AS HELD

NON-CONFIDENTIAL VERSION

BEFORE THE WORLD TRADE ORGANIZATION

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

WT/DS337

SECOND PANEL MEETING
OPENING STATEMENT
NORWAY

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I. INTRODUCTION

1. Mr. Chairman and members of the Panel, Norway would like to thank you, once again, for devoting your time to serve as panelists, and for your on-going efforts to help the Parties resolve this dispute. In this statement, Norway responds to issues raised by the EC in its answers to the Panel's questions ("Answers") and in its Second Written Submission ("SWS"). The EC's latest submissions provide the Panel with a mixed bag: on some issues, it makes admissions that substantiate Norway's claims; on others, it offers a new defense that differs from both the published determination and its First Written Submission; and, on still others, the EC still presents an inaccurate picture of the investigation.

II. THE PANEL CANNOT CONDUCT A *DE NOVO* REVIEW

2. Before turning to Norway's arguments on specific claims, Norway wishes to comment on the standard of review. Because this dispute concerns an anti-dumping measure, the Panel's task is to review the *investigating authority's factual and legal determinations* as set forth in the published determination. The Panel cannot make new determinations, on the basis of new facts and reasons, that replace those originally made by the authority. Nonetheless, the EC regularly urges the Panel to conduct such a *de novo* review.

3. *First*, on almost every issue, the EC provides new explanations in an attempt to justify its authority's determinations. It, essentially, admits that it provides new explanations because it argues that a responding Member must be able to defend its authority's failings with new explanations that address the WTO claims.[1] Thus, the EC asks the Panel to find that the authority's conclusions are justified because the facts support a new explanation that the authority never gave.

4. It is not the Panel's task to conclude that the authority reached the right conclusions for the wrong reasons. The *authority's* reasons would serve no purpose if they could simply be changed by the *responding Member* in panel proceedings. The Panel would cease to review the reasons that led the authority to its determinations, and would, instead, review new reasons developed by a Member in dispute settlement. The duty to explain in Article 12.2 is thereby rendered *inutile*. For this reason, panels and the Appellate Body have consistently

[1] *See*, for example, EC's Answers, para. 162.

refused to allow *ex post* rationalization.[2] By providing new reasoning that is not found in the published determination, the EC admits that the reasons given in its Definitive Regulation are wrong. The Panel must therefore find for Norway on these points.

5. Also, because the authority has an independent duty to investigate, and to demonstrate that it complied with the *Anti-Dumping Agreement*, a Member cannot justify its authority's failings on the grounds that the Complainant did not raise a particular issue in the investigation. There is, after all, no obligation on the Complainant even to participate in the investigation, nor is there any limitation on the claims that can be made in WTO dispute settlement.

6. *Second*, the EC argues that publicly available information is *automatically* part of the authority's record.[3] In these proceedings, the EC relies on public information obtained from Eurostat, the U.S. Census Bureau, Statistics Canada, and newspapers. Also, as predicted, the EC even contends that information from the Internet is part of the record.[4] It is unacceptable to allow a Member to defend an anti-dumping measure on the basis of a virtually infinite supply of public information that could have been gathered at any time.

7. The EC cannot show that the contested public information was gathered during the investigation; nor that it was shown to interested parties under Article 6.4; nor that it was disclosed under Article 6.9; nor that it was mentioned in the published determination. In short, the EC cannot show any *procedural connection* between the public information and the investigation. As a result, Article 17.5(ii) requires the Panel to disregard it. Norway returns later to the EC's failure to explain the nature and use of this information in the published determination.

III. THE PRODUCT UNDER CONSIDERATION

8. There are two issues for the Panel to decide: *first*, whether the *Anti-Dumping Agreement* imposes any obligations on the authority's determination of the product under

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

[3] The EC contends that information in Exhibits EC-2, EC-10, EC-14, EC-15, and EC-16 is part of the record because the information is publicly available. *See* EC's Answer to Panel Question 1, paras. 5, 18, 30 and 31.

[4] EC's Answers, paras. 166 ("data from the US Bureau of Census and from the Statistics Canada are publicly available on internet") and 177 ("the EC investigating authority also conducted a comprehensive internet research"). *See* Norway's Second Written Submission ("SWS"), para. 17 ("the EC might argue that "everything that is available on the Internet is part of the authority's record of the investigation").

consideration; and, *second*, whether the EC *demonstrated* on the basis of a reasoned and adequate explanation that the products at issue are all alike. It is not the Panel's task to decide whether there are, in fact, one, two, or more products. Apart from being unnecessary, that would imply a *de novo* review.

A. *The Anti-Dumping Agreement Imposes Disciplines on the Authority's Determination of the "Product"*

9. The EC's latest arguments show an important change in its position. The EC now asserts that "it did not state that it is impossible to discern any obligation in the *Anti-Dumping Agreement*" governing the determination of the product.[5] Instead, it contends that, although there is no obligation in Articles 2.1 and 2.6, "it may be that other provisions of the *Anti-Dumping Agreement* contain obligations on Members that go to the question of the selection of the product concerned."[6]

10. Norway is pleased that the EC appears to *agree* that the *Anti-Dumping Agreement* disciplines the determination of the product under consideration. However, Norway would welcome clarification from the EC as to which provision of the *Anti-Dumping Agreement* imposes these obligations on the determination of the product.

11. Norway continues to believe that Articles 2.1 and 2.6, and Article VI:1 of the GATT 1994, impose obligations on the authority's determination of the product. Although the EC accepts that these provisions require that likeness be ensured at the level of models, Norway has explained that this is not sufficient. As the EC accepts, Article 2.1 and Article VI:1 require that the authority make a *single determination of price discrimination for the investigated product as a whole*.[7] In making that determination, the authority necessarily compares the prices of all models in a single, overall comparison. As a result, likeness must be established for the product as a whole. It is difficult to envisage which "other provisions of the *Anti-Dumping Agreement*" would impose this requirement.

12. The EC suggests that Article 2.6 is irrelevant because the product under consideration must be determined prior to identifying the like product.[8] This argument misses the point. The requirement for the like product to closely resemble the product under consideration

[5] EC's SWS, para. 24.
[6] EC's SWS, paras. 24 and 26. Original underlining.
[7] EC's SWS, para. 40.
[8] EC's SWS, para. 34.

means that, in determining the latter product, the authority must include only products that are all alike. Otherwise, it will prove impossible for the authority subsequently to identify like products that meet the definition in Article 2.6. Instead, the like product will necessarily include some products that are not like some products under consideration.

13. The EC also contends that Article 2.1 establishes a definition, without also imposing obligations.[9] The EC mistakenly relies on the Appellate Body's statement in *US – Zeroing (Japan)* that Article 2.1 does not impose independent obligations *with respect to zeroing*, in addition to those found in Articles 2.4 and 2.4.2.[10] Contrary to the EC's views, the Appellate Body has already found that Article 2.1 imposes independent obligations: in *US – Hot-Rolled Steel*, the Appellate Body gave a lengthy interpretation of Article 2.1 "in isolation", and found that the United States "acted inconsistently with Article 2.1".[11]

14. In any event, Norway does *not* read Article 2.1 "in isolation" because it always *combines* Article 2.1 with claims under *other provisions*. Norway's claims are that the improper product determination vitiates: (1) the EC's initiation of the investigation under Articles 5.1, 5.2, 5.3 and 5.4; (2) the EC's dumping determination under Articles 2.1 and 2.6; and (3) the EC's injury determination under Articles 3.1, 3.2, 3.4, 3.5 and 3.6.

15. The Appellate Body also stated that Article 2.1 is "no doubt central to the interpretation of other provisions of the *Anti-Dumping Agreement*".[12] In this dispute, the interpretation of Article 2.1, with Article 2.6 and Article VI:1, is central to the interpretation of Articles 3 and 5. Under Article 5, read together with Articles 2.1 and 2.6, an authority cannot initiate an investigation into a group of products for which the authority cannot make a single, overall determination of dumping. Thus, the duty in Article 5.2(ii) for the complaint to provide a "complete description of the allegedly dumped product" relates to products that are like. Equally, the examination of evidence under Article 5.3 must relate to allegedly dumped products that are all like, and support for initiation under Article 5.4 must be assessed for domestic producers of products that are like.

16. The ordinary meaning of the term "product under consideration" is also central to the interpretation of Article 3 because it determines the scope of the "domestic industry" and,

[9] EC's FWS, para. 20, and EC's SWS, para. 26.
[10] EC's SWS, para. 26.
[11] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 131 to 158, and 240(d).
[12] Appellate Body Report, *US – Zeroing (Japan)*, para. 140. Underlining added.

therefore, the scope of the "injury determination". Because the EC improperly determined the "product", its injury determination is necessarily flawed.

B. *The EC Failed to Provide a Reasoned and Adequate Explanation to Support Its Product Determination*

17. The EC now appears to accept that: there are physical differences between the products it bundled together; they are produced from different productions processes; are not fully substitutable; have different end uses; and have different tariff classifications. The EC asserts, for reasons still unknown, that the authority drew "the line at further processed types".[13] The WTO inconsistency arises precisely because the EC failed to give any explanation how and why the authority drew the line for the product scope where it did. The entire product determination consists of conclusory statements made in three short sentences.[14]

IV. DOMESTIC INDUSTRY

18. The Panel must decide two issues: *first*, whether the EC was entitled to define the domestic industry as 15 complaining producers to the exclusion of several other categories of producer; and, *second*, whether the EC was entitled to examine injury on the basis of a sample of only five of the 15 complaining producers.

A. *Article 4.1 of the Anti-Dumping Agreement Imposes Obligations*

19. The EC argues that Article 4.1 contains a definition but does not impose obligations, and it questions the case-law that Norway cites.[15] In *Argentina – Poultry*, the panel found that the definition of the "domestic industry" in Article 4.1 constitutes an *instruction* to investigating authorities to define the "domestic industry" in a particular way.[16] If the authority does not comply with that instruction, it violates Article 4.1. Although the EC implies that the panel's finding in *Poultry* is wrong, it has not explained why definitional provisions cannot impose obligations on investigating authorities.[17]

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[13] EC's SWS, para. 45.
[14] *See* Norway's FWS, paras. 51 – 52. *See also* Provisional Regulation, para. 11. Exhibit NOR-9.
[15] EC's SWS, para. 55.
[16] Panel Report, *Argentina – Poultry*, para. 7.338.
[17] EC's SWS, para. 55. The EC also argues that the panel in *EC – CVD on DRAMS* was incorrect to find that the EC authority violated a definitional provision in the *SCM Agreement*.

20. The EC also argues that an authority complies with the *Anti-Dumping Agreement* if it analyzes the domestic industry "consistently with the definition of the domestic industry *it adopted*."[18] Thus, it says, an authority can disregard the definition in Article 4.1, provided it does so consistently. This is wrong because the treaty requires that the definition of the "domestic industry" in Article 4.1 be used "[f]or the purposes of this *Agreement*", including for initiation and injury determinations.[19] An authority is not entitled to be consistently wrong.

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

B. *EC Fillet Producers Cannot Be Excluded from the Domestic Industry*

22. The EC admits that it excluded "filleting only undertakings" from the EC domestic industry for purposes of initiation and injury. Although the published determination gives no reasons for this, the EC contends that the exclusion was intended to prevent double-counting, and also because fillet producers are "industrial users" of the product.

23. The EC makes much of Norway's agreement that a double-counting problem may exist.[20] In fact, Norway has explained that no problem of double-counting arises if the product is properly defined pursuant to Articles 2.1 and 2.6, without combining upstream and downstream products. Even under the EC's flawed product definition, any double-counting arises only with respect to the portion of salmon grown by the 15 complaining producers that is transformed into fillets by the domestic downstream industry.

24. Moreover, even where double-counting arises, the scale of the problem is much overstated by the EC. In reality, double-counting is a minor problem that is largely irrelevant. The reason is that the examination of the domestic industry covers many issues besides the counting of salmon flesh.

[18] EC's SWS, para. 117.
[19] Opening clause of Article 4.1.
[20] EC's SWS, paras. 57 – 60.

25. Under Article 5.4, an authority must assess the level of support for initiation among domestic producers. Asking *all* salmon growers and *all* fillet producers whether they support initiation involves no double counting of salmon flesh. In assessing the *proportion* of support for initiation, the authority can avoid double-counting by relying on the value of production, instead of volume, or by making separate assessments for the two industries. Under Article 3.4, an authority examines a long list of factors. Among these, only the "output" involves counting salmon flesh, and any double-counting can be addressed by appropriate methodologies.[21] None of the other factors, such as sales revenues, profits, and market share, involves double-counting.[22] The EC's exclusion of fillet producers is, therefore, an extreme solution to a minor problem that can be addressed in less radical ways.

26. Finally, the EC argues that its examination of price undercutting and price trends included data for filleted products.[23] In fact, fillet production in Norway and the EC was peripheral to the investigation. The dumping determination included 7.8 percent fillets; and the examination of price undercutting a minuscule 0.17 percent fillets.[24] Moreover, price undercutting and price trends excluded the prices of any fillet-only producers. Thus, the investigation focused almost exclusively on HOG fish.

C. *EC Organic Production Cannot Be Excluded from the Domestic Industry*

27. The EC admits that organic production was excluded from the injury examination, even though organic salmon was part of the product.[25] The EC's pretext for excluding organic salmon is that production costs, prices and profits are all higher. However, these are important factors that the authority was required to examine under Article 3.4.

28. The EC's manner of excluding organic salmon is not adequately explained. *First*, despite the Panel's clear question, the EC has not explained, with evidence, how it separated out data for organic and conventional production for all injury factors, including costs, prices

[21] *See* Norway's answer to Questions 50 and 73.
[22] The factors in question are: sales revenues, profits, market share, productivity, investment and return on investments, capacity utilization, prices, cash flow, inventories, wages and growth.
[23] EC's answer to Question 35.
[24] 2.8 tonnes out of a total EC sales volume of 16,825 tonnes.
[25] EC's SWS, para. 64 and the EC's answer to Question 7.

and profits.[26] *Second*, the EC defends its conclusion that Loch Duart was a conventional producer as follows:

> *None of the web sites referred to by Norway indicate a relevant date* and are therefore of no relevance to assessing the situation during the investigation period. There was *no indication during verification that Loch Duart was producing organic salmon*.[27]

29. This is incorrect. Loch Duart's *questionnaire response* states that it produces under the Freedom Food and Label Rouge labels, both of which involve non-conventional production.[28] Freedom Food is the very same certification that Wester Ross has, and the EC treated its production as "organic".[29] Also, one of the web sites referred to in Norway's First Written Submission was Loch Duart's own, which states that the Freedom Food label was awarded on 6 September 2002 – a full year before the IP began.[30]

30. *Third*, leaving aside the treatment of Loch Duart, the EC now gives contradictory figures for two organic producers included in the sample. For Wester Ross, the EC states that total production was 1,602 tonnes in its Answers[31] and 1,391 tonnes in its Second Written Submission.[32] For West Minch, the two different figures are, respectively, 1,178 tonnes[33] and 996 tonnes.[34] Thus, the EC still cannot provide a consistent set of production figures for sampled companies one year after adoption of the Definitive Regulation.

31. Norway questions how total production of the sampled companies increased between the Provisional and Definitive Regulations, even though the EC *eliminated* organic production, which it says amounted to 800 tonnes.[35] In the Provisional Regulation, the production of the sampled producers was 8,300 tonnes.[36] In the Definitive Regulation, production was 8,770 tonnes[37] – a figure that excludes the 800 tonnes of organic salmon. Thus, total production for the IP was 9,570 (8,770 + 800) tonnes, instead of 8,300 tonnes.

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[26] EC's answer to Question 7.
[27] EC's SWS, para. 64. Emphasis added.
[28] *See* Loch Duart's Questionnaire response, page 2, Section B 5. Exhibit NOR-15. Norway's FWS, paras. 247 - 252.
[29] *See* Exhibit NOR-31, page 2.
[30] Exhibit NOR-32.
[31] EC's Answers, para. 26.
[32] EC's SWS, footnote 69.
[33] EC's Answers, para. 26.
[34] EC's SWS, footnote 69.
[35] EC's SWS, footnote 69.
[36] Provisional Regulation, para. 48.
[37] Definitive Regulation, para. 50 and Table 1. Exhibit NOR-11.

Accordingly, on the basis of identical questionnaire responses, instead of finding that the exclusion of organic production resulted in lower total production, as might be expected, the EC concluded that total production for the IP was 15 percent larger.

32. These issues cast serious doubt on the correctness of the EC's determinations on the volumes, values, prices and costs of the EC domestic industry. Given that the volumes are wrongly stated, Norway and the Panel cannot but assume that there are consequential mistakes in all these other determinations.

D. *The EC Improperly Examined a Sample of Five Complaining Producers*

33. Norway claims that the EC violated Articles 3.1, 3.4 and 3.5 of the *Anti-Dumping Agreement* by examining certain injury factors for a sample of five complaining producers. Norway argues that sampling in an injury determination is not permitted but, even if it were, the EC's sample was not properly constituted. These are not separate claims, as the EC suggests, but two arguments supporting a single claim under the provisions of Article 3.[38]

34. The *Anti-Dumping Agreement* authorizes sampling in specified circumstances under Article 6.10 and footnote 13. Although footnote 13 authorizes sampling of the domestic industry during initiation, the *Agreement* does not authorize sampling of the domestic industry in an injury determination. The drafters' decision to include sampling in one context, but not in another, cannot be ignored by the Panel.

35. If sampling were permitted under Article 3, the rules governing sampling must be derived by analogy from footnote 13 because it is the only provision dealing with sampling of the domestic industry. Sampling must also permit an objective examination. The EC resorted to sampling even though the domestic industry is not "fragmented", and does not involve an "exceptionally large" number of producers, as required by footnote 13. Moreover, a sample comprising a sub-set of the complainants does not permit an objective examination.

36. Even at this stage, a year after the measure was adopted, the EC is unable to explain why and how it sampled the domestic industry. The EC states that its sample "focuses on the *larger* companies", not the "largest".[39] Moreover, the EC admits that: "*the measure at issue*

[38] EC's SWS, paras. 125 - 128.
[39] EC's Answers, para. 27. The data that the EC provided for the first time shows that the sample excluded two of the largest producers, Muir Gheal Teoranta and Muirachmhainnai Teoranta.

does not expressly refer to additional criteria used to select the remaining three representative companies".[40] Like the measure, the EC's answer also fails to "refer to [the] additional criteria" its authority used to select the sample. In short, in a situation where no sampling criteria are expressed in the treaty, the EC still cannot explain to the Panel and Norway the criteria that it used. This is far from an objective examination of the domestic industry.

37. The circumstances surrounding the EC's selection of the sample are also unexplained. In reply to Question 4, the EC says the sample was selected on the basis of sampling replies. However, according to the record that Norway was shown, the sampled companies provided sampling replies in February 2005, long after the sample was selected in November 2004.[41] With remarkable foresight, three of the sampled companies even submitted a questionnaire response that included Excel spreadsheets which were dated 23 October 2004 – *the date the investigation was initiated*.[42] The chronology suggests that the EC's description of the sampling process is not accurate. Certain sampled companies were selected before they provided a sampling reply; and three sampled producers were busy preparing their questionnaire replies before the investigation was even initiated.

38. Finally, on this issue, we note that three of the sampled producers are organic producers with an admittedly different cost structure.[43] This suggests that at least three of the companies selected are not representative of the industry.

V. DUMPING

A. *The EC Acted Inconsistently with Article 6.10 in Composing the Sample*

(i) The EC Improperly Excluded Independent Exporters from the Sample

39. For the EC's sample to be consistent with Article 6.10, the Panel must find that Article 6.10 permits the exclusion of all exporters from the investigation of dumping.

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[40] EC's Answers, para. 28.
[41] Sampling replies of Hoove Salmon, Loch Duart, Orkney Seafarms, Wester Ross and Celtic Atlantic Salmon, dated 25 to 28 February 2005. Exhibit NOR-176. Norway was not given access to the sampling replies of West Minch Salmon and Sidinish Salmon; *see* Exhibit NOR-13, Annex 3B.
[42] Questionnaire replies from Hoove Salmon, Loch Duart and Orkney Seafarms, print-outs of the Excel spreadsheets covering, among others, corporate information, production volumes and values, production capacity, capacity utilization, sales volumes and values, stocks, cost of production, profitability, cash flow, investments, return on net assets, employment and labour costs. Exhibits NOR-75 (32nd to 45th page) NOR-15 (12th to 15th page) and NOR-72 (13th to 25th page).
[43] Loch Duart, Wester Ross and West Minch Salmon.

However, contrary to the EC's argument, the *Anti-Dumping Agreement* expresses no preference for determining dumping for producers, to the exclusion of exporters.[44]

40. Normal value can be calculated for both producers and exporters, and both can engage in export pricing that results in dumping. Indeed, it would be perverse to exclude exporters under Article 6.10 because "dumping", by definition, "relates to the pricing behavior of the *exporter*".[45] For this reason panels and the Appellate Body have ruled that, in principle, Article 6.10 requires an authority to determine dumping for known producers *and* exporters.[46] In keeping with this requirement, the second sampling option focuses neutrally on the "volume of *exports from the country in question*", without permitting the investigation to be confined to exports from producers or exporters. Also, excluding exporters deprives them of their due process rights to participate fully in that investigation.[47]

41. The EC's fears of an overly "complicated procedure" if an authority must investigate non-producing exporters are without merit.[48] In fact, as recently as 2003, the EC conducted an investigation in which it constructed normal value for Norway's non-producing exporters.[49]

(ii) The EC Improperly Excluded Two Large Exporting Producers

42. The EC excluded from the sample the third and seventh largest exporting producers, Salmar and Bremnes. The EC continues to argue that it did not know that Salmar was a major exporter to the EC.[50] However, the EC knew: (1) Salmar's volume of production was among Norway's largest; (2) a large part of this production had to be exported because it was several times larger than total Norwegian consumption; (3) the EC was an almost certain destination because it is Norway's main export market; and (4) FHL proposed Salmar, further

[44] *See* Norway's FWS, para. 313; Norway's First Opening Statement, paras. 70 – 73; Norway's SWS, para. 133; *see also* Norway's response to Panel Questions 75, 76, 77 and 78.
[45] Appellate Body Report, *US – Zeroing (Japan)*, para. 165.
[46] *See* Norway's SWS, para. 129, where Norway refers to Panel Report, *Korea –Paper*, para. 7.157; Appellate Body Report, *US – Hot-Rolled Steel*, para. 118; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 186; Appellate Body Report, *US – Zeroing (EC)*, para. 129; Appellate Body Report *Mexico - Rice*, para. 216; Appellate Body Report, *US – Softwood Lumber V*, footnote 158; and Panel Report, *Mexico – Rice*, paras. 7.182 and 7.183.
[47] Articles 6.2 and 6.11(i) of the *Anti-Dumping Agreement*.
[48] EC's Answers, para. 219.
[49] Exhibit NOR-5.
[50] EC's Answers, para. 51.

signaling that the company was a significant exporter to the EC. Thus, the EC had more than enough information to know that Salmar was a significant exporter to the EC *via* traders.

43. 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.[51] Yet, for Salmar, the EC chose not to ask. The EC's approach is at odds with the "active role" an authority must play "in the search of the information it requires in order to make its determination".[52]

44. The EC's defense on Bremnes still rests on the fact that Bremnes was not proposed by FHL,[53] and on the assertion that the authority did its utmost to accommodate FHL's sampling preferences. In fact, the authority did little to accommodate FHL's preferences when they did not suit its own.[54]

45. Rather than defending the improper exclusion of exporters, and of two large exporting producers, which it cannot, the EC makes an utterly baseless claim that Norway's claim under Article 6.10 is outside the Panel's terms of reference.[55] Paragraph 4 of Norway's panel request plainly identifies Article 6.10 as within the Panel's terms of reference.[56] The EC's view that Article 6.10 permits these exclusions raises an interpretive question that does not alter the Panel's terms of reference.[57] The Panel must therefore address Norway's claims.

B. *The EC's Failure to Perform the Cost Recovery Test under Article 2.2.1*

46. The EC's latest submissions contain important admissions regarding its approach to the cost recovery test under Article 2.2.1. *First*, the EC expressly acknowledges that it did *not* conduct the cost recovery test in the second sentence of Article 2.2.1.[58] Consequently, the EC cannot be found to have made a determination under that sentence, explicitly or implicitly.

[51] Norway's SWS, para. 136.
[52] Panel report, *Mexico – Rice*, para. 7.185, citing with approval Appellate Body Report, *US – Wheat Gluten*, para. 53.
[53] EC's FWS, para. 191.
[54] Norway's SWS, para. 137.
[55] EC's SWS, paras. 3 – 16.
[56] WT/DS337/2.
[57] EC's SWS, para. 14.
[58] EC's Answers, paras. 239 – 242.

47. *Second*, the EC argues that the *Vienna Convention* "is not well suited to" interpreting Article 2.2.1.[59] The EC, therefore, proposes an alternative interpretive approach that renders the structure of Article 2.2.1 "simpler".[60] Freed from the constraints of the *Vienna Convention*, the EC reduces the "three conditions"[61] that it admits are provided in Article 2.2.1 to only "two conditions".[62] Cost recovery is eliminated as an independent condition.

48. The EC no doubt proposes an alternative to the *Vienna Convention* because otherwise its approach fails. However, the EC's express rejection of the *Vienna Convention* makes its approach untenable. The Panel must, instead, follow the *Vienna Convention* interpretation set forth by Japan,[63] Norway,[64] and the United States,[65] which recognizes that Article 2.2.1 contains three independent conditions for determining which below cost sales must be used for calculating normal value. As the third of these conditions, the cost recovery test must be satisfied before below cost sales can be rejected.

49. In eliminating the cost recovery test as an independent condition, the EC seeks to equate the duration of the "reasonable period" and the IP. Again, this is untenable under the *Vienna Convention*. *First*, if the drafters had intended to equate the reasonable period with the IP, they could easily have said so.[66] Yet, they chose to distinguish between the two periods. The drafters' use of different words to refer to different periods in Article 2.2.1 must be given meaning. Japan and the United States both agree with Norway that the different terminology means that the reasonable period is not necessarily identical to the IP.[67]

50. *Second*, the EC's textual basis for equating the reasonable period and the IP is the second sentence of Article 2.2.1. However, this approach re-writes the second sentence. The EC admits that the second sentence merely sets forth one "*specific situation*" – or *example* – where costs are recovered in a reasonable period that equals the IP.[68] Yet, the EC seeks to transform that example into a general rule – or "irrebuttable presumption" – that applies "in

[59] EC's Answers, para. 236.
[60] EC's Answers, paras. 236 and 238.
[61] EC's Answers, para. 237.
[62] EC's Answers, para. 238.
[63] Japan's Answers, paras. 8 – 9.
[64] Norway's Answers, para. 107.
[65] United States' Answers, para. 6.
[66] Japan's Answers, para. 10; United States' Answers, para. 8.
[67] *See* Japan's Answers, paras. 10 – 11; United States' Answers, para. 8.
[68] EC's Answers, para. 246.

all other situations".[69] Under the *Vienna Convention*, the second sentence of Article 2.2.1 cannot be transformed in this way.

51. The EC's approach also makes normal value depend on the administrative considerations that determine the duration of the IP. In fact, normal value depends on the "normal commercial practice" regarding the recovery of costs in a period that is "reasonable", taking into account the product and industry concerned.

52. Finally, the EC conspicuously failed to address the authority's duty to make a "*determination*" regarding the reasonable period. A "determination" must be set forth in the published determination, and must address the facts that support the authority's determination. The EC made no such determination and, indeed, the only "evidence" it can cite regarding the reasonable period is the fact that sampled companies were requested to provide questionnaire responses for the IP.[70] This general request, at the outset of the investigation, provides no evidence that the EC made a "determination" in the published determination.

C. *The EC Improperly Excluded Domestic Sales under Articles 2.2 and 2.2.2*

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

(i) Rejection of Low Volume Sales under the 5 Percent Test

54. The panel and the Appellate Body in *EC – Tube or Pipe Fittings* held that, under Article 2.2.2, an authority cannot reject profits and SG&A data on the grounds that it is drawn from a low volume of domestic sales. In contrast to Article 2.2, there is no low-volume exception in Article 2.2.2,[71] and data has to be taken from any sales in the ordinary course of trade, regardless of volume.

[69] EC's Answers, para. 246.
[70] EC's Answers, para. 63(c).
[71] Norway's FWS, paras. 387 – 388; Norway's SWS, para. 153.

55. The EC now tries to argue that the term "ordinary course of trade" changes meaning in Articles 2.2, 2.2.1 and 2.2.2. Under Article 2.2.2, the EC contends that a volume requirement applies to this term. The EC takes this approach because it perceives a "logical problem" if the term has a consistent meaning in these provisions.[72]

56. In fact, a consistent meaning creates no "logical problem". In establishing the right to construct normal value under Articles 2.2 and 2.2.1, the authority calculates the *actual* costs incurred for *all sales*, including the actual SG&A costs. If the authority is entitled to construct normal value, Article 2.2.2 requires that SG&A costs and profits be calculated using data for a *sub-set of sales*, namely those in the ordinary course of trade. This sequence creates no logical problems, and does not require that the meaning of the term "ordinary course of trade" change from one provision to the next.

(ii) Rejection of Low Volume Profitable Sales under the 10 Percent Test

57. The EC has admitted that, for three companies, it constructed normal value because the volume of profitable domestic sales was less than 10 percent of domestic sales of that type.[73] Under this test, the EC treated profitable domestic sales as outside the ordinary course of trade solely because of the price and volume of the greater-than-90 percent loss-making sales.

58. Articles 2.2, 2.2.1 and 2.2.2 do not permit an authority to exclude profitable sales from the ordinary course of trade simply because of the price and volume of loss-making sales. Whether a particular profitable sale is made in the ordinary course of trade depends on the characteristics of *that sale*, not on the terms and conditions of other sales.[74]

59. The EC argues that the 10 percent test is the "*reasonable corollary*" of the "substantial quantities" requirement for loss-making sales under Article 2.2.1.[75] The EC, thereby, admits that the 10 percent test is not expressly set forth in the treaty, and improperly seeks to imply a "reasonable corollary" into the rules. However, a Member cannot modify treaty rules simply because it thinks that an additional rule is "reasonable".

[72] EC's SWS, para. 86.
[73] EC's answer to Question 15.
[74] *See* Norway's Answers, paras. 123-124.
[75] EC's Answers, para. 249.

D. *The EC Improperly Applied Facts Available to Grieg*

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

61. The best that the EC can do is to complain that Article 6.8 and Annex II was "somewhat difficult to apply",[76] and bemoan that Norway interprets the *Anti-Dumping Agreement* "in an arid, legalistic fashion".[77] However, treaty interpretation under the *Vienna Convention* is necessarily "legalistic" and, to some observers, "arid".

(i) Filleting Costs

62. The EC notes that, in the Information Note of 8 March 2005, it informed Grieg that the problem on filleting costs "was one of a deficiency of information".[78] It contends that, thereafter, "[[xx.xxx.xx]] did nothing to change the situation".[79] This ignores that, just one week after the EC's request for comments, Grieg submitted information on its filleting costs.[80] There is simply no basis for the EC's contention that there was no information to reject, and that Grieg did not act to remedy the stated deficiency.[81]

63. In fact, in the Definitive Disclosure, the EC even gave a reason for rejecting Grieg's information – the EC said that the additional information it requested in March could not be verified in January.[82] Norway has explained that on-the-spot verification is not required by the *Anti-Dumping Agreement*, and that the EC could have verified the information Grieg provided using other techniques.

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[76] EC's Answers, para. 90.
[77] EC's SWS, para. 96.
[78] EC's Answers, para. 94.
[79] EC's SWS, para. 102.
[80] *See* Norway's First Opening Statement, para. 95, for a detailed account of the chronology of events.
[81] EC's Answers, para. 102.
[82] Definitive Disclosure to Grieg Seafood, 28 October 2005, Annex II. Exhibit NOR-16.

64. The EC now contends that its investigators must be "able to insist on *immediate* production of documents" during an on-the-spot verification.[83] This statement is highly revealing. Under Annex II(6), if an investigating authority considers that information is deficient, it must provide the investigated company with a "*reasonable period*" to provide "further explanations". Because the EC sent no deficiency notice to Grieg before verification, and then insisted on "*immediate* production of documents" at verification, it failed to provide Grieg with a "reasonable period" to submit the requested information.

(ii) Finance Costs

65. Grieg submitted detailed information regarding its finance costs, including a statement from its bank. That information was usable, verifiable and submitted in timely fashion in response to the EC's request for information.[84] Under Annex II(3), the EC was obliged to take that information into account. Yet, it did not. Under Annex II(6), the EC was also required to state the reasons for not accepting the information on finance costs, and to give Grieg an opportunity to provide explanations for those costs.[85] Again, the EC failed to respect the detailed requirements of that provision.

66. For the first time in these proceedings, the EC has attempted to justify its approach with reasons – summarized below – that it never gave in the investigation, and never stated in the published determination. Annex II(6) obliges the authority to provide reasons *during the investigation* so that companies have a chance to remedy the perceived deficiencies. It is not acceptable under Annex II(6) for the EC to give reasons one year after the publication of the Definitive Regulation.

67. In any event, the EC has stated incorrect reasons. In its First Written Submission, the EC contended that the reported finance costs were rejected because the loans in question were inter-company.[86] Norway explained that the loans were external, with interest costs certified by a bank statement.[87] Now, in its Second Written Submission, the EC alleges that Grieg received loans at "cheap rates" that reflected "a non-commercial relationship".[88] The EC does not state how it concluded that the rates were "cheap"; nor how it concluded that there

[83] EC's Answers, para. 101.
[84] Norway's FWS, paras. 414 – 457.
[85] EC's FWS, para. 451.
[86] EC's FWS, para. 307.
[87] Norway's First Opening Statement, para. 100. *See also* Exhibit NOR-56, Enclosure 2, page 7.
[88] EC's Answers, paras. 102 and 104.

was a "non-commercial relationship". It does not even state with whom Grieg had this non-commercial relationship. In any event, the average rates paid on Grieg's external loans during the IP were 3.56 percent, which is not "cheap" relative to the average Norwegian Central Bank ("NCB") rate of 2.62 percent for that period.[89]

E. *The EC Violated Articles 9.4 and 6.8 with Respect to Non-Sampled Companies*

(i) Margins of Dumping

68. The EC admits that it incorrectly calculated a weighted average dumping rate for non-sampled companies.[90] The EC used that rate in determining the fixed anti-dumping duty. As a result, the EC acted inconsistently with Article 9.4.

69. The EC attaches significance to the fact that the fixed duty was calculated on the basis of the weighted average *injury margin* of 14.6 percent, and not of the weighted average *dumping margin* of 14.8 percent.[91] However, the EC used the injury margin as the ceiling because it was "lower than the weighted average dumping margin".[92] In fact, if the EC had properly calculated the weighted average dumping margin, that margin would have been 13.1 percent, that is, less than the injury margin.[93] The admittedly incorrect calculation of the weighted average dumping margin, therefore, violates Article 9.4.

(ii) Facts Available

70. The EC accepts that it used facts available with respect to allegedly non-cooperating, non-sampled companies, to determine the residual dumping margin for these companies.[94] It contends that it was entitled to do so because it requested the necessary information, and provided adequate "warning" by means of the Notice of Initiation and "two successive questionnaires".[95]

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[89] Exhibit NOR-56. The NCB rate for 2003 was 3.95 percent, and for 2004 it was 2.18 percent. See Norway's FWS, para. 963. The average for the IP (1 October 2003 to 30 September 2004) was, therefore, 2.62 percent.
[90] EC's FWS, para. 312. To recall, after making downward revisions to the dumping margins of PFN, Hydroteck and Sinkaberg, the EC failed to recalculate the weighted average margin. The EC also failed to exclude Grieg's margin, which was calculated using facts available.
[91] EC's SWS, para. 106.
[92] Definitive Regulation, para. 136, as referred to in EC's SWS, para. 106.
[93] Exhibit NOR-68. The weighted average was calculated using the EC's disclosure data and includes the contested cost adjustments.
[94] EC's Answers, para. 257 and Definitive Regulation, para. 32.
[95] EC's Answers, para. 259.

71. Norway contests the right of a Member to apply adverse facts to non-sampled companies because the maximum "all others" rate is set forth in Article 9.4. In any event, with respect to the EC's defence, Norway has presented a list of 67 companies that did not receive any communication from the EC.[96] The EC admits that it did not contact all companies, and instead relied on FHL as a channel of communication.[97] However, FHL's membership did not include all Norwegian producers and exporters. This shows why, under the *Anti-Dumping Agreement*, an authority is not permitted to outsource the responsibility for making detailed requests for company-specific information that can lead to adverse facts.

72. Months before the Definitive Regulation was adopted, the allegedly "non-cooperating" companies offered to cooperate fully.[98] The EC dismisses this as coming "too late".[99] However, Annex II(6) requires an authority to give companies further opportunities to provide requested information. The EC never gave the 67 companies those opportunities, even when they offered to cooperate.

73. The EC has also not shown that "necessary information" was withheld, as required by Article 6.8. As was made clear to the authority, the 67 companies are all very small producers that would never have been sampled. They include, for example, Skjervøy VGS and Val VGS, two Norwegian high schools that produce farmed salmon for educational purposes. The application of facts available to producers that did not receive a request for information is simply an abuse of authority.

VI. INJURY

A. *The EC Improperly Determined the Volume of Dumped Imports*

74. In its injury determination, the EC assumed that *all* imports from Norway were dumped, even though the EC examined a sample that comprised solely producers, and even though the EC's dumping determination covered a mere 25.5 percent of Norwegian exports to the EC.[100] The EC now accepts that the evidence from the sampled companies "could"

[96] Exhibit NOR-152.
[97] EC's Answers, para. 269.
[98] *See* Letter from FHL to the Commission of 4 May 2005, page 3, and Memorandum from FHL to the Commission, paras. 6 – 9 and 17. Exhibits NOR-152 and NOR-153.
[99] EC's SWS, para. 113.
[100] *See* Exhibit NOR-174.

qualify as just "*part* of the 'positive evidence'".[101] The disagreement between the Parties centers on the absence of "other [positive] evidence".

75. In its First Written Submission, the EC initially tried to fill the gap in the published determination with Exhibit EC-10. This exhibit is inadmissible and, in any event, suffers from fatal flaws.[102] Now, the EC suggests that the evidence was all along contained in the published determinations: "the 'other evidence' is expressly referred to in recital 40 (and 41) of the Provisional Determination and is confirmed in recital 31 of the Definitive Regulation."[103] This is not so.

76. In paragraph 40, on the basis of unspecified Eurostat data, and unspecified data of "cooperating" companies, the EC concludes that "cooperating" companies accounted for 80 percent of total exports. This conclusion addresses the *level of cooperation* of these companies, not dumping.

77. Paragraph 41 then states a mere conclusion: "From the *information available*, it was concluded that [*non-cooperating*] companies did not dump at a lower level than any of the [sampled] companies". The alleged "information" is never identified, far less explained. Unknown information cannot meet the requirements of "positive evidence" because it is not "affirmative", "objective", "verifiable", and "credible".[104] In any event, this conclusion relates to alleged dumping by *non-cooperating* companies (which account for 20 percent of exports), and not alleged dumping by other non-sampled companies (which account for around 50 percent of exports). The positive evidence does not, therefore, apply to 50 percent of exports.

78. In its Second Written Submission, the EC again mentions that it examined exports for sampled producers that were made through exporters.[105] However, this is misleading. To Norway's knowledge, there were six sampled companies that "exported" indirectly *via* unrelated traders, in addition to making direct exports of their own. However, for five of those six companies, contrary to the impression the EC seeks to create, it *excluded* the indirect "exports" through unrelated traders from the determination of export price. This is

[101] EC's SWS, para. 152.
[102] Norway's SWS, paras. 37 – 43; Norway's Answers, paras. 182 – 196.
[103] EC's Answers, para. 156.
[104] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.
[105] EC's SWS, para. 153.

shown in the table in Exhibit NOR-177. Thus, the EC's asserted "positive evidence" from the examination of exports through unrelated traders is incorrect.

79. Moreover, the EC failed to consider any evidence relating to the exporters' normal value. The "positive evidence" must cover both normal value and export price in some fashion. The EC contends, though, that, "[a]s a matter of principle, *traders do not have normal value*".[106] Norway doubts the seriousness of this argument because, in all previous investigations, the EC determined normal value for traders.[107]

80. With respect to Nordlaks, the EC continues to urge the Panel to find that the impermissible inclusion of *de minimis* dumped imports "*in [no] way affected* the outcome of the injury analysis".[108] As Norway has pointed out, the Panel can only reach the conclusion requested by the EC by performing a *de novo* examination.[109]

B. *The EC Improperly Examined Price Undercutting*

81. The price premium enjoyed by EC producers was documented in the record, and described in the Definitive Disclosure. The context in Article 6.5 of the *Subsidies Agreement*, and the case-law, show that in a price undercutting examination "due account [must] be taken of *any other factor affecting price comparability*".[110] To recall, the alleged price undercutting of 12 percent equaled the price premium of 12 percent disclosed in the Definitive Disclosure, and this had to be taken into account by the authority.

82. The EC continues to assert that a price premium for the domestic product is not relevant in the event of dumping.[111] Norway has explained that this argument is devoid of

[106] EC's SWS, para. 153. Emphasis added.
[107] *See, for example,* Council Regulation (EC) No. 930/2003 of 26 May 2003 terminating the anti-dumping and anti-subsidy proceeding on imports of farmed Atlantic salmon originating in Norway and the anti-dumping proceeding concerning imports of farmed Atlantic salmon originating in Chile and the Faeroe Islands ("Termination Regulation"), paras. 77 and 78. Exhibit NOR-5.
[108] EC's Answers, para. 160. Emphasis added.
[109] Norway's First Opening Statement, paras. 118. Norway's SWS, para. 48.
[110] Article 6.5 of the *SCM Agreement*. *See also* Panel report, *EC – Tube or Pipe*, para. 7.293. Norway would like to correct its reference to the relevant finding of the Panel in *Indonesia – Autos*. The correct reference is Panel Report, *Indonesia – Autos*, para. 14.251, and not para. 8.400, as stated in a footnote to paragraph 120 of Norway's First Opening Statement.
[111] EC's SWS, para. 160.

economic logic.[112] In any event, the EC's explanation is an *ex post* rationalization that is not found in the published determinations.

C. *The EC Incorrectly Analyzed Price Trends*

83. With respect to price trends, the EC's latest argument marks a shift of position. The EC accepts that no price decline occurred in pounds sterling, and all of its arguments in its Second Written Submission are intended to show that the injury analysis would be the same in pounds sterling.[113] It argues that the price trend analysis is not important because, even in pounds, prices did not cover costs. Thus, it says, "[t]he ultimate result of the analysis, namely the profit and loss ratio, is absolutely the same".[114]

84. The EC seeks to reduce the injury determination to the examination of a single factor: profitability. In fact, an authority must objectively examine *all* of the factors listed in Article 3.4, including *both* profits *and* prices.[115] An authority cannot ignore prices, or any other factor, simply because it examined profitability. Moreover, the authority's determination relies on a *decline* in prices, which did not occur in the relevant currency.[116] The EC cannot now reinvent the authority's reasoning by arguing that the price decline was irrelevant.

85. The EC also argues that reduced price in euros means that, after currency conversion, the Scottish growers received fewer pounds for the minority of their euro sales. Thus, the EC argues, for the minority of sales, Scottish growers were injured because their prices *remained stable and did not increase*.[117] Norway disagrees with the proposition that *stable prices* are an indicator of injury. In any event, this basis for the injury determination is very different from the authority's finding that the Scottish growers were injured by a *decrease* in prices.

86. All of the EC's latest arguments invite the Panel to perform a *de novo* examination of prices in pounds sterling, using a different constellation of facts, and a different set of reasons. Needless to say, this is improper.

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[112] Norway's First Opening Statement, para. 122.
[113] EC's SWS, para. 165.
[114] EC's SWS, para. 165. Underlining added.
[115] Appellate Body Report, *Thailand – H-Beams*, para. 128.
[116] Definitive Regulation, para. 80.
[117] EC's SWS, para. 169.

VII. CAUSATION

A. *Increase in Costs of Production*

87. On causation, the EC accepts that FHL raised the increased costs as a factor causing injury to the EC industry.[118] However, it dismisses FHL's submission as a mere "calculation".[119] Besides providing a calculation, FHL explained the significance of the increased costs, concluding: "*the real reason for the problems experienced by the Community industry was rising costs*."[120] The EC was obliged to address this factor in the published determination, but did not.

88. The EC now appears to assert that increased costs were caused by dumped imports. Norway fails to understand the alleged mechanism by which dumping caused increased costs. However, if the EC considered that increased costs were caused by dumped imports, it should have explained this in the published determination, with reference to supporting facts.

B. *Imports of Salmon from Canada and the United States*

89. Although the EC accepts that an authority must explain the facts supporting an *injury* determination, it appears to believe that there is no obligation to explain the facts supporting a *causation* determination.[121] This is absurd. Article 3.1 requires that both the injury *and* causation determinations be based on "*positive evidence*".[122] Thus, the duty to explain that "positive evidence" through a reasoned and adequate explanation applies to Article 3.5, which regulates causation.

90. The EC has not been able to show that it provided the required explanation. Indeed, it cannot even demonstrate that the record contained positive evidence supporting its findings that: (1) imports from Canada and the United States consist mostly of wild salmon; and (2) wild and farmed salmon do not compete.[123]

91. The EC now contends that its authority relied on data submitted by Norway in a *safeguard* investigation as support for its finding that exports from Canada and the United

[118] EC's Answers, para. 174.
[119] EC's Answers, para. 174 and EC's SWS, para. 172.
[120] Comments on the Definitive Disclosure, 8 November 2005, paras. 61 and 62. Exhibit NOR-49. *See* Norway's FWS, para. 583.
[121] EC's SWS, paras. 184 and 185.
[122] Appellate Body Report, *Thailand – H-Beams*, para. 106.
[123] Norway's FWS, paras. 602 – 616; Norway's First Opening Statement, paras. 137 – 142; Norway's SWS, paras. 202 to 204.

States consist mostly of wild salmon. The EC asserts that this data – verified, it says, with Internet research – formed part of the record of this investigation.

92. However, an authority cannot automatically treat information gathered in one investigation as part of the record in all other investigations. Interested parties cannot possibly know what information was submitted in separate investigations. If the authority wishes to use information from other investigations, it must formally make it part of the record, and disclose it to interested parties.[124] In this investigation, the data in question was *not* made available under Article 6.4; was *not* disclosed as essential facts under Article 6.9; and was not mentioned in the published determination. Indeed, despite its obvious importance, the data was not even mentioned in the EC's first submissions to the Panel.

93. With respect to competition, the EC concluded that farmed and wild salmon do not compete because: (1) they taste significantly different; (2) they have different end uses, with wild salmon sold "mostly" in tins; and (3) wild salmon is significantly cheaper.[125] The EC claims that the positive evidence is found in: Norway's safeguard submission; unsubstantiated "common industry knowledge"; and on the Internet.

94. *First*, Norway's safeguard submission did not address competition between farmed and wild salmon. It did not mention: the taste of the products; their ends uses and prices; tinning and canning; or any other factor that goes into an analysis of competition. Nor did it provide evidence on these issues. Norway merely questioned whether the EC's import statistics included data for wild salmon, which had been expressly excluded from the scope of the investigated product.

95. *Second*, the EC's asserted perceptions regarding "*common industry knowledge*"[126] are not substantiated by any "credible" and "verifiable" "positive evidence".[127] They cannot, therefore, form the basis for an examination under Article 3.5. If the EC were correct that the competitive relationship between farmed and wild salmon is a matter of industry knowledge, it should not have been difficult to obtain a modicum of positive evidence. Yet, there is none

[124] Panel Report, *US – OCTG (21.5 – Argentina)*, para. 7.128.
[125] Provisional Regulation, paras. 85 and 86.
[126] EC's FWS, 441; EC's Answers, para. 170.
[127] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192. *See* Norway's First Opening Statement, para. 141.

on the record. Indeed, the only evidence in the record indicates that there is increasing competition between farmed and wild salmon.[128]

96. *Third*, the EC now contends that its authority secured unspecified positive evidence through a "comprehensive internet research".[129] The notion that a Member can defend an injury determination because its investigators might have "surfed the net" is absurd. This argument illustrates the importance of insisting that an investigating authority justify its determinations with a reasoned and adequate explanation that actually addresses the facts relied upon.

97. Suffice it to say that the EC's authority *never* stated that it conducted "comprehensive internet research"; did not explain what specific information it collected from the Internet; did not place that information on the record; did not disclose that information; did not explain how that information supported its factual findings; and did not submit the information to this Panel. Indeed, despite the importance of this Google research, the EC neglected to mention it in its first submissions.

VIII. THE EC'S MIPS EXCEED THE INDIVIDUALLY DETERMINED NORMAL VALUES

98. Norway's claim regarding the excessive level of the MIPs has been clear since 17 March 2006, when Norway requested consultations, among others, "because the MIPs exceed normal value".[130] At consultations, the EC refused to provide its calculation of the MIPs. The EC has now made two written submissions to the Panel, two oral statements, and answered the Panel's first set of questions, including a question that expressly asked the EC to explain, with evidence, its calculation of the MIPs. The EC has allowed all of these opportunities to pass without offering any defence of its MIPs, and without showing its MIPs calculations. Incredibly, the EC even considers that its own MIPs calculations would be a "red herring".[131]

99. The EC's suggestion that it is not "quite sure" of what the Panel requested in Question 39 indicates willful ignorance.[132] The EC seems to expect the Panel to clarify precisely what

[128] Norway's FWS, paras. 612 and 613, and Exhibit NOR-80.
[129] EC's Answers, para. 171.
[130] Request for Consultations, para. 14. WT/DS337/1.
[131] EC's Answers, para. 183.
[132] EC's Answers, para. 183.

evidence the EC should submit to defend its measure. However, the Panel *cannot* make the case for the EC by specifying what evidence the EC should present.[133]

100. The EC incorrectly states that Norway's MIPs table is based on "interpretations of the *Anti-Dumping Agreement* that are different from those of the EC."[134] In fact, Norway stated in its First Written Submission that:

> … the normal values are those that the EC determined on the basis of the examined producer's costs, as determined by the EC. They, therefore, include the substantial adjustments that the EC made to these costs, which are contested …[135]

IX. THE EC'S FIXED DUTIES EXCEED THE MARGIN OF DUMPING

101. The Panel must decide two issues with respect to the EC's fixed duties: *first*, that the EC's fixed duties are "specific action" against dumping; and, *second*, that WTO Members cannot impose a fixed anti-dumping duty exceeding the dumping margin.

102. Norway continues to disagree with the EC that the fixed duties do not constitute "specific action against dumping". The EC accepts that the fixed duty would be "*specific*" if it were "inextricably linked to", or had "a strong correlation" with the elements of dumping.[136] Norway fails to see how the EC can seriously contend that the fixed duty does not meet these requirements:

- the fixed duty was imposed because the EC found injurious dumping by Norway's exports;
- the amount of the duty was determined according to the weighted average dumping and injury margins;
- the duty is imposed if the actual import price is below the MIPs, which is the threshold for the imposition of anti-dumping duties; and,
- the duty was imposed on the basis of the EC's Basic Anti-Dumping Regulation and is described by the EC as a "fixed <u>anti-dumping</u> duty".[137]

By its design, architecture, and declared purpose, the fixed duties are anti-dumping duties.

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[133] Appellate Body Report, *Japan – Agricultural Products II*, para. 129. This was also argued by the EC in *US – Zeroing (EC)*, para. 256.
[134] EC's Answers, para. 179.
[135] Norway's First Written Submission, para. 638.
[136] EC's Answers, para. 193.
[137] Definitive Regulation, Article 1(5). Underlining added.

103. The EC accepts that the fixed duty would involve "*action against*" dumping if it has an "adverse bearing" on dumping.[138] The EC brazenly asserts that the fixed duty "*adds nothing* to the amount of the anti-dumping duty that is payable".[139] This is false. The fixed duties often result in the imposition of higher anti-dumping duties than the variable duties system.[140] This is so whenever the amount of the fixed duty is greater than the difference between the actual import price and the MIP.

104. Finally, the EC still argues that the fixed duties sanction and deter customs fraud,[141] even though it is the EC member States, and not the EC, that can adopt such measures.[142] The EC contends that this inconvenient fact is irrelevant.[143] However, in the absence of the necessary legal competence, the fixed duty cannot be specific action to deter and sanction customs fraud.

X. PROCEDURAL REQUIREMENTS

A. *The EC Failed to Provide Access to the Record under Article 6.4*

105. Norway now turns to the procedural claims. On access to the record under Article 6.4, the EC now acknowledges that it did *not* grant Norway access to the 68 documents listed in Exhibit NOR-31.[144] However, the EC argues that "there were various grounds for not including the 68 documents into the investigation files."[145] To recall, the 68 documents fall into the following four categories:[146]

a) sampling replies and questionnaire replies of sampled and non-sampled EC producers, with attachments;

b) submissions of EC "users" and "user" associations on the "deepened investigation on Community interest";

[138] EC's Answers, para. 194.
[139] EC's Answers, para. 194. Emphasis added.
[140] *See* Norway's FWS, para. 673
[141] EC's Answers, para. 193.
[142] *See* Norway's reference to EC municipal law and the Appellate Body Report in *EC – Customs Matters*, Norway's First Opening Statement, footnote 172.
[143] EC's Answers, para. 201.
[144] EC's SWS, para. 242. ("In the present case there were various grounds for not including the 68 documents into the investigation files.")
[145] EC's SWS, para. 242. For its position on the notion of "record" or "file", Norway refers to Norway's Answers, paras. 234 to 237.
[146] *See* Exhibit NOR-13.

c) documents submitted by sampled and non-sampled Norwegian companies, including sampling forms, and comments on the authority's Information Notes and disclosures; and,

d) communications from other parties, including FHL and the Government of Norway, on dumping.

106. In this dispute, there were no "practical" impediments that prevented the EC from providing timely opportunities to see the 68 documents in November and December 2005.

107. Further, all of the documents were "relevant" to Norwegian interested parties and "used" by the authority. The sampling and questionnaire responses of EC producers are important for interested parties and the authority in piecing together the domestic industry, as well as for the injury and causation determinations. Documents submitted by EC "users" were used by the EC to set the MIPs and, therefore, contained relevant information.[147] These documents may also have contained information on injury and causation. The Norwegian parties' submissions are especially relevant for the analysis of the dumping determinations.

108. The grounds of non-disclosure advanced by the EC do not justify its failure to provide the 68 documents. *First*, the EC's justifications do not pertain to all categories of missing documents. Even on a generous reading, the EC advances justification only for categories (b), (c), and (d). The EC nowhere justifies the absence of category (a) documents.

109. The EC argues that the category (b) documents provided by "users" on "Community interest" are not "relevant" because they address an issue not regulated by WTO law.[148] The EC's reasoning is flawed. Article 6.4 applies to *any* information that is "relevant" to interested parties, and that is "used" by an authority. The source of the information, and the reason why it is submitted, is not important under Article 6.4. In any event, even if "Community interest" is not a WTO issue, "users" provided information on the remedy, and on other issues such as injury and causation.[149]

110. With respect to category (c) documents provided by Norwegian companies, the EC argues that these companies "did not provide a non-confidential version" of confidential

[147] *See* EC's Information Note on MIPs, 13 December 2006. Exhibit NOR-19.
[148] EC's SWS para. 244.
[149] Those communications from "users" that were shown to Norway were contained in the EC's files on injury and causation, and contained important information on these issues. *See* Exhibits NOR-79, NOR-80 and NOR-96.

information.[150] However, the panel in *US – OCTG (21.5 - Argentina)* found that, under Article 6.5.1, it is the *investigating authority* that must request interested parties to submit a non-confidential summary of confidential information or, which failing, a statement of the reasons why summarization is not possible.[151] Although the EC asserts that Norwegian companies did not provide non-confidential summaries, it has not shown that it requested those companies to provide either a non-confidential summary or a statement of reasons. The EC cannot invoke its failure to comply with Article 6.5.1 as an excuse for not showing Norway these documents.

111. On category (d) documents submitted by other parties, the EC explains that it treated Norway's submissions as "government-to-government correspondence, not to be included in the file."[152] However, Norway was an interested party and, as such, its submissions had to be "made available promptly to other interested parties".[153] Furthermore, the EC indicated that it would treat the submissions as non-confidential, unless Norway requested otherwise. This is shown in the e-mail from the Commission to Norway of 10 November 2005 that we have submitted as Exhibit NOR-178 this morning.[154] Norway did not request confidential treatment for its submissions.

112. It is irrelevant that the EC considered that Dr. Jaffa was not an interested party.[155] Again, the obligation in Article 6.4 applies to any "relevant" information that is "used" by the authority, irrespective of its source. Dr. Jaffa's letter addressed the "number of salmon farms" omitted from the complaint, an issue closely linked to the scope of the domestic industry.[156] The information was, therefore, highly "relevant" for Norwegian interested parties. The authority considered the letter important enough to address questions on "its nature and its accuracy" to the EC industry.[157] By so doing, the authority "used" the letter to obtain further information for its industry determination. No Norwegian interested party was permitted to comment on – or, even, to see – Dr. Jaffa's letter.[158] Instead, the EC made

[150] EC's SWS, para. 243.
[151] Panel Report, *US – OCTG (21.5 – Argentina)*, not yet adopted, para. 7.135.
[152] EC's SWS, para. 246.
[153] Article 6.1.2 of the *Anti-Dumping Agreement*.
[154] E-mail from the Commission to Norway, 10 November 2005. Exhibit NOR-178.
[155] EC's SWS, para. 245.
[156] *See* letter from EUSPG to the EC of 3 October 2005, para. 1. Exhibit NOR-160.
[157] EC's Answers, para. 205.
[158] *See* Exhibit NOR-160.

relevant information available to EC interested parties, but not to foreign interested parties. Such an *ex parte* communication suggests bias, and is an egregious violation of Article 6.4.

113. Finally, Norway has argued that certain exhibits are inadmissible.[159] However, if the Panel disagrees, the EC was obliged to make the information in these exhibits available pursuant to Article 6.4. It did not do so. The relevance and use of this information is well illustrated by the EC's reliance on it in these proceedings. In addition, the EC failed to disclose to interested parties: (1) Norway's safeguard data on imports from Canada and the United States;[160] (2) the information it claims to have gathered from "intense contacts"[161] with the industry; and (3) the information it allegedly gathered from the Internet.[162] This information was relevant to interested parties, and allegedly used by the authority.

B. *The EC Failed to Disclose Essential Facts*

114. Norway claims that the EC failed to disclose the essential facts that formed the basis for its determinations on the domestic industry, causation, dumping and the MIPs. To recall, the EC argued that it is sufficient for the authority simply to disclose its "factual findings".[163] Significantly, the EC now agrees it is not sufficient to disclose factual findings. Yet, the substance of its position does not appear to have changed much:

> Due process rights do, however, not require knowing exactly *which piece or pieces of evidence have led the investigating authority to accept a certain fact*. What counts is to be informed about the *acceptance* of a fact".[164]

115. Thus, the EC distinguishes between the underlying facts that "*led*" the authority to a factual finding, and the factual finding itself (*i.e.* "the *acceptance* of a fact"). The EC is still arguing that the authority can disclose its own findings and conclusions on which facts to accept, without also disclosing the underlying facts that "*led*" to – or "*form the basis*" for – the authority's findings. In essence, requiring the disclosure of the *facts accepted by an authority* is the same as requiring disclosure of the *authority's factual findings*.

[159] Exhibits EC-2, EC-10, EC-12, EC-12, EC-14, EC-15 and EC-16. *See* Norway's First Opening Statement, paras. 11 - 12.
[160] EC's Answers, para. 166.
[161] EC's Answers, para. 170.
[162] EC's Answers, para. 171.
[163] EC's FWS, paras. 538, 539 and 541.
[164] EC's SWS, para. 251.

116. Norway has explained that the word "*basis*" shows that the authority must disclose the *essential facts* in the record that provide the "*foundation*" for the authority's findings and conclusions.[165] However, the EC expressly excludes any disclosure of the facts in the record that "*led* the investigating authority" to its findings on which facts to accept.

117. The EC also still collapses the distinctions between Articles 6.9 and 12.2. Prior to the final determination, Article 6.9 requires disclosure of the "facts *under consideration*" that will "*form the basis*" for the determination. In contrast, after the determination is made, Article 12.2 requires a public notice setting forth the "*findings and conclusions reached* on all issues of *fact* and law". However, the EC's disclosure document and the public notice are virtually identical, showing that it does not distinguish between the two procedural steps. Moreover, as shown below, the EC disclosed only its factual findings – that is the facts it "accepted".

118. Norway has already outlined that the case-law supports its interpretation.[166] In *Guatemala – Cement II*, the panel described the essential facts in terms of "*particular information in the file* [that] forms the basis of the authority's final determination."[167] In *Argentina – Ceramic Tiles*, the "essential facts under consideration" included "*evidence submitted*" by certain interested parties and *evidence* "derived from *secondary sources*". The "essential facts" were, therefore, the *facts in the file submitted by interested parties or gathered by the authority from secondary sources*.[168]

119. The EC argues that due process does not require interested parties to "know[] exactly *which piece or pieces of evidence have led the investigating authority to accept a certain fact*."[169] Norway disagrees strongly. If the authority merely discloses the facts it has accepted, without disclosing the facts in the file that support its findings, interested parties are simply not aware of the "basis" in fact for the authority's determination, and they cannot point out that the facts are unreliable or have been incorrectly interpreted by the authority. The EC's interpretation literally frustrates the interested parties, and denies them due process.

[165] *See* Norway's FWS, para. 715, for a fuller analysis of the ordinary meaning.
[166] *See* Norway's First Opening Statement, paras. 181 to 183.
[167] Panel Report, *Guatemala – Cement II*, para. 8.229.
[168] Panel report, *Argentina – Ceramic Tiles*, para. 6.129.
[169] EC's SWS, para. 251.

120. This problem is well illustrated in this dispute. On the domestic industry, even after months of litigation, the EC still has not disclosed the volumes of the various excluded categories of EC producer and production.[170] For example, on organic salmon, the EC failed to disclose: what criteria it applied to differentiate between conventional and non-conventional salmon; which producers produced organic salmon; and what volume they produced. For the first time, the EC has given information on the excluded production. However, it still fails to identify the criteria it applied to identify organic salmon and to separate data for that salmon. More importantly, it gives two different figures for two organic producers, and incorrectly states that Loch Duart is a conventional producer.[171] Because the EC made no disclosure of the essential facts, Norway was denied its due process rights to comment earlier on those facts.

121. On dumping, the essential facts changed between the EC's definitive disclosure and its final determination. The EC describes this change in dumping margins as a "re-assessment"[172] or "re-calculation", but one that did not require a new disclosure.[173] It also contends that, in any event, it provided oral disclosures.[174]

122. Norway fails to see how the same set of essential facts can simultaneously support, for instance, dumping determinations of 17.7 percent and 24.5 percent for Pan Fish Norway ("PFN"). Either the authority's assessment of export price or normal value, or both, must have changed significantly in order for the dumping margin to decrease by 6.8 percent. The authority was obliged to disclose the essential facts underlying this change.[175] Yet, the EC provided no disclosure.

123. Norway contests the right of an authority to provide an oral disclosure and disputes that the EC provided oral disclosures under Article 6.9. The EC has provided no evidence to show that it made any oral disclosures. With respect to PFN, Norway submits evidence contesting the EC's assertions of an oral disclosure. On 3 March 2006, long after the Definitive Regulation was adopted, the General Manager of PFN, Øyvind Tørlen, sent an e-mail as follows: "I did not see the reduction [in margin] before yesterday when I went

[170] *See* Norway's FWS, para. 735, for a fuller description of the non-disclosed essential facts.
[171] *See* para. 31 above.
[172] EC's SWS, paras. 259 - 261.
[173] EC's SWS, para. 259.
[174] EC's SWS, para. 262.
[175] Panel Report, *Argentina – Poultry*, para. 7.224.

through the Council regulation (major surprise since the final disclosure showed 24.5%)".[176] In the same e-mail, Mr. Tørlen stated: "We have not received a new disclosure showing how the Commission arrived at the 17.7%".

124. On 3 March 2006, another PFN employee wrote to the Commission requesting a disclosure "showing which changes in the calculation the reduction of the dumping margin are based on."[177] PFN followed up, on 11 March 2006, with a letter to the Commission requesting disclosure.[178]

125. Thus, contrary to the EC's assertions that it made an oral disclosure, *PFN discovered for itself, in March 2006, that the EC had altered its margin*, and sent a request for a disclosure to the EC. However, the EC refused to provide a disclosure of the essential facts for its final determination, stating that the Definitive Regulation contained a "detailed explanation" of how the margin was calculated.[179] However, the Regulation does no such thing. As Mr. Tørlen put it, "This is just unbelievable!"[180]

126. On causation, the EC made factual findings – that is, "accepted" – that wild and farmed salmon do not compete, and that wild salmon is sold mostly in tins and cans.[181] The Definitive Disclosure does not disclose any facts that "form[ed] the basis" for these findings. Norway has still not seen any facts to support the EC's sweeping conclusions.

127. With respect to the MIPs, the EC explicitly *acknowledged* that new "information", requested by the EC *after* the Definitive Disclosure, formed the "basis" for a change in MIPs.[182] However, the EC failed to disclose any of the new facts that formed the "basis" for the EC's decisions on the MIPs. Norway was deprived any opportunity to comment on these extremely important facts.

[176] E-mail from the General Manager of PFN, Øyvind Tørlen, to PFN's lawyer, Benoît Servais, 3 March 2006. Exhibit NOR-179.
[177] E-mail from PFN to the Commission, 3 March 2006. Exhibit NOR-180.
[178] Letter from PFN to the Commission, 11 March 2006. Exhibit NOR-181.
[179] E-mail from the Commission to Øyvind Tørlen, 21 March 2006. Exhibit NOR-182.
[180] E-mail from Øyvind Tørlen to PFN's lawyer, Benoît Servais, 21 March 2006. Exhibit NOR-182.
[181] *See* Norway's FWS, para. 744, for a fuller description of the non-disclosed essential facts.
[182] Information Note on the Definitive MIPs, 13 December 2005, page 1. Emphasis added. Exhibit NOR-19. *See also* Norway's Answers, paras. 245 – 247.

C. *The EC Failed to Provide a Reasoned and Adequate Explanation*

128. The EC initially argued that Articles 12.2 and 12.2.2 are satisfied when the authority provides the information that the authority *itself* considers relevant.[183] As Norway pointed out, the EC was essentially arguing that an authority can decide for itself whether its conduct meets a WTO standard.

129. The EC now argues that the authority can interpret and apply the treaty "in the first place", until such time as its conduct is challenged in a WTO proceeding. At that time, a panel will decide whether the authority met the required standard.[184] This is not a response to Norway's claims. Norway has challenged the EC's published notice, and the Panel must decide whether the EC's notice is reasoned and adequate.

XI. THE EC'S IMPROPER COST ADJUSTMENTS

A. *The EC's Inclusion of Non-Recurring Costs and Operating Losses in the Cost of Production*

(i) The Ordinary Meaning of the Term "Cost of Production"

130. The major difference between the Parties regarding many of the contested cost adjustments boils down to the meaning of the term "cost of production" in the *Anti-Dumping Agreement*.[185] Norway argues that the treaty requires a demonstrable relationship between costs and production. The relevant costs are those incurred to pay for resources used in the production process to produce the like product sold in the IP.[186]

131. In contrast, the EC continues to argue that all costs that affect a company's *profitability* are costs of production.[187] Contrary to the wording of the treaty, the EC makes no attempt to establish the existence of the required relationship between costs and production.

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[183] EC's FWS, para. 562.
[184] EC's SWS, para. 266.
[185] The meaning of the term "cost of production" resolves the dispute regarding: [[xx.xxx.xx]]'s NRC and operating losses; [[xx.xxx.xx]]'s NRC; and [[xx.xxx.xx]]'s and [[xx.xxx.xx]]'s investment losses. It does not resolve the dispute regarding: the use of a three-year average to calculate NRC; the use of a three-year average to calculate finance costs; smolt cost adjustments for [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]]; [[xx.xxx.xx]]'s SG&A costs; and [[xx.xxx.xx]]'s costs of purchased salmon.
[186] *See* Norway's answer to Question 63, para. 163 ff.
[187] EC's SWS, para. 213.

132. The EC's arguments illustrate the difficulty of its overly broad approach. In reply to Question 28(b), the EC quotes from U.S. GAAP to show that costs of production include "losses and costs incurred as a result of September 11, 2001 terrorist attacks".[188] Thus, for the EC, the non-recurring costs ("NRC") associated with terrorist attacks are costs of production under the *Anti-Dumping Agreement*, even though such costs plainly do not contribute to production. This highlights the absurdity of its interpretation.

133. The EC also emphasizes the need to prevent "manipulation" of accounts by investigated companies.[189] For the EC, "manipulation" occurs when the questionnaire response diverges from a company's audited accounts. The EC ignores the difference between audited financial accounts and cost reporting in an anti-dumping investigation. GAAP and financial accounts provide an overview of the financial situation of a company as a whole.[190] Under the *Anti-Dumping Agreement*, an authority seeks to establish the cost of producing and selling the like product in the IP.[191]

134. Divergences between audited accounts and costs of production under the *Anti-Dumping Agreement* are, therefore, to be expected and are, in fact, expressly envisaged in Article 2.2.1.1 – GAAP accounts can be used solely to the extent that they "reasonably reflect the costs associated with the production and sale" of the product.

135. Strikingly, the EC's current view on divergences between audited accounts and reported costs of production differs from its position in the farmed salmon investigation in 2003. In that investigation, on the basis of constructed costs, the EC found that Norwegian exports were not dumped. The authority stated that one party argued for a positive dumping determination because "*certain important Norwegian operators had reported losses for the IP*".[192] The authority noted that "the reasons for companies reporting losses may vary (e.g. extraordinary restructuring costs, losses from investments in other products or countries)".[193] As a result, "*the fact alone that they were loss making during the IP does not necessarily imply that they were dumping the product concerned*".[194]

[188] EC's Answers, para. 109.
[189] *See, for example*, EC's SWS, para. 205.
[190] Norway's Answers, para. 156.
[191] Norway's Answers, paras. 157 and 158.
[192] Termination Regulation, para. 91. Exhibit NOR-5.
[193] Termination Regulation, para. 91. Exhibit NOR-5.
[194] Termination Regulation, para. 91. Exhibit NOR-5.

136. Thus, the EC admitted that not all costs that affect profits are relevant to a dumping determination, and it explicitly referred to restructuring costs and investment losses as examples of NRC that are irrelevant. The EC also recognized that GAAP accounts do not necessarily provide an accurate picture of costs for purposes of dumping. It is not clear why the EC now believes that a divergence between the audited accounts and a questionnaire reply is the result of "manipulation" by the companies.

(ii) The Contested Non-Recurring Costs and Operating Losses Are Not Costs of Production

137. The EC does not even attempt to establish the existence of the required relationship between production in the IP and the contested NRC and operating losses incurred by [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]].[195] For the EC, it suffices that these costs and losses affected *profitability*.

138. With respect to [[xx.xxx.xx]] NRC on the closure of smolt facilities, the EC asserts that the company did not "inform[] the investigating authorities that the additional depreciation cost … concerned write-downs following the closure of smolt facilities."[196] However, as the Panel itself noted in Question 29, [[xx.xxx.xx]] informed the authority unequivocally that the additional amount in the audited depreciation costs "*is explained by write-downs of fixed assets*"; the company clarified that the write-down occurred because it had "*shut down 4 smolt facilities*" in 2003.[197] The EC's answer to the Panel's direct question denies what is stated on the face of [[xx.xxx.xx]] comments.

B. *The EC Has No Justification for the Three-Year Averaging of Non-Recurring Costs and Finance Costs*

(i) The EC's Changing Justification of the Three-Year Approach Is *Ex Post* Rationalization

139. Exhibit EC-37 clarifies that the EC used a three-year average to calculate NRC for three companies,[198] and finance costs for five companies.[199] The EC's justification for using

[195] *See* Norway's FWS, paras. 815 – 939.
[196] EC's Answers, para. 128.
[197] [[xx.xxx.xx]]'s Comments on the Information Note on Costs of Production, 15 March 2005, page 3. Emphasis added. Exhibit NOR-[[xx.xxx.xx]].
[198] [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]].
[199] [[xx.xxx.xx]], [[xx.xxx.xx]], [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]].

a three-year averaging period for these costs has continuously shifted and, for this reason alone, lacks credibility.

140. For NRC, in the Definitive Regulation, the EC claimed to use three years as a substitute for allocating what it then called "extraordinary costs" over the lifetime of the fixed asset.[200] It wrongly claimed that it had no information on the lifetime of the assets concerned, whereas, in fact, the record included evidence on depreciation periods.[201] The EC stated that three years was an "appropriate" alternative period because it is the average time to grow "a *smolt* to a harvestable salmon".[202]

141. For finance costs, the EC gave no separate explanation for the use of a three-year period to calculate finance costs for five companies. This approach significantly inflated costs because interest rates fell markedly during the period concerned.

142. In these proceedings, the EC no longer argues that it used a three-year period as a proxy for the useful life of fixed assets, and it has not addressed the fact that the record included evidence on depreciation periods. Thus, no alternative period was needed. Also, it no longer contends that three years is the period from smolt to harvest, and instead argues that three years is the period from egg to harvest.[203] This difference is important because the period from eggs to smolt, which is an on-shore activity in hatcheries and fresh-water cages, can last nine to 15 months.

143. More importantly, the EC has introduced a new justification for three-year averaging based on project accounting ("PA"). This reason was never mentioned either in the published determination or the disclosures. As a result, the interested parties were denied an opportunity to comment on the EC's alleged use of PA to calculate their costs, and on its reliance on PA as a justification for three-year averaging. This argument is *ex post* rationalization. For that reason alone, the Panel can reject this justification. The Panel need not decide, therefore, whether a PA or IP approach is "correct" or "preferable", or even whether the EC used a PA approach.

[200] Definitive Regulation, para. 18.
[201] Norway's FWS, paras. 953 - 956.
[202] Definitive Regulation, para. 18.
[203] EC's FWS, paras. 617 and 692.

(ii) The EC's Justification in the First Written Submission Was Wrong

144. Besides constituting an *ex post* rationalization, the EC's reliance on PA approach is riddled with inconsistencies, and is factually wrong. In its First Written Submission, the EC justified three-year averaging by arguing that it used a PA approach for *all* companies and for *all* cost elements, *including* finance costs.[204] Thus, it said, the use of a three-year average for NRC was merely an extension of a universal approach. Now, the EC has changed its argument, and admits that, for *four out of ten* companies, it did *not* use the PA approach, but rather an IP approach.[205] Thus, the EC acknowledges that it used an IP approach that it previously described as a "manifest error".[206] More importantly, the EC can no longer claim that the three-year approach is merely a logical extension of the approach it used for all companies for all other cost elements.

145. Exhibit EC-37 also shows that the EC's use of three-year averaging was not linked to its alleged use of the PA approach. The EC claims to have used PA for six companies; however, it used three-year averaging for eight companies. Thus, for two companies, the EC used three-year averaging, even though it calculated costs using an IP approach.[207] This shows that the EC's use of three-year averaging was not motivated by principled considerations relating to PA, but by its desire to create dumping where there was none.

(iii) The EC's Use of Three-Year Averaging Was Inconsistent

146. Exhibit EC-37 also shows that the EC used different three-year periods for different companies. For some, 2001 to 2003 was used and, for others, 2002 to 2004 was used. The EC asserts that this is because it used the audited accounts for the three most recent years. For some companies, it contends that the 2004 statements were available, while for others they were not.[208]

147. This is incorrect. The EC used the period 2001 to 2003 for, among others, [[**xx.xxx.xx**]] and [[**xx.xxx.xx**]]; in contrast, it used 2002 to 2004 for [[xx.xxx.xx]], [[xx.xxx.xx]] [[xx.xxx.xx]] and [[xx.xxx.xx]]. However, for [[**xx.xxx.xx**]] and [[**xx.xxx.xx**]],

[204] EC's FWS, para. 700.
[205] *See* Exhibit EC-37 and EC's Answers, paras. 142 and 147; the four companies were [[xx.xxx.xx]], [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]].
[206] EC's FWS, para. 618. Under this approach, the COP includes all costs incurred in the IP for all salmon generations. The total of these costs is then divided by the weight of fish harvested in the IP.
[207] [[xx.xxx.xx]] and [[xx.xxx.xx]].
[208] EC's Answers, para. 148.

the 2004 statements were provided at the same time as, or even before, the 2004 statements for these four other companies:

- on 13 April 2005, prior to the provisional determination, FHL submitted the 2004 financial statements for, among others, [[**xx.xxx.xx**]], [[xx.xxx.xx]], [[xx.xxx.xx]], and [[**xx.xxx.xx**]];[209]
- on 27 May 2005, [[**xx.xxx.xx**]] itself submitted its 2004 financial statement, including a translation of the auditors' statement;[210]
- on the same date, [[xx.xxx.xx]] submitted a draft of the 2004 accounts for the investigated company, [[xx.xxx.xx]], and the final group-wide 2004 accounts;
- also on that date, [[xx.xxx.xx]] also submitted its financial statement for 2004, with a translation of the auditors' statement.

148. This shows that the 2004 statements for [[**xx.xxx.xx**]] and [[**xx.xxx.xx**]] were available to the EC.

(iv) The EC's Description of Its Use of Project Accounting Is Also Not Supported by the Facts

149. The EC asserts that it used a PA approach for six companies.[211] Norway continues to disagree. Norway recalls that a PA approach includes the accumulated farming costs incurred *during, and prior to, the IP* for salmon generations harvested in the IP. The PA approach does not include any costs incurred in the IP for generations harvested *after* the IP. In contrast, an IP approach includes all costs incurred in the IP for any salmon generations in the water during that time, irrespective of the harvest date. However, *all costs incurred prior to the IP are excluded*.

150. For [[xx.xxx.xx]], the EC makes much of a letter from the company stating that costs were taken from the company's "project accounting *system*".[212] However, as [[xx.xxx.xx]]'s letter shows, this means simply that the company extracted the submitted cost data from its internal cost recording "system", which is sub-divided by projects.[213] However, the company extracted the costs incurred *in the IP for all salmon generations that were in the water at that*

[209] Exhibit NOR-[[xx.xxx.xx]].
[210] Exhibit NOR-[[xx.xxx.xx]].
[211] [[xx.xxx.xx]], [[xx.xxx.xx]], [[xx.xxx.xx]], [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]].
[212] EC's Answers, para. 55.
[213] Letter from [[xx.xxx.xx]] to the EC, 27 May 2005, page 4. Emphasis added. Exhibit NOR-[[xx.xxx.xx]].

time. [[xx.xxx.xx]] did not report any costs incurred *prior* to the IP. Indeed, in the same letter cited by the EC, [[xx.xxx.xx]] states clearly:

> As a consequence of the definition of IP, *all events, costs and sales occurring prior to or after the IP are not part of the investigation*.[214]

151. In a letter of 30 January 2007, responding to questions asked by the Government of Norway, [[xx.xxx.xx]] confirms that it reported costs on an IP basis and that the EC made its determinations on that basis, subject to cost adjustments. This letter is submitted today as Exhibit NOR-183.[215]

152. This was explained to the EC during verification, among others, with the slide in Exhibit NOR-156. [[xx.xxx.xx]] confirms that Exhibit NOR-156 was presented, in the format shown in the exhibit, to the investigators on 6 January 2005. For the Panel's convenience, the entire slide presentation is attached as Exhibit NOR-184. Norway strenuously objects to the EC's assertion that the slide in Exhibit NOR-156 has been tampered with.[216] The slides in Exhibits NOR-156 and EC-24 show different things. EC-24 is an explanation of the *duration of the salmon growth cycle*, whereas NOR-156 shows that [[xx.xxx.xx]] based the COP on the costs incurred in the IP for all salmon generations in the water during that period.

153. For [[xx.xxx.xx]], the EC now admits that the company reported on an IP basis. However, the EC claims that it based its calculation on the annual accounts, which it says "implicitly included the company's normal project accounting approach".[217] Although the EC may have verified the reported IP figures in the annual accounts, the EC never asked [[xx.xxx.xx]] to re-state its costs on a PA basis, and based its own determination on the reported IP costs actually submitted by [[xx.xxx.xx]], without adjusting them to a PA basis.

154. The EC's alleged use of a PA approach for [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]] is also belied by the adjustment that the companies requested for smolt costs. Using an IP approach, [[xx.xxx.xx]] and [[xx.xxx.xx]] reported smolt costs incurred in the IP

[214] Letter from [[xx.xxx.xx]] to the EC, 27 May 2005, page 4. Emphasis added. Exhibit NOR-[[xx.xxx.xx]].
[215] Letter from [[xx.xxx.xx]] to Norway in response to Norway's questions, 30 January 2007. Exhibit NOR-183.
[216] EC's SWS, paras. 229 and 230.
[217] EC's Answers, para. 144.

for salmon that would be harvested after the IP.[218] Because both companies were increasing production, the smolt cost in the IP exceeded the smolt cost incurred to produce the salmon harvested in the IP. Both companies, therefore, claimed an adjustment of smolt costs. If the companies had reported on a PA basis, no adjustment would have been needed because the reported costs would have included only the actual smolt costs incurred to grow the salmon harvested in the IP.

155. For [[xx.xxx.xx]], one of the EC's contested adjustments also relates to smolt costs. The EC included smolt costs incurred in the last month of the IP. This smolt was not delivered to [[xx.xxx.xx]] until after the IP and the salmon was harvested much later. If the EC had adopted a PA approach, it would not have included this smolt cost.

156. Finally, Norway reiterates that it is *not* asking the Panel to rule that the EC should have used a particular cost accounting approach. The issue before this Panel is the improper use of three-year averaging to calculate non-recurring and finance costs for certain companies. Because the EC's reliance on a PA approach is an *ex post* justification for the three-year averaging, the Panel can reject the EC's argument on this basis alone. However, if the Panel chooses to decide whether the EC used PA or IP, Norway has shown that an IP basis was used to calculate costs for eight of the nine companies that received an individual margin. Thus, the use of a PA approach does not justify the three-year averaging.

C. *[[xx.xxx.xx]] Costs of Purchased Salmon*

157. Norway claims that the EC double-counted [[xx.xxx.xx]] in its treatment of [[xx.xxx.xx]] costs of purchased salmon. To recall, [[xx.xxx.xx]] entered into a toll-processing agreement with unrelated producers whereby it purchased live salmon from them, and slaughtered, packed, and re-sold that salmon. Under the agreement, [[xx.xxx.xx]] purchase price was equal to its final re-sale price for HOG fish. This ensured that the unrelated producers were guaranteed all the revenues for growing the salmon, and [[xx.xxx.xx]] revenues as a toll processor were limited to the slaughtering and packing services.

158. [[xx.xxx.xx]] *gross* purchase costs were [[xx.xxx.xx]], which reflected the market price for HOG salmon. However, as part of the arrangement, the gross purchase costs were

[218] *See* Norway's FWS, paras. 992 ff.

off-set by [[xx.xxx.xx]] paid to [[xx.xxx.xx]] for the slaughtering and packing services. Thus, [[xx.xxx.xx]] *net* purchase cost for live salmon was only [[xx.xxx.xx]].[219]

159. The EC included in [[xx.xxx.xx]] salmon production cost the gross purchase cost of [[xx.xxx.xx]], instead of the net cost of [[xx.xxx.xx]]. In addition to the [[xx.xxx.xx]], the EC refused to deduct [[xx.xxx.xx]] from [[xx.xxx.xx]] slaughtering and packing costs. The result is that the EC treated [[xx.xxx.xx]] total costs of purchasing and processing the live salmon as [[xx.xxx.xx]], whereas [[xx.xxx.xx]] actual costs were [[xx.xxx.xx]] plus [[xx.xxx.xx]], or [[xx.xxx.xx]]. This double-counting of [[xx.xxx.xx]] is extremely important because, without it, [[xx.xxx.xx]] margin is below zero.

160. As with so many other claims, the EC's defence is a moving target. The EC initially contended that the [[xx.xxx.xx]] "is an *entirely new figure*, not mentioned in any reply or submission before, not substantiated during the investigation and impossible to have been verified".[220] However, Norway explained at the last meeting that this was factually incorrect.

161. Now the EC argues something altogether different. The EC has suddenly recalled that it "acknowledg[ed] the existence of this figure" during the investigation.[221] However, it contends that, at verification, it disagreed with [[xx.xxx.xx]] on the "nature of this figure" and "how it should be used".[222] The EC also argues that, during verification, [[xx.xxx.xx]] could not "provide accounting records relating to the purchase of salmon" and could not "make a distinction between the sales of own as opposed to purchased salmon".[223]

162. As a preliminary matter, Norway considers it not credible that, in the First Written Submission, the EC claimed that the [[xx.xxx.xx]] was unknown, and never mentioned in the investigation. Yet, in the Second Written Submission, the EC has managed to recall that it knew of the figure all along, and even tried to verify it. This calls into doubt the credibility of the EC's assertions that it tried to verify the data.

163. Although the EC's new defense is based on alleged events at verification, it offers no evidence to support its contention that it could not verify the relevant figures. Under Article

[219] [[xx.xxx.xx]] minus [[xx.xxx.xx]] equals [[xx.xxx.xx]]. *See* affidavit from [[xx.xxx.xx]], Exhibit NOR-185. *See also* Norway's FWS, paras. 1062 – 1070, for further details.
[220] EC's FWS, para. 715.
[221] EC's SWS, para. 230.
[222] EC's SWS, para. 230.
[223] EC's SWS, para. 230.

6.7 of the *Agreement*, the EC was obliged to "make the results of [the] verification available, or [] provide disclosure thereof pursuant to [Article 6.9]". It did not do so.

164. In the Definitive Disclosure, the EC stated that it included the full [[xx.xxx.xx]] in the COP, and noted that this corresponded to a production weight for salmon of [[xx.xxx.xx]]. The EC stated that "slaughtering services have *not been deducted* from the cost of production. It has been considered that, under normal circumstances, the total cost of the slaughtering facility should be allocated to own production."[224]

165. Significantly, the EC never mentioned that it tried, but failed, to verify figures relating to the purchase of the live salmon, and its slaughter and re-sale. It did not mention that [[xx.xxx.xx]] could not provide relevant accounting records and could not distinguish between the sales of own and purchased salmon. Instead, the tenor of the disclosure, in particular the precise figures mentioned, indicate that the EC had an accurate understanding of the issue. On the slaughtering and packing costs, the EC did not say that it could not verify the [[xx.xxx.xx]] paid to Sinkaberg for slaughtering services. Rather, the EC stated a *decision of principle* to reject the claimed deduction because it "considered" that the slaughtering costs should be included in the COP, in addition to the full purchase cost. This involved unacceptable double-counting.

166. The EC's account of the verification is disputed in an affidavit from [[xx.xxx.xx]] in Exhibit NOR-185. At verification, the EC asked why the company purchased and re-sold salmon at the same price. [[xx.xxx.xx]] explained that the purchase price was, in fact, lower than the sale price because it was off-set by revenues [[xx.xxx.xx]] earned from the sale of its processing activities. Upon request, [[xx.xxx.xx]] provided detailed information regarding the relevant re-sale transactions for a two-week period – weeks 38 and 39 of 2004 (corresponding to 13 to 26 September 2004). The investigators were satisfied with the information shown to them, and requested no further information either during or after verification concerning the purchased salmon, the slaughtering and packing costs, or the re-sale of that salmon.[225]

[224] Definitive Disclosure to [[xx.xxx.xx]], 28 October 2005, page 2. Exhibit NOR-[[xx.xxx.xx]].
[225] *See* affidavit from [[xx.xxx.xx]]. Exhibit NOR-185. *See also* [[xx.xxx.xx]] letter to the Commission, Exhibit NOR-150.

167. Finally, Norway recalls the EC's discriminatory treatment of [[xx.xxx.xx]] during the investigation. The EC refused to provide [[xx.xxx.xx]] with an Information Note on Costs of Production in March 2005 or with a Provisional Disclosure in April 2005, and it improperly refused to calculate a provisional individual margin for [[xx.xxx.xx]]. [[xx.xxx.xx]], therefore, first learned of the EC's decision on purchased salmon in the Definitive Disclosure.[226] Thus, whereas other sampled companies were given three opportunities to comment on the authority's interim findings, [[xx.xxx.xx]] was given only one.

XII. CONCLUSION

168. Norway, also submits 10 new exhibits, from Exhibit NOR-176 to Exhibit NOR-185, together with this Opening Statement. Pursuant to para. 11 of the BCI procedures,[227] Norway requests that the Panel apply the BCI procedures to protect the information in Exhibits NOR-177, NOR-183 and NOR-185.

169. Mr. Chairman, members of the Panel, staff of the Secretariat, that concludes our statement. I would like to thank you for your attention and look forward to answering your questions.

[226] *See* Norway's FWS, paras. 1073 – 1075.
[227] Additional Working Procedures of the Panel Concerning Business Confidential Information, 22 September 2006.