate explanation "is not one where the conclusion *does not even refer to the facts that may support that conclusion*".[490]

604. In this dispute, the EC *never refers to a single piece of evidence* in support of its factual findings that the majority of salmon imports from Canada and the United States are wild salmon; and that wild and farmed salmon do not compete. Absent an explanation of the

[484] Definitive Regulation, para. 86.
[485] Definitive Regulation, para. 85.
[486] Definitive Regulation, para. 85.
[487] Definitive Regulation, para. 85.
[488] Definitive Regulation, para. 86.
[489] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 98.
[490] Appellate Body Report, *US – Steel Safeguards*, para. 326.

evidence supporting these findings, they must be disregarded as mere speculation, conjecture and possibility.[491]

605. In consequence, because the EC's assessment of the injurious effects of salmon imports from Canada and the United States is based on speculative findings that are not properly explained, they have no legal basis. The EC has, therefore, violated Article 3.5 by failing to assess properly the injurious effects of these imports and by failing to ensure that injury caused by these imports was not ascribed to dumped imports.

606. Norway reviews separately the different factual findings that underpin the EC's assessment of the injurious effects of imports of salmon from Canada and the United States.

(a) *There Is No Explanation of the Evidence Showing That the "Majority" of Imports from Canada and the United States Are Wild Salmon*

607. The EC does not refer to any evidence, whatsoever, to substantiate its assertion that the "majority" of imports of salmon from Canada and the United States consist of wild salmon.[492] Indeed, the EC brazenly acknowledges that its import statistics "do not distinguish between farmed salmon and wild salmon".[493] Moreover, both Canada and the United States produce farmed salmon, and, therefore, exports from those countries to the EC may well include farmed salmon.[494] Nonetheless, the EC concluded "on the basis of information gathered during the investigation", that it "appears that the vast part of imports from [the United States] and Canada consists most [sic] of wild salmon".[495] The EC does not identify any "information" that supports this "apparent" conclusion. Norway and the Panel are left wondering:

- *what* information the EC relied on in making this finding;

[491] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 98.
[492] Definitive Regulation, para. 86.
[493] Provisional Regulation, para. 96; Definitive Regulation, para. 84.
[494] In 2004, Canada harvested 89,000 tonnes of farmed Atlantic salmon and exported 66,600 tonnes. Canada also harvested 18,000 tonnes of farmed Pacific salmon and caught 18,900 tonnes of wild catch Pacific salmon. Thus, Canada's production of farmed salmon (107,000 tonnes) amounts to 85.0 percent of Canada's total salmon production (125,900 tonnes); and Canada also exports very significant volumes of farmed Atlantic salmon. In 2004, the United States harvested 13,000 tonnes of farmed Atlantic salmon and exported 7,200 tonnes. The United States caught 363,200 tonnes of wild catch Pacific salmon. Thus, the United States has a small production of farmed salmon some of which is exported. *See* Kontali Analyse, *Salmon Market Analysis 2005 – North America*. Exhibit NOR-78.
[495] Provisional Regulation, para. 96.

- *where* that information can be found; and

- *how* that information supports the EC's finding.

608. It bears repeating that a reasoned and adequate explanation "is not one where the conclusion *does not even refer to the facts that may support that conclusion*".[496] Absent an explanation of the evidence supporting the EC's conclusion on the proportion of imports of wild salmon from Canada and the United States, the EC's factual finding must be disregarded as mere speculation. There is simply no explanation of the factual basis for concluding that the majority of salmon imports from Canada and the United States are wild salmon.

(b) *There Is No Explanation of the Evidence Showing That Wild and Farmed Salmon Do Not Compete*

609. Likewise, the EC does not refer to any evidence in the record that supports its conclusion that wild and farmed salmon "do not directly compete with each other".[497] In particular, the EC fails to refer to a single piece of evidence to support its factual findings that: (i) the taste of wild salmon is significantly different from that of farmed salmon; (ii) wild salmon is practically not offered in the market for sale as a fresh product, but is mostly sold in tins and cans; and (iii) wild salmon is "cheaper" than farmed salmon.

610. An assessment of the competitive relationship between products is a complex matter that requires a careful examination of often conflicting evidence.[498] Yet, the EC provided no explanation of the evidence that supported its determination regarding the competitive relationship between wild and farmed salmon.

611. Norway has found very little evidence in the record relating to competition between wild and farmed salmon that supports the EC's factual finding. However, the record does contain information that *contradicts* the EC's findings.

612. The EC processor, Laschinger indicated to the EC that its product range included smoked salmon prepared with salmon from Norway, Scotland, Ireland and Alaska. Laschinger's website indicates that its smoked Alaska salmon is a wild salmon product,

[496] Appellate Body Report, *US – Steel Safeguards*, para. 326.
[497] Definitive Regulation, para. 85.
[498] *See, for example, Japan – Alcoholic Beverages II*, *Korea – Alcoholic Beverages*, *Chile – Alcoholic Beverages* and *EC – Asbestos*.

produced from fish caught in Alaska and Canada. Moreover, Laschinger's processing facilities all appear to be located in the EC, and not Alaska, suggesting that the company may well import HOG wild salmon that is processed in the EC.[499] Another EC processor, Dirk Abrahams, also advised the EC that it produces a smoked "pacific wild salmon product" in the EC, which may well also be produced from imported fresh, chilled or frozen HOG wild salmon.[500] Thus, two EC processors asserted that they produce wild salmon products which are sold alongside farmed salmon products, and for which the input could well be imported HOG wild salmon. This suggests that not all wild salmon is sold in cans and that some competes with farmed salmon.

613. The United Kingdom's Food and Drink Federation ("FDF") also stated to the EC:

> The other aspect of the disclosure document that was challenged [during a meeting between FDF and the Commission on 8 November 2005] related to wild salmon where it was stated it only had relevance to the canning sector. This is not so, particularly since the salmon was MSC certified[[501]]. *A significant import trade is developing in added value steaks and portions, particularly in the use of ready meals*. This is *yet another factor that will impact the salmon industry* and Scotland in particular going forward.[502]

614. Thus, FDF contradicted the EC's finding that wild salmon is relevant only to the EC canning sector; it stated that there was increasing importation of wild salmon and increasing competition between wild and farmed salmon. FDF also expressly cited imports of wild salmon as "yet another factor" that will "impact" the EC salmon industry, in particular Scottish producers.

615. The record, therefore, includes information from two EC processors and an EC processors' association to the effect that imported wild salmon competes with farmed salmon both at the level of processors and consumers. The EC's explanation fails to address these

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[499] Sections of the Laschinger web site, www.laschinger.de, on Coho and Sockeye Salmon, and on the location of Laschinger's facilities. Exhibit NOR-97.
[500] Letter from Dirk Abrahams Räucherei & Spezialitäten to the EC, 7 June 2005. Exhibit NOR-79.
[501] The Marine Stewardship Council certifies wild catch fisheries that meet standards for sustainability (http://www.msc.org/). Wild Alaska salmon is MSC certified.
[502] Letter from the Food and Drink Federation to the EC, 8 November 2005. Emphasis added. Exhibit NOR-80. An EC processors' association informed the EC that farmed salmon was used to prepare ready-made dinners. See para. 67 above. Thus, the record shows that wild and farmed salmon are used to produce ready-made dinners in the EC.

"alternative explanations and interpretations of the evidence" regarding imports of (wild) salmon from Canada and the United States.[503]

616. In short, the EC's explanation of its findings regarding competition between wild and farmed salmon is wholly inadequate because it "does not even refer to the facts that may support that conclusion" and because it fails to explain why the EC rejected alternative explanations of the evidence regarding wild salmon, as submitted by EC processors and a processors' association.[504] Absent a reasoned and adequate explanation, the EC's factual findings on competition between wild and farmed salmon must be disregarded as mere speculation.

(c) *Norway's Other Concerns Regarding the EC's Conclusion That Wild and Farmed Salmon Do Not Compete*

617. Norway has further concerns regarding the EC's assessment of the competitive relationship between wild and farmed salmon.

618. *First*, with respect to *taste*, the WTO case-law shows that two products can compete even if they taste very differently. For example, in *Chile – Alcoholic Beverages*, the EC (and other complainants) persuaded the panel that pisco, brandy, whisky, rum, gin, vodka, anisette liqueurs, aquavit, korn, fruit brandies, ouzo and tequila are competing products.[505] On any view, wild and farmed salmon taste considerably more alike than, for example, whisky and cherry brandy. The EC's suggestion that the (unsubstantiated) taste difference between wild and farmed salmon prevents competition between them is, therefore, absurd.

619. *Second*, concerning *prices*, the WTO case-law also shows that competition can exist between products that have very different price levels. In *Korea – Alcoholic Beverages*, the panel found that, even though cognac was 24 times more expensive than standard diluted soju, the two products were competing.[506]

620. *Third*, regarding *end uses*, Norway notes that evidence in the record suggests that wild and farmed do compete with respect to certain end uses. As noted in paragraphs 612 and

[503] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 98.
[504] Appellate Body Report, *US – Steel Safeguards*, para. 326.
[505] Panel report, *Chile – Alcoholic Beverages*, para. 7.88. The product scope of the dispute is set forth at para. 2.7.
[506] Panel report, *Korea – Alcoholic Beverages*, paras. 10.94 (including footnote 408) and 10.95, upheld by the Appellate Body, *Korea – Alcoholic Beverages*, para. 152.

613, EC interested parties asserted that wild and farmed salmon are both used to produce smoked salmon products; and wild and farmed salmon are also both used to prepare ready-made meals. This suggests that wild and farmed salmon have overlapping end uses.

(d) *Conclusion*

621. The EC's conclusion that imports from Canada and the United States do not cause injury to the EC industry is premised on factual findings that are not supported by a reasoned and adequate explanation. The EC's assessment of the injurious effects of imports from these two countries is, therefore, bereft of both factual and legal basis.

622. As a result, the EC has failed to show that its industry was not injured by the massive increase in low priced imports of salmon from Canada and the United States at volumes far exceeding the EC industry's own volume of production. Because the EC has improperly assessed the injurious effects of imports of salmon from Canada and the United States, it has failed to ensure that it did not attribute the injurious effects of this factor to dumped imports from Norway. Consequently, the EC violated Article 3.5 of the *Anti-Dumping Agreement* in its assessment of this factor.

E. *Conclusion*

623. For all of the above reasons, the EC's causation determination is inconsistent with Article 3.5 of the *Anti-Dumping Agreement*. The EC has failed to separate and distinguish the injurious effects of

- the EC industry's increased costs of production and
- imports of salmon from Canada and the United States

from the injurious effects of dumped imports from Norway. As a result, the EC has not ensured that the injurious effects of these factors were not incorrectly attributed to dumped imports. The EC, thereby, violated Article 3.5 of the *Anti-Dumping Agreement*.

624. Moreover, because the EC has improperly assessed the injurious effects of factors other than dumped imports, it has made an injury determination more likely, and failed to act fairly and even-handedly. The EC, therefore, also violated Article 3.1 of the *Anti-Dumping Agreement*.

VIII. THE MIPS IMPOSED BY THE EC VIOLATE ARTICLE VI:2 OF THE GATT 1994 AND ARTICLE 9 OF THE *ANTI-DUMPING AGREEMENT*

A. *Introduction*

Norway claims that the EC's minimum import prices ("MIPs") violate Article VI:2 of the GATT 1994 and various paragraphs of Articles 9 of the *Anti-Dumping Agreement*:

- *first*, with respect to individually examined producers, the EC imposed MIPs that exceed the individual normal values (violation of Article VI:2 and Article 9.2);

- *second*, with respect to non-sampled producers and exporters, the EC imposed MIPs that exceed the weighted average normal value of the individually examined producers (violation of Article VI:2 and Article 9.4(ii)); and,

- *third*, the amount of duties imposed on individually examined producers is not limited by the margin of dumping for those producers (Article VI:2, and Articles 9.1 and 9.3).

625. Norway will, first, provide an overview of the EC's determination, before considering the EC's violation of its obligations under Article VI:2 and Article 9.

B. *Overview of the EC's Determination*

(i) The EC's Minimum Import Prices

626. Under the Provisional Regulation, the EC initially imposed provisional anti-dumping measures in the form of *ad valorem* duties.[507] Prior to the adoption of the Definitive Regulation, the EC amended the Provisional Regulation, changing the form of the provisional measures from *ad valorem* duties to minimum import prices ("MIPs").[508] The EC imposed five separate provisional MIPs on five different salmon products. Each of these MIPs was applicable to all examined producers, irrespective of the individual normal values and margins of dumping, and also to all non-examined producers.

[507] Article 1(3), Provisional Regulation.
[508] Amendment to the Provisional Regulation, Article 1(4).

627. In the Definitive Regulation, the EC continued to apply measures in the form of MIPs. However, the EC imposed six separate MIPs, rather than five. The EC established the sixth category by dividing one of the previous product categories in two. Specifically, the category of "whole fish fillets of more than 300g" became: (1) whole fish fillets of more than 300g *skin on* and (2i) whole fish fillets of more than 300g *skin off*. Additionally, the EC modified the level of the MIPs it had imposed on a provisional basis, for the most part elevating the provisional MIP. Again, each of the MIPs applies in identical fashion to all examined producers and non-examined producers and exporters.

628. The MIPs imposed by the EC on a provisional and a definitive basis may be summarized as follows:

Table 8: Overview of the Provisional and Definitive MIPs

	Product (all fresh, chilled or frozen)	**Provisional**	**Definitive**
1	Whole fish	€2.81/kg	€2.80/kg
2	Gutted, head-on	€3.12/kg	€ 3.11/kg
3	Other fish (including gutted, head-off)	€3.51/kg	€3.49/kg
4	Fillets weighing more than 300 g, skin on	€4.99/kg	€5.01/kg
5	Fillets weighing more than 300 g, skin off		€6.40/kg[509]
6	Fillets weighing less than 300g	€6.00/kg	€7.73/kg[510]

629. Under the MIPs, no anti-dumping duty is imposed where the "net free-at-Community-frontier" price of a shipment of the subject product is *above* the appropriate MIP. However, where the "net free-at-Community-frontier price" is *below* the MIP, *a duty* is imposed in an amount that equals the difference between that price and the MIP.[511] The EC's MIPs are, therefore, a form of variable anti-dumping duty levied to the extent that the shipment price is below a reference price. There is no limit on the amount of anti-dumping duty that may be imposed under the MIPs, other than the full amount of the MIP itself.

[509] For this product category, the definitive MIP is 28.3 percent higher than the provisional MIP.
[510] For this product category, the definitive MIP is 28.8 percent higher than the provisional MIP.
[511] Definitive Regulation, para. 133.

630. The EC stated that the MIPs was fixed at so-called "*non-injurious*" levels. By this, the EC means that the MIPs constitute a "floor price"[512] that:

> … should allow the Community industry to cover its costs of production and obtain overall a profit before tax that could be reasonably achieved by an industry of this type in the sector under normal conditions of competition, *i.e.* in the absence of dumped imports, on the sales of the like product in the Community.[513]

The MIPs are thus based on the *EC producers' and processors' costs of production plus an 8 percent profit margin*.[514] Despite a request during consultations, the EC has refused to disclose its calculation of the non-injurious MIPs.

631. The EC compared the "non-injurious" MIPs to what it called "*non-dumped*" MIPs.[515] By "non-dumped", the EC refers to a MIP based on the normal value determined for each examined producer for each product category. The EC concluded that "[i]n all cases it was found that the non-injurious MIP was lower than the non-dumped MIP".[516]

632. In calculating the non-dumped MIPs, the EC had to convert the normal value determined in Norwegian kroner into euros. The EC chose to use the three year average exchange rate, instead of the exchange rate from the IP. The EC did not explain which three year period it used. However, between 2002 and the IP, the euro appreciated by 11.6 percent against the kroner.[517] As a result, the three year average exchange rate for 2002, 2003 and the IP is 7.963 NOK to the euro, whereas the rate in the IP was 8.378 NOK. Therefore, by using the three year average exchange rate, the EC overstated normal value in euros by 5.2 percent.[518]

633. The EC has refused to disclose its calculations of the non-dumped MIPs for each of the examined producers, for each of the product categories. In the investigation, the EC calculated normal value for sub-types of the product that do not correspond to the MIP

[512] Definitive Regulation, para. 116.
[513] Definitive Regulation, para. 131.
[514] Definitive Regulation, para. 131.
[515] Definitive Regulation, para. 129.
[516] Definitive Regulation, para. 130.
[517] In 2002, the euro was worth 7.509 NOK; in 2003, 8.003 NOK; and in the IP, 8.378 NOK. The average for these three years is 7.963 NOK. *See* the Table of Exchange rates that the EC requested interested parties to use. Exhibit NOR-74.
[518] 5.2 percent is the difference between the normal value calculated using the exchange rate for the IP (8.378 NOK) and a three year rate for 2002, 2003 and the IP (7.963 NOK).

product categories.[519] Thus, to calculate the non-dumped MIPs, the EC must have aggregated the normal values it had calculated for the product sub-types relevant to each MIP. The EC has not disclosed its aggregation calculations.

634. More importantly, during the IP, none of the sampled producers sold all six products to which a MIP applies. In fact, as shown by the table in paragraph 638 below, by volume, 92.0 percent of all sales by the sampled producers consisted of head on, gutted fish. Most producers sold a tiny volume of filleted products. For one product category, there were no sales, at all, during the IP. In order to calculate a non-dumped MIP for these product categories, the EC must have calculated a normal value for each producer, for each product category. However, again, the EC has refused to disclose the normal values it calculated for each of the examined producers.

(ii) The EC's MIPs Exceed the Individually Determined Normal Values and the Weighted Average Normal Value

635. In the vast majority of cases, the MIPs exceed the normal values determined for the examined producers. In addition, all six MIPs exceed the weighted average normal value. Norway has prepared a table that shows normal values for all six products for seven of the sampled companies.[520]

636. Because the EC has refused to disclose the normal values it calculated for each of the product categories, Norway has calculated them all on the basis of data disclosed to the seven sampled producers in the definitive disclosures. They are set forth in the table in paragraph 638 below. Norway's calculation methodology is set forth in Exhibit NOR-84. There are three points to note.

637. *First*, Norway has converted the normal values using the average exchange rate between Norwegian kroner and euros the during the IP.[521] Norway considers that the EC's use of a three year average rate is impermissible for the reasons set forth in paragraph 653 below. Using the exchange rate for the IP, the MIPs exceed normal value for 45 of the 48

[519] The list of product sub-types (so-called product control numbers or "PCNs") is contained in Exhibit NOR-81.
[520] Norway has not included three producers in the table, Nordlaks, Sea Farm Invest and Stolt Sea Farm. Nordlaks is excluded because it has a *de minimis* dumping margin; Sea Farm Invest is excluded because it did not receive an individual margin of dumping, despite being included in the sample; and, Stolt Sea Farm is excluded because Norway does not have the necessary data for this company.
[521] The exchange rate for the IP is rate that the EC requested respondents for that period (Exhibit NOR-74).

boxes in the table; using a three year rate, MIPs exceed normal value for 38 out of 48 boxes.[522] Thus, a three year rate is favorable to the EC, but only with respect to seven of the comparison points.

638. *Second*, 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 in Section XI. In the case of PFN, for example, the EC's adjustments increased the costs by a third.[523]

[522] *See* Exhibit NOR-83. A detailed explanation of Norway's calculations underlying the Table is contained in Exhibit NOR-84.
[523] *See* Summary Table of the EC's Cost Adjustments. Exhibit NOR-99.

Table 9: Comparison of Minimum Import Prices ("MIPs") with Normal Value Based on IP Exchange Rate

MIP Category (All fresh, chilled or frozen)	Share of Exports	**Fjord**	**Follalaks**	**Grieg**	**Hydroteck**	**Marine Harvest**	**PFN**	**Sinkaberg**	**Average NV (ex Grieg)**	**Average NV**	Scaling Factor	**MIP**
Whole fish	0%	[[xx.xx x.xx]]	[[xx.xxx .xx]]	[[xx.xx x.xx]]	[[xx.xxx. xx]]	[[xx.xx x.xx]]	[[xx.xx x.xx]]	[[xx.xxx. xx]]	[[xx.xxx.x x]]	2.33	N/A	**2.80**
Gutted fish, head-on	92.0%	[[xx.x xx.xx]]	[[xx.xxx .xx]]	[[xx.xx x.xx**2**]]	[[xx.xxx. xx]]	[[xx.xx x.xx]]	[[xx.xx x.xx]]	[[xx.xxx. xx]]	[[**xx.xxx.x x**]]	**2.94**	1.0	**3.11**
Other (including gutted, head-off)	0.1%	[[xx.x xx.xx]]	[[xx.xxx .xx]]	[[xx.xx x.xx]]	[[xx.xxx. xx]]	[[xx.xx x.xx]]	[[xx.xx x.xx]]	[[xx.xxx. xx]]	[[**xx.xxx.x x**]]	**3.27**	N/A	**3.49**
Whole fish fillets and fillets cut in pieces, weighing more than 300g per fillet, skin on	6.9%	[[xx.x xx.xx]]	[[xx.xxx .xx]]	[[xx.xx x.xx]]	[[xx.xxx. xx]]	[[xx.xx x.xx]]	[[xx.xx x.xx]]	[[xx.xxx. xx]]	[[**xx.xxx.x x**]]	**4.58**	1.56	**5.01**
Whole fish fillets and fillets cut in pieces, weighing more than 300g per fillet, skin off	0.7%	[[xx.x xx.xx]]	[[xx.xxx .xx]]	[[xx.xx x.xx]]	[[xx.xxx. xx]]	[[xx.xx x.xx]]	[[xx.xx x.xx]]	[[xx.xxx. xx]]	[[xx.xxx .xx]]	**5.22**	1.78	**6.40**
Other whole fish fillets and fillets cut in pieces, weighing 300g or less per fillet	0.2%	[[xx.x xx.xx]]	[[xx.xxx .xx]]	[[xx.xx x.xx]]	[[xx.xxx. xx]]	[[xx.xx x.xx]]	[[xx.xx x.xx]]	[[xx.xxx. xx]]	[[xx.xxx .xx]]	**4.75**	1.62	**7.73**

MIPs exceed individually determined normal values for 38 out of 42 boxes and for all weighted average normal values.

639. Table 9 shows that, for *every one of the six products*, the applicable MIP exceeds the normal value determined for some or all of the seven examined producers. For certain *products*, the MIP exceeds the individually determined normal value for *all seven* producers. For certain *producers*, all six of the MIPs exceed the individually determined normal values. The table shows, therefore, the so-called non-injurious MIPs are systematically higher than the normal values determined for individually examined producers.

640. Further, for non-examined producers, the table also shows that the MIP imposed for each of the six products exceeds the weighted average normal value. Because the EC refused to disclose its calculation of the weighted average normal value, Norway has calculated figures shown in the table. The weighted averages in the table does not take account of the normal values for three producers: Nordlaks, Sea Farm Invest and Stolt Sea Farm. With respect to Nordlaks, Article 9.4 provides for the exclusion of a producer's normal value where its margin was *de minimis*, which Nordlaks' was. Sea Farm Invest did not receive an individual margin of dumping, but was instead attributed Marine Harvest's margin.[524] Thus, Norway considers that, absent an individual margin of dumping, Sea Farm Invest must be excluded from the weighted average. Finally, absent disclosure, Norway has no data for Stolt Sea Farm.

641. In addition, in calculating the weighted average normal value, Norway excluded Grieg because, under Article 9.4, a producer's normal value must be excluded if it was calculated using facts available, as Grieg's was. As shown in Table 9, the MIPs for all six product categories exceed the weighted average normal values determined by Norway, excluding Grieg. For the sake of completeness, the table also shows that the MIPs exceed the weighted average normal values including Grieg's data.

C. *The EC Violated Article VI:2 of the GATT 1994 and Article 9 of the Anti-Dumping Agreement in Imposing the MIPs*

(i) Introduction

642. Norway submits that, in imposing the MIPs, the EC breached Article VI:2 of the GATT 1994 and Articles 9.1, 9.2, 9.3 and 9.4 of the *Anti-Dumping Agreement*. *Firstly*, the MIPs exceed normal value for *individually examined producers*. As a result, the EC's MIPs

[524] Definitive Disclosure to Seafarm Invest, 28 October 2005, Annex 2. Exhibit NOR-85.

"condemn" export prices that are above normal value, and that constitute fair trade. *Secondly*, the MIPs exceed the weighted normal value for the individually examined producers, which is the ceiling reference price that can be imposed on *non-examined producers and exporters*. *Third*, the amount of duties imposed on examined producers is not limited by the margin of dumping. Norway will address the first and second issue together, before turning to the third issue.

(ii) The EC Violated Article VI:2 of the GATT 1994 and Articles 9.2 and 9.4 of the *Anti-Dumping Agreement* By Imposing MIPs that Exceed Normal Value

(a) *The EC's Obligations Under Article VI:2 and Article 9*

643. In this dispute, the EC has imposed variable anti-dumping duties on the examined producers on the basis of a reference price. The GATT 1994 and the *Anti-Dumping Agreement* do not expressly address the maximum level of the reference price for examined producers. However, Article 9.2 of the *Anti-Dumping Agreement* provides, in relevant part:

> When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in *the appropriate* amounts in each case … (emphasis added)

644. This provision states that there is an "appropriate" amount of anti-dumping duties that can be collected "in each case". The dictionary definition of the term "appropriate", under Article 9.2, is "[s]pecially fitted or suitable" or "proper".[525] The conjunction of the words "*the*" and "*appropriate*" in Article 9.2 indicates that there is a specific amount of duty that is "appropriate" in each case. Hence, an anti-dumping duty must be imposed in an amount that is proper in the light of the requirements in the *Anti-Dumping Agreement* and the GATT 1994.

645. Under Article VI of the GATT 1994 and Article 9 of the *Anti-Dumping Agreement*, Members are entitled to impose variable anti-dumping duties on the basis of a reference price. However, the reference price applied to individually examined producers and exporters 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

[525] *The Oxford English Dictionary*, J.A. Simpson and E.S.C. Weiner (eds.) (Clarendon Press, 1989, 2nd ed.), Volume I, page 586, column 3, meaning 5. Exhibit NOR-86.

cannot incur liability for payment of anti-dumping duties".[526] The EC itself recognized as much in its Definitive Regulation when it emphasized that the MIPs were *lower* than "non-dumped" MIPs, which it said were "calculated on the basis of normal value".[527]

646. This reading stems from the definition of "dumping" in Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*. Under Article VI:1 of the GATT 1994, the sale of a product "at less than the normal value" is "condemned" if it causes injury. Article 2.1 of the *Anti-Dumping Agreement* also defines "dumping" as the sale of a product at less than its normal value. In the event that a product is sold at less than normal value, Article VI:2 permits a Member to "offset or prevent" this "dumping" by levying an anti-dumping duty. Article 11.1 of the *Anti-Dumping Agreement* also states that an anti-dumping duty may be imposed only "to the extent necessary to counteract dumping", that is selling at less than normal value.[528]

647. Thus, pricing is to be condemned, and anti-dumping duties imposed, solely when a product is sold at less than normal value; in contrast, when the export price exceeds normal value, that price is fair and no duties can be imposed.[529] Normal value, therefore, 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 ensures that duties are collected solely when pricing is unfair and that they serve to offset dumping.

648. Strong contextual support for this interpretation is provided by Article 9.4, which "defines the maximum anti-dumping duty that may be applied to exports from producers *not individually examined*".[530] Article 9.4(ii) sets forth the maximum amount of duty that can be imposed on non-sampled exporters and producers when an authority imposes duties on the basis of a reference price. It states that the duty cannot exceed "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." (emphasis added) Thus, in keeping with Article VI:1, which condemns pricing behavior solely when it is below normal value,

[526] Panel report, *US – Zeroing (Japan)*, para. 7.201. See also para. 7.205 of that panel report.
[527] Definitive Regulation, para. 129.
[528] *See, also*, panel report, *Mexico – Rice*, para. 7.58.
[529] *See, also*, panel report, *US – Zeroing (Japan)*, paras. 7.201 and 7.205.
[530] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 122. Emphasis added.

the threshold for the imposition of variable duties on non-examined producers is "the weighted average *normal value*".

649. The last sentence of Article 9.4 provides further that "[t]he authorities *shall apply individual … 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". (emphasis added) This demonstrates that, where an individually determined normal value is available, the authority must use that normal value as the maximum reference price.

650. The *Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties* from 1960 adds further weight to Norway's interpretation. The Group of Experts stated that a "basic price" – by which is meant a reference price – "was satisfactory only provided that: … [t]he basic price was less than, or at most equal, to the lowest normal price in any of the supplying countries".[531] Using the terminology of the *Anti-Dumping Agreement*, the Export Group stated that a MIP cannot exceed normal value.

651. In sum, when anti-dumping duties are imposed on examined producers on the basis of a reference price, they are collected in "the appropriate amounts", pursuant to Article 9.2, solely when the reference price does not exceed the producer's individually determined normal value. Moreover, in the event that the reference price exceeds normal value, the Member also violates Article VI:2 of the GATT 1994, because it imposes duties that are greater than necessary "to offset or prevent dumping". In the case of non-examined producers and exporters, a reference price that exceeds the weighted average normal value of the examined entities is contrary to Article VI:2 and Article 9.4(ii).

(b) *The EC Violated its Obligations by Imposing MIPs that Exceed Normal Value*

652. In this dispute, the table in paragraph 638 demonstrates that the EC has violated these obligations. For each of the seven examined producers included in that table, duties are collected by reference to a MIP that exceeds the individually determined normal values for some or all of the six products. The EC, therefore, violated Article VI:2 of the GATT 1994

[531] *Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties*, L/1141, 29 January 1960, para. 11 and 11(a). Exhibit NOR-87.

and Article 9.2 of the *Anti-Dumping Agreement*. Furthermore, for non-examined producers and exporters, the table also shows that the MIPs exceed the weighted average normal values. The EC, therefore, also violated Article VI:2 of the GATT 1994 and Article 9.4(ii) of the *Anti-Dumping Agreement*.

653. As noted in paragraph 637, Norway used the exchange rate for the IP to convert the various normal values from Norwegian kroner to euros. For its part, the EC improperly used a three year average exchange rate. The panel in *Mexico – Rice* held that, under the *Anti-Dumping Agreement*, there must be "an inherent real-time link between the imposition of [an anti-dumping] measure and the conditions for application of the measure, dumping causing injury."[532] In that dispute, the Appellate Body held that "*the conditions for imposition of a measure must be based on data that provide indications of the situation prevailing when the investigation takes place*."[533] As a result, normal value *expressed in any currency* must be determined using data – including exchange rate data – that reflects the "situation prevailing" during the investigation period. Otherwise, normal value could well be distorted by changes in the relative value of the currencies that occurred outside the IP.

654. This is confirmed by Article 2.4.1 of the *Anti-Dumping Agreement*, which sets forth rules governing the conversion of exchange rates for purposes of the comparison of normal value and export price. Under that provision, the exchange rate should be the rate applicable *on the date of the sales being compared*. In others words, the data used must be *the most relevant data to the situation prevailing at the time of sale*. It would be wholly inconsistent with Article 2.4.1 to convert normal value into other currencies using data from outside the period of investigation.

655. As a result, when the EC converted the normal values determined for the IP into euros it was obliged to do so using the exchange rate for that same period. By using a three year average exchange rate, the EC relied on irrelevant data that distorted the conversion, overstating normal value in euros by 5.2 percent.[534] The EC justified its reliance on a three exchange rate on the ground this is the average production cycle of salmon.[535] However, normal value is simply "the 'normal' price of the like product" at a given moment in time,

[532] Panel report, *Mexico – Rice*, para. 7.58.
[533] Appellate Body Report, *Mexico – Rice*, para. 166. Emphasis added.
[534] *See* para. 632.
[535] Definitive Regulation, para. 130.

namely during the IP. The duration of the production cycle of a product is irrelevant when determining the finished product's price at a given moment.

656. Finally, Norway observes that the EC has imposed a single set of MIPs on all Norwegian producers and exports. If the EC wishes to adopt a *uniform minimum price* applicable to all exporters and producers, it must do so at the level of the *lowest normal value determined for an investigated exporter or producer*.

(c) *Conclusion*

657. By imposing MIPs that that exceed the normal values determined for individually examined producers, as set forth in the table in paragraph 638, the EC violated Article VI:2 of the GATT 1994 and Article 9.2 of the *Anti-Dumping Agreement*. Likewise, by imposing MIPs that exceed the weighted average normal values for examined producers, other than Nordlaks and Grieg, the EC violates Article VI:2 of the GATT 1994 and Article 9.4(ii) of the *Anti-Dumping Agreement*.

(iii) <u>The EC Violated Article VI:2 of the GATT 1994 and Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreemen*t Because it Imposed Anti-Dumping Duties that are Not Limited by the Margin of Dumping</u>

658. In the case of *examined producers*, both the GATT 1994 and the *Anti-Dumping Agreement* provide that an authority cannot impose anti-dumping duties that exceed the margin of dumping. Article VI:2 of the GATT 1994 states than an anti-dumping duty shall be "*not greater in amount than the margin of dumping*" (emphasis added). Similarly, Article 9.1 of the *Anti-Dumping Agreement* provides, in relevant part:

> 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. (emphasis added)

Thus, an authority can "impose" anti-dumping duties that are *less than* the margin of dumping; but in no case can an authority impose duties that *exceed* the full margin of dumping.

659. In the same vein, Article 9.3 states that "[t]the amount of the anti-dumping duty *shall not exceed the margin of dumping* established under Article 2". Interpreting Article 9.3, the Appellate Body found in *US – Zeroing (EC)* 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) … .[536]

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.[537]

660. Other provisions in the *Anti-Dumping Agreement* contain similar limitations. Pursuant to Article 7.2, provisional measures may "not [be] greater than the provisionally estimated margin of dumping". Likewise, according to Article 8.1, price increases under price undertakings "shall not be higher than necessary to eliminate the margin of dumping".

661. Thus, under the *Anti-Dumping Agreement*, and Articles 9.1 and 9.3 in particular, *any* remedial action against dumping by examined producers and exporters is *limited by the margin of dumping*. Nothing in the text confines this limitation to anti-dumping measures in the form of an *ad valorem* duty, nor does the text exclude this rule where variable duties are imposed on the basis of a reference price.

662. 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. That amount could, theoretically, equal the entire amount of the MIP. [538] As a result, the amount of anti-dumping duty that may be imposed is not limited to the margin of dumping of any of the examined producers. Thus, contrary to Article VI:2, and Articles 9.1 and 9.3, there is no mechanism in the measure to ensure that the amount of duties imposed does not exceed the margins of dumping determined for the examined producers.

663. Furthermore, where an anti-dumping duty exceeds the dumping margin, and is therefore inconsistent with Articles 9.1 and 9.3, this anti-dumping duty is, by definition, a

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[536]Appellate Body Report, *US – Zeroing (EC)*, para. 130. (original emphasis)
[537]Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 125 and footnote 156 thereto. (underlining added)
[538]The amount of the anti-dumping duty cannot exceed the level of the MIP, in the theoretical event that the export price is just marginally above zero.

duty that is not collected in "the appropriate amount", within the meaning of Article 9.2. As a result, the EC's MIPs are inconsistent also with that provision.

664. A similar issue arose in *Argentina – Textiles*, where the Appellate Body examined a measure that imposed a specific (i.e. fixed) duty on imports of a particular product. Argentina's Schedule of Concessions imposed a ceiling on duties that was expressed as an *ad valorem* percentage, not as a specific amount. The Appellate Body observed that:

> … for any specific duty, there is an *ad valorem* equivalent deduced from the ratio of the absolute amount collected to the price of the imported product.[539]

665. In the case of lower-priced imports, when the *ad valorem* equivalent was higher, the *ad valorem* equivalent exceeded Argentina's bound rate. The Appellate Body noted:

> that it is possible, under certain circumstances, for a Member <u>to design a legislative "ceiling" or "cap" on the level of specific duty applied</u> which would ensure that … the *ad valorem* equivalents of the duties actually applied would not exceed the *ad valorem* duties provided for in the Member's Schedule.[540] (underlining added)

However, the Appellate Body found that "no such 'ceiling' exists in this case".[541] Argentina, therefore, acted inconsistently with its obligations under the GATT 1994.

666. In this dispute, the amount of the variable duty imposed on a shipment can be expressed as an *ad valorem* equivalent deduced from the ratio of the amount of duty collected on a shipment to the price of the imported product. Like Argentina's measure, the EC's measure contains no "ceiling" or "cap" that ensures that the duty imposed does not exceed the maximum permissible amount of duty.

667. The EC, therefore, violated Article VI:2 of the GATT 1994 and Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement* by failing to ensure that anti-dumping duties imposed on examined producers do not exceed the individually determined dumping margin.

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[539] Appellate Body Report, *Argentina – Textiles*, para. 50.
[540] Appellate Body Report, *Argentina – Textiles (EC)*, para. 54.
[541] Appellate Body Report, *Argentina – Textiles (EC)*, para. 54.

D. *Conclusion*

668. For all the above reasons, the EC violated Article VI:2 of the GATT 1994 as well as Articles 9.1, 9.2, 9.3, and 9.4(ii) of the *Anti-Dumping Agreement*. Specifically, the EC violated:

- Article VI:2 of the GATT 1994 and Article 9.2 of the *Anti-Dumping Agreement* because it imposed MIPs that exceed the normal values determined for examined producers;

- Article VI:2 of the GATT 1994 and Article 9.4(ii) because it imposed MIPs that exceed the weighted average normal values determined for the examined producers, excluding Nordlaks and Grieg; and,

- Article VI:2 and Articles 9.1, 9.2 and 9.3 because it imposed MIPs on examined producers that are not limited by margin of dumping determined for those producers.

IX. THE EC IMPOSED FIXED DUTIES ARE IN VIOLATION OF ARTICLES 9.1, 9.2, AND 9.3 OF THE *ANTI-DUMPING AGREEMENT*

669. 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.

A. *Overview of the EC's Fixed Duties*

670. To recall, in the Definitive Regulation, the EC imposed anti-dumping duties in the form of MIPs. In addition to the MIPs, in defined circumstances, the EC applies *fixed anti-dumping duties*. Together with the MIPs, the fixed duties provide a "double system of measures".[542] According to the EC, 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".[543] However, the EC has not explained what this means nor disclosed it calculations. In particular, it has not explained how the fixed duty, which is an *absolute* amount, is based on the weighted average injury margin, which is a *percentage* amount.[544]

671. Pursuant to the Definitive Regulation, the fixed duty is imposed "[w]here 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:

(1) below the price declared to the customs authorities (the "declared price"); and

(2) below the relevant MIP.

672. The level of the fixed duties for each product category is set out in the Definitive Regulation.[545] A single fixed duty is established for all examined and non-examined producers and exporters, for each of the six products subject to a separate MIP. The fixed duties range from €0.40/kg to €1.12/kg net product weight.

673. In some circumstances, the imposition of the fixed duty results in the entry price of a shipment exceeding the MIP. For example, assume an exporter ships "gutted, head-on, fresh,

[542] Definitive Regulation, para. 136.
[543] Definitive Regulation, para. 136.
[544] According to the Definitive Regulation, para. 127, the injury margin is 14.6 percent.
[545] Article 1(5) of the Definitive Regulation.

chilled or frozen" fish at a declared price of €3,11/kg. This equals the MIP for this product and no anti-dumping duty is imposed. However, now assume that customs officials subsequently ascertain that the actual price is €2.90/kg. Because the actual price is lower than both the declared price and the MIP, a fixed duty of €0.45/kg is imposed. The actual price (€2.90/kg) plus the specific duty (€0.45/kg) results in an entry price of €3.35/kg, which exceeds the MIP of €3.11/kg. Thus, the fixed duty elevates the entry price *above* the MIP prescribed by the EC.

674. In other circumstances, however, the fixed duty does not function in this way. Assume, again, that the declared sales price of the same shipment is €3.11/kg. However, now assume that the actual price is €2.50/kg. This would, again, trigger the imposition of a fixed duty of €0.45/kg. However, in this example, the actual price (€2.50/kg) plus the fixed duty (€0.45/kg) equals €2.95/kg, which is still below the MIP of €3.11/kg. In that event, the EC imposes an *additional variable amount* to ensure that the duty equals the difference between the actual price and the relevant MIP. In our example, this difference is 0.61 EUR/kg.[546] In other words, the fixed duty is, effectively, superseded by a variable duty.

675. Where the gap between the actual price and the MIP is less than the amount of the fixed duty, the entry price is higher than the relevant MIP (see the example in paragraph 673); whereas, when the gap is greater than the amount of fixed duty, the entry price equals the MIP (see the example in paragraph 674).

B. *The EC's Fixed Duties Violate Articles 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement Because They Are Not Limited to the Individually Determined Margins of Dumping*

676. The provisions relevant to Norway's claim concerning the fixed duties are Articles 9.1 and 9.3 of the *Anti-Dumping Agreement*, which are described in paragraphs 658 to 661 above. Like the MIPs, the EC's fixed duties violate these provisions because they are not limited by a producer's individual margin of dumping. As a result, when expressed as a percentage of the export price, the fixed duty exceeds the margin of dumping for five examined producers.

[546] €3.11/kg (MIP) less €2.50/kg (actual price) equals a duty of €0.61/kg.

677. Norway's claim in this section address the application of the fixed duties in circumstances where the EC imposes fixed duties that 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 (*see* paragraph 673).

678. Norway's claims in this section do not address the application of the fixed duty in circumstances where the EC imposes the fixed duty *plus* an additional variable amount to ensure that the entry price is equal to the MIP (*see* paragraph 674). In that case, the duty is, in reality, a variable duty and Norway's claims in Section VIII regarding the improper level of the MIPs are relevant.

679. In table below, Norway compares the *ad valorem* equivalent of the fixed duties, on the basis of two actual import prices, with the individual margins of dumping for five examined producers. The *lower actual price*, marked with an "L" in the table, is the lowest actual price which, with the addition of the fixed duty, exceeds the MIP and involves *no additional variable element*. The lowest price equals the amount of the MIP less the fixed duty plus one cent. The *higher actual price*, marked with an "H" in the table, is the highest actual price at which a fixed duty can be imposed given that the actual price must be below the level of the MIP for a fixed duty to apply.[547]

[547] *See* paras. 673 and 674 above.

Table 10: Comparison of the *Ad Valorem* Equivalent of the Fixed Duties with Individual Margins Of Dumping

	Product (all fresh, chilled, or frozen)	**MIP**	**Actual Price**	**Fixed Duty**	***Ad Valorem* Equivalent**	**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%
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%

680. Thus, for five examined producers, the table demonstrates that the *ad valorem* equivalents of the fixed duties exceed the margin of dumping when the actual price is at the lowest level at which the fixed duties are applied without an additional variable amount. Even when the actual price is at its highest level, the fixed duties exceed the individual margins for four of the five producers. For the fifth producer, Fjord, the fixed duties exceed the margin for more than half of the price points between the lowest and the highest actual prices.[548]

681. Norway recalls its review of the Appellate Body's findings in *Argentina – Textiles* in paragraphs 664 and 665. The Appellate Body observed that "for any specific [or fixed] duty, there is an *ad valorem* equivalent deduced from the ratio of the absolute amount collected to the price of the imported product."[549] The Appellate Body held that a Member must adopt a mechanism to ensure that a fixed duty does not exceed the maximum amount of *ad valorem* duties that may be imposed under WTO law.[550]

682. 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, the fixed duty for each of the six products exceeds the dumping margin for some or all export prices.

683. The EC's fixed duties are, therefore, inconsistent with Articles 9.1 and 9.3 of the *Anti-Dumping Agreement*, which expressly provide that an anti-dumping duty shall not exceed the margin of dumping. The EC also violated Article 9.2 because the anti-dumping duty is not collected in "the appropriate amounts", within the meaning of that provision.

C. *Conclusion*

684. For the above reasons, the EC violated Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement*.

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[548] Fjord's margin of dumping equals 15 percent. Thus, the *ad valorem* equivalent of the fixed duty rises above the margin of dumping when it equals 15 percent. For Fjord, for all product categories, the *ad valorem* equivalent of the fixed duty rises above 15 percent at an actual price that is closer to the highest actual price than the lowest. For example, for whole fish, the *ad valorem* equivalent of the fixed duty exceeds 15 percent when the actual price is at €2.67, whereas the lowest actual price is €2.41 and the highest actual price is €2.79. Thus, the fixed duty exceeds Fjord's margin for more than half of the prices between the highest and lowest actual prices. The same is true for the fixed duties for all other product categories for Fjord.

[549] Appellate Body Report, *Argentina – Textiles*, para. 50.

[550] Appellate Body Report, *Argentina – Textiles*, para. 54.

X. THE EC VIOLATED THE PROCEDURAL REQUIREMENTS IN ARTICLES 6 AND 12 OF THE *ANTI-DUMPING AGREEMENT*

685. In this Section, Norway will set out the EC's violations of the procedural rules in the *Anti-Dumping Agreement*. *First*, Norway claims that the EC violated Articles 6.4 and 6.2 because it failed to disclose non-confidential information contained in the record of the investigation. *Second*, the EC also failed to disclose the essential facts that formed the basis for its decision to impose duties, as required by Articles 6.9 and 6.2. *Third*, Norway argues that the EC violated Articles 12.2 and 12.2.2 because it failed to provide a reasoned and adequate explanation for a number of its findings and conclusions.

A. *The EC Failed to Ensure an Adequate Opportunity For Interested Parties to See Relevant Information in the Record of the Investigation*

(i) Introduction

686. An anti-dumping investigation involves a process whereby an authority obtains information from a variety of sources and, on the basis of this information, makes a series of factual and legal determinations. These determinations can adversely affect the position of interested parties, including through the imposition of anti-dumping duties. In order to protect the interests of interested parties, the *Anti-Dumping Agreement* requires the authority to conduct its investigation, and make determinations, in accordance with certain minimum standards of procedural justice and fairness. In this investigation, the EC failed to comply with these standards, in particular the interested parties' basic rights of defence and right to be heard.

687. Norway argues that the EC did not provide access to all relevant information in the non-confidential record of the investigation, as required by Articles 6.2 and 6.4 of the *Anti-Dumping Agreement*. This is because 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.

(ii) The EC Failed to Provide Access to All Relevant Information in the Public Record of the Investigation

688. The Appellate Body has underscored "the importance of the obligations contained in Article 6 of the *Anti-Dumping Agreement*", which "establish a framework of procedural and

due process obligations."[551] Article 6.2 of the *Anti-Dumping Agreement* enshrines a cardinal principle for the conduct of an anti-dumping investigation:

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests.

689. Pursuant to that right, Article 6.2 guarantees interested parties the right to present views "oppos[ed]" to the views presented by other parties, and to make "rebuttal" arguments. Consistent with the requirements of due process, Article 6.2, therefore, provides that interested parties enjoy the right of defence and the corollary right to be heard.

690. The effective exercise of these rights requires that interested parties have access to information submitted by the other interested parties, as well as to information obtained by the authority during the investigation. Absent access to this information, an interested party cannot formulate an "opposing view", make "rebuttal arguments", or generally make effective comments on the evidence in the record and on the authority's determinations.

691. Article 6.4 of the *Anti-Dumping Agreement*, therefore, confers on interested parties a right of access to evidence in the non-confidential record of the investigation:

> The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is *relevant to the presentation of their cases*, that is *not confidential* as defined in paragraph 5, and that is *used by the authorities* in an anti-dumping investigation, and to prepare presentations on the basis of this information. (Emphasis added.)

692. The Appellate Body has ruled that the relevance of information must be assessed from the perspective of the interested parties.[552] The essence of due process is that interested parties must be in a position to defend their interests in light of the views of other parties and the information before the authority. An authority cannot, therefore, second-guess whether a particular document could be "relevant" to an interested party's "presentation". After all, if one interested party has taken the time to put a document on the record, that party clearly considers it to be relevant and the authority should not deny another interested party the opportunity to comment upon it.

[551] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 138.
[552] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 145.

693. The Appellate Body has also held that the phrase "used by the authorities" in Article 6.4 refers to information that the authority must *evaluate* in making its determinations.[553] An authority must evaluate all of the information submitted to it that relates to its determinations, and cannot ignore any of it. The rights of defence guaranteed by Articles 6.2 and 6.4 require that, in making "presentations", interested parties have an opportunity to "see" and, thereafter, comment upon all information that the authority will evaluate and that could, therefore, form the basis for the authority's determination. The authority cannot, therefore, selectively limit access to certain information, but must make available all information that might be used by the authority. If interested parties are denied an opportunity to see all information in the record, they cannot adequately formulate their defence "throughout the anti-dumping investigation", as required by Article 6.2.

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

695. The duty to allow interested parties to "see" relevant information is subject to limitations in the case of confidential information, which the authorities cannot disclose. However, under Article 6.5.1, a non-confidential summary of confidential information must be included in the record. In "exceptional circumstances", the duty to provide non-confidential summaries may be waived, provided that "a statement of the reasons why summarization is not possible" is given.

696. In this investigation, the EC violated the obligations to ensure that interested parties could see all non-confidential information relevant to the defence of their interests, including non-confidential summaries of confidential information.

697. By letter of 4 August 2006, Norway outlined to the Panel the circumstances surrounding the EC's failure to disclose all non-confidential documents in the record. To

[553] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 145. Information submitted regarding injury factors listed in Article 3.4 was information that must "be used by the authorities" in making its determination.

recall, briefly, the circumstances are as follows: on 28 and 29 November, as well as on 23 December, officials from the Government of Norway inspected the non-confidential record at the offices of the European Commission in Brussels with a view to confirming its contents at that late stage of the investigation.[554] The EC provided no master list of the documents included in the non-confidential record because, it said, there is no such requirement of the *Anti-Dumping Agreement*.

698. On inspection, it became clear to the Norwegian officials that the non-confidential record was incomplete because numerous documents that should have been in the record were missing.[555] In Annex 3-A to its letter of 4 August 2006, Norway attached a list of all the documents that were included in the non-confidential record.[556] In Annex 3-B to that letter, Norway provided the Panel with a list of 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.[557] Annex 3-B is based on:

- Norway's knowledge of documents submitted by certain interested parties;
- references in documents in the non-confidential record to other documents that were missing from the record; and,
- references in the Provisional and Definitive Regulations to documents that were missing from the record.

699. By definition, Norway does not know which documents were submitted to the EC, and which were not. The list provided in Annex 3-B is, therefore, indicative and not an exhaustive statement of the documents that were not disclosed to Norway.

700. The documents that Norway knows to be missing cover all aspects of the investigation, including the investigation of both dumping and injury. They include:

[554] The circumstances of these inspections are described in affidavits from the officials that conducted the inspections of the non-confidential record (*see* Affidavits from Paul Øystein Bjørdal and Sigrun Holst). Exhibits NOR-90 and NOR-91. *See also* Note Verbale No. 14/2005 from Norway to the EC, 13 December 2005 (Exhibit NOR-88) and Note Verbale No. 3/2006 from Norway to the EC, 28 April 2006 (Exhibit NOR-89).
[555] *See* Affidavits from Paul Øystein Bjørdal and Sigrun Holst. *See* Exhibits NOR-90 and NOR-91.
[556] Exhibit NOR-13.
[557] Exhibit NOR-13.

(a) sampling forms and questionnaire responses provided by EC domestic producers;[558]

(b) questionnaire responses (or other communications) from EC "importers users and processors";[559]

(c) questionnaire responses (or other communications) from EC "users' associations";[560]

(d) all submissions by the Government of Norway;

(e) all submissions by FHL;

(f) numerous submissions by all ten sampled Norwegian companies and by a related company that was requested to provide a questionnaire response.[561]

701. The non-confidential record of the EC's investigation does not, therefore, contain many of the documents that were submitted to the EC nor, where appropriate, non-confidential summaries thereof.

702. The EC's standards of transparency fall very far below the minimum requirements imposed by the *Anti-Dumping Agreement*. The EC has not complied with the requirement in Article 6.4 to ensure an opportunity for interested parties to see "all information" that is

[558] No sampling forms (or non-confidential summaries) are provided for: Foraness Fish Ltd; Mannin Bay Salmon; North Atlantic Salmon; Sidinish Salmon; and West Minch Salmon. Questionnaire responses (or non-confidential summaries) are missing for: Bressey Salmon; Scord Salmon; Shetland Salmon Group; and Stolt Sea Farm.

[559] Para. 6 of the Provisional Regulation states that "15 importers users and processors" had cooperated in the investigation. However, the record discloses questionnaire responses pre-dating the Provisional Regulation for only five of those 15 "importers users and processors": Armoric, Labeyrie; Laschinger; SIF France, and Fjord Seafood Pieters. The record discloses one further questionnaire response, dated after the publication of the Provisional Regulation, for Norlax. No communications from the other 8 importers users and processors were in the record of the investigation.

[560] Para. 6 of the Provisional Regulation states that 4 users' associations cooperated in the investigation; para. 7 of the Definitive Regulation states that verification visits were conducted at the premises of the Association of Danish Fish Processing Industries and Exporters (Copenhagen); Bundesverband der Deutschen Fischindustrie und des Fischgrosshandels (Hamburg); Polish Association of Fish Processors (Koszalin); and Syndicat national du saumon et de la truite fumés (Paris). However, there are no questionnaire responses for these four associations. The record furthermore discloses no other communications from the Polish Association of Fish Processors (Koszalin).

[561] The missing documents include the heart of the exchange between the sampled Norwegian companies and the EC on the calculation of the COP, namely, non-confidential versions of the companies' comments on: (1) the Information Note on Cost of Production of 8 March 2005; (2) the provisional disclosure of 22 April 2005; (3) the definitive disclosure of 28 October 2005; (4) the EC's request for comments on remedies of 16 November 2005; and, (5) the Information Note concerning the definitive MIPs of 13 December 2005.

relevant to the presentation of their respective cases. The information relating to the EC domestic industry and users – including sampling forms and questionnaire responses – is relevant to the presentation of the position of Norwegian interested parties regarding the domestic industry and injury. Equally, the submissions by interested Norwegian parties are relevant to the presentation of the position of other Norwegian interested parties, if not interested EC parties. To the extent the information concerned is confidential, the EC was obliged to allow the interested parties to see non-confidential summaries of the information.

703. Finally, all of the information that was missing from the record is information that the investigating authority was required to evaluate. In particular, the information relating to the EC domestic industry and the EC processing industry involved responses to questions posed by the EC itself in sampling forms or questionnaires. Further, the EC was also required to evaluate the submissions of interested Norwegian parties that responded to specific invitations by the EC to provide comments. The EC, therefore, evaluated (or should have evaluated) the missing information in making its factual and legal determinations.

(iii) Conclusion

704. The EC, therefore, violated Article 6.4 of the *Anti-Dumping Agreement*. Because the EC failed to provide full access to the non-confidential record of the investigation, Norway and other interested parties were unable properly to defend their interests. The EC, in consequence, also violated Article 6.2 of that *Agreement*.

B. *The EC Failed to Inform the Interested Parties of the Essential Facts that Form the Basis for its Decision to Impose Definitive Measures*

(i) Introduction

705. Norway submits that the EC violated Article 6.9 of the *Anti-Dumping Agreement* because it failed to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." In consequence, the EC violated Article 6.2 of the *Agreement*, because it did not provide for "a full opportunity" for all interested parties to defend their interests.

706. 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 that formed the basis for its decision to impose definitive

measures. The non-disclosed facts related to key elements of the EC's decision, such as: its definition of the product concerned; its definition of the domestic industry; dumping; injury; causation and non-attribution; and the remedy.

707. Norway sets out, *first*, the obligations imposed by Articles 6.9 and 6.2 of the *Anti-Dumping Agreement* and, *second*, Norway demonstrates that the EC violated these provisions. The EC failed to disclose essential facts to the interested parties in numerous instances. However, Norway does not wish to test the Panel's patience by bringing claims with respect to *all* of those instances. Instead, Norway has limited its claim to four examples: (1) dumping; (2) definition of the domestic industry for purposes of the injury determination; (3) causation and non-attribution; and (4) the remedy.

(ii) The Disciplines in Article 6.9 of the *Anti-Dumping Agreement* on the Disclosure of "Essential Facts"

708. Article 6.9 of the *Anti-Dumping Agreement* 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 (underlining added).

709. The first sentence of Article 6.9 has been interpreted by WTO panels on several occasions. Those panels have found that the aim of disclosure is to "actually disclose to the interested parties the essential facts which, being under consideration, are anticipated by the authorities as being those which will form the basis for the decision whether to apply definitive measures."[562]

710. Panels have held that the requirements of Article 6.9 cannot be complied with simply by providing access to *all* information in the file – otherwise, "there would be little, if any, practical difference between Article 6.9 and Article 6.4".[563] Rather, the investigating authority must actively identify the facts on which it will rely in making its determination, for

[562] Panel report, *Argentina – Ceramic Tiles*, para. 6.125. Emphasis added.
[563] Panel report, *Guatemala – Cement II*, para. 8.230.

instance, by "disclosing a *specially prepared document* summarizing the essential facts under consideration". [564] The duty to identify separately the essential facts arises because:

> … an investigating authority's file is likely to contain vast amounts of information, some of which may not be relied on by the investigating authority in making its decision whether to apply definitive measures. … The difficulty for an interested party with access to the file … is that it will not know whether particular information in the file forms the basis of the authority's final determination. One purpose of Article 6.9 is to resolve this difficulty for interested parties.[565]

711. Article 6.9, therefore, requires the authority to *identify* for all interested parties the essential facts that form the basis of its decision whether to apply definitive measures, as opposed to other facts in the record that are not regarded as determinative.

712. The core of the duty of disclosure under Article 6.9 relates to "essential facts". The term "fact" has been interpreted to mean "a thing that is known to have occurred, to exist or to be true".[566] On the basis of that definition, the panel in *Argentina – Poultry* distinguished "facts" – as referred to in Article 6.9 – from "reasons". The authority's reasons (should) explain, among others, how it weighed the facts; why it considered certain facts more important than others; and, how the facts in the record supported its factual and legal determinations. In contrast, the duty of disclosure in Article 6.9 relates to evidence.

713. The dictionary meaning of "essential" is "[a]ffecting the essence of anything"; "material", "important".[567] Hence, Article 6.9 requires the identification of all "material" or "important" facts that form the basis of the decision whether to apply definitive measures.

714. Finally, the term 'basis" is defined as:

> 7. [t]he main constituent. … 8. That by or on which anything immaterial is supported or sustained; a foundation, support … 9. That on which anything is reared, constructed, or established, and by which its constitution or operation is determined. …[568]

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[564] Panel report, *Argentina – Ceramic Tiles*, para. 6.125. Emphasis added.
[565] Panel report, *Guatemala – Cement II*, para. 8.229.
[566] Panel report, *Argentina – Poultry*, para. 7.225.
[567] *The Oxford English Dictionary*, J.A. Simpson and E.S.C. Weiner (eds.) (Clarendon Press, 1989, 2nd ed.), Volume V, page 402, column 1, meaning 3b. Exhibit NOR-92.
[568] *The Oxford English Dictionary*, J.A. Simpson and E.S.C. Weiner (eds.) (Clarendon Press, 1989, 2nd ed.),Volume I, page 985, column 3, meaning 7, 9, and 9c). Exhibit NOR-93.

715. Thus, the investigating authority must disclose the "material" or "important" facts that provide the "foundation" on which the decision to apply definitive measures is "constructed". These are the facts in the record that "support" the authority's determination that definitive measures may be imposed.

716. The second sentence of Article 6.9 sheds light on the first sentence. Under the second sentence, disclosure must occur "in sufficient time for the parties to defend their interests". Interests can be defended by allowing interested parties an opportunity, among others, to "comment[ ] on the completeness of the essential facts under consideration",[569] or by "giving reasons why [parties'] responses should not be rejected and by suggesting alternative sources for facts available if their responses were nonetheless disregarded."[570] Article 6.9 is intended to place interested parties in a position where they can properly understand, verify, and challenge the facts that are likely to lead the authority to impose definitive measures. Absent full disclosure of the essential facts, interested parties are left guessing at the factual basis in the record for the authority's factual and legal determinations. In that event, they cannot make effective comments on the factual basis for the authority's intended decision. Norway now turns to its claims.

(iii) <u>The EC Failed to Disclose Essential Facts</u>

(a) *The EC's Approach to Disclosing Essential facts*

717. In the present investigation, the EC undertook two "rounds" of disclosure – provisional and definitive. The provisional disclosure took place on 22 April 2005, roughly six months after initiation of the investigation. The definitive disclosure took place on 28 October 2005, roughly a year after initiation and roughly three months before the Definitive Regulation was adopted.

718. In each round of disclosure, the EC sent disclosure documents to the interested parties.[571] Each investigated Norwegian producer received a letter with a number of annexes. Some of those annexes were identical for all investigated producers, while other annexes were specific to each producer.

[569] Panel report, *Argentina – Ceramic Tiles*, para. 6.125.
[570] Panel report, *Argentina – Ceramic Tiles*, para. 6.129.
[571] The EC sent definitive disclosure documents to the Norwegian producers included in the sample, to FHL and to Norway. The EC requested Norway to distribute the General Disclosure document "to all interested parties in Norway" (Note Verbale No. *D(2005) 14141 from the EC to Norway, 28 October 2005. Exhibit NOR-94).

719. The "*general*" disclosure document consisted of a draft of the forthcoming EC Regulation. Hence, in the Provisional Disclosure, the EC sent a draft of the Provisional Regulation and, in the Definitive Disclosure, the EC sent a draft of the Definitive Regulation. Norway and FHL received only the General Disclosure document and no further disclosure of the essential facts.

720. In the annexes sent only to the investigated Norwegian producers, the EC provided a "*specific dumping disclosure*" document (narrative), accompanied by calculation spreadsheets, as well as an "injury disclosure" document (narrative), also accompanied by calculation spreadsheets.[572]

721. 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. This note addressed "concerns" regarding the minimum import price (MIP) for fillets. The EC also sent a subsequent information note regarding the definitive MIPs for fillets.[573]

(b) *Examples of the EC's Failure to Disclose Essential Facts*

722. As explained in paragraph 707, in the interests of brevity, Norway does not address every instance in which the EC failed to properly disclose the essential facts under consideration because, in Norway's view, there are simply too many.

723. Norway has instead chosen to rely on a number of examples, each of which pertains to a key part of the EC's anti-dumping determination, namely: (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).

(b)(i) *The EC failed to disclose the essential facts relating to its dumping determination*

724. Norway first turns to the EC's disclosure relating to the EC's dumping determination. In the Definitive Regulation, the EC set out dumping margins for the investigated producers. For one producer, namely PFN, the EC established a definitive dumping margin of 17.7

[572] The injury disclosure document contained, at least for some investigated companies, a "specific injury disclosure document" with examination of some injury factors.
[573] Letter from the Commission on the definitive MIP, 13 December 2005, in Exhibit NOR-19.

percent.[574] However, in PFN's Definitive Disclosure, the EC disclosed facts supporting a considerably higher dumping margin of 24.5 percent.[575] Thus, following the definitive disclosure, the EC re-assessed the essential facts and revised its dumping determination downwards by, in absolute terms, 6.8 percent and, in relative terms, 27.8 percent.

725. The EC did not provide any additional disclosure of the essential facts supporting its modified dumping determination. A specific request from PFN for information regarding the change in the determination was refused.[576] Hence, there was no disclosure of the essential facts forming the basis for PFN's revised dumping margin.

726. The facts underlying the dumping margin determined by the investigating authority are "essential facts" "form[ing] the basis for the decision whether to apply definitive measures". This is because the determination of a dumping margin above the *de minimis* level is necessary to justify the imposition of an anti-dumping measure.

727. The significant change in the level of PFN's margin means that the EC revised its assessment of the facts underlying the dumping determination between the definitive disclosure and the definitive determination. In other words, the essential facts that lead to the imposition of definitive measures on PFN changed. Absent disclosure, PFN has no idea what changes were made in the EC's assessment of which facts were essential, and which were not.

728. This has a profound effect on PFN's ability to defend its interests, notably, in judicial proceedings under Article 13 of the *Anti-Dumping Agreement* because the company does not know how the EC arrived at a dumping determination of 17.7 percent. PFN does not know which facts the EC regarded as important in calculating its normal value and export price, and which is disregarded. The non-disclosure also impairs the ability of Norway to pursue claims in WTO proceedings regarding PFN's dumping determination.

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[574] Definitive Regulation, para. 32.

[575] Definitive Disclosure, para. 32. For two other companies, Hydroteck and Sinkaberg, the EC also changed the margin of dumping following definitive disclosure. For Hydroteck, the margin dropped from 21.0 percent to 18.0 percent; and, for Sinkaberg, it dropped from 2.8 percent to 2.6 percent. The EC failed to disclose to either of these companies the change in its assessment of the essential facts that supported the revised determinations. In both cases, the companies requested information from the EC regarding the modified determination.

[576] *See* e-mail from Øyvind Torlen of PFN to Mr. Schmidt at DG-Trade, dated 21 March 2006; response by Mr. Schmidt to Mr. Torlen, of the same day; and e-mail from Mr. Torlen to Mr. Schmidt, of the same day. Exhibit NOR-95.

729. This situation is similar to one that arose in *Guatemala – Cement II*. In that dispute, the panel found that the disclosure of the essential facts underlying a provisional determination was insufficient under Article 6.9 "where the factual basis of the provisional measure is *significantly different from the factual basis of the definitive measure*."[577] In this case, the definitive disclosure is also based on a preliminary dumping determination that is significantly different from the factual basis of the definitive measure.

730. Norway notes that the EC also failed to disclose the essential facts relating to the dumping margins for Hydroteck and Sinkaberg-Hansen, which also changed between the Definitive Disclosure and the Definitive Regulation.[578]

731. Norway recalls that, by way of disclosure of the essential facts, it received the General Disclosure document, a draft of the Definitive Regulation. That document provides little information on how the EC arrived at its determinations of normal value and, in some cases, is inaccurate. For example, the Provisional Regulation states that the EC used "company specific information" to calculate amounts for SG&A costs for all sampled producers.[579] This is merely confirmed in the General Disclosure and the Definitive Regulation.[580] However, the EC fails 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.[581] The General Disclosure, therefore, gives the incorrect impression that Hydroteck's reported SG&A costs were used by the EC, when they were not. This is a failure to disclose essential facts.

732. Finally, Norway wishes to draw the Panel's attention to a comment made by one the Community's own processors regarding the level of transparency in the EC's disclosure on dumping. It stated:

[577] Panel report, *Guatemala – Cement II*, para. 8.228. Emphasis added.
[578] Hydroteck's margin decreased from 21.0 to 18.0 percent and Sinkaberg's from 2.9 to 2.6 percent. Compare General Disclosure, para. 32 (Exhibit NOR-67) and Definitive Regulation, para. 32.
[579] Provisional Regulation, para. 31.
[580] General Disclosure, para. 11. Exhibit NOR-67.
[581] Information Note on Cost of Production to Hydroteck, 8 March 2005. Exhibit NOR-142. Definitive Disclosure to Hydroteck, Annex 2, point 2.1. Exhibit NOR-45.

> *The European Commission's [disclosure] document provides us with no clarification* regarding either the method for calculating the production cost or the elements that have been taken into account in the calculation.[582]

733. For these reasons, the EC violated Article 6.9 in its disclosure of the essential facts underlying its dumping determinations.

(b)(ii) *The EC failed to disclose the essential facts relating to its definition of the domestic industry*

734. As the second example of non-disclosure, 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.

735. Norway has fully described the EC's findings in the Definitive Regulation on the domestic industry in Section IV of this submission. The Definitive Disclosure is identical to the Definitive Regulation with respect to these findings:

- The EC stated that 15 "complaining Community producers are … deemed to constitute the Community industry … ".[583] The reason for this finding was that those "complaining Community producers" had produced approximately 82 per cent of the "estimated total Community production" of farmed salmon and that this figure of 82 per cent "constitute[d] a major proportion of the Community production".[584] <u>The Commission did not disclose who those 15 Community producers were</u>.

- In defining the universe of "Community production", the EC excluded Community producers that were related to Norwegian exporters or importers.[585] <u>The EC did not disclose those "related" producers nor did it disclose their individual or collective production volumes</u>.

- The EC stated that "the estimated total Community production of the product concerned was around 22,000 tonnes during the IP".[586] <u>The EC did not disclose any fact or document that provides the basis for this determination.</u>

- The EC referred to a category of "silent" producers, that is, "Community producers that were not related to Norwegian exporters or importers, and

[582] Letter from Syndicat Saumon et Truite Fumés to the EC of 8 November 2005 (unofficial translation from French original). Emphasis added. Exhibit NOR-96.
[583] Definitive Disclosure, para. 40; Definitive Regulation, para. 40.
[584] Definitive Disclosure, para. 40; Definitive Regulation, para. 40. The figure indicated by the Commission in the Provisional Disclosure and Provisional Regulation was 90 per cent. (Provisional Disclosure, para. 44; Provisional Regulation, para. 44).
[585] Provisional Regulation, para. 44; Definitive Regulation, para. 37.
[586] Definitive Regulation, para. 38.

which did not take a position on the complaint".[587] The EC never disclosed those "silent" producers, nor did it disclose their individual or collective production volume. The EC also never stated whether the production volume of those producers was or was not included in the concept of "Community production".

- The EC determined that "only data supplied by 15 Community producers which were complainants or which explicitly supported the complaint could be taken into account for the definition of the Community industry". The EC excluded from the definition of the Community industry "companies [that] did not produce salmon any longer, or … did not produce it during the IP, or [that] exclusively produced certain types of salmon, or that … fell into receivership during the IP, or [that] did not provide data in the format requested."[588] The EC did not identify any of those companies that had been excluded from the definition of the domestic industry nor their individual and collective production volume.

736. The EC's statements on the domestic industry in the Definitive Disclosure make a mockery of the requirement to disclose "essential facts" forming the basis of the determination (in this case, the definition of the domestic industry). There is not a single reference to any document or fact that supports or substantiates any of the EC's assertions. It is simply impossible to identify any facts in the record that the EC considers as essential in its determination of the scope of the injured domestic industry.

737. Instead of disclosing the essential facts underlying its determinations, the EC has simply disclosed its determinations. Norway is entitled to know the factual basis for those determinations. Because the essential facts have not been disclosed, neither the Panel nor Norway have any way of verifying the factual basis for the determinations. The EC seems to believe that Norway should simply trust that the record contains "essential facts" that form the basis for the determinations regarding the domestic industry.

738. The determination of the domestic industry is a key element in any anti-dumping investigation because it shapes the outcome of the injury determination and also because an investigation can only be initiated if an application is made by or on behalf of the domestic industry. Hence, facts relating to the definition of the domestic industry are "essential facts" that must be disclosed to enable interested parties to comprehend the basis for the decision whether to apply definitive measures.

[587] Provisional Regulation, para. 43.
[588] Definitive Disclosure, para. 39; Definitive Regulation, para. 39.

739. In sum, the EC failed to disclose some of the key facts relating to the definition of the domestic industry and, therefore, failed to disclose "essential facts … which form the basis for the decision whether to apply definitive measures". The EC, therefore, violated Article 6.9 of the *Anti-Dumping Agreement*.

(b)(iii) *The EC failed to disclose the essential facts relating to its causation and non-attribution determination*

740. Norway turns to the EC's non-attribution analysis as the third example of the EC's failure to disclose "essential facts" within the meaning of Article 6.9. The EC determined that imports from Canada and the United States were not another factor causing injury to the domestic industry. This determination was part of the EC's causation and non-attribution analysis under Article 3.5, and, as a result, an important part of the "basis for the decision whether to apply definitive measures". However, the EC failed to disclose the facts underpinning its determination and thereby violated Article 6.9.

741. In the Provisional Disclosure, the EC stated:

> It should be noted that the import statistics do not distinguish between farmed salmon and wild salmon. However, on the basis of information gathered during the investigation, it appears that the vast part of imports from [the United States] and Canada consists most [sic] 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.[589]

742. In the Definitive Disclosure, the EC confirmed its provisional finding and stated:

> … It was further alleged that the Commission failed to prove that wild salmon did not have any impact on the situation of the Community industry and that wild and farmed salmon are not interchangeable.
>
> It is noted that none of the interested parties questioned the figures relating to the prices and absolute quantities of imports originating in other third countries, but rather their interpretation. It was also not disputed that the import statistics do not distinguish between farmed salmon and wild salmon and that the price of wild salmon is lower than that of farmed salmon.
>
> It is thus important to recall that there is no distinction between farmed salmon and wild salmon in the import statistics. However, it appears that the taste of wild salmon is significantly different from that of

[589] Provisional Disclosure, para. 96. The same text appears in the Provisional Regulation, para. 96.

> farmed salmon. More importantly, the investigation showed that contrary to farmed salmon, wild salmon is practically not offered in the market for sale as a fresh product but it is mostly sold in tins and cans. It is clear that these products are not directly competing with each other on the market. This explains why the price of wild salmon is lower compared to farmed salmon and why these products are not interchangeable for users and consumers. Finally, it is noted that none of these interested parties submitted evidence with regard to the alleged interchangeability of wild and farmed salmon. On this basis, their claims are rejected. [590]

743. The above-quoted EC statements on imports from Canada and the United States consist almost exclusively of conclusions that the EC drew, presumably, based on facts that are not disclosed. There is no reference to any documents and facts on the record substantiating the EC's statements.

744. Specifically, the EC disclosure does not contain any facts or reference to facts on the record concerning:

- import figures relating to wild salmon from Canada and the United States
- the EC's assertions that:
  - wild salmon and farmed salmon do not directly compete with each other
  - wild salmon is not offered in the market for sale as a fresh product but is mostly sold in tins and cans
  - the price of wild salmon is lower than that of farmed salmon, and
  - the taste of wild salmon is different from the taste of farmed salmon.

745. The causation and non-attribution determination is an integral part of any dumping investigation. Without a finding of a causal link between dumped imports and injury to the domestic industry – and a finding that injury attributable to dumped imports is not incorrectly attributed to other factors – an authority cannot impose anti-dumping measures. The facts relating to the non-attribution determination were, therefore, "essential facts" that formed an important part of the basis for the decision whether to apply definitive measures.

[590] General Disclosure, paras. 83 to 85 (Exhibit NOR-67). The same text appears in the Definitive Regulation, paras. 83 to 85.

746. The non-disclosure of essential facts prevented the interested parties from defending their interests and challenging the EC's assessment that imports from Canada and the United States consisted mostly of wild salmon, and that wild and farmed salmon do not compete. Again, the EC seems to consider that interested parties should trust that the record contains "essential facts", and it denies them the opportunity to verify this for themselves. The EC has, therefore, again violated Article 6.9 of the *Anti-Dumping Agreement*.

(b)(iv) *The EC failed to disclose the essential facts relating to its remedy determination*

747. The final example of the EC's failure to disclose essential facts that form the basis for the decision to apply definitive measures are the minimum import prices (MIPs). The Definitive Disclosure is based on a series of MIPs, for different product categories, ranging from 2.80 EUR/kg to 7.73 EUR/kg.

748. Subsequent to the Definitive Disclosure, the EC recalculated the MIP for fillets. On 13 December 2005, the Commission sent to the interested parties a document entitled "Information concerning the definitive MIP" (the "MIPs disclosure"). In that document, the EC set out the new MIPs, which were significantly higher for filleted products.[591] It stated:

> In the light of the comments received, the Commission services deepened the investigation by verifying and cross-checking *all the information available*, namely the data collected during the on-spot verifications at the premises of salmon farms, Community processors and processor's [sic] associations and *the latest information provided by all parties in reply to the definitive disclosure. … On that basis*, it was found … [592]

749. However, the MIPs disclosure does not disclose the essential facts that form the basis for its decision regarding the definitive measures to be imposed. Tantalizing references to "all the information available" and also "the latest information provided by all parties in reply to the definitive disclosure" is insufficient to disclose the "essential facts" that form the "basis" for the determination regarding the imposition of duties. In essence, the EC's MIPs disclosure simply refers interested parties to the entire investigation record regarding MIPs,

[591] A table setting out the changes in the MIPs from the preliminary to the definitive determination is contained in Table 8 in para. 628, above.
[592] MIP Disclosure, 13 December 2005, page 1. Emphasis added.

without specifying which particular documents and which facts in the record are relevant for the EC's revised determination.

750. As WTO panels have found, providing access to the file or informing interested parties that the facts underpinning the authority's determination are included in the record falls far short of the requirements of Article 6.9. As the panel in *Guatemala – Cement II* stated:

> an investigating authority's file is likely to contain vast amounts of information. … The difficulty for an interested party with access to the file … is that it will not know whether particular information in the file forms the basis of the authority's final determination. One purpose of Article 6.9 is to resolve this difficulty for interested parties.[593]

751. Absent disclosure of the essential facts that led the EC to impose the MIPs at the chosen level, the interested parties were not in a position to understand, verify and challenge the information that the EC used in making that determination. The EC, therefore, violated Article 6.9.

(iv) The EC Violated Article 6.2 of the *Anti-Dumping Agreement* by Failing to Ensure Interested Parties a Full Opportunity to Defend Their Interests

752. Norway considers that, when an investigating authority violates Article 6.9, it also violates Article 6.2 of the *Anti-Dumping Agreement*. Norway recalls that Article 6.9 refers to the ability of interested parties to "defend their interests". Thus, the requirements of Article 6.9 – the proper disclosure of essential facts – serve, among others, the purpose of enabling interested parties to defend their interests.

753. For its part, Article 6.2 requires that interested parties be given full opportunity for the defense of their interests *throughout the anti-dumping investigation*. In other words, whenever an interested party is not given full opportunity to defend its interests, during an anti-dumping investigation, the obligation under Article 6.2 is infringed. As a result, any violation of the disclosure obligation Article 6.9 entails a violation of Article 6.2.

(v) Conclusion

754. For the reasons stated, the EC violated Article 6.9 of the *Anti-Dumping Agreement* because it failed to disclose the essential facts that led to the imposition of definitive

[593] Panel report, *Guatemala – Cement II*, para. 8.229.

measures. As a result of that failure, the EC failed to ensure that the interested parties were in a position fully to defend their interests throughout the investigation. Thus, the EC also violated Article 6.2 of the *Anti-Dumping Agreement*.

C. *The EC Failed to Provide a Reasoned and Adequate Explanation in Support of Its Conclusions*

(i) Introduction

755. Norway submits that the EC violated Articles 12.2 and 12.2.2 of the *Anti-Dumping Agreement* because it failed to provide a reasoned and adequate explanation for many of its findings. 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. Almost every determination – from the product determination to the level of the MIPs – is shrouded in obscurity. Typically, the EC presents bald conclusions that make no reference to the facts in the record that support the conclusion. Throughout this submission, Norway has regularly mentioned the EC's failure to provide an adequate explanation for its determination.

756. In this Section, Norway claims that the failure to provide reasons involves a violation of Articles 12.2 and 12.2.2. Norway will not present every single instance in which the EC has failed to provide a reasoned and adequate explanation for its conclusions because, again, there are too many. Instead, Norway offers examples relating to determinations of significance to Norway, namely the 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. Norway, first, reviews the EC's obligations under Article 12 of the *Anti-Dumping Agreement*.

(ii) The EC Failed to Provide a Reasoned and Adequate Explanation under Article 12 of the *Anti-Dumping Agreement*

(a) *The Obligations Imposed by Article 12 of the Anti-Dumping Agreement*

757. Article 12.2 of the *Anti-Dumping 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)

758. Article 12.2.2, in turn, provides:

> A public notice of conclusion … of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty … shall contain, or otherwise make available through a separate report, *all relevant information on the matters of 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. (Emphasis added)

759. These provisions set forth comprehensive obligations on the investigating authority to provide a transparent statement of the reasons for the imposition definitive anti-dumping measures. In sum, Articles 12.2 and 12.2.2 require that the investigating authority provide:

- *in sufficient detail the findings and conclusions reached on all issues of fact and law* considered material by the investigating authorities (Article 12.2);
- *all relevant information on the matters of fact and law* that led to the imposition of final measures (Article 12.2.2);
- the *reasons* that led to the imposition of final measures (Article 12.2.2); and,
- the *reasons* for acceptance or rejection of arguments made by exporters (Article 12.2.2).

760. Thus, the authority must set forth the relevant facts in the record; and it must explain "in sufficient detail" the factual and legal determinations made on the basis of the evidence in the record that led to the imposition of measures.

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

record supports the authority's determination.[594] The authority's explanation must demonstrate in a "clear and unambiguous" manner that the substantive conditions for imposition of trade remedy measures have been satisfied.[595]

(b) *The Failure to Provide a Reasoned and Adequate Explanation for the Product Determination*

762. In Section III of this Submission, Norway sets forth its claim that the EC violated among others, Articles 2.1 and 2.6 of the *Anti-Dumping Agreement*, as well as Articles 3 and 5, in making its determination of the "product under consideration". In making those arguments, Norway narrated the EC's consistent failure to provide a reasoned and adequate explanation for its product determination. The failure to set forth "all relevant information" and to provide "reasons" with respect to this determination also violates Articles 12.2 and 12.2.2 of the *Anti-Dumping Agreement*.

763. The EC's statement of reasons for the determination of the "product under consideration" amounts to three sentences:

> Based on the *physical characteristics*, the *production process* and the *substitutability* of the product from the perspective of the consumer, it was found 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 purpose of the proceeding.[596] (emphasis added)

764. In making this statement, the EC failed 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, it has not explained how the facts in the record support its conclusions. Norway has addressed these failings at length in Section III and will not repeat its arguments here.

765. The lack of a reasoned and adequate explanation for the product determination violates Articles 12.2. and 12.2.2. The EC failed to set out "in sufficient detail" the findings and conclusions reached on all issues of fact and law that it considered material to the product

[594] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 99.
[595] Appellate Body Report, *US – Line Pipe*, para. 217. Norway reviews, in detail, the authority's duty to provide a reasoned and adequate explanation in Section II above.
[596] Provisional Regulation, para. 11.

determination, within the meaning of Article 12.2. And it failed to provide "all relevant information" on the facts in the record pertinent to the determination; and it failed to offer reasons why those facts led it to impose final measures, within the meaning of Article 12.2.2.

(c) *The Failure to Provide a Reasoned and Adequate Explanation for the "Domestic Industry" Determination*

766. As the next example, Norway recalls that, in Section IV, it demonstrated that the EC improperly defined the "domestic industry" under Article 4.1. As a consequence, the EC violated Article 5.4 of the *Anti-Dumping Agreement* and with Articles 3.1, 3.4 and 3.5 of that *Agreement*.

767. Among the many short-comings of the EC's determination of the domestic industry is the failure to provide a reasoned and adequate explanation for many of the elements that make up this determination, as was required by Articles 12.2 and 12.2.2. Again, Norway has described these in detail in an earlier section and will not repeat its arguments.[597] Norway offers several examples:

- The EC did not explain whether its figures for total EC production (22,000 tonnes) included production of all six products corresponding to the six different MIPs, or only on some of them. The explanation fails to indicate, therefore, whether total EC production of the like product included EC production of filleted products.

- The EC excluded an unstated number of related parties but gave reasons with respect to the exclusion of just five related parties.[598] Norway believes that the EC excluded a far larger number of related parties without stating any reasons.

- The EC excluded six other categories of producers from the EC industry but did not provide information on the total production of each category of excluded producers nor state whether the production of these excluded producers is included or not in the total production of the EC industry. The explanation fails to provide evidence supporting the assertion that the

[597] *See* Section IV above.
[598] Definitive Regulation, para. 37.

remaining 15 producers that are included in the EC industry account for a major proportion of total EC production.

- The EC decided to exclude the production of organic salmon from its examination of the EC industry but failed to explain: what criteria were used to identify conventional and organic salmon production; how the EC separated financial and production data pertaining to conventional and organic salmon; and whether total EC production, and the production of the five sampled companies, included or excluded organic salmon.

768. For all these, and many other reasons set out fully in Section IV, Norway submits that EC violated Articles 12.2 and 12.2.2 by failing to provide a reasoned and adequate explanation of how the evidence on record supports its determination regarding the domestic industry. The EC failed to provide the relevant information and reasons relating to this important issue that led it to impose definitive measures.

(d) *The Failure to Provide a Reasoned and Adequate Explanation for the Dumping Determination*

769. Norway considers that there are many examples of the EC's failure to explain its dumping determinations for the ten sampled companies, some of which have already been described. However, a blatant example, again, involves PFN. To recall, PFN's Definitive Disclosure was based on a dumping margin of 24.5 percent. Following the Definitive Disclosure, PFN argued that the EC's determination was flawed.[599] In the Definitive Regulation, the EC revised its determination downwards to 17.7 percent.[600] As a result, the EC must have accepted some of PFN's arguments, although it continued to reject others because, if accepted, PFN's other arguments would have resulted in a much lower margin.[601]

770. The Definitive Regulation provides *no* reasons whatsoever to explain the significant change in the dumping margin. It is impossible to discern the reasons that led the EC to accept certain arguments made by PFN but to reject others. It is even impossible to ascertain which arguments were accepted and which were rejected. Norway notes that the EC also failed to provide any reasons for changes to the dumping margins for Hydroteck and

[599] *See* PFN's Comments on the Definitive Disclosure, 8 November 2005. Exhibit NOR-98.
[600] Definitive Regulation, para. 32.
[601] *See* Norway's claims in Section XI on costs adjustments made with respect to PFN.

Sinkaberg-Hansen that occurred between the Definitive Disclosure and the Definitive Regulation.[602]

771. The EC's failure to state "the reasons for the acceptance or rejection" of arguments made by PFN, Hydroteck and Sinkaberg-Hansen is a violation of Article 12.2.2 and, in consequence, Article 12.2 of the *Anti-Dumping Agreement*.

(e) *The Failure to Provide a Reasoned and Adequate Explanation for the Causation Determination*

772. In Sections VI and VII, Norway claimed that the EC's injury and causation determination is inconsistent with Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*. In making that argument, Norway observed that the EC failed to provide a reasoned and adequate explanation for its price undercutting and "non-attribution" analysis under Articles 3.1, 3.2 and 3.5. That failure also constitutes a violation of Articles 12.2 and 12.2.2.

773. Norway offers three examples. *First*, in the General Disclosure the EC found that that the Community industry can sell at a certain price premium by comparison to Norwegian products, up to a maximum of 12 percent and that this price premium should be "taken into account".[603] The price premium equaled the level of price undercutting found the by the EC, namely 12 percent.[604] Thus, in reality, the EC findings indicate that there was no price undercutting.[605] In the Definitive Regulation, the EC deleted the reference to the price premium that had appeared in the General Disclosure and failed to address, in any way, the EC industry's price premium, despite the fact that this issue was raised by several interested parties.[606] By failing to address – perhaps, even, ignoring – "relevant information" submitted by interested parties, the EC failed to provide a reasoned and adequate explanation.

774. *Second*, the EC summarily dismissed an argument by an interested party that any injury sustained by the EC industry was caused by an increase in the industry's costs of production. The EC merely noted that the EC industry enjoyed certain cost advantages over Norway's industry, and concluded that the EC industry's lower efficiency "was not

[602] Hydroteck's margin decreased from 21.0 to 18.0 percent and Sinkaberg's from 2.9 to 2.6 percent. Compare General Disclosure, para. 32 (Exhibit NOR-67) and Definitive Regulation, para. 32.
[603] General Disclosure, para. 122. Exhibit NOR-67.
[604] Definitive Regulation, para. 57.
[605] *See, further*, Norway's claim in Section VI.B above on this issue.
[606] *See* paras. 534 - 537 above.

substantiated".[607] The EC failed to set forth "all relevant information", in particular, *facts submitted by the EC industry itself* showing that costs for the vast majority of sampled domestic companies increased very significantly between 2001 and the IP.[608] The EC, therefore, failed to address a crucial fact in its explanation.

775. *Third*, the EC failed to provide a proper explanation for why imports from Canada and the United States were not another factor causing material injury to the domestic industry. The EC determined that imports from those countries consisted "mostly" of wild salmon. It also concluded that the taste of wild salmon is "significantly different from that of farmed salmon", that wild salmon is "practically not offered" in the market for sale as a fresh product, but is rather sold in tins and cans, and that, for all these reasons, wild salmon and farmed salmon do not compete with each other.[609]

776. The EC failed to refer to a single piece of evidence in the record in support of these conclusions. The "evidentiary path" that led the EC to these conclusions is not "clearly discernible", but remains mysterious.[610] Again, these failings constitute a violation of Articles 12.2. and 12.2.2.

(f) *The Failure to Provide a Reasoned and Adequate Explanation for the Level of the MIPs*

777. Norway argues, in Section VIII, that the EC violated Article VI:2 of the GATT 1994 and Article 9 of the *Anti-Dumping Agreement* in its determination of the level of MIPs for the various products at issue. Norway observed 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, 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. The EC's failure to provide a reasoned and adequate explanation is exacerbated by the fact that the EC failed to disclose the "essential facts" concerning this determination. No "information" or "reasons" on this material issue is presented in the Definitive Regulation. The absence of an

[607] Provisional Regulation, para. 108.
[608] *See*, further, Norway's claim in Section VII.C above on this issue.
[609] Definitive Regulation, para. 85.
[610] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97. *See*, further, Norway's claim in Section VII.D above on this issue.

explanation for its MIP determination violates Article 12.2 and 12.2.2 of the *Anti-Dumping Agreement*.

(iii) Conclusion

778. The EC has failed to provide relevant information and reasons in support of virtually every determination that formed part of the "path" leading to the imposition of definitive measures.[611] The facts in the record supporting the EC's determinations remain known only to the EC itself because they have not been explained in the Definitive Disclosure. Articles 12.2 and 12.2.2 of the *Anti-Dumping Agreement* serve to prevent this lack of transparency. For the reasons stated, the EC repeatedly violates these two provisions.

D. *Conclusion*

779. The EC violated:

- Article 6.4 and 6.2 of the *Anti-Dumping Agreement*, because it failed to ensure an adequate opportunity for interested parties to access all relevant non-confidential information in the record of the investigation;
- Article 6.9 and 6.2 of that *Anti-Dumping Agreement*, because it failed to inform the interested parties of the essential facts that form the basis for the decision to impose definitive measures; and,
- Article 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.

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

XI. 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

780. In this section, Norway sets out its claims relating to the adjustments the EC made to the cost data reported by the Norwegian companies. Norway argues that, on a number of occasions, the EC made impermissible cost adjustments that inflated the companies' normal value and, as a result, their dumping margins. By doing so, the EC violated Article 2.2 and 2.2.1.1 of the *Anti-Dumping Agreement*.

A. *Introduction*

781. The EC determined individual margins of dumping for nine Norwegian producers.[612] As explained in paragraphs 354 - 356, for at least seven producers, the EC constructed normal value for some or, in most cases, all types of the like product. According to the Provisional Regulation:

> … normal value was constructed by adding to each exporter's manufacturing costs of the exported types, adjusted where necessary, a reasonable amount for selling, general and administrative expenses ("SG&A") and a reasonable margin of profit.[613]

782. In constructing normal value, the EC systematically revised the company's reported costs of production ("COP") and SG&A costs upwards by significant amounts – on average by 22 percent.[614] As a result of the elevated costs found for each producer, the margin of dumping for eight of the producers was also elevated and, for one producer, dumping was found where there was none.

783. Norway's claims in this Section concern a series of improper adjustments made by the EC in calculating the COP for six companies: [[xx.xxx.xx]]. These adjustments relate to: (1) non-recurring costs ("NRC");[615] (2) finance costs;[616] (3) smolt costs;[617] (4) selling, general and administrative (SG&A) costs;[618] and (5) costs of purchased salmon.[619]

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[612] (1) Fjord Seafood Sales AS; (2) Follalaks AS; (3) Grieg Seafood AS; (4) Hydroteck AS; (5) Marine Harvest Norway AS; (6) Nordlaks Oppdrett AS; (7) Pan Fish Norway AS; (8) Sinkaberg-Hansen AS; and (9) Stolt Sea Farm AS. The EC failed to determine an individual margin of dumping for one sampled producer, Seafarm Invest AS. Instead, Seafarm Invest was given the margin of dumping determined for Marine Harvest Norway AS. The Definitive Regulation incorrectly states that individual margins have been determined for all ten sampled producers. Definitive Regulation, para. 29.
[613] Provisional Regulation, para. 26.
[614] *See* Summary Table of the EC's Cost Adjustments. Exhibit NOR-99.
[615] *See* paras. 815 ff.

784. Norway maintains that, in making these various adjustments, the EC violated Articles 2.1, 2.2 and 2.2.1.1 of the *Anti-Dumping Agreement* because it failed to determine the companies' COP correctly and, as a result, improperly determined normal value. Norway will examine the contested cost adjustments in turn. Before doing so, Norway reviews, generally, the EC's obligations under Article 2 of the *Anti-Dumping Agreement* in determining COP.

B. *Determination of the COP Under Article 2 of the Anti-Dumping Agreement*

(i) General Considerations in the Calculation of Costs of Production

785. According to Article 2.1, "dumping" arises when the export price of the investigated product is less than its "normal value", which is "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." A dumping determination, therefore, involves a comparison between two prices: the export price and the domestic price of the investigated product.

786. Article 2.2 sets forth rules that apply when the domestic price of the product cannot be ascertained on the basis of sales of the product in the ordinary course. In that event, the authorities are entitled 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." As the panel in *US – Softwood Lumber V* observed, this method for determining normal value involves "the establishment of an *appropriate proxy for the price* of the like product in the ordinary course of trade in the domestic market of the exporting country".[620]

787. The ordinary meaning of the term "costs of production" ("COP") refers to the "outlay, expenditure, expense" or "charges" that a producer sacrifices to pay for the economic *resources* used to produce a good.[621] Costs are invested in the acquisition of resources that are used to produce goods that will generate new and, hopefully, greater resources in the form

[616] *See* paras. 960 ff.
[617] *See* paras. 992 ff.
[618] *See* paras. 1027 ff.
[619] *See* paras. 1062 ff.
[620] Panel report, *US – Softwood Lumber V*, para. 7.278.
[621] *The Oxford English Dictionary*, J.A. Simpson and E.S.C. Weiner (eds.) (Clarendon Press, 1989, 2nd ed.), Volume III, page 988, column 1, meaning 1.b and 1.c. Exhibit NOR-100.

of revenues obtained from the sale of the goods. Norway elaborates further on the notion of "costs" in paragraph 798 below.

788. The *Anti-Dumping Agreement* provides an investigating authority with guidance in deciding which costs are relevant in determining the production costs of the investigated product. Article 2.2.1 states that the cost of production includes both "fixed and variable" costs. Article 2.2 clarifies that the relevant costs are those incurred "in the country of origin". Further, Articles 2.2.1.1 provides that, in calculating the COP, the producer's records may be rejected when they do not "reasonably reflect the costs *associated with* the product under consideration". Article 2.2.2 requires that, in principle, the amounts for SG&A and profits shall be based on data "pertaining to production and sales in the ordinary course of trade of the like product".

789. Relying on these provisions, the panel in *Egypt – Rebar* held that costs may be included in the COP when they are "associated with" or "pertain to" the production and sale of the like product.[622] This is in keeping with the fact that constructed value is a "proxy" for the price "of the like product when destined for consumption in the exporting country". The authority must, therefore, demonstrate a relationship between an element of cost and the production of the like product in the exporting country.

790. This meaning of the term "cost of production" is also consistent with the understanding of that term in financial accounting as a measure of the value of the resources that are consumed in producing goods. Under International Financial Reporting Standards, for example, the costs that may be included in the costs of production are defined by reference to costs of inventory. These include: any "*costs directly attributable* to the acquisition of finished good, materials and services"; the costs of converting input materials *directly related to the units of production*, such as direct labor", and a "*systematic allocation of fixed and variable production overheads that are incurred in converting the materials into finished goods*."[623]

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[622] Panel report, *Egypt – Rebar*, para. 7.393.

[623] *See* International Accounting Standard 2, *Inventories*, paras. 10–12 and 15, in *International Financial Reporting Standards (IFRS) 2005*. Exhibit NOR-101. As at 22 March 2006, IFRS is a required accounting standard in over 65 countries for some or all listed companies (*see* http://www.iasplus.com/country/useias.htm#* for a list of countries using IFRS.) *See also*, Financial

791. The term "cost of production", therefore, includes the expenses incurred to pay for *all input resources* that are directly attributable or related to the production of a particular unit. They include fixed and variable costs, and direct and indirect costs.

(ii) Allocation of Costs Over Time

792. In an anti-dumping investigation, the investigating authority seeks to determine whether the investigated product is being exported at dumped prices *during the period of investigation*. The prices that are compared under Article 2.1 are, therefore, the prices for the product sold during that time period. Article 2.4 also insists that the comparison be made in respect of domestic and export market sales "made at as nearly as possible the same time."

793. Accordingly, as a "proxy" for the domestic sales price, normal value must be constructed, under Article 2.2, on the basis of the costs of producing the like product that is sold during the IP. The costs associated with producing and selling the like product in the past and the future are not relevant to constructed normal value for the IP.

794. The *Anti-Dumping Agreement* expressly addresses the temporal relationship between costs and the IP. This is particularly important because producers often incur significant costs at a particular moment in time with a view to generating future revenues. Under cash-basis accounting, all business outlays would be treated as costs at the time of the outlay, even though they may provide resources that are exhausted in production over a considerable period.[624]

795. Article 2.2.1.1 rejects cash-basis accounting and provides that authorities "shall consider all available evidence on the proper allocation of costs" in "establishing appropriate amortization and depreciation periods". By allocating costs over time, the investigating authority determines that portion of costs properly attributable to production of the like product during the IP.

Accounting Standards Board, Accounting Research Bulletin 43, *Restatement and Revision of Accounting Research Bulletins*, chapter 4, para. 5. Exhibit NOR-102.

[624] Under cash-basis accounting, expenses are recognized, or recorded, in full when a liability arises. For example, if a new factory is purchased, the full cost of the facility would be recorded at the time of purchase. Thus, under cash-basis accounting, no attempt is made to allocate expenses across the time-period during which the resource acquired by the expense contributes to production. In contrast to cash-basis accounting, under financial, or accrual, accounting, an expense is allocated over the time-period during which the resource acquired by the expense contributes to production. Thus, the cost of factory would be allocated over the time during which the factory contributes to production.

796. The verb "allocate" refers to the process whereby the whole of a thing is sub-divided or apportioned into smaller parts.[625] Cost allocation arises where a particular expense is incurred in a single accounting period but that expense relates to production in multiple accounting periods. For example, the acquisition of fixed assets incurs an expense at the time of acquisition and that expense is allocated to the periods during which the asset is used to produce goods.

797. In deciding on the "proper allocation" of costs, the authority must be guided by the fact that it is seeking to determine the COP for the production and sale of the like product during the IP. Thus, the authority may allocate to the COP for the IP a portion of any costs that relate to the production and sale of the like product during the IP.

798. From a financial accounting standpoint, the allocation of costs is governed, among others, by the concept of "matching" that is common to all accrual accounting standards.[626] In short, the matching principle refers to the process of relating efforts (expenses) with accomplishment (revenues) in determining net income. Where the cost of production is concerned, the matching principle states that a cost directly attributable to production is recorded as an *asset* (inventory) until such time as it is sold, at which point it is recognized as an *expense* (cost of sales) in the same accounting period as the revenue that the cost helped to earn.[627] As noted, the costs of production measure the *value of the resources used to produce a good*. If a cost does *not* pay for resources that generate revenues then, under the matching principle, it cannot be included as part of assets in inventory and is therefore *not* a cost of production. In contrast, when a cost does pay for productive resources, the cost is treated as a cost of production in inventory and recognized as an expense that is matched to revenues

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[625] *The Oxford English Dictionary*, J.A. Simpson and E.S.C. Weiner (eds.) (Clarendon Press, 1989, 2nd ed.), Volume I, page 339, column 2, meaning 1. Exhibit NOR-103.

[626] *See, for example*, International Financial Reporting Standards, *Framework for the Presentation of Financial Statements*, paras 37 and 95 (Exhibit NOR-104) *See also* U.S. GAAP, "*Statement of Financial Accounting Concepts No. 6, Elements of Financial Statements*", Financial Accounting Standards Board (Exhibit NOR-105); *Financial Accounting, An Introduction to Concepts, Methods and Uses*, Stickney and Weil, Eighth Edition, 1997, pages 114 – 115 (Exhibit NOR-106); *Dictionary of Accounting Terms*, Siegel and Shim, 1987, page 266 (Exhibit NOR-107).

[627] For example, under accrual accounting and the matching principle, when a baker purchases a supply of flour, the purchase price of the flour is treated as an *asset*, i.e., raw materials inventory. Later, when the flour is taken from inventory to produce bread, the cost of the flour (as well as all other costs attributable to the production of bread) is recorded as part of a new *asset*, i.e., finished goods inventory. Finally, when the finished bread is sold, the cost of the flour is recognized as an *expense*, i.e., cost of sales, and "matched" in a particular accounting period with the sales revenues that it helped to generate. If the bread produced using the flour is sold in more than one accounting period, the costs of the flour are allocated over time in relation to the use of the flour.

when a good produced from those resources is sold. The matching principle, therefore, refers in part to the process of relating the costs of the resources used in producing a good to the revenues that result from the sale of the good.

799. In some instances, it is difficult to establish a direct matching relationship between a particular expense and the revenues generated by that expense. In that event, a rational and systematic allocation method must be chosen in order to approximate the matching of expenses and revenues. This requires that assumptions be made with respect to the pattern of cost recognition and the expected benefits to be received. For example, in the case of the pre-production design costs, the total costs incurred could be spread evenly, or "amortized," over each of the accounting periods during which the product is expected to generate sales revenues. Alternatively, where sales are expected to occur in greater volumes at the beginning of the product's life cycle, pre-production costs could be amortized based on the anticipated number of units that will be sold each year. That means that greater amounts would be amortized in the early years and smaller amounts would be amortized subsequently. However, in each case, the allocation of costs is based on the expected relationship between the use of resources in production and revenues earned from the sale of that production.

800. The appropriate period over which to allocate a particular cost depends on the nature of the cost concerned and the period during which it will contribute to production and, thereby, generate revenues. For example, the allocation period for the costs of a new software system might well differ from the allocation period for the costs of a new production facility.

801. In deciding on the "proper" allocation method, the authority must "consider all available evidence". In *US – Softwood Lumber V*, the Appellate Body stated:

> In the context of the second sentence of Article 2.2.1.1, we read the term "consider" to mean that an investigating authority is required, when addressing the question of proper allocation of costs for a producer or exporter, to "reflect on" and to "weigh the merits of" "all available evidence on the proper allocation of costs". As we stated above, the requirement to "consider" evidence would not be satisfied by simply "receiving evidence" or merely "tak[ing] notice of evidence".[628]

[628] Appellate Body Report, *US – Softwood Lumber V*, para. 133. Emphasis added.

802. The Appellate Body added that the word "proper" in Article 2.2.1.1 "suggests some degree of *deliberation* on the part of the investigating authority in "consider[ing] all available evidence", so as *to ensure that there is a proper allocation of costs*."[629] The Appellate Body also stated that the requirement to "consider" evidence could, in specific circumstances, mean that the investigating authority must *compare* different allocation methods to ensure that there is a proper allocation of costs.[630]

(iii) Non-Recurring Costs as Costs of Production

803. A significant issue in this dispute is the EC's treatment of certain non-recurring costs ("NRC") in calculating the COP for three companies. Article 2.2.1.1 requires that "costs shall be adjusted appropriately for *those* non-recurring items of cost which *benefit* future and/or current production". (emphasis added)

804. The provision distinguishes between recurring and non-recurring costs. The verb "recur" means to happen to occur or happen again, often repeatedly.[631] In the context of costs of production, the meaning of the term "non-recurring" costs can be best ascertained through a contrast with "recurring" costs. These are the routine, unavoidable costs that *must* be incurred, on a systematic basis, if a good is to be produced and sold.

805. Recurring costs include amounts for the manufacture of a good, for example the cost of raw materials, labor and factory overhead, as well as amounts incurred in support of the production and sale of the good, such as selling, management and financing costs. Recurring costs are the unavoidable costs incurred to provide the input resources essential to producing and selling a product; they *always* benefit current or future production. Moreover, if the producer wishes to continue in business, recurring costs must be reflected in the domestic and export selling price. These costs must, therefore, be included in the calculation of the constructed normal value because it acts as a benchmark for determining whether the export price is unfairly low.

806. By definition, and in contrast to recurring costs, "non-recurring" costs are not incurred on a repeated or a regular basis. In the context of costs of production, also in contrast to

[629] Appellate Body Report, *US – Softwood Lumber V*, para. 134. Emphasis added.
[630] Appellate Body Report, *US – Softwood Lumber V*, para. 138.
[631] *The Oxford English Dictionary*, J.A. Simpson and E.S.C. Weiner (eds.) (Clarendon Press, 1989, 2nd ed.), Volume XIII, page 384, column 1, meaning 5. Exhibit NOR-108.

recurring costs, NRC reflect amounts that need not be incurred in order to produce and sell a good. Thus, these costs are incurred in connection with activities that have no necessary link to the revenue cycle: a producer can produce and sell goods without incurring NRC.

807. Examples of NRC include: the costs of a new accounting or production control system; the startup costs of a new business or product line; the gains or losses on restructuring troubled debt; the cost of plant closures; the cost of severance payments; gains or losses from the early retirement of debt; the write-off of an intangible asset (e.g., goodwill from the purchase of a subsidiary); gains or losses related to changes in accounting methods; gains or losses from the sale of fixed assets; and losses from the impairment of an asset, for example, due to changes in market conditions, fire or natural disaster.

808. In contrast to recurring costs, these NRC do not all involve outlays that pay for resources used in current or future production. Some NRC involve costs that arise from the *elimination* of formerly productive resources (e.g. plant closure; severance; and asset impairment).

809. Under Article 2.2.1.1, the COP cannot include *all* NRC. Instead, it can include solely an allocation of "*those*" NRC that "benefit" current or future production. NRC that do not contribute resources to an enterprise cannot "benefit" the current or future production of a good. In contrast, NRC that pay for resources that are used in current or future production "benefit" that production. The notion of "benefit" in Article 2.2.1.1, therefore, ties with the matching principle discussed in paragraph 798. Under that concept, the costs of the resources used in producing a good are expensed at the time that revenues are earned from the sale of the good. Thus, expenses that "benefit" production by generating revenues are recognized as part of the cost of production when those revenues are earned.

810. Thus, under Article 2.2.1.1, the COP for the IP can include solely "*those*" NRC that "benefit" or contribute to production of the like product in the IP or thereafter. Thus, the provision permits solely the inclusion of "those" NRC that can be matched with a current or future revenue stream. In that regard, Article 2.2.1.1 requires that NRC be allocated over time through an "appropriate adjustment". For example, when new production facilities are purchased, the facilities will benefit future production. The authority may include in the IP the portion of the costs attributable to the use of the new assets to produce the like product in

the IP. This portion of the costs is "associated with" or "pertains to" the production and sale of the like product during the IP.[632]

811. Article 2.2.1.1 does not, however, permit the inclusion in the COP of NRC that do not contribute to producing the like product in the IP or thereafter. The production of the like product does not "benefit" from these costs and they will not result in a current or future revenue stream. In other words, current or future production would occur in the same way whether these costs were incurred or not. In terms of Article 2.2, these costs are not "associated with" or "pertain to" the production and sale of the like product during the IP.[633]

812. An example is the disposal of fixed assets at a loss, e.g. through fire. In that event, the producer sacrifices economic resources on the disposal and incurs costs through the lost value of the assets. The disposal of the assets does not make any positive contribution to the production of the like product. Instead, formerly productive assets are *eliminated* from the company's production operations. The disposal does not provide any resources that are consumed in production of the product; nor does it allow the producer to raise the price of its future production. Instead, the loss represents a reduction in the asset value of the company that constitutes a loss of shareholder equity rather than an investment made to generate future resources.

813. Because constructed normal value is a "proxy" for the domestic selling price of the like product, costs that do not benefit current or future production cannot be included in the COP. Under the matching principle, these costs cannot be matched against the future revenues and are not treated as costs of production. Moreover, generally, such costs cannot be reflected in the domestic or export price of the product. For example, when fire destroys a factory, a producer cannot raise the price of goods produced at other factories.

814. By excluding these NRC from constructed value, Article 2.2.1.1 ensures an even-handed benchmark for establishing whether the export price of the product fails to recover the costs of producing that product. If the COP included costs that could not be reflected in the selling price, the normal value would necessarily be higher than export price and the comparison would be distorted.

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[632] Panel report, *Egypt – Rebar*, para. 7.393.
[633] Panel report, *Egypt – Rebar*, para. 7.393.

C. *The EC's Improper Adjustments Relating to NRC*

815. The EC made substantial adjustments for NRC to the COP of three companies: [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]]. These adjustments were amongst the most significant that the EC made to the COP of any of the individually examined companies. Norway will examine the EC's adjustments for NRC in relation to each of the three companies in turn.

(i) [[xx.xxx.xx]]

816. The EC found that [[xx.xxx.xx]] COP for the period of investigation ("IP") is [[xx.xxx.xx]] NOK/kg WFE. This amount includes an upward adjustment of [[xx.xxx.xx]] NOK/kg for non-recurring costs. Thus, the EC found that this single adjustment amounted to [[xx.xxx.xx]] percent of the company's COP for the IP.

817. The EC calculated the NRC adjustment by totaling all NRC reported by [[xx.xxx.xx]] for the three years from 2002 to 2004 (i.e. before and after the IP), and attributing one-third of the total to the IP. The EC stated that three years was "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".[634] The EC adopted the same approach in calculating NRC for [[xx.xxx.xx]] and [[xx.xxx.xx]]. Norway will refer to this as the "three-year average approach".

818. In the Provisional and Definitive Regulations, the EC provided no explanation that justifies its considerable NRC adjustment. In particular, it did not identify the cost elements that made up the NRC adjustment; it did not specify how it decided that these costs benefited current or future production; it did not explain how the life cycle of salmon was relevant to each of the cost elements.

819. In [[xx.xxx.xx]] Definitive Disclosure, the EC provided the following break-down of the NRC adjustment:

[634] Definitive Regulation, para. 18.

Table 11: Break-down of NRC Adjustment for [[xx.xxx.xx]]

	(Million NOK)	2002	2003	2004	2002-2004
1	"Biomass" Deformity	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]
2	Closure of the [[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]
3	Other NRC	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]
	Total	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]
	Annual Average				[[xx.xxx.xx]]

(a) *Biomass Deformity*

820. Of the three categories of NRC mentioned in the Disclosure, the sole explanation provided relates to *biomass deformity*. Biomass is live fish that is being grown in the water, but it is not yet harvestable. It is, therefore, a form of work-in-progress or inventory that must be valued in the company's accounts. Following generally accepted accounting principles ("GAAP") in Norway, [[xx.xxx.xx]] values biomass at the lower of cost or anticipated market value.[635] In its audited accounts for 2003, [[xx.xxx.xx]] had included a write-down of [[xx.xxx.xx]] NOK that reflected a reduction in the anticipated market value of biomass compared with the previous year. Part of this write-down related to a general decline in market prices and part to the reduced value of deformed fish.[636] The write-down did not reflect any outlay incurred by the company in producing the salmon. Rather, it reflected the fact that the anticipated value of the company's biomass was lower in 2003 than it had been in 2002.

821. In the provisional determination, the EC added the entire [[xx.xxx.xx]] NOK to [[xx.xxx.xx]] cost of producing salmon in 2003. [[xx.xxx.xx]] responded that the biomass write-down did not reflect a cost of producing salmon but rather an anticipated lower market

[635] [[xx.xxx.xx". Exhibit NOR-xx.]]
[636] The write-down included: [[xx.xxx.xx]] NOK for the general decline in market prices, coupled with a reversal of [[xx.xxx.xx]] NOK; and [[xx.xxx.xx]] NOK in recognition of the reduced market value of certain deformed salmon. Net of the reversal, the total write-down was [[xx.xxx.xx]] NOK. *See* Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex 2, point 1. Exhibit NOR-[[xx]].

value of the harvested fish.[637] In the Definitive Disclosure, the EC accepted that a biomass write-down due "to unfavourable (expected) market price evolution" should not be included in the COP.[638] The EC, therefore, accepted that it was not appropriate to include the write-down for the general decline in the market prices in [[xx.xxx.xx]] COP. However, it said, "the same reasoning was not followed regarding the write-down of [[xx.xxx.xx]] NOK that was based on deformity of the biomass."[639] Instead, "this cost is considered a non-recurring cost".[640] No explanation is given for the inconsistent treatment of the two parts of the biomass write-down, both of which reflect a decline in the anticipated market value of the fish.

822. The EC's inclusion of the write-down of the value of biomass in the COP is both illogical and incorrect. As noted in paragraph 798, by definition, a "cost" arises when a producer invests economic resources in the production of a good. In the case of biomass, [[xx.xxx.xx]] incurs costs through, among others, the purchase and husbanding of smolt. In its accounts, [[xx.xxx.xx]] records these costs as they arise and they were all included in the COP.

823. Independently of the costs of purchasing and husbanding smolt grow, the smolt has a value as an asset. Therefore, in its balance sheet, [[xx.xxx.xx]] also includes the value of biomass. That value is the lower of cost or the estimated market value of the harvestable salmon that the smolt will become. However, the *value* of the smolt is conceptually different from the *costs* incurred in purchasing and husbanding it. A producer may well find, at the end of the production cycle, that the prevailing market price does not fully reflect its costs of production.

824. [[xx.xxx.xx]] valued biomass on the basis of the anticipated revenues that it would receive for the fish when harvested. In 2003, [[xx.xxx.xx]] reduced its valuation of biomass, first, because of a decline in market prices and, second, because some of its fish were deformed and would, therefore, command lower prices. To reflect the decline in valuation, [[xx.xxx.xx]] wrote-down a portion of the (anticipated market) value previously recorded in its accounts. The total of the write-down was [[xx.xxx.xx]] NOK.

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[637] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, point 7, page 6. Exhibit NOR-[[xx]].
[638] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex 2, point 1. Exhibit NOR-[[xx]].
[639] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex 2, point 1. Exhibit NOR-[[xx]].
[640] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex 2, point 1. Exhibit NOR-[[xx]].

825. [[xx.xxx.xx]] did not expend this sum, as it would expend resources on the purchase of raw materials, machinery and labor. Nor does the sum reflect an allocation of the costs of purchasing fixed assets, such as plant and machinery, for the use of those assets in 2003. Instead, the sum reflects the fact that [[xx.xxx.xx]] anticipated that the market value of salmon would be lower than previously expected. This is not a "cost" of producing farmed salmon, within the meaning of Article 2.2 of the *Anti-Dumping Agreement*.

826. To some extent, the EC itself recognized that a write-down of the market value of biomass is not a "cost". As noted, in the provisional determination, the EC treated the entire [[xx.xxx.xx]] NOK as a cost of production. However, in the definitive determination, the EC excluded from the COP the portion of the write-down attributable to a general decline in market prices.[641] It did so in recognition of that fact that the write-down did not involve a "cost" but a decline in market value. However, it nonetheless retained the portion of the write-down attributable to the fact that certain biomass was deformed and would command a lower market price, namely [[xx.xxx.xx]] NOK.

827. There is no basis in fact or law for this distinction. Both parts of the write-down reflect the reduced anticipated market value of the harvested fish, whatever the reason for the valuation. [[xx.xxx.xx]] did not expend the sum of [[xx.xxx.xx]] NOK on the deformed biomass, just as it did not spend [[xx.xxx.xx]] NOK on the biomass. Any sums expended on purchase and husbanding of the biomass were separately recorded in the COP and did not increase because the anticipated sale price of the fish was lower than expected. Thus, the sums expended on purchasing and husbanding reflect *costs of production*; the change in the anticipated sale price of the fish is a change in inventory *value*.

828. The EC itself did not attempt to justify its decision to treat the two parts of the write-down differently. With respect to general decline in market prices, the EC stated that the [[xx.xxx.xx]] NOK:

[641] The write-down attributable to general market decline was [[xx.xxx.xx]] NOK, with a reversal of [[xx.xxx.xx]] NOK, giving a net figure of[[xx.xxx.xx]] NOK.

> … is a reaction to unfavourable (expected) market price evolution, the consequences of which will express itself in lower profitability of future sales.[642]

829. With respect to the write-down for deformed biomass, the EC limited itself to the cryptic statement of its conclusion: "the same reasoning was not followed regarding the write-down of [[xx.xxx.xx]] NOK that was based on deformity of the biomass."[643] This "cost was considered a non-recurring cost".[644] This is not a reasoned and adequate explanation that provides the reader with any understanding as to *why* the EC found that the reduced market value of biomass was, in one case, a "cost" but not in the other case.

830. In any event, whatever the EC's reasons might be, they are without foundation in the *Anti-Dumping Agreement*. By treating the write-down of [[xx.xxx.xx]] NOK for the reduced market value of biomass as a "cost" of production, the EC violated Article 2.2 of the *Anti-Dumping Agreement*. As a result, the EC improperly determined normal value, thereby vitiating its dumping determination under Article 2.1 of the *Agreement*.

(b) Other Non-Recurring Costs, Including the Closure of the [[*xx.xxx.xx*]]

831. The major part of the EC's adjustment of [[xx.xxx.xx]] COP, shown in the table in paragraph 819 above, results from a large category of unspecified "other" NRC ([[xx.xxx.xx]] NOK), together with a small adjustment made for the closure of the [[xx.xxx.xx]] ([[xx.xxx.xx]] NOK). The costs in question relate, among others, to the write-down of assets on the closure of production facilities and various consequential costs, such as severance pay.[645]

832. Norway contends that this entire adjustment is impermissible under the *Anti-Dumping Agreement*. In outlining its claims in this regard, Norway will proceed as follows.

833. Norway will, first, review the EC's wholly inadequate explanation of why these non-recurring costs were, in the EC's mistaken view, recurring costs. Norway will then review, in detail, certain of the individual adjustments made by the EC as part of the miscellaneous

[642] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex 2, point 1. Exhibit NOR-[[xx]].
[643] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex 2, point 1. Exhibit NOR-[[xx]].
[644] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex 2, point 1. Exhibit NOR-[[xx]].
[645] *See*, in detail, the list in para. 846 below.

group of "other NRC". Unfortunately, the total adjustment of [[xx.xxx.xx]] NOK covers a very large number of individual adjustments. The EC has totally failed to provide adequate reasons in relation to any of these individual adjustments. In particular, it failed to:

- identify which specific cost items made up the sizeable category of "other NRC";
- explain how these NRC benefited current or future production; and,
- respond adequately to the objections made by [[xx.xxx.xx]] to the inclusion of these elements in the COP for the IP.

834. In sum, the EC's inadequate explanation fails to provide a valid legal basis for these adjustments. Norway considers that the absence of an explanation, however brief, for any of the adjustments means that the EC has not demonstrated that it satisfied the requirement in Article 2.2.1.1 to include in the COP solely an allocation of those non-recurring costs that benefit current or future production. That failure alone suffices to establish a *prima facie* violation of Article 2.2.1.1 with respect to the entire category of "other NRC".

835. However, to illustrate its claim, Norway examines each of the adjustments included by the EC for 2003. As shown by the table in paragraph 819, the major portion of the "other NRC" adjustment relates to that year. For 2003, there are 24 separate adjustments – *none* of which is the subject of any explanation by the EC justifying its inclusion in the COP. Norway examines these adjustments, showing that the EC was not permitted to include them in [[xx.xxx.xx]] COP because none of them benefited current or future production.

(b)(i) *The EC Failed to Explain Why Extraordinary Non-Recurring Costs are Recurring Costs*

836. In the Definitive Regulation, the EC notes that several of the investigated companies objected to the inclusion of certain extraordinary expenses in the COP on the ground that they were non-recurring costs that should be excluded.[646] The EC responded by attempting to explain that the extraordinary or non-recurring costs were not, in fact, non-recurring costs. This distinction is important because, under Article 2.2.1.1, the EC was entitled to include in

[646] Definitive Regulation, para. 15.

the COP solely an appropriate allocation of those NRC that benefited current or future production. The EC's explanation runs as follows:

> … extraordinary costs have been reported by many of the companies over a number of financial years. It is, therefore, clear that the extraordinary costs in question are not isolated non-recurring costs restricted to a few companies. Rather, they appear to be systemic costs associated with the production of salmon.[647]

837. Thus, the EC's justification for including these "extraordinary" costs is that they have become "systemic", or recurring, costs of producing salmon. By treating these costs as recurring costs of production, the EC significantly elevated [[xx.xxx.xx]] COP and sought to avoid the constraints of Article 2.2.1.1. However, the EC has failed to provide an adequate explanation of how the facts in the record supported its conclusion that these costs are, indeed, "systemic" recurring costs.

838. It is noteworthy that the EC's own designation of these costs is very inconsistent. In [[xx.xxx.xx]] company-specific disclosure, the EC described the costs under the heading "non-recurring (extraordinary) costs" and referred to them as "non-recurring" costs.[648] For [[xx.xxx.xx]], the EC described them as "recurring extraordinary costs," an obvious contradiction in terms that carried no explanation.[649] The EC also described the restructuring costs as "non-recurring" in [[xx.xxx.xx]] company-specific disclosure.[650]

839. The EC's only reason for departing from its own – and the usual accounting – categorization of the costs concerned as extraordinary or NRC is that "many" of the companies reported these costs in a "number" of financial years. In Norway's view, that explanation is insufficient because a "non-recurring" cost does not become "recurring" simply because it happens with higher frequency during a particular period of time. As explained in paragraph 805, recurring costs are the unavoidable costs incurred to provide the input resources essential to producing and selling a product, like raw materials, labor and utility costs. However, if a company acquires new production facilities every year for several

[647] Definitive Regulation, para. 16.
[648] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex 2, page 2, point 4. Exhibit NOR-[[xx]].
[649] Definitive Disclosure to[[xx.xxx.xx]], 28 October 2005, Annex 2, heading "Adjustments concerning the cost of production", para. 5. Exhibit NOR-[[xx]].
[650] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex 2, page 2, point 7. Exhibit NOR-[[xx]].

years, these non-recurring costs do not become recurring costs just because they are incurred more frequently.

840. In any event, the EC's explanation is inadequate because it failed to specify how "many" companies had previously reported similar costs in previous years and it also failed to specify how regularly these companies had reported such costs. Thus, the EC has not explained how the evidence in the record supports its conclusion.

841. In fact, the record contradicts the EC's assessment. To Norway's knowledge, the EC made adjustments for "extraordinary" closure and other restructuring costs for only *four of ten sampled producers*.[651] Moreover, the evidence in the record indicates that these companies incurred these costs in very few years. [[xx.xxx.xx]] incurred costs of this type in 2002 and 2003, but not in 2004.[652] [[xx.xxx.xx]] incurred extraordinary losses in 2002 and 2003; however, the company informed the EC that these were the only two years in the company's 17 year history in which such losses were incurred.[653] [[xx.xxx.xx]] incurred NRC on the closure of smolt facilities in 2003 but stated to the EC that "there were no [other] relevant write down costs in the years prior to the IP".[654] [[xx.xxx.xx]] suffered extraordinary losses of any significance in only one year, 2003.[655]

842. Moreover, the period from 2002 to 2003 was a low point in the business cycle for the Norwegian salmon industry.[656] Without comparison with other periods, the EC's consideration of NRC during a downturn for the industry cannot, on its own, provide a sufficient basis for its conclusion that certain extraordinary NRC have been become "systemic" costs of producing salmon.[657]

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[651] [[xx.xxx.xx]], [[xx.xxx.xx]], [[xx.xxx.xx]]t and [[xx.xxx.xx]].
[652] *See* [[xx.xxx.xx. Exhibit NOR-xx]].
[653] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, pages 9 – 10. Exhibit NOR-[[xx]].
[654] [[xx.xxx.xx]] Comments on the Definitive Disclosure, 8 November 2005, point 4, page 6. Exhibit NOR-[[xx.
[655] In 2003, [[xx.xxx.xx]] reported extraordinary losses of [[xx.xxx.xx]] NOK, due mainly to [[xx.xxx.xx]]. In contrast, in 2001 and 2002, the company reported extraordinary losses of only [[xx.xxx.xx]] NOK and [[xx.xxx.xx]] NOK, respectively. Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex 2, point 7. Exhibit NOR-[[xx]].
[656] *See* 2004 Profitability Survey of Norwegian Fish Farms, Report of the Directorate of Fisheries, page 69 (English summary). Exhibit NOR-114. This survey was submitted by Norway in its Comments on the General disclosure document in Note Verbale 11/2005. Exhibit NOR-115.
[657] Definitive Regulation, para. 16.

843. The evidence in the record, therefore, shows that a minority of the sampled producers incurred restructuring costs in a two-year period that coincided with the IP. There is no evidence that these companies incurred similar losses in other years and, in some cases, evidence that they did not. That is hardly a sufficient factual basis to conclude that extraordinary NRC have become necessary and unavoidable "systemic" costs. To recall, these costs are not like raw material costs, labor costs and factory overhead, all of which must be incurred on a "systemic" basis to produce salmon.[658] In contrast, the record does not show that the production of salmon by any of the investigated companies systematically requires that production facilities be closed, and employees made redundant every year.

844. In sum, there is no basis for the EC's conclusion that costs of closures and restructuring have become ordinary recurring costs for [[xx.xxx.xx]] or for the other examined producers. The costs at issue are properly to be regarded as non-recurring costs that are subject to Article 2.2.1.1 of the *Anti-Dumping Agreement*.

(b)(ii) *The EC Failed to Demonstrate that the Non-Recurring Costs at Issue Benefited Current or Future Production*

845. Under Article 2.2.1.1, the authority is entitled to include in the COP solely an allocation of the non-recurring costs that benefit current or future production. If an NRC does not benefit current or future production, it cannot be included in the COP. In this dispute, the EC failed to demonstrate that it included in the COP solely an allocation of the "other NRC" that relate to current or future production. Indeed, this issue is not mentioned in any of the disclosure documents or either the Provisional or Definitive Regulation. As a result, the EC has no basis for including any of the [[xx.xxx.xx]] NOK adjustment for these "other NRC". To illustrate that these costs must be excluded from the COP, Norway now reviews, in detail, the adjustments made for 2003.

846. During the investigation, [[xx.xxx.xx]] presented the EC with the following table, commenting on each of the 24 items that make up the total of [[xx.xxx.xx]] NOK of "other" NRC for 2003[659]:

[658] *See* paras. 805 and 806 above.
[659] This Table is contained in [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, point 7, pages 9 – 11. Exhibit NOR-[[xx]].

Table 12: Other Non-recurring Costs for [[xx.xxx.xx**]]**

Element	**Amount (TNOK[660])**	**When incurred/reported**	**In IP**	**Comments**
[[xx.xxx.xx [661]]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[xx.xxx.xx]]
[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	
[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]
[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	
[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]
[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]
[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]
[[xx.xxx.xx]]	[[xx.xxx.xx]]			[[xx.xxx.xx]]
[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]
[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]
[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]
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[[xx.xxx.xx]]	[[xx.xxx.xx]]			[[xx.xxx.xx]]
[[xx.xxx.xx]]	[[xx.xxx.xx]]			[[xx.xxx.xx]]
=	[[xx.xxx.xx]]			[[xx.xxx.xx]]

847. In the Definitive Disclosure, the EC failed to respond to any of these arguments; it also failed to provide any reasons for including any of the 24 items in the COP for the IP. The same is true for the NRC for 2002. This does not meet the Appellate Body's requirement for an authority to explain how the facts in the record support its conclusions, in this case, regarding the costs that make up [[xx.xxx.xx]] COP.

848. The failure to provide a rational basis for the NRC adjustment deprives that adjustment of legal basis. An authority cannot rely on sweeping conclusions that provide no

[660] "TNOK" refers to thousands of Norwegian kroner.
[661] "WD" refers to a write down made for the listed item.

basis for interested parties, domestic courts and WTO panels to review critically whether the facts of record justify that conclusion. In essence, the EC asks all concerned to trust that it has properly reviewed the facts. The imposition of anti-dumping duties that usually exceed bound tariff rates is not based on trust, but fact and reason.

849. As noted, in response to the provisional disclosure, the company provided comments on each of the NRC elements that it believed made up the total for 2003 (i.e. [[xx.xxx.xx]] NOK plus [[xx.xxx.xx]] NOK for the [[xx.xxx.xx]] closure). These items fall into the following categories: (1) facility closure; (2) sale of fixed assets; (3) write-down of salmon farming licenses; (4) restructuring costs; (5) severance pay; (6) operating losses; (7) destruction of fry; and (8) costs associated with foreign operations. Norway will make arguments with respect to each category.

(b)(iii) *Costs of Facility Closures*

850. In 2003, [[xx.xxx.xx]] wrote down the value of several of production facilities that it closed. These were: [[xx.xxx.xx]]. In total, including the [[xx.xxx.xx]] NOK for the closure of [[xx.xxx.xx]], these write downs amounted to [[xx.xxx.xx]] NOK in 2003.[662] All of these closures occurred before the IP began. One-third of this loss – [[xx.xxx.xx]] NOK – was attributed to the IP as a cost of producing salmon during that period.

851. The EC was not entitled to include an adjustment for these NRC because they were incurred before the IP began and they do not benefit current or future production.

852. Production facilities are fixed assets that form part of the capital of a company and that are used to produce goods. In ascertaining the production costs of goods, a distinction must be drawn between the acquisition and disposal of fixed assets, and their use in between these events to produce goods.

853. First, the *acquisition of fixed assets* involves an investment of capital (e.g., shareholder equity) in resources that are used over time in the production process. However, the acquisition of the assets is not, in itself, part of the process of producing goods. At that

[662] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, point 7, page 9. Exhibit NOR-[[xx]]. Closure of [[xx.xxx.xx]]: [[xx.xxx.xx]] NOK; closure of [[xx.xxx.xx]]: [[xx.xxx.xx]] NOK; closure of [[xx.xxx.xx]]: [[xx.xxx.xx]] NOK; closure of [[xx.xxx.xx]]: [[xx.xxx.xx]] NOK; closure of [[xx.xxx.xx]]: [[xx.xxx.xx]] NOK; closure of [[xx.xxx.xx]]: [[xx.xxx.xx]] NOK; and closure of [[xx.xxx.xx]]: [[xx.xxx.xx]] NOK. In addition, there was a related accounting adjustment of [[xx.xxx.xx]] NOK.

stage, it does not involve the sacrifice of resources used in the production of goods; and it does not give rise to production costs. In accounting terms, the acquisition costs are not a production cost at the time of purchase, and the newly acquired asset is reflected as an (unexpired) asset in the balance sheet. The amount paid for the fixed asset is reflected in the balance sheet as a decline in the assets (e.g., cash) or an increase in the liabilities (e.g., long-term debt) used to make payment.

854. Second, the *use of fixed assets* to produce goods is an important part of the production process that gives rise to production costs in the form of depreciation expenses. The use of the asset results in the exhaustion of a portion of the resources making up the asset. To the extent that the resources are consumed, a cost must be recognized through depreciation, which reflects the decline in the value of an asset due to age, wear and tear. Through depreciation, the book value of a fixed asset is reduced in the balance sheet, generally, over the estimated economic lifespan of the asset. Thus, in essence, a portion of the acquisition cost of the asset is attributed to the production of goods that are produced through use of the asset. After production, and before the goods are sold, the depreciation costs are reflected in the value of the goods held in inventory. When the goods are sold, the depreciation expense is matched with the income that results from the use of the asset. The costs of production, therefore, reflect the use of the fixed assets.

855. Third, the *disposal of fixed assets* involves the realization of capital that has been invested in production operations. In other words, the sale of a fixed asset realizes the value of that asset, which has been recorded in the balance sheet. Just like the initial investment in fixed assets, the disposal of that investment does not involve the use of resources in the production of goods and it is not part of the production process; rather, it involves a change in the company's assets and, possibly, its overall capital position.

856. The disposal of a fixed asset gives rise to either a gain or a loss as compared with the residual value of the asset in the balance sheet. A gain on disposal is not income earned from the production and sale of goods nor does the gain reduce the company's costs of producing and selling goods. Instead, the gain on the realization of the investment in fixed assets increases the shareholder's equity in the company entirely independently of the company's production and sale of goods. Equally, a loss incurred on the disposal of fixed assets is not a cost that the company incurs in order to produce and sell goods. The production and sale of

goods continues using other assets, which give rise to production costs. Instead, a loss on the disposal of fixed assets decreases the shareholder's equity independently of the company's on-going production and sale of goods.

857. The gain or loss that arises on the disposal of an asset indicates that the depreciation expenses recorded for the *past use* of the asset did not fully reflect the evolution of the value of the asset since acquisition. Depreciation is an estimate of the change in value of an asset that necessarily cannot always predict accurately the actual evolution of the asset's value. In the case of a gain, the accumulated depreciation expenses were too high because the company disposed of the asset for more than its residual book value. Thus, in previous years, the costs of production were overstated by the amount of the gain. In the case of a loss on disposal, the residual book value of the asset was too high. This could be due to the fact that the market value of the asset declined more steeply than expected or due to the fact that depreciation expenses were too low.

858. The discussion may be illustrated by example. Assume that a salmon production facility cost 100 million NOK and was expected to have a useful life of ten years. Using linear depreciation, the cost of producing salmon would bear 10 million NOK of the acquisition cost for each year of the facility's life. However, if the facility is closed at the end of year seven, the company will record in that year a NRC of 30 million NOK in connection with the closure, as well as the usual depreciation cost of 10 million NOK for the use of the asset in year seven.

859. The write-down of 30 million NOK recognizes that the asset no longer has any productive value and must be eliminated from the balance sheet. The sum is not a cost of producing salmon during the year of closure. It is permanent loss of shareholder value in the assets of the business. The company cannot suddenly raise either its domestic or export prices to recoup the 30 million NOK that the company planned to recover over the remaining years of the asset's life. Instead, this amount is a cost of producing salmon during years one through seven that was not fully recorded because the yearly depreciation was too low. But the fact that, consistent with GAAP accounting, a company may have recorded production costs in the past that were too low does not justify adding the entirety of that accumulated cost to the COP during the IP.

860. Equally, if the company had sold the facility at the end of year seven for 45 million NOK, it would record a gain of 15 million NOK as the difference between the residual book value of 30 million NOK and the sale price. The gain of 15 million NOK suggests that the cost of production was overstated in preceding years, possibly also the IP. The company could not reduce the production costs for year seven either by 45 million NOK or 15 million NOK because the disposal itself is not connected with the production and sale of salmon.

861. In sum, the acquisition of a fixed asset does not *per se* increase cost of production. Instead, following acquisition of a fixed asset, during that asset's useful life, a company will determine the depreciation method and will then depreciate every year by a particular portion of the fixed asset's value. These yearly depreciation amounts are part of the cost of production of a product. The disposal of a fixed asset, in turn, is not part of the cost of production, even if it results in the value of the asset being written-off.

862. In constructing normal value, Article 2.2.1.1 permits an authority to make an appropriate adjustment to the COP for "those" NRC that "benefit current and/or future production". As noted in paragraph 809, the provision distinguishes between "those" NRC that benefit current or future production and those that do not. This ensures that the COP for a particular period includes solely those expenses that are incurred in order to produce goods during that period. The provision also seeks to ensure, through appropriate adjustment of costs, that the costs recorded for a particular period are matched with the benefits that accrue in that period. Thus, production in a particular period cannot be burdened with costs that benefit production in a different period. This rule is in keeping with all accounting standards and principles with which Norway is familiar. For example, under international accounting standards, costs are allocated over time in relation to the income that is generated by the cost under the matching principle.[663] Thus, under Article 2.2.1.1, costs that benefit production during a future period are apportioned across that future period. Equally, NRC that relate to past periods cannot be included in the COP.

863. In 2003, [[xx.xxx.xx]] incurred a series of losses on the disposal of fixed assets as a result of the closure of several production facilities. These losses arose independently of [[xx.xxx.xx]] production and sale of salmon during that period. They did not stem from the *use* of the assets concerned to produce salmon but from the *disposal* of the assets. Indeed,

[663] *See* para. 798 above.

depreciation costs arising from the use of fixed assets in the IP were separately accounted for as operating expenses.

864. All of the losses on disposal were incurred in the second quarter of 2003, that is, before the IP began.[664] Thus, under Article 2.2.1.1, the EC can allocate a portion of these losses to the IP solely if they *benefit* future production that occurs during the IP. However, none of the losses benefited [[xx.xxx.xx]] current or future production of salmon. The disposal of the assets did not involve the sacrifice of resources used to produce goods at that time or in the future. To the contrary, the losses reflect the fact that the assets concerned have *ceased* to have productive value and will no longer be used in the production process. Indeed, if the asset *were* to contribute resources to future production and revenue generation, it would not have been appropriate for [[xx.xxx.xx]] to write down the full residual value of the assets. Instead, the costs would have been depreciated in future years.

865. During the IP, [[xx.xxx.xx]] produced salmon at other production facilities that, obviously, had not been closed before the IP. The costs incurred at these other production facilities to produce salmon are totally unaffected by the closure of the facilities concerned. Equally, the revenues earned from the sale of salmon produced at these other facilities are unaffected by the closure of the facilities. The losses on the closure of the facilities do not, for example, justify an increase in either the domestic or the export price of salmon that [[xx.xxx.xx]] produced during the IP at other production facilities. Instead of contributing to the generation of future revenues, the losses represent a loss of shareholder equity recorded through a reduction in asset values in the balance sheet.

866. As also noted, viewed from a different perspective, the premature closure of a facility means that the depreciation costs recorded in previous years were too low given the actual economic life of the asset. In other words, if the actual economic life of the assets had been accurately predicted, the loss on disposal would have burdened the cost of production in all previous years during which the asset was used.

867. For example, in the case of the [[xx.xxx.xx]] and [[xx.xxx.xx]] facilities, the closure concerned [[xx.xxx.xx]] and involved a total loss of [[xx.xxx.xx]] NOK compared with the residual book value of the facilities. The write-down of the assets occurred before the IP

[664] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, point 7, page 9. Exhibit NOR-[[xx]].

began. The EC included one-third of this sum in the cost of producing salmon in the IP as part of the smolt cost. Yet, the EC failed to explain how closing [[xx.xxx.xx]] before the IP began contributed positively to salmon production during or after the IP.

868. The closure of the [[xx.xxx.xx]] does not benefit [[xx.xxx.xx]] current or future production but is, instead, intended to *eliminate* productive assets. In other words, the loss on disposal does not involve the sacrifice of resources by [[xx.xxx.xx]] to produce salmon during or after the IP. The loss does not involve any efficiency gains at other production facilities that will continue to produce salmon nor can the company increase prices on its future production to recoup the loss. Indeed, if future revenues were positively impacted by the loss, the loss could not be fully written-down but should be expenses over the time when the revenues to which they relate will be earned. Instead of being a cost incurred to produce salmon, the loss reflects a reduction in the company's capital and a consequent loss of shareholder equity, as reflected on the balance sheet.

869. These arguments apply equally to the closure of [[xx.xxx.xx]] In each case, the closure of production facilities, before the IP began, does not involve the expenditure of resources to produce salmon during the IP. Rather, the NRC reflects a loss of shareholder equity on the disposal of fixed assets.

870. Under Article 2.2.1.1, the EC was not entitled to include the NRC that resulted from the closure of these production facilities in the COP for the IP. The costs were not incurred in order to support or otherwise benefit production in that year. The EC, therefore, violated Article 2.2.1.1 and, as a result, made a determination of normal value that is inconsistent with Article 2.2.

871. Furthermore, the EC also failed to follow the dictates of its own flawed logic. In the case of [[xx.xxx.xx]], [[xx.xxx.xx]] informed the EC that it had sold the facility after the close of the IP for a gain of [[xx.xxx.xx]] NOK.[665] Nonetheless, the EC included the loss recorded on the closure of the facility but ignored the corresponding gain. Gains and losses arising from the disposal of a production facility – whether through closure or sale – must be treated in the same way. The EC was correct in concluding that the gain earned on the disposal of the facility did not lower the production costs of salmon. However, it was

[665] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, point 7, page 9. Exhibit NOR-[[xx]].

incorrect in concluding that the losses incurred on the disposal of the same facility (and other facilities) were costs of producing salmon in the IP.

(b)(iv) *Costs on the Sale of Fixed Assets*

872. In 2003, [[xx.xxx.xx]] closed down and sold the [[xx.xxx.xx]]. Both the closure and sale occurred before the IP began. In addition to a write-down of [[xx.xxx.xx]] NOK on closure of the facility, [[xx.xxx.xx]] recorded a loss of [[xx.xxx.xx]] NOK on the sale of the facility. The sale of the [[xx.xxx.xx]] facility involved the disposal of fixed assets and the loss represents the difference between the sale value of the facility and its unamortized, residual value in the balance sheet. Thus, on closure of the facility, [[xx.xxx.xx]] reduced the book value of the facility by [[xx.xxx.xx]] NOK to the value it believed it could recover from a sale of the facility. However, the sale proceeds fell short of the estimated sale valuation by some [[xx.xxx.xx]] NOK. On sale of the facility, [[xx.xxx.xx]], therefore, made a further write-down resulting for the disposal of the [[xx.xxx.xx]] facility.

873. The loss that [[xx.xxx.xx]] incurred on the sale of facility is, therefore, akin to the loss that occurred on the closure of production facilities: both arise from the disposal of fixed assets. For the reasons stated, the loss is not incurred to provide resources that contribute to producing salmon during the IP; it arises because the disposal of fixed assets realized less of a return than anticipated. The loss is, therefore, a reduction in the company's capital that is not related to production.

(b)(v) *Costs on the Write-Down of Salmon Farming Licenses*

874. In 2003, as part of its closure of [[xx.xxx.xx]], [[xx.xxx.xx]] wrote-down the value of certain of its salmon farming licenses in the sum of [[xx.xxx.xx]] NOK. Salmon farming licenses confer on the licensee the right to grow and hold fish in cages up to a specified quantity. They are acquired either directly from the Ministry of Fisheries, with payment, or they are acquired through another producer, also with payment. [[xx.xxx.xx]] annual accounts for 2003 notes that

> …the value of licenses acquired by the company is capitalized. Licenses that are considered perpetual are not subject to depreciation or amortization.[666]

[666] [[xx.xxx.xx. Exhibit NOR-xx]].

875. In its letter of 27 May 2005 to the EC, [[xx.xxx.xx]] commented that the licenses it wrote off in 2003 were not subject to depreciation. Consistent with GAAP accounting, the use of the licenses on a year-to-year basis did not give rise to an expense in the production of salmon because the licenses were deemed to have no finite economic lifespan. Thus, the acquisition cost of the licenses was *never* treated as a cost of production but rather as an outlay incurred in the acquisition of an intangible asset.

876. Due to a change in market conditions, [[xx.xxx.xx]] decided in 2003 that these licenses no longer had any value because it was closing the production sites which they covered. As a result, in the second quarter of 2003 – before the IP began – [[xx.xxx.xx]] wrote-off the value of the licenses.

877. The write-down in the value of the licenses involves the elimination of an asset that *formerly* contributed to production. By writing-down the licenses, [[xx.xxx.xx]] recognized that they had ceased to have value for the company's continuing productive operations. That is, they do not contribute to current or future production. If they did, the company would not have written-down the value of the licenses. The write-down in the value of the licenses does not involve the sacrifice of resources that are used to produce salmon in the IP or thereafter. The loss makes no contribution to on-going production. The write-down of the licenses is, therefore, not a cost that the [[xx.xxx.xx]] incurred in producing salmon in the IP – not least because the write-down occurred before the IP began.

(b)(vi) *Restructuring Costs*

878. During 2003, [[xx.xxx.xx]] made provision for various "restructuring" costs totaling [[xx.xxx.xx]] NOK.[667] This sum represents outlays that the company incurred in connection with the closure of production and sales facilities. These costs were incurred, in part, to close facilities where production had been terminated and, in part, to close a sales office that had, therefore, ceased to contribute to the business.

879. The restructuring costs incurred to close production facilities were not sacrificed to produce or sell salmon in the IP or, indeed, thereafter. Thus, they do not benefit current or future production that is undertaken at other facilities. For example, in closing the

[667] This sum consists of restructuring costs associated with [[xx.xxx.xx]], coupled with a technical downward adjustment of [[xx.xxx.xx]] NOK.

[[xx.xxx.xx]] facility, [[xx.xxx.xx]] expended considerable sums in cleaning the site. Cleaning up a closed production facility does not benefit, in any way, salmon production that continues at other production sites. It is not a cost of producing that salmon and should not be included among those costs under Articles 2.2 and 2.2.1.1.

880. Among the restructuring costs, [[xx.xxx.xx]] made a payment of [[xx.xxx.xx]] NOK as part of the [["xx.xxx.xx".]] The payment under this agreement was incurred to terminate a lease for a sales office in Norway and also for certain administrative services.[668] Similar to other restructuring costs, making a payment to breach a contractual arrangement does not provide any resources that are used to "benefit" current or future production. In any event, even assuming that the payment did benefit current or future production (*quod non*), the EC was obliged to allocate the payment across the duration of the remaining term of the lease. It failed to do so. Thus, under Article 2.2.1.1, the EC was entitled to include solely the fraction of the NRC attributable to the IP.

(b)(vii) *Costs of Severance Payments*

881. The closure of production facilities entailed redundancies among [[xx.xxx.xx]] personnel at the production facilities concerned. In 2003, [[xx.xxx.xx]] incurred non-recurring severance costs of [[xx.xxx.xx]] NOK in closing production facilities in Norway.

882. Employment costs are, generally, incurred in return for the provision of services that contribute to current and, in some cases (e.g. research), future production. Severance payments, however, compensate an employee for termination of an employment contract and not for the provision of services that contributed to the producing goods. A severance payment is, therefore, a special payment made to ensure that employees *cease* to provide services that benefit production. The payment does not, therefore, benefit either the current or future production of goods As such, there was no basis under Article 2.2.1.1 for the EC to include severance payments in the COP.

883. Norway contends that the severance payments should not be included, at all, in the COP because, under Article 2.2.1.1, they are NRC that do not benefit current or future production of salmon.

[668] [[xx.xxx.xx]] Comments on the Information Note on Cost of Production, 16 March 2005, page 4. Exhibit NOR-[[xx]].

(b)(viii) *Operating Losses*

884. The EC added operating losses incurred in the first part of 2003 at [[xx.xxx.xx]] [[xx.xxx.xx]] and [[xx.xxx.xx]] to the company's COP for the IP. The losses at [[xx.xxx.xx]] were incurred in the period January to September 2003 ([[xx.xxx.xx]] NOK); and the losses at [[xx.xxx.xx]] in the period January to February 2003 ([[xx.xxx.xx]] NOK). That is, *all* these losses were incurred in operations that took place before the IP began.

885. An operational loss arises when the revenues earned on the sale of goods are less than the costs incurred in producing those products. In other words, an operating loss is the *difference* between production costs and revenues. It is not, therefore, a cost of production; but the result of comparing those costs with revenues. For example, if a producer's operating costs are 100 million NOK and its operating income is only 90 million NOK, there is an operating loss of 10 million NOK. The 10 million NOK is not additional expense, elevating the cost of production to 110 million NOK. Rather, the 10 million NOK is a permanent reduction in shareholder equity that is reflected in a reduction in the company's assets in the balance sheet, for example, in lower cash reserves.

(b)(ix) *Costs on Destruction of Fry*

886. In the second quarter of 2003, [[xx.xxx.xx]] wrote down the value of fry that it had been growing ([[xx.xxx.xx]] NOK). Fry is salmon at an early stage of development that forms part of a salmon producer's biomass.

887. As noted in paragraph 798, by definition, a "cost" arises when a producer uses economic resources to produce a good. In the case of fry, [[xx.xxx.xx]] incurs costs through, among others, the purchase of fry and the husbanding of the fish as they grow. These costs form part of the COP.

888. As noted in paragraph 823, in its accounts, [[xx.xxx.xx]] treats biomass as inventory that is valued at the lower of cost or estimated market value.[669] [[xx.xxx.xx]] had to reflect in its accounts that the value of inventory had declined on destruction of the fry. [[xx.xxx.xx]], therefore, reduced the value of inventory by the value of the fry. The destruction of the fry before the IP did not, however, contribute resources to the production of salmon either in the

[669] [[xx.xxx.xx. Exhibit NOR-xx.]]

IP or thereafter. To the contrary, the destruction of fry *reduced* [[xx.xxx.xx]] future salmon production.

889. The EC, therefore, violated Articles 2.2 and 2.2.1.1 of the *Anti-Dumping Agreement* by apportioning the entirety of this NRC to the production of salmon during the IP.

(b)(x) *Costs Incurred in [[xx.xxx.xx]]*

890. In 2003, [[xx.xxx.xx]] incurred several NRC in connection with the closure of EU sales operations in Denmark.[670] In [[xx.xxx.xx]] letter to the EC of 27 May 2005, these NRC are identified as: [[xx.xxx.xx]] NOK for severance pay; [[xx.xxx.xx]] NOK for restructuring costs; [[xx.xxx.xx]] NOK for other restructuring; and [[xx.xxx.xx]] NOK for other costs.

891. Article 2.2 of the *Anti-Dumping Agreement* states expressly that constructed normal value includes, among others, "the cost of production *in the country of origin*". This is consistent with the fact that, under Article 2.2, constructed normal value is a "proxy" for the price of the like product *when it is sold in the domestic market*, as set forth in Article 2.1. In the same vein, Article 2.2.2 provides three alternative methods for determining SG&A costs and profits, each of which is based on amounts derived in respect of production and sales "in the domestic market *of the country of origin*".

892. It follows, therefore, from Articles 2.1, 2.2 and 2.2.2 that constructed normal value may include only the costs of producing the like product "in the country of origin" with a view to the sale of the product in that country. Thus, costs that a producer incurs in other countries in connection with sales outside the domestic market are not relevant to the determination of normal value for the country of origin.

893. The costs that a [[xx.xxx.xx]] subsidiary incurred in [[xx.xxx.xx]] were not costs of producing or selling the like product in Norway; they are costs incurred in the export market for selling the product in that market. By including these costs in the COP, the EC, therefore, violated Articles 2.1 and 2.2 of the *Anti-Dumping Agreement*. Furthermore, the costs in

[670][[xx.xxx.xx]] Comments on the Information Note on Cost of Production, 16 March 2005, page 4. Exhibit NOR-[[xx]]; [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, point 7, pages 9 and 10. Exhibit NOR-[[xx]]; and Consolidated Report on Cost of Production of PriceWaterhouseCoopers of 30 April 2005, [[xx.xxx.xx]]. Exhibits NOR-[[xx]].

question relate to the closure of operations in Denmark and are, therefore, NRC that do not benefit current or future production.

(b)(xi) *Conclusion*

894. In sum, the EC has not provided an adequate and reasoned explanation that supports its inclusion of the costs incurred by [[xx.xxx.xx]] with respect to biomass deformity and the NRC that are set forth in paragraph 819.

(ii) [[xx.xxx.xx]]

(a) *Losses on Investments Activities*

895. [[xx.xxx.xx]] COP for the IP was found to be [[xx.xxx.xx]] NOK/kg WFE, including an upward adjustment of [[xx.xxx.xx]] NOK/kg for non-recurring costs resulting from the write-down in the value of investments in other companies that did not contribute to [[xx.xxx.xx]] production of salmon during the IP.[671] This single adjustment amounted to [[xx.xxx.xx] NOK or [[xx.xxx.xx]] percent of the company's COP for the IP, as found by the EC. The EC applied its three-year averaging approach to determine the amount of this adjustment.

896. In the Provisional and Definitive Regulations, the EC provided no explanation for including [[xx.xxx.xx]] losses on investments activities as part its costs of producing salmon in the IP. In particular, it failed to identify: which other companies incurred the losses; what the nature of [[xx.xxx.xx]] investment in these companies was; and how the activities of these companies contributed to [[xx.xxx.xx]] production of salmon during the IP.

897. In the Information Note on Cost of Production, sent to [[xx.xxx.xx]] on 8 March 2005, the EC stated as follows:

> It was established that the audited accounts included substantial extraordinary items which were recurring at least during years 2001, 2002 and 2003. An adjustment was made at the level of the year 2003 financial report to take into account of these recurring items in fact given rise by the production of the product concerned [sic].

898. Thus, the justification for including these sums was (1) that the losses were recurring costs and (2) that they were occasioned by the production of the like product.

[671] *See* Summary Table of the EC's Costs of Production with Adjustments. Exhibit NOR-99.

899. On 16 March 2005, [[xx.xxx.xx]] responded, explaining that the losses were incurred as a result of its *investment* activities, which have nothing to do with its salmon production activities.[672] Thus, the investment losses were not among [[xx.xxx.xx]] reported costs of producing salmon.

900. In the provisional disclosure, the EC accepted that the loss incurred on an investment in a company that owned a fleet of fishing vessels was not part of the company's costs of producing salmon. The EC said: "the Commission services take note of your auditors comments attached in your submission of 16 March concerning [[xx.xxx.xx]] [["xx.xxx.xx"]] whose activity was investment in fishing boats and not the product concerned." The EC, therefore, reduced the adjustment for investment losses. However, the EC ignored [[xx.xxx.xx]] comments that the remaining losses were also sustained through investment in companies that did not contribute to [[xx.xxx.xx]] production of salmon during the IP.

901. After the provisional determination, [[xx.xxx.xx]] provided detailed objections to the inclusion of this adjustment, giving a description of each of the losses making up the adjustment and explaining that none was incurred to produce salmon during the IP.[673] [[xx.xxx.xx]] also addressed the EC's conclusion that the losses were recurring costs. It noted that, in 17 years of existence, [[xx.xxx.xx]] had incurred such losses only twice in its history – in 2002 and 2003 – and that losses of this type would not recur in the future because the company's investment activity had been reduced to a minimum.[674]

902. To Norway's knowledge, the EC did not request any further information from [[xx.xxx.xx]] before the Definitive Disclosure regarding the investments losses in other companies. In that disclosure, the EC responded to [[xx.xxx.xx]] detailed comments as follows:

> As concerns your comments on the allocation of recurring <u>extraordinary cost</u> the Commission services take note of your comments concerning the extraordinary costs not being recurring costs.[675]

[672] [[xx.xxx.xx]] Comments on the Information Note on Cost of Production, 16 March 2005, page 6, [[xx.xxx.xx]]. Exhibit NOR-[[xx]].
[673] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, page 9 ff. Exhibit NOR-[[xx]].
[674] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, page 10. Exhibit NOR-[[xx]].
[675] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex II, page 1, under heading "Adjustments concerning the cost of production", para. 5. (original underlining) Exhibit NOR-[[xx]].

903. In light of these comments, the EC decided to use a "three year average" of the losses (2002 to 2004) instead of the losses from 2003.[676] The result was that the adjustment increased from [[xx.xxx.xx]] NOK to [[xx.xxx.xx]] NOK.[677] In addition, in calculating the three-year average of investment losses, the EC *included* the losses related to [[xx.xxx.xx]] investment in [[xx.xxx.xx]] – that is, the very same losses that the EC had *excluded* from the COP in the provisional determination because [[xx.xxx.xx]] operations were unrelated to [[xx.xxx.xx]] salmon production.

904. The EC's choice of these three years means that it relied on the only two years out of the company's [[xx.xxx.xx]]- year history when investment losses were incurred. Despite relying on these years, the EC failed to address the objection that these years were exceptional. Norway has already explained that extraordinary, non-recurring costs do not become recurring costs simply because they are incurred, in [[xx.xxx.xx]] case, in two out of [[xx.xxx.xx]] years.[678]

905. In addition, neither the Provisional nor the Definitive Regulation provides any reasons justifying the inclusion of the various investment losses as a cost of producing salmon. The EC entirely failed to respond to the objections that these losses were totally unrelated to [[xx.xxx.xx]] production of salmon. Absent an adequate explanation addressing these issues, the EC had no basis for adding the very considerable investment losses to [[xx.xxx.xx]] COP.

906. A company can choose to invest its resources in one or more operational activities with a view to generating profits and enhancing, and diversifying, the shareholder's equity in the business. For example, a company may decide to invest resources in the production and sale of salmon, and also in the production and sale of cattle. The company will incur separate production costs for each activity. In calculating the cost of producing salmon, it would not be appropriate to add costs incurred to produce cattle. Yet, in the case of [[xx.xxx.xx]], that is essentially what the EC has done.

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[676] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex II, page 1, under heading "Adjustments concerning the cost of production", para. 5. Exhibit NOR-[[xx]]. *See* paras. 940 ff below regarding the use of a three year averaging approach in connection with certain NRC.

[677] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex II, page 1, under heading "Adjustments concerning the cost of production", para. 6. Exhibit NOR-[[xx]].

[678] *See* paras. 841 ff.

907. During the IP, [[xx.xxx.xx]] business activities included, on the one hand, the production and sale of salmon and, on the other hand, investment in other companies. As the company itself said to the EC, "[[xx.xxx.xx]] is also an investment company."[679]

908. In relation to its investment activities, [[xx.xxx.xx]] acquired equity stakes in other companies in the expectation that the capital invested would appreciate. The sole source of revenue from these investments was dividend income and capital gains, if any. The companies in which [[xx.xxx.xx]] invested were involved in fisheries and some in salmon production. However, none of these companies contributed, in any way, to [[xx.xxx.xx]] salmon production.

909. In 2002 and 2003, [[xx.xxx.xx]] recognized that its investment activities were not performing and decided to write-down its valuation of the investments. Thus, the stated value of the assets was reduced to reflect their diminished market value. The reduction in the value of these assets does not involve costs that [[xx.xxx.xx]] incurred to produce or sell salmon. Norway reviews, briefly, these investments.

(a)(i) *Investments in Companies Unrelated to Salmon Industry*

910. A number of the companies accounted for in the EC's three-year average of investment losses were involved in business operations entirely unrelated to the salmon industry. Among these, the most substantial loss related to the write-down of [[xx.xxx.xx]] investment in [[xx.xxx.xx]], which totaled nearly [[xx.xxx.xx]] NOK in 2003. As noted above, this company owned a fleet of fishing boats and was also involved in the processing of whitefish. While the EC had excluded the loss from [[xx.xxx.xx]] investment in [[xx.xxx.xx]] for the provisional determination, in the definitive determination, the loss was inexplicably added back as part of the EC's calculation of [[xx.xxx.xx]] salmon production costs.

911. Other investment losses included in the EC's three-year average cost related to write-downs in the value of shares held by [[xx.xxx.xx]] in: [[xx.xxx.xx]]; [[xx.xxx.xx]]; and [[xx.xxx.xx]], a [[xx.xxx.xx]].

[679] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, page 4. Exhibit NOR-[[xx]].

912. In addition, the EC included in its cost calculations the share of losses on certain investments in companies that, for accounting purposes, [[xx.xxx.xx]] recorded under the equity method of accounting.[680] These losses included [[xx.xxx.xx]] share of the net operating losses related to investments held in [[xx.xxx.xx]], and [[xx.xxx.xx]], a [[xx.xxx.xx]].

913. Each of these investments shares common characteristics: none of the investee companies was engaged in the production and/or sale of salmon and none of the investee companies contributed, in any way, to the process by which [[xx.xxx.xx]] produced and sold its salmon.

914. These investment activities, thus, comprised a separate line of operations that neither added to nor detracted from the company's salmon producing operations. All gains and losses from the investment operations therefore reflected directly on [[xx.xxx.xx]] equity, and not on the production costs of its salmon business. Accordingly, the losses related to investments – whether incurred due to a write-down of the market value of an investment or as a proportional share of the loss in an investee company – could never serve to increase salmon production costs in the same way that any investment gain or profit could never decrease those same production costs.

915. Importantly, for another selected salmon producer, [[xx.xxx.xx]], the EC recognized that the losses related to the producer's separate investment activities were not a part of its salmon production costs. In the case of [[xx.xxx.xx]], the EC excluded from that producer's financial expenses a loss incurred on the sale of [[xx.xxx.xx]] investment in [[xx.xxx.xx]], a fish oil and fish meal producer whose operations the EC accepted were unrelated to [[xx.xxx.xx]] salmon farming business.[681] Just as for [[xx.xxx.xx]], [[xx.xxx.xx]] loss on investments unrelated to the salmon industry must also be excluded from the company's salmon production costs.

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[680] The equity method is generally used by investors who own between 20 and 50 percent of the voting stock of a company. Under the equity method, the investment is initially recorded at the cost of the shares acquired but is subsequently adjusted each accounting period for changes in the net assets of the investee company. That is, the carrying value of the investment is periodically increased for the investor's proportionate share of net profits of the investee (i.e., a gain on the investment) or decreased for the share of the investee's losses (i.e., a loss on the investment).

[681] The EC did not expressly acknowledge that it had accepted [[xx.xxx.xx]] arguments that its losses in [[xx.xxx.xx]] should be excluded. However, [[xx.xxx.xx]] refers to this fact at page 8 of its comments of 8 November 2005 on the definitive disclosure. [[xx.xxx.xx]] on the Definitive Disclosure, 8 November 2005, page 8. Exhibit NOR-[[xx]].

(a)(ii) *Investments in Companies Involved in the Salmon Industry*

916. The EC also included in the three-year average of costs losses incurred by [[xx.xxx.xx]] in investments in companies that were, to varying degrees, involved in the salmon industry. In this instance, the majority of the amount included by the EC in [[xx.xxx.xx]] costs concerned the company's share of losses (under the equity method) in the operations of [[xx.xxx.xx]] ("[[xx.xxx.xx]]") and [[xx.xxx.xx]] ("[[xx.xxx.xx]]").

917. [[xx.xxx.xx]] was an investment and trading company involved in buying and reselling mussels, salmon, and whitefish. [[xx.xxx.xx]] also held a [[xx.xxx.xx]] percent stake in [[xx.xxx.xx]]. In addition to [[xx.xxx.xx]] recorded equity losses in [[xx.xxx.xx]] (which in part included [[xx.xxx.xx]] losses in [[xx.xxx.xx]]), the EC also included in its investment losses a [[xx.xxx.xx]] NOK loan guarantee that [[xx.xxx.xx]] had granted to [[xx.xxx.xx]] bank.

918. [[xx.xxx.xx]] was a holding company that owned (1) a [[xx.xxx.xx]] stake in [[xx.xxx.xx]] ("[[xx.xxx.xx]]") at the beginning of the IP (which was later increased to [[xx.xxx.xx]] percent) and (2) a [[xx.xxx.xx]] percent share of [[xx.xxx.xx]] ("[[xx.xxx.xx]]"), in which [[xx.xxx.xx]] also held a [[xx.xxx.xx]] percent indirect interest. Both [[xx.xxx.xx]] and [[xx.xxx.xx]] were small salmon production companies.

919. With respect to [[xx.xxx.xx]], the EC specifically allowed [[xx.xxx.xx]] to exclude this company's salmon production costs from its reported costs.[682] For [[xx.xxx.xx]], [[xx.xxx.xx]] owned significantly less than a controlling interest in the company and, thus, had little or no influence on the operations of the company. As a result of the lack of control, [[xx.xxx.xx]] costs were also excluded from the calculation of [[xx.xxx.xx]] COP.

920. In addition to the losses relating to investments in [[xx.xxx.xx]] and [[xx.xxx.xx]], the EC also included [[xx.xxx.xx]] share in the operating results of [[xx.xxx.xx]] and the write-down of the company's investment in [[xx.xxx.xx]], both smolt producers, and the write-down in [[xx.xxx.xx]] investments in [[xx.xxx.xx]], a salmon and rainbow trout breeding company and egg producer, and [[xx.xxx.xx]], a codfish farming operation.

[682] *See* [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, page 10. Exhibit NOR-[[xx]].

921. Of the other salmon-related companies in which [[xx.xxx.xx]] held an interest, only one, [[xx.xxx.xx]], a smolt producer, conducted business with [[xx.xxx.xx]] during the IP. The cost of [[xx.xxx.xx]] smolt purchased by [[xx.xxx.xx]] during the IP is reflected in [[xx.xxx.xx]] reported salmon costs. Obviously, smolt purchased from another company should be reflected in [[xx.xxx.xx]] reported salmon costs regardless of whether [[xx.xxx.xx]] held an interest in that company. Significantly, the EC did not express concern regarding the pricing of transactions between [[xx.xxx.xx]] and [[xx.xxx.xx]]. Moreover, to the extent that there were any such concerns, the appropriate remedy would have been for the EC to investigate whether the prices were at arm's length, not to include [[xx.xxx.xx]] losses on its investment in [[xx.xxx.xx]] as part of [[xx.xxx.xx]] COP.

922. [[xx.xxx.xx]] investments in companies operating in the salmon industry are no different from its investments in other non-salmon related companies in that they are all part of [[xx.xxx.xx]] activities as an investment company. This line of business operations is distinct from the company's salmon farming and processing operations. The fact that some of the investee companies were, more or less, involved in the salmon industry does not mean that the losses from those investments should be included in [[xx.xxx.xx]] salmon costs. None of the investee companies contributed, in any way, to [[xx.xxx.xx]] production and/or sale of salmon. Just like [[xx.xxx.xx]] investments in non-salmon companies, its losses from the investment operations impact the company's equity, and do not make [[xx.xxx.xx]] production of salmon any more costly.

(a)(iii) *Conclusion*

923. The EC was not entitled to include in [[xx.xxx.xx]] costs of production the company's losses on its investments operations. These losses impact the company's overall shareholder equity, but do not make [[xx.xxx.xx]] production of salmon any more costly.

(iii) [[xx.xxx.xx]]

(a) *Closure of Smolt Facilities*

924. The EC found that [[xx.xxx.xx]] COP for the IP was [[xx.xxx.xx]] NOK/kg WFE, including an upward adjustment of [[xx.xxx.xx]] NOK/kg for the non-recurring costs resulting from the write-down in the value of four smolt production facilities that were closed

in December 2003.[683] The production facilities did not, therefore, contribute to production of salmon during the last three quarters of the IP. This single adjustment for the facility closures amounted to [[xx.xxx.xx]] NOK or [[xx.xxx.xx]] percent of the company's COP for the IP, as found by the EC.

925. In the Provisional and Definitive Regulations, the EC included a general statement that certain, unspecified NRC, including the cost of closures, had become "systemic" costs of producing salmon.[684] Further, in a company-specific disclosure of 22 April 2005, the EC stated that these NRC "have been incurred in the salmon industry for years in a rather ordinary manner". [685] Therefore, in the EC's view, it seemed "reasonable" to include them in the cost of production."[686]

926. [[xx.xxx.xx]] countered the EC's assertion that the NRC were "ordinary" "systemic" costs by informing the EC that "there were no relevant write down costs in the years prior to the IP".[687] [[xx.xxx.xx]] also explained that the write-down was made because the smolt production facilities were no longer in use, and the book value of the asset, therefore, had to be reduced. [[xx.xxx.xx]] noted that the write-down indicated that the original depreciation schedule was "too optimistic" and should have been "higher from the outset" to reflect the shorter life of the asset.[688] However, it added that it is not always possible to predict the lifespan of an asset correctly. [[xx.xxx.xx]] observed that burdening the IP with the full cost of the write-down would penalize the company because of the coincidence between the time of closure and the IP. [[xx.xxx.xx]] explained that, in reality, the cost of the write-down pertained to production of salmon over the life of the facility which, conservatively, would be at least five years (i.e. 60 months). A rational approach would, therefore, be to apportion to the IP the share of the cost of using the facility during that period. Because the facility was closed in the first quarter of the IP, the IP should bear just 3/60 of the write-down.[689]

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[683] *See* Summary Table of the EC's Costs of Production with Adjustments. Exhibit NOR-99.
[684] *See* paras. 836 ff.
[685] Provisional Disclosure to [[xx.xxx.xx]], 22 April 2005, Specific Disclosure on Dumping, page 2, heading "Adjustment of depreciation cost". Exhibit NOR-[[xx]].
[686] Provisional Disclosure to [[xx.xxx.xx]], 22 April 2005, Specific Disclosure on Dumping, page 2, heading "Adjustment of depreciation cost". Exhibit NOR-[[xx]].
[687] [[xx.xxx.xx]] Comments on Definitive Disclosure, 8 November 2005, point 4, page 6. Exhibit NOR-[[xx]].
[688] [[xx.xxx.xx]] Comments on Provisional Disclosure, 27 May 2005, point 4, page 8. Exhibit NOR-[[xx]].
[689][[xx.xxx.xx]] Comments on Provisional Disclosure, 27 May 2005, point 4, pages 8-10. Exhibit NOR-[[xx]].

927. The EC's response was cursory. It noted that the full write-down was recorded in the IP and stated: "it is noted that in the questionnaire response no reasons as to why disregard this part of depreciation cost were given (sic)."[690] It added that, even if the company's arguments were accepted, similar NRC from previous years would have to be allocated to the IP. It concluded that, given that there was "no claim in the questionnaire response", the full cost of the closure would be allocated to the IP.

928. The EC's explanation for inclusion of the write-down of smolt production facilities is, yet again, wholly inadequate. The explanation rests on two points. *First*, the NRC is a "systemic" or "ordinary" cost of producing salmon that "have been incurred in the salmon industry for years";[691] and, *second* that the company gave no reasons in its questionnaire for leaving some or all of the NRC out of its COP.

929. *First*, Norway has explained in paragraphs 841 to 844 that the EC has no factual basis in the record for its conclusion that write-downs for the closure of production facilities are a "ordinary", "systemic" cost of producing salmon. Closing production facilities is not an ordinary, systemic part of producing salmon. Further, in the case of [[xx.xxx.xx]], the EC even failed to respond to the company's statement that there were no similar NRC in the years prior to the IP. There is simply no basis for considering that [[xx.xxx.xx]] cost of closing a smolt production facility is a recurring cost of producing salmon.[692]

930. *Second*, the EC justified ignoring [[xx.xxx.xx]] explanations regarding the NRC on the ground that they had not been given in the questionnaire response. The refusal to take into account explanations that were given in good time during the investigation is an abuse of the investigative process that the EC was supposed to be leading. the EC was obliged to use verifiable information provided in timely and appropriate fashion.

931. The questionnaire response is the first step in an investigation. However, Article 6.2 makes clear that it is far from the last step: "[*t]hroughout the anti-dumping investigation* all interested parties shall have a full opportunity for the defence of their interests." In that regard, Article 6 makes provision for hearings; opportunities to review the record;

[690] Definitive Disclosure to [[xx.xxx.xx]], Annex 2, page 2, heading "Adjustment of depreciation cost", point 4. Exhibit NOR-[[xx]].
[691] *See* para. 925 above.
[692] [[xx.xxx.xx]] Comments on the Definitive Disclosure, 8 November 2005, point 4, page 6. Exhibit NOR-[[98]].

opportunities to make presentations on the basis of information in the record; verification of information by the authority; disclosure of essential facts; and opportunities for investigated parties to defend their interests in light of the essential facts. These events all occur after the questionnaire response is submitted.

932. [[xx.xxx.xx]] explanations were first made on 15 March 2005 and they were reiterated with more or less detail three times: at a hearing on 26 May 2005; in writing on 27 May 2005; and, again, in writing on 8 November 2005.[693] The EC was duty bound to consider [[xx.xxx.xx]] submissions and provide an adequate response. The EC's refusal to do so eviscerated entirely [[xx.xxx.xx]] right to defend its interests.

933. The EC was not entitled to include any adjustment for [[xx.xxx.xx]] closure of smolt facilities in the company's COP for the IP. As outlined in paragraphs 852 to 862, the costs incurred on closure of a production facility reflect a reduction in the value of assets. The amount of the cost is the residual, unamortized value of the assets recorded in the balance sheet. The NRC arises because the depreciation expense in previous years was too low in view of the actual lifespan of the asset. The NRC on closure, therefore, reflects costs of producing salmon in previous periods that were not matched to revenue earned in these periods. The NRC does not, however, involve the sacrifice of economic resources to produce salmon sold in the IP or thereafter.

934. As also outlined above, under Article 2.2.1.1, NRC can only be added to the COP when the cost benefits current or future production.[694] In this case, the smolt production facilities were closed in December 2003, that is, after 3 months of the IP started. Thus, the facilities benefited production of salmon during one quarter of the IP. Beyond the closure date, the NRC provided no benefit to production. The remainder of the NRC pertains to past production and cannot be allocated to the IP.

935. The EC was, therefore, required to make an allocation of the total NRC of [[xx.xxx.xx]] NOK. It failed to do so. In the Definitive Regulation, the EC asserted that the write down of fixed assets should be allocated across the lifespan of the asset. Yet, since the

[693] [[xx.xxx.xx]] Comments on the Information Note on Costs of Production, 15 March 2005, page 3. Exhibit NOR-[[xx]]; [[xx.xxx.xx]] Slide Presentation to the Commission in hearing of 26 May 2005, slide 5. Exhibit NOR-[[xx]]; [[xx.xxx.xx]] Comments on the Definitive Disclosure, 8 November 2005, point 4, page 6. Exhibit NOR-[[xx]].
[694] *See* paras. 809 and 810.

companies failed, it said, to provide information on the lifespan of assets, it decided to include the average NRC incurred in a three-year period because this is the lifespan of salmon.

936. Norway objects to the three-year average approach. However, in the case of [[xx.xxx.xx]], the EC failed to apply even this methodology. Instead, it simply applied the full NRC incurred in 2003 to the IP. This failure is all the more striking because [[xx.xxx.xx]] submitted to the EC that "a very conservative estimate of life time [for a smolt facility] would be five years."[695] Thus, the NRC that could be allocated to the IP is 3 months out of 60 months. The EC ignored [[xx.xxx.xx]] argument.

937. As with [[xx.xxx.xx]], the EC also failed to respect the logic of its own flawed position. [[xx.xxx.xx]] informed the EC in March 2005 that the NRC would, in fact, be reversed by the sale of the assets within two weeks. On 27 May 2005, [[xx.xxx.xx]] advised the EC the sale of two production facilities had realized a gain of [[xx.xxx.xx]] NOK.[696] This was confirmed by the company's auditors, [[xx.xxx.xx]].[697]

938. If the extraordinary loss incurred on the disposal of an asset is part of the COP, the extraordinary gain realized on the disposal of the same asset must offset the COP. Yet, despite being informed of the fact that the earlier loss had been largely reversed, the EC insisted on allocating the full amount of the loss to the IP. In fact, as Norway has argued, the loss on the disposal of a fixed asset is not a cost of producing salmon any more than the gain on the disposal of the same asset is revenue earned from the sale of salmon.

939. By including the NRC incurred by [[xx.xxx.xx]] 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*.

[695] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, point 4, page 10. Exhibit NOR-[[xx]].
[696] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, point 4, page 10. Exhibit NOR-[[xx]].
[697] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, point 4, page 10, referring to Annex 3 to the letter. Exhibit NOR-[[xx]].

(iv) Averaging of NRC Over a Three Year Period for Several Companies

(a) *Overview of the EC's Three Year Averaging Approach for NRC*

940. In the Definitive Regulation, the EC addressed an argument made by some interested parties that, assuming that the NRC were to be included in the COP, "there should be some allocation of these costs 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."[698] This argument is based on Article 2.2.1.1 of the *Anti-Dumping Agreement*, which requires the investigating authority to make an allocation of those costs that relate to production in accounting periods other than just the IP.[699] In the case of NRC, the provision permits the allocation of those costs that benefit current or future production.

941. In response to the interested parties arguments on cost allocation, the EC responded as follows:

> … 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 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.*[700]

942. In the passage, the EC accepted that "extraordinary costs" should be allocated over time; it also accepted that, "ideally", costs should be spread over the "useful life" of an asset; it blamed the companies for failing to provide information to that end; and, instead, it adopted an "averaging" approach based on total NRC incurred over a three year period on the ground that this is the growth period of salmon. It appears, therefore, from the explanation that the EC regarded the three-year averaging approach as a method of allocating costs relating to assets.

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[698] Definitive Regulation, para. 15.
[699] *See* paras. 792 to 814 above.
[700] Definitive Regulation, para. 18. Emphasis added.

943. The EC applied the three-year averaging approach to diverse NRC: losses on the closure of production facilities; losses on the sale of fixed assets; losses on investment activities; restructuring (clean up) costs; severance pay; the write-down of the value of biomass and fish farming licenses; operating losses; and losses on the write-down of investments.

944. By applying the three-year averaging approach to all these costs, the EC accepts that they are "extraordinary costs" – not ordinary recurring costs – that it accepts should be allocated over time.[701] Recurring costs are not allocated over the useful of an asset.

945. 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.

946. 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.

(b) *The EC's Three Averaging Approach for NRC is Not a Proper Allocation Method Under Article 2.2.1.1 of the Anti-Dumping Agreement*

947. Under Article 2.2.1.1, cost allocation involves apportioning a given cost over time according to the relationship between the cost and production activities benefiting from those costs.[702] An allocation methodology must, therefore, establish a link between the cost and production in specific years. Furthermore, in the case of allocation of NRC, the link must be established between the particular NRC and production activities in current and future years.

948. The EC's three-year averaging approach fails to meet these two fundamental requirements of an allocation method for NRC under Article 2.2.1.1: *first*, it does not establish any rational link between the apportionment of costs and the production activities

[701] Definitive Regulation, para. 18.
[702] *See* paras. 792 to 814.

benefiting from the costs; and *second*, it does not allocate NRC exclusively to current and future years.

949. *First*, the EC's three-year averaging approach is based on the duration of the growth cycle of salmon. There is no rational relationship between that cycle and the period during which a particular NRC will contribute to salmon production. There is, for example, no link between the lifespan of salmon production facilities and the lifespan of a single salmon. Equally, a fish farming license can be used indefinitely and not just for the life of a single salmon. Also, a one-off severance payment to terminate employment has no relationship to the life of a salmon; nor is the salmon growth cycle relevant either to the annual revaluation of biomass or to operating losses incurred at a production plant in a given year. Finally, losses on investments also have no relationship with the life of a fish

950. Not surprisingly, the EC has not even attempted to establish, with facts, that there is a rational relationship between the lifespan of a salmon and the period during which each of these costs will benefit production. It is simply absurd to suggest that the various NRC at issue in this dispute should be allocated in relation to the lifespan of a salmon. Applying the EC's logic to other industries yields absurd results. A harvesting machine for a wheat producer would have a useful life of only 6-months, because this is the time it takes to plant, grow and harvest wheat. The useful life of a new machine purchased by a car producer would be the few days or weeks that it takes to produce the various car parts and assemble them into a car.

951. *Second*, the EC's three-year averaging approach does not allocate the NRC at issue exclusively to production activities in current and future years. Under the EC's averaging approach, all the NRC incurred in three financial years (2002, 2003 and 2004) are simply totaled and divided by three. The amount of NRC added to the COP is the arithmetic mean of the costs incurred in three years. In essence, by averaging costs, the EC carried the 2002 costs *forwards* to 2003 and 2004; it carried the 2003 *partially forwards* and *partially backwards*; and, it carried the 2004 costs *backwards*. Thus, instead of allocating NRC solely to current and future production, the EC's approach allocates some costs to the past and the present; others to the past, the present and the future; and still others to the present and the future.

952. For these two reasons, the EC's three-year averaging method is not, therefore, a methodology that allocates NRC consistently with Article 2.2.1.1.

(c) *The Evidence in the Record Contradicts the EC's Justification for the Three Year Averaging Approach*

953. The EC itself recognized that its averaging approach was less than "ideal" because, it said, the ideal method would be to allocate costs over the useful life of a fixed asset.[703] Yet, the EC said that this approach could not be adopted because none of the companies provided information on the lifespan of assets. However, the EC's explanation does not accurately reflect the record. Contrary to the impression given in the passage quoted in paragraph 941, the EC *did* receive information on the useful life of assets.

954. In particular, in its questionnaire reply, [[xx.xxx.xx]] stated that land and buildings are depreciated over a period of up to 20 years; plant and equipment, and fixtures and fittings over 3 to 10 years; and ships and boats over 7 years. [[xx.xxx.xx]] also stated that assets are treated as fixed if the useful economic lifetime exceeds three years. It noted that farming licenses that are considered perpetual are not depreciated.[704] [[xx.xxx.xx]] response to the same question in the questionnaire referred to its financial statements, which contain similar statements to those made by [[xx.xxx.xx]].[705] [[xx.xxx.xx]] also provided information of the average useful life of machinery and equipment, barges and boats, and buildings and property. [706] Further, [[xx.xxx.xx]] stated that, on "a very conservative estimate", the

[703] Definitive Regulation, para. 18.

[704] [[xx.xxx.xx]] Questionnaire Response, Section F-1.6, 4th page of exhibit, under heading "Intangible Assets on the bottom of page". Exhibit NOR-[[xx]].

[705] [[xx.xxx.xx]] Questionnaire Response at Attachments10 and 11. Attachment 10 to [[xx.xxx.xx]] Questionnaire Response provides the 2001-2002 comparative financial statements for [[xx.xxx.xx]], the parent company of the [[xx.xxx.xx]], and for all other companies within the Group. Attachment 11 provides the 2002-2003 comparative financial statements for [[xx.xxx.xx]] and all other Group companies. The useful lives of the fixed asset categories held by each company in the [[xx.xxx.xx]] are reported in the footnotes that accompany each set of financial statements in Attachments 10 and 11. For [[xx.xxx.xx]], for example, the company's financial statements show that it depreciated land and buildings over 10 to 20 years; machines over 5 to 10 years; and boats over 4 to 7 years (*see* Attachment 10, page 8, footnote 5). [[xx.xxx.xx]] did not depreciate farming licenses and water rights, as demonstrated in the company's financial statements (*see* Attachment 10, page 8, footnote 6). Rather, for accounting purposes, [[xx.xxx.xx]] treated farming licenses and water rights as permanent assets, decreasing their historical purchase cost only when the value of those assets to the business was considered to be impaired (*See* Attachment 11, page 9, footnote 6, showing the write down of farming licenses for [[xx.xxx.xx]] and [[xx.xxx.xx]] in 2003). Exhibit NOR-[[xx]].

[706] [[xx.xxx.xx]] Questionnaire Response, Section F-1.5 and Attachments 11 and 12. In its Questionnaire Response, [[xx.xxx.xx]] stated that its buildings and property are depreciated over a period of 13 to 33 years; machinery and equipment over 3 to 10 years, and barges and boats over 5 to 10 years. Attachment 11 to [[xx.xxx.xx]] Questionnaire Response provides the 2001-2002 comparative financial statements for [[xx.xxx.xx]]. Attachment 12 provides the 2002-2003 comparative financial statements for [[xx.xxx.xx]] and all

lifespan of smolt production facilities would be five years.[707] Thus, contrary to the statement in the Definitive Regulation, the EC *had* evidence on the record regarding the lifespan of assets which the EC plainly failed to consider, as it was required to do under Article 2.2.1.1.

955. In any event, if the EC believed that it lacked information regarding the appropriate allocation of specific costs that it proposed to include in the COP, it should have expressly requested that information from the parties during the investigation. As the panel in *Mexico – Rice* held, "an investigating authority required to conduct an investigation in an objective and unbiased manner has to *play an active role in the search of the information it requires in order to make its determination*."[708] The EC never made any such request to the companies concerned. In these circumstances, by blaming the companies for the EC's own failure to adopt a rational cost allocation methodology, the EC turns on its head the notion of an "investigation" by an "investigating authority".

956. Further, even assuming that the EC could properly rely on the average lifespan of a salmon as an appropriate proxy for the useful life of assets, the EC offers no facts in support of its conclusion that three years is the "average length of time that it takes to grow a salmon from a smolt to a harvestable salmon".[709] In fact, the evidence in the record suggests that three years is close to the maximum growth period because, after that, the quality of the salmon deteriorates. The average period is *less than two years*.[710] The minimum period can be as short as 9 months. Thus, the factual underpinnings of the three-year period at the heart of the EC's averaging approach are without foundation.

(d) *The EC's Use of the Three Year Averaging Approach is Inconsistent*

957. Finally, the EC applied its flawed three-year averaging approach inconsistently. The averaging approach was applied to *all* of the NRC incurred by [[xx.xxx.xx]] and

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other Group companies. Footnote 4 to [[xx.xxx.xx]] financial statements shows that the company does not depreciate farming licenses in Norway but, instead, treats them as permanent assets (*See* Attachment 11, pages 11 and 12, footnote 4; and Attachment 12, page 11, footnote 4). Exhibit NOR-[[xx]].

[707] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, point 4, page 10. Exhibit NOR-[[xx]].

[708] Panel report, *Mexico – Rice*, para. 7.185, citing with approval Appellate Body Report, *US – Wheat Gluten*, para. 53. Emphasis added.

[709] Definitive Regulation, para. 18. Emphasis added.

[710] *See* [[xx.xxx.xx]] Questionnaire Response at Section F-2.1.b, with a chart showing that the average sea-water production period from smolt to harvested salmon is between 15 and 19 months that and that the full production cycle from eggs to harvested salmon is between 27 and 36 months. (*See* Exhibit NOR-[[xx]]) *See also* [[xx.xxx.xx]] Questionnaire Response at Section F-1.8, which states that average growth period from smolt to harvested salmon is 570 days (or less than 19 months). (*See* Exhibit NOR-[[xx]])

[[xx.xxx.xx]]. For these companies, the NRC included, among others, losses on the closure of [[xx.xxx.xx]] at [[xx.xxx.xx]] and [[xx.xxx.xx]].[711] However, the EC did not apply the three-year averaging method to the losses incurred by [[xx.xxx.xx]] on the closure of [[xx.xxx.xx]]. Instead, the EC used the NRC incurred during the IP taken alone. [[xx.xxx.xx]] loss on the closure of smolt facilities is of exactly the same character as the losses incurred by [[xx.xxx.xx]] on the closure of the [[xx.xxx.xx]].[712] There can be no justification for the EC's arbitrary and inconsistent application of its averaging approach.

(e) *Conclusion*

958. The EC 's averaging of NRC over a three-year period for several producers violated Article 2.2.1. The EC's approach is not a proper allocation method under Article 2.2.1. Furthermore, the evidence on the record contradicts the EC's justification for resorting to the three-year approach. Finally, the EC applied this flawed three-year averaging approach selectively and inconsistently.

(v) Conclusion

959. The EC violated Article 2.2.1.1 of the *Anti-Dumping Agreement* by making a series of significant adjustments for NRC that do not benefit current or future production of salmon. The costs in question were, therefore, not part of the producers' costs of producing and selling salmon during the IP. By including these costs within the COP, the EC also violated Article 2.2 of that *Agreement*.

D. *The EC's Improper Adjustments Relating to Finance Costs*

960. A second group of adjustments that the EC made to the COP of certain investigated companies concerned finance costs. Specifically, the EC made adjustments to the finance costs of four companies: [[xx.xxx.xx]]. Norway pursues claims with respect to adjustments made for all these companies, except [[xx.xxx.xx]]. Norway claims that, in making the adjustment for finance costs for [[xx.xxx.xx]], the EC has included costs that do not form part of the companies' costs of producing and selling salmon during the IP. Norway, again, sets forth its claims in relation to the specific adjustments made for each producer.

[711] *See* para. 867 above.
[712] *See* para. 867 above.

961. Norway also claims that the EC violated Article 6.8 of the *Anti-Dumping Agreement* in the calculation of [[xx.xxx.xx]] finance costs because of the inappropriate application of facts available. That claim is dealt with in Section V.D above.

(i) Averaging of Finance Costs Over a Three Year Period for Several Companies

962. In the definitive determination, the EC calculated finance costs for three companies – [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]] – by reference to a three-year period, rather than by reference to the IP. In the case of [[xx.xxx.xx]], the three-year period was 2001 to 2003; and, in the case of [[xx.xxx.xx]] and [[xx.xxx.xx]], the three-year period was 2002 to 2004. The EC adopted the three-year averaging approach for the first time when it issued the company-specific definitive disclosures on 28 October 2005.

(a) *Overview of [[xx.xxx.xx]] Determination*

963. In the case of [[xx.xxx.xx]], finance costs were calculated by determining the three-year average amount of the company's interest bearing loans in the period 2001 to 2003 and applying to that amount a weighted-average borrowing rate derived from Norwegian Central Bank ("NCB") interest rate data for the same three-year period.[713] No offset was allowed for the interest income earned by [[xx.xxx.xx]] during the IP. Although the EC never disclosed to [[xx.xxx.xx]] the precise source of the NCB interest rate data, the amount of any premium added to the Norwegian inter-bank offered rate ("NIBOR"), or the specific calculation of the weighted-average borrowing rate, the three-year rate used was 6.85 percent. In contrast, during 2002, 2003 and 2004, the rates offered by the NCB were, respectively: 6.92 percent, 3.95 percent and 2.18 percent.[714] By using a three-year averaging approach, the EC significantly increased [[xx.xxx.xx]] finance costs.

964. In the definitive disclosure, the EC's explanation for using a three year period amounted to a single sentence:

[713] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex II, page 2, point 2. Exhibit NOR-[xx]]. In Section V.D, Norway claims that the EC violated Article 6.8 of the *Anti-Dumping Agreement* by using the NCB's interest rate.

[714] *See* [[xx.xxx.xx]] Slide presentation to the Commission at hearing of 14 November 2005, slide 8. Exhibit NOR-[[xx]]. These rates are the NIBOR rates for 2002 to 2004. The important point is that NIBOR declined significantly from 2002 to 2004. *See* also the interest rate attachment in [[xx.xxx.xx]] Comments on the Information Note on Costs of Production, 16 March 2005. Exhibit NOR-[[xx]].

> The 3 year average for both the interest bearing loans and the interest rate is because of the 3 year cycle for producing salmon to harvest weight.[715]

965. No other explanation is given in the Provisional or Definitive Regulation for the use of a three averaging approach to calculate [[xx.xxx.xx]] finance costs.

(b) *Overview of [[xx.xxx.xx]] and [[xx.xxx.xx]] Determination*

966. For [[xx.xxx.xx]] and [[xx.xxx.xx]], finance costs were determined slightly differently. The EC totaled the reported finance expenses at the group-wide level for the years 2002 to 2004 and divided that figure by the total group-wide turnover for the same period. The EC, thereby, calculated a three-year weighted average ratio of finance costs to turnover for the group. The turnover of each investigated company, in the IP, was then multiplied by the average finance ratio to determine a finance cost of the company.

967. The relevant finance costs ratios for the years concerned, and the weighted average, are shown in the following table:

Table 13: Cost Ratios of the [[xx.xxx.xx]] **group and the** [[xx.xxx.xx]] **group**

	2002	**2003**	**2004**	**Average**	**IP**[716]
[[xx.xxx.xx]] [717]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]
[[xx.xxx.xx]] [718]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]

968. The table demonstrates that the burden of finance costs on both companies fell sharply during the three-year period used by the EC. For the two companies, the declines

[715] Definitive disclosure to [[xx.xxx.xx]], Annex II, page 1, point 2. Exhibit NOR-[[xx]].
[716] The finance ratio for the IP was calculated using the data in the definitive disclosures for the two companies. *See* [[xx.xxx.xx]] Worksheet. Exhibit NOR-[[xx]]. One quarter of the total group-wide interest for 2003 was added to three quarters of the total group-wide interest for 2004; one quarter of the total group-wide revenue for 2003 was added to three quarters of the total group-wide revenue for 2004. The interest figure was divided by the revenue figure. The figures used to derive the IP average exchange rate are the same as those used by the EC and were taken from the Definitive Disclosures to [[xx.xxx.xx]], Annex 3, 28 October 2005 (Exhibit NOR-[[xx]]) and Definitive Disclosures to [[xx.xxx.xx]], Annex 3, 28 October 2005 (Exhibit NOR-[[xx]]).
[717] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, "Group Results" worksheet. Exhibit NOR-[[xx]].
[718] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, "ASA financials". Exhibit NOR-[[xx]].

were, respectively, 61 and 59 percent. Notably, the finance cost ratios for the IP were markedly lower than the three-year average ratios. Indeed, if the finance cost ratio from the IP had been used, the total finance costs for [[xx.xxx.xx]] would have been [[xx.xxx.xx]] NOK instead of [[xx.xxx.xx]] NOK, that is, [[xx.xxx.xx]] per cent lower; and, in the case of PFN, finance costs would have been [[xx.xxx.xx]] instead of [[xx.xxx.xx]] NOK, that is, [[xx.xxx.xx]] per cent lower.[719] [[xx.xxx.xx]] also explained to the EC that interest rates in Norway fell significantly during the three-year period. The NCB rates in the three years were, respectively, 6.92 percent, 3.95 percent and 2.18 percent.[720] Thus, by resorting to a three-year average finance cost ratio, the EC significantly increased the finance costs of the companies.

969. In the definitive disclosure for both companies, the following comprises the EC's entire explanation of its finance cost calculation:

> Reference is made to paragraph (20) of the general disclosure. In the case of your company, financial expenses incurred in the years 2002 and 2004 by the group were accordingly allocated to salmon cost of production of the IP.[721]

970. Paragraph 20 of the General Disclosure is reproduced in paragraph 20 of the Definitive Regulation, and contains the following sentence:

> … 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.

971. To recall, in the case of "extraordinary expenses", the EC relied on a three year averaging period for certain companies (but not others) on the ground that three years is "the average length of time that it takes to grow a salmon from a smolt to a harvestable salmon."[722] No other explanation is given for the three year averaging of finance costs.

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[719] *See* [[xx.xxx.xx]] and [[xx.xxx.xx]] Worksheet. Exhibit NOR-[[xx]].
[720] [[xx.xxx.xx]] Slide presentation to the Commission at Hearing of 14 November 2005, slide 8. Exhibit NOR-[[xx]].
[721] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex 2, page 2; and Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex 2, page 2. Exhibits NOR-[[xx]] and NOR-[[xx]].
[722] Definitive Regulation, para. 18.

(c) *The EC's Three Averaging Approach Is an Improper Basis for Calculating Finance Costs in the IP*

972. By calculating finance costs on the basis of a three-year average, the EC violated Article 2.2 of the *Anti-Dumping Agreement*. Under Article 2.2, the authority calculates a "proxy" for the price of the like product that is compared with export prices in the IP.[723] The costs relevant to constructing normal value are, therefore, the costs associated with producing and selling the like product in the IP.

973. Finance costs are, in essence, the costs associated with funding debt that is used as part of the working capital invested in production and sale of the like product. By relying on a three-year average of finance costs, the EC necessarily determined the average costs associated with funding production and sale during that entire period and not, therefore, the costs incurred during the IP. The average finance costs incurred by a company during a three-year period do not, however, provide an objective basis for making conclusions about finance costs in the IP.

974. There are a number of reasons why finance costs during a three-year period are very likely, indeed, to be different from the finance costs for the IP. *First*, interest rates – the primary component of finance costs – are likely to change from one time period to another. In this case, as noted in paragraph 963, during the three year period used by the EC for [[xx.xxx.xx]], and for [[xx.xxx.xx]] and [[xx.xxx.xx]], interest rates dropped by upwards of 60 percent. Thus, even if outstanding debt were constant during a three-year period, finance costs would be markedly lower in the IP than on average during the three years. *Second*, debt levels are very unlikely to remain constant in a three-year period. Instead, a company's debt is likely to evolve from one time period to another due to the changing capital needs of the business. The relative levels of, for example, debt to equity, debt to total assets, and debt to revenue, are likely to change in a three-year period. As a result, the cost of financing production activities almost certainly varies with time.

975. This is reflected in the record of this investigation: the table in paragraph 967 shows that the ratio of finance costs to income declined dramatically for the [[xx.xxx.xx]] and [[xx.xxx.xx]] during the EC's three-year averaging period. If the EC had relied on the same methodology, but had used the ratio for the IP alone, finance costs would have been

[723] *See* para. 786 ff.

considerably lower for these two companies. The three year averaging method used by the EC, therefore, resulted in a much higher finance cost than that incurred in the IP.

976. Equally, given the decline in the NCB's interest rates, the finance costs on [[xx.xxx.xx]] loans also changed significantly during the three-year period. [[xx.xxx.xx]] interest payments in the IP amounted to [[xx.xxx.xx]] NOK, whereas using a three-year average of loans and NCB rates, the amount applied by the EC was [[xx.xxx.xx]] NOK.[724] Again, therefore, the three-year averaging method resulted in a much higher finance cost.

977. The EC itself recognized that the COP it used pursuant to Article 2.2 should be based on costs incurred in relation to production of salmon in the IP. The EC requested the respondents, in the questionnaire, to provide data on costs "used in the production of the product concerned during the **investigation period**".[725] The underlining and bold type in this quote were added to the questionnaire by the EC itself, presumably to ensure that the respondents grasped the basic principle that the relevant costs were exclusively those of the IP. Nonetheless, in calculating finance costs for three companies, the EC calculated costs using a three-year averaging method. However, Article 2.2 of the *Anti-Dumping Agreement* requires that normal value be determined for the IP and, therefore, that the costs of production be those incurred in producing the goods sold in that period.

978. Norway also notes that the EC's reliance upon a three year averaging approach for NRC and finance served contradictory purposes. The averaging approach for NRC supposedly served as an "allocation" method for NRCs in the absence of data regarding the useful life of assets.[726] In the case of finance costs, the three year averaging approach served simply as the means of calculating the relevant amount of the costs. Finance costs are not, however, "allocated" over time. Thus, precisely the same three year averaging approach allegedly served to allocate costs in one instance and to calculate costs in the other.

[724] Definitive Disclosure to [[xx.xxx.xx]], Annex 2, 28 October 2005. Exhibit NOR-[[xx]].
[725] *See* Question F2.4. *See* also Questions F2.2 (purchases from unrelated suppliers used in production during the IP), F2.3 (purchases from related suppliers used in production during the IP), in Questionnaire Reply from [[xx.xxx.xx]], 27 December 2004. Exhibit NOR-[[xx]].
[726] Definitive Regulation, para. 18.

(d) *The EC's Use of the Three Year Averaging Approach Was Inconsistent*

979. The use of a three-year average was anomalous even in the context of the *E*C's own dumping determinations. Generally, the EC determined the COP on the basis of the costs that were incurred during the IP. Thus, for example, smolt, feed, labor, veterinary, well-boat, slaughter, insurance and rent costs, were all determined on the basis of data for the IP alone and *not* for a three-year average. Yet, for the finance costs of three companies, the EC abandoned this approach, resorting instead to averaging on a three-year basis.[727]

980. The anomalies in the EC's approach do not end there because the EC was inconsistent in its application of the three-year averaging even for finance costs. The EC calculated three-year average finance costs for [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]]. Yet, for [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]] it relied exclusively on the finance costs incurred in the IP. Further, for no apparent reason, the EC relied on two different three-year periods when it chose to average. In the case of [[xx.xxx.xx]], the three-year period was 2001 to 2003; and, in the case of [[xx.xxx.xx]] and [[xx.xxx.xx]], it was 2002 to 2004.

981. To recall, the EC's flawed justification in the definitive disclosures for using a three-year average is based on the purported natural growth cycle of salmon, which does not vary from cost element to cost element; nor from producer to producer.[728] Thus, the anomalies are not explained by the EC's justification for resort to a three-year average. The EC never acknowledged, far less explained, its arbitrary and inconsistent use of three-year averaging: for one type of recurring cost (but not for others); for certain producers (but not for others); and for different three-year periods ([[xx.xxx.xx]] *versus* [[xx.xxx.xx]] and [[xx.xxx.xx]]).

982. Finally, the EC claims that this is the average time it takes to grow a smolt to a harvestable salmon.[729] However, as explained in paragraph 956, there is no factual basis for this assertion. The evidence in the record shows that the average period is less than two years, and three years is the maximum period.

[727] The EC also used a three-year averaging approach to calculate the NRC of three companies, [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]]. Norway also contests the use of a three year averaging approach for the calculation of NRC. *See* sub-section XI.C(iv) above.
[728] *See* paras. 964 [[(xx.xxx.xx)]], and 970 and 971 ([[xx.xxx.xx]] and [[xx.xxx.xx]]) above.
[729] Definitive Regulation, para. 18. Emphasis added.

(e) *Conclusion*

983. For all these reasons, the EC's calculation of finance costs using a three year average of finance costs is impermissible under Article 2.2. Moreover, the EC's use of this approach was arbitrary and inconsistent because it applied it to some producers, but not others; and because it used different three year periods for the producers subject to this approach.

(ii) [[xx.xxx.xx]] Finance Costs

984. The EC found that [[xx.xxx.xx]] COP for the IP was [[xx.xxx.xx]] NOK/kg WFE, including an upward adjustment of [[xx.xxx.xx]] NOK/kg for finance costs.[730] For [[xx.xxx.xx]], the EC determined an amount for finance costs by calculating the average finance costs incurred by the parent company, [[xx.xxx.xx]], during a three-year period from 2002 to 2004.

985. In calculating the three year average, the EC included among the finance costs a loss of [[xx.xxx.xx]] NOK that the [[xx.xxx.xx]] incurred in 2002 on the write-down of shares held in [[xx.xxx.xx]], a whitefish farming and processing company.[731]

986. Norway separately contests the EC's use of the three-year average period to calculate finance costs.[732] As a result, the loss in [[xx.xxx.xx]] must be excluded from the calculation as it was not incurred in the IP. In addition to this argument based on the timing of the loss, Norway contends in this section that the loss incurred in [[xx.xxx.xx]] must be excluded from the calculation of finance costs because it is an investment loss. This investment loss was not a finance cost arising from payments made by the [[xx.xxx.xx]] to service debt. There are, therefore, no grounds for treating this loss as a finance cost.

987. Further, Norway has already explained in paragraphs 895 to 922 that 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 related to salmon production.[733] The arguments made previously apply equally to [[xx.xxx.xx]] investment in [[xx.xxx.xx]]. The investment losses do not, therefore, form part of the costs of producing salmon for purposes of constructing normal value under Article 2.2.

[730] *See* Summary Table of the EC's Costs of Production with Adjustments. Exhibit NOR-99.
[731] [[xx.xxx.xx]] Comments on Definitive Disclosure, 8 November 2005, page 8. Exhibit NOR-[[xx]].
[732] *See* sub-section XI.D(i).
[733] *See* paras. 895 to 922 above.

988. An oddity of the EC's inclusion in finance costs of [[xx.xxx.xx]] investment losses in [[xx.xxx.xx]] is that the EC *simultaneously* excluded [[xx.xxx.xx]] investment losses in [[xx.xxx.xx]], [[xx.xxx.xx]]. In the provisional determination, the finance costs were based on the figures for 2003 alone. The EC included in the finance costs losses of over [[xx.xxx.xx]] NOK incurred by the [[xx.xxx.xx]] in an investment in [[xx.xxx.xx]]. [[xx.xxx.xx]] objected on the grounds that the losses were not related to the [[xx.xxx.xx]] production of salmon.[734]

989. In the definitive determination, the EC excluded the losses in [[xx.xxx.xx]] from the finance costs. Yet, it added losses of exactly the same type incurred in [[xx.xxx.xx]]. The EC gives no explanation for this inconsistent treatment of [[xx.xxx.xx]] investment losses, which must all be excluded from the COP. [[xx.xxx.xx]] pointed out this inconsistency to the EC after the definitive disclosure, arguing that the loss in [[xx.xxx.xx]] must also be excluded, but to no avail.

990. Thus, the EC must exclude investment losses from [[xx.xxx.xx]] COP, pursuant to Article 2.2 of the *Anti-Dumping Agreement*.

(iii) Conclusion

991. The EC made improper adjustments relating to the finance costs of [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]] that violated Article 2.2 of the *Anti-Dumping Agreement*. *First*, the EC inappropriately averaged finance costs over a three-year period. *Second*, the EC inappropriately included [[xx.xxx.xx]] investment losses as part of its finance costs.

E. *The EC's Improper Adjustments Relating to Smolt Cost*

(i) [[xx.xxx.xx]] and [[xx.xxx.xx]]

992. The EC made adjustments to the smolt costs of two companies, [[xx.xxx.xx]] and [[xx.xxx.xx]]. Smolt are juvenile salmon that take approximately 9 to 16 months to develop into harvestable salmon. Because of the extended growth cycle of smolt, not all the smolt in the water at the start of the IP are harvested during that period. As a result, some of the smolt costs incurred during the IP do not relate to salmon produced in the IP, but instead to salmon that will be produced in future periods after the IP.

[734] [[xx.xxx.xx]] Comments on Provisional Disclosure, 27 May 2005, page 13. Exhibit NOR-[[xx]].

993. During the IP, with a view to increasing future salmon production, both [[xx.xxx.xx]] and [[xx.xxx.xx]] purchased much larger volumes of smolt than were necessary to produce the salmon that the companies harvested in the IP. Thus, a portion of the companies' smolt costs in the IP related to future salmon production and not production in the IP.

994. In the IP, the relationship between smolt production and harvested salmon was as follows:

Table 14: Relationship Smolt - Salmon Production for [[xx.xxx.xx]] **and** [[xx.xxx.xx]]

(Thousands)	Smolt (A)	Salmon (B)	Mortality (C)	Smolt Related to Production (B/(1.0 - C) = D)	Surplus (A – D = E)
[[xx.xxx.xx]]	[[xx.xxx.xx]][735]	[[xx.xxx.xx]][736]	[[xx.xxx.xx]]%[737]	[[xx.xxx.xx]]	[[xx.xxx.xx]]
[[xx.xxx.xx]]	[[xx.xxx.xx][738]	[[xx.xxx.xx]][739]	[[xx.xxx.xx]]%[740]	[[xx.xxx.xx]]	[[xx.xxx.xx]]

995. In this table, column A shows the number of smolt produced during the IP (work-in-progress) and column B shows the number of salmon harvested in the IP (finished goods). Column C shows the mortality rate of smolt during the IP. In column D, the number of smolt relating to salmon production in the IP is derived from the number of salmon harvested in the IP, adjusted to take into account the average mortality rate. The calculation includes one smolt per salmon harvested and, in addition, a number to account for the smolt that perish.

[735] Questionnaire reply from [[xx.xxx.xx]], DMCOP file, at worksheet [[xx.xxx.xx]], cell K33. Exhibit NOR-[[xx]].
[736] Questionnaire reply from [[xx.xxx.xx]], DMCOP file, at worksheet [[xx.xxx.xx]], cell C 38. Exhibit NOR-[[xx]].
[737] [[xx.xxx.xx]] Comments on the Information Note on Cost of Production, 16 March 2005, page 2, with enclosures. Exhibit NOR-[[xx]].
[738] Questionnaire reply from [[xx.xxx.xx]], 30 December 2004, Sections F-2.4 and F-2.5. The volume of smolt was [[xx.xxx.xx]] cubic metres and the average weight was [[xx.xxx.xx]] kg per smolt. This gives a total number of smolt of [[xx.xxx.xx]] million smolt. Exhibit NOR-[[xx]], first page of Exhibit under heading "Farming cost". *See also* [[xx.xxx.xx]] Comments on the Definitive Disclosure, 8 November 2005. Exhibit NOR-[[xx]].
[739] Questionnaire reply from [[xx.xxx.xx]], 30 December 2004, Sections F-2.4 and F-2.5. Exhibit NOR-[[xx]]. The volume of harvested salmon was [[xx.xxx.xx]] tonnes with an average weight of [[xx.xxx.xx]] kg. Thus, the number of harvested fish was [[xx.xxx.xx]] fish.
[740] Questionnaire reply from [[xx.xxx.xx]], 30 December 2004, Sections F-2.4 and F-2.5. Exhibit NOR-[[xx]].

The resulting figure represents the work-in-progress during the IP that is related to finished goods produced during the IP.

996. However, in its determination, the EC included the cost of *all* smolt produced during the IP (i.e. column A), even though that number was far greater than the number of smolt associated with production of the salmon harvested and sold in the IP. Column E shows the difference between the EC's smolt figure and the number of smolt related to the salmon harvested in the IP. The "surplus" smolt in column E are not related to production during the IP but to future production. The inclusion of the costs associated with these smolt is considerable because the cost of producing a single smolt for each company was, respectively, [[xx.xxx.xx]] NOK per smolt and [[xx.xxx.xx]] NOK per smolt. The total extra amounts thereby incorrectly added by the EC are [[xx.xxx.xx]] NOK and [[xx.xxx.xx]] NOK, respectively.

997. Both companies requested that their smolt costs in the IP be allocated costs in relation to salmon produced and sold in the IP.[741] In the case of [[xx.xxx.xx]], the company reported a smolt cost that amounted to [[xx.xxx.xx]] NOK/kg WFE of the harvested fish.[742] The EC adjusted that figure to [[xx.xxx.xx]] NOK/kg. The major part of this adjustment related to the purchase of increased levels of smolt with a view to raising future production levels.[743] In the case of [[xx.xxx.xx]], the reported cost was [[xx.xxx.xx]] NOK/kg WFE and the EC adjusted this figure to [[xx.xxx.xx]] NOK/kg. The absolute difference is [[xx.xxx.xx]] NOK. This represents an increase in the COP of [[xx.xxx.xx]] NOK/kg or [[xx.xxx.xx]] percent.

[741] Questionnaire reply from [[xx.xxx.xx]], Sections F-2.4 and F-2.5. Exhibit NOR-[[xx]]. [[xx.xxx.xx]] provided a calculation that was based on an allocation of smolt costs in relation to salmon produced in the IP. *See* Questionnaire reply from [[xx.xxx.xx]], DMCOP file, at worksheet "[[xx.xxx.xx]]", cells K29-33. Exhibit NOR-[[xx]].

[742] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, page 8 and the discussion on pages 6 – 8. Exhibit NOR-[[xx]].

[743] A small part of the adjustment resulted from a disagreement over the treatment of the portion of [[xx.xxx.xx]] smolt costs that represented internal profits earned by a subsidiary on the sale of smolt to [[xx.xxx.xx]]. [[xx.xxx.xx]] argued that this cost should be excluded from its costs because the profits remained within the [[xx.xxx.xx]] group and the true cost of smolt was, therefore, net of the profits. The EC did not separately identify the portion of the adjustment it attributed to, respectively, internal profits and increased smolt production. However, based on the company's submissions to the EC, Norway believes that it amounted to [[xx.xxx.xx]] NOK/kg. *See* [[xx.xxx.xx]] Comments on the Information Note on Cost of Production, 16 March 2005, pages 2-3 (Exhibit NOR-[[xx]]); [[xx.xxx.xx]] Post-Hearing Brief, 22 June 2005, page 6 (Exhibit NOR-[[xx]]); [[xx.xxx.xx]] Comments on the Definitive Disclosure, 27 May 2005, pages 6-8 (Exhibit NOR-[[xx); and [[xx.xxx.xx]] Comments on the Provisional Disclosure, pages 2 and 5-6 (Exhibit NOR-[[xx]]).

998. Both companies explained to the EC that smolt activity had increased during the IP, meaning that the smolt stocks corresponded to a larger quantity of harvestable salmon than was, in fact, produced during the IP.[744] [[xx.xxx.xx]] explained the adjustment to the EC with the following example:

> [During the IP, [[xx.xxx.xx]] harvested [[xx.xxx.xx]] fish and produced [[xx.xxx.xx]] smolt.] Imagine that a car manufacturer during a period produces 2,000 finished cars and 3,000 engines. In such a case it cannot be correct to allocate the cost of more than 2,000 engines to the cost of the finished cars. The EU approach implies the opposite solution, where the cost of the spare parts are not matched with the production of finished goods. This is not correct.[745]

999. During the investigation, the two companies proposed that the smolt costs be allocated according to the following methods and provided the data needed to apply these methods:

- [[xx.xxx.xx]] suggested a straightforward approach. First, the production cost per smolt was calculated, including both fixed and variable costs. This cost is divided by the weight of the harvested fish that results from the smolt. For example, if the cost per smolt is 7 NOK during the IP, and the average weight of a harvested fish is 5 kg, the cost per kg produced is 7 NOK divided by 5 kg (i.e. 1,40 NOK/kg). This figure assumes that every smolt survives and is harvested. To account for the fact that many smolt die, the figure must be adjusted by the average mortality rate for the IP. This ensures that smolt cost attributed to harvested salmon bears the costs associated with smolt that do not survive to harvest. Continuing with the same example, if the mortality rate is 10%, the final smolt cost is 1,40 NOK/kg divided by 0.9 (i.e. 1.0 less 0.1), that is, 1.55 NOK/kg.[746]

[744] [[xx.xxx.xx]] Comments on the Information Note on Cost of Production, 16 March 2005, pages 2-3 (Exhibit NOR-[[xx]]); [[xx.xxx.xx]] Post-Hearing Brief, 22 June 2005, page 7 (Exhibit NOR-[[xx]]); [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, pages 6-8 (Exhibit NOR-[[xx]]); and [[xx.xxx.xx]] Comments on the Definitive Disclosure, 8 November 2005, pages 2 and 5-6 (Exhibit NOR-[[xx]]).
[745] [[xx.xxx.xx]] Comments on the Definitive Disclosure, 8 November 2005, page 5. Exhibit NOR-[[xx]].
[746] Questionnaire reply from [[xx.xxx.xx]], Section F-2.4 and F-2.5. Exhibit NOR-[[xx]]. In order to confirm the outcome of its proposed allocation methodology (described above), [[xx.xxx.xx]] pointed out to the EC that its approach approximated the result that "intuitively should be expected". It noted that the average growth time for salmon in sea-water is approximately 18 months. Thus, the number of salmon harvested during a 12-month period, generally, represents about two thirds of the annual smolt production. In keeping with this rule of thumb, it noted that its claimed adjustment was approximately two-thirds of the total smolt cost. *See*

- [[xx.xxx.xx]] proposed that the smolt cost should be based on "an auditor-approved proportional number of smolt per produced kg during the IP".[747] Like the [[xx.xxx.xx]] method, this approach is based on the number of smolt needed to produce the salmon harvested, taking into account the mortality rate. The total number of smolt is divided by the weight of the harvested salmon, to give a number of smolt per kg produced. That number is multiplied by the cost per smolt during the IP. In practice, although expressed in more complicated terms, this approach is essentially the same as [[xx.xxx.xx]].

1000. Both of these approaches provide a means of allocating the smolt costs incurred in the IP in relation to the salmon produced in the IP.

1001. The EC failed to apply any allocation method and, in both cases, included the full cost incurred in the IP. The EC failed to explain why it rejected the proposed allocation methods. It also gave no explanation, with respect to either company, in either the Provisional or the Definitive Regulation for its failure to make an allocation of the smolt costs related to salmon produced in the IP. The issue is not even mentioned.

1002. In the definitive disclosure for [[xx.xxx.xx]], the EC stated:

> We have taken note of your disagreement with the smolt costs as assessed by the Commission. With a view to your arguments and for reasons of

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[[xx.xxx.xx]] Comment on the Information Note on Cost of Production, 15 March 2005, point 2, page 2. Exhibit NOR-[[xx]].

In the definitive disclosure, the EC asserted that [[xx.xxx.xx]] had made two arguments in support of the smolt cost adjustment: first, the quantity of smolt produced was larger than the quantity of salmon harvested; and, second, that the IP constitutes 12 months out of the 18-months growth cycle of smolt in the sea. The EC said "it is not clear how these two explanations relate to each other and whether they come down to the same conclusion." Thus, partly because the EC did not understand the two explanations, it refused to make any cost allocation. *See* Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex II. Exhibit NOR-[[xx]].

The EC mischaracterizes [[xx.xxx.xx]] arguments because [[xx.xxx.xx]] did *not* purport to present two *alternative* allocation methods. [[xx.xxx.xx]] insisted in its submissions of 15 March and 27 May that the approach first proposed in the questionnaire response was correct (described above). For example, in concluding its 27 May submission on this issue, [[xx.xxx.xx]] stated that its approach was "the <u>only</u> appropriate [allocation] method" ([[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, page 6. Exhibit NOR-[[xx.xxx.xx]], original underlining). In any event, the EC reduces the investigative duty of an authority to a nullity if it can simply refuse to make an allocation of costs because it professes not to understand a producer's arguments. The EC fails, thereby, to "consider" the straightforward evidence presented on cost allocation.

[747] [[xx.xxx.xx]] Comments on the Information Note on Cost of Production, 16 March 2005, page 2, with enclosures. Exhibit NOR-[[xx]].

> consistent treatment of all exporters concerned, it is considered to refer to the full smolt actually incurred in the IP.[748]

1003. The EC made a similar statement in [[xx.xxx.xx]] definitive disclosure, also emphasizing the importance of "consistent treatment".[749]

1004. The EC's reason for refusing to make an adjustment of costs is, therefore, the need for consistent treatment. In other words, the EC concludes that, because it refused to allocate smolt costs for some companies, it must also refuse to allocate them for [[xx.xxx.xx]] and [[xx.xxx.xx]].

1005. This reasoning is flawed. *First*, the EC *did* make an adjustment for a company that increased the production of smolt during the IP. Specifically, [[xx.xxx.xx]] increased the level of its smolt production during the IP under four new farming licenses, stating that the extra smolt would be harvestable as salmon after the close of the IP.[750] The company excluded the costs associated with this increased smolt production, without objection by the EC. Thus, the EC's asserted "consistent treatment" of companies is factually inaccurate because the costs associated with increased smolt production were included for [[xx.xxx.xx]] and [[xx.xxx.xx]], but were excluded for [[xx.xxx.xx]].

1006. *Second*, consistent treatment of investigated companies is important solely when the companies are in a similar situation. When companies are not similarly situated, consistent treatment may well be wrong. As [[xx.xxx.xx]] objected, the EC's refusal to allocate smolt costs between current and future production *assumes* that – like [[xx.xxx.xx]] and [[xx.xxx.xx]] – all other investigated companies had increased the level of smolt production during the IP.[751] However, the EC provides no explanation of how the facts in the record support this assumption. In fact, to Norway's knowledge, not all companies increased the level of smolt production in the IP and, therefore, not all companies were in a similar situation to [[xx.xxx.xx]] and [[xx.xxx.xx]].

1007. *Third*, even if the EC treated all companies consistently (*quod non*), there is no virtue to an investigating authority being consistently wrong. An authority cannot do what it likes

[748] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex 2. Exhibit NOR-[[xx]].
[749] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex 2. Exhibit NOR-[[xx]].
[750] Questionnaire reply from [[xx.xxx.xx]], Section F-2.9, page 34. Exhibit NOR-[[xx]].
[751] [[xx.xxx.xx]] Comments on the Definitive Disclosure, 8 November 2005, page 5. Exhibit NOR-[[xx]].

when calculating the COP, subject only to the *proviso* it treats companies consistently. Instead, the authority must respect the obligations in the *Anti-Dumping Agreement* governing the calculation of the COP. Thus, even if the EC consistently failed to allocate smolt costs in relation to production levels, it would not thereby comply with the disciplines in Articles 2.2 and 2.2.1.1.

1008. Under Article 2.2, the COP must be calculated for goods that are produced and sold during the IP; costs relating to the production of goods that will be sold in future periods are not relevant to the comparison. Accordingly, under Article 2.2.1.1, where costs relate partly to production that will occur in future periods, the authority must allocate to the IP the portion of the costs relating to production in that period. In deciding on the proper allocation method, Article 2.2.1.1 requires the authority to "consider all available evidence on the proper allocation of costs". In paragraph 801, Norway noted that, in *US – Softwood Lumber V*, the Appellate Body stated that the term "consider" requires an investigating authority to "*reflect on*" and to "*weigh the merits of*" "all available evidence".[752] This calls for more than merely "receiving" or "tak[ing] notice of evidence".[753] This is essential "*to ensure that there is a proper allocation of costs.*"[754]

1009. In this dispute, the EC failed to adopt any method to "ensure" a "proper" allocation of smolt cost in relation to the production and sale of salmon in the IP. Instead, it simply treated all the smolt costs as if they related to production in the IP, when in fact they did not.

1010. The EC also failed to "consider" evidence submitted by [[xx.xxx.xx]] and [[xx.xxx.xx]] on the proper allocation method. The EC's reasoning gives no indication that it reflected upon or weighed the merits of the methods, as it was required to do. Instead, without consideration, the EC summarily dismissed the proposals purportedly because of the need for consistent treatment. Rejecting the proposal because of the perceived need for consistency provides no assessment of the merits of the allocation method at all. If all companies were, indeed, in the same situation, the EC could have acted with perfect consistency by adopting one of the allocation methods proposed by [[xx.xxx.xx]] and

[752] Appellate Body Report, *US – Softwood Lumber V*, para. 133. Emphasis added.
[753] Appellate Body Report, *US – Softwood Lumber V*, para. 133. Emphasis added.
[754] Appellate Body Report, *US – Softwood Lumber V*, para. 134. Emphasis added.

[[xx.xxx.xx]]. Thus, an explanation based on the need for consistency does not suffice to demonstrate that the EC properly considered the evidence submitted on cost allocation.

1011. The EC violated Article 2.2.1.1 because it failed to consider available evidence on cost allocation and also because it failed to make an allocation of smolt costs.

(ii) [[xx.xxx.xx]]

1012. A similar issue also arises for [[xx.xxx.xx]]. In calculating [[xx.xxx.xx]] COP, the EC refused to exclude a cost of [[xx.xxx.xx]] NOK incurred in September 2004, the last month of the IP, in connection with the purchase of smolt that were delivered to [[xx.xxx.xx]] in October 2004, after the IP had closed.[755] The purchase of this smolt is plainly not related to the production and sale of salmon during the IP because these smolt were put in the sea after the IP, and were only harvested in August 2005. These costs cannot, therefore, be part of the cost of producing salmon during the IP.

1013. Similarly, [[xx.xxx.xx]] requested the exclusion of approximately [[xx.xxx.xx]] NOK from its smolt costs that was earned from sales of smolt to unrelated customers at arm's length prices. By refusing this adjustment, the EC included in its COP the cost of producing these smolt but refused to deduct the revenue earned from sale of the smolt. As a result, [[xx.xxx.xx]] smolt costs are overstated by the costs it incurred in producing the smolt that were sold during the IP. In other words, [[xx.xxx.xx]] smolt costs include the additional costs of producing smolt that were purchased by unrelated customers.[756]

1014. In *US – Softwood Lumber V,* the United States reduced the investigated companies costs of production the value of a by-product (woodchips from wood processing). The disagreement between the parties in that dispute revolved around the proper valuation of that by- product. However, there was no disagreement that the cost of production had to be reduced by some amount to reflect the costs incurred to produce and sell the by-product.[757] This is consistent with the fact that the entirety of the costs of production was not incurred to produce the like product.

[755] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, page 8, adjustment 1.c. Exhibit NOR-[[xx]].
[756] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, page 8, adjustment 1.d. Exhibit NOR-[[xx]].
[757] Appellate Body Report, *US – Softwood Lumber V*, para. 165.

1015. The same holds true where an enterprise produces an input for the production of the like product and also sells a portion of its production of that upstream product as a separate line of business. In that case, in calculating the cost of producing the upstream product for use as an input for the like product, Article 2.2 of the *Anti-Dumping Agreement* requires the authority to take into account the fact that a portion of the total cost of producing the upstream product is attributable to the volume of that product that was sold to unrelated customers.

1016. In this dispute, the EC refused to do so. Its excuse for refusing [[xx.xxx.xx]] adjustments on this issue is that they were based on "information that was not verified on the spot." The chronology of the investigation shows that the EC's inability to verify these costs on the spot lies with the EC, and not [[xx.xxx.xx]]. To recall, the questionnaire response was filed at noon on 3 January 2005. In that response, [[xx.xxx.xx]] did not include the two smolt adjustments of [[xx.xxx.xx]] NOK in its COP because it did not consider them to be part of its cost of producing salmon during the IP. [[xx.xxx.xx]] verification took place on 10 and 11 January 2005, just one week after the submission of the questionnaire response. The EC did not send [[xx.xxx.xx]] any notice informing the company of further information that it needed to verify, as it "should" have done under Article 6.7 and Annex I, paragraph 7, of the *Anti-Dumping Agreement*.

1017. [[xx.xxx.xx]] became aware that its reported COP was rejected by the EC solely on receipt of the Information Note on Cost of Production, on 8 March 2005. It responded on 16 March 2005, explaining that the [[xx.xxx.xx]] NOK was not part of its COP.[758] It provided a statement from its auditor that was submitted to the EC on 18 March 2005. [[xx.xxx.xx]] continued to insist on this issue throughout the proceedings.[759] In the provisional disclosure, in April 2005, the EC declined to examine [[xx.xxx.xx]] claims regarding these smolt costs, stating that they would:

[758] [[xx.xxx.xx]] Comments on the Information Note on Cost of Production, 16 March 2005, page 2, adjustment 1. Exhibit NOR-[[xx]]. The discussion of these smolt costs took place under the rubric of "non-salmon adjustments".
[759] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005. Exhibit NOR-[[xx]].

> … be re-examined at the definitive stage once all the required information has been collected. If extra information is required from your company we will inform you.[760]

1018. The EC never requested any further information regarding these smolt costs. To Norway's knowledge, the EC never took any further steps to verify the accuracy of the information regarding [[xx.xxx.xx]] smolt costs. Yet, in the definitive disclosure, the EC rejected the smolt cost adjustment because the information was not verified at the on-the-spot verification in January 2005. It is contradictory for the EC to state, in April 2005, that it will re-examine a claimed adjustment when the necessary information has been collected and then reject the claim, after failing to conduct further investigation, because information relating to the claim was not verified in January 2005.

1019. As a legal matter, the EC's position that it was entitled to reject [[xx.xxx.xx]] information on smolt costs simply because it was not verified on-the-spot is incorrect. The panel in *US – Steel Plate* noted that investigating authorities are *not* obliged to verify information on-the-spot, provided they satisfy themselves as to the accuracy of the information.[761]

1020. The on-the-spot verification is also not the latest time for submission of information, as suggested by the EC. Rather, the *Anti-Dumping Agreement* affords interested parties the opportunity to submit information after the verification, for example, to clarify their initial response, provided that does not pose undue difficulties for the investigating authority.[762]

1021. In the context of this investigation, the EC plainly did not have any difficulties using and verifying information received after March 2005, when [[xx.xxx.xx]] sent the further information justifying its initial exclusion of the two smolt costs from its COP. Norway notes that, after the provisional determination in April 2005, the EC, by its own admission, "continued to seek all information it deemed necessary for the purpose of its definitive findings". It also stated that, "*after the imposition of provisional measures*, additional on-

[760] Provisional Disclosure to [[xx.xxx.xx]], 22 April, Annex II, page 2, last paragraph. Exhibit NOR-[[xx]]. The smolt costs were claimed by [[xx.xxx.xx]] as an additional "non-salmon" deduction, under "Adjustment 1", because they were not related to salmon production during the IP.
[761] Panel report, *US – Steel Plate*, footnote 67.
[762] *See, for example,* Annex II, para. 3, of the *Anti-Dumping Agreement*.

spot visits were carried out at the premises of [six] Community users and associations of Community users".[763]

1022. Additionally, on 16 November 2005, the EC itself requested further information on the level of the MIPs, following claims from EC processors. On 13 December 2005, the EC issued an information note on the MIPs, stating:

> In the light of the comments received [in reply to the request of 16 November 2005], the Commission services deepened the investigation by verifying and cross-checking all the information available…[764]

1023. Thus, many months after the verification of [[xx.xxx.xx]], the EC: (1) actively solicited further information from interested EC parties; (2) conducted on-the-spot verifications of information at the premises of EC processors; and (3) used that information to increase the level of the MIPs. This may be contrasted with the EC's failure to take any steps to verify [[xx.xxx.xx]] smolt costs – despite its own statement that it would seek "extra information" on this issue if necessary.[765]

1024. In these circumstances, the EC cannot reject information from [[xx.xxx.xx]] that was submitted in March on the grounds that it was not verified in January. [[xx.xxx.xx]] reacted in expeditious fashion to the EC's disclosure when it discovered that the EC had adjusted its reported costs. The information submitted was verifiable and, indeed, if the EC had treated [[xx.xxx.xx]] as it treated EC interests, it would have verified the information.

1025. For these reasons, the EC's justification for including the [[xx.xxx.xx]] NOK in [[xx.xxx.xx]] COP is without foundation. That sum is not part of the company's cost of producing and selling salmon during the IP, under Article 2.2 of the *Anti-Dumping Agreement*.

(iii) Conclusion

1026. The EC made improper adjustments to the smolt costs for three sampled producers. For [[xx.xxx.xx]] and [[xx.xxx.xx]], the EC simply treated all the smolt costs as if they

[763] Definitive Regulation, para. 7. Emphasis added,
[764] Information Note from the Commission on the Definitive MIP, 13 December 2005. Exhibit NOR-[[xx]].
[765] Provisional Disclosure to [[xx.xxx.xx]], 22 April, Annex II, page 2, last paragraph. Exhibit NOR-[[xx]]. The smolt costs were claimed by [[xx.xxx.xx]] as an additional "non-salmon" deduction, under "Adjustment 1", because they were not related to salmon production during the IP.

related to production in the IP, when in fact they did not. For [[xx.xxx.xx]], the EC inappropriately included cost of smolt that were put in the sea after the IP and were only harvested in August 2005, long after the IP had concluded; and it failed to exclude revenues earned from the sale of smolt to unrelated parties at arm's length prices. None of these smot costs can, therefore, be part of the cost of producing salmon during the IP.

F. *The EC's Improper Adjustments Relating to SG&A Costs for [[xx.xxx.xx]]*

1027. In its definitive determination, the EC adjusted [[xx.xxx.xx]] cost of production on the pretext that the company had not properly allocated its SG&A expenses to the product concerned. The EC specifically noted that [[xx.xxx.xx]] SG&A expenses did not reflect a *higher* amount for sales made to unrelated domestic customers than for sales made to a related trading company, [[xx.xxx.xx]].[766] Based on this claim, the EC devised an alternative method for computing the [[xx.xxx.xx]] SG&A costs. This method added [[xx.xxx.xx]] NOK/kg WFE in SG&A costs to [[xx.xxx.xx]] reported costs, *increasing the company's costs by nearly* [[xx.xxx.xx]] *percent*. The EC's method yielded a result for SG&A costs that was seven times higher than the reported SG&A costs.

1028. In choosing to reject [[xx.xxx.xx]] reported SG&A expenses in favor of expenses computed under its own methodology, the EC failed to meet the standard of "any other reasonable method" under Article 2.2.2 of the *Anti-Dumping Agreement*. The EC's method of computing [[xx.xxx.xx]] SG&A expenses resulted in the double counting of a substantial portion of the company's reported COP for salmon. Moreover, the method did not in any way address the issue for which the EC stated it had rejected [[xx.xxx.xx]] SG&A costs, i.e., that [[xx.xxx.xx]] SG&A costs were not higher for domestic sales to unrelated customers than for sales to related customer, [[xx.xxx.xx]].

(i) [[xx.xxx.xx]] Reported its Full SG&A Expenses for the IP

1029. In responding to the EC's anti-dumping questionnaire, [[xx.xxx.xx]] reported salmon COP data that included, among other costs, amounts specifically designated as "Administrative cost" and "Sales and marketing cost."[767] With respect to administrative costs – that is, the "G&A" portion of the company's "SG&A" expenses – [[xx.xxx.xx]]

[766] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex 2, point 2.1. Exhibit NOR-[[xx]].
[767] Questionnaire reply from [[xx.xxx.xx]], 3 January 2005, Attachment 8 at worksheet [[xx.xxx.xx]]. Exhibit NOR-[[xx]].

reported an average cost of [[xx.xxx.xx]] NOK/kg WFE, which was calculated by dividing the company's actual G&A expenses by the quantity of salmon harvested during the IP. [[xx.xxx.xx]] later revised its average SG&A costs to [[xx.xxx.xx]] NOK/kg WFE as a result of corrections identified by the company during the EC's verification process.[768]

1030. With respect to its G&A expenses, [[xx.xxx.xx]] noted in its questionnaire response that [[xx.xxx.xx]], the parent company, conducted the administrative functions for all companies in the group. Under the [[xx.xxx.xx]] normal accounting system, the costs associated with these functions were allocated among the companies in the group.[769] [[xx.xxx.xx]] reported G&A expenses, therefore, reflected its actual allocated share of the actual G&A expenses incurred by [[xx.xxx.xx]], as recorded in the audited accounts for the IP.

1031. For selling expenses – that is, the "S" portion of the company's "SG&A" costs – [[xx.xxx.xx]] reported an average expense of [[xx.xxx.xx]] NOK/kg WFE. [[xx.xxx.xx]] explained in its questionnaire response that, during the IP, all of the company's salmon was sold to [[xx.xxx.xx]], the sales company for the [[xx.xxx.xx]]. [[xx.xxx.xx]] further explained that [[xx.xxx.xx]] then re-sold the majority of the salmon to a related trading company, [[xx.xxx.xx]], which was responsible for both domestic and export sales of the company's salmon. [[xx.xxx.xx]] sold the remaining part of [[xx.xxx.xx]] salmon to unrelated domestic market customers. A significant portion [[xx.xxx.xx]] domestic market sales to unrelated customers were of inferior quality salmon.[770]

1032. In the normal course of operations, [[xx.xxx.xx]] invoiced [[xx.xxx.xx]] for the costs that [[xx.xxx.xx]] incurred in administering [[xx.xxx.xx]] salmon sales.[771] Thus, the selling expenses reported by [[xx.xxx.xx]] reflect the actual amounts for selling services invoiced to the company by [[xx.xxx.xx]] during the IP, divided by the quantity of salmon harvested during the period.[772]

[768] [[xx.xxx.xx]] Comments on the Information Note on Cost of Production, 16 March 2005, Annex 4, page 1. Exhibit NOR-[[xx]].
[769] Questionnaire reply from [[xx.xxx.xx]], 3 January 2005, Section A-3-6. Exhibit NOR-[[xx]].
[770] Questionnaire reply from [[xx.xxx.xx]], 3 January 2005, Section L-1-1. Exhibit NOR-[[xx]].
[771] Questionnaire reply from [[xx.xxx.xx]], 3 January 2005, Section E-1-2. Exhibit NOR-[[xx]].
[772] [[xx.xxx.xx]] selling costs were reported separately to the EC.

1033. The starting-point for the EC's analysis was, therefore, that [[xx.xxx.xx]] reported costs included an amount for SG&A expenses. These expenses were taken directly from the company's normal audited accounting records, maintained in accordance with Norwegian GAAP; they also reflected the auditor-approved allocation methods for selling expenses, administrative expenses, and other inter-company costs, that were routinely used by the companies in the [[xx.xxx.xx]]. Article 2.2.1.1 also stipulates that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation".

(ii) The EC Rejected [[xx.xxx.xx]] Reported SG&A Expenses

1034. The EC conducted an on-the-spot verification of [[xx.xxx.xx]] reported cost data on 17 to 19 January 2005. There is nothing in the record of this case to suggest that the EC expressed any concerns with respect to [[xx.xxx.xx]] method of computing its SG&A expenses, either before or during verification. Nevertheless, the EC rejected the company's SG&A expenses, stating as its reasons the following:

> 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.[773]

1035. [[xx.xxx.xx]] responded stating that it could not understand the reasons for rejection. Nor could it comprehend the alternative formula that the EC devised to calculate SG&A costs. [[xx.xxx.xx]] noted that, when this formula was applied to the figures in [[xx.xxx.xx]] 2004 accounts, instead of the figures in the 2003 accounts, it yielded a *negative* SG&A expense ratio of approximately [[xx.xxx.xx]] percent. In other words, in some circumstances, the EC's illogical formula suggested that a company's SG&A activities actually reduced its costs.

1036. In its provisional determination, the EC stated that, while it had not changed its assessment of [[xx.xxx.xx]] SG&A expenses in "principle," it had nonetheless revised its method for calculating those expenses. Specifically, the EC explained that:

> 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 reassessment was

[773] Information Note on Cost of Production to [[xx.xxx.xx]], 8 March 2005. Exhibit NOR-[[xx]].

> 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 SGA incurred on domestic sales to unrelated customers.[774]

1037. In commenting on the determination, [[xx.xxx.xx]] again explained that its reported SG&A expenses consisted of the *actual* SG&A expenses of the company as recorded in its audited financial statements, and explained why. Further, [[xx.xxx.xx]] reiterated that the EC's methodology resulted in the *triple* counting of many of [[xx.xxx.xx]] costs.[775]

1038. For the definitive determination, for a third time, the EC modified its reasons for rejecting the company's expenses as originally submitted and also its own methodology, stating:

> 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 ([[xx.xxx.xx]]).[776]

1039. Under the newest, and last, version of its calculation method, the EC used the 2003 and 2004 consolidated income statements of the [[xx.xxx.xx]] to compute a ratio of "*other operating expenses*" to "*operating income*" for each of the two years. The EC then weight-averaged the two ratios to derive a single ratio that reflected (in rough relation to the IP) 25 percent of the 2003 ratio and 75 percent of the 2004 ratio. The EC applied this single weighted-average ratio to [[xx.xxx.xx]] salmon production costs for the IP in order to derive what the EC described in its calculations as "SGA ([[xx.xxx.xx]])."[777] The EC then added the amount produced by this methodology to the company's costs *without deducting the amount* [[xx.xxx.xx]] *had already reported for SG&A costs*.

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[774] Provisional Disclosure to [[xx.xxx.xx]], 22 April, Annex 2, point 2.1. Exhibit NOR-[[xx]].
[775] [[xx.xxx.xx]] Comments on the Provisional Disclosure, 27 May 2005, pages 10 through 12. Exhibit NOR-[[xx]].
[776] Definitive Disclosure to [[xx.xxx.xx]], Annex 2, point 2.1. Exhibit NOR-[[xx]].
[777] *See* Definitive Disclosure to [[xx.xxx.xx]], DMCOP Calculation at Worksheet, "Group results". Exhibit NOR-[[xx]].

1040. In commenting on the definitive determination, [[xx.xxx.xx]] pointed out the fact that, by basing its SG&A calculation on the consolidated "*other operating expenses*" of the [[xx.xxx.xx]], the EC had double counted a number of cost items that were already included as part of [[xx.xxx.xx]] reported costs for smolt, feed, harvesting and other farming and processing operations.[778]

1041. To demonstrate this, [[xx.xxx.xx]] provided an analysis of the "*other operating expenses*" reported in the 2004 consolidated income statement of [[xx.xxx.xx]]. These were the same expenses that the EC had used as part of its own calculation of its SG&A expenses. This analysis, the relevant portions of which are provided in the table below, showed the actual amounts of "*other operating expenses*" recorded on a consolidated basis by each of the companies in the [[xx.xxx.xx]]. It also showed how each of those amounts had already been accounted for in [[xx.xxx.xx]] reported cost of production for salmon.[779]

[778] [[xx.xxx.xx]] Comments on the Definitive Disclosure, 8 November 2005, page 9. Exhibit NOR-[[xx]].
[779] [[xx.xxx.xx]] Comments on the Definitive Disclosure, 8 November 2005, Annex 1. Annex 2 of the letter provides a statement from [[xx.xxx.xx]] external auditors, [[xx.xxx.xx]], affirming the accuracy of the information presented in the analysis. Exhibit NOR-[[xx]].

Table 15: Other Operating Expenses for [[xx.xxx.xx]]

[[xx.xxx.xx]]	**Total "Other Operating Expenses" (NOK)**	**Reported in** [[xx.xxx.xx]] **Costs As:**
[[xx.xxx.xx]]	[[xx.xxx.xx]]	Administrative Cost
[[xx.xxx.xx]]	[[xx.xxx.xx]]	Sales and Marketing Costs
[[xx.xxx.xx]]	[[xx.xxx.xx]]	Production Costs, Including Maintenance, Insurance, Medicines, and Veterinary Costs
[[xx.xxx.xx]]	[[xx.xxx.xx]]	Well-boat, Feed and Technical Services
[[xx.xxx.xx]]	[[xx.xxx.xx]]	Harvesting Costs
[[xx.xxx.xx]]	[[xx.xxx.xx]]	Smolt Costs
[[xx.xxx.xx]]	[[xx.xxx.xx]]	Smolt Costs
[[xx.xxx.xx]]	[[xx.xxx.xx]]	Smolt Costs
[[xx.xxx.xx]]	[[xx.xxx.xx]]	Smolt Costs
[[xx.xxx.xx]]	[[xx.xxx.xx]]	Smolt Costs
[[xx.xxx.xx]]	[[xx.xxx.xx]]	Not Included (Unrelated to Salmon Production)
Total	[[xx.xxx.xx]]	

1042. As further evidence that the EC's SG&A adjustment double counted a substantial part of the company's production costs, in its post-hearing brief, [[xx.xxx.xx]] provided an analysis detailing each of the specific general ledger accounts that comprised the 2004 "other *operating expenses*" for each company in the [[xx.xxx.xx]]. [[xx.xxx.xx]] then showed how the balance of each of those accounts had been properly accounted for in the company's original reported production costs.[780]

[780] *See* [[xx.xxx.xx]] Post-Hearing Brief, 18 November 2005, Annexes 2 and 3. Exhibit NOR-[[xx]].

(iii) The EC Did Not Provide an Adequate Explanation for Rejection of [[xx.xxx.xx]] SG&A Costs

1043. Article 2.2.2 of the *Anti-Dumping Agreement* requires the authority to base SG&A expenses on actual data pertaining to production and sales in the ordinary course of trade. The authority may resort to alternative calculation methods set forth in that provision solely where it is not possible to base SG&A expenses on actual data. When the authority rejects a company's actual data, it must provide an adequate explanation of why it did so and why it resorts to information from a secondary source.

1044. The EC's reasons for rejecting [[xx.xxx.xx]] reported SG&A costs related to the company's *selling* expenses, not its *general and administrative* expenses. In particular, in the definitive disclosure, the EC's summarily stated "reason" was that the *selling* expenses incurred by [[xx.xxx.xx]] – [[xx.xxx.xx]] sales company – to unrelated customers were not sufficiently high by comparison with the sales costs to a related customer, [[xx.xxx.xx]].[781] The EC has failed to provide any explanation to support its rejection of [[xx.xxx.xx]] reported *general and administrative* costs.

1045. To recall, the reported G&A costs were those incurred by the parent company and charged to [[xx.xxx.xx]] on the basis of an auditor-approved allocation method. Moreover, the G&A costs incurred by the parent company were, by definition, "general" in character and did not vary depending on the purchaser of [[xx.xxx.xx]] salmon. There was, therefore, no reason for EC to reject this portion of [[xx.xxx.xx]] costs. This portion of the costs amounted to [[xx.xxx.xx]] NOK/kg WFE. The EC could not simply disregard [[xx.xxx.xx]] reported G&A costs, which were based on actual data, without a statement of the reasons for rejection.

1046. With respect to *selling* expenses, the EC provide an explanation that is inadequate. In its explanation, the EC failed to identify any specific selling functions undertaken by [[xx.xxx.xx]] that would have contributed to a difference in the amount of expenses incurred for sales transactions to related and unrelated customers. The EC simply *assumed* that the selling expenses to unrelated customers should be higher. In fact, [[xx.xxx.xx]] method of reporting an actual IP-average sales and marketing costs for *all* salmon sales made through

[781] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, Annex 2, point 2.1. Exhibit NOR-[[xx]].

[[xx.xxx.xx]] provided a reasonable and accurate reflection of the company's sales activities to all customers, both related and unrelated.

1047. In fact, although [[xx.xxx.xx]] was the only sampled producer for which the EC rejected the company's method of computing SG&A expenses on an average per-kilo basis, it was not the only company that relied on this methodology. Other producers, including [[xx.xxx.xx]] and [[xx.xxx.xx]], with sales to related and unrelated purchasers followed this same average-cost approach in order to calculate not only selling expenses, but also G&A expenses.[782] Indeed, [[xx.xxx.xx]], a company that was also related to [[xx.xxx.xx]] and which, like [[xx.xxx.xx]], had sales both to [[xx.xxx.xx]] and to unrelated customers in the domestic market, reported its SG&A costs on an average per-kilo basis.[783] The EC never questioned the accuracy of [[xx.xxx.xx]] SG&A data in this regard. The EC, therefore, treated [[xx.xxx.xx]] in a discriminatory fashion, without justification or explanation.

1048. In sum, the EC failed to provide any reasons for the rejection of [[xx.xxx.xx]] reported general and administrative expenses, and failed to provide adequate reasons for the rejection of the company's selling expenses, all of which were based on actual data. The EC did not, therefore, establish that it was entitled to have recourse to the alternative calculation method under Article 2.2.2 of the *Anti-Dumping Agreement*.

(iv) The EC Did Not Use a "Reasonable Method" in Computing [[xx.xxx.xx]] SG&A Expenses

1049. Where SG&A expenses cannot be determined on the basis of actual data pertaining to sales in the ordinary course of trade, Article 2.2.2 of the *Anti-Dumping Agreement* provides the following three alternative methods:

> (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;

[782] Questionnaire reply from [[xx.xxx.xx]], 3 January 2005, Section F-2.4 and 2.5. Exhibit NOR-[[xx]]. Questionnaire reply from [[xx.xxx.xx]], 3 January 2005, Section F-2, question 8. Exhibits NOR-[[xx]].
[783] Questionnaire reply from [[xx.xxx.xx,]] 3 January 2005, Section F-2, question 10 and Attachment 4. Exhibits NOR-[[xx]].

(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.

1050. The methodology adopted by the EC to calculate [[xx.xxx.xx]] SG&A costs is set forth in paragraph 1039 above. As Norway understands it, that methodology is not based on either of the first two possibilities in Article 2.2.2(i) and 2.2.2(ii) and must, therefore, meet the standard of an "other reasonable method" in Article 2.2.2(iii).

1051. The EC's method, however, fails to respect the requirements of "reasonableness" for three reasons. *First*, it involves a substantial double counting of [[xx.xxx.xx]] costs; *second*, to compound the double counting, the method also fails to take into account the SG&A costs already reported by [[xx.xxx.xx]]; and, *third*, the method does not address the perceived deficiency identified by the EC as the reason for rejecting [[xx.xxx.xx]] own reported SG&A expenses, namely, the failure to report higher SG&A expenses for sales to unrelated domestic market customers.

1052. The double counting of [[xx.xxx.xx]] costs through the EC's adopted SG&A calculation method occurs in the following instances. *First*, as explained above, [[xx.xxx.xx]] reported costs included [[xx.xxx.xx]] NOK/kg of G&A expenses and [[xx.xxx.xx]] NOK/kg of selling expenses.[784] Although the EC rejected these costs, it did *not* exclude them from the calculation of [[xx.xxx.xx]] COP. Furthermore, the alternative method for calculating SG&A costs also included these same amounts, which were therefore double counted.

1053. As shown in the table in paragraph 1041, in its calculation of the additional SG&A costs, the EC included the full amount of "*other operating expenses*" incurred by [[xx.xxx.xx]] and by [[xx.xxx.xx]] during the years 2003 and 2004. For 2004, this is

[784] *See* paras. 1029 and 1031 above.

demonstrated in the table above taken from [[xx.xxx.xx]] post-definitive comments. The table shows the total amount of 2004 "*other operating expenses*" included in the EC's SG&A ratio calculation for that year, namely [[xx.xxx.xx]] NOK. Of this amount, the first listed item, [[xx.xxx.xx]] NOK, was incurred by [[xx.xxx.xx]] for *administrative services* provided to all companies in the [[xx.xxx.xx]], including [[xx.xxx.xx]]. The second listed item, [[xx.xxx.xx]] NOK, was incurred by [[xx.xxx.xx]] for the *sales and marketing services* provided to [[xx.xxx.xx]] during that year.

1054. As [[xx.xxx.xx]] explained to the EC, [[xx.xxx.xx]] had already included a portion of these costs in its reported amounts for G&A costs ([[xx.xxx.xx]] NOK/kg) and for selling costs ([[xx.xxx.xx]] NOK/kg) . The EC, therefore, accounted for the same expenses twice in [[xx.xxx.xx]] costs.

1055. The *second* instance of double counting relates to the "*other operating expenses*" that were incurred by [[xx.xxx.xx]] itself. For 2004, the table in paragraph 1041 shows that these costs totaled [[xx.xxx.xx]] NOK for the year (third item). The table notes the fact that [[xx.xxx.xx]] accounted for the amount of these costs incurred during the IP in various categories of the company's reported salmon production costs, including maintenance costs, insurance, medicines, and veterinary costs.

1056. As part of its SG&A calculation method, however, the EC included in its 2003 and 2004 SG&A ratios for the consolidated [[xx.xxx.xx]] the full amount of [[xx.xxx.xx]] "*other operating* expenses." At the same time, the EC did not make an adjustment to exclude the "*other operating expenses*" that were already contained in [[xx.xxx.xx]] reported COP. The EC's method of computing SG&A expenses therefore double counts a portion of [[xx.xxx.xx]] "*other operating expenses*", because these costs had already been accounted for in the company's reported cost of production.

1057. The *third* instance of double counting arises with respect to the company's purchase of production inputs from related suppliers in the [[xx.xxx.xx]]. During the IP, [[xx.xxx.xx]] purchased smolt, feed, and well-boat and harvesting services from various companies within [[xx.xxx.xx]]. These transactions were conducted at arm's length transfer prices that already covered all costs incurred by the related supplier companies, including the "*other operating expenses*" incurred by those companies. The EC did not take issue with the amounts paid by

[[xx.xxx.xx]] for the production materials and services that it purchased from its related suppliers, or with the fact that the prices charged for those inputs compensated for the full amount of costs incurred by the suppliers.

1058. However, under its SG&A calculation method, the EC included the "*other operating expenses*" of each of the related supplier companies in its calculation of SG&A ratios for the years 2003 and 2004. This is demonstrated for the year 2004 in the table above, which shows that the EC included in its SG&A ratio calculation for that year a total of [[xx.xxx.xx]] NOK in "*other operating expenses*" incurred by [[xx.xxx.xx]] companies that supplied smolt, feed, and well-boat and harvesting services to [[xx.xxx.xx]] during the IP.[785] The EC's SG&A calculation method, thus, counted the related supplier's "*other operating expenses*" both in the cost of the purchased inputs and in the SG&A adjustment added by the EC to [[xx.xxx.xx]] cost of production.

1059. A method of accounting for SG&A expenses cannot be considered "reasonable" where it results in such a substantial overstatement of a company's costs through double counting.

1060. Furthermore, the EC's alternative calculation method also fails to address the perceived deficiency in [[xx.xxx.xx]] reported SG&A costs, namely the failure to distinguish between selling expenses to related and unrelated parties. Under the EC's methodology, the addition of the [[xx.xxx.xx]] "*other operating expenses*" to [[xx.xxx.xx]] cost of production does not serve to differentiate selling expenses incurred between the two categories of customers.

(v) Conclusion

1061. The EC violated Article 2.2.2 of the *Anti-Dumping Agreement*, because it failed to determine [[xx.xxx.xx]] 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 [[xx.xxx.xx]] SG&A costs.

[785] The amount of [[xx.xxx.xx]] NOK includes the fourth to the penultimate listed items. For an unexplained reason, the EC also included in its SG&A ratio calculation for 2003 and 2004 the "*other operating expenses*" of [[xx.xxx.xx]], a company with operations unrelated to [[xx.xxx.xx]] salmon production.

G. *The EC's Improper Adjustments Relating to Costs of Purchased Salmon for [[xx.xxx.xx]]*

1062. In calculating the margin of dumping for [[xx.xxx.xx]], the EC included costs that the company had incurred in purchasing salmon from other, unrelated salmon growers. In so doing, the EC overstated the costs of the purchased salmon to [[xx.xxx.xx]] by [[xx.xxx.xx]] NOK. [[xx.xxx.xx]].

1063. The facts are as follows. During the IP, [[xx.xxx.xx]] purchased salmon from other farmers that did not have harvesting operations or slaughtering facilities. The salmon was delivered live to [[xx.xxx.xx]] on an "ex-cage" basis at the other farmers' growing sites. [[xx.xxx.xx]] then transported the salmon to its gutting and packing facility.

1064. Although the salmon was delivered live, [[xx.xxx.xx]] paid the other farmers the (higher) market price for slaughtered, packed, head-on gutted ("HOG") salmon. [[xx.xxx.xx]] slaughtered and packed the purchased salmon and then sold it at the *same* price that it had paid to the other farmers. [[xx.xxx.xx]] charged these farmers the market price for the slaughtering and packing services it performed. [[xx.xxx.xx]], therefore, profited from the transaction by charging the other farmers for the slaughtering and packing services performed, not from the sale of the HOG salmon. [786]

1065. [[xx.xxx.xx]] paid [[xx.xxx.xx]] NOK to the other farmers for live salmon and, as part of the same transactions, charged these farmers [[xx.xxx.xx]] NOK for the slaughtering and packing services. Thus, the net purchase price of the live salmon – paid by [[xx.xxx.xx]] and received by the growers – was not [[xx.xxx.xx]] NOK, but rather [[xx.xxx.xx]] NOK, that is, the [[xx.xxx.xx]] NOK less [[xx.xxx.xx]] NOK. Looked at another way, Sinkaberg paid the other farmers [[xx.xxx.xx]] NOK for live fish, purchased on an "ex cage" basis. [[xx.xxx.xx]] then incurred the costs of harvesting, gutting, packing and delivering the fish for sale to downstream customers.

1066. In reporting its salmon production costs to the EC, [[xx.xxx.xx]] took the view that its purchase of live fish was not part of its own salmon growing activities. The other farmers, not [[xx.xxx.xx]], had incurred the growing costs and the fish were delivered "ex cage". [[xx.xxx.xx]] did not, therefore, add the [[xx.xxx.xx]] NOK purchase price to its own farming

[786] The salmon farmers, for their part, earned profits relating to their growing activities.

costs for the IP and it did not include the quantity of the purchased salmon in its harvest volume. For slaughtering and packing costs, [[xx.xxx.xx]] reported to the EC a figure that included *all* of its slaughtering and packing costs,[787] but claimed a reduction for the [[xx.xxx.xx]] NOK for the revenues received from the other farmers for performing these services on the purchased salmon. At verification, the circumstances surrounding the purchased salmon were explained to the EC.[788]

1067. In its *definitive* determination, the EC disagreed with [[xx.xxx.xx]] and insisted that the purchased salmon be included in the company's COP. The EC, therefore, added the quantity of purchased salmon to [[xx.xxx.xx]] harvested quantity and made two adjustments to [[xx.xxx.xx]] costs. *First*, the EC *added* the full [[xx.xxx.xx]] NOK to the company's *"ex cage"* growing costs, even though this sum reflected the market price of *HOG salmon*. *Second*, the EC rejected [[xx.xxx.xx]] claimed adjustment for the reported slaughtering and packing costs figure, adding back the [[xx.xxx.xx]] NOK that the company had deducted from its reported costs for the revenues received for slaughtering and packing the purchased salmon. Thus, the total amount of the EC's adjustment to [[xx.xxx.xx]] costs for the purchased salmon was [[xx.xxx.xx]] NOK, and not [[xx.xxx.xx]] NOK.[789] As a result, the EC overstated [[xx.xxx.xx]] costs by [[xx.xxx.xx]] NOK.

1068. In making its adjustment, the EC ignored the fact that [[xx.xxx.xx]] had paid the market price for *HOG salmon, not "ex cage" salmon*, and that – as part of the purchase transactions – its purchase costs were offset by payments of [[xx.xxx.xx]] NOK to cover the services that transformed the salmon from "ex cage" to HOG. Thus, when the [[xx.xxx.xx]] NOK is taken into account, [[xx.xxx.xx]] "ex cage" cost for the purchased salmon was just [[xx.xxx.xx]] NOK. Thus, the EC has taken into account one part of the purchase transactions, but ignored the other part.

1069. Under the EC's approach, the [[xx.xxx.xx]] NOK that [[xx.xxx.xx]] received for slaughtering and packing activities is simply ignored, as if this part of the transaction never took place. The EC never explained why it took this approach.

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[787] That is, slaughtering and packaging for salmon grown by [[xx.xxx.xx]] and for the purchased salmon.
[788] [[xx.xxx.xx]] Comments on the Definitive Disclosure, 8 November 2005, pages 1-2. Exhibit NOR-[[xx]]. *See*, also letter from [[xx.xxx.xx]] to the Commission, 20 March 2006. Exhibit NOR-[[xx]].
[789] [[xx.xxx.xx]] NOK plus [[xx.xxx.xx]] NOK equals [[xx.xxx.xx]] NOK.

1070. The proper course for the EC, if it wished to include the purchased salmon in [[xx.xxx.xx]] costs, was: (1) to add [[xx.xxx.xx]] NOK to the company's "ex cage" costs because this is the net "ex cage" costs of the purchased salmon;[790] and (2) add back in the [[xx.xxx.xx]] NOK that [[xx.xxx.xx]] had originally deducted from its slaughtering and packing costs. This ensures that [[xx.xxx.xx]] costs reflect simply the net cost to the company of the purchased "ex cage" salmon. The purchased "ex cage" salmon is then treated like the remainder of [[xx.xxx.xx]] "ex cage" salmon, to which slaughtering costs of [[xx.xxx.xx]] NOK/kg were added by the EC.

1071. The following table shows [[xx.xxx.xx]] reported costs for purchased salmon, the EC's adjustments and the correct adjustments:

Table 16: [[xx.xxx.xx]] **Costs for Purchased Salmon**

PURCHASED SALMON (million NOK)	**Reported Costs**	**EC Approach**	**Norway's Approach**
Adjustment to *Growing* Costs	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]
Adjustment to *Slaughtering* Costs	[[xx.xxx.xx]]	[[xx.xxx.xx]]	[[xx.xxx.xx]]
Total Adjustment to Reported Costs		[[xx.xxx.xx]]	[[xx.xxx.xx]]
"Ex Cage" Cost After Adjustment		[[xx.xxx.xx]]	[[xx.xxx.xx]]

1072. The EC's overstatement of [[xx.xxx.xx]] costs is critical because the company's margin of dumping was [[xx.xxx.xx]]. If [[xx.xxx.xx]] "*growing*" cost for the purchased salmon is correctly treated as [[xx.xxx.xx]] NOK[791], and not as [[xx.xxx.xx]] NOK, [[xx.xxx.xx]] margin disappears. In other words, the EC's determination that [[xx.xxx.xx]] was dumping is based on an overstatement of the cost of purchased salmon.

1073. The discriminatory treatment that [[xx.xxx.xx]] received during the investigation is worth noting. The disagreement over [[xx.xxx.xx]] growing costs for the purchased salmon arose for the first time in the *Definitive* Disclosure in November 2005. [[xx.xxx.xx.]]

[790] [[xx.xxx.xx]] NOK minus [[xx.xxx.xx]] NOK.
[791] Namely, [[xx.xxx.xx]] NOK for growing and [[xx.xxx.xx]] NOK for slaughtering and packaging, yielding a total of [[xx.xxx.xx]] million NOK.

1074. In the Note on Costs of Production in March 2005, and in the Provisional Disclosure in April 2005, [[xx.xxx.xx"]].[792] However, having included [[xx.xxx.xx]] in the sample – with the knowledge that all its sales were to a related company – [[xx.xxx.xx.]][793]

1075. Following the Definitive Disclosure, [[xx.xxx.xx]] objected to the adjustments, recalling that the circumstances of the live salmon purchases had been explained during verification.[794] The company argued that the cost of live salmon purchased on an "ex cage" basis should not be included in the company's cost of growing salmon and also that the revenues the company earned on the sale of slaughtering and packing services for the purchased salmon should be deducted from its costs. In the Definitive Regulation, the EC failed to provide an explanation addressing these objections.

1076. Under Article 2.2 of the *Anti-Dumping Agreement*, if the EC wished to include the purchased salmon in [[xx.xxx.xx]] costs of growing salmon, it was entitled to include solely the net costs that the company incurred to produce and sell the salmon. The EC was, therefore, obliged to take into account that [[xx.xxx.xx]] purchase costs of live "ex cage" salmon were offset by payments made to [[xx.xxx.xx]] by the sellers of the live salmon for slaughtering and harvesting services.

H. *Conclusion*

1077. In conclusion, for all of the reasons set forth in this Section, the EC incorrectly determined normal value for six sampled producers by making improper adjustments to their costs of production and SG&A, thereby violating Articles 2.2 and 2.2.1.1 of the *Anti-Dumping Agreement*. Specifically, the EC made improper adjustments relating to:

- non-recurring costs;
- finance costs;

[792] Provisional Disclosure to [[xx.xxx.xx]], 22 April 2005, Annex II (Exhibit NOR-[[xx]]). *See* also letter from the Commission to [[xx.xxx.xx]], 10 March 2005. Exhibit NOR-[[xx]].
[793] Investigated producers were invited to comment on the Note on Costs of Production; the provisional disclosure; and the definitive disclosure. For [[xx.xxx.xx]], the EC refused to calculate a cost of production for purposes of the Note and it refused to provide a provisional dumping determination disclosing constructed normal value. [[xx.xxx.xx]] cooperated fully throughout the investigation, offering information to the EC within deadlines, when it was requested.
[794] [[xx.xxx.xx]] Comments on the Definitive Disclosure, 8 November 2005, pages 1-2. Exhibit NOR-[[xx]]. *See also* letter from [[xx.xxx.xx]] to the Commission, 20 March 2006. Exhibit NOR-[[xx]].

- smolt costs;
- SG&A costs; and,
- the costs of purchased salmon.

1078. These adjustments increased the constructed normal value for the producers concerned and, thereby, increased the individual dumping margin determined for them.

XII. CONCLUSION

1079. For the reasons set forth above, Norway respectfully requests 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.

1080. Norway respectfully requests that the Panel recommend that the Dispute Settlement Body request the EC to brings the contested measure into conformity with its obligations under the *Anti-Dumping Agreement* and the GATT 1994.

1081. 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 the initiation of the investigation, and the measures resulting from it, are vitiated and deprived of legal basis. Consequently, Norway respectfully request the Panel to suggest that the EC implement the recommendations and rulings of the DSB by withdrawing the contested measures.