AS HELD

BEFORE THE WORLD TRADE ORGANIZATION

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

WT/DS337

CLOSING STATEMENT AT THE SECOND SUBSTANTIVE MEETING WITH THE PANEL

NORWAY

7 FEBRUARY 2007

I. INTRODUCTION

Mr. Chairman, Members of the Panel,

1. Allow me first of all to thank you once more for having devoted your time to this Panel. We appreciate that the task may have been challenging given the volume of documentation and the number of claims. The scope of the dispute is, however, due to the fact that the EC's measure involves a very large number of inconsistencies with WTO rules.

2. Through our submissions, we have tried to present a complete picture of the major failings of the EC. More could have been addressed, but we have chosen to focus on the most important violations.

3. As we have detailed in our submissions, and once more in our Opening Statement to this Panel meeting, the determinations of the EC were not only flawed *ab initio*, but the explanations and the factual basis given for the determinations are constantly changing. The Panel, however, should not let the numerous *ex post* rationalizations, and new "facts", divert its attention from the real issue: Did the EC present, in its published determination, *reasoned and adequate explanations* for the determinations made that addressed *how the facts in the record supported the determinations.* When an authority fails to do so, it cannot demonstrate that it has respected the *substantive requirements* of the *Anti-Dumping Agreement*.

4. Through its submissions, and before this Panel, Norway has shown that the EC's measure is fundamentally inconsistent with WTO rules.

5. The EC tries to confuse the issues with a number of unfounded allegations and misrepresentations of Norway's claims and arguments. The Panel should not be side-tracked by this. Norway has presented the issues clearly, and with your permission I will distill the major interpretative questions raised by our claims. Needless to say, all claims and arguments are maintained, even if not mentioned in this closing statement.

6. Norway makes three independent claims regarding the <u>determination of the product under consideration</u>: (1) initiation; (2) dumping; and (3) injury. The major interpretative issues before the Panel are (i) whether the *Anti-Dumping Agreement* imposes obligations on the determination of the product under consideration; and (ii) whether the EC has demonstrated on the basis of a reasoned and adequate explanation that the products at issue are all alike. The Panel need not decide whether there are, in fact, one, two or more products.

7. Regarding the determination of the domestic industry, the major interpretative issues are *first* whether the EC was entitled to define the domestic industry as solely the 15 complaining salmon growers, to the exclusion of a number of other producers and production of the like product. The excluded producers include fillet producers and the excluded production includes organic salmon. This is the issue of the serious mismatch between the product and the domestic industry. There are two independent claims here, relating to (1) initiation, and (2) the injury determination.

8. *Secondly*, on the domestic industry, in analyzing certain injury factors, the EC examined a sample of the domestic industry. The question is how to interpret correctly the provisions of the *Anti-Dumping Agreement* in respect of injury determinations. Sampling is explicitly permitted in two instances under the *Anti-Dumping Agreement*, and with stringent requirements, but not for the injury determination. Article 3.1 requires an *objective examination* of the domestic industry based on *positive evidence.* The Parties seem to be in agreement that the EC's sample did not respect the conditions of footnote 13 or Article 6.10 were they to be considered relevant (*quod non*). The flawed industry definition of the EC and the biased sample it chose, do not permit an objective examination under Article 3.1. So, even if sampling were permitted under Article 3.1, the EC's sample violates that provision.

9. Turning to the dumping determination, I will highlight four key interpretative issues. The *first* is whether an authority can exclude entirely from its sample all exporters that do not themselves produce. In any event, irrespective of the answer to this, the EC improperly excluded two of the largest exporting producers from its sample – thereby violating the conditions in Article 6.10, even under the EC's flawed interpretation.

10. The *second interpretative issue* relates to the requirements of Article 2.2.1 to determine that below-cost sales were made at prices that did not provide for cost recovery within a reasonable period of time. The EC admits that it made no determination on cost recovery in the published determination. It also argues that the cost recovery test in the second sentence of Article 2.2.1 did not apply in this investigation. Moreover, as an interpretative matter, the EC wrongly contends that the "reasonable period" for cost recovery may always be equated with the IP.

11. The *third interpretative issue* relates to the EC's rejection of domestic sales data under the "10 percent test" and the "5 percent test". Under Articles 2.2 and 2.2.2, an authority cannot reject data from a low volume of profitable sales simply because of a large volume of loss-

making sales. The EC does not argue that the "10 percent test" is set forth in the *Agreement*. There is also no basis for this test in either Article 2.2 or Article 2.2.2. The only way to follow the interpretation suggested by the EC would be by ignoring the rules of treaty interpretation set out in the *Vienna Convention*. On the 5 percent test, panels and the Appellate Body have already found that no low volume exception applies under Article 2.2.2.

12. The *fourth interpretative* issue regarding the dumping determination relates to the procedures to be applied before an authority may resort to facts available. Although the EC tries to portray this as a situation where facts available were not used, the issue is quite simple. It is uncontested that the EC applied adverse facts derived from secondary source information, but did not follow the rules set forth in Article 6.8 and Annex II. The interpretative question for the Panel is whether the *Agreement* provides for a *category* of secondary information to which no substantive or procedural obligations apply, a proposition that we consider totally devoid of merit.

13. Turning now to the injury determination, the interpretative issues in respect of Articles 3.1, 3.2, 3.4 and 3.5 are by now largely agreed between the parties, and the arguments in defense of the EC center around impermissible *ex post* rationalizations that the Panel should dismiss.

14. With respect to the *volume of dumped imports*, the EC now seems to agree that it cannot extrapolate from its sample to determine that all imports from non-sampled companies, including all non-producing exporters, were also dumped. In addition, there must be "other positive evidence" of dumping. The EC also seems to agree now that the volumes of Nordlaks should have been excluded. On these particular issues, all of the EC's justifications are *ex post* rationalizations not found in the published determination.

15. Concerning *price undercutting*, the facts are undisputed, and the interpretative issue is whether a "price premium" documented even in the Definitive Disclosure must be accounted for in a price undercutting analysis. Norway considers that it must. Indeed, had the authority done so, it would have found no price undercutting. To escape this inconvenient fact, the EC now advances an *ex post* rationalization that is not found in its published determination.

16. The issues surrounding the EC's determination of *price trends* have also been clarified. The EC accepts that no decline in prices took place in pounds sterling. Because this is the material currency for examining the prices of Scottish producers, the EC's determination is flawed. Here too, the EC advances numerous *ex post* rationalizations that must be dismissed.

17. On causation, the issue centers on the EC's failure to provide a reasoned and adequate explanation based on positive evidence. The EC does not dispute that it must address all factors causing injury, and separate and distinguish the injury caused by them. However, the EC's explanation failed to address the sharp increases in the domestic industry's costs of production, nor did it explain the facts supporting its findings on imports from Canada and the United States. The issue for the Panel is, thus, whether the EC disclosed any facts in support of its conclusions, and set forth "an evidentiary path" leading from the evidence in the record to its determinations. The Appellate Body has stated that a reasoned and adequate explanation "is not one where the conclusion does not even refer to the facts that may support that conclusion".[1]

18. On MIPs, Norway has made a *prima facie* case that the EC's MIPs exceed individual and weighted average normal values, in violation of Articles 9.2 and 9.4, and Article VI:2. Because the EC has not rebutted Norway's case, the Panel's task is straightforward.

19. A further interpretative question in respect of MIPs is whether the normal values may be recalculated using historical exchange rates for the three preceding years, bearing in mind that doing so divorces the MIPs from the normal values for the IP.

20. In respect of the ceiling on anti-dumping duties, Articles 9.1 and 9.3, and Article VI:2, require that the duties imposed on an individually examined *exporter* not exceed its margin of dumping. Under these provisions, it is not sufficient that an *importer* can subsequently seek a refund under Article 9.3.2.

21. The interpretative issues regarding the fixed duties are equally straightforward. The EC does not contest that the duties exceed the margins of dumping. Rather, the EC seeks to divert the Panel's attention from this fact by claiming that the fixed duties do not involve "specific action against dumping". Again, the facts surrounding the adoption and imposition of the fixed duties do not support the EC's argument.

22. Turning for a moment to the procedural issues relating to Articles 6.2 and 6.4, the EC has admitted that 68 documents were not made available to Norway during the investigation. The Panel should dismiss the EC's improbable excuses.

23. Under Article 6.9, the Panel must decide whether it is sufficient for an authority to disclose only its factual findings, or whether it must also disclose the "basis" in fact for those findings. Panels have correctly found that an authority is obliged to disclose the *essential facts*

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

from the file that will form the basis for its findings and conclusions. The EC did not disclose the essential facts that formed the basis for its determination relating to: (1) domestic industry; (2) dumping; (3) causation; and (4) MIPs.

24. On Articles 12.2 and 12.2.2, the interpretative issue is whether the authorities can decide for themselves what "information" and "reasons" to publish. Case law on this point is clear. 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*."[2] 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".[3] Norway requests the Panel to follow the case law, and find that the EC violated Articles 12.2 and 12.2.2.

25. Allow me finally to say a few words about costs. The EC has presented numerous arguments to justify its systematic inflation of the costs of production and SG&A amounts. The major interpretative issue relates to what can be included as "cost of production" under the *Anti-Dumping Agreement.* The Panel must interpret this *Agreement*, and decide whether it allows the authority to *sever* the link between a cost and production, by adding to cost of production certain costs that, by the EC's own admission, do not benefit the current or future production of the product under consideration.

26. Also, on non-recurring and finance costs, the Panel must decide whether there is any basis in law, or in the EC's published determination, for the EC's incoherent application of "three-year averaging" to calculate costs. All the justifications that the EC presents are *ex post* rationalizations not found in the published determination. The Panel need not decide on the merits of a particular accounting method – be it PA or IP. Because the EC has abandoned the justification it gave in the Definitive Regulation for three-year averaging, this issue should be straightforward. Norway also contests the EC's description of its alleged use of PA.

27. In addition to these, the EC made numerous flawed cost adjustments. I will not go into each and every one of them - they speak for themselves.

II. CONCLUSION

28. Finally, Norway requests that the Panel address *all* of its claims. In particular, in weighing whether it is appropriate to exercise judicial economy in these proceedings, Norway

[2] Appellate Body Report, *US – Steel Safeguards*, para. 326. Emphasis added.
[3] Appellate Body Report, *US – Line Pipe*, para. 217.

asks the Panel to consider the implications for implementation. The contested measure is part of a series of trade remedy measures that have provided protection to EC salmon growers almost continuously since 1989. Typically, in trade remedy disputes, Members seek to implement the recommendations and rulings of the DSB on a piecemeal basis, by repairing solely those flaws that have actually been found by the Panel. Issues on which the Panel does not rule cannot be the subject of implementation obligations. Norway does not wish to return to the Panel in Article 21.5 proceedings.

29. Further, in view of the nature and scope of Norway's claims, Norway requests that the Panel find that the contested measure is deprived of legal basis, and that the Panel suggest, under Article 19.1 of the DSU, that the EC implement the recommendations and rulings of the DSB by withdrawing the contested measure.[4]

30. In conclusion, Norway thanks the Panel for its attention. Norway maintains all its claims and respectfully reiterates the requests that are set forth in Section XII of its First Written Submission.

[4] Norway's FWS, para. 1081.