NORWAY'S REPLIES TO THE PANEL'S QUESTIONS AFTER THE FIRST MEETING WITH THE PARTIES

15 JANUARY 2007

A. *PRODUCT UNDER CONSIDERATION*

Question 46: Where in the text of the ADA does Norway find the asserted obligation to "determine" the product under consideration? Is there a difference between the necessity to identify the product being investigated, and an affirmative obligation to determine the product under consideration as defined by Norway?

1. The title of Article 2 of the *Anti-Dumping Agreement* requires an investigating authority to make a "*Determination of Dumping*". To make a "dumping" determination, an authority must make a determination with respect to each of the constituent elements that define "dumping". These are: (1) the "*export price*" of (2) the "*product under consideration*" which must be compared with (3) the "*normal value*" of (4) the "*like product*". The term "dumping" is merely a label that refers to the results of a comparison of all these elements. Absent a finding with respect to each of them, a "dumping" determination cannot be made.

2. Norway does not consider that there is any material difference between "*identifying*" and "*determining*" the product under consideration. Instead of these two words, the EC has also used the verb "*select*" to describe the authority's task.[1] Whatever verb is used, it is common ground between the Parties that an authority must take an *active step* to define the "product under consideration".

3. In other instances, the *Anti-Dumping Agreement* also requires an authority to take an active step – make a finding – that is not expressly described as a "determination". For example, the *Agreement* does not expressly state that an authority must make a determination of: the "*like product*"; the "*domestic industry*"; or the "*export price*". Nonetheless, an authority must make findings with respect to each of these elements because they are integral to the dumping and injury determinations set forth in Articles 2 and 3. In each case, under the *Vienna Convention*, the ordinary meaning of the treaty term imposes obligations that limit

[1] *See, for example,* EC's First Written Submission ("FWS"), title of Sub-section III.F ("Selection of the product concerned"); and EC's FWS, para. 50 ("This is not a case in which […] out of a large number of contiguous models or types of a product, a few non-contiguous models or types have been selected as together constituting the product concerned").

the discretion of the investigating authority. The term "product under consideration" is no different.

4. In Norway's view, under Article 2.1, an authority must determine/identify/select "a product" that allows an authority to make a *single, overall "dumping" determination* that an exporter is engaging in *discrimination* in the pricing of "a product".[2] In the words of both Article VI:1 and Article 2.1, discriminatory pricing arises where "a product" is exported at less than "*its*" normal value. This wording accords with the usual understanding that price discrimination occurs where a particular product is priced differently in two markets. As a result, if an authority identifies a group of products as a single "product under consideration", they must be like – *i.e.* "closely resembling" – so that a single "dumping" determination can be made for them. Conversely, if products that are *not* like are included in a single investigation, a combined dumping determination *cannot* reveal whether one, some or all of the investigated products are "dumped".

5. In the example we gave in our Opening Statement, an authority combines cars and bicycles ("certain vehicles") into a single product. To arrive at a single overall dumping determination, the authority must make an aggregate comparison of the prices of these different products. However, an *aggregate* comparison *cannot* disclose whether only cars are dumped; or only bicycles; or both cars and bicycles. Nonetheless, if a Member could combine these different products into a "single" product, it could impose anti-dumping duties on both products, without establishing that both are indeed dumped. A Member could manipulate the product scope of an investigation to enable the imposition of duties on a product that is not dumped, thereby depriving exporting Members of the value of market access concessions.[3] Norway has provided a numerical example in paragraph 95 of its Second Written Submission.

6. Norway addresses the criteria for assessing the "product under consideration" in reply to Question 47.

[2] Appellate Body Report, *US – Zeroing (Japan)*, para. 151; Appellate Body Report, *US – Softwood Lumber V*, para. 93. *See* Norway's FWS, para. 84 ff. and Norway's Opening Statement of 12 December at the First Substantive Meeting with the Parties ("Opening Statement"), para. 30 ff.

[3] Norway's Opening Statement, para. 25. *See, also*, Norway's FWS, paras. 93 to 97.

Question 47: ***What is the basis for the view that there should have been two products under consideration in the present investigation? That is, if HOG fish and fillets are distinct products, why are not each of the different presentations or models also distinct products, i.e., the 8 separate models, fresh or frozen, 7 different sizes, and 3 different levels of quality, resulting in 8, or 16, or 21, or 24, or indeed, 336 (8 x 2 x 7 x 3)? On the basis of what criteria does Norway consider that the limits or parameters of a product under consideration should be determined? Where in the ADA does Norway find support for its views in this regard?***

7. In its First Written Submission, Norway stated that the criteria governing the determination of the "product under consideration" are: (1) *physical characteristics*; (2) *production processes*; (3) *substitutability*; (4) *end uses*; and (5) *tariff classification*.[4] These criteria are the same as those used by the EC, with the addition of tariff classification.[5]

8. Article 2.6 requires an authority to ensure that the "like product" "*closely resembles*" the "product under consideration". These criteria are relevant in establishing whether products resemble one another physically, and in the eyes of consumers.

9. Article 2.6 also demonstrates that, in a dumping determination, a like-with-like comparison must be made between the prices of products that can properly be compared. Article 2.6 states, without qualification, that the requirements of likeness apply at the level of the "product under consideration". Nothing in the text permits an authority to establish likeness at the level of one *sub*-product to the exclusion of all the others. Thus, textually, it is not sufficient that bicycles are "like" bicycles because they must also be like cars, which are a part of the "product under consideration". The reason is that Article 2.1 requires that an *aggregated* comparison be made for bicycles and cars together. Thus, the different sub-parts of the product must be all "like" to permit an overall like-with-like comparison and a single determination.

10. Article 3.6 also highlights the importance of examining separately the different products that are produced through separate "production processes". In that regard, the Appellate Body has explicitly endorsed an examination of "*production processes*" to ascertain "whether two articles are *separate products*" in a trade remedy investigation.[6] The

[4] Norway's FWS, para. 133.
[5] Provisional Regulation, para. 11. Exhibit NOR-9.
[6] Appellate Body Report, *US – Lamb*, footnote 55. Original emphasis.

Appellate Body's statement shows that it considers that there are limits to the discretion of an investigating authority to describe different "articles" as a single "product".

11. Panels and the Appellate Body have relied on the criteria Norway mentioned to identify whether products are "like" for purposes of Article III of the GATT 1994.[7] Like Article VI, Article III addresses the discriminatory treatment of products in the marketplace, albeit from the perspective of regulatory behaviour. Under both provisions, "likeness" is used to determine whether the relative situation of different products can be compared with a view to establishing the existence of discrimination in the treatment of the products. If products are not "like", the relative situations of the two products cannot be compared, even on an aggregated basis.

12. To take an example from Article III, assume that imported bicycles are taxed more heavily than domestic bicycles, but imported cars are taxed less heavily than domestic cars. Even if a complaint were brought by a Member on a combined basis, and even if a panel conducted "intermediate" comparisons of cars and bicycles on the basis of "models", Article III does not permit a single, aggregated comparison of "certain vehicles" to conclude, on a combined basis, that both bicycles and cars are subject to discriminatory taxation. Rather, the situation of each like product must be examined on its own merits, without any off-setting between the different products. The same is true in assessing whether a product is subject to discriminatory pricing.

13. Thus, under Articles III and VI of the GATT 1994, whatever the terms of a complaint, neither a panel nor an investigating authority can simply combine two non-like products, without limits, to conclude on a combined basis that both are subject to discrimination.

14. In this dispute, it is not the Panel's task to make a *de novo* review of whether there is one product, two products or 336 products. Instead, the Panel must decide whether the EC provided a reasoned and adequate explanation to supports its conclusion that there is a single "product under consideration".

15. Norway has shown that the EC's explanation failed to address the following facts: (1) there are obvious *physical differences* between whole/HOG fish and fillets; (2) the products

[7] Norway's FWS, para. 133.

are produced by *separate industries* using *separate production processes*; (3) the products are *not substitutable*; (4) the products have *different end uses*; and (5) the products have *different tariff classifications*. Norway's arguments are set out fully in paragraphs 132 to 165 of its First Written Submission.

> ***Question 48**: What does the ability to limit an investigation to a limited number of "types" of product under Article 6.10 say about whether or not a product under consideration may be made up of different "products"? How can the notion that the product under consideration must be made up of products that are all "like" each other be reconciled with the permissibility of "multiple averaging" in the comparison of export price and normal value, leading to a single margin of dumping for the product, despite the fact that individual models may not be comparable to one another? Does the practice of "multiple averaging" and limiting an investigation to types of products imply that the product under consideration need not be internally homogeneous?*

16. There is no inconsistency between the authority's discretion to conduct intermediate comparisons using "models" or "types" under Article 2.4.2, or to sample "models" or "types" of the product under Article 6.10, and the requirement in Article 2.1 and Article VI:1 to make a single "dumping" determination for a product comprising "models" or "types" that are all "like" within the meaning of Article 2.6. That is, neither Article 2.4.2 nor Article 6.10 permit an authority to bundle together non-like products in the "product under consideration".

17. The EC mistakenly argues that Norway insists that all investigated products must be "identical". That is incorrect because the notion of "likeness" in Article 2.6 extends beyond "identical" products to include products that are "*closely resembling*". Thus, although cars and bicycles cannot be different "models" of a single product, an authority could determine that all flat screen LCD televisions are part of the same product. In that event, the authority might wish to sub-divide the product into different models on the basis of, for example, the size of the screen. However, all of the models are closely resembling.

18. Thus, there is *no* requirement for precise uniformity or homogeneity in the product scope of an investigation. Where there are physical differences between like products that are subject to a single "dumping" determination, panels and the Appellate Body have

recognized that an authority may choose to sub-divide the investigated product into "models" or "types".[8]

19. Accordingly, where *non-identical products* are grouped together as a single "product", an authority may establish sub-groups of *identical sub-products* for purposes of comparing normal value and export price. The panel in *US – Softwood Lumber V* explained that grouping identical sub-products is helpful because it avoids the need for adjustments due to physical differences under Article 2.4.[9]

20. The thrust of the Panel's question appears to be whether it *suffices* for an authority to ensure that "likeness" is established at the level of "*models*", or whether "likeness" must also be established at the level of the "*product*". The EC appears to consider that it is sufficient to establish "likeness" for models only. On this view, so long as bicycles are "like" bicycles, the requirements of the *Anti-Dumping Agreement* are met – even if bicycles are not "like" cars.

21. In Norway's view, it is not sufficient for an authority to ensure "likeness" solely for *models* because, *as a matter of law*, an authority *cannot* make "dumping" determinations solely for models. Where model-specific comparisons are made using "multiple averaging", panels and the Appellate Body have held that the outcome of model-specific comparisons "reflect only *intermediate* calculations"; further, "it is only on the basis of aggregating *all* these 'intermediate values' that an investigating authority can establish margins of dumping for the *product under investigation as a whole*."[10] The panel in *US – Softwood Lumber V* also held that a "dumping" determination must be based on the prices of "*all transactions* involving *all types* of the *product under investigation*".[11] Last week, the Appellate Body confirmed this interpretation:

> … "dumping" and "margins of dumping" can be found to exist only at the level of a "product": they cannot be found to exist at the level of a type, model, or category of a product under consideration.[12]

[8] Panel Report, *US – Softwood Lumber V*, para. 7.211.
[9] Panel Report, *US – Softwood Lumber V*, para. 7.207.
[10] Appellate Body Report, *US – Softwood Lumber V*, para. 97.
[11] Panel Report, *US – Softwood Lumber V*, para. 7.224.
[12] Appellate Body Report, *US – Zeroing (Japan)*, para. 151, quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 104; Appellate Body Report, *US – Zeroing (EC)*, para. 126; and Appellate Body Report, *US – Softwood Lumber V*, para. 93.

22. Thus, models are merely an "intermediate" step in the process of making an overall comparison on a weighted average basis. To complete the comparison process, an authority must aggregate the model-specific results to make a single, overall determination for the "product" as a whole. That overall determination necessarily reflects *a single, aggregated comparison* of the prices of "*all transactions involving all types* of the product".[13]

23. This is precisely the Appellate Body's analysis in *US – Softwood Lumber V (Article 21.5 – Canada)* of the multiple comparisons made under the transaction-to-transaction comparison method in Article 2.4.2:

> … the reference to "*a comparison*" in the singular suggests an overall calculation exercise involving *aggregation* of these multiple transactions. *The transaction-specific results are mere steps in the comparison process*. This tallies with the term "basis" at the end of the [first] sentence [of Article 2.4.2], which suggests that these individual transaction comparisons are not the final results of the calculation, but, rather, are *inputs for the overall calculation exercise*. Thus, the text of Article 2.4.2 implies that the calculation of a margin of dumping using the transaction-to-transaction methodology is a *multi-step exercise in which the results of transaction-specific comparisons are inputs that are aggregated* in order to establish the margin of dumping of the product under investigation for each exporter or producer.[14]

24. Equally, in a weighted average comparison under Article 2.4.2, the model-specific results "are *mere steps* in the comparison process", which "is a multi-step exercise in which the results of [model-specific] comparisons are inputs that are aggregated" in making a single dumping determining for the "product".

25. The intermediate price differences resulting from each model-specific comparison are simply totaled to give an overall price difference that reflects an *overall comparison made for "all transactions involving all types of the product"*. In the overall comparison, the prices of the different models of the product are *necessarily* all compared through the aggregation process. Norway has provided a numerical example in paragraph 95 of its Second Written Submission.

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[13] Panel Report, *US – Softwood Lumber V*, para. 7.224.

[14] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87. *See, also,* Appellate Body Report, *US – Zeroing (Japan)*, paras. 115, 120, and footnote 352.

26. Accordingly, because the authority must make an aggregate comparison for "*all types*" of the "product", it is insufficient for an authority to ensure "likeness" at the level of "models".[15] In short, there is no point to a rule that requires that bicycles only be like bicycles, and not like cars, because the prices of bicycles and cars are necessarily also compared on an aggregated basis.

Question 49: Please elaborate on your views concerning the definition of "a product" under Article 2.1.?

27. Please see Norway's replies to Questions 46 to 48, at paragraphs 1 to 26 above.

B. *DOMESTIC INDUSTRY*

Question 50: The EC suggests that inclusion of fillets production in calculating total domestic production of the like product would result in double counting. Norway appears to recognize that a double counting problem does arise, but suggested that it could be addressed methodologically, referring to analogous problems in the calculation of gross domestic product for national accounts. Could Norway please elaborate as to what it might consider appropriate methodologies for dealing with the problem of double-counting in an industry that includes producers of an upstream input and producers of the downstream output, both of which are within the scope of the domestic like product? Please also indicate whether, in your knowledge, fillets producers purchase salmon grown in the EC, or import it in any of the known presentations of this product?

And

Question 73: Are you aware of whether similar questions concerning possible double counting in assessing production of the domestic industry have arisen in the practice of other Members, and if so, how the questions have been addressed? If so, please describe.

28. The issue of possible "double counting" of production volumes arises because the EC grouped together non-like upstream (whole/HOG fish) and downstream products (fillets). The production volume of filleted products includes the production volume of the whole/HOG fish that are used to produce the fillets. Had the EC properly determined that there are at least two products (whole fish and fillets), the issue of double counting would not arise and the production volumes of each industry would have been counted separately.

[15] Panel Report, *US – Softwood Lumber V*, para. 7.224.

29. In any event, the issue of double counting pertains only to a small minority of the production of the EC processing industry. The EC determined that the EC salmon growing industry produces around 18,000 tonnes. According to evidence of record, the EC salmon processing industry produces "several hundred thousand tonnes" of filleted products.[16] The double counting issue relates to a tiny portion of those filleted products: the fillets produced from the whole/HOG fish produced by the 15 complaining salmon growers determined to be the EC industry. The vast majority of the production of the EC processing industry's is produced from inputs other than those produced by the 15 complainants.

30. The Panel asks about the different sources of these other inputs. Norway recalls that the market share of imports from Norway was 59,6 per cent during the investigation period,[17] whereas the market share of the 15 complainants was 2,77 per cent,[18] leaving close to 40 per cent of the market to other producers in the EC and elsewhere. Norway does not have precise information on the sources of input products for EC fillet producers. However, Norway believes that the input sources are: (1) other EC production excluded from the EC domestic industry and (2) imports from various countries. No issue of double counting arises with respect to fillets produced using these inputs.

31. In defining the EC domestic industry, the EC excluded the vast majority of salmon grown in the EC. In the safeguards investigation in 2003, the EC concluded that EC production amounted to 190,903 tonnes. The Complaint from September 2004 also states that total EC production amounts to 181,000 tonnes.[19] Thus, with production of just 18,000 tonnes, the 15 complainants that make up the EC "domestic" industry account for as little as 10 percent of total EC production. The remaining EC production is input material available to the EC processing industry.

32. The EC also imports salmon that is processed by the EC processing industry. These imports could come from various countries, including Canada, Chile, Faroe Islands, Iceland, Norway, USA and others. For example, Laschinger, a German processor, indicated during

[16] Exhibit NOR-17.
[17] Provisional Regulation, para. 56, table 3. Exhibit NOR-9.
[18] Definitive Regulation, para. 65, table 2. Exhibit NOR-11.
[19] Exhibit NOR-14, page 5.

the investigation that its product range during the investigation included smoked salmon prepared with salmon from Norway, Scotland, Ireland and the United States (*i.e.* Alaska).[20]

33. With respect to the 18,000 tonnes produced by the EC domestic industry, the Panel also asks how the issue of double counting could be resolved. Norway has identified four methods that have been used by the United States. Norway takes no position on which method is the most appropriate, and also recognizes that there may well be other methods for tackling double counting.

34. The first method is to analyze production volumes separately for the upstream and downstream industry. The USDOC did this in the investigation of *Certain Frozen Fish Fillets from Vietnam*. In that case, USDOC considered two separate domestic industries comprising (a) farmers of fresh catfish and (b) processors of frozen fillets that sourced their inputs from those farmers. The USDOC established industry support *separately* for the two industries, i.e. farmers and processors.[21] The same approach could be taken with respect to other data pertaining to farmers and processors.

35. The second method is to combine the production volumes of both industries. In *Certain Orange Juice from Brazil*, the USDOC combined the growers' production of oranges with the processors' production of orange juice to assess support for the initiation of an investigation. It expressly acknowledged that it engaged in double counting. However, it considered that this double counting was not problematic because it occurred equally in both the numerator and denominator of its calculation. USDOC considered that this methodology accounted fairly for the total production of oranges and the total production of orange juice.[22]

36. A third method is to measure total domestic production by value instead of volume. Article 5.2(i) of the *Anti-Dumping Agreement* expressly requires that the complaint measure domestic production by both volume *and* value. The drafters thus envisaged that domestic production could be assessed by an authority in terms of either volume or value, or both. In that regard, neither Articles 5.4 nor 3.4 prevent an investigating authority from measuring "output" or "total production" in terms of either volume or value, or both.

[20] Norway's FWS para 612 and Exhibit NOR-97.
[21] USDOC, *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, AD Investigation Initiation Checklist, A-552-801, 18 July 2002, Attachment II, page 1. Exhibit NOR-161.
[22] USDOC, *Certain Orange Juice from Brazil*, AD Investigation Initiation Checklist, A-351-840, 9 February 2005, Attachment I, footnote 9 on page 17. Exhibit NOR-162.

37. Indeed, the United States' Statement of Administrative Action similarly states that "[USDOC] normally will determine the existence of industry support based on the volume *or value of production*."[23] A value-based approach was also adopted by the USITC in the injury determination in *Certain Uranium from Russia*. The USITC acknowledged that combining the production figures of different processed uranium products would lead to double counting. It, therefore, considered the total *value* of the products.[24]

38. Under this method, the authority could establish the total sales value of domestic production by combining (a) the sales value of the EC's filleting industry's production and (b) the value of the EC growers' production shipped directly to customers without processing by EC processors. As a variant, the authority could measure the value of the processing industry's production by subtracting the acquisition costs from the industry's sales value. This would focus only on the value added by that industry. For the growers, the authority could measure the value of their total production subtracting the intermediate consumption produced by a different industry (e.g. smolt cost).

39. This is similar to the method used in calculating Gross Domestic Production ("GDP") figures, where the added value of each producer/segment is calculated by subtracting intermediate consumption from the total sales value which includes the purchasing price of inputs.[25] The GDP is then the aggregated added value within each producer/segment.

40. A fourth method would be to measure solely the volume of "commercial shipments" by upstream and downstream producers to final customers. In *US – Steel Safeguards*, where the USITC used "commercial shipments including exports" as the appropriate benchmark for the aggregated production figures of the US industry,[26] the USITC excluded captive

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[23] Statement of Administrative Action, in *Message from the President Transmitting the Uruguay Round Trade Agreements*, H.R. Doc. No. 316, 103d Cong., 2d Sess., Vol. I, *reprinted in* 1994 U.S.C.C.A.N. 4040, page 862. Exhibit NOR-163.

[24] *Uranium from Russia*, Investigation No. 731-TA-539-C (Second Review), USITC Pub. No. 3872, August 2006, page III-12 and table III-5. Exhibit NOR-164.

[25] For an explanation of how to treat intermediate consumption in national accounts, *see* "intermediate consumption" on *Wikipedia*, at http://en.wikipedia.org/wiki/Intermediate_consumption. Exhibit NOR-165.

[26] *See Steel*, Investigation no. TA-201-73, USITC Pub. No. 3479, Vol. II, December 2001, in particular footnote 11 on page FLAT-15. The United States asked for information on 33 products, later grouped into 10 products of which one was "Certain Carbon Flat Rolled Steel". This group consisted of everything from steel slabs to plate, hot-rolled, cold-rolled, grain oriented silicon electrical steel, coated steel and tin plate (e.g. yoghurt lids). Since slabs are the raw material for all other steel products, significant issues of double-counting arose when just aggregating the production of each product in the bundle, and all the more so since certain producers were integrated and producing more than one of the above products. ITC staff chose to base their aggregate measure

production that was further processed internally, but included shipments to independent processors that were used to produce a product that was still part of the "like product". Thus, double counting arose with respect to downstream production by independent processors. This double counting could be eliminated by excluding also shipments *between* upstream producers and independent downstream processors.

> ***<u>Question 51</u>: Assuming sampling for purposes of injury determinations is not prohibited, does the obligation to conduct an "objective examination" based on "positive evidence" provide any guidance for how to sample the domestic industry? If so, please elaborate.***

41. Norway does not agree with the assumption that sampling is "not prohibited" for purposes of injury determinations. Norway's views are set out in paragraphs 272 to 281 of Norway's First Written Submission and paragraphs 65 to 68 of Norway's Opening Statement.

42. Assuming that Article 3 of the *Anti-Dumping Agreement* could be interpreted to confer an implied right to sample in an injury determination (*quod non*), 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 of the importing country. [27]

43. Footnote 13 defines both *when* and *how* to sample. The authority may sample *when* it is faced with a "fragmented industr[y] involving an exceptionally large number of producers". With respect to *how* to sample, footnote 13 provides that an authority must use "statistically valid sampling techniques". Sampling of the domestic industry for purposes of an injury determinations must meet both of these requirements. However, the EC's recourse to sampling of the domestic industry complies with neither condition. Thus, even if footnote 13 somehow applied to Article 3, the EC would not have met the requirements of that provision.

44. Further, the obligation in Article 3.1 to conduct an "objective examination" based on "positive evidence" requires that a sample

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of US production of the summing of commercial shipments (to the US Market) and exports by US producers, as explained in footnote 11 on page FLAT-15. Exhibit NOR-166.

[27] 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."

- be "unbiased",[28]
- "conform to the dictates of the basic principles of good faith and fundamental fairness",[29] and
- not "favour[] the interests of any interested party or group of interested parties".[30]

45. A sample must, therefore, provide a balanced and representative view of the domestic industry in its entirety. In the present case, the EC did not examine the domestic industry on the basis of a balanced and representative sample. Instead, the EC examined simply a subset of the complainants, which are among the producers that are most likely to be in an unhealthy economic condition. As a result, the EC's composition of the sample favors the complainants' interests by making it more *likely* that the authority will make an affirmative injury determination. As a result, the EC's sampling methodology falls short of the obligation to conduct an "objective examination" based on "positive evidence".

> ***Question 52: If, as Norway claims, the ADA does not allow sampling of the domestic industry, is it Norway's view that an investigating authority must seek information from each and every producer comprising the domestic industry producing the like product, regardless of the number of products? Is Norway's answer to the previous question remain the same for a domestic industry defined as producers "as a whole" or "those of them whose production accounts for a major proportion of total domestic production of the like product".***

46. Yes. The authority must seek information from each and every producer comprising the domestic industry, as defined by the investigating authority. This is true regardless of whether the domestic industry has been defined as producers "as a whole" or "those [producers] whose production accounts for a major proportion of total domestic production of the like product".

47. The degree and quality of the information that an authority secures for each of the producers may differ from producer to producer. However, an authority must make an effort to secure relevant information from all domestic producers – which are, after all, within its

[28] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[29] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[30] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

jurisdiction. Where an authority is unable to obtain information, it can, if necessary, obtain the "best information" available from secondary sources under Article 6.8 of the *Anti-Dumping Agreement*.

C. *LIMITED EXAMINATION*

Question 53: Does Norway take the view that implementation of the second limited examination option in Article 6.10 (examination of the largest percentage of the volume of the exports from the country in question which can reasonably be investigated) involves a purely arithmetic exercise? If so, what is the point of the obligation in Article 6.10.1 to choose any selection preferably "in consultation with and with the consent of the exporters, producers or importers involved"? What role does Article 6.10.1 play in the operation of Article 6.10 second sentence? Please explain your answer in the light of the statement at paragraph 77 of Norway's oral submission, that "the consultations process under Article 6.10.1 does not relieve the investigating authority of its obligations under Article 6.10".

48. The second sentence of Article 6.10 sets out a *substantive* obligation to select either a "statistically valid" sample or, alternatively, a sample based on the "largest percentage of the volume of the exports from the country in question which can reasonably be investigated". Where an authority decides to use the second sampling option, it must ensure that its sample respects the unqualified requirement that the sample include the largest volume of exports.

49. Article 6.10.1. is a *procedural* provision that sets out a mere "*prefer[ence]*" for an authority to compose a sample "in consultation with and with the consent of" certain interested parties. The EC has not addressed the fact that Article 6.10.1 plays a limited role in composing the sample, and imposes no obligation on the investigating authority either to consult with, or obtain the consent of, exporters, producers, or importers. A procedural provision that expresses a mere preference for consultations cannot override a substantive requirement agreed among WTO Members.

50. The investigating authority and private parties cannot, therefore, agree to depart from the substantive requirements in Article 6.10 by developing *ad hoc* sampling criteria for a particular investigation. The EC's argument to the contrary places the benefits accruing to Norway under the *Anti-Dumping Agreement* in the hands of the investigating authority and private parties.

51. There are important practical considerations that support this view. The consultations process does not take place between parties with equality of bargaining power. The conduct of foreign producers and exporters in the consultations must be viewed in light of the fact that all parties are aware that, under the *Anti-Dumping Agreement*, the power of decision on the composition of the sample, and in the subsequent investigation, rests exclusively with the investigating authority. Consultations are coloured by the fact that foreign producers and exporters have an interest in trying to reach an accommodation with the authority early in the investigation. Furthermore, there is no objective record of what occurred during the consultations process. It is, therefore, impossible for panels and the Appellate Body to verify what happened during the consultations process, and why.

52. For example, in this investigation, the EC makes a virtue of its own assertion that FHL "agreed" with the Commission on eight of the ten sampled parties. This is inaccurate. FHL did *not* agree with the Commission's selection but was willing to compromise, provided that the authority include at least two independent exporters and Salmar in the sample. Because the EC refused to do so, FHL's alleged "agreement" lapsed. There was, therefore, no agreement on the composition of the sample.[31]

53. Given that the authority is not required to secure the consent of exporters, producers and importers in its selection of the sample, the interests of the exporting Member and its producers and exporters must be protected by the substantive sampling requirements set forth in the second sentence of Article 6.10.

54. Norway does not wish to suggest that consultations are without significance. A number of important issues may be addressed in consultations, including: (1) which sampling option under Article 6.10 should be used; (2) the accuracy and interpretation of the data before the authority (e.g. the significance of the export data in the sampling returns, the identity of the largest exporters, etc.); and, (3) how many companies can reasonably be investigated.

[31] *See, e.g.*, letter from FHL to the Commission, 24 November 2004. Exhibit NOR-47. *See, also*, letter and Memorandum from FHL to Commission, 13 April 2005, para 3.1. Exhibit NOR-48.

<u>Question 54</u>: Norway states in its First Written Submission that FHL discussed the "inclusion of Salmar" with the EC investigators at a meeting of 17 November 2004 (para. 325). Does Norway mean that the volume of Salmar's export sales made through trading companies was discussed at this meeting? If so, is there any evidence that this is in fact what took place?

55. The question of Salmar's inclusion in the sample was raised several times with the EC prior to its unilateral selection of the sample on 24 November 2004. In the meeting of 17 November 2004, FHL proposed Salmar because it is one of the largest salmon producers. This request was repeated in three subsequent letters from FHL to the EC.[32]

56. Although the precise volume of Salmar's export sales *via* unrelated traders was not specifically discussed during the meeting of 17 November, FHL made clear that Salmar, in its capacity as one of the largest independent producers[33] of salmon, was also a major "exporting producer" to the EC.[34] Consequently, the EC had knowledge that Salmar, a large salmon producer, fell within the category of the Norwegian industry which the EC chose to investigate.

57. Although the EC knew the volume of Salmar's production and knew that this volume could not be absorbed in the domestic market, and although the EC decided to include companies in the sample on the basis of exports *via* traders, the EC never informed FHL or Salmar of any deficiencies in Salmar's sampling questionnaire. Nor did the EC ever ask any questions about Salmar's exports to the EC *via* traders.

[32] FHL's e-mail of 18 November 2004 (Exhibit EC-4), letter of 24 November 2004 (Exhibit NOR-47) and letter of 3 December 2004. Exhibit NOR-167.

[33] The EC must have been well aware of Salmar's size given its high volume of domestic sales. The affidavit from CEO of Salmar Mr. Leif Inge Nordhammer (Exhibit NOR-42) reiterates its reply to the EC's sampling questionnaire where Salmar reported 21,888 tonnes (WFE) as its total domestic sales.

[34] *See* Provisional Regulation, para. 16. The EC defines "…producers of farmed salmon, which also exported the product concerned to the EU (the 'exporting producers'). Sales were either made direct or via unrelated traders."

<u>Question 74</u>: Exhibit NOR-39 contains a notification letter from the EC to a representative of the Norwegian Industry Association (FHL) identifying the companies selected to form part of the investigation. This document indicates that factors other than the volume of exports were taken into account in identifying the investigated companies.

…

(c) Does Norway accept that the EC was entitled to take these other factors into account in choosing the companies to investigate pursuant to the second sampling methodology in Article 6.10?

58. Norway does not accept the relevance of these criteria in establishing a sample that comprises "the largest percentage of the volume of exports from the country in question which can reasonably be investigated." Under that sampling option, the sole criterion that an authority may take into account is the volume of exports of the companies considered for inclusion in the sample. The EC's six criteria introduce other considerations that are not relevant and that detract from the objective of sampling the largest volume of exports.

59. Through these additional considerations, the EC attempted to ensure: "a large coverage" of two types of producer ("integrated exporting producers" and "independent producers"); "a wide geographical coverage of the Norwegian coast"; "a large proportion of sampling returns"; "a large proportion of … the production, sales and export industry as a whole"; "a good proportion of domestic sales"; and, that more "producers" rather than "integrated producer/exporters" be included.

60. The EC nowhere explains: why it relied on these different criteria; how it reconciled them when they pointed in different directions; and how they related to the treaty requirement to select the sample with the "largest" volume of exports. Norway believes that these criteria were developed by the EC to comply with the requirement in EC domestic law to compose a sample with "the largest *representative* volume of *production, sales or exports* which can reasonably be investigated".[35] The word "representative" in EC law does not appear in the second sampling option in the *Anti-Dumping Agreement*. EC law, therefore, introduces an

[35] Article 17(1) of the EC Basic Regulation on anti-dumping (Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, as amended by Council Regulation (EC) No 2331/96 of 2 December 1996; Council Regulation (EC) No 905/98 of 27 April 1998; Council Regulation (EC) No 2238/2000 of 9 October 2000; Council Regulation (EC) No 1972/2002 of 5 November 2002; Council Regulation (EC) No 461/2004 of 8 March 2004; and Council Regulation (EC) No 2117/2005 of 21 December 2005). Exhibit NOR-168.

additional requirement that tempers the focus on "the largest percentage of the volume of exports". This additional requirement may explain why the EC introduced certain criteria into its analysis, such as geographical balance and "a large proportion of … the *production, sales and export* industry as a whole". FHL's discussions of these criteria were premised on the understanding that they were relevant to the requirement of "representativity" in EC law.

61. The additional qualification in EC law cannot justify the EC's reliance on a series of criteria that do not ensure that the sample include the "largest" volume of exports, as required by WTO law. Indeed, it is striking that *none* of the EC's criteria aims at ensuring that the "*largest*" volume of exports is examined.

62. For example, a focus on geographical balance does not pursue the requirements of examining the largest volume of exports. Similarly, the criterion of covering "a large proportion of *sampling returns*" has no bearing whatsoever on the requirements that attach to the second sampling option. Equally, the criterion of securing "a good proportion of *domestic* sales" is alien to a requirement to focus on the largest volume of *exports*.

63. If the EC wished to ensure that its sample was "representative" of the Norwegian industry, it should have selected the first sampling option. Under that option, the EC could have developed a range of criteria to ensure that the sample was "statistically valid". However, it chose not to do so.

> ***<u>Question 75</u>: In general, does the ADA express any preference for the type of interested party that may be investigated for the purpose of dumping? If not, does this support or undermine the view that Members may focus their investigations, that do not involve examinations of a limited number of interested parties, on any one or more types of interested parties?***
>
> ***And***
>
> ***<u>Question 76</u>: How do the parties understand the requirement under Article 6.10 to calculate an individual margin of dumping for each known exporter "or" producer?***

64. Contrary to the EC's views, the *Anti-Dumping Agreement* does not express any preference for the type of interested party that may be investigated in a dumping determination. As a result, an authority may not focus an investigation on producers to the exclusion of exporters, as the EC argues.

65. The *Anti-Dumping Agreement* addresses *international* price discrimination that arises when goods *are sold for export* at dumped prices. The focus of the investigation is, therefore, on *export* pricing behaviour. Numerous provisions highlight the central importance of *exporters and exportation*. Article 10.6(i) states that "the *exporter practices dumping*". Also, Articles 4.2 and 8 state that it is "*exporters*", not producers, that can "*cease exporting at dumped prices*". The Appellate Body has, furthermore, clarified that "under the *Anti-Dumping Agreement*, dumping determinations relate to the *exporter*, and both "dumping" and "margins of dumping" relate to the pricing behaviour of the *exporter*."[36]

66. In fact, the *Agreement* refers to "exporters" much more frequently than it does to foreign "producers".[37] Also, every provision that refers to exporters and foreign producers together, refers to exporters first.[38] None of this suggests that the EC is correct that the *Agreement* places "producers" in a preferential position, to the exclusion of "exporters".

67. The EC claims that the definition of normal value is "intimately linked to the notion of *production* costs", which it says exporters do not have.[39] In principle, however, normal value is based on the domestic *sales prices*, *not* production costs. Both exporters and producers can have domestic sales that can be used to calculate normal value. It is only by way of exception that normal value can be constructed. Even under the exception, only one of the methods of constructing normal value involves production costs and, even then, the *Agreement* expressly envisages the calculation of *production costs* for *exporters*.[40] Further, in previous salmon investigations, the EC has succeeded in constructing normal value for exporters using production costs.[41]

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[36] Appellate Body Report, *US – Zeroing (Japan)*, para. 165.

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

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

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

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

[41] *See, e.g.,* Council Regulation (EC) No 1890/1997 imposing a definitive anti-dumping duty on imports of farmed Atlantic salmon originating in Norway, paras. 13, 18 and 19; and Council Regulation (EC) No 930/2003 of 26 May 2003 terminating the anti-dumping and anti-subsidy proceedings concerning imports of farmed Atlantic salmon originating in Norway and the anti-dumping proceeding concerning imports of farmed Atlantic salmon originating in Chile and the Faeroe Islands, paras. 77 and 78. Exhibits NOR-2 and NOR-5.

68. In that context, Article 6.10 requires an authority to determine a margin for "each known exporter or producer". The EC suggests that because the *Agreement* contains a preference for calculating margins for producers, an authority is entitled to exclude exporters completely from an investigation. Norway disagrees.

69. The pricing behaviour that is addressed by dumping determinations made pursuant to Article 6.10 is export pricing behaviour for which exporters are, in principle, responsible. The exporter may, of course, be a producer that exports or it may be an independent exporter that buys the product on the domestic market for export. In either case, it is the exporter that practices dumping because the exporter controls the export price of the product. Thus, in *US – Zeroing (EC)*, the Appellate Body emphasized that the focus of a dumping determination is the *export* pricing behaviour of foreign producers and exporters.[42] The Appellate Body reiterated that statement in *US – Zeroing (Japan)*.[43]

70. At the least, the general rule in Article 6.10 places known exporters and producers on an equal footing, and requires that a margin be calculated for each of them. Nothing suggests that one category of interested party – particularly exporters – can simply be excluded from the investigation under the first sentence of Article 6.10. The panel in *Korea – Paper* reached this conclusion:

> We note that Article 6.10 mentions "exporters" *and* "producers" of the subject product and *requires that an individual margin be calculated for each of them.*[44]

71. The Appellate Body has also held that:

> "[M]argins" means the *individual* margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product.[45]

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[42] Appellate Body Report, *US – Zeroing (EC)*, para. 129. ("Establishing margins of dumping for exporters or foreign producers is consistent with the notion of dumping, which is designed to counteract the foreign producer's or exporter's pricing behaviour. Indeed, *it is the exporter, not the importer, that engages in practices that result in situations of dumping*.")

[43] Appellate Body Report, *US – Zeroing (Japan)*, para. 156. "The concept of dumping relates to the pricing behaviour of exporters or foreign producers".

[44] Panel Report, *Korea –Paper*, para. 7.157.

[45] Appellate Body Report, *Mexico –Rice*, para. 216, citing Appellate Body Report, *US – Hot-Rolled Steel*, para. 118. Underlining added.

72. The word "or", therefore, has a conjunctive meaning in the first sentence of Article 6.10, as it does in Articles 2.2.1.1, 2.2.2, 2.2.2(i), 2.2.2(ii), 2.2.2(iii), 4.1(i), 5.2(ii), 6.1.1, 6.10.1. 6.10.2., 6.11, 9.4, 9.5, and 12.2.2. Under the first sentence of Article 6.10, an authority cannot, therefore, simply exclude exporters from the investigation.

73. Under the sampling rules in the second sentence of Article 6.10, there is also no preference for producers. Under the first sampling option, the authority must examine a "reasonable number of *interested parties* or products". The term "interested parties" applies equally to exporters and producers, and demonstrates that both types of interested party must be considered for inclusion in the sample. The second sampling option comprises the largest volume of "exports *from the [exporting] country*", irrespective of whether the sampled parties are producers or not.

74. The due process obligations of Article 6.2 also prevent an authority from excluding *a priori* an entire category of interested party from an investigation. Article 6.2 provides that "*all interested parties* shall have a *full opportunity* for the defence of their interests." Under this provision, exporters and producers have an equal right to defend their interests in an investigation. The EC's exclusion of exporters from the investigation strips an entire category of interested parties of their right to defend their interests. They are deprived of the opportunity to show that they are not engaging in dumping and are, instead, always subjected to duties because producers are found to be dumping.

75. For all these reasons, an authority cannot focus an investigation on one category of interested party (producers) to the exclusion of another (exporters) as the EC suggests.

> ***<u>Question 77</u>: What are the implications for the calculation of individual margins of dumping, within the meaning of the first sentence of Article 6.10, of saying that interested parties, irrespective of type, accounting for "the largest percentage of volume exporters...that can reasonably be investigated" must in all cases be investigated, in a situation where the volume of exports of an exporter and the volume of exports of a producer (that exports both directly and via the first exporter) account for the largest volume of exports that can be reasonably investigated?***

76. As stated in Norway's response to Questions 75 and 76, the focus of the *Anti-Dumping Agreement* is on export pricing behaviour.

77. When an authority engages in sampling based on the second option, i.e. "*the largest percentage of the volume of the exports... which can reasonably be investigated*" the focus must be on the entity that engages in the export pricing behaviour that results in dumping.[46] In a situation where a producer exports both directly and through an unrelated trader, the volume that the producer exports directly (or through a related trader) is relevant to a dumping determination for the producer under the first sentence of Article 6.10, and is relevant to the selection of a sample under the second sentence of Article 6.10, because the producer determines the export price for this volume.

78. Sales made by a producer to unrelated traders are domestic sales that are not relevant in assessing the producer's export pricing behaviour for purposes of a dumping determination under the first sentence of Article 6.10. Nor are these sales relevant in assessing the volume of the producer's exports for purposes of composing a sample under the second sentence of Article 6.10.

79. Instead, the volume of these domestic sales is relevant to the unrelated trader that subsequently exported it. Under the first sentence, the trader is responsible for the export pricing behaviour that may create a situation of dumping; and, under the second sentence of Article 6.10, this volume must be attributed to the unrelated trader that made the exports.

80. In calculating a margin of dumping for a trader, normal value must be based on domestic sales of the like product by the trader at the same level of trade.[47] Only where the conditions of Article 2.2 are respected can normal value be constructed.

<u>Question 78</u>: To what extent may Article 2.5 of the ADA provide relevant context to the question of whether investigating authorities may focus their investigations on producers and/or exporters in the context of a limited examination?

81. The EC contends that Article 2.5 expresses a preference for calculating dumping margins for producers, rather than exporters.[48] Article 2.5 contains no such preference.

[46] Appellate Body Report, *US – Zeroing (EC)*, para. 129. ("Establishing margins of dumping for exporters or foreign producers is consistent with the notion of dumping, which is designed to counteract the foreign producer's or exporter's pricing behaviour. Indeed, *it is the exporter, not the importer, that engages in practices that result in situations of dumping*.")

[47] In an investigation of dumping of farmed salmon in 1997, the EC accepted the domestic sales prices of the exporters as the normal value. *See* 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, para. 15, second paragraph. Exhibit NOR-2.

82. The EC relies specifically on the fact that Article 2.5 refers to a situation in which "products are not produced in the country of export". The EC argues that Article 2.5 "underline[s]" the "importance of the position of producers of the exported product" and "envisages going back to the producer and basing the normal value on his data."[49] The EC misrepresents both the text and the meaning of Article 2.5.

83. Article 2.5 sets out rules for the comparison of export price and normal value in situations where products are not imported from the country of origin directly, but instead reach the importing Member via an "intermediate country".[50]

84. The basic rule in Article 2.5 is that normal value is "normally" the "comparable price in the country of export [i.e. the intermediate country]" (underlining added). Contrary to the EC's argument, Article 2.5 expresses no preference for "going back" to data pertaining to the producer in the country of origin. Instead, it expresses a preference for relying on sales prices for the like product in the country of export, without recourse to any data for the producer.

85. Article 2.5 goes on to define circumstances in which the authority "may", as an exception, determine normal value on the basis of "the price in the country of origin". Thus, even under the exception, Article 2.5 envisages basing normal value on sales prices, not on data pertaining to the producer's production costs.

86. As a result, the EC's argument that Article 2.5 expresses a preference for producer data over price data, or producer data over exporter data, is not supported by the text. The basic rule in Article 2.5 is to rely on price (in the intermediate country) as normal value. The alternative rule is, again, to rely on price (in the country of origin). Nothing in Article 2.5 indicates a preference for relying on a *producer's* production costs as the basis for calculating normal value. To the contrary, if Article 2.5 expresses any preference, it is a strong preference for using "price" as the basis for normal value. Because both exporters and producers have a "price", no preference for either type of interested party can be read into Article 2.5.

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[48] EC's FWS, paras. 146 and 147.
[49] EC's FWS, paras. 146 and 147.
[50] Panel Report, *US – Hot-Rolled Steel*, footnote 88. Dumping that arises in such circumstances is sometimes also referred to as "indirect dumping". *See* Panel Report, *US –Zeroing (EC)*, para. 9.46.

<u>Question 79</u>: Exhibit NOR-39, titled "Sampling Replies Submitted by FHL to the Commission", shows that "Salmar Farming AS" indicated in its "Sampling Form" that none of its turnover for the period of investigation was generated from export sales to the EU. In its "Sampling Form", "Nordlaks Oppdrett AS" did not indicate that it generated any turnover from export sales to the EU during the same period. Exhibit EC-4 indicates that the FHL requested that "Salmar A/S" be included in the EC's "sample" and also that a company called "Norlaks A/S" be likewise included in the EC's "sample".

(a) Could the parties please indicate whether this latter company is the same company as "Nordlaks Oppdrett AS"?

(b) If "Norlaks A/S" is the same company as "Nordlaks Oppdrett AS", could the EC please explain the basis for including "Nordlaks Oppdrett AS" in its limited examination and not "Salmar Farming AS", given that both companies were contained in the list of companies the FHL had requested be examined and that both seem to have reported no export sales for the period of investigation in their respective "Sampling Form"?

87. (a) For purposes of the EC's investigation, Nordlaks A/S is the same as "Nordlaks Oppdrett AS". Specifically, Nordlaks A/S is the 100 percent holding company for "Nordlaks Oppdrett AS" and "Nordlaks Produkter AS".

88. (b) Norway would like to note that Sinkaberg Hansen, another company that was included in the EC's sample, also reported zero export sales to the EC, just as Nordlaks Oppdrett and Salmar did. To Norway's knowledge, another sampled company, Stolt Seafarm, submitted no sampling form. Thus, the EC selected Nordlaks Oppdrett AS, Sinkaberg Hansen, and Stolt Seafarm for the sample without any information in the record regarding their export sales, while excluding Salmar for that same reason.

D. *BELOW-COST SALES OUTSIDE OF THE ORDINARY COURSE OF TRADE*

***Question 55*: In its First Written Submission (para. 354), Norway describes the below-cost sales test applied by the EC as follows: "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 for the sub-type of the product". Does Norway consider that this test reflects the methodology set out in the last sentence of Art. 2.2.1? If not, why not? If so, does this not imply that the test applied by the EC complied with Art. 2.2.1?**

(i) The EC Did Not Make a "Determination" Regarding "Cost Recovery"

89. The Panel asks whether the quoted phrase may "*imply*" that the EC determined that sampled producers' respective prices did not permit the recovery of costs in a reasonable period. The Panel's suggestion of an "implicit" determination draws on *Norway's* description of the EC's below-cost sales tests, and not the EC's own published determination.

90. Under Article 2.2.1, an authority must "*determine*" that below-cost sales are made at prices that do not provide for cost recovery within a reasonable period of time. The Appellate Body has made clear that an investigating authority's "determination" cannot leave anything "merely *implied or suggested*; it must be clear and unambiguous [as well as] straightforward".[51] Given these requirements, Norway does not consider that the phrase quoted by the Panel from *Norway's First Written Submission* can be used to "imply" that the EC set forth the required determination in the published determination. A panel can hardly find the investigating authority's "determination" in the Complainant's submissions.

91. The EC's rejection of below-cost sales does not even mention the term "cost recovery" or the "reasonable period" over which costs were assessed, far less make a determination in that regard. In this dispute, the EC has also not asserted that it made any "determination" regarding the reasonable period for cost recovery, implicit or otherwise.

92. The passage quoted by the Panel is Norway's description of the EC's "80 percent" and "10 percent" tests. Norway was not describing any "cost recovery" test performed by the EC. Nothing in the published determinations supports the view that the EC conducted the

[51] Appellate Body Report, *US – Line Pipe*, paras. 194 and 217; Appellate Body Report, *US – Steel Safeguards*, paras. 296 and 442. Emphasis added.

comparison as part of a "cost recovery" test. In fact, nothing suggests that the authority made any determination regarding "cost recovery".

93. If the EC's comparison of individual sales prices with average costs was intended to be part of a "cost recovery" test, the EC was obliged to say so. The EC should also have stated the duration of the "reasonable period" for cost recovery. In this dispute, the EC has stated that determining the duration of the "reasonable period" was "rendered more complicated" by the fact that it calculated certain costs on a three year basis because of project accounting.[52] However, the published determination does not explain how that complication was resolved.

94. In the absence of any statement by the EC that it compared prices with average costs as part of a "cost recovery" test, the Panel cannot "imply" from some other part of the EC's findings – far less from Norway's submissions – that the EC made a "determination" regarding cost recovery.

(ii) The Test Quoted by the Panel Does Not Meet the Requirements of Article 2.2.1

95. Assuming that an implied determination is permissible, *quod non*, the Panel asks whether the EC's comparison of individual sales prices and weighted average costs establishes that prices do not provide for the recovery of costs in a reasonable period. Specifically, the Panel suggests that the EC's comparison complies with the last sentence of Article 2.2.1. Although the EC never stated that costs were averaged over the IP, the Panel's question assumes that costs were averaged over this period.

96. The second sentence of Article 2.2.1 sets forth specific circumstances in which prices are *deemed* to recover costs. The second sentence applies when ("if") an authority determines that prices "are below per unit costs *at the time of sale*". If the sales price is sufficient to recover costs "at the time of sale", there is no need for the authority to establish whether the price is also sufficient to recover per unit costs weight averaged over the IP. By recovering costs "at the time of sale", a producer or exporter has recovered costs within a reasonable period. Norway notes that, because costs vary over time, it is perfectly possible

[52] EC's FWS, para. 195.

for a sales price to be above cost at the time of sale, but below costs averaged over a longer period.

97. In this investigation, the EC did not establish that the prices of sales rejected under Article 2.2.1 were below cost "at the time of sale". The passage that the Panel quoted from Norway's submission refers only to a comparison of sales prices with average costs. The EC has, therefore, not complied with the second sentence of Article 2.2.1.

98. Even if the EC had determined that costs were not recovered either at the time of sale or over the IP (*quod non*), this does not necessarily mean that costs were not recovered within a reasonable period. The last sentence of Article 2.2.1 does not establish an *exhaustive* test for determining whether below-cost prices provide for the recovery of costs within a reasonable period. The last sentence merely describes *one situation* in which an authority must conclude that prices allow for cost recovery in a reasonable period. The last sentence, therefore, serves to protect foreign producers and exporters by fixing the *minimum* duration of the reasonable period as equal to the IP. The authority cannot reject sales by reason of price on the grounds that costs were *not* recovered in a period *shorter than* the IP.

99. However, the last sentence does not establish that the *maximum* duration of the "reasonable period" is always *equal* to the duration of the IP. Thus, even if costs were not recovered in the IP, the prices may still provide for cost recovery over a "reasonable period". Therefore, the mere fact that the EC compared prices with average costs *over the IP* does not necessarily mean that costs would not be recovered *over a reasonable period* – absent a determination that the "reasonable period" equaled the IP.

100. If the drafters had intended that cost recovery period should *always* equal the IP, they could simply have stated that below-cost prices could be rejected when, *inter alia,* the prices "do not provide for the recovery of all costs within [*the period of investigation*]". The drafters' decision to refer to a "*reasonable period of time*" instead of the IP must be given meaning. The ordinary meaning of the word "reasonable" requires that the period be determined taking into account the specifics of each investigation, including the product, the producer or exporter, and the industry at issue.[53] Although the "reasonable period of time"

[53] Norway's FWS, paras. 345 – 351.

may equal the "period of investigation", in some circumstances it may be longer. Norway elaborates on this answer in paragraphs 108 to 116 below.

101. In this dispute, the EC failed to make any determination of the duration of the reasonable period. Thus, it did not determine that the reasonable period equaled the IP nor that it was longer than the IP. Absent such a determination, the EC failed to comply with Article 2.2.1.

102. Norway notes that the EC has insisted upon the importance of calculating production costs over a three year period because of the duration of the growth cycle of salmon. This is precisely the type of factor that the EC should have taken into account in determining whether the "reasonable period" necessarily equaled the IP.

> ***<u>Question 80</u>: How should the Panel interpret the requirement in Article 2.2.1 of the ADA to "determine" whether below-cost sales do not provide for the recovery of all costs within a reasonable period of time, in the light of the Vienna Convention rules of treaty interpretation?***

103. The ordinary meaning of the word "determine" has already been examined by the Appellate Body. In *US – Corrosion-Resistant Steel Sunset Reviews*, the Appellate Body found that, in the context of "review", the word "determine" "suggest[s] that authorities … must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination."[54] The Appellate Body recently reiterated this finding in *US – Zeroing (Japan)*.[55] The Appellate Body has also held that a "determination" must be set forth in an "explanation" that is "clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms."[56] In the context of Article 2.2.1, which applies to investigations and reviews, the verb "determine" has the same meaning.

104. In this investigation, the EC has not made any determination regarding the "cost recovery" test under Article 2.2.1. Thus, regardless of the proper interpretation of the costs recovery test in that provision, the EC has not demonstrated that it complied with the conditions for rejecting sales as not in the OCT by reason of price.

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[54] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111.
[55] Appellate Body Report, *US – Zeroing (Japan)*, para. 182.
[56] Appellate Body Report, *US – Line Pipe*, paras. 194 and 217; Appellate Body Report, *US – Steel Safeguards*, paras. 296 and 442.

<u>Question 81</u>: What does the obligation to "determine" whether below-cost sales do not provide for the recovery of all costs within a reasonable period of time require an investigating authority to actually do when it acts as described in the last sentence of Article 2.2.1?

105. Norway has just explained that the duty to "determine" requires an authority to state explicitly the nature and content of its findings in a reasoned and adequate explanation. The last sentence of Article 2.2.1 obliges the authority to find, in specified circumstances, that sales prices provide for the recovery of costs (prices "*shall be considered*" to provide for cost recovery). In making a determination consistent with the last sentence of Article 2.2.1, an authority must explain why it concluded: (1) that sales prices were "below per unit costs at the time of sale" and (2) that prices were "above weighted average per unit costs for the period of investigation".

106. In reply to Questions 82 and 83, Norway outlines the general considerations that an authority should take into account in deciding on the duration of the "reasonable period" for cost recovery.

<u>Question 82</u>: How do you understand the last sentence of Article 2.2.1 to interact with the cost-recovery condition set out in the first sentence? Is it exhaustive of the situations when below-cost sales may be found to provide for cost recovery within a "reasonable period of time" or is it just one example of when below-cost sales will be deemed to provide for cost recovery within a "reasonable period of time"?

And

<u>Question 83</u>: Please explain whether you consider that the "reasonable period of time" could ever be different from the 12 month period corresponding to the investigation period that is referred to in the final sentence of Article 2.2.1, for the purpose of satisfying the cost-recovery condition set out in the first sentence of Article 2.2.1?

107. The first sentence of Article 2.2.1 sets out that the investigating authority must determine that three separate conditions are met before it can reject sales as not in the OCT by reason of price. One of those conditions is that an authority cannot reject below-cost sales unless the sales prices "do *not* provide for the recovery of all costs within a *reasonable period of time*". The last sentence of Article 2.2.1 specifies a situation in which an authority must determine the *contrary*, namely that sales prices *do* provide for the recovery of costs in a

reasonable period when those costs are recovered in the "period of investigation" ("IP"). In essence, the Panel's two questions ask whether the "reasonable period" *always* equals the IP.

108. In Norway's view, the "reasonable period" and the "period of investigation" are not necessarily identical, although they may be in some cases. In specifying the cost recovery condition in both the first and the second sentence of Article 2.2.1, the drafters chose to refer to a period other than the "period of investigation". If the drafters had intended that the sales could be rejected, *inter alia*, whenever costs were not recovered in the period of investigation, they could easily have said so. The first sentence of Article 2.2.1 would simply have read: "… [sales] are at prices which do not provide for the recovery of all costs within [*the period of investigation*]". However, the drafters did not choose this formulation.

109. In fact, the drafters carefully referred to *three different time periods* in Article 2.2.1: (1) "an *extended* period"; (2) "a *reasonable* period"; and (3) the "period of *investigation*". Under the *Vienna Convention*, the textual differences between these terms must be given meaning. A treaty interpreter cannot simply collapse the meaning of different terms that are used in a single sentence of a single treaty provision.

110. The ordinary meaning of the word "reasonable" requires that the reasonable period be determined taking into account the specifics of each investigation, including the product, the producer or exporter, and the industry at issue.[57] Although the "reasonable period" may equal the IP, in some circumstances the reasonable period may be longer.

111. Normal value may be based on below-cost prices that provide for cost recovery within a "reasonable period" precisely because these prices may be part of the "normal commercial practice" in the industry.[58] For example, consistent with basic economic principles, producers may be required to adopt short-term pricing strategies that do not provide for the full recovery of total average production costs, i.e., total average variable and fixed costs. These strategies may be carried out in response to periods of recession during normal business cycles or as a "buy-in" approach to market entry. In these instances, producers must set their prices at levels that recover average variable costs over the short term in order to ensure continued cash flow. Over the long term, however, the prices charged by producers

[57] Norway's FWS, paras. 345 to 351.
[58] Appellate Body Report, *US – Hot-Rolled Steel*, para. 140.

must recover not only variable costs, but also fixed costs in order to replace productive fixed assets. One way to achieve this is through increased production volumes that lower average unit fixed costs, an event normally associated with upturns in the business cycle.

112. The short-term period over which a given producer will engage in variable cost pricing may be shorter or longer than the IP depending on normal commercial practice for the product and industry(e.g. the length of the business cycle). However, because normal value is based on prices reflecting "normal commercial practice", the *Agreement* allows for costs to be recovered over a longer reasonable period that reflects this normal practice.

113. In considering whether prices provide for the recovery of costs within a reasonable period, an authority could take into account such factors as: (1) whether the producer's unit prices during the IP cover average variable costs, (2) whether production volumes during the IP are lower than normal due to a contraction in the industry's business cycle, and (3) whether unit prices during the IP are at a level that would recover both average variable costs and average fixed costs, where fixed costs are computed based on "normalized" production volumes over the business cycle.

114. Norway also observes that Question 83 states that the period of investigation is 12 months. However, the *Anti-Dumping Agreement* does not specify a duration for the period of investigation. The *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations* suggests that the IP be 12 months and "in no case less than six months".[59] The IP may, therefore, be as short as six months. If the "reasonable period" necessarily equaled the IP, this would mean that the duration of the "reasonable period" could sometimes be as short as six months.

115. However, the administrative considerations that dictate the authority's choice of the duration of the IP have nothing to do with the normal commercial practice within which producers and exporters should reasonably recover costs. For example, in an industry with a long business cycle, an authority may opt for a short IP for administrative reasons. The choice of a shorter IP does not, however, mean that it is thereby "reasonable" to expect producers and exporters in that industry to recover their costs within that same shorter period. Thus, if the "reasonable period" and the IP were always equated, normal value would be

[59] G/ADP/6, adopted 5 May 2000.

divorced from prices that reflect normal commercial practice for certain products and industries. Instead, the drafters opted for a "reasonable period" that has sufficient flexibility to ensure that normal value reflects the norm for the particular product and industry.

116. The *Agreement* does make one important link between the "reasonable period" and the IP. The last sentence of Article 2.2.1 specifies that the duration of the "reasonable period" cannot be *shorter* than the IP. Thus, provided that costs are recovered during the IP, an authority *cannot* reject sales prices as not in the OCT by reason of price. This sentence, therefore, protects foreign producers and exporters by fixing the *minimum* duration of the reasonable period as equal to the IP. However, this sentence does not state that the *maximum* duration of the "reasonable period" is the same as the IP; it does not state that the "reasonable period" always equals the IP; and it does not state that there are no other situations in which costs can be recovered in a reasonable period.

E. *REJECTION OF ACTUAL SG&A AND PROFIT DATA*

<u>Question 56</u>: In paragraph 381 of its First Written Submission, Norway states that the EC rejected the actual SG&A cost data in the case of only one company, [[xx.xxx.xx]]. At footnote 266 of its First Written Submission, Norway appears to state that the EC also rejected the SG&A costs for [[xx.xxx.xx]], but it does not elaborate any claim in respect of [[xx.xxx.xx]] in this section of its First Written Submission. Please confirm that it is [[xx.xxx.xx]] and not [[xx.xxx.xx]] that forms the basis of Norway's claim in this part of its First Written Submission.

117. Norway confirms that the company for which the EC rejected actual SG&A cost data is [[xx.xxx.xx]] and not [[xx.xxx.xx]].

***Question 57**: The Provisional Regulation indicates that the less-than-10% profitable sales test was part of a test applied by the EC to determine whether domestic sales were made in the "ordinary course of trade". Please comment on the extent to which you agree with this statement.*

And

***Question 85**: Please explain the extent to which it is permissible under the ADA to assess whether domestic sales are made in the "ordinary course of trade" through the application of the less-than-10% "profitable" sales test? To what extent can the volume of "profitable" domestic sales compared to total domestic sales be an objective basis for assessing whether those sales are compatible with "normal" commercial practice?*

118. Norway agrees with the statement in Question 57 that, in this investigation, the EC applied the 10 percent test as part of a method for determining whether domestic sales were made in the ordinary course of trade ("OCT"). The EC also clarified in its First Written Submission that, when the volume of profitable sales was less than 10 percent of the volume of loss-making sales, the EC concluded that there were zero sales in the OCT.[60] The EC applied this test in deciding whether to construct normal value under Article 2.2; and, in constructing normal value, in deciding whether to use actual sales data to determine amounts for SG&A costs and profits under Article 2.2.2.

119. Norway disagrees that the EC's 10 percent test is a permissible basis for determining whether sales are made in the OCT. Norway has set out its views on the EC's 10 percent test in paragraphs 86 to 89 of its Opening Statement.

120. In *US – Hot-Rolled Steel*, the Appellate Body stated that normal value reflects the price of the like product in "*a sales transaction*" that is concluded on terms and conditions that are compatible with "'*normal' commercial practice* for sales of the like product, in the market in question, at the relevant time".[61]

121. Thus, sales in the ordinary course reflect *normal practice for all participants* in the marketplace, and not just the norm for a particular producer or exporter. Moreover, the terms and conditions of each individual sales transaction ("a sales transaction") must be assessed in

[60] EC's FWS, paras. 228 and 229.
[61] Appellate Body Report, *US – Hot-Rolled Steel*, para. 140.

light of "normal commercial practice". If a sales transaction is consistent with "normal commercial practice" in the marketplace, that sale is in the OCT, irrespective of whether other sales by the same producer or exporter are not.

122. Under the EC's 10 percent test, an exporter's profitable sales are treated as not in the OCT because of the relative volume of its loss-making sales. However, the volume of loss-making sales provides no indication whether the profitable sales are consistent with "normal commercial practice" in the marketplace. The terms and conditions of the profitable sales may all be fully consistent with "normal commercial practice" and, therefore, constitute a perfectly sound basis for determining normal value. It is irrelevant that an exporter makes other sales that are not consistent with "normal commercial practice".

123. This may be illustrated by example. Assume that two exporters each make 1,000 profitable sales of a product on identical terms and conditions that are consistent with "normal commercial practice". Imagine that the first exporter also makes 9,001 loss-making sales, but the second exporter makes no loss-making sales. The EC's approach would lead to the illogical result that, for the first exporter, the EC would reject the 1,000 profitable sales as outside the OCT because they represent less than 10 percent of all the exporter's sales of the product. However, for the second exporter, the EC would accept that 1,000 identical sales are in the OCT because the second exporter made no loss-making sales.

124. This is contrary to Articles 2.1 and 2.2 because "normal commercial practice" does not vary from one commercial operator to another. The terms and conditions of a sale are either consistent with "normal commercial practice" or they are not. That determination cannot vary depending on the volume of an exporter's *other* sales that are not in the OCT, for example because they are loss-making.

125. Consistent with this approach, Article 2.2 specifies no volume threshold in deciding whether there are sales in the OCT. The provision permits the construction of normal value solely "when there are *no* sales" in the OCT. As Norway noted in its Opening Statement, the ordinary meaning of the word "no" is "*not any*".[62] Under the EC's interpretation, Article 2.2 would read "When there are *10 percent* of sales" in the OCT. Modifying the words of treaty provisions in this manner is not acceptable under the *Vienna Convention*.

[62] Exhibit NOR-151.

126. In fact, the drafters specified volume thresholds when these were relevant. Thus, Article 2.2 distinguishes between the conditions relating to *low-volume* sales and sales *in the OCT*.[63] In connection with low-volume sales, Article 2.2 expresses a precise volume threshold in footnote 2. Further, in connection with below-cost sales, Article 2.2.1 also expresses a precise volume threshold in footnote 5. If the drafters had also intended to apply a low-volume test to sales in the OCT, they would have so specified.[64]

> ***Question 84: As we have understood the facts so far, the basis for the exclusion of the domestic sales data of five investigated companies was that those sales were found not to be in the "ordinary course of trade". The EC's Provisional Regulation reveals that a three step test was applied to make this determination, which included the less-than-10% "profitable" sales test. Are we to understand that all five investigated companies had a level of "profitable" sales that was less than 10% of the volume of total domestic sales? In other words, was the less-than-10% "profitable" sales test actually the basis for the exclusion of domestic sales data for each of the companies concerned? Please substantiate your explanations in respect of each examined producer with reference to information and evidence on the file of the investigation.***

127. Norway's understanding is that, on the basis of the 10 percent test, the EC rejected domestic sales for certain models for at least three companies. These companies are [[xx.xxx.xx]], [[xx.xxx.xx]], and [[xx.xxx.xx]]. Norway's understanding is based on Excel spreadsheets provided to the companies as part of the company-specific disclosures and on the sales databases submitted by the companies in response to the EC's anti-dumping questionnaire. Norway believes that [[xx.xxx.xx]] was one of the five companies with overall representative sales. Thus, the EC could also have rejected some domestic sales for this company on the basis of the 10 percent test. However, Norway does not have disclosure documents for this company that would enable it to establish whether this is so.

128. Norway explained the EC's methodology for deciding whether it could construct normal value in paragraphs 354 to 356 and 375 to 377 of its First Written Submission. The EC applied the same methodology in deciding whether to use actual sales data for SG&A costs and for profits.[65] To recall, the EC proceeded in three steps. *First*, the EC established whether the company's domestic sales of the product as a whole amounted to 5 percent of

[63] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 99.
[64] Norway's Opening Statement, paras. 88 and 89.
[65] Provisional Regulation, para. 27. Exhibit NOR-9.

export sales. *Second*, if the company had overall representative sales, the EC established whether the company's domestic sales by model amounted to 5 percent of export sales of that model. *Third*, for each model with representative sales, the EC established whether at least 10 percent of domestic sales were profitable. When the domestic sales subject to one of these tests did not meet the standard, they were all excluded from the investigation.

129. The EC found in the Provisional Regulation that five companies had overall representative sales.[66] The EC found further that just one of the five companies had sales in the OCT for an unspecified number of models.[67] Thus, four of the five companies had no sales in the OCT. From the company-specific disclosures, including the Excel spreadsheet calculations, Norway understands that the five companies with overall representative sales were: [[xx.xxx.xx]], [[xx.xxx.xx]], [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]].[68] From the same information, Norway understands that for:

- [[xx.xxx.xx]], domestic sales for <u>thirteen models</u> were rejected on the basis of the 10 percent test.[69]
- [[xx.xxx.xx]], domestic sales for <u>one model</u> was rejected on the basis of the 10 percent test.[70]
- [[xx.xxx.xx]], domestic sales for <u>one model</u> was rejected on the basis of the 10 percent test.[71]
- [[xx.xxx.xx]], domestic sales for all models were rejected on the basis of the 5 percent test.[72]
- [[xx.xxx.xx]], Norway does not have any disclosure documents to ascertain whether any domestic sales were rejected on the basis of the 10 percent test.

[66] Provisional Regulation, para. 29. Exhibit NOR-9.
[67] Provisional Regulation, para. 29. Exhibit NOR-9.
[68] Norway does not have disclosure documents for [[xx.xxx.xx]]. However, [[xx.xxx.xx]] must be the fifth company because [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]] did not have overall representative sales, and the EC did not examine [[xx.xxx.xx]] or [[xx.xxx.xx]] at the provisional stage (*see* Provisional Regulation, para. 18).
[69] In the Definitive Disclosure to [[xx.xxx.xx]], the EC refers to "some" sales that were not in the OCT, without specifying the number of models. According to the disclosed Excel spreadsheets, thirteen models were rejected on the basis of the 10 percent test. Exhibit NOR-[[xx.xxx.xx]].
[70] *See* the Definitive Disclosure to [[xx.xxx.xx]], Annex II, Page 1. Exhibit NOR-[[xx.xxx.xx]].
[71] *See* the Provisional Disclosure to [[xx.xxx.xx]], Annex II, Page 1. Exhibit NOR-[[xx.xxx.xx]]. Norway does not have a copy of [[xx.xxx.xx]]'s Definitive Disclosure. However, given that, at the Definitive stage, the EC merely "confirmed" its findings from the Provisional Determination, Norway understands that [[xx.xxx.xx]]'s data did not change in this respect.
[72] *See* the Definitive Disclosure to [[xx.xxx.xx]], Annex II, Page 1. Exhibit NOR-[[xx.xxx.xx]].

F. *ALLEGED RELIANCE ON "FACTS AVAILABLE"*

<u>Question 58</u>: How does Norway respond to the EC's allegation that if there is no alternative to either submitted information or "facts available", then it would be impossible to impose an anti-dumping duty on non-sampled producers under Article 9.4 of the ADA, in a case where all of the margins of dumping of all sampled producers were calculated on the basis of facts available?

130. According to the Appellate Body, Article 6.8 and Annex II set forth rules that allow an investigating authority "to make determinations by remedying gaps in the record which are created, in essence, as a result of deficiencies in, or a lack of information supplied by the investigated exporters."[73] In that situation, an authority may have recourse to "best information available" (or "facts available") to fill gaps in the "record".[74]

131. Article 6.8 and Annex II impose rules that protect the "legitimate interests of the parties to submit information and to have that information taken into account."[75] In particular, before resorting to "facts available" obtained from a secondary source, an authority must respect all of the conditions in those provisions.[76]

132. The rules in Article 6.8 and Annex II that protect investigated parties would be eviscerated if an authority could reject submitted information, and resort to information from a secondary source, without respecting those rules. In short, investigated parties would be totally deprived of the protections that are afforded in Article 6.8 and Annex II. For this reason, the EC's interpretation must be rejected.

133. Article 9.4 prevents producers and exporters that were not investigated from being "prejudiced by gaps or shortcomings in the information supplied by the investigated exporters."[77] Thus, an authority cannot use margins calculated with facts available to determine the "all others rate" applied to non-sampled companies. In *US – Hot-Rolled Steel*, the Appellate Body recognized that Article 9.4 "does not expressly address" how the rules in that provision should apply "in the event that *all* margins are to be *excluded* from the

[73] Appellate Body Report, *US – Hot-Rolled Steel*, para. 123.
[74] *See* Panel Report, *Mexico – Rice*, para. 7.166.
[75] Appellate Body Report, *US – Hot-Rolled Steel*, para. 86.
[76] Appellate Body Report, *Mexico – Rice*, para. 287 – 289. *See, also*, para. 292.
[77] Appellate Body Report, *US – Hot-Rolled Steel*, para. 123.

calculation, under the prohibitions."[78] The Appellate Body noted that that appeal did not raise the issue of how this "*lacuna* might be overcome".[79] In Norway's view, however this *lacuna* is overcome, the rules in Article 6.8 and Annex II must be respected fully. In any event, Norway considers that there is no reason for the Panel to address this interpretive question in this dispute because the EC calculated several margins without using facts available.

> ***Question 86: Do the parties agree that the alleged confusion surrounding [[xx.xxx.xx]] filleting costs may be properly characterised as a situation where "necessary information" was not "otherwise" provided within the meaning of Article 6.8?***

134. Norway does not agree with this characterization. The confusion alleged by the EC arose from the terms of Grieg's initial questionnaire response. This alleged confusion could only constitute the *starting point* of a process of evaluation, by the investigating authority, as to whether the situation described in Article 6.8 obtains. It is only as an *outcome* of this evaluation that the investigating authority could conclude that "necessary information" was not "otherwise" provided.

135. Annex II to the *Anti-Dumping Agreement* lays down substantive criteria and procedural guarantees that govern this process of evaluation.[80] In particular, if an investigating authority considers that there is confusion surrounding the information initially submitted by an interested party, it must apply the provisions of Annex II to attempt to obtain explanations and information to dispel any confusion. In the case of Grieg's filleting costs, the EC rejected information submitted by Grieg that dispelled any confusion, without respecting the requirements of Annex II(3) and Annex II(6). Therefore, the EC failed to meet the conditions in Article 6.8 for concluding that Grieg did not provide "necessary information within a reasonable period".

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[78] Appellate Body Report, *US – Hot-Rolled Steel*, para. 126. Original emphasis.
[79] Appellate Body Report, *US – Hot-Rolled Steel*, para. 126. Original emphasis.
[80] "Annex II […] is incorporated by reference into Article 6.8". Appellate Body Report, *US – Hot-Rolled Steel*, para. 75. "Annex II […] contains certain substantive parameters […] which address [among others] when facts available can be used". Panel Report, *Egypt – Steel Rebar*, para. 7.152.

<u>Question 87</u>: Do you believe that there is an obligation in the ADA to determine a margin of dumping for non-sampled companies? If so, where in the ADA do you find it?

136. No. Norway refers also to its answer to Question 59, at paragraphs 143 to 145 below.

<u>Question 88</u>: In Mexico – Rice, the Appellate Body found that:

> ***"... an investigating authority that uses the facts available in the application for the initiation of the investigation against an exporter that was not given notice of the information the investigating authority requires, acts in a manner inconsistent with paragraph 1 of Annex II to the Anti-Dumping Agreement and, therefore, with Article 6.8 of that Agreement."***[81]

Please explain, in the light of the Appellate Body's finding, whether you consider that the Notice of Initiation, published by the EC in the Official Journal and provided to the Norwegian "industry associations", constituted "notice of the information the investigating" authority required, within the meaning of Article 6.8 and paragraph 1 of Annex II.

And

<u>Question 89</u>: Do you believe that Article 6.8 and paragraph 1 of Annex II require that an investigating authority must notify companies individually or would notification through an industry association or official public gazette suffice?

137. No, neither publication of the Notice of Initiation in the Official Journal nor the provision of that Notice to industry associations constitutes the notice required by Article 6.8 and Annex II. Annex II(1) requires the authority to "specify in detail the information required from any interested party" and to "ensure that "the party" is aware that, if the required information is not supplied within a reasonable time, the authority may make determinations using facts available. As the Appellate Body held, under Article 6.8 and Annex II, facts available can only be applied to a particular interested party, if the investigating authority requests specific detailed information from *that interested party*, and makes that party "aware" of the consequences of not providing the information.[82] The Appellate Body stated that, if an exporter is "*not notified of the information required to be*

[81] Appellate Body Report, *Mexico – Rice*, para. 259.
[82] Appellate Body Report, *Mexico – Rice*, para. 259.

submitted to the investigating authority", it is not given the required opportunity to provide that information.[83]

138. Accordingly, it is not sufficient under Article 6.8 and Annex II for an authority to inform *other* interested parties – such as the Government of the exporting country or industry associations – of information that is required of a particular producer or exporter. This does not afford the particular party from whom information is, in fact, requested of the necessary opportunity to provide that information, nor does it give that interested party the necessary warning regarding non-compliance. In short, for purposes of Article 6.8 and Annex II, an authority cannot rely on a third party to forward requests. Instead, the particular party must be informed, in detail, of the information required from it, and also of the consequences of not providing that information in timely fashion.

139. The requirements of Article 6.8 may be contrasted with the requirements of Article 6.1.3. Under Article 6.1.3, an authority is required to notify the "full text of the written application" by the complainants to all "known exporters" (producers are not mentioned). This is a general information notice to known exporters that does not require any action by the recipient. In the case of this notice, footnote 16 provides that, where the number of exporters is "particularly high", the authority need "only" provide the full text of the written application to the "authorities of the exporting Member" and a "relevant trade association".

140. However, under Article 6.8 and Annex II, the authority makes detailed company-specific requests for information that require action by the recipient; moreover, any failure to act carries potentially adverse consequences for the recipient. In the context of these detailed requests for information, the treaty does not afford the authority with the possibility for notifying the "authorities of the exporting Member" and a "relevant trade association"" instead of notifying the companies directly.

141. Further, under Article 6.8 and Annex II, the process of securing information from a particular party requires ongoing dialogue between the authority and the party from whom information is requested. Annex II, as a whole, envisages that the entire dialogue take place between the authority and the particular interested party from which information is requested ("the party"; "an interested party; "the interested party"; "the supplying party").

[83] Appellate Body Report, *Mexico – Rice*, para. 259.

142. In the present case, the Notice of Initiation[84] was not sent to the exporters and producers listed in Exhibit NOR-152. Nonetheless, the EC deemed the failure by these parties to be non-cooperation, and applied facts available to them. For these parties, *Mexico – Rice* is directly on point – they did not receive any request for information and were not informed of the consequences of not providing the non-requested information. By applying facts available to these parties, the EC violated Article 6.8 and Annex II.

G. *MARGINS OF DUMPING FOR NON-SAMPLED COMPANIES*

> ***Question 59**: Norway argues that the EC violated Article 9.4 in making "**dumping determinations" for non-sampled companies (Norway Opening Statement, para. 103). It could be argued that a determination of dumping is made under Article 2 of the Agreement, while Article 9 relates to the imposition and collection of duties, and Article 9.4 establishes a maximum limit on the amount of duties that may be collected from companies for which no determination of dumping under Article 2 has been made, because they were not individually examined. Please comment on this view.*

143. In the Definitive Regulation, the EC refers to the fact that it made dumping determinations for "non-sampled companies" and "non-cooperating companies"[85]. The dumping margins for these companies are set out in paragraph 32 of the Definitive Regulation. Paragraph 41 of the Provisional Regulation also includes a specific dumping determination for "non-cooperating companies" [86]. The EC's First Written Submission further confirms that the EC made determinations of dumping margins for these companies.[87]

144. Under Article 9.4(i), the weighted average margin of dumping is the ceiling for *ad valorem* duties imposed on non-examined companies. The EC has imposed fixed duties by reference to a weighted average *ad valorem* margin that the EC admits is incorrectly calculated because it exceeds the weighted average of the margins established for the

[84] Notice of Initiation of an anti-dumping proceeding concerning imports of farmed salmon originating in Norway, 2004 OJ C 261/6, dated 23 October 2004. Exhibit EC-9.
[85] Definitive Regulation, paras. 30 and 31. Exhibit NOR-11.
[86] Provisional Regulation, para. 41, states: "From the information available, it was concluded that these companies did not dump at a level lower than any of the companies included in the sample. The residual dumping margin was consequently set at the level of the highest individual dumping margin established for a cooperating company. [...]." The factual basis for this determination cannot be found either in the Regulation itself or in the non-confidential file. Exhibit NOR-9.
[87] EC's FWS, paras. 322, 346 and 416.

investigated producers.[88] By imposing duties that exceed the ceiling in Article 9.4(i), the EC violated that provision.

145. On the general WTO-consistency of fixed duties, please also see Norway's reply to Question 92 at paragraph 254 to 257 below.

> ***Question 60: Does Norway know of any salmon producer that did not receive the "warning" referred to by the EC at paragraph 324 of its First Written Submission?***

146. Yes. In Exhibit NOR-152, Norway has provided the Panel with a list of sixty-seven companies that did not receive that "warning" and yet were treated as non-cooperating. FHL provided the Commission with this list of sixty-seven companies by an annex to a letter of 4 May 2005.[89] Furthermore, on 2 June 2005, representatives of the non-sampled companies that were treated as "non-cooperating" attended a hearing in Brussels. They explained that sixty-seven companies that the EC had treated as non-cooperating had not received any request for information. They further indicated that all the companies were committed to cooperating fully in providing all information that the EC might need in the investigation.[90] However, the EC did not request any information from any of the companies. Nonetheless, in the Definitive Regulation, the EC continued to treat these companies as non-cooperating, without ever specifying the nature of the alleged non-cooperation.

H. *CNV ADJUSTMENT CLAIMS*

> ***Question 61: Please clarify whether the claims made in respect of the EC's smolt cost adjustment (First Written Submission, paras. 992-1026) are based on both Articles 2.2 and 2.2.1.1 or only Article 2.2 or only Article 2.2.1.1.***

147. Norway's claims in respect of the EC's smolt cost adjustment are based on both Articles 2.2 and 2.2.1.1.[91]

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[88] Definitive Regulation, para. 136. Exhibit NOR-11.

[89] Annex 2 to the letter from FHL to Commission of 4 May 2005, Exhibit NOR-152. Annex 2 was submitted to the Commission as a follow-up to the 4 May 2005 letter, on 9 May 2005 (*see* the letter of 4 May 2005, page 2, under section 4, "Assessment"). The fifth column of the table comprising Annex 2 to the letter of 4 May 2005 indicates, for each listed company, whether it received the EC's sampling form.

[90] Post-hearing brief of 3 June 2005 to the EC from representatives of the non-sampled companies that allegedly failed to cooperate. Exhibit NOR-153.

[91] *See* Norway's FWS, paras. 1108, 1011, 1015, and 1025.

> ***Question 62**: Norway appears to argue that non-recurring costs can only be used as a cost of production for the purpose of the construction of normal value when they benefit current or future production. How does Norway reconcile this statement with the language of the last sentence of Article 2.2.1.1 which specifies that "[u]nless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production..."? (Emphasis added)*

148. The Panel has correctly understood Norway's view that, under Articles 2.2 and 2.2.1.1, non-recurring costs ("NRC") can properly be included in the costs of production ("COP") solely when they benefit current and/or future production of the investigated product. This rule reflects the fact that, by definition, the relevant costs of production that can be included pursuant to Article 2.2 are those that contribute to the process of producing the like product sold in the IP. An authority cannot burden production in the IP with costs that relate to production in other periods because that distorts the normal value determined for the IP.

149. The Panel's question appears to suggest that the underlined portion of the last sentence of Article 2.2.1.1 might allow the inclusion of costs that do *not* benefit current and/or future production in the COP. This is not correct. The underlined clause refers to NRC for which "cost allocations" have "already" been made under the first two sentences of Article 2.2.1.1 because the cost benefits production in the IP and is included in accounting "records" that are consistent with generally accepted accounting principles ("GAAP") .

150. Norway begins by explaining which NRC are "already" the subject of an allocation under the first two sentences of Article 2.2.1.1, before turning to the clause in the last sentence of Article 2.2.1.1 that the Panel quotes.

(i) The First Two Sentences of Articles 2.2.1.1 Capture a GAAP-Consistent Allocation of the NRC Benefiting Production in the IP

151. The first sentence of Article 2.2.1.1 requires, in principle, the use of accounting "records" that are consistent with GAAP to determine production costs. Under GAAP, certain NRC may be capitalized on the balance sheet provided that they are incurred to acquire assets used in (i.e. benefiting) future production. In that event, the costs incurred through the use of the asset in subsequent periods are treated as production expenses in those periods in line with the matching principle. In other words, under GAAP, the costs are

allocated over time *to the extent that the asset benefits production.* Because the first sentence of Article 2.2.1.1 requires the use of GAAP-consistent accounting records, an authority necessarily captures a GAAP-consistent allocation of any NRC that benefited production during the IP.

152. The requirement for the cost to "benefit" production in the IP is further emphasized by the *proviso* in the first sentence of Article 2.2.1.1 that GAAP-consistent records can be used solely when they "reasonably reflect the costs associated with the production and sale of the product under consideration".

153. The second sentence of Article 2.2.1.1 requires an authority to consider evidence on the proper allocation of costs. The provision makes specific reference to certain NRC that are often capitalized, and expensed over the time during which they benefit production, under GAAP: "capital expenditures and other development costs". By permitting solely an "*allocation*" of these NRC, and not simply the full amount of the NRC, the second sentence shows that NRC can only be included in the COP for the IP to the extent that they benefit production in that period. In other words, the authority cannot include the whole of the NRC as a production cost of the IP.

154. Thus, under the first two sentences of Article 2.2.1.1, NRC are included as production costs solely when they are the subject of cost allocations under GAAP that reflect the extent to which the costs benefited production and sales in the IP.

(ii) <u>The Last Sentence of Article 2.2.1.1 Captures an Allocation of NRC that Benefit Current and/or Future Production Even though the NRC Are Not Capitalized and Expensed over Time under GAAP</u>

155. Under GAAP, not all NRC that benefit future production are capitalized and allocated over time. As a result, the GAAP records that must be used under the first sentence of Article 2.2.1.1 may not "already" include an allocation of certain NRC. The last sentence of Article 2.2.1.1, therefore, allows an authority to capture an allocation of these NRC in the COP.

156. The reason that GAAP may not capitalize, and allocate, certain NRC is that GAAP seeks to provide an overall view of the financial situation of a company. It, therefore, applies the principle of "prudence", which requires conservatism in the recognition of assets. Under the prudence principle, certain NRC must be expensed all at once, even though the costs

benefit production in future years in terms of the matching principle. Thus, under GAAP, the prudence principle often prevails over the matching principle. As a result, the mere fact that a NRC is fully expensed in GAAP accounts in the year in which the cost is incurred does not mean that the NRC provides no benefit to future production.

157. For example, in the case of basic research costs incurred to develop a new generation of products, both International Financial Reporting Standards ("IFRS") and U.S. GAAP require that companies recognize the costs fully as expenses in the period in which they are incurred.[92] Following the prudence principle, these accounting standards disallow the capitalization of research costs even in instances in which they will benefit production of new products. Other examples of costs that GAAP requires to be expensed immediately, even though they benefit future production periods include: costs associated with worker training; expenditures for relocating or reorganizing an entity; and, costs related to the start-up of a new production plant.[93]

158. Under Articles 2.2 and 2.2.1.1, an authority is not attempting to provide an overall view of the financial situation of a company. Instead, it is establishing the cost of producing and selling the like product in the IP as a proxy for the domestic sales price in the period. It would overstate production costs in the IP to include the full amount of those NRC that are fully expensed in the IP under GAAP (i.e. not capitalized) but that have nonetheless been shown to benefit current and future production. These NRC do not relate exclusively – or, sometimes, even at all – to production and sale in the IP, and inclusion of the full cost in the COP would overstate "normal value". The last sentence of Article 2.2.1.1, therefore, requires an authority to make an allocation of these NRC, even if no allocation is made under GAAP.

159. The requirement to allocate these NRC is particularly important because the application of the prudence principle varies from country to country. Some countries apply the prudence principle more "prudently" than others. Thus, a given NRC may be capitalized and allocated over time in one country, whereas the very same NRC might not be capitalized in another country. For example, U.S. GAAP allows companies to capitalize the cost of software used to operate a new website, as well as design costs incurred to create the

[92] *See* International Accounting Standard 38, *Intangible Assets*, page 1605, paragraph 54. Exhibit NOR-169. *See, also*, Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 2, *Accounting for Research and Development Costs*, page FAS2-4, paragraph 12. Exhibit NOR-170.
[93] International Accounting Standard 38, *Intangible Assets*, pages 1608 to 1609. Exhibit NOR-171.

website's graphic interface.[94] These costs are then expensed over time in line with the revenues they help to earn. In contrast, GAAP in the United Kingdom takes a more prudent approach. The very same costs can only be capitalized if they provide a future economic benefit in terms of a discrete revenue stream that can be attributed to the website's operation. This precludes the capitalization under U.K. GAAP of development costs for websites used by companies only for promotional or advertising purposes.[95]

160. If the *Anti-Dumping Agreement* blindly followed GAAP, a company's production costs, and constructed normal value, could vary dramatically simply because of different accounting standards. In countries where a given NRC was capitalized and allocated over time under GAAP, the COP would be much lower than in countries where it was not. Under a rigid application of GAAP rules, the multilateral understanding of "costs of production" and "normal value" would be subject to the vagaries of domestic accounting rules.

161. Instead, to ensure a uniform approach to normal value in the *Anti-Dumping Agreement*, the *proviso* in the first sentence of Article 2.2.1.1 requires an authority to establish a link between costs and production and sale in the IP, and to make appropriate allocations in light of that link. In particular, when NRC are *not* capitalized under GAAP, and therefore *not* "already" reflected in allocations in the GAAP "records", the last sentence of Article 2.2.1.1 requires an authority to make an allocation, if the NRC are shown to benefit future production.

162. Finally, the EC's argument that Article 2.2.1.1 allows an authority to include a NRC in the COP irrespective of whether the cost benefits current and/or future production means that the EC severs the link between costs, and production and sale in the IP (i.e. *current* production) that is required by Articles 2.2 and 2.2.1.1. By necessity, if a cost does not benefit production and sale in the IP, it simply cannot be part of the cost of producing the like product during that period. There is, therefore, no basis for including that cost in normal value.

[94] *See* Financial Accounting Standards Board, Emerging Issues Task Force, Issue No. 00-2, *Accounting for Web Site Development Costs*, pages 7 to 9. Exhibit NOR-172.
[95] *See* Accounting Standards Board, Urgent Issues Task Force, Abstract 29, *Website Development Costs*, page 2, paragraph 6. Exhibit NOR-173.

<u>Question 63</u>: At paragraph 791 of its First Written Submission, Norway states that "the term 'cost of production' ... includes the expenses incurred to pay for all input resources that are directly attributable or related to the production of a particular unit."

(a) Is it Norway's view that this is how cost of production must be understood for the purpose of Article 2.2.1.1?

(b) To the extent that it speaks of costs "associated" with, but not costs that are "directly attributable" to, production and sale of the product under consideration, is it not the case that the meaning of cost of production advocated by Norway is more restrictive than that envisaged under the ADA?

(c) Please explain the notion that costs for the purpose of Article 2.2.1.1 should be viewed as "expenses incurred to pay for all input resources" directly attributable to salmon production and not other cost items associated with the running of a salmon business.

(i) <u>The Required Relationship Between Costs and Production</u>

163. The passage cited by the Panel is a concluding sentence in a section entitled "general considerations" on COP. In that section, Norway reviewed the ordinary meaning of the term "cost of production", which refers to the expenses incurred to pay for resources that are used in the process of producing the like product.[96] Norway summarized the relevant provisions in Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2.[97] Norway also recalled that panels have found that the relevant costs are those that are "*associated with*" or "*pertain to*" the production and sale of the like product. Thus, Norway noted that the case-law confirms that there must be a *relationship* between a cost and the production of the like product.[98] Norway also noted that this meaning of the term "costs of production" is consistent with the understanding of the term in financial accounting.[99] In concluding, Norway summarized the discussion with the single sentence cited by the Panel, and added that the COP includes "fixed and variable costs, and direct and indirect costs".[100]

[96] Norway's FWS, para. 787.
[97] Norway's FWS, para. 788.
[98] Norway's FWS, para. 789.
[99] Norway's FWS, para. 790.
[100] Norway's FWS, para. 791.

164. In its Opening Statement, Norway reiterated this position: "the term 'costs of production' measures *the value of the resources used to produce a good*."[101] Norway added that, when resources are not used in production, no goods are produced using the resource, and there is no relationship between the cost of the resource and production.[102]

165. Thus, the required relationship between costs and production exists when a particular cost benefits production by contributing resources that are used in production.

166. In constructing normal value, there is also an important *temporal dimension* to the required relationship between costs and production. Norway addressed this in the section that followed "general considerations", entitled "allocation of costs over time".[103] In sum, an authority is calculating a "proxy" for the price of domestic sales of the like product *during the period of investigation* ("IP"). Accordingly, the relevant costs are solely those that paid for resources used to produce the goods that are sold during the IP. As a result, an authority is required by Article 2.2.1.1 to allocate costs that are used in (i.e. "benefit") production in current and/or future periods.

167. Norway stands by all of these views. Norway appreciates that the required relationship between costs and production can be expressed using different words. Indeed, the *Anti-Dumping Agreement* itself uses four different terms to express the required relationship: Article 2.2.1.1 refers to costs "*associated with*" production, and also costs that "*benefit*" production; Article 2.2.2(i) and (ii) refers to "amounts incurred" "*in respect of*" production; and, of course, Article 2.2 refers simply to costs "*of*" production. Panels have also used different terminology to describe the required relationship. In a single paragraph, the panel in *Egypt – Rebar* used three different terms: costs "*associated with*" production; costs that "*pertain … to*" production; and costs that were "'reasonably' *related to*" production.[104]

168. Norway's terminology was not intended to alter the scope of the required relationship in Article 2.2 between costs and production during the IP. Although the *Agreement* and panels have used slightly different terminology, the essence of the required relationship is

[101] Norway's Opening Statement, para. 201 ff. Original emphasis.
[102] Norway's Opening Statement, para. 203.
[103] Norway's FWS, para. 792 ff.
[104] Panel Report, *Egypt – Rebar*, para. 7.393.

that relevant costs are those incurred to pay for resources used to produce the like product that is sold during the IP.

(ii) Costs That Do Not Benefit Production Are Not Costs of Production

169. The Panel's question contrasts costs that are associated with *production*, and costs that are associated with *"running" a salmon business*. According to the *Anti-Dumping Agreement*, solely those business costs that are "associated with" *production* in the IP may be included in the COP.

170. The EC's argument nullifies the various treaty provisions specifying that the relevant costs are those incurred in *producing* the like product in the IP. If the EC were correct, the *Agreement* would not refer to costs that are "*associated with*", "*benefit*", and are incurred "*in respect of production*". Nor even would it refer to costs "*of production*". As Norway noted in its Opening Statement, the EC rewrites Article 2.2.1.1 as referring to "business" costs that "benefit future and/or current [*profitability*]" or that are "associated with" or "pertain to" "profitability". However, the drafters of the *Anti-Dumping Agreement* used the word "profit" in other provisions of the *Anti-Dumping Agreement* when they saw it fit.[105]

171. Although many business costs are costs of production, not all of them are. For example, income taxes are a business costs that no company can escape. However, taxes are not a cost "of production" because settling this liability does not involve the provision of any resources that are used in (i.e. benefit) the production process. Thus, in the case of each cost, an authority must determine whether the required relationship exists between costs, and production and sale in the IP. In this dispute, there are numerous examples of charges that do not exhibit the necessary relationship, including:

- [[xx.xxx.xx]]'s and [[xx.xxx.xx]]'s write-downs on the closure of production facilities.[106] These charges arose because [[xx.xxx.xx]] and [[xx.xxx.xx]] *reduced the value of certain fixed assets* in their respective balance sheets. The charges, therefore, appear as non-recurring items in the profit and loss accounts. In [[xx.xxx.xx]] case, the charges were incurred *before the IP* to write-off assets that were *no longer productive*. These charges do not reflect any costs that paid for resources used in salmon production during the IP. Thus, the charges are not associated with, and do not benefit, production in the IP.

[105] Article 2.2, 2.2.2, and 2.2.2(iii).
[106] Norway's FWS, para. 850 ff. ([[xx.xxx.xx]]) and para. 924 ff. ([[xx.xxx.xx]]).

- [[xx.xxx.xx]]'s write-down of the value of biomass.[107] This charge arose because [[xx.xxx.xx]] adjusted the value of biomass in its balance sheet to reflect the fact that the expected sales value was lower than previously anticipated. The cost of biomass relevant to production and sale in the IP is already expensed elsewhere in the accounts. By changing the asset valuation, [[xx.xxx.xx]] did not incur any costs that were used in the production of salmon in the IP.

- [[xx.xxx.xx]]'s operating losses incurred at two processing plants before the IP.[108] An operating loss is the difference between costs and sales revenues, and not a further costs of production.

- [[xx.xxx.xx]]'s investment losses.[109] During the IP, [[xx.xxx.xx]] wrote-down the value of investments in other companies. The write-down involved reducing the value of [[xx.xxx.xx]]'s assets in the balance sheet, with a corresponding non-recurring charge in the profit and loss account. The losses were not incurred to pay for any resources that were used to produce [[xx.xxx.xx]]'s salmon in the IP. The company's investment activities were a separate line of business that did not contribute to salmon production; the losses merely reduced the company's equity.

- [[xx.xxx.xx]]'s smolt costs.[110] In the last month of the IP, [[xx.xxx.xx]] purchased smolt; however, that smolt was not delivered to [[xx.xxx.xx]] until *after the IP had closed*. These smolt costs could not possibly be associated with, or benefit, [[xx.xxx.xx]]'s salmon production in the IP because the smolt were not even in [[xx.xxx.xx]]'s possession during that period. Also, [[xx.xxx.xx]] sold smolt to an independent purchaser. The costs of producing that smolt are not costs associated with [[xx.xxx.xx]]'s own salmon production.

172. In each of these cases, the EC has improperly treated business costs as costs of producing salmon in the IP. However, the costs in question were not incurred to produce the like product sold in the IP, and cannot be included in normal value.

[107] Norway's FWS, para. 820 ff.
[108] Norway's FWS, para. 884 ff.
[109] Norway's FWS, para. 895 ff.
[110] Norway's FWS, para. 1012 ff.

I. *INJURY*

***Question 64**: Norway disputes the EC's assertion that it relied on "other evidence" in justifying the treatment of imports from companies not individually examined, including independent exporters, as dumped imports. Norway asserts that, assuming that the evidence in question was part of the record, it is not "positive evidence" that imports from independent exporters were dumped. Norway also asserts that "a "dumping" determination for an independent exporter involves a comparison of that exporter's export prices with that same exporter's normal value" (Norway Opening Statement at para. 115). However, assuming some independent exporters are not individually examined, in the context of a proper limited examination under Article 6.10, then no such comparison is made. What evidence then, in the absence of a comparison of normal value and export price, might serve to justify treatment of imports from an un-examined independent exporter as dumped?*

(i) General Considerations on Other Positive Evidence of Dumping

173. In its Opening Statement, Norway recalled that the Appellate Body expressed reservations about the use of extrapolation in cases where the sample is not "statistically valid", but is based on the largest percentage of exports.[111] In such a situation, the Appellate Body cautioned that evidence from the sample could be used as one "*part* of the positive evidence" regarding the volume of dumped imports from non-sampled companies.[112] There must, therefore, be *other* "positive evidence" to justify the determination made regarding dumped imports from non-examined companies.

174. The Panel's question picks up on this requirement, asking what additional positive evidence an authority could rely on.

175. Norway believes that the other evidence of dumping by non-sampled companies should, typically, be based on some form of comparison between normal value data and export price data. A comparison of aggregate data on domestic sales prices and/or costs of production, and export pricing data could constitute one form of "other evidence" of dumping by non-examined companies. However, where an industry comprises different categories of companies, data may have to be disaggregated to enable the authority to make an "objective examination" on the basis of "positive evidence". For example, it may be appropriate to

[111] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 138.
[112] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 138.

differentiate companies according to economic activity, production methods, product range, size or location. It may also be relevant to consider "other evidence" regarding conditions of competition in the domestic and export markets at issue. These factors would all have to be assessed in light of the specific circumstances of each case. Norway notes that industry consultancies, as well as Norwegian Government bodies, produce surveys that provide information on such factors.

176. The nature and scope of the other evidence needed to conclude that non-sampled companies are dumping will vary, depending on the composition of the sample. For instance, where a sample based on the largest percentage of exports covers a large majority of the exports "from the country in question", the requisite "other evidence" need not be as extensive as where the sample covers a small minority of those exports.

177. The "other evidence" may also be less extensive when the sample covers all categories of exporter in the exporting country. However, where the authority excludes one or more categories of exporter from the sample, it would have no positive evidence that exporters in that category are dumping. This is a particular problem when the authority constructs normal value for all companies in the sample. In that case, the authority has no evidence regarding costs of production pertaining to the excluded categories of exporter.

178. Further, where the investigating authority relies on "other evidence", it must provide a reasoned and adequate explanation of how the "other evidence" supports the inference that non-sampled companies are dumping.

179. Norway notes that the EC could also have chosen to compose a statistically valid sample. In that case, the case-law suggests that an authority may be able to apply its conclusions regarding the sampled companies to the non-sampled companies, without relying on other evidence.

(ii) <u>The EC's Published Determinations Disclose No Other Positive Evidence of Dumping by Non-Sampled Companies</u>

180. In this investigation, several factors indicate that the EC was obliged to gather considerable other positive evidence before it could conclude that all non-sampled companies were dumping. The EC's dumping determinations cover only 25.5 percent of Norway's total

exports;[113] its sample excludes an entire category of Norway's exporters (i.e. independent exporters) that accounts for the majority of Norway's exports to the EC. Finally, the EC found that only eight of the nine examined companies were dumping but took no account of this fact in its determination.[114]

181. In fact, the EC's published determination does not identify any "other evidence" that demonstrates dumping by non-sampled companies. Far less did the EC provide an explanation in the published determination that supports the inference that all imports from non-sampled companies are dumped. The EC, therefore, did not have an adequate basis under Articles 3.1, 3.2 and 3.5 to conclude that all imports from non-sampled companies were dumped.

(iii) The EC's New Evidence in Exhibit EC-10 Is Inadmissible and Flawed

182. For the first time in these Panel proceedings, the EC presents new evidence – Exhibit EC-10 – to support its finding that all imports from non-sampled companies are dumped. This evidence is inadmissible. Moreover, the explanations based on that evidence are inadmissible *ex post* rationalization.

183. In any event, the new "other evidence" adduced by the EC in Exhibit EC-10 does not demonstrate that non-sampled companies were dumping. Before commenting on the flaws in Exhibit EC-10, Norway wishes to emphasize that it is unable to reproduce the data in Exhibit EC-10 because the sources for that data are not adequately explained. Nonetheless, Norway has the following seven detailed comments on the exhibit.

184. *First*, Exhibit EC-10 purports to provide information solely on aggregate *export* pricing data. However, that alone does not provide evidence of dumping, because dumping is the *difference* between normal value and export price. The EC provides no evidence whatsoever relating to prices and/or costs of production in the domestic market.

185. *Second*, on the basis of Exhibit EC-10, the EC argues that the export prices of non-sampled producers (€2.43/kg) are allegedly 1.2 percent lower than the export prices of

[113] Table on "Quantity of Sales That Were Found to Be Dumped". These volume figures are taken the EC's company-specific definitive disclosures. Exhibit NOR-174.

[114] The EC made dumping determinations for nine of the ten sampled companies because it made no separate determination for Seafarm Invest. The EC found a *de minimis* margin for Nordlaks which means that, for these purposes, Nordlaks was not dumping. *See* Norway's Opening Statement, paras. 117 and 118.

sampled producers (€2.46/kg). The EC concludes from this price difference that non-sampled companies are dumping. However, as the EC admits, Exhibit EC-10 provides export pricing data only for 80 percent of Norway's salmon exports to the EC.[115] The EC says that, "for the sake of *simplicity*", it has – yet again – excluded filleted products from its analysis.[116] However, the *Anti-Dumping Agreement* requires accurate results, not simplified results. Given that the alleged difference between the average export prices for whole/HOG fish is so small (1.2 percent), the average export prices of the remaining 20 percent of Norway's imports is significant. Because the EC excluded the prices of filleted products from its analysis, the export prices calculated by the EC in Exhibit EC-10 are not a reliable indication of export prices for the investigated product.

186. *Third*, Exhibit EC-10 covers exports of (1) whole fish; (2) gutted, head-on fish; and (3) other fish, including gutted head-off. The EC provides a single export volume for these three categories of product on a "whole fish equivalent" ("WFE") basis. For these three categories, the conversion factors to generate WFE figures are, respectively, 1.0 (whole fish), 0.9 (head-on gutted) and 0.8 (head-off gutted). For example, 80 kg of head-off gutted fish has a WFE of 100 kg. Thus, to arrive at a single volume for different categories of fish, the EC has grossed up the gutted volumes to a WFE basis.

[115] *See* the first *comment in Exhibit EC-10.
[116] *See* Exhibit EC-10.

187. However, the EC performed no comparable conversion in calculating a single *turnover figure* for the three categories of fish. If the EC failed to gross up the turnover figures to account for the differences among these three categories of the product, the aggregate turnover figures shown in Exhibit EC-10 are meaningless. The following table offers a hypothetical example to illustrate this point:

	Sampled Companies	Non-Sampled Companies
Head-on Gutted Export Volume	0 kg	90 kg
Head-off Gutted Export Volume	80 kg	0 kg
WFE Export Volume	100 kg	100 kg
Head-on Gutted Market Price/kg	N/A	€2.00
Head-off Gutted Market Price/kg	€2.50	N/A
Total Turnover (price/kg x number of ***actual*** kg)	€200	€180
Price/kg WFE	€2.00/kg WFE	€1.80/kg WFE

188. In this example, like Exhibit EC-10, it appears that non-sampled companies are exporting at a price that is lower than the export price of sampled companies. However, in this example, the reason for the price difference is that the product mix sold by non-sampled companies is different from the product mix sold by sampled companies. Specifically, non-sampled companies sold products with a lower market price. This difference is not accounted for in the calculation. As a result, the comparison of prices between the two groups in the final row of the table is utterly meaningless as a means of showing that non-sampled companies are "dumping" more than the sampled producers. In Exhibit EC-10, the EC does not indicate that it factored the different prices of the different products sold by the two groups into its calculations.

189. *Fourth*, the export volume figure for *sampled* producers (item (b) in column 2 of Exhibit EC-10) is said to be 78.9 percent of the export volume figure for *non-sampled* companies (item (c) in column 2). The EC states in its reply to Question 1 that the origin of

this percentage figure of 78.9 percent is paragraph 17 of the Provisional Regulation.[117] That paragraph states that the sample represented "*almost 80%* of the export volume to the Community of *all* co-operating exporting producers". The EC's reliance on the 78.9 percent figure is wrong because paragraph 17 means that the non-sampled producers amount to just 20 percent of "*all*" exports, while the sampled producers amount to 80 percent of "*all*" exports. Thus, the volume of the sampled companies' exports should be *four times greater* than the volume of exports of the non-sampled companies (*i.e.* a ratio of 80:20). However, in Exhibit EC-10, the volume of sampled producers' exports is, in fact, less than the volume of the non-sampled producers' exports. The EC's calculation is, therefore, wrong.

190. The EC also does not explain why it derived the volume figure of *sampled* producers (item (b)) from the (extrapolated) *volume figure of non-sampled companies* (item (c)). The logical source for the volume figure for sampled companies are questionnaire responses, not the extrapolated volume figure of non-sampled companies.[118]

191. Furthermore, to add to the mystery, Exhibit EC-10 states that the questionnaire replies of the *sampled* companies provided the source for the volume figure for *non-sampled* companies (item (c)) from which the EC then took 78.9 percent as the volume figure for *sampled* companies (item (b)).[119] The EC never explained how it extrapolated the volume figures for non-sampled companies from the volume figures in the questionnaire replies. Nor why it was necessary to follow this totally circular approach.

192. *Fifth*, the volume figure of 96,165,367 kg WFE (item (c)) for sampled exporters does not match figures provided elsewhere by the EC. For instance, this figure does not match the total volume figure for sampled exporters indicated in Exhibit EC-11, namely, 107,271,601 kg WFE. The EC explains that CN Code 302 12 00 accounts for 80 percent of Norwegian exports to the EC. However, 96,165,367 kg WFE represents *89.6 percent* of 107,271,601 kg WFE, and not *80 percent*.

[117] EC's Reply to Question 1, para. 12.
[118] All the more so as the source for the turnover figure for sampled companies appears to be the "questionnaires for the ten largest exporting producers".
[119] In other words, rather than calculating the volume for sampled exporters directly from the questionnaire responses, the EC: draws figures from the questionnaire responses; extrapolates from them by means of an unexplained method to obtain the volume for non-sampled companies; and then applies an unexplained percentage figure to this extrapolation to obtain the volume for sampled companies.

193. *Sixth*, the EC improperly manipulates the export price for non-sampled and non-cooperating companies by deducting a [[xx.xxx.xx]] percent "traders' mark-up" from the price. In a dumping determination, the relevant price is the export price, including all the selling costs and profits of the exporter. There is no basis for an authority to reduce the actual export price by deducting these elements. For Sinkaberg, which made all its exports through an independent exporter, the EC did not deduct these elements from the export price. Moreover, in constructing normal value, the authority must include domestic selling costs and profits in the calculation. The EC's deduction of [[xx.xxx.xx]] percent is, therefore, inappropriate.

194. If the [[xx.xxx.xx]] percent is added back to the export price of non-sampled and non-cooperating companies, the export price of these companies is €2.53/kg, using the EC's flawed volume figures. This price is 3 percent *higher* than the price of sampled companies.

195. In sum, Exhibit EC-10 is seriously flawed and does not constitute positive evidence that all imports from non-sampled and non-cooperating companies were dumped.

196. Finally, Norway wishes to reiterate that Exhibit EC-10 is inadmissible new evidence that was not part of the EC's record of investigation. Moreover, the arguments based on it are inadmissible *ex post* rationalization that is not contained in the investigating authority's determination. Consequently, the Panel may not take either the exhibit or the *ex post* explanations into account.[120]

> ***Question 65: Could Norway elaborate on the asserted obligation that "in order to examine the impact of price developments on the state of domestic producers, an authority must examine prices in the operating currency of those producers"? (Norway's first Written Submission at paragraph 562) Where in the ADA does Norway consider this obligation is to be found? Could Norway comment on the view that so long as the investigating authority's treatment of various elements of its analysis is consistent in terms of the currency, it is irrelevant whether it is the currency of any one of the companies comprising the domestic industry?***

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

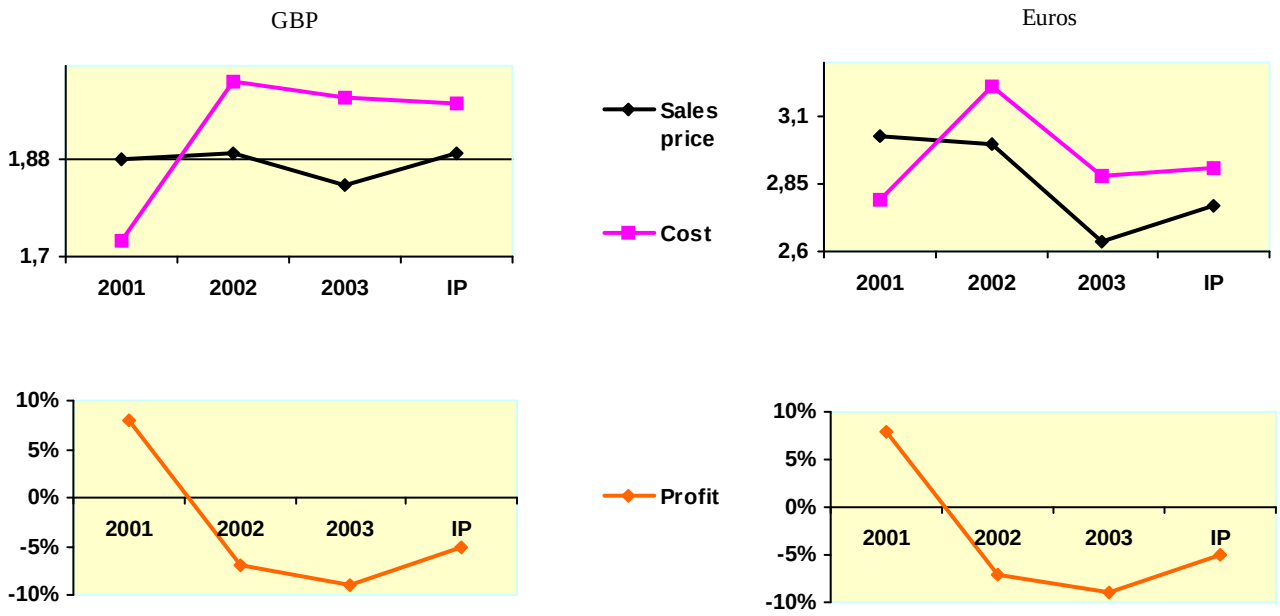
197. No, it is not sufficient for an authority to treat the various elements of its analysis consistently in terms of the currency.

198. Article 3.1 of the *Anti-Dumping Agreement* requires an authority to conduct an "objective examination" of injury based on "positive evidence". Under Article 3.4, an authority must examine any relevant economic factors having a bearing on the state of the domestic industry. Under Article 3.5, an authority must also examine any known factors, other than dumped imports, that were simultaneously causing injury to the domestic industry.

199. To satisfy these requirements, the Appellate Body has stated that the evidence examined by an investigating authority for relevant factors must be "material", "relevant and pertinent to the issue to be decided".[121] In this case, the material, relevant and pertinent evidence for examining the financial performance of the five sampled Scottish companies, in particular their sales prices, is in pounds sterling. If the EC chose not to use pounds sterling, it was required to take into account the impact on the companies of changes in the relative values of sterling and euros.

200. It would not suffice to use euros consistently because this creates a distorted impression of the financial situation of companies that conduct their business in pounds sterling. This may be illustrated by data from this investigation regarding sales prices, costs of production, and profitability:[122]

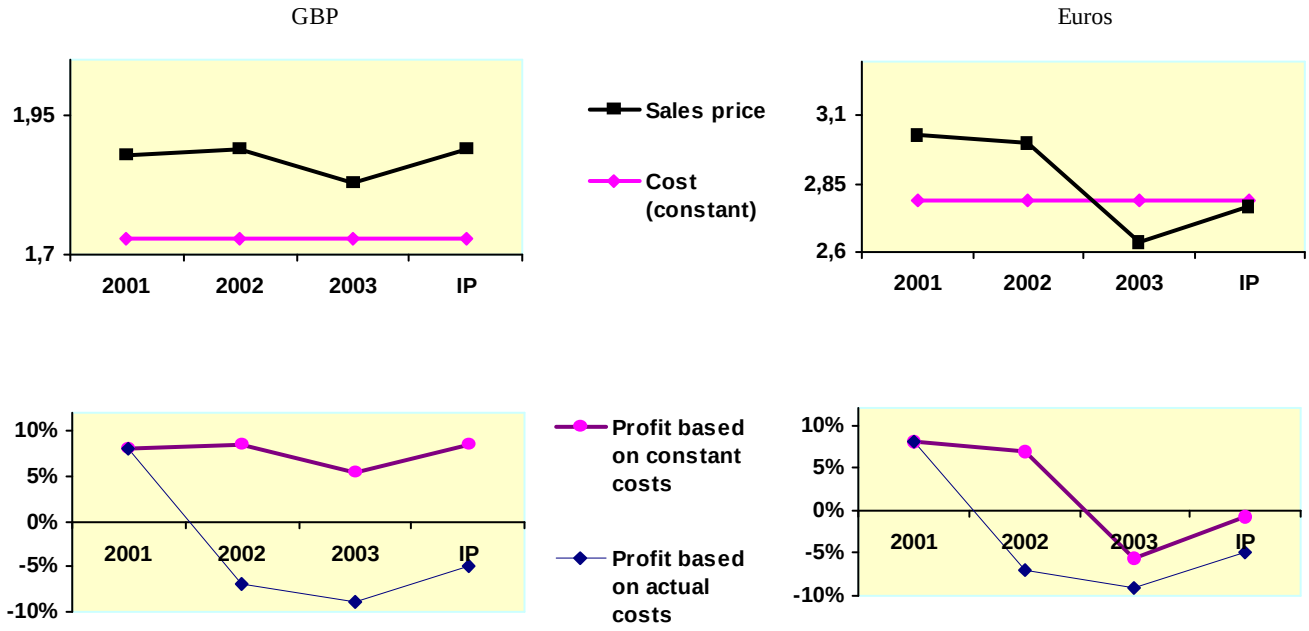
[121] Appellate Body Report, *Mexico – Rice*, para. 165.
[122] *See* Norway's FWS, para. 582.



201. The top two graphs show that it makes a material difference to an authority's examination of sales prices and costs whether these factors are examined in pounds sterling or euros. As the top two graphs show, the evolution of the data regarding prices and costs is quite different in the two currencies. In pounds sterling, prices were essentially *constant* during the period considered, starting and ending the period at £1.88. In contrast, in pounds sterling, costs *rose sharply*. However, in euros, prices fell from €3.03 to €2.77, and the Scottish producers costs *appear* to have *risen only slightly* and, in fact, they even seem to have fallen markedly in the last two years of the period. A domestic producer's business cannot simultaneously be experiencing the trend lines in both currencies. An authority must, therefore, conduct an examination of these factors in the currency that is material to the financial performance of the domestic producers. If need be, an authority must make adjustments to its examination to take account of the impact of currency movements on its examination.

202. Further although profitability is the same in both currencies, the forces that generate the profit trend are quite different depending upon whether prices and costs are analyzed in pounds sterling or euros. In pounds sterling, the cause of the sharp drop in profitability is seen to be the sustained and considerable rise in costs, with prices constant. In euros, the decline in profitability appears to be driven mostly by the fall in prices.

203. In its First Written Submission, Norway illustrated this argument with a routine counter-factual analysis that showed the impact of the changes in costs by holding them constant.[123] Norway explained that, if costs had not increased, the domestic industry would not have sustained the same level of losses. Indeed, in pounds sterling, the industry would have remained profitable. Again, the use of different currencies has a material impact on this counter-factual analysis:



204. The top two graphs show the actual movements in sales prices against a constant cost of production fixed at 2001 levels. The bottom graphs show that the industry would have enjoyed significantly higher profitability if costs had not increased as they did in both currencies. However, the impact of increased costs is far more significant when costs are measured in pounds sterling than when they are measured in euros. In pounds sterling, the industry would have continued to enjoy profits of eight percent but for the increased costs. In contrast, an examination in euros suggests that, with constant euro-based costs, the industry would have sustained slight losses.

205. The reason for this marked discrepancy in the *apparent* causes of the domestic industry's situation is explained by currency movements. Indeed, if Norway undertook this same examination of prices, costs and profitability in a third currency, the financial situation

[123] Norway's FWS, para. 586.

of the domestic industry, and the causes of that situation, would *appear* to be different again. It is, therefore, incorrect to assume – as the EC does – that an authority's choice of currency has no impact on the injury and causation examination, provided only that the authority consistently examines all factors in the same currency.

> ***<u>Question 66</u>: Does Norway consider that the Panel should consider its claims concerning price trends and price undercutting even if it determines that the EC wrongly defined the domestic industry? If so, why?***

206. Norway understands the Panel to ask whether the Panel could exercise "judicial economy" with respect to Norway's claims on price trends and price undercutting in the event that the Panel finds that the EC wrongly defined the domestic industry.

207. Norway accepts that there are instances in which a Panel may exercise judicial economy. As stated by the Appellate Body, "a Panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute".[124] However, the right to exercise judicial economy is circumscribed by two important considerations: (i) the DSB must be able to make sufficiently precise recommendations and rulings; and (ii) the recommendations and rulings must be sufficiently precise to allow for prompt compliance in a manner that resolves the dispute.

208. In that regard, the Appellate Body held, in *Australia – Salmon*, that a Panel "has to address those claims on which a finding is necessary in order to enable the [DSB] to make sufficiently precise recommendations and rulings *so as to allow for prompt compliance* by a Member with those recommendations and rulings '*in order to ensure effective resolution of disputes to the benefit of all Members*.'"[125] Further, in *Canada – Wheat Exports and Grain Imports*, the Appellate Body stated that "although the doctrine of judicial economy allows a panel to refrain from addressing claims beyond those necessary to resolve the dispute, ... if a panel fails to make findings on claims where such findings are *necessary to resolve the*

[124] Appellate Body Report, *US – Wool Shirts and Blouses*, page 19. Later restated by the Appellate Body a number of times: *see, e.g.*, Appellate Body Report, *EC – Hormones*, para. 250; Appellate Body Report, *India – Patents (US)*, para. 87; Appellate Body Report, *Australia – Salmon*, para. 223; Appellate Body Report, *Japan – Agricultural Products II*, para. 111.

[125] Appellate Body Report, *Australia – Salmon*, para. 223, referring to Article 21.1 of the DSU. Emphasis added.

dispute, then this would constitute a false exercise of judicial economy and an error of law."[126]

209. Norway considers that the Panel should address Norway's claims regarding price trends and price undercutting, even if the Panel agrees that the EC's determination of the domestic industry is flawed. Both these claims are important in determining the extent of the EC's implementation obligations and, therefore, in resolving the dispute. Addressing additional claims is particularly important in trade remedy disputes because Members typically seek to amend the contested measure in an attempt to "repair" the WTO-inconsistencies found by panels. Each additional finding of inconsistency creates an additional obligation on implementation. A finding of violation on only some of Norway's claims, but not on others, may imply that the EC could attempt to "repair" the violations through a new measure based on the same facts as the original investigation.

210. If the Panel finds that the EC's injury determination is WTO-inconsistent because of the price trend and price undercutting analysis, the EC would be obliged to address these inconsistencies on implementation if it seeks to "repair" the flaws in the measure. Conversely, if no findings are made on these issues, the EC would not have to address them on implementation, and the issues could return to the Panel in Article 21.5 proceedings – at considerable additional cost to Norway. The Panel should, therefore, address these two claims – and all of Norway's other claims – to ensure that the DSB's recommendations and rulings are sufficiently precise to resolve the dispute.

211. Norway does not exclude that there are certain WTO-inconsistencies that are "irreparable", that is, they cannot be remedied through simple re-determinations based on the same set of facts that were gathered in the original investigation. In such cases, withdrawal of the measure would be the only possible form of implementation. In Norway's opinion, a finding that the EC acted inconsistently with Article 5.4 in initiating the investigation would have this result. In that event, if the Panel were to declare that the measure was "deprived of legal basis",[127] and to suggest implementation by way of withdrawal under Article 19.1 of the DSU, Norway would agree that other claims it made need not to be addressed. Given the

[126] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.
[127] *See* Appellate Body Report, *US – Steel Safeguards*, para. 431.

nature and scope of the WTO-inconsistencies in the contested measure, Norway has requested that the Panel make such a suggestion for withdrawal of the measure.[128]

J. *MINIMUM IMPORT PRICE*

> ***Question 67**: Norway asserts that the MIPs imposed by the EC may, in certain circumstances, result in the collection of an amount of duty that is not limited by the margins of dumping determined for individual producers, and that this is inconsistent with Articles 9.1 and 9.3 of the Agreement, and Article VI:2 of the GATT 1994. However, it could be argued that in a system of minimum import prices, the amount of duty on any individual importation is determined by comparison of the export price of that transaction to the applicable MIP. Barring a subsequent assertion by an importer that the applicable MIP was set at the wrong level and a request for a refund, there is no obligation to reconsider the amount of duty collected or calculate a margin of dumping either for that particular transaction, or for any group of transactions including that transaction. To what extent does Norway agree or disagree with this view?*

212. Norway disagrees. This interpretation suggests that the amount of duties initially imposed is not limited by the margin of dumping. This approach overlooks the text of Articles 9.1 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994, all of which expressly state that a Member *cannot* impose duties in excess of the individually determined *margin of dumping*. Article 9.1 states that a Member may decide whether the amount of duties "imposed shall be the full margin of dumping *or less*". Article 9.3 provides that the anti-dumping duty "*shall not exceed* the margin of dumping". Article VI:2 also states that a Member may levy an anti-dumping duty "*not greater in amount* than the margin of dumping". Furthermore, the Appellate Body stated 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) covered by the duty assessment proceeding."[129] (original italics)

213. It is clear from these provisions, and from the interpretation of the Appellate Body, that an authority can "impose" anti-dumping duties that are *less* than the margin of dumping, but in no case can it impose duties that *exceed* the full margin of dumping. The dumping

[128] Norway's FWS, paras. 12 and 1081.
[129] Appellate Body Report, *US – Zeroing (Japan)*, para. 155. *See, also*, Appellate Body Report, *US – Zeroing (EC)*, para. 130.

margin is, therefore, the ceiling for the duties that may be imposed on imports from individually examined producers.

214. Articles 9.1 and 9.3, and Article VI:2, apply to any individually examined company and none of the provisions contains an exception to this rule when MIPs are used to impose duties. If the drafters had intended to permit Members to impose variable duties in excess of the individual margin of dumping, they could easily have included a rule to that effect in one of these provisions. However, they did not.

215. The approach in the Panel's question appears to be similar to the approach set forth in Article 9.4(ii) for *non-examined companies*. Under that provision, variable duties may be imposed on non-examined companies up to the level of normal value. However, as the Appellate Body ruled, Article 9.4 "has, by its own terms, a limited purpose as an *exception* to the rule in Article 9.3". That "exception" "permits the imposition of a certain maximum amount of anti-dumping duties on imports attributable to producers that were *not* examined individually".[130]

216. Article 9.4 does not apply to *individually examined companies*, which are instead subject to the rules in Articles 9.1 and 9.3, and Article VI:2 described above. It is contrary to the *Vienna Convention* to *imply* the *exception* in Article 9.4(ii) into Articles 9.1 and 9.3, and Article VI:2 because the implied rule would eliminate protection afforded to individually examined companies by the express rule in these latter provisions. In short, the margin of dumping would cease to operate as a ceiling on the maximum level of duties that can be initially imposed on individually examined companies. Instead, Members would be permitted to impose duties in excess of the margin of dumping, undermining further the value of market access concessions, and placing the burden on importers to spend time and money on seeking a refund.

[130] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 125. Original emphasis.

<u>Question 68</u>: Does Norway's position in respect of the MIPs applied by the EC require that, at the time of each importation of a product subject to an anti-dumping measure in the form of MIPs, the customs officials collecting the duty must compare the amount of duty collected to the dumping margin established for that exporter during the investigation, and only collect the amount of the dumping margin?

(a) Where in the Agreement does Norway find such an obligation?

(b) If there is such an obligation, what would be the point of imposing an anti-dumping measure in the form of an MIP? Would such an obligation not render a system of MIPs redundant?

217. The answer to the first part of the question is "yes". The customs officials collecting the duty must compare the declared value of the imported products with the MIP. In cases where the declared value is lower than the MIP, the official must first calculate the variable duties (i.e. the difference between the declared value and the MIP). The official must then compare the amount of the variable duties with the margin of dumping by expressing the amount of variable duties as a percentage of the declared value. The amount of the variable duties would be capped by the margin of dumping.

218. Norway notes that this task is not difficult, and is similar to the system followed today for imports into a number of WTO Members operating a "double binding" in their tariff schedule, i.e. a binding of both an *ad valorem* duty and a fixed duty, where normally the highest of the two is levied on a particular importation. This is common for agricultural products, and is used, *inter alia*, by Canada, Iceland and Korea. For certain processed agricultural products, the EC has composite duties based on the various inputs of primary products into the processed product, which may in addition be subject to either fixed or *ad valorem* duties – thus entailing at least three separate calculations for the customs official. Also, the calculation that Norway envisages was contemplated by the Appellate Body in *Argentina – Textiles*, too.[131]

219. Regarding sub-question (a), Norway has explained in reply to Question 67 that the source of the obligation to limit the duties initially imposed on individually examined producers is Articles 9.1 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Furthermore, when interpreting Article 9.3 and Article VI:2 in *US – Zeroing*

[131]Appellate Body Report, *Argentina – Textiles*, para. 50.

(EC), the Appellate Body confirmed that the margin of dumping operates as a ceiling on the duty that may be imposed.[132] Norway's position is also set out in paragraphs 658 to 667 of its First Written Submission. Regarding sub-question (b), Members can impose variable duties in an amount that is *less* than the full margin. Thus, the duties still vary according to the import price, up to the ceiling imposed by the margin of dumping. The ceiling contained in Articles 9.1 and 9.3, and Article VI:2, does not, therefore, render a system of variable duties based on a MIP redundant.

Question 69: What is the source of any obligation to ensure that the exchange rate used to convert normal value from one currency to another for the purpose of calculating an MIP must be that applicable during the POI?

220. Under Article 9.2 of the *Anti-Dumping Agreement*, a Member may collect variable duties "in the appropriate amounts". The "appropriate" amount of these duties can be discerned from the definition of "dumping" in Article VI of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*. Under both these provisions, a product is dumped if it is sold for export "at *less than its normal value*". When dumping causes injury, Article VI:1 states that the pricing "is to be condemned". In that event, Article VI:2 permits a Member to "offset or prevent" dumping by levying an anti-dumping duty. Article 11.1 of the *Anti-Dumping Agreement* provides that anti-dumping duties may be imposed only "to the extent necessary to counteract dumping".[133] Thus, anti-dumping duties may be imposed solely when the export price is less than normal value; in contrast, when the export price exceeds normal value, there is no dumping and no duties can be imposed.[134]

221. Normal value, therefore, constitutes the dividing line between fair and unfair pricing, delineating when duties can and cannot be imposed. Accordingly, if variable anti-dumping duties are imposed under Article 9 on the basis of a MIP, the MIP cannot exceed the normal value *calculated consistently with Article 2*.

222. The issue in this dispute is whether a Member is entitled to convert that normal value on the basis of *historical* exchange rates that applied *prior to the IP*. By definition, normal value reflects the *value* of the like product sold *in the IP*. For this reason, Article 2.4.1

[132] Appellate Body Report, *US – Zeroing (EC)*, para. 130.
[133] *See, also*, Panel Report, *Mexico – Rice*, para. 7.58.
[134] *See, also*, Panel Report, *US – Zeroing (Japan)*, paras. 7.201 and 7.205.

requires that any exchange rates used to compare normal value and export price in a dumping determination must be contemporaneous exchange rates. Otherwise, the value of the product is distorted by changes in the value of the currency.

223. Using *historical* exchange rates to *recalculate* normal value for purposes of duty imposition means that a Member is no longer relying on the normal value calculated for the IP, consistently with Article 2, because the exchange rate used is not permissible under Article 2.4.1. Moreover, the use of a historical exchange rate distorts the level of the MIP because the non-dumped MIP (i.e. *normal value*) is influenced by changes in the relative value of currencies that have nothing to do with an exporter's pricing behaviour.

224. For example, imagine that an exporter's normal value is determined to be 15 NOK/kg in an investigation. In the IP, the exchange rate is 8.4 NOK/€ and, pursuant to Article 2.4.1, this exchange rate is used for purposes of the dumping determination. In euros, this exchange rate means that 15 NOK is worth €1.78. Assume that export prices were expressed in euros, and found to be €1.70/kg. As a result, there is dumping and a MIP is imposed. The authority cannot set the MIP at a level that exceeds the exporter's normal value (i.e. 15 NOK/kg or €1.78/kg) because that is the level of "fair" pricing. However, for purposes of duty imposition, the authority now decides to use a *historical* exchange rate of 7.5 NOK/€. The exporter's normal value in euros suddenly jumps from €1.78 during the investigation (and on the basis of which dumping was determined) to €2.00 for duty imposition. This new normal value is 12.4 percent higher than the original.

225. Thus, by using a historical exchange rates, the Member distorts the level of "fair" prices at which the exporter is deemed to engage in dumping. By so doing, the Member violates Article 9.2 by imposing duties in amounts that are not "appropriate".

> ***Question 90: Both parties seem to agree that any MIPs imposed on sampled producers must not exceed the same producers' individual normal values. What provision of the ADA includes such an obligation?***

226. Norway's detailed arguments on this issue are set forth in paragraphs 643 to 651 of its First Written Submission. Norway has also addressed this issue in paragraphs 220 to 225 in answer to the previously listed question.

227. Under Article 9.2 of the *Anti-Dumping Agreement*, a Member may collect variable duties "in the appropriate amounts". That amount is defined by reference normal value because, under Article 2.1 and Article VI:1, a product is dumped if it is sold for export "at *less than its normal value*". Thus, anti-dumping duties can be imposed solely when the export price is less than normal value, and not when it is higher.[135] Normal value, therefore, constitutes the dividing line between fair and unfair pricing, delineating when duties can and cannot be imposed. Accordingly, if variable anti-dumping duties are imposed on the basis of a MIP, the MIP cannot exceed the normal value calculated consistently with Article 2.

228. 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*".[136] 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 MIP. 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).

229. 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 "shall apply" that normal value as the maximum MIP.

230. In addition, in the case of individually examined exporters or producers, Articles 9.1 and 9.3, and Article VI:2, require that the amount of anti-dumping duties not exceed the individually determined margin of dumping.

[135] *See, also*, Panel Report, *US – Zeroing (Japan)*, paras. 7.201 and 7.205.
[136] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 122. Emphasis added.

> ***Question 91**: Assuming that Article VI.2 of the GATT 1994, and Articles 9.1, 9.2 and 9.3 of the ADA, require that any MIP applied to sampled producers be based on the normal values corresponding to their respective margins of dumping, what is the relevant margin of dumping that should be used for this purpose? Is it the margin of dumping calculated in the original investigation, the margin of dumping prevailing at the time of importation, or the margin of dumping calculated for the purpose of a duty refund request?*

231. The relevant *normal value* is the value determined in the original investigation or in a review conducted under Article 9.5. That normal value may be revised following a review conducted pursuant to Article 9.3 or 11.2.

232. A margin of dumping *cannot* be determined for an individual import *transaction*:[137]

> Thus, "dumping" and "margins of dumping" can be found to exist only at the level of a "product": they cannot be found to exist at the level of a type, model, or category of a product under consideration; nor can they be found to exist at the level of an individual transaction.[138]

233. Thus, no margin is determined at the time of importation. Similarly, at that time, the investigating authorities do not determine a normal value that can be compared with the price of an import transaction.

K. *PROCEDURAL CLAIMS*

> ***Question 70**: Norway repeatedly refers to the concept of a record. Assuming that the maintenance of some sort of formalized "record" may be useful to an investigating authority, and to interested parties in an investigation, could Norway point to where, in the ADA, there is any reference to the concept of a "record" of the investigation as such?*

234. The word "record" is a convenient shorthand expression or label routinely used by investigating authorities, Members, panels and the Appellate Body to refer to the information gathered by an investigating authority during the course of an investigation.

235. Article 6 of the *Anti-Dumping Agreement* imposes a formal obligation on an investigating authority to gather considerable information and evidence from interested

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[137] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 87 and 112; and Appellate Body Report, *US – Zeroing (Japan)*, paras. 160 to 163.

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

parties.[139] The authorities determinations must be based on, and justified in terms of, that body of information. Thus, Article 17.5(ii) provides that panels are to examine anti-dumping disputes on the basis of "the facts made available in conformity with appropriate domestic procedures to the authority of the importing Member". Moreover, an authority is also obliged to grant interested parties access to information it has gathered in the investigation under Articles 6.1.2 and 6.4.

236. Panels and the Appellate Body have repeatedly referred to the body of information gathered by an authority as the "record" of the investigation. For example, the panel in *Guatemala – Cement II* noted that "we are not to examine any new evidence that was not part of the *record of the investigation*".[140] The Appellate Body has also repeatedly referred to an investigating authority's "*record*" of the investigation. For example, in summarizing the standard of review under the *Anti-Dumping Agreement*, it held that a panel's examination of the conclusions of the national authority must be "*based on the information contained in the record*".[141] In fact, the case law is replete with similar references to the "record" of an anti-dumping investigation.[142] This Panel has also referred to the "*record*" of the investigation in Questions 12(b), 12(c), 39 and 64 as a shorthand expression for the information gathered by an investigating authority during the course of an investigation. The EC itself has referred to the record of an investigation in other trade remedy disputes. For example, in *EC – Tube or Pipe Fittings* the EC asserted that its "examination of the factor of 'growth' was clearly evident in the record of the investigation".[143]

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[139] In detail, under Articles 6.1 to 6.6, the investigating authority is obliged to: (i) collect the information that it requires, or that the interested parties consider relevant (Article 6.1); (ii) require that information provided orally be committed to documentary form before it can be "taken into account" by the investigating authority (Article 6.3); (iii) satisfy itself as to the accuracy of the information obtained (Article 6.6, 6.5.1 and 6.7); (iv) allow interested parties to see all the information that it uses, that is relevant to the presentation of the parties' case and that is not confidential (Article 6.4); and (v) require interested parties providing confidential information to furnish non-confidential summaries of that information, save in exceptional circumstances (Article 6.5).
[140] Panel Report, *Guatemala – Cement II*, para. 8.19.
[141] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93. Emphasis added.
[142] By way of example, *see* Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.3; Panel Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 7.9, 7.56 and 7.62; Panel Report, *Korea – Certain Paper*, paras. 6.10 and 6.25; and Panel Report, *US – Hot-Rolled Steel*, para. 7.204; Appellate Body Report, *EC – Bed Linen*, paras. 120, 124, 127, 128, 132 and 161; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 222; and Appellate Body Report, *US – Hot-Rolled Steel*, paras. 69, 105, 120 and 123.
[143] EC's Appellee Submission, *EC – Tube or Pipe Fittings*, para. 137. *See, also*, the EC's First Written Submissions in *US – Corrosion-Resistant Steel*, paras. 37, 87 and 96; and *US – Countervailing Measures on Certain EC Products*, paras. 89, 94 and 109. These submissions were downloaded at http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114563.pdf, http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114357.pdf, and

237. Norway is, therefore, surprised by the controversy regarding the use of the word "record". In any event, whether the label "record" is used or not, an investigating authority is obliged to gather information and evidence during the investigation, and to grant interested parties access to it. Moreover, in this dispute, the EC's measure must be justified by a reasoned and adequate explanation of how this body of information (i.e. "record") supports its determinations.

Question 71: What does Norway mean when it says that, after the disclosure, "the essential facts changed"?

238. The Panel's question appears to quote from paragraph 192 of Norway's Opening Statement, which addressed the EC's failure to disclose the essential facts regarding the determination of the level of the MIPs.

239. In general terms, the facts that are essential to a particular determination necessarily depend on the substantive nature of that determination. For example, if an authority proposes to find that there is injury, the facts essential to this determination would be very different from the facts essential to a determination that there is no injury. As a result, if an authority changes its mind about the substantive character of a determination it proposes to make, this will likely entail a "change" in the essential facts supporting the new determination.

240. Under Article 6.9, an authority is obliged to disclose the essential facts that support the *final* determination that an authority proposes to make. It is irrelevant that an authority has disclosed facts that were intended to support a different determination that the authority has subsequently abandoned. For example, if the authority finally determines that there is injury, it is not sufficient that it disclosed essential facts supporting a finding that there is no injury, even if the authority intended to make such a finding at an earlier stage. The facts supporting the proposed earlier determination are not "essential" to the final determination.

241. This is the conclusion reached by the panel 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*."[144] In that

http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114337.pdf, respectively.
[144] Panel Report, *Guatemala – Cement II*, para. 8.228. Emphasis added.

situation, the factual basis for the final determination *changed significantly* from the factual basis for the provisional determination. As a result, a new disclosure of the changed essential facts was required.

242. This interpretation is consistent with the due process aims that Article 6.9 pursues. If an authority was permitted to change its mind about the essential facts without disclosing the authority's new assessment of those facts, interested parties would be deprived of an opportunity to comment during the investigation on the facts essential to the authority's final determination. This would frustrate the objectives of Article 6.9, which seeks precisely to allow for comment on the essential facts prior to a final decision.

243. In this dispute, two of Norway's examples of a failure to disclose the essential facts involve situations where the EC changed its mind about the substantive character of its final determinations and, therefore, changed its mind about the facts that were essential to its final determination. These examples relate to (1) the dumping determination for PFN and (2) the determination of the level and number of MIPs.

244. For PFN, the EC established a definitive dumping margin of 17.7 percent.[145] However, in PFN's Definitive Disclosure, the EC disclosed facts supporting a considerably higher dumping margin of 24.5 percent.[146] Thus, following that Definitive Disclosure, the EC revised its dumping determination downwards by 6.8 percent, in absolute terms, and 27.8 percent, in relative terms. In order to make such a significant change to the final dumping determination, the EC must have re-assessed the facts, and decided that different facts were essential to its determination. Put differently, the same set of essential facts *cannot* support dumping determinations of 17.7 percent and 24.5 percent. Because the EC never disclosed the essential facts supporting its proposed final determination of 17.7 percent, the EC failed to comply with Article 6.9.

245. With respect to MIPs, the EC's disclosure on 28 October 2005 was based on MIPs ranging from 2.80 EUR/kg to 6.00 EUR/kg. Subsequently, the EC *recalculated* the MIP for

[145] Definitive Regulation, para. 32. Exhibit NOR-11.
[146] 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. Exhibit NOR-11.

fillets, with the highest MIP rising to 7.73 EUR/kg.[147] Thus, the EC's determination of the appropriate level of the remedy changed by almost 30 percent.

246. The EC recognized this dramatic change through a further information note on 13 December 2005.[148] In that document, the EC expressly acknowledged that the new MIPs determination was based on new information that was obtained *subsequent* to the October disclosure. The EC noted that it had requested information from interested parties on the level of the MIPs on 16 November. It continued:

> *In the light of the comments received* [on the 16 November request for information], the Commission services deepened the investigation by verifying and cross-checking all the information available, [including] *the latest information provided by all parties in reply to the definitive disclosure. … On that basis,* it was found … [149]

247. Thus, the EC admits that it used this information obtained after the disclosure as the "basis" for setting the level of the recalculated MIPs. Consequently, the "essential facts" forming the "basis" for the EC's final determination changed, that is they were different from the essential facts at the time of the disclosure. The EC was required to disclose the new essential facts – what it called "the latest information" – and set an appropriate time frame for interested parties to comment. However, although the EC referred to these new essential facts, it never disclosed them or gave an opportunity for comment.

> ***Question 72: Could Norway comment on the view that the obligation to inform interested parties of the essential facts pursuant to Article 6.9 is a one-time obligation? If Norway disagrees with this view, could Norway explain how an investigating authority could comply with an obligation to disclose essential facts repeatedly, with an obligation to allow time for parties to defend their interests, and still be able to finalize the investigation within the time available?***

248. Article 6.9 requires the investigating authority to disclose to interested parties the "essential facts under consideration which form the basis of the decision whether to apply definitive measures". Article 6.9 also states that such disclosure shall take place "in sufficient time for the parties to defend their interests". The purpose of Article 6.9 is, therefore, to disclose to the parties the essential facts under consideration, at a point in time in

[147] The changes in the MIPs are set forth in Table 8, para. 628, of Norway's FWS.
[148] Exhibit NOR-19.
[149] Information Note on the Definitive MIPs, 13 December 2005, page 1. Emphasis added. Exhibit NOR-19.

which the parties can defend their interests, for instance, by providing comments to the investigating authority.

249. Article 6.9 does *not* require an investigating authority to disclose an essential fact *more than once*. However, the essential facts must be disclosed *at least once*. As Norway explained in reply to Question 71, if an authority decides that the essential facts are different from those it initially disclosed, its earlier disclosure did not comply with the duty to disclose the essential facts. In that event, the essential facts have *not been disclosed once*.

250. The need for "repeated" disclosures, as well as any concomitant delays in the investigation, are the result of the authority's own decision to rely on essential facts that were not previously disclosed to interested parties. However, in most investigations, an authority will have gathered and considered the information it needs prior to disclosing the essential facts. In a properly conducted investigation, comments on the essential disclosure will rarely raise new facts that would require a further disclosure. Thus, the duty to make further disclosures is unlikely to arise frequently.

251. In any event, interested parties cannot be prejudiced by the fact that the authority has decided that previously undisclosed facts are now essential to its final determination. Article 6.9 guarantees interested parties an opportunity to comment *during the investigation* on the facts essential to the authority's final determination. The authority cannot deprive interested parties of that right on the grounds that respecting due process would delay the investigation.

252. Indeed, in this investigation, the EC acknowledged the need for a second disclosure where the essential facts change following an initial disclosure. On 13 December 2005, it decided to make a second disclosure relating to the MIPs because, in its final determination, it proposed to rely on new information obtained following the initial disclosure on 28 October 2005.[150]

253. Finally, Norway wishes to emphasize that an additional disclosure is required only if the authority discovers that it has not disclosed some fact that is *essential* to its final determination. There is no duty to make a further disclosure when the authority modifies its *findings* or *reasoning* made on the basis of essentials facts that have already been disclosed.

[150] *See* paras. 246 and 247 above.

For instance, if the authority decides to change its injury finding from "present injury" to a "threat of injury" *on the basis of the same set of essential facts that were previously disclosed*, Article 6.9 does not require additional disclosure.[151]

L. *DOMESTIC INDUSTRY*

Question 73: please see paragraphs 28 to 40 above.

M. *LIMITED EXAMINATION*

Question 74: Please see paragraphs 58 to 63 above.

Question 75 and Question 76: Please see paragraphs 64 to 75 above.

Question 77: Please see paragraphs 76 to 80 above.

Question 78: Please see paragraphs 81 to 86 above.

Question 79: Please see paragraphs 87 and 88 above.

N. *BELOW-COST SALES OUTSIDE THE ORDINARY COURSE OF TRADE*

Question 80: Please see paragraphs 103 and 104 above.

Question 81: Please see paragraphs 105 and 106 above.

Question 82 and Question 83: Please see paragraphs 107 to 116 above.

O. *REJECTION OF ACTUAL SG&A AND PROFIT DATA*

Question 84: Please see paragraphs 127 to 129 above.

Question 85: Please see paragraphs 118 to 126 above.

P. *ALLEGED RELIANCE ON "FACTS AVAILABLE"*

Question 86: Please see paragraphs 134 and 135 above.

Question 87: Please see paragraph 136 above, and the answer to Question 59 in paragraphs 143 to 145 above.

[151] Panel Report, *Guatemala – Cement II*, para. 239.

***Question 88* and *Question 89*:** Please see paragraphs 137 to 142 above.

Q. *MINIMUM IMPORT PRICES*

***Question 90*:** Please see paragraphs 226 to 230 above.

***Question 91*:** Please see paragraphs 231 and 232 above.

R. *FIXED DUTIES*

***Question 92*: Article 9.3 requires that the amount of any anti-dumping duty collected must not exceed the margin of dumping as established under Article 2.**

(a) How does this and/or any other provision(s) of the ADA regulate the amount of fixed duty that may be imposed?

(***b) Please explain whether, in the context of the application of fixed duties, you consider that the "margin of dumping" referred to under Article 9.3 is the margin of dumping from the original investigation, the margin of dumping prevailing at the time of importation, or the margin of dumping calculated for the purpose of a duty refund request?***

254. With respect to sub-question (a), neither Article VI of the GATT 1994 nor Article 9 of the *Anti-Dumping Agreement* require that anti-dumping duties take a particular form (e.g. fixed, variable or *ad valorem*). Nor do these provisions prohibit any particular forms of duty (e.g. fixed duties). Instead of prescribing the *form* of duties, Article VI:2 and Articles 9.1 and 9.3 set forth a *ceiling* on the maximum *amount* of duties that can be imposed on individually examined producers and exporters. Each of these provisions states that anti-dumping duties cannot be imposed on individually examined producers and exporters in an amount that exceeds the margin of dumping.

255. In the absence of rules prescribing the form of anti-dumping duties, or prohibiting fixed duties, Norway does not exclude that fixed duties may be permitted, subject to respect for the ceiling on the maximum amount of duties.

256. In *Argentina – Textiles*, 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."[152] The Appellate Body held that a Member

[152]Appellate Body Report, *Argentina – Textiles and Apparel*, para. 50.

must adopt a mechanism – such as a cap – to ensure that a fixed duty does not exceed the maximum amount of *ad valorem* duties that may be imposed pursuant to tariff rate bindings.[153]

257. Applying the same principles, if a Member chooses to impose a fixed duty, Article VI:2 and Article 9.1 and 9.3 require that it adopt a "ceiling" or "cap" to ensure that the fixed duties, expressed as an *ad valorem* equivalent of the export price, do not exceed the individual margin of dumping. In the contested measure, the EC failed to adopt such a mechanism. 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.[154]

258. With respect to sub-question (b), the relevant margin of dumping is the margin determined in the original investigation or in a review conducted under Article 9.5. That margin may be revised following a review conducted pursuant to Article 9.3 or 11.2. A margin of dumping cannot be determined for an individual import transaction at the time of importation.[155]

259. Finally, if the Panel were to find that Members cannot impose fixed duties, the EC would plainly have violated Articles 9.1, 9.2, 9.3 and 9.4, as well as Article VI:2, in imposing duties of this kind.

[153]Appellate Body Report, *Argentina – Textiles and Apparel*, para. 54. *See* Norway's FWS, paras. 664, 665 and 681.
[154] *See* Norway's FWS, para. 679 and Table 10.
[155] Appellate Body Report, *US – Zeroing (Japan)*, para. 151 and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 87 and 112.