NON-CONFIDENTIAL VERSION

BEFORE THE WORLD TRADE ORGANIZATION

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

WT/DS337

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

23 FEBRUARY 2007

I. QUESTIONS TO NORWAY

A. *Limited Examination*

Question 132: At para. 43 of its Second Oral Statement, Norway states that "if the EC was in any doubt that Salmar's exports to the EC were significant, it could easily have asked either Salmar or FHL – as it did for other companies." Is Norway in this context referring to the email or fax from the Commission that is presented in Exhibit NOR-51? If not, what additional questions or follow-up is Norway referring to in the statement made in this paragraph?

1. It is correct that Norway was referring to the e-mail or fax which the investigating authority addressed to certain companies and which was presented by Norway as Exhibit NOR-51.[1] These e-mails or faxes asked for clarifications and additional information to supplement the information provided in the sampling form.

2. The fact that the EC addressed supplementary questions to certain companies demonstrates that the EC could have addressed similar additional questions to Salmar regarding its exports *via* related and unrelated traders, as well as the destination of those exports.

3. Exhibit NOR-51 also demonstrates that the process of gathering information, for purposes of composing a sample, is not limited to the receipt of a sampling response by the authority. Rather, it is a dialogue between the investigating authority and the investigated companies. The authority must actively seek out information when it is in doubt, for instance, about a company's activities, volume of exports or other relevant attributes.[2] The authority cannot limit its role to passively receiving information.

B. *Below-Cost Sales Outside the Ordinary Course of Trade*

Question 133: How does Norway respond to the EC's assertion, at para. 45 of its Second Oral Statement, that it follows from the second sentence of Art. 2.2.1 that "any sales will be regarded as providing for the recovery of costs within a reasonable period if its price is above the weighted average per unit costs for the period of investigation"?

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[1] The mode of transmission depended on the respective addressee.

[2] Panel report, *Mexico – Rice*, para. 7.185, citing with approval Appellate Body Report, *US – Wheat Gluten*, para. 53.

4. Paragraph 45 of the EC's Second Opening Statement addresses the following two scenarios:

a) the price of a sale is ***below* cost at the time of sale; but ***above*** costs for the investigation period ("IP")**

5. This scenario is taken directly from the second sentence of Article 2.2.1, which states that sales falling within this scenario provide for the recovery of costs within a reasonable period. Norway and the EC agree that these sales cannot be rejected as outside the ordinary course of trade by reason of price.

b) the price of a sale is ***above* cost at the time of sale; and ***above*** costs for the IP**

6. Because the sales price is above costs under both time periods considered, Norway agrees with the EC that there is no basis for excluding these sales from the ordinary course of trade. Indeed, these sales are not covered by Article 2.2.1 because that provision addresses solely sales made at prices that are below cost.

7. Both of the scenarios described by the EC involve sales prices that are *above* costs during the IP. These situations are not contentious and do not raise the interpretive question that divides the EC from Japan,[3] Norway, and the United States.[4] The interpretive divergence arises in a third scenario that the EC does not mention:

c) the price of sale is ***below* costs over the IP; but ***above*** costs over a reasonable period.**

8. Under Article 2.2.1, the "period of investigation" and the "reasonable period" are different periods that cannot be equated. Thus, the mere fact that prices are below cost for the IP does not necessarily mean that prices fail to provide for cost recovery in a reasonable period.

9. 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

[3] Japan's Answers to Questions 3 to 6.
[4] United States' Answers to Questions 3 to 6.

exporter, and the industry at issue.[5] Although the "reasonable period" may equal the IP, in some circumstances the reasonable period may be longer. Norway has explained factors that an authority could consider in assessing whether prices provide for cost recovery in a reasonable period in paragraph 113 of its answer to Questions 82 and 83.

10. In its Second Opening Statement, the EC also argues that the second sentence of Article 2.2.1 confers a "special status" on the "period of investigation".[6] As the EC would have it, the second sentence "shift[s] the burden of proof": if prices are below cost for the IP, the "onus" would be on the investigated company to show that prices provide for the recovery of costs within a reasonable period.[7]

11. There is nothing in the text of Article 2.2.1 that supports this proposition. As the EC itself concedes, and as Japan[8] and the United States[9] also argue, the second sentence of Article 2.2.1 merely sets forth one example of a situation where prices provide for the recovery of costs. The EC also admits that the second sentence does not "*explicitly* define[]" when the costs are *not* recovered in a reasonable period. The EC's argument, therefore, asks the Panel to transform an example of cost recovery into a general rule on the non-recovery of costs. Moreover, the EC urges this transformation even though it admits that the text does not "*explicitly*" set forth any general rules on the non-recovery of costs. Thus, the EC's proposed approach is based on implication and invention, and not treaty text.

12. If the drafters had intended to introduce general rules, coupled with a burden of proof, they would have added words to that effect. Instead, the duty is firmly placed on the authority to "*determine*", in every investigation, whether prices provide for the recovery of costs within a "reasonable period". Through an implied "burden of proof", the EC tries to limit the authority's duty to make a determination to situations where interested parties request such a determination. That is not acceptable.

13. Furthermore, the EC's arguments are premised on the view that a Member actually "*adopts*" a general "rule" that, if prices are below average costs for the IP, the "burden of

[5] Norway's Answers, paras. 108 to 113; and Norway's FWS, paras. 345 to 351.
[6] EC's Second Opening Statement, para. 49.
[7] EC's Second Opening Statement, para. 50.
[8] Japan's answers to Questions 3 to 6.
[9] United States' answers to Questions 3 to 6.

proof" "shifts" to the investigated companies to show that prices allow for cost recovery in a reasonable period.[10] Even if Article 2.2.1 were to permit (*quod non*) this interpretation, the EC has not shown that it "adopted" such a "rule". To Norway's knowledge, the EC has never published any such "rule". Investigated parties cannot, therefore, be expected to know of this rule. Moreover, in this investigation, the EC never informed interested parties of the existence of this "rule" nor that the burden of proof had "shifted" to them. Thus, the EC has not even established that it satisfied the conditions it says apply in order to "shift the burden of proof" to interested parties.

C. *Margins of Dumping for Non-Sampled Companies*

<u>Question 134</u>: The Panel understands that Mr Per Dag Iversen represented the FHL and its members. In addition, the EC has submitted, as Exhibit EC-56, a copy of the Power of Attorney granted by the Norwegian Seafood Association to Mr Iversen to act on its behalf in the salmon investigation. Norway claims that 67 companies did not receive the Notice of Initiation. Does Norway contend that none of these 67 companies were members of either the FHL or the Norwegian Seafood Association?

14. As stated during the Second Substantive Meeting with the Panel, Norway requested information from FHL and NSL to ascertain which producers were actually members of one or other of the two organizations in October/November 2004.

15. Based on information received from FHL and NSL, the following 33 companies were not members of either FHL or NSL in November 2004:[11]

[[xx.xxx.xx]]

16. All of these companies were given the punitive residual rate of 20.9 per cent.

[10] EC's Second Opening Statement, para. 50.

[11] Due to a change in computer system at NSL, the NSL membership list as it stood in November 2004 can no longer be retrieved. The information received from NSL is based on NSL's membership as of June 2005. However, Norway is not aware of any company that was an NSL member in October 2004 but subsequently resigned its membership between October 2004 and June 2005.

Question 135: The Panel has noted that among the 67 companies listed by Norway in Exhibit NOR-152 as not having received the Notice of Initiation, there are companies named in the list of companies provided by the FHL to the EC in the attachment to Exhibit EC-52 (e.g. Altafjord Oppdrett AS, Aqua Farms ASA, Engsund Fiskeoppdrett AS). Can Norway explain why the FHL did not inform these companies of the Notice of Initiation, even though it was aware of their existence and postal address?

and

Question 136: To the extent that the FHL acted for both its members and those for the Norwegian Seafood Association, does Norway consider that the EC had to notify each and every member of each of the two industry associations?

17. Norway notes that the Panel refers to the EC's "Notice of Initiation", and asks about the EC's duty to "*notify*" individual interested parties. In fact, the EC's "Notice of Initiation" served a *dual function*. On the one hand, it *informed interested parties of the initiation* of the anti-dumping investigation, under Article 12.1 of the *Anti-Dumping Agreement*; and, on the other hand, it *requested detailed information* from certain interested parties under Article 6.1 and Annex II(1). The EC relied on the alleged failure of some Norwegian companies to respond to this request for information as justification for applying facts available under Article 6.8.[12]

18. Norway does not contest the manner in which the EC *provided information to* interested parties; instead, Norway's claim concerns the EC's *request for information from*

[12] See EC's Answers, paras. 259, 265, and 268 – 270.

interested parties. Before responding to the specifics of the Panel's question, Norway addresses certain general interpretative matters.

(i) In what circumstances may an investigating authority use an industry association as a channel of communication?

19. The *Anti-Dumping Agreement* envisages different types of communication between an authority and interested parties. An investigating authority can *provide information to* interested parties, without any obligation on the parties to take any action in response;[13] or the authority can *request information from* interested parties, and facts available may be applied if the party does not respond.[14]

20. When the authority *provides information to* interested parties, it is not always bound to communicate directly with the foreign companies. Footnote 16 indicates that, in defined circumstances, the authority may communicate information to exporters through an industry association.[15]

21. In contrast, when the authority *requests information from* interested parties, the *Agreement* does not permit the authority to use an industry association as an intermediary. Rather, the authority itself must ensure direct communication with the specific interested party from which information is requested.

22. Thus, Article 6.1 requires that the authority advise interested parties of information that it requires from them. Further, Annex II(1) requires that the authority "specify in detail the information required from any interested party" and "ensure that the party is aware" that adverse facts may be used against that party if requested information is not supplied within a reasonable time. Because of the potentially adverse consequences for the interested party, the *Agreement* requires the authority to make the effort to communicate directly with the company. The remainder of Annex II also envisages a dialogue between the authority and a specific interested party from which information is requested.

23. If an authority does not communicate directly with the interested party from which information is requested, it cannot comply with the requirements of Articles 6.1 and 6.8, and

[13] *See, for instance*, Articles 6.1.3 and 12.1 of the *Anti-Dumping Agreement*.
[14] *See, for instance,* Article 6.1 and Annex II(1) of the *Anti-Dumping Agreement*.
[15] This is where the number of exporters involved is "particularly high".

Annex II. The authority does not "ensure" that the interested party receives a detailed request for information, nor that "the party" concerned is aware that adverse facts may be used. As in this investigation, interested parties may *never* receive any request for information nor, as a result, any warning regarding facts available.

24. In *Mexico – Rice*, after reviewing Annex II(1), the Appellate Body stated:

> In other words, [under Annex II(1),] an exporter shall be given the opportunity to provide the information required by the investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. *An exporter that is* unknown to the investigating authority—and, therefore, is *not notified of the information required to be submitted to the investigating authority—is denied such an opportunity*. Accordingly, an investigating authority that uses the facts available in the application for the initiation of the investigation against an exporter *that was not given notice of the information the investigating authority requires*, acts in a manner inconsistent with paragraph 1 of Annex II to the *Anti-Dumping Agreement* and, therefore, with Article 6.8 of that Agreement.

25. Thus, under Article 6.1 and Annex II, an authority must make requests for company-specific information directly to the interested party to ensure that the party is given an opportunity to provide the information required from it and is aware of the consequences of withholding information.

(ii) <u>The specific circumstances of the present investigation</u>

26. Norway now turns to the Panel's specific questions. Under Article 6.1 and Annex II(1), the EC could not request company-specific information required from Norwegian exporters and producers merely by transmitting its Notice of Initiation to FHL. Rather, the EC was obliged to address such requests directly to the companies themselves. In other words, the EC could not "outsource" to FHL the responsibility for making detailed requests for company-specific information that lead to the application of adverse facts.[16]

27. The only situation in which the EC could have communicated with FHL, instead of investigated companies, would have been where the investigated company provided FHL with a power of attorney to act on its behalf in its dealings with the authority. In fact, when the EC imposed the provisional "all others" rate of 24.5 percent on the allegedly non-

[16] *See* Norway's Second Opening Statement, para. 71.

cooperating, non-sampled companies, FHL informed the EC that it had obtained individual powers of attorney to act on behalf of the majority of those companies in this proceeding.[17] Prior to that time, the authority was obliged to respect the fact that investigated companies are legally independent of a trade association, which cannot be expected to serve the individual interests of all of its members during an anti-dumping investigation.

28. The Panel enquires specifically why FHL did not transmit the EC's request for information to certain Norwegian license-holders listed in Exhibit EC-52. Norway notes that FHL provided a list of all license-holders in Norway upon the request of the EC. There are two reasons why FHL did not transmit the EC's communications to all companies on that list. *First*, not all of the listed companies were members of FHL.[18] *Second*, FHL reasonably took the view that certain Norwegian companies were too small to be included in the sample and, therefore, considered that the EC's communications were not relevant to them. This illustrates well why the *Anti-Dumping Agreement* does not permit an authority to rely on third parties, such as industry associations, to transmit requests for company-specific information to interested parties that could lead to adverse facts.

29. Norway notes that it was not unduly burdensome for the authority to comply with its obligation to request information from the companies themselves because the EC had obtained the names and addresses of all license holders in Norway, and could very easily have sent communications to each of them.[19] This was *not*, therefore, a situation where Norway's producers were *unknown* to the authority.

30. In any event, even if the authority were entitled to rely on an industry association to request company-specific information (*quod non*), there are two reasons why the EC acted inconsistently with the *Anti-Dumping Agreement*. *First*, before applying facts available, an authority must respect the procedures in Annex II of the *Anti-Dumping Agreement*. Under Annex II(6), the authority must:

[17] 64 allegedly non-cooperating, non-sampled companies provided FHL with a power of attorney to represent the company at the meeting held with the authority in Brussels on 2 June 2005. If necessary, Norway would be happy to provide the Panel with copies of these powers of attorney, which were provided to the authority.

[18] *See* the list of non-member companies in paragraph 15.

[19] See Exhibit EC-52.

- inform the companies concerned that they failed to provide required information; and
- give the companies an opportunity to remedy the failing within a reasonable period.[20]

The EC did not respect these requirements in its dealings with the companies that were subjected to the punitive residual rate.

31. *Second*, again assuming that the authority was entitled to rely on FHL to transmit requests to Norwegian companies (*quod non*), it could do so solely with respect to companies that were members of FHL and NSL. As set forth in paragraph 15 above, the EC failed to request information from more than 30 companies that were *not* members of either FHL or NSL.

32. Finally, Norway notes that the issue relates to the incorrect application of "adverse facts available" to companies that were not selected as part of the sample and, consequently, were not examined. Norway reiterates its belief that the *Anti-Dumping Agreement* does not permit the EC to apply "adverse facts" to non-examined companies, and does not permit the EC to determine a punitive "all others" rate. According to Article 9.4, any non-sampled companies may be subject only to the weighted average dumping margin, or the weighted average normal value. Article 9.4 does not envisage the application of a second, punitive, all others rate.

33. The *proviso* at the end of Article 9.4 confirms that non-sampled companies may not be subject to a residual rate based on facts available. Article 9.4 requires that, in calculating the all others rate, any margins established using facts available shall be excluded. It would be incongruous if Article 9.4 *prohibited* the calculation of the all others rate on the basis of facts available, but at the same time *permitted* an all others rate that was premised on facts available.

[20] See Annex II(6) of the *Anti-Dumping Agreement*.

II. QUESTIONS FOR BOTH PARTIES

A. *Below-Cost Sales Outside the Ordinary Course of Trade*

Question 137: What are the Parties' views in respect of the question whether the test set out in the first sentence of Art. 2.2.1 must be carried out through a comparison of sales prices to per unit costs *at the time of the sale* or sales prices to *average* per unit costs *for the period of investigation*?

34. Article 2.2.1 of the *Anti-Dumping Agreement* applies to sales of the like product made "at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs" (so-called "below cost sales"). The provision sets forth that these "below cost sales" may be excluded from the ordinary course of trade solely if the authorities "determine" that the three conditions enumerated in the remainder of the first sentence of Article 2.2.1 are satisfied.

35. To recall, these conditions require that the "below cost sales" are made: (1) within an extended period of normally one year, but of at least 6 months;[21] (2) in substantial quantities; and (3) at prices that do not provide for cost recovery within a reasonable period. In this dispute, Norway claims that the EC failed to make any determination with respect to the third condition, namely "cost recovery within a reasonable period".

36. Norway understands that the Panel's question refers to the initial "test" applied by the authority to identify the individual "below cost sales" to which the authority must, in turn, apply the three conditions. Article 2.2.1 does not itself prescribe a time-period that an authority must use to measure costs when it initially identifies the "below cost sales". The second sentence of Article 2.2.1 does, however, indicate that the time-period must *include* "the time of sale". However, the provision does not specify whether the relevant "time" must be the particular day of sale, or an average including that day, over a week, month or the period of investigation.

37. The authority, therefore, has a degree of discretion to determine the appropriate time-period for this initial test in light of the particular circumstances of the investigation, including relevant economic considerations that have affected the development of costs

[21] Article 2.2.1 and footnote 4 of the *Anti-Dumping Agreement*.

during the period of investigation (e.g. high inflation or a significant change in input costs). Norway is aware that different authorities have identified "below cost sales" on the basis of monthly costs,[22] quarterly costs,[23] or costs over the IP.

38. As already noted, the identification of a "below cost sale" is only the *first* step under Article 2.2.1. When the authority has identified such sales, it must "*determine*" whether those sales meet the three conditions enumerated in paragraph 34 above. Any "below cost sale" that does not meet these three conditions must be treated as being made in the ordinary course of trade.

39. Thus, for example, if the authority identifies "below cost sales" on the basis of monthly costs, it must thereafter "determine" whether the sales-below-monthly-costs are made within an "extended period" (normally *one year* and not less than *6 months*), in "substantial quantities", and at prices that do not provide for cost recovery in a "reasonable period". Norway has explained in paragraph 9 above the considerations that an authority must take into account in determining the duration of the "reasonable period" in the normal commercial practice of the industry concerned.

B. *Margins of Dumping for Non-Sampled Companies*

<u>Question 138</u>: Please explain what the reference to the establishment of a "salmon project" in the "Note for the File" dated 28 October 2004 submitted by the EC as Exhibit EC-55, was intended to mean. Was any such "salmon project" ever established? If so, please describe its details.

40. During the anti-dumping investigation in 1996 – 1997, the two organizations (FHL and NSL) established a joint "salmon secretariat" (Norwegian: "Laksesekretariatet") to coordinate their contact with the EC and with Norwegian authorities. Its purpose was to

[22] Council Regulation (EC) No. 2413/95 imposing a definitive anti-dumping duty on imports of ferro-silico-manganese originating in Russia, Ukraine, Brazil and South Africa, 1995 OJ 248/1, paras. 27 and 31; USDOC, *Light-Walled Rectangular Pipe and Tube from Turkey: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, A-489-812, 13 April 2004, p. 19397; USDOC, *Final Determination of Sales at Less Than Fair Value: Ferrosilicon From Brazil*, A-351-820, 6 January 1994, pp. 733 – 734. Exhibits NOR-186, NOR-187 and NOR-188.

[23] USDOC, *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, A-583-827, 23 February 1998, p. 8913. Exhibit NOR-189.

ensure that the two organizations spoke with one voice. It was led by FHL, which is why Mr. Iversen (of FHL) received the "power of attorney" referred to in Exhibit EC-55.

III. CNV ADJUSTMENTS

Question 139: At the beginning of the second day of the Panel hearing, Norway contested certain issues raised by the EC in its Second Oral Statement as containing some "factual errors". In particular, in response to para. 132(b) of the EC's Second Oral Statement, Norway observed that its claim in respect of CNV adjustments for biomass deformity did not relate to the issue of valuation of biomass following unfavourable market price conditions, but to the adjustment made for the deformity of fry. To this end, Norway explained that two groups of deformed fry were considered: (a) fry, which was completely destroyed; and (b) fry, which was partially deformed. If the Panel's understanding is correct, Norway argues that the adjustment that it contends the EC failed to make relates only to fry, which was completely destroyed. Could the parties comment on this understanding and the EC's treatment of both categories of fry? Please substantiate your statements with reference to information and evidence that was before the investigating authority during the investigation.

41. In 2003, [[xx.xxx.xx]] made three write-downs in the value of live fish, or biomass, each of which was triggered by a different circumstance, namely: (1) destruction of fry ([[xx.xxx.xx]] NOK);[24] (2) lower anticipated sales prices due to fish deformity ([[xx.xxx.xx]] NOK); and (3) lower anticipated sales prices due to unfavourable market developments ([[xx.xxx.xx]] NOK).[25] The EC *wrongly included* the first and second of these non-recurring costs ("NRC") in [[xx.xxx.xx]] cost of production, but *correctly excluded* the third.

42. There is no rational basis for this inconsistent approach. Each of these non-recurring costs ("NRC") is of exactly the same nature: it reduced the *asset value* of [[xx.xxx.xx]] biomass in the balance sheet, but did not provide any resources that contributed to the company's production of salmon sold in the IP.

[24] *See* Norway's FWS, paras. 886 to 889.
[25] *See* Norway's FWS, paras. 820 to 830.

43. The EC accepted this logic with respect to one part of the biomass write-down (i.e. (3) above), but did not accept the very same logic with respect to the other two parts of the biomass write-down (i.e. (1) and (2) above). The EC offers no explanation for this illogical approach.

44. Finally, in paragraph 132 of its Second Opening Statement, the EC mischaracterizes Norway's claims, as well as its own determination. In that paragraph, the EC does not even refer to the write-down due to biomass deformity. At the hearing, Norway had not realized this additional mischaracterization of its claims. Moreover, contrary to what the EC implies, the three biomass write-downs—destruction of fry, fish deformity, and marketplace developments—are not all "part" of a single cost adjustment made by the EC. Rather, they were all treated separately.