NON-CONFIDENTIAL VERSION

BEFORE THE WORLD TRADE ORGANIZATION

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

WT/DS337

SECOND WRITTEN SUBMISSION

NORWAY

15 JANUARY 2007

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US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875
	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, modified by Appellate Body Report, WT/DS264/AB/R, DSR 2004:V, 1937
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US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Related to Zeroing and Sunset Reviews*, WT/DS322/AB/R (circulated 9 January 2007, not yet adopted)

TABLE OF ABBREVIATIONS

Abbreviation	Description
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
CIF	cost, insurance, freight
COP	costs of production
Closing Statement	Closing Statement of 13 December 2006 at the First Substantive Meeting with the Parties
Definitive Regulation	Council Regulation (EC) No. 85/2006 of 17 January 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of farmed salmon originating in Norway. Exhibit NOR-11.
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
EC	European Communities
FHL	Norwegian Seafood Federation
FWS	First Written Submission
GAAP	Generally Accepted Accounting Principles
GATT 1994	*General Agreement on Tariffs and Trade 1994*
HOG	head-on gutted
IP	period of investigation
MIP	minimum import price
NOK	Norwegian Kroner
NRC	non-recurring costs
Opening Statement	Opening Statement of 12 December 2006 at the First Substantive Meeting with the Parties
PA	project accounting
PFN	Pan Fish Norway AS

Abbreviation	**Description**
Provisional Regulation	Commission Regulation (EC) No. 628/2005 of 22 April 2005 imposing a provisional anti-dumping duty on imports of farmed salmon originating in Norway (OJ L104/5, 23 April 2005), as amended by Commission Regulation (EC) No. 1010/2005 of 1 July 2005 (OJ L170/32, 1 July 2005). Exhibit NOR-9.
SG&A	selling, general & administrative costs
Vienna Convention	*Vienna Convention on the Law of Treaties*
WFE	whole fish equivalent

I. INTRODUCTION

1. In its First Written Submission, Norway demonstrated that the EC's anti-dumping duty on imports of farmed salmon from Norway suffers from numerous WTO-inconsistencies. At every step of the proceeding, from the initiation of the investigation, through the substantive determinations, to the remedy determination, the EC violated its WTO obligations. The EC also failed to respect the procedural rights of Norwegian interested parties. In Norway's view, the failings in the EC's measure are so profound that the measure is deprived of legal basis and must be withdrawn.

2. Norway's First Written Submission sets out its claims and arguments in detail. Norway responded to the EC's First Written Submission in its Opening Statement of 12 December 2006 at the First Substantive Meeting with the Parties ("Opening Statement"). Norway explained that the EC's response is based on incorrect interpretations of the *Anti-Dumping Agreement*; attempts to justify the contested measure with new reasons and evidence that are inadmissible; an inaccurate statement of the facts regarding the investigation; and, a plea for its authority to enjoy discretion that would free it of multilateral disciplines.

3. Today, Norway provides the Panel with written answers to the questions posed at the first meeting, as well as this Second Written Submission. This submission addresses arguments from the EC's First Written Submission that were not addressed in Norway's Opening Statement, and also counters arguments made by the EC in its Opening Statement, and Closing Statement of 13 December 2006 at the First Substantive Meeting with the Parties ("Closing Statement"). To avoid repetition, Norway provides extensive cross-references to the arguments made in its earlier submissions and in today's responses to the Panel's questions.

4. Norway begins by commenting on the EC's reply of 8 January 2007 to the Panel's questions on the new evidence (Section II). Norway then addresses the EC's Opening Statement on the standard of review (Section III), the product under consideration (Section IV), the domestic industry (Section V), dumping, excluding cost adjustments (Section VI), injury (Section VII), causation (Section VIII), MIPs (Section IX), fixed duties (Section X), procedural issues (Section XI), cost adjustments in constructing normal value (Section XII) and the conclusion (Section XIII).

II. SEVEN OF THE EC'S NEW EXHIBITS ARE INADMISSIBLE AND SUPPORT IMPROPER *EX POST* RATIONALIZATIONS

5. In this Section, Norway comments on the EC's response of 8 January 2007 to Question 1, in which the EC defends the seven new exhibits it has presented to the Panel. Norway first recalls its earlier preliminary requests for the Panel to request a list of documents that form part of the record of the EC's investigation. Norway then provides general comments on the EC's answer of 8 January, as well as detailed remarks concerning the contested individual exhibits.

A. *Norway Has Repeatedly Attempted to Avoid Being Confronted by New Evidence Not Contained in the Record*

6. Norway has found it impossible to obtain confirmation of the contents of the record of the contested investigation. From November 2004, Norway requested the EC to confirm the contents of that record repeatedly. The EC always refused to do so. By letter of 4 August 2006, Norway outlined to the Panel the circumstances surrounding the EC's failure to disclose all non-confidential documents in the record.

7. In Annex 3-A to its letter of 4 August 2006, Norway attached a list of all the documents that were included in the non-confidential record that Norway was allowed to inspect during the investigation.[1] In Annex 3-B to that letter, Norway provided the Panel with a list of 68 documents that Norway knows, or has reason to believe, were submitted in the investigation but that were missing from the record it was permitted to inspect.[2]

8. In that same letter, Norway recalled that, during the proceedings in *EC – Tube or Pipe*, the EC produced information that had not been disclosed to interested parties during the investigation in order to justify its measure.[3] The Appellate Body found that this non-disclosure violated Articles 6.2 and 6.4. Norway stated:

> Throughout the investigation and now in this dispute, it has been Norway's wish to avoid any doubts or misunderstandings, such as those in *EC – Tube or Pipe*. Norway, therefore, renews its request for confirmation of the contents of the non-confidential record through the offices of the Panel.[4]

[1] Exhibit NOR-13.
[2] Exhibit NOR-13.
[3] Norway's Letter of 4 August 2006, para. 28, citing panel report, *EC – Tube or Pipe*, para. 7.306. Exhibit NOR-13.
[4] Norway's Letter of 4 August 2006, para. 30. Exhibit NOR-13.

9. The Panel declined Norway's request. Norway now finds itself in the same position that Brazil did in *EC – Tube or Pipe*, confronted by seven new exhibits that it has never seen before. These exhibits contain information that was not made available for interested parties to see during the investigation, as required by Article 6.4; and that was not disclosed as essential facts under Article 6.9.

10. Norway deeply regrets that this situation has arisen and is at a loss to see what additional steps it could have taken to prevent the situation from arising.

11. In Norway's view, all of the seven contested Exhibits – EC-2, EC-10, EC-12, EC-13, EC-14, EC-15, and EC-16 – must be rejected by the Panel as inadmissible because they contain information that the EC has been unable to demonstrate was before the investigating authority; that was not shown to interested parties under Article 6.4; that was not disclosed as essential facts under Article 6.9; and, that is nowhere identified or mentioned in the published determinations. Moreover, the new reasons that the EC advances on the basis of this new information are also inadmissible as *ex post* rationalizations not contained in the published determination.

B. *General Remarks on the EC's Defense of the Seven New Exhibits*

12. Norway now turns to provide detailed comments on the EC's answer of 8 January 2007. Norway first makes general comments on the EC's defense of its exhibits, before providing detailed comments on the exhibits themselves.

(i) The EC cannot submit publicly available information that was not demonstrably part of the record of the investigation

13. Norway recalls that, under Article 17.5 of the *Anti-Dumping Agreement*, a WTO Member may not seek to "defend its agency's decision on the basis of evidence not contained in the record of the investigation."[5] Hence, any evidence, information or facts relied on by the EC must be discernible in the investigation record. This evidence must have also been made accessible to the parties pursuant to Article 6.4 and, if it contains essential facts, must have been disclosed to interested parties pursuant to Article 6.9.

14. In its answer to Question 1, the EC repeatedly asserts that particular information was publicly available as a way of demonstrating that the information was part of the

[5] Appellate Body Report, *US – DRAMS*, para. 161.

investigation record.[6] However, *public availability* does not, *in and of itself*, mean that the information in question was submitted to, or otherwise gathered by, the investigating authority. In other words, not all publicly available information is before an investigating authority during an investigation.

15. Furthermore, interested parties must also be given an opportunity to comment on the pertinence and accuracy of publicly available information, and the format in which it will be considered by the authority. Publicly available statistical information can be parsed, presented and used in myriad different forms – aggregated or disaggregated; a subset or the entirety of data can be used; data can be split into different time periods; and it can be taken in raw format, adjusted, or converted to a common denominator. Moreover, the authority gathering the information can simply err and use incorrect data, as indeed happened in this very investigation.[7]

16. Given the choices an authority makes in selecting and using publicly available information, it must allow interested parties to have access to it, under Article 6.4, in the form that it will be considered in order for that data to become part of the record evidence. If the data is "essential", it must also be disclosed under Article 6.9. The EC's approach emasculates the procedural rights of interested parties under these provisions.

17. The EC's view appears to be that, simply because "Eurostat data is [the] official source of EU statistical information, or because the authority refers generally to "Eurostat data", all data contained in the Eurostat database is deemed to have been collected and considered by the investigation record. The EC appears to take the same view with respect to the newspaper articles in Exhibit EC-2. Thus, because news is publicly available, the EC appears to believe all news was necessarily before the authority. This is also unacceptable because interested parties do not know which newspapers and journals EC officials read, and which news stories must be addressed in their comments to the authority. On the EC's view, everything that is available on the Internet is part of the authority's record of the investigation.

[6] EC's response to Question 1, paras. 3, 5, 18, 21, and 30.
[7] Norway understands that the "technical" and "clerical" errors surrounding import statistics of salmon from Canada and the United States were errors made by the investigating authority. (*See* EC's First Written Submission ("FWS"), para. 433). Another example of the risks of relying upon undisclosed publicly available information is given in footnote 21.

18. The EC's view means that vast amounts of information, in many different formats and configurations, from a vast number of sources, would simply be *presumed, automatically,* to be part of the investigation record, regardless of whether the investigating authority actually considered or relied on that data. The defending WTO Member in subsequent WTO proceedings would be free to draw upon vast amounts of public data, compile and parse it in a potentially infinite number of ways, regardless whether data in those specific configurations and compilations was considered by the investigating authority. This would give the defending WTO Member endless possibilities to defend its measures with new information that was not before the authority.

19. Hence, where the EC wishes to justify the authority's determination on the basis of publicly available *statistical information* it must demonstrate that its authority: (1) gathered this data during the investigation in the configuration now presented by the EC; (2) made that data available to the parties pursuant to Articles 6.2 and 6.4; and (3), disclosed that data to interested parties pursuant to Article 6.9 because the EC presents the data as an "essential" justification to defend its measure. The same is true for other publicly available information, such as the news reports in Exhibit EC-2 and allegedly general business knowledge.[8]

20. As Norway will demonstrate, a significant portion of the data now presented by the EC fails to satisfy these requirements.

(ii) <u>The EC cannot submit data that has been "manipulated" to establish new facts</u>

21. As noted in paragraph 15, the information gathered by the investigating authority may be presented and examined in an endless variety of ways. The data can be subjected to an extremely wide range of mathematical operations that aggregate and disaggregate the data, and combine it with other data, in many different ways. The authority can also conduct these operations using models, assumptions, projections, and extrapolations. As a result of these operations, the "facts" that are before the authority, and the conclusions to be drawn from those "facts", differ according to how the data is presented and manipulated.

22. In WTO anti-dumping proceedings, the respondent cannot present new facts that are derived from a manipulation of data that was before the authority. In other words, a Member cannot take the facts that were before the authority, subject them to mathematical operations, and contend that the resulting new facts were also before the authority. For example, in *US* –

[8] *See* EC's response to Question 1, para. 16.

Softwood Lumber V, Canada was not permitted to present a new "regression analysis" of data drawn from the record.[9] The panel highlighted that the new analysis was performed on the basis of a series of "*choices*" by Canada, and these choices "may have [had] a significant impact on the conclusions drawn" from the data.[10]

23. The EC argues that a number of the seven new exhibits are based on facts that were before the investigating authority. However, the facts before the investigating authority have been materially altered by calculations, extrapolations, estimations and other mathematical operations. Thus, as a result of these operations, the facts presented consist of new facts that are materially different from those that were before the authority. For instance, Exhibit EC-10 contains "extrapolations", and EC-12 contains "projections" of original data that result in the *establishment of new facts* relating to sales volumes and prices that were not previously known. The decisions on which extrapolations and projections to make, and how to divide the data into the different categories shown in the exhibits, are the result of choices made, *not* by the investigating authority during the investigation, but by the EC in these proceedings. Moreover, these choices are deliberately intended to influence the "conclusions" to be drawn by the Panel from the newly established facts.

24. Other exhibits contain data that has been disaggregated and/or aggregated into new categories. As a result, the facts that were before the authority have been materially changed to create new facts. For instance, EC-13 disaggregates data from the Scottish producers questionnaire responses by sub-dividing sales information into two newly created categories: UK and non-UK sales. The EC, thereby, manipulates the original data, making choices on how to present and categorize that data. In so doing, the EC alters the substance of the original data by *establishing new facts* regarding UK and non-UK sales that were not previously known. Again, the EC does so with a view to influencing the "conclusions" to be drawn by the Panel from the newly established facts.

25. These new facts are inadmissible because they: were not part of the record; were never disclosed or otherwise made available to the interested parties; and, were not relied on by the authority.

[9] Panel Report, *US – Softwood Lumber V*, para. 7.40.
[10] Panel Report, *US – Softwood Lumber V*, para. 7.40.

(iii) The EC cannot rely on explanations that are not found in the investigating authority's report

26. Norway recalls the fundamental requirement that an investigating authority must provide a reasoned and adequate explanation of how the facts on the record supports its determination. Hence, the reasoned and adequate explanation must be found in the report of the investigating authority – and *not* in the submissions of a WTO Member.

27. As a result, even if particular data was properly before the investigating authority, a WTO Member may not advance an interpretation and explanation of that data that was not given by the investigating authority itself. Panels have routinely rejected such *ex post* rationalizations as inadmissible.[11] In this dispute, the EC advances new explanations on the basis of every single one of the contested exhibits. Leaving aside the admissibility of the exhibits, the new explanations are themselves inadmissible.

(iv) The EC's contention that the new exhibits do not contain "evidence" but "explanation" is irrelevant

28. The EC repeatedly attaches importance to the fact that it provided a particular exhibit not as "evidence", but rather as an "explanation".[12] The EC's distinction is irrelevant. The decisive question is whether particular *information* or *data* relied upon by the EC, either in its submission or in an exhibit, was or was not properly before the investigating authority as part of the investigation. The answer to this question does not change depending on whether the EC chooses to label its exhibits as "evidence" or "explanations".

29. Moreover, ironically, by labeling its exhibits as "explanations", rather than as "documents … obtained during the investigation",[13] the EC confirms that the contested exhibits support new explanations that were not relied upon by the investigating authority during the investigation. As noted, such *ex post* rationalizations are inadmissible.[14]

(v) The EC cannot rely on the conduct of the domestic proceedings to justify its failure to provide a reasoned and adequate explanation

[11] Appellate Body Report, *US – Wheat Gluten*, para. 162. Panel Report, *Argentina - Poultry*, paras. 7.284, 7.306 and 7.321. Panel Report, *Guatemala – Cement II*, para. 8.48. *See* also Appellate Body Report, *US – CVD on DRAMS*, para. 165.
[12] EC's response to Question 1, para. 17 (Exhibit EC-10), para. 22 (Exhibit EC-12), and para. 26 (Exhibit EC-13).
[13] EC's response to Question 1, para. 22.
[14] Appellate Body Report, *US – Wheat Gluten*, para. 162. Panel Report, *Argentina - Poultry*, paras. 7.284, 7.306 and 7.321. Panel Report, *Guatemala – Cement II*, para. 8.48. *See* also Appellate Body Report, *US – CVD on DRAMS*, para. 165.

30. Contrary to the EC's argument in reply to Question 1,[15] the obligation to provide a reasoned and adequate explanation exists independently of the arguments raised by interested parties during the investigation. Under Article 12.2.2, a reasoned and adequate explanation must address "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". Thus, *even if no issues are raised in the investigation*, the authority must still demonstrate, through an explanation, that it complied with the substantive requirements of the *Agreement* in deciding to impose final measures. This requirement ensures that Members provide a sufficient justification for imposing measures that may exceed bound tariffs under Article II:2(b) of the GATT 1994. The Appellate Body has also clarified that a complaining Member can make claims and arguments in WTO dispute settlement that were not raised during an investigation.[16]

(vi) The EC cannot rely on administrative difficulties to evade its duty to provide a reasoned and adequate explanation

31. In its reply to Question 1, the EC argues that its internal translation requirements, which result in "acute pressure" on administrative resources,[17] preclude the EC from satisfying fully its obligation to provide a reasoned and adequate explanation, and from making express references in the determination to particular facts on the record.[18]

32. The EC's argument is absurd. WTO Members may not invoke domestic law, much less mere administrative difficulties, to justify breaches of WTO law.[19] As the EC would have it, the requirement to provide a reasoned and adequate explanation applies in different ways to different WTO Members, depending on how many official languages a Member has adopted. This interpretive approach is hardly consistent with the requirements of the *Vienna Convention*.

[15] *See, for instance*, EC's response to Question 1, paras. 13 and 25.
[16] Appellate Body Report, *US – Lamb*, para. 113 ("In arguing claims in dispute settlement, a *WTO Member* is not confined merely to rehearsing arguments that were made to the competent authorities by the *interested parties* during the domestic investigation, even if the WTO Member was itself an interested party in that investigation. Likewise, panels are not obliged to determine, and confirm themselves the nature and character of the arguments made by the interested parties to the competent authorities. Arguments before national competent authorities may be influenced by, and focused on, the requirements of the national laws, regulations and procedures.") The Appellate Body quoted Appellate Body Report, *Thailand – H-Beams*, para. 94, which establishes the same principle in connection with the *Anti-Dumping Agreement*.
[17] EC's response to Question 1, para. 11.
[18] EC's response to Question 1, para. 11.
[19] Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 46; *see, also,* Appellate Body Report, *EC – Asbestos*, para. 159 and Panel Report, *United States – Gasoline*, above, footnote 15, paras. 6.26 and 6.28.

33. In any event, if the EC considers that its municipal translation requirements are too burdensome, it can always change them. To comply with WTO law, the EC need only provide *one language version* with a reasoned and adequate explanation, not *multiple language versions* with *no* explanation.

C. *Specific Comments on the EC's New Exhibits*

(i) Exhibit EC-2

34. With respect to Exhibit EC-2, the EC grounds the admissibility of the six Intrafish articles on the fact that these articles were in the "public domain", and that the authority had a subscription for the Intrafish news service.[20] As explained in paragraphs 13 to 19 above, the fact that information is publicly available does not make that information part of the investigation record. The EC may have shown that it subscribed to Intrafish, but it has not shown that the entire archive of articles from Intrafish are part of the file of every investigation into fish products conducted by the EC. The EC has also failed to show that the articles in question were part of the record of *this investigation*, and were considered by the authority as part of that decision-making process.

35. The articles in question were not shown to Norway when Norway inspected the non-confidential record of the investigation in November and December 2005. Thus, if the Panel concludes that the articles were part of the record, the EC failed to show them to interested parties, as required by Article 6.4. Equally, the EC now relies on these articles as essential facts supporting its determination on the composition of the sample. If the Panel concludes that the articles were part of the record, the EC violated Article 6.9 by failing to disclose these articles before imposing its measure. Norway was, for example, denied the opportunity to inform the EC that the merger between two Norwegian companies described in one of the articles never took place.[21] An authority cannot rely on everything it reads in the newspapers.

36. The EC submits the Intrafish articles as the factual basis for its conclusion that changes in the structure of the industry permitted it to exclude independent exports from the investigation.[22] Norway notes that this exhibit relates to its claim that the EC was required by

[20] *See* EC's response to Question 1, para. 5.
[21] The merger between Fjord and Cermaq, referred to in one of the Intrafish articles in Exhibit EC-2, never took place. In fact, other *publicly available* information, also contained in an Intrafish article that predated this investigation, showed that one of the Intrafish articles relied on by the EC had been superseded by subsequent events. The authority's alleged reliance on the earlier article was therefore wrong. Exhibit NOR-175.
[22] Provisional Regulation, para. 15.

Article 6.10 of the *Anti-Dumping Agreement* to include independent exporters in the sample. This claim is plainly included in the Panel's terms of reference, despite the EC's arguments to the contrary.[23]

(ii) Exhibit EC-10

37. Norway contests the admissibility of the aggregate statistical data of 303.696.222 kg whole fish equivalent ("WFE") and CIF value of € 762.102.000 that are shown in this exhibit, and that are central to the extrapolations from which other figures in the exhibit are derived[24] (referred to by the EC in paragraph 21 of its response). The EC's argument that these two figures are taken from *public* Eurostat data does not mean that these two figures were among the information gathered by the authority during the investigation. Norway recalls its arguments on publicly available data in paragraphs 13 to 19 above. Not all Eurostat data is part of the record of every investigation conducted by the EC, just as not all information on the Internet is part of that record. The EC has not demonstrated that these two figures were part of the record.

38. The two figures appear *nowhere* in the authority's determination; they were not contained in any documents shown to Norway; nor were they disclosed to interested parties. They relate to only *a subset* of Norway's exports of the like product – a subset chosen by the EC for these proceedings; the volume figure is moreover based on a *conversion* of actual Eurostat data to a WFE basis, using conversion factors chosen by the EC.[25] Hence, the allegedly publicly available data has been manipulated on the basis of a number of choices made by the EC for purposes of this proceeding. Moreover, no interested party was ever in a position to comment on these figures.

39. Even accepting (*quod non*) that the two aggregate figures of 303.696.222 kg WFE and CIF value of € 762.102.000 were properly before the authority, all the other figures in EC-10

[23] *See* Norway's Request for the Establishment of a Panel, WT/DS337/2, point 4 on p. 2.
[24] *See* EC's response to Question 1, para. 21.
[25] The EC argues that the conversion process and the conversion factors were never "contested by Norway". EC's response to Question 1, paras. 19 and 23. In fact, Norway was never given the opportunity to comment on those conversion factors nor on how these conversion factors specifically impact the figures derived by the EC to create EC-10.

were not, except for the turnover figure for sampled producers (which Norway assumes was taken from questionnaire responses).[26]

40. The volume figures in the exhibit are all based on undisclosed "extrapolations" that involve choices by the EC – even the figure for *sampled* producers is derived from a figure for *non-sampled* producers. The turnover figures are all the subject of a downwards adjustment, again chosen by the EC. The authority has also made choices in selecting the categories into which sort the data, and in allocating data between non-sampled producers and non-cooperating producers.

41. The result is that the EC establishes new volume and turnover figures for non-sampled producers and non-cooperating producers that were not part of the record. These calculations involve the substantial manipulation of data on the basis of "choices [that] may have a significant impact on the conclusions drawn".[27] Case-law has made clear that the "manipulation" of data performed by the EC is not acceptable, and may not be relied on by the Panel.[28] Further, the EC uses this exhibit to advance new reasons in support of its conclusions regarding the volume of dumped imports by non-sampled companies. This is also inadmissible *ex post* rationalization.

42. The data in Exhibit EC-10 was not shown to Norway when Norway inspected the non-confidential record of the investigation in November and December 2005. Thus, if the Panel concludes that the exhibit contains information that was part of the record, the EC failed to show that information to interested parties, as required by Article 6.4. Equally, the EC now relies on this exhibit as providing essential facts supporting its determination of the volume of dumped imports. If the Panel concludes that the exhibit was part of the record, the EC violated Article 6.9 by failing to disclose the facts in the exhibit before imposing its measure.

43. Through this denial of due process, Norway was, for example, prevented from informing the EC that the data in Exhibit EC-10 are erroneous, misleading, and contradict

[26] Norway fails to see how the EC can assert that the calculations process has not "ever been contested by Norway". (EC's response to Question 1, para. 21.) Norway was never given the opportunity to comment on these calculations, nor on the actual figures, because Exhibit EC-10 was never presented or otherwise made available to Norway, nor any other interested party, and was not relied upon by the investigating authority.
[27] Panel Report, *US – Softwood Lumber V*, para. 7.40.
[28] Panel Report, *US – Softwood Lumber V*, para. 7.40.

figures provided elsewhere in the determination. Norway's comments in that regard are set forth in detail in its response to Question 64.

(iii) Exhibit EC-12

44. Norway has five comments on the EC's defense of Exhibit EC-12. *First*, the EC claims that Exhibit EC-12 is not "evidence", but rather "explanation (in tabular format)".[29] Norway has already explained that this distinction is irrelevant. It is irrelevant whether the EC labels the exhibit as evidence or explanation because what matters is whether the factual information contained in Exhibit EC-12 was before the authority as part of the investigation record.

45. *Second*, the EC argues that the content of EC-12 is "entirely based on information that was before the investigating authority".[30] The EC explains that the total volume of imports, as well as Nordlaks' imports, were on the record. However, some of the key data in Exhibit EC-12 involves a new manipulation of data in the record. For instance, figures in the lines entitled:

- "projection Nordlaks on total imports",
- "Import by Sample", defined as "projection of the data established for the investigation period"; and
- "projection Nordlaks/total non dumped"

do not appear to have been obtained directly from Eurostat nor from Nordlaks' questionnaire response, nor do they appear in the authority's determinations.

46. Instead, these figures are based on *computations* that were performed by the EC to show that its authority's determinations would not be different if extrapolations are made excluding imports from Nordlaks. The calculation also involves "choices" regarding the nature of the extrapolation to be made. In particular, the EC assumed that a linear extrapolation could be made from the level of dumping in its sample to the level of dumping outside its sample. These choices "have a significant impact on the conclusions drawn" from the new data.[31] Thus, the new data are "manipulations"[32] of original data, and inadmissible.

[29] EC's response to Question 1, para. 22.
[30] EC's response to Question 1, para. 23.
[31] Panel Report, *US – Softwood Lumber V*, para. 7.40.

47. *Third*, Exhibit EC-12 purports to show the volume of dumped imports, *excluding* imports from Nordlaks. The EC admits that, during the investigation, its authority failed to exclude imports from Nordlaks in determining the volume of dumped imports.[33] Thus, the figures in Exhibit EC-12 were not before the authority because the authority admittedly never calculated them.

48. *Fourth*, the purpose of Exhibit EC-12 is now to demonstrate that, *had the authority excluded Nordlaks* from the volume of dumped imports, "it would not have made any (significant) difference in the injury analysis".[34] However, the authority performed its analysis on the basis of data that *included* Nordlaks. As a result, the very purpose of Exhibit EC-12 is to present facts that are *different* from those considered by the investigating authority. The EC is, therefore, requesting that the Panel perform a *de novo* review on the basis of facts not considered, and reasons not advanced, by the investigating authority.

49. *Fifth*, and finally, the information in Exhibit EC-12 was not shown to Norway when Norway inspected the non-confidential record of the investigation in November and December 2005. Thus, if the Panel concludes that the exhibit contains information that was part of the record, the EC was failed to show that information to interested parties, as required by Article 6.4. Equally, the EC now relies on this exhibit as providing essential facts supporting its determination of the volume of dumped imports. If the Panel concludes that the exhibit was part of the record, the EC violated Article 6.9 by failing to disclose the facts in the exhibit before imposing its measure.

(iv) Exhibit EC-13

50. Norway rejects the EC's arguments relating to EC-13, which shows the UK and non-UK sales of the EC domestic industry. *First*, according to the EC, Exhibit EC-13 is "*based* on information that was before the investigating authority".[35] However, although the new data may be "*based*" on data that was before the authority, the original data has been transformed into a new set of facts through manipulation by the EC. The EC has chosen to sort the data into two novel categories it selected.

[32] Panel Report, *US – Softwood Lumber V*, para. 7.40.
[33] EC's FWS, para. 352.
[34] EC's response to Question 1, para. 24, and EC's FWS, para. 352.
[35] EC's response to Question 1, para. 27.

51. Thus, whereas previously, the data showed aggregate sales data (or, perhaps, EC sales and non-EC sales), it now shows UK and non-UK sales. This choice of categorization is explicitly intended to influence the conclusions that the Panel draws from the sales data in the context of Norway's arguments on the relevance of pounds sterling. A defendant in a WTO dispute settlement proceeding cannot manipulate data in the record in this way, and thereby establish new facts that were not previously known.

52. *Second*, the EC's argument that the authority had data before it on UK and non-UK sales is contradicted by a statement in the Provisional Regulation:

> It has been argued that there had been an alleged fall in consumption in the United Kingdom and that this had caused injury to the Community producers. However, the United Kingdom market cannot be isolated from the overall Community market and the increased consumption found for the Community market during the period considered.[36] (underlining added)

53. This statement demonstrates that the authority deemed itself unable – or at least unwilling – to isolate data relating to the UK market alone. Nonetheless, the EC has performed the task of isolating UK sales for purposes of this proceeding.

54. *Third*, in calculating data for non-sampled EC producers, the EC "*assume[es]* [that the] share of sales outside UK is the same as that of the UK sampled producers"; the bottom part of Exhibit EC-13 is also entitled "Total Community industry *estimation* of sales outside UK". By making an "estimation" based on an "assumption", the EC has manipulated the original data on the basis of choices that "have a significant impact on the conclusions drawn" from the new data.[37]

55. *Fourth*, the data in Exhibit EC-13 support an *ex post* rationalization that the authority never gave. Nowhere in the published determination does the authority justify its examination of Scottish producers' prices in euros on the grounds that these producers made "only" 72 percent of their sales in the United Kingdom. In any event, Exhibit EC-13 does not provide any evidence, and nor has the EC suggested, that the Scottish producers settled their non-UK sales – which involve sales to markets all over the world – in Euros.

[36] Provisional Regulation, para. 101. Exhibit NOR-9.
[37] Panel Report, *US – Softwood Lumber V*, para. 7.40.

56. *Fifth*, and finally, the information in Exhibit EC-13 was not shown to Norway when Norway inspected the non-confidential record of the investigation in November and December 2005. Thus, if the Panel concludes that the information contained in the exhibit was part of the record, the EC was failed to show that information to interested parties, as required by Article 6.4. Equally, the EC now relies on this exhibit as providing essential facts supporting its examination of price trends. If the Panel concludes that the exhibit was part of the record, the EC violated Article 6.9 by failing to disclose the facts in the exhibit before imposing its measure. It is striking that, during the investigation, the EC was either unable or unwilling to analyze data for the UK in isolation. Yet, it now says that its authority considered data organized in precisely this way. This is a violation of the due process requirements in Articles 6.4 and 6.9.

(v) Exhibits EC-14 and EC-15

57. The EC explains that the purpose of Exhibits EC-14 and EC-15 is the "*correction* of the technical error … [that] *post-dates* the measure at issue".[38] The EC, therefore, explicitly confirms that, at least, part of the data in those exhibits is new and was *not* before the investigating authority. As a result, this data is inadmissible.[39]

58. Moreover, as with Exhibit EC-12, the EC is presenting an analysis that is different from the original analysis performed by the investigating authority. The original analysis was performed on the basis of the data before the authority; the new analysis is performed on the basis of the "corrected" data that "post-dates the measure at issue".[40] Thus, the EC is requesting the panel to perform a *de novo* review of *new* data on the basis of an *ex post* rationalization, and conclude that the new data supports the same conclusion as that obtained by the investigating authority on the basis of different data. Again, such *de novo* review is inadmissible.

59. Finally, because the new "corrected" data in Exhibits EC-14 and EC-15 "post-dates the measure at issue", they were plainly not made available to the parties during the investigation, contrary to Articles 6.2 and 6.4, and were not disclosed, contrary to Article 6.9.

(vi) Exhibit EC-16

[38] EC's response to Question 1, para. 30.
[39] Appellate Body Report, *US – CVD on DRAMS*, para. 161.
[40] EC's response to Question 1, para. 30.

60. The EC again relies on that fact that the data in Exhibit EC-16 were taken from Eurostat and, for that reason, forms part of the investigation record. Norway has explained in paragraphs 13 to 19 that Eurostat data is not part of the record simply because it is publicly available. The EC essentially asks the Panel to trust that because the data was in the hands of Eurostat, it was also in the hands of the investigating authority. However, the EC has failed to show that this data, organized and broken down in this way, was before the authority during the investigation.

61. Even if the data in EC-16 were admissible, the exhibit nevertheless supports *ex post* rationalization. The exhibit relies on *import statistics* to demonstrate that imports of salmon from the United States consists mostly of wild salmon. However, the investigating authority *expressly discarded import statistics* as a reliable source of information for that conclusion, because "import statistics do not distinguish between farmed salmon and wild salmon".[41] Therefore, ironically, not only is the EC supplying information and data that the investigating authority never demonstrably relied on, it is relying on sources of information that the authority expressly *rejected*.

62. The data in Exhibit EC-16 was not shown to Norway when Norway inspected the non-confidential record of the investigation in November and December 2005. Thus, if the Panel concludes that the information contained in the exhibit was part of the record, the EC failed to show that information to interested parties, as required by Article 6.4. Equally, the EC now relies on this exhibit as providing essential facts supporting its causation determination. If the Panel concludes that the exhibit was part of the record, the EC violated Article 6.9 by failing to disclose the facts in the exhibit before imposing its measure. Indeed, not only did the EC fail to disclose this new data, its disclosure misleadingly rejected import statistics as a reliable source of information on imports of wild salmon from the United States.[42]

D. *Conclusion*

63. In sum, the EC has not demonstrated that the seven contested exhibits contain information that was before the investigation authority during the investigation. As a result, Norway reiterates its request that the Panel exclude these exhibits as inadmissible. Moreover, Norway also requests that the Panel exclude the new reasons that the EC advances on the

[41] Provisional Regulation, para. 96. Exhibit NOR-9.
[42] Provisional Regulation, para. 96. Exhibit NOR-9.

basis of these exhibits because they are *ex post* rationalizations that were not given by the authority in its published determinations.

III. STANDARD OF REVIEW

64. Remarkably, the EC's Opening Statement did not advance substantive arguments in defense of the contested measure. Instead, the EC devoted its entire statement to emphasizing the discretion that it believes should be afforded to its authority under Article 17.6(i) of the *Anti-Dumping Agreement*. In particular, the EC asserted repeatedly that the Panel should not interfere with the authority's determinations on complex factual matters, and should not substitute its judgment for that of the authority.[43]

65. In the absence of substantive arguments to defend its flawed measure, the EC appears to believe that its best chance of prevailing in this dispute is to persuade the Panel not to undertake the "critical and searching" review that the Appellate Body requires.[44] However, in making these arguments, the EC misrepresents the standard of review in two important respects.

A. *The EC Misrepresents the Scope of Article 17.6(i) of the Anti-Dumping Agreement*

66. Article 17.6(i) of the *Anti-Dumping Agreement* relates to an authority's *establishment of the facts* and their *evaluation of those facts.* Article 17.6(i) must be seen in the light of the obligation incumbent upon the Panel not to conduct a *de novo* review, nor simply to defer to the conclusions of the national authority.[45] It is for the authorities, not for the Panel to establish and evaluate the facts, and to draw factual conclusions from the facts (i.e. fact finding and gathering evidence). However, a panel may review whether the establishment of the facts was proper, and whether the factual evaluation was unbiased and objective. Thus, Article 17.6(i) establishes a division of labour between the authorities and the panel. The authority is the "trier of facts", but is always subject to the oversight of the panel. The EC also overlooks the fact that Article 17.6(i) must be read together with the requirement to make an objective assessment under Article 11 of the DSU.

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[43] *See, for instance*, the EC's Opening Statement at the First Substantive Meeting with the Panel ("Opening Statement"), paras. 8 – 9, 12 – 13, 16, and 17.
[44] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93, citing Appellate Body Report, *US – Lamb*, para. 106.
[45] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

67. More importantly, the EC fails to recognize that, although an authority enjoys a certain discretion in its treatment of the facts, it must *always* provide *a reasoned and adequate explanation* to demonstrate that it has complied with the substantive requirements of the *Anti-Dumping Agreement* and Article VI of the GATT 1994.[46]

68. Norway has described the standard of review in detail in paragraphs 32 to 43 of its First Written Submission. In sum, a panel must be satisfied that the authority adequately explained, in the published determination itself, *how the facts on the record supported its findings and conclusions*.[47] The Appellate Body has also held that an authority must describe the "evidentiary path" leading from the evidence in the "record"[48] to the authority's determinations.[49] If an authority fails to do so, it does not demonstrate compliance with the substantive requirements for imposition of anti-dumping duties.

69. One reason this standard has been developed is to ensure that panels are in a position to decide whether an authority's establishment of the facts is unbiased and objective. In this dispute, the EC asserts – time and time again – that its authority made unbiased and objective findings. However, its published determination does not provide the Panel with the tools to review these unsubstantiated assertions because the EC systematically fails to refer to the facts in the record that support its determination.

70. The EC cannot now bridge the very considerable gap between the evidence in the record, and its findings and conclusions simply by invoking deference. The provision of a reasoned and adequate explanation is not a matter of choice for the authority, but an obligation.

B. *The EC Misrepresents Legal Issues as Factual Issues*

71. Article 17.6(i) is limited to fact finding, and does *not* extend to legal interpretations of the covered agreements or to the legal characterization of the facts. The EC's Opening Statement not only misrepresents the standard of review under Article 17.6(i), it also improperly extends that standard to legal issues. Essentially, the EC tries to cloak legal findings as factual findings. There are six examples of this.

[46] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 99.
[47] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 93 – 99.
[48] *See* also Norway uses the term "record" to refer to the body of information and evidence gathered by the authority in the course of its investigation. *See also* Norway's reply to Question 70 on the concept of a "record".
[49] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

72. *First*, on the definition of the "domestic industry", the EC suggests that the decision whether a company "qualif[ies] as [a] producer[] of the like product", and whether "filleting-only entities should [] be included in the notion of the EC 'producers' of salmon", is an issue of fact that deserves deference under Article 17.6(i). To the contrary, this issue involves the legal interpretation of the definition of "domestic industry" in Article 4.1.

73. *Second*, the EC tries to disguise the correct interpretation of Article 6.10 as a factual issue. In sweeping terms, the EC asserts that "the use of sampling is not inherently biased or unobjective", and it contends that its decision to focus only on producers – to the exclusion of independent exporters – involved a "factual evaluation".[50] However, the EC ignores the core legal failing in its determination: an authority cannot, as a matter of law, exclude an entire category of exporters from the investigation under Article 6.10.

74. *Third*, the EC contends that its treatment of the facts available relating to Grieg is permissible because its authority established the facts "properly" under Article 17.6(i).[51] Again, the EC overlooks the central legal issue: its authority failed to comply with the legal requirements of Article 6.8 and Annex II when it determined Grieg's filleting and finance costs using information from a secondary source.[52]

75. *Fourth*, on injury, the EC maintains that the only issue is whether "the EC's evaluation was biased and/or unobjective".[53] Again, this is wrong. The issue is whether the EC complied with the *legal requirements* of Article 3 when it ignored the price premium enjoyed by EC producers and when it examined the price trends affecting Scottish companies in euros.

76. *Fifth*, the EC asserts that its authority's findings on causation are beyond reproach because the authority acted in an unbiased and objective manner.[54] However, Norway's claim concerns the EC's failure to satisfy the *legal requirement* in Article 3.5 for an authority to demonstrate that it properly performed the non-attribution analysis.

[50] EC's Opening Statement, para. 12.
[51] EC's Opening Statement, para. 13.
[52] Surprisingly, the EC's Opening Statement contradicts the argument in its FWS, para. 307, that the dispute regarding finance costs is not one of evidence or fact, but concerns a point of law.
[53] EC's Opening Statement, para. 16.
[54] EC's Opening Statement, paras. 17 and 18.

77. *Sixth*, and finally, the EC asserts that most of its adjustments to producer's costs "concerned the evaluation of facts", and "must be accepted by the Panel unless Norway can show them to have been biased or not objective."[55] Again, the EC attempts to mask a legal issue as a question of fact. The disagreement between the EC and Norway does not relate to the establishment of the facts, for example whether the amount of a particular cost item should be 100 NOK or 120 NOK. Instead, Norway's claim is that the EC authority relied on an impermissible legal interpretation of Articles 2.2 and 2.2.1.1 in deciding that certain costs were "costs of production" in the IP.

78. Therefore, the EC is wrong in arguing that its authority's findings are immune from challenge because they all involve an evaluation of the facts that is "subject to the standard laid down in Article 17.6(i)".[56] Contrary to the impression the EC tries to create, Norway's claims contest the authority's determinations on the grounds that they do not meet the *legal requirements* of the *Anti-Dumping Agreement* and the GATT 1994.

IV. THE EC INCORRECTLY DEFINED THE PRODUCT UNDER CONSIDERATION

79. Norway now turns to the EC's determination of the product under consideration. Norway's arguments are set out in paragraphs 44 to 176 of its First Written Submission and in paragraphs 17 to 42 of Norway's Opening Statement. Norway also refers to its response to Questions 46 to 49. Below, Norway summarizes the main arguments, before highlighting the key areas of disagreement between the Parties. Finally, Norway highlights the inconsistent approach now taken by the EC by pointing to a previous dispute in which the EC advanced arguments very similar to those Norway now makes.

A. *Norway's Arguments*

80. Norway's claim is that the references to "*a product*", "*the product* under consideration" and "*the product* under investigation" in Article 2.1, 2.6 and 6.10 of the *Anti-Dumping Agreement*, and "*a product*", "*the product*", and "*any dumped product*" in Article VI of the GATT 1994 must be interpreted as referring to a product whose sub-parts or models are all "like" each other. Each of these formulations shows that the drafters contemplated that dumping determinations must be made in respect of "a" specific "product".

[55] EC's Opening Statement, para. 23.
[56] EC's Opening Statement, para. 13.

81. This interpretation stems also from the definition of "dumping" in Article 2.1 and Article VI:1, in terms of which "dumping" involves a determination that the export price of "*a product*" is less than "*its*" normal value. The reference to "*a product*" and "*its*" (*i.e. that product's*) normal value is explicit textual confirmation that an authority must compare the prices of "*a [specific] product*" in two different markets.

82. This is also dictated by the fact that "dumping" involves a single, overall determination of price discrimination. Discrimination can only be established through an apples-to-apples comparison of products that are identical or closely resembling. If non-like products are the subject of a single comparison, the outcome of the comparison does not disclose the existence of price discrimination.

83. Consistent with the usual understanding of discrimination, Article 2.6 confirms that the pricing comparison in Article 2.1 must be made between exported and domestic products that are all "like". The provision describes the "like product" as "*a product*" that is identical to, or closely resembling, "*the product under consideration*". The text contains no exception that permits an authority to include, within a single investigation and a single determination, products that are not like. Norway expressed the requirements of "likeness" with a diagram in paragraph 89 of its First Written Submission showing the horizontal and vertical "vectors" of likeness.

84. Because the EC determined the product scope of the investigation inconsistently with Article 2.1, it violated: (1) Articles 5.1 and 5.4 in initiating an investigation into an incorrectly determined product; (2) Article 2.1, read together with 2.6, in making its dumping determinations into an incorrectly determined product; and (3) Articles 3.1, 3.2, 3.4, 3.5 and 3.6, in making its injury determination for a domestic industry that produces an incorrectly determined product.

B. *The EC's Arguments*

85. The EC's first line of defense is that the various terms in the *Anti-Dumping Agreement* used to refer to "the product under consideration" have no ordinary meaning. Instead, the EC believes that a key constituent element of "dumping" is an empty vessel that can be filled in any way the authority wishes. Norway has explained that this is untenable

given the rules of treaty interpretation that apply to WTO dispute settlement.[57] The words of a treaty must have an ordinary meaning, and that meaning shapes the rights and obligations that Members assumed under the *Anti-Dumping Agreement*.

86. Nonetheless, the EC agrees with Norway that a "dumping" determination establishes the existence of price *discrimination*. It also accepts that, in order to establish that there is discrimination, comparisons must be made between the prices of products that are "like". However, for the EC, it suffices that likeness under Article 2.6 is established at the level of "*models*" of the product, and not at the level of "the product under consideration". Thus, according to the EC, an authority can bundle any products together for purposes of a dumping determination, even if they do not "resemble" each other at all.[58] Taken to its extreme, the EC's approach would allow an authority to investigate "food", covering more than 25 chapters of the HS-system, in one single investigation.

C. *Likeness Must be Established For the Product as a Whole*

87. The interpretive issue that faces the Panel is whether the EC is correct that a "dumping" determination requires solely that likeness be established for models of the product.

88. Norway strongly disagrees that it is sufficient for an authority to ensure likeness solely within models and respectfully refers the Panel to its arguments in paragraphs 34 to 36 of its Opening Statement and to its response to Panel Question 47. A failure to ensure likeness for all models is contrary to the text of Articles 2.1 and 2.6 of the *Anti-Dumping Agreement*, which do not even mention "models" or "types" of the product.

89. Under Article 2.1, dumping determinations are made for the investigated product as a whole:

> Thus, "dumping" and "margins of dumping" can be found to exist only at the level of a "product": they cannot be found to exist at the level of a type, model, or category of a product under consideration.[59]

[57] Norway's Opening Statement, paras. 20 – 23.
[58] EC's FWS, para. 37.
[59] Appellate Body Report, *US – Zeroing (Japan)*, para. 151, quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 104; Appellate Body Report, *US – Zeroing (EC)*, para. 126; and Appellate Body Report, *US – Softwood Lumber V*, para. 93.

90. Thus, even though an authority may conduct intermediate comparisons for models, the model-specific comparison results must be aggregated into a single, overall determination. By combining all model-specific results, the investigating authority is ultimately comparing and off-setting prices for all models of the product through a single, overall comparison. It is, therefore, not sufficient to ensure likeness solely at the intermediate *model* level. Likeness must ensured at the level of the *product* because prices are ultimately compared at that level in a *single, aggregate comparison* that provides a *single, aggregate dumping determination*.

91. Article 2.6 bears out this interpretation because it states unequivocally that the like product is "a product" that is like "*the product under consideration*". Nothing in the text suggests that likeness under Article 2.6 can be established solely for particular sub-groups of the product under consideration. Instead, the authority must assess likeness for the product in all its forms. This, in turn, ensures that the authority is in a position to make a single, aggregated apples-to-apples comparison, and a single, aggregated dumping determination.

92. The EC's position that it suffices to establish likeness within models allows Members to evade the disciplines in Article 2.4. Under that provision, to ensure a "fair comparison", an authority must make detailed adjustments that ensure perfect price comparability *within each model*. However, if likeness is not ensured for the product as a whole, these adjustments are rendered utterly meaningless. After conducting model-specific comparisons for like products that are made perfectly comparable by adjustment, the authority would make a single, overall comparison and determination for non-like products that are completely different.

93. To revert to Norway's example in its Opening Statement of bicycles and cars, detailed adjustments would have to be made to account for small differences between the bicycles and cars within the respective "bicycle" and "car" models. However, having obtained two model-specific comparison results, the authority would subsequently be obliged to aggregate these model-specific comparison results into a single, overall comparison and determination for bicycles and cars – products that are not in the least comparable. This renders completely *inutile* the fine adjustments made to ensure perfect price comparability with the respective models. In sum, there is no point in making an adjustment to account for the size of bicycle frames, if the prices of bicycles and cars are ultimately compared in a single determination.

94. Norway has also highlighted that the EC's approach permits a Member to impose anti-dumping duties – in excess of bound tariffs – without establishing that a particular product is dumped. The reason is that, if the prices of two non-like products are compared in a single determination, the dumping of one product may be sufficient to conclude that the other product is also dumped, when it is not.

95. For example, in Norway's bicycles and cars example, the following could occur:

Table 1: Dumping determination for "Certain Vehicles"

	"Certain Vehicles"	
	Bicycles	Cars
Normal Value	100	1,000
Export Price	120	800
Model-specific Dumping Amount	-20	200
Model-specific "Margin"	0 %	25 %
Total Dumping Amount	180	
Product-wide Margin / Duties	19.6 %	
Bound Tariff	5.0 %	17.0 %

96. This example illustrates that, even when models are used, the pricing comparison and dumping determination are ultimately made *for the product as a whole* – even though bicycles and cars are very different products that cannot be compared. The Panel can see that the total dumping amount (180) is the difference between the total normal value (1,100) and the total export price (920). As Norway has argued, the sub-division of the product into models is merely a temporary tool to facilitate that overall comparison. Thus, it makes no sense for an authority to ensure likeness merely within the respective models because ultimately a single, overall comparison is made.

97. Further, in the overall comparison and determination in the example, bicycles are not dumped, but cars are. However, by combining these two non-like products into a single determination, the authority secures an affirmative dumping determination for bicycles.

Furthermore, because of the high level of dumping of cars, and the much higher price of this product, the importing Member can impose dumping duties of 19.6 percent on the non-dumped product, bicycles, far in excess of the bound tariff for that product of 5 percent.

98. However, it is contrary to Articles 2.1 and 2.6, and Article VI:1, to group together non-like products. Under these provisions, the different models that are subject to a single dumping determination must all be "like".

D. *The EC Advanced Similar Arguments in the US – Steel Safeguards Dispute to Those Norway Now Makes*

99. The EC's interpretative approach is fundamentally at odds with its arguments on the same issue in *US – Steel Safeguards*. In that dispute, the EC advanced similar arguments to those Norway now makes. Specifically, the EC argued that an investigating authority may not group together two products "that are not even like or directly competitive". For instance, the EC stated:

> Reading the term "such product" in Article 2.1 of the *Agreement on Safeguards* contextually with the phrase "domestic industry that produces like or directly competitive products", mandates that the imported product may under no circumstances be defined so as to bundle products that are not even like or directly competitive. (emphasis added)
>
> …
>
> [T]he bundle of domestically produced articles may not contain products that are not even like or directly competitive with each other.[60]

100. The EC further argued:

> [The required analysis] cannot, however, be undertaken, if imported (and domestic) products may be "bundled" in a way that the components of the imported product bundle are not even like or directly competitive with all the components of the domestic product bundle.[61] (emphasis added)

101. The EC, therefore, claimed that the "product" scope of a safeguards investigation is subject to multilateral disciplines, and that the investigating authority cannot group two products together that are not even like or directly competitive with all components of the domestic product. As textual basis for those arguments, the EC relied on the terms "*a*

[60] EC's Second Written Submission in *US – Steel Safeguards*, para. 137. (Available at http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114421.pdf).
[61] EC's Second Written Submission in *US – Steel Safeguards*, paras. 130-131.

product", "*such product*" and "domestic industry that produces *like … products*" in the *Agreement on Safeguards* – terms that are very similar to those that Norway relies on in the *Anti-Dumping Agreement*.

102. Furthermore, in *US – Steel Safeguards*, the EC warned the panel against the possibility of manipulation of safeguards' determinations if an investigating authority were given the discretion to define the "product" at will:

> [A] safeguard measure must relate to "*a* product" and be based on a determination that "*such* product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces *like or directly competitive products*." It is not admissible to create a broad bundle of "product concerned" or "subject merchandise" in order to obtain protection for one product that is not being imported in increased quantities by virtue of the fact that another product grouped together with the first is being imported in increased quantities.[62] (emphasis added)
>
> …
>
> If investigating authorities were entirely free to bundle products as they wish, they could impute increases in imports to a product that has not increased.[63]

103. The EC's argument that authorities "could impute increases in imports to a product that has not increased" is very similar to Norway's argument in the present case as set forth in Table 1: if investigating authority were free to bundle non-like products together in the "product under consideration", it could impute dumping of one product (cars) to a product that is not being dumped (bicycles).

104. Finally, in *US – Steel Safeguards*, the EC illustrated its arguments by means of a graph, which Norway reproduces here.[64] This graph bears a striking resemblance to the graph presented by Norway in paragraph 89 of its First Written Submission, showing the "vectors of likeness".

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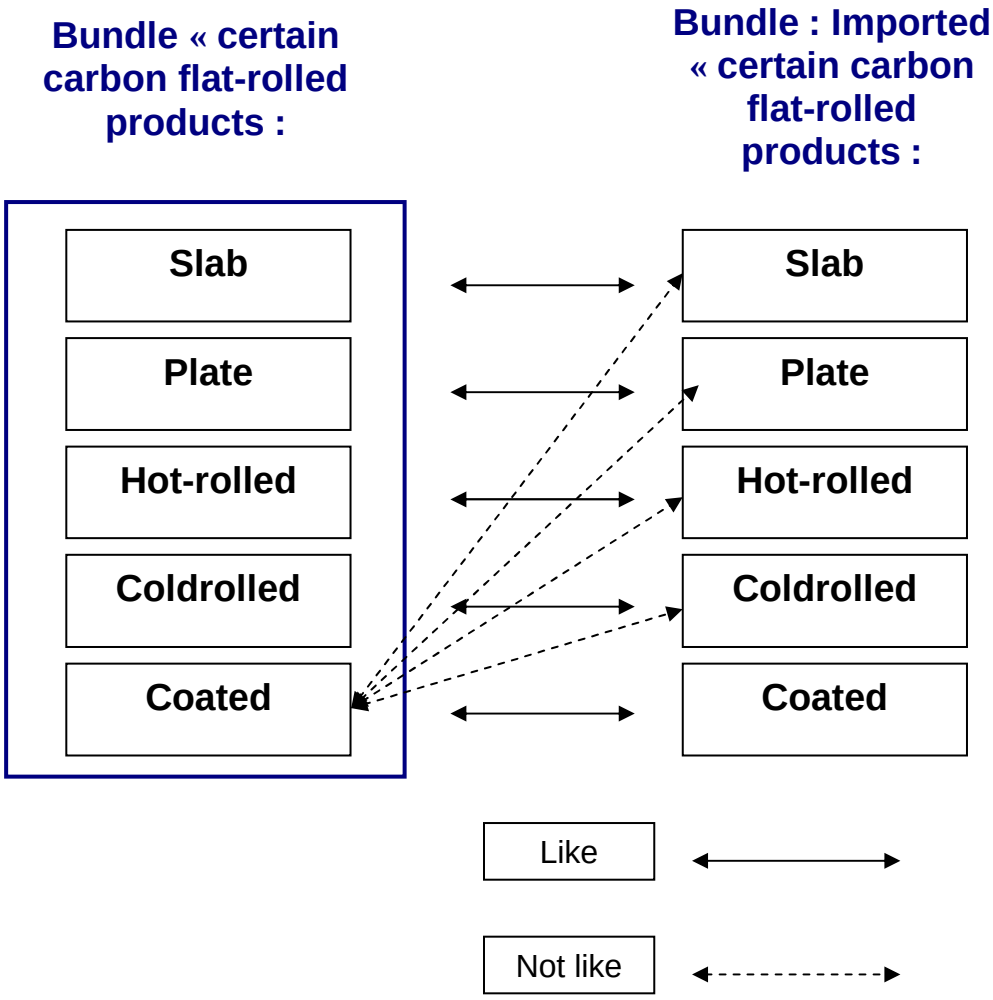
[62] EC's Second Written Submission in *US – Steel Safeguards*, para. 90. (Available at http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114421.pdf).
[63] EC's Second Written Submission in *US – Steel Safeguards*, para. 118. (Available at http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114421.pdf)
[64] EC's Second Written Submission in *US – Steel Safeguards*, para. 133. (Available at http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114421.pdf)


Bundle « certain carbon flat-rolled products :
Bundle : Imported « certain carbon flat-rolled products :
Slab
Plate
Hot-rolled
Coldrolled
Coated
Slab
Plate
Hot-rolled
Coldrolled
Coated
Like
Not like

105. In sum, like Norway, the EC argued that an authority could not lump together non-like product for purposes of a single determination. Norway is at a loss to understand why, in the *Anti-Dumping Agreement*, the EC believes that there are no disciplines on the product scope of the investigation, when it believes that there are such disciplines in the context of another WTO trade remedy agreement.

V. THE EC INCORRECTLY DEFINED THE DOMESTIC INDUSTRY

A. *Norway's Arguments*

106. Norway now turns to the EC's definition of the domestic industry. Norway's arguments have been fully canvassed in its First Written Submission and in its Opening Statement.[65] Norway also refers to its response to Questions 50 to 52 and 73. Norway's claims on this point can be summarized as follows:

- The EC included *only 15 complainants* in the domestic industry. Under Article 4.1, the domestic industry cannot be confined to producers from a particular sector or segment of the industry, especially the complainants.
- The EC excluded *EC fillet producers* from the scope of the domestic industry. In contrast to the salmon growing industry with a minuscule production of 18,000 tons, the filleting industry produces "several hundred thousand tons". There is, therefore, a profound mismatch between the product scope and the scope of the domestic industry that is contrary to Article 4.1.
- Without adequate explanation, the EC also excluded *six other categories of EC salmon producer* from the scope of the domestic industry.[66] Norway disputes that an authority can exclude entire categories from the domestic industry under Article 4.1.
- The EC failed to explain how it excluded *organic salmon production* from its analysis. Producers of organic salmon, which is part of the like product, must be included in the domestic industry under Article 4.1.
- The EC violated Article 5.4 in initiating the investigation and Article 3.1 in making an injury determination on the basis of a domestic industry that is determined inconsistently with the definition in Article 4.1.
- The EC examined certain injury factors only with respect to a sample of five domestic producers. Article 3 does not permit sampling of the domestic industry for purposes of the injury determination.

[65] Norway's FWS, paras. 177 – 283; Norway's Opening Statement, paras. 43 – 68.
[66] *See* Norway's FWS, para. 225.

B. *The EC's Arguments*

107. The EC's defence so far can be summarized as follows:

- Article 4.1 contains only a definition, and does not impose an obligation to define the domestic industry in a particular manner.
- The EC was entitled to exclude categories of domestic producers, and define the *15 complainants* as the domestic industry, as long as these 15 complainants represent a "major proportion" of domestic producers.
- The EC fillet producers are not "producers" but "industrial users" of the like product. Furthermore, including fillet producers in the domestic industry results in double counting.
- Including the EC fillet producers would deprive the Scottish Salmon Growers of an effective remedy, as they could forever block any anti-dumping proceeding.[67]
- The use of sampling is permitted by Article 3.

C. *The EC's Definition of the "Domestic Industry" is WTO-inconsistent*

108. Norway has fully addressed the EC's arguments in its Opening Statement.[68] Specifically, Norway noted that, contrary to the EC's contention, WTO case-law demonstrates that Article 4.1 imposes an obligation on the investigating authority to determine the "domestic industry" consistently with the definition in that provision.[69]

109. In its Opening Statement, Norway explained that Article 4.1 does not permit an authority to define the domestic industry solely as the 15 complainants, even if they represent a "major proportion" of domestic producers.[70] Nor does it permit the exclusion of entire categories of producer, other than related parties. The definition of the "domestic industry" includes all producers, or at the least, a major proportion of them, on an equal footing. For the reasons stated fully in earlier submissions, the context in Articles 3 and 5 supports the view that, under Article 4.1, an authority cannot cherry-pick particular sectors or segments for inclusion in the industry, to the exclusion of all others. By failing to define the domestic industry consistently with Article 4.1, the EC violated Articles 3.1 and 5.4.

[67] EC's Closing Statement, page 1.
[68] Norway's Opening Statement, paras. 43 – 68.
[69] Norway's Opening Statement, paras. 45 – 47.
[70] Norway's Opening Statement, paras. 48 – 55.

110. Norway's answers to Questions 50 and 73 also refute the EC's arguments regarding the alleged problems of double counting if salmon growers and fillet producers are both included in the EC domestic industry. Norway recalls the key elements of its response:

- *First*, the EC's entire "double-counting" argument is *ex post* rationalization that was never addressed in the published determination. The Panel can reject the EC's argument on that basis alone. [71]
- *Second*, any practical difficulties arising from combining upstream and downstream *producers* result from the EC's own decision to bundle upstream and downstream *products* together as a single product.
- *Third*, any double counting arises only with respect to fillets produced from salmon grown by the EC domestic industry, that is, solely with respect to a part of 18,000 tonnes WFE. However, the filleting industry produced "several hundred thousand tonnes" of salmon fillets. [72] Thus, the vast majority of EC fillet production is derived from inputs sourced from producers that are not part of the EC industry, as defined by the EC. No double counting arises with respect to salmon supplied companies that are not part of the EC domestic industry. In response to Questions 50 and 73, Norway has provided the Panel with the information it possesses on the origin of that salmon.
- *Fourth*, in response to Questions 50 and 73, Norway has presented a number of ways in which the authority can easily address any perceived problem of double-counting, without improperly excluding an entire segment of the domestic industry from the analysis.

111. Below, Norway provides additional arguments on (1) the exclusion of EC fillet producers and (2) the EC's improper use of sampling in an injury determination.

(i) <u>EC fillet producers</u>

112. Norway disagrees with the EC's argument that the EC filleting undertakings can be considered as not being "producers", but rather as industrial *users* of the like domestic product. Under Article 4.1, the scope of the domestic industry is driven by the scope of the like product. Any party that produces any of the like products is necessarily a member of the domestic industry.

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

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

113. The EC suggests that if a fillet producer uses a like product (whole/HOG fish) as an input, the fillet producer is excluded from the domestic industry.[73] This is absurd. As the Appellate Body held in *US – Lamb*, a producer is included in the domestic industry because of its *production*, that is, its *output* and not its input products.[74] The fact that a producer's input product is also part of the like product is, therefore, irrelevant.

114. The EC's suggestion that whole/HOG fish and fillets are the same product is also nonsense. The two products are produced by *different* industries using *different* production methods; they have *different* physical characteristics and *different* end uses; consumers perceive them *differently*; they command *very different* prices in the marketplace (see the EC's MIPs); and they are subject to *different* regulatory treatment (e.g. tariff classification).

115. The EC's argument that fillet producers are merely "users" within the meaning of Article 6.12 is also wrong. An industrial "user" is a company that uses or consumes the like product, *without* producing a like product. No amount of sophistry can obfuscate this rather obvious point.

116. The EC also overstates the importance of Article 6.12, which is merely a procedural provision that gives users a right to comment. On the EC's interpretation, a procedural provision trumps the substantive obligations in Article 4.1. In Norway's view, such procedural rules cannot be used to alter the substance of WTO obligations.

117. The EC has also suggested that including fillet producers in the domestic industry would create insurmountable practical difficulties because of double-counting of like products produced by EC growers that are subsequently transformed into fillets by EC filleters. Norway has addressed this issue fully in response to Questions 50 and 73. Norway has explained in detail how the investigating authority could easily accommodate concerns regarding double-counting in its analysis.

118. Finally, in its Closing Statement, the EC contended that it must exclude EC fillet producers from the investigation because otherwise "the Scottish salmon growers in this case

[73] EC's FWS, paras. 70 and 71.
[74] Appellate Body Report, *US – Lamb*, para. 84.

[would have] had no effective remedy, *since the EC filleting-only firms could forever block any anti-dumping proceeding*."[75]

119. In this astonishing statement, the EC leaves treaty interpretation to one side, and lays bare the true motivation for its exclusion of EC fillet producers from the investigation: *fillet producers would have opposed – indeed "blocked" – the initiation of an anti-dumping proceeding*. It is difficult to conceive of a more blatant admission that the investigating authority acted in a biased manner, with protectionist intent. The EC states openly that the starting premise for the investigation was that an "effective remedy", i.e. protection, would be granted to EC salmon growers. The scope of the domestic industry was then tailored to ensure protection for one segment of the domestic industry (growers) through the *deliberate* exclusion of the opposing views of another, larger segment (filleters) of the allegedly same domestic industry.

(ii) Sampling of the domestic industry for purposes of the injury determination

120. Norway has set forth its view on sampling of the domestic industry for purposes of the injury determination in paragraphs 272 to 281 of its First Written Submission and paragraphs 65 to 68 of its Opening Statement. Norway also refers the Panel to its response to Questions 51 and 52.

121. Norway reiterates that permitting the use of sampling in an injury analysis is contrary to the rules of treaty interpretation of the *Vienna Convention*. Where an agreement expressly regulates, in two distinct situations[76], *when* and *how* an authority may sample, silence on the use of sampling in *another* situation means that sampling is *not* permitted in that situation.

122. The EC and China, in addition, invoke alleged practical reasons necessitating the use of sampling.[77] However, the drafters were well aware of these practical considerations because they allowed sampling under footnote 13 when the domestic industry is "exceptionally fragmented". The drafters nonetheless decided not to include any sampling rule in Article 3. Once the authorities have defined the domestic industry (be it each and every domestic producer or those of them whose production accounts for a major proportion) the authorities must seek information from each and every one of them that forms the

[75] EC's Closing Statement, p. 1.
[76] Namely, Article 6.10 and footnote 13.
[77] *See* EC's Closing Statement, p. 2 and China's Opening Statement, paras. 2 – 5.

domestic industry. These are not unknown entities and they are within the jurisdiction of the investigating authorities. The practical difficulties raised by the EC and China may be addressed through the provisions relating to "best information available", if need be.

123. *Even assuming* that sampling were permitted under Article 3 (*quod non*), such sampling must follow the rules under footnote 13.[78] This is the sole provision in the *Agreement* that addresses sampling of the domestic industry. The EC did not respect the rules in footnote 13 governing *when* and *how* sampling of the domestic industry can be undertaken.

124. Furthermore, any sample must permit the authority to conduct an "objective examination" based on "positive evidence". The EC failed to respect those requirements because the EC's sample comprises solely a subset of the complainants that are the most likely to be in an unhealthy economic condition. Thus, the EC's sample makes an injury finding more likely, thereby "favour[ing] the interests of [a particular] interested party or group of interested parties".[79]

VI. THE EC'S DUMPING DETERMINATIONS ARE FLAWED

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

(i) Norway's arguments

125. Norway's arguments on the EC's selection of a sample for the dumping determinations are set out in Norway's First Written Submission[80], Norway's Opening Statement[81], and Norway's response to Questions 53 and 54 and 74 to 79. To recall, Norway argues that the EC violated Article 6.10 because it:

- Included only 3 out of the 10 largest exporters and producers in its sample. The sample therefore does not account for the "largest percentage of the volume of exports that can reasonably be investigated".
- Excluded from the scope of investigation all independent exporters, even though they account for the majority of exports from Norway.

[78] *See also* Norway's Opening Statement, para. 280.
[79] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[80] Norway's FWS, paras. 284 to 331.
[81] Norway's Opening Statement, paras. 69 to 77.

- Excluded from its producers-only sample two producers, Salmar and Bremnes, that accounted for the 3rd and 7th largest export volumes to the EC during the IP.

(ii) EC's arguments

126. In its defence, the EC has argued that:

- Article 6.10 of the *Anti-Dumping Agreement* does not require the authorities to investigate exporters as well as producers. Instead, the *Anti-Dumping Agreement* has a "preference" for making dumping determinations for producers rather than for exporters and, therefore, allows the authority to exclude exporters from the investigation.

- The EC was justified in not including Salmar and Bremnes in its sample because of the consultation process between the EC and the Norwegian industry association FHL.

127. Norway rebutted the EC's arguments in paragraphs 70 to 77 of its Opening Statement, and provides additional arguments below.

(iii) The case-law confirms that the "or" in the first sentence of Article 6.10 is conjunctive

128. The EC argues that the "or" in the first sentence of Article 6.10 is disjunctive.[82] Thus, it says, an authority is not, "as a rule", required to calculate a margin for all known producers *and* exporters. Instead, the authority can choose to exclude all exporters from an investigation and, instead, calculate margins for producers only. Norway continues to assert that the "or" in Article 6.10 is *conjunctive* and refers the Panel to its answer to Question 76.

129. Existing case law contradicts the EC's interpretation of Article 6.10, and supports Norway's argument that the word "or" in Article 6.10 is to be read *conjunctively*.[83] The Panel in *Korea – Paper* clarified that:

> … Article 6.10 mentions "exporters" *and* "producers" of the subject product and requires that an individual margin be calculated *for each of them*.[84]

[82] EC's FWS, paras. 142 to 143.
[83] Norway also respectfully refers the Panel to: Norway's Opening Statement, para. 73; Norway's FWS, paras. 309 to 315; and Norway's response to Panel Questions 75 and 76.
[84] Panel Report, *Korea –Paper*, para. 7.157. *See, also,* 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.

130. The EC has put forward alleged practical problems that could arise, should the authority determine dumping margins for both producers and exporters. Norway disagrees that such practical problems exist and refers the Panel to its response to Question 77.

131. Moreover, the EC's approach to Article 6.10 has unacceptable consequences as a matter of due process. By excluding an entire category of interested parties – exporters – from the investigation, the EC deprive those companies of the right to be given an individual dumping margin under Article 6.10 and of the right to defend their interests under Article 6.2. The EC effectively condemns the excluded companies to the "all others" rate, without any opportunity whatsoever for them to obtain an individual dumping margin.

(iv) The *Anti-Dumping Agreement* does not express a preference for producers

132. The EC wrongly contends that the *Anti-Dumping Agreement* expresses a preference for anti-dumping determinations to be made for producers, rather than for exporters. Norway has addressed this argument in paragraphs 70 to 72 of its Opening Statement, and also refers the Panel also to its detailed responses to Panel Questions 75, 77 and 78. The Appellate Body's findings last week in *US – Zeroing (Japan)* also contradict the EC's view that the *Anti-Dumping Agreement* expresses a preference for determining dumping for producers, and permits the exclusion of exporters:

> under the *Anti-Dumping Agreement*, dumping determinations relate to the *exporter*, and both "dumping" and "margins of dumping" relate to the pricing behaviour of the *exporter*.[85]

133. For the reasons that Norway has stated, the *Anti-Dumping Agreement* does not express a preference for any particular category of companies, but rather places them on an equal footing. The first sentence of Article 6.10 requires that a margin be determined for all known producers *and* exporters. Further, the sampling options under the second sentence of Article 6.10 also do not prefer producers to exporters. The first option refers generally to "interested parties", while the second option focuses on examining the largest possible volume of exports from the exporting country, without mentioning producers or exporters. Every company, be it a producer or exporter, has an equal right to an individual dumping margin, and both categories of companies are, therefore, eligible to be included in a sample under Article 6.10.

[85] Appelate Body Report, *US – Zeroing (Japan)*, para. 165.

(v) The exclusion of Salmar and Bremnes

134. With respect to the non-inclusion of Salmar and Bremnes in the sample, the EC seeks justification for its action in the consultation process between itself and FHL that preceded the composition of the sample. The EC argues that FHL did not bring relevant facts about Salmar to the EC's attention[86] and that Bremnes was left out of the sample because FHL had not proposed Bremnes.[87] In the EC's view, the "largest percentage of the volume of exports *that can reasonably be investigated*" depends on the particular circumstances of the consultation process under Article 6.10.1.

135. Norway submits that the EC's view is wrong, and refers the Panel to paragraph 77 of its Opening Statement and to Norway's response to Question 53. For the reasons stated in Norway's response to Panel Question 53, a merely facultative consultation process in which the authority holds the power of decision cannot relieve the authority of its substantive obligation to include the largest percentage of volume of exports in the sample.

136. The EC's factual description of the consultation process in this investigation is wrong. The EC's claim that FHL never drew Salmar to the EC's attention is false as demonstrated even by the EC's own Exhibit EC-4.[88] The EC also relies on the fact that Salmar reported all its sales as "sold on the domestic market"; this, as the EC would have it, means that the EC did not have the requisite information to include Salmar in the sample. Yet, similar circumstances did not prevent the EC from including Nordlaks and Sinkaberg, which had also reported zero exports in their sampling form,[89] and even Stolt Seafarm, which *had not submitted any sampling form at all* and was not among the companies proposed for inclusion by FHL.[90]

137. Further, the facts contradict the EC's suggestion that it strove to accommodate FHL's preferences for the composition of the sample. The EC never accommodated any of FHL's preferences for the sample.[91] For instance, FHL consistently sought the inclusion of

[86] EC's FWS, paras. 189 - 190.
[87] EC's FWS, para. 191.
[88] *See* Norway's FWS, para 324 (*see, also,* paras. 323 and 325 of Norway's FWS; Exhibits EC-4 and NOR-47; and Norway's Opening Statement, para. 76.
[89] Nordlaks and Sinkaberg-Hansen. *See* Norway's response to Panel Question 79, and the sampling forms of Nordlaks and Sinkaberg-Hansen in Exhibit NOR-38.
[90] *See* Exhibit EC-4.
[91] FHL's proposals for the sample were based on the sampling criteria that the EC had used in previous investigations concerning salmon. *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

independent exporters in the EC's sample,[92] yet the EC never acceded to this request. FHL consistently asked the EC to include Salmar in the sample, yet the EC ignored this request. In fact, the EC never modified its first sample proposal.[93] The EC suggests that FHL agreed to eight of the producers in the EC's sample. In fact, FHL was willing to compromise, provided that the EC included at least two independent exporters in the sample. Because the EC refused to do so, FHL's alleged agreement lapsed. There was, therefore, no agreement on any element of the composition of the sample.[94]

B. *The EC Violated Articles 2.2 and 2.2.1 of the Anti-Dumping Agreement by Failing to Determine that Below Cost Sales Were Made at Prices that Did Not Permit the Recovery of Costs within a Reasonable Period of Time*

(i) Norway's arguments

138. Norway has provided detailed observations on the cost-recovery test in response to Questions 55, 80 to 83. Norway's arguments under Article 2.2.1 are also set out in paragraphs 332 to 371 of its First Written Submission and in paragraphs 78 to 80 of its Opening Statement.

139. The essence of Norway's argument is, *first*, that the EC did not make the "determination" required by Article 2.2.1 to the effect that below-cost sales were made at prices that did not provide for cost recovery within a reasonable period of time. A determination must be set forth explicitly. However, the EC nowhere even mentioned a cost-recovery test. Nor has the EC pointed out in its First Written Submission where or how it conducted a cost recovery test. *Second*, even assuming the EC could make an implicit determination for cost recovery, the EC did not apply a test that would correctly test for cost recovery.

(ii) The EC's arguments

140. The EC has not attempted to demonstrate that it made any determination on cost recovery. Instead, in its First Written Submission, the EC devotes much energy to defending

Norway and the anti-dumping proceeding concerning imports of farmed Atlantic salmon originating in Chile and the Faeroe Islands, at para. 38. Exhibit NOR-5.

[92] *See* Norway's FWS, para. 298; Exhibit EC-4; and Exhibit NOR-47.

[93] *Compare* the EC's initial proposal of a sample to FHL by letter of 22 November 2004, Exhibit NOR-39, with the sample as finally selected, paragraph (7)(b) of the Provisional Regulation, Exhibit NOR-9. There was not a single change in the sample, despite the intervening letter from FHL to the EC of 24 November 2004. Exhibit NOR-47.

[94] *See, for instance*, Letter and Memorandum from FHL to EC Commission, para 3.1. Exhibit NOR-48.

claims that Norway never made. Specifically, it argues that it made determinations relating to the first and second conditions in Article 2.2.1, that is, that below cost sales were made (1) within an extended period and (2) in substantial quantities. It notes that its test for substantial quantities is the same as the test in footnote 5 for substantial quantities. However, these arguments do not address the EC's failure to make a determination for the separate condition in Article 2.2.1 relating to cost recovery.

(iii) The EC has not rebutted Norway's arguments

141. The word "determine" in Article 2.2.1 requires a "reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination".[95] However, the EC's rejection of below-cost sales does not even mention the term "cost recovery" or the "reasonable period" over which costs were assessed, far less make a determination in that regard. The EC has also not asserted that it made any "determination" regarding the reasonable period for cost recovery, implicit or otherwise. On this basis alone, the Panel must find that the EC has violated Article 2.2.1.

142. Even if an implicit determination of cost-recovery were permitted, the EC's comparison of prices and weighted average cost does not satisfy the cost recovery test. *First*, the EC did not conduct the test provided in the second sentence of Article 2.2.1. That sentence sets forth specific circumstances in which cost recovery is deemed to occur. The second sentence applies when ("if") an authority determines that prices "are below per unit costs *at the time of sale*". The EC did *not* establish that the prices of sales rejected under Article 2.2.1 were below cost "at the time of sale". An authority cannot skip this part of the test under the second sentence.

143. *Second*, even if the EC had determined under the second sentence that costs were not recovered either at the time of sale or over the IP (*quod non*), a producer's prices may still recover costs within a reasonable period. The last sentence of Article 2.2.1 does not establish an *exhaustive* test for determining whether below-cost prices provide for the recovery of costs within a reasonable period. It merely describes *one situation* in which an authority must conclude that prices *allow* for cost recovery in a reasonable period.

[95] Appellate Body Report, *US – Zeroing (Japan)*, para. 182, quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 283.

144. Norway refers the Panel to its response to Questions 82 and 83, where Norway explains why the "reasonable period of time" cannot be equated with the IP, and must be established taking into account the "normal commercial practice" of a particular industry. Norway also outlines specific criteria that the investigating authority could take into account in determining the duration of the reasonable period of time and how the authority can conduct its cost recovery test.

145. In this dispute, the EC failed to make any determination of the duration of the reasonable period. Thus, it did not determine either that the reasonable period equaled the IP or that it was longer than the IP. Absent such a determination, the EC failed to comply with Article 2.2.1.

C. *The EC Violated Article 2.2.2 by Improperly Rejecting Actual Sales Data Because of the Low Volume of Sales*

146. Norway's arguments under Article 2.2.2 are set out in paragraphs 372 to 398 of its First Written Submission, paragraphs 81 to 90 of its Opening Statement, and in its response to Questions 56 and 57, and 84 and 85. Specifically, Norway argues that the EC improperly rejected actual profits and selling, general, and administrative ("SG&A") data when constructing normal value on the basis that the volume of the sales at issue was too low. There are two ways in which the EC rejected sales because of the low sales volume. *First*, the EC rejected domestic sales data if the domestic sales volume was less than 5 percent of export sales either for the product as a whole or for a particular model. *Second*, the EC rejected domestic sales data if the volume of profitable sales was less than 10 percent of total domestic sales by product model.

(i) Rejection of domestic sales under the 5 percent representative sales test

147. The EC rejected all domestic sales data from three companies on the basis that those companies' overall domestic sales were less than 5 percent of their export sales.[96] Moreover, for four other companies, the EC rejected the sales of some[97] or all[98] models because the 5 percent threshold was not met on a model-specific basis. Norway's arguments on this point can be found in paragraphs 384 to 398 of its First Written Submission, in paragraphs 81 to 90 of the Opening Statement, and in reply to Question 84.

[96] Provisional Regulation, para. 29. Exhibit NOR-9.
[97] [[xx.xxx.xx]], [[xx.xxx.xx]], [[xx.xxx.xx]], and [[xx.xxx.xx]]. *See* Norway's response to Panel Question 84.
[98] [[xx.xxx.xx]] *See* Norway's response to Panel Question 84.

148. In determining amounts for SG&A costs and for profits, Article 2.2.2 allows the authority to disregard data solely from sales that are not in the ordinary course of trade. As the panel and Appellate Body held in *EC – Tube or Pipe Fittings*, the text of Article 2.2.2 does not permit data to be rejected on the basis of the low sales volume.

149. The EC effectively requests the Panel to disregard and reverse the findings in *EC – Tube or Pipe Fittings*. The EC puts forward a convoluted argument based on alleged economic effects of including low-volume sales. However, in *EC – Tube or Pipe Fittings*, the *EC itself* explained the economic rationale for permitting the exclusion of low-volume sales under Article 2.2, but including those low-volume sales under Article 2.2.2. The EC has not offered any good reason why its explanation in *EC – Tube or Pipe Fittings* is no longer valid. For reasons of security and predictability, Norway requests the Panel to reaffirm the clear and unambiguous findings of the panel and the Appellate Body in *EC – Tube or Pipe Fittings*.

(ii) Rejection of domestic sales under the 10 percent profitable sales test

150. Norway claims that the EC's 10 percent test is an improper means of establishing that sales are made in the ordinary course of trade. To recall, under this test, the EC discards profitable sales of a particular model when those sales represent less than 10 percent of total sales for that model. In other words, when loss-making sales represent more than 90 percent of total sales, the EC discards all sales, including profitable sales, on the basis that no sales are in the ordinary course of trade.

151. The EC applied the 10 percent test in two circumstances. *First*, on the basis of this test, the EC decided to discard domestic sales prices for at least three (and possibly four) companies and, instead, resorted to constructed normal value under Article 2.2.[99] *Second*, when constructing normal value, the EC again used the 10 percent test to discard actual sales data for these same companies to determine the applicable amount for SG&A costs and profit.

152. In its responses to Question 57, Norway has explained in detail why the EC's 10 percent is an impermissible test for determining whether sales are in the ordinary course of trade. According to the Appellate Body, an authority must decide whether sales are made in

[99] [[xx.xxx.xx]] with respect to thirteen models, [[xx.xxx.xx]] for one model, [[xx.xxx.xx]] for one model, and possibly also for one or more models for [[xx.xxx.xx]]. *See* Norway's reply to Question 84.

the ordinary course of trade by examining whether the terms and conditions of a particular sale correspond to "'normal' commercial practice" in the marketplace.[100]

153. Under the 10 percent test, the EC rejects a producer's profitable sales solely because of the relative volume of that same producer's loss-making sales. However, the profitable sales could well all be in the ordinary course of trade in comparison with "'normal' commercial practice" in the marketplace. In assessing whether profitable sales conform to "'normal' commercial practice", it is irrelevant that a portion – even a large portion – of a producer's sales are not in the ordinary course of trade. Under Article 2.2, there is no low volume threshold for sales in the ordinary course of trade. If there are any such sales, an authority must use the prices of those sales to determine normal value, and it has no right to construct normal value.

154. By applying the 10 percent, the EC improperly excluded domestic sales data by reason of the price and volume of the loss-making sales. In so doing, the EC acted inconsistently with Article 2.2 because, for the companies affected by this test, the EC was not permitted to construct normal value for the models concerned. The EC also violated Article 2.2.2 because, once it had decided to construct normal value, it used the 10 percent test again to discard actual profit data. Norway, therefore, requests that the Panel find that the EC acted inconsistently with Articles 2.2 and 2.2.2.

D. *The EC Violated Article 6.8 and Annex II of the Anti-Dumping Agreement in its Use of Facts Available to Determine Normal Value For Grieg*

155. The EC violated Article 6.8 and Annex II of the *Anti-Dumping Agreement* in its use of facts available to determine filleting and finance costs in constructing normal value for Grieg. Norway's detailed arguments are contained in paragraphs 399 to 457 of its First Written Submission and in paragraphs 91 to 100 of its Opening Statement. Norway's answers to Questions 58 and 86 also address this issue.

156. To recall, Norway argues that the EC rejected information that it was not entitled to reject under paragraph 3 of Annex II; and failed to take the procedural steps required by paragraph 6 of Annex II before resorting to facts available. The information that the EC used was prejudicial to Grieg's interests. Moreover, the EC's reasons for rejecting Grieg's information were that it could not be verified, even though the reason for this was the EC's

[100] Appellate Body Report, *US – Hot-Rolled Steel*, para. 140.

own failure to send a deficiency notice in advance of verification. The EC's defence rests mainly on the contention that, with respect to Grieg, the EC did not actually use "facts available" within the meaning of Article 6.8 of the *Anti-Dumping Agreement*.[101] Therefore, according to the EC, the "special rules of Annex II" do not apply.[102]

157. Norway has responded to this argument in paragraphs 92, 93 and 99 of its Opening Statement. The EC is fundamentally mistaken in arguing that it did not use facts available with respect to Grieg. The *Anti-Dumping Agreement* distinguishes between *primary* source information obtained from the investigated company itself and *secondary* source information obtained from another source. Secondary source information is referred to as "facts available" or "best information available". The EC acknowledges that it did not use the information supplied by Grieg, but argues that it did not use facts available. The EC thereby asks the Panel to endorse a novel third category of information that is not provided for in the *Anti-Dumping Agreement*.

158. However, if an authority could resort to secondary source information without respecting the rules in Article 6.8 and Annex II, investigated parties would be deprived of the protection that is afforded to them, by these provisions, when an authority wishes to resort to secondary source information. For this reason, the EC's interpretation must be rejected.

159. The EC also contends that, with respect to Grieg's filleting costs, it satisfied the requirements of Annex II(3) and Annex II(6).[103] A key element of the EC's argument is the unsubstantiated assertion that Grieg was informed *orally* of deficiencies in its questionnaire response during the verification visit.[104] However, the *Anti-Dumping Agreement* does not permit *oral* deficiency notices. Furthermore, even if this oral notice were sufficient (*quod non*), the EC was required by Annex II(6) to give Grieg a "reasonable period" to provide "further explanations". Instead, the EC expected Grieg to respond *immediately* at verification. This is not a *reasonable* period for response. In fact, following the first written deficiency notice,[105] Grieg responded within the very reasonable period of one week.[106]

[101] EC's FWS, paras. 290 and 307 – 308.
[102] EC's Opening Statement, para. 13.
[103] EC's FWS, para. 291 – 303. Norway has rebutted the EC's arguments in paragraphs 94 to 97 of its Opening Statement.
[104] EC's FWS, para. 301.
[105] Information Note to Grieg Seafood on Cost of Production, 8 March 2005. Exhibit NOR 55.
[106] Grieg Seafood's Comments to the Commission on the Information Note on Cost of Production, 16 March 2005. Exhibit NOR-56.

160. That information was rejected by the EC because it had not been verified on the spot during the visit in early January, two months earlier. The EC expressly states that it would only have accepted the information had it been presented during the on-the-spot verification, and that it would never have contemplated a second visit.[107] With this statement the EC effectively deprives any company of its due process rights under Annex II, as no deficiency letters were sent out between the submission of the questionnaire responses and the verification visits, but only much later.

E. *The EC's Treatment of Non-Sampled Companies Violates Articles 6.8 and 9.4 of the Anti-Dumping Agreement*

(i) Norway's arguments

161. With respect to non-sampled companies, Norway has made claims under Articles 6.8 and 9.4 of the *Anti-Dumping Agreement*. Norway has canvassed this issue in paragraphs 458 to 493 of its First Written Submission, paragraphs 101 to 106 of its Opening Statement, and in response to Questions 59 to 60 and 87 to 89. The EC violated Article 9.4 because it:

- incorrectly calculated the "all others" rate;
- failed to exclude Grieg's margin from the calculation of the "all others" rate, even though it was based on facts available; and
- assigned to the allegedly non-cooperating, non-sampled producers a "residual margin" of 20.9 percent, which exceeds the maximum weighted average margin under Article 9.4.

162. Under Article 6.8, Norway reaffirms its claim that the EC improperly applied facts available with respect to non-sampled companies.

(ii) The EC's arguments

163. The EC expressly acknowledged that it incorrectly calculated the weighted average dumping margin.[108] However, it says that this error is irrelevant under Article 9.4 because the authority's determinations of the weighted average dumping margin (for cooperating non-sampled companies) and the residual rate (for non-cooperating non-sampled companies) are without practical or legal effect. The EC argues that, because it did not impose *ad valorem* duties, but rather minimum import prices (MIPs), Article 9.4 is not relevant to its error. The

[107] EC's FWS, paras. 295 and 296.
[108] EC's FWS, para. 312.

EC also argues that it was not obliged to exclude Grieg's margin from the calculation of the all others rate, because it did not use facts available.

164. The EC has argued that, "when facts available have been invoked in order to determine a dumping margin", Article 6.8 does not apply if the dumping duty is not set according to this margin.[109] The EC argues that, in any event, it complied with Article 6.8 because it provided a notice of initiation to known companies and to industry associations.

(iii) The EC has not rebutted Norway's arguments

165. Norway has addressed the EC's arguments in paragraphs 101 to 106 of its Opening Statement.[110] Norway argues that the EC is incorrect in asserting that the authority's dumping determination for non-sampled companies is devoid of legal effect. Under Article 9.4, the *ad valorem* "all others" rate cannot exceed the weighted average of the dumping margins determined for the sampled producers and exporters.[111] In the contested measure, the EC set the level of the fixed duty for all companies, including non-examined companies, by reference to the weighted average margin of dumping referred to in Article 9.4(i). Thus, even on the EC's logic, this determination *is* of legal effect under Article 9.4(i) because it is the basis for fixed anti-dumping duties that *have actually been* imposed.

166. With respect to Article 6.8, the EC again seeks to evade the failings of its authority by arguing that they are without effect. In fact, the EC made dumping determinations for the non-cooperating, non-sampled companies using facts available.[112] Article 6.8 must, therefore, apply.

167. Norway rejects the EC's argument that it complied with Article 6.8 because it published a notice of initiation in the Official Journal and sent that notice to known companies and to industry associations.[113] Neither the publication of the Notice of Initiation in the Official Journal nor the provision of that Notice to industry associations constitutes the notice required by Article 6.8 and Annex II. In this respect, Norway respectfully refers the Panel to its detailed response to Question 88.

[109] EC's FWS, para. 322.
[110] Norway's Opening Statement, paras. 101 – 106.
[111] Definitive Regulation, para. 136. Exhibit NOR-11.
[112] The EC consistently refers to the calculated dumping value for non-cooperating, non-sampled companies as "dumping margin" or "margin". Provisional Regulation, para. 40 and Definitive Regulation, para. 32. Exhibits NOR-9 and NOR-11.
[113] Norway's Opening Statement, paras. 105 – 106.

168. Similar to *Mexico – Rice*, sixty-seven of the companies that are subject to the residual rate received no notification, at all, from the EC, contrary to Annex II(1).[114] The EC not only failed to provide any notice of initiation to those companies, it also failed to inform them of the information that was missing (Annex II(6)); it did not give them a chance to provide further explanations in a reasonable period (Annex II(6); and, it did not state how the alleged non-cooperation hindered the investigation (Article 6.8). The EC, therefore, did not comply with Article 6.8 and Annex II.

169. Moreover, the allegedly "non-cooperating" companies in fact offered their full cooperation to the Commission during the investigation. On 2 June 2005, at the request of FHL, the investigating authority held a meeting with the supposedly "non-cooperating" companies.[115] At that meeting, representatives of the companies explained their situation to the authority and offered to cooperate fully in the investigation.[116] Thus, many months before the definitive determination, the EC knew that many companies it had previously labeled as non-cooperating had not received the Notice of Initiation and were, in fact, willing to cooperate fully in the investigation. However, the EC continued to treat these companies as non-cooperating, without ever specifying the nature of the alleged non-cooperation.

VII. THE EC'S INJURY DETERMINATION VIOLATED ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT

170. Norway challenges the EC's injury determination in three respects.

- *First*, the EC violated Articles 3.1, 3.2 and 3.5 because it failed to determine correctly the volume of dumped imports from Norway.
- *Second*, the EC violated Articles 3.1, 3.2 and 3.5 because it did not adequately examine the existence of price undercutting by Norwegian Exports.
- *Third*, the EC failed objectively to examine price trends affecting EC producers, contrary to Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*.

171. Norway's arguments are set forth in paragraphs 494 to 573 of its First Written Submission and in paragraphs 107 to 132 of its Opening Statement. Norway also refers to its response to Questions 64 to 66. Norway reaffirms all the claims and arguments set forth therein.

[114] *See* Exhibit NOR-152. This list was provided by FHL to the Commission on 9 May 2005.
[115] Letter from FHL to the Commission of 4 May 2005, p. 3. Exhibit NOR-152.
[116] Memorandum from FHL to the Commission, paras. 6 – 9 and 17. Exhibit NOR-153.

A. *The EC Violated Articles 3.1, 3.2 and 3.5 of the Anti-Dumping Agreement in its Examination of the Volume of Dumped Imports*

172. Norway's first claim on injury is that the EC incorrectly determined the volume of dumped imports. Norway set out its views in paragraphs 495 to 526 of its First Written Submission and in paragraphs 107 to 118 of its Opening Statement. Norway also refers to its response to Question 64.

173. *First*, the EC treated *all* imports from Norway as dumped, although it had examined dumping for a sample of Norwegian producers that the EC says accounted for just 30 percent of imports.[117] In fact, the EC's dumping determination pertained to just 25.5 percent of exports from Norway.[118] The EC also simply assumed that a sample containing exclusively *producers* permitted it to draw conclusions regarding dumping by *exporters*. Although the EC assumed that all independent exporters were dumping, it steadfastly refused to include any of them in the investigation. *Second*, the EC treated all imports from Norway as dumped, even though it found that one sampled producer was dumping at *de minimis* levels.

174. In rebuttal, the EC argues that the Appellate Body Report in *EC – Bed Linen (Article 21.5 – India)* permits it to conclude that all imports from non-sampled companies were dumped. However, as Norway explained in its Opening Statement, the EC misreads that report. In fact, where the second sampling option is used, the Appellate Body cautioned that evidence from the sample could be used as just one "*part* of the positive evidence" regarding the volume of dumped imports from non-sampled companies.[119] Thus, in this investigation, the scope for extrapolation was limited by the need for additional "positive" evidence.

175. In reply to Question 64, Norway has outlined the types of evidence that an authority could rely on as additional positive evidence. However, the EC's determination neither identifies additional positive evidence supporting its conclusion on the volume of dumped imports nor provides any explanation relating to such evidence. The published determination merely assumes that all imports from non-sampled companies were dumped, but nowhere

[117] EC's FWS, para. 340.
[118] Table on "Quantity of Sales That Were Found to Be Dumped". These volume figures are taken the EC's company-specific definitive disclosures. Exhibit NOR-174.
[119] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 138.

sets out any reasoning or evidence to support that assumption.[120] The EC, therefore, failed to satisfy the requirements of Article 3.

176. In its First Written Submission, the EC tried to fill the gap in its published determination. It submitted Exhibit EC-10, which it says provides evidence that non-sampled companies are dumping. Norway addresses this exhibit fully in its reply to Question 64 and also in Section II above on inadmissible evidence. Exhibit EC-10 is inadmissible because it contains facts that were not before the authority. Moreover, the explanations based on this exhibit are also inadmissible *ex post* rationalization. The data in Exhibit EC-10 are seriously defective – in reply to Question 64, Norway has outlined seven separate flaws that undermine this exhibit. The exhibit does not, therefore, provide positive evidence that all imports from non-sampled companies were dumping.

177. At the first meeting, the EC also stated that its authority had relied on *"... factual information gathered from the investigated companies. Additionally it also had, for example, Eurostat data*."[121] However, the EC failed to indicate what "factual information" and "data" it had in mind. This enigmatic statement in a panel meeting certainly does not amount to a reasoned and adequate explanation provided in a published determination.

178. Further, the EC has failed to explain why a dumping determination pertaining to *producers* accounting for just one quarter of exports permits conclusions to be drawn about the pricing behaviour of independent *exporters* that account for the majority of exports. The extrapolation that the EC made from sampled producers to the different segment of independent exporters is not supported by other positive evidence[122], and does not fulfill the requirements set forth by the Appellate Body in previous cases.

179. Regarding Nordlaks, the EC was not entitled to include Nordlaks' imports in the volume of dumped imports. The EC admits that it failed to exclude imports relating to Nordlaks from the volume of dumped imports. However, it argues that the exclusion of Nordlaks "... would not have made any (<u>significant</u>) difference in the injury analysis."[123] The EC's arguments are, yet again, based on new evidence in Exhibit EC-12 that is

[120] *See* Norway's FWS, paras. 497 to 499.
[121] EC's Opening Statement, para. 15.
[122] *See* Norway's answer to Question 64 regarding the scope and nature of such "other evidence". Importantly, no such evidence was considered by the EC in this case.
[123] EC's FWS, para. 352. Emphasis added.

inadmissible.[124] The EC's argument is also not contained in the published determination and is, therefore, *ex post* rationalization that cannot justify the EC's conclusion in the measure.

180. Leaving aside its inadmissibility, this new evidence and argument confirms the exclusion of Nordlaks would have had <u>*some*</u> impact on the injury analysis, the question is the significance of that impact. In such a case, it is incumbent upon the investigating authority to account for the differences in volume and explain the impact in its published determination. The EC did no such thing, and the Panel cannot do a *de novo* review of that impact analysis for the EC now.

181. Finally, the EC was also obliged to take account of the fact that Nordlaks was not dumping in its determination of the volume of dumped imports from non-sampled producers. It failed to do so.

182. The Panel must, therefore, find that the EC violated Articles 3.1, 3.2 and 3.5 of the *Anti-Dumping Agreement* in its examination of the volume of dumped imports.

B. *The EC Violated Articles 3.1, 3.2 and 3.5 of the Anti-Dumping Agreement in its Examination of Price Undercutting*

183. Norway's arguments are set forth in paragraphs 527 to 552 of its First Written Submission and in paragraphs 119 to 123 of its Opening Statement. Norway reaffirms all claims and arguments set forth therein.

184. Norway has explained in its First Written Submission that the EC ignored the fact that EC salmon products generally enjoy a price premium in the marketplace of 12 percent – a price premium recognized by the EC on numerous occasions including in its Definitive Disclosure and First Written Submission.[125] Taking into account this price premium, there was no price undercutting.

185. The EC reply is that it took account of the price premium in examining the *injury margin* (and the level of the MIP), but *not* in the context of price undercutting in the *injury determination*.[126] Thus, the EC accepted the relevance of the price premium for price comparability in one instance relating to injury, but ignored this factor in another instance relating to injury. The EC's vain attempts to explain away the relevance of this price

[124] *See* paras. 44 to 49 above.
[125] EC's FWS, paras. 358 – 359.
[126] EC's FWS, para. 360.

premium for its price undercutting analysis have been effectively rebutted by Norway in its Opening Statement, and Norway has nothing further to add.[127]

186. In conclusion, the EC violated Articles 3.1, 3.2 and 3.5 of the *Anti-Dumping Agreement* in its examination of price undercutting.

C. *The EC Violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement Because It Failed to Evaluate Objectively Price Trends Affecting EC Producers.*

187. Norway's claim is set out, in detail, in paragraphs 553 to 572 of its First Written Submission and in paragraphs 124 to 132 of its Opening Statement. Norway's reply to Question 65 also addresses this issue.

188. In the injury determination, the EC examined certain financial indicators, including price trends, for a sample of just five Scottish companies. In so doing, the EC found that the companies' sales prices declined by *9 percent* when measured in euros.

189. Norway claims that the material currency for examining the financial performance of these companies is pounds sterling, and not euros. During the period considered, the euro appreciated against the pound by almost exactly *9 percent*. Thus, from the perspective of the examined companies, *no price decline* affected their financial performance because of the movement in the value of the currencies.

190. Norway has, in its Opening Statement, reiterated the importance of measuring the financial performance of the sampled Scottish companies in pounds sterling, the currency used by these companies. This is particularly important when evaluating the impact of price developments on the state of domestic producers, as the use of a different currency can give a different price trend caused solely because of movements in exchange rates – which is what happened in the present case.

191. The EC argues that the authority can examine financial indicators in any currency, provided that it consistently uses the same currency. This is wrong both as a matter or law and as a matter of fact. To satisfy the requirements of Articles 3.1 and 3.4, the Appellate Body has stated that the evidence examined by an authority must be "material", "relevant and

[127] Norway's Opening Statement, paras. 119 – 123.

pertinent to the issue to be decided".[128] In this case, the material evidence for examining the trend in Scottish companies' sales prices is their development in pounds sterling.

192. It is not sufficient for an authority to treat the various elements of its analysis consistently in terms of the currency, as the EC asserts.[129] This may be illustrated by data from this investigation regarding sales prices, costs of production and profitability:[130]

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

[128] Appellate Body Report, *Mexico – Rice*, para. 165.
[129] EC's FWS, para. 374.
[130] *See* Norway's FWS, para. 582.

194. Further, although profitability is the same in both currencies, the forces that generate the profit trend are quite different depending upon whether prices and costs are analyzed in pounds sterling or euros. In pounds sterling, the cause of the sharp drop in profitability is seen to be the sustained and considerable rise in costs, with prices constant. In euros, the decline in profitability appears to be driven mostly by the fall in prices. Norway has addressed this argument further in reply to Question 65.

195. At the very least, if the EC wished to use euros for purposes of its analysis, it was required to explain how changes in the relative values (appreciation/depreciation) of euros and sterling affected the financial performance of the industry. In this investigation, even though FHL explained the significance of currency movements to the EC, the EC did not address this issue.

196. The Panel must, therefore, find that the EC violated Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* in its examination of price trends affecting EC producers.

VIII. THE EC VIOLATED ARTICLES 3.1 AND 3.5 OF THE *ANTI-DUMPING AGREEMENT* IN CONCLUDING THAT DUMPED IMPORTS CAUSED MATERIAL INJURY TO THE EC DOMESTIC INDUSTRY

197. Norway claims that the EC violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* in its determination that "there is a causal link between the dumped imports and the material injury suffered by the Community industry".[131] Norway claims that the EC failed to ensure that injury caused by factors other than dumped imports was not improperly attributed to dumped imports. Specifically, Norway argues that the EC failed to conduct a proper assessment of the injury caused to the domestic industry by two factors other than dumped imports:

- increases in the EC industry's costs of production; and,
- imports of salmon from the U.S. and Canada.

198. Norway's claim is set out in paragraphs 591 to 624 of the First Written Submission and in paragraphs 137 to 142 of the Opening Statement.

[131] Provisional Regulation, para. 110, confirmed in the Definitive Regulation, para. 99. Exhibits NOR-9 and NOR-11.

A. *Increased Costs of Production*

199. According to the evidence in the record of the investigation, the costs of production of the sampled Scottish companies increased sharply. At the same time, prices in pounds sterling remained constant. As a result, the increased costs were an important factor causing injury to the domestic injury. Indeed, if costs had not increased, the sampled Scottish companies would have remained profitable. Even if prices and costs are measured in euros, the increased costs were an important cause of injury. Norway has illustrated this point graphically in reply to Question 65. Norway's detailed arguments on this issue are set forth in paragraphs 578 to 590 of its First Written Submission and paragraphs 133 to 136 of its Opening Statement.

200. In its Opening Statement, the EC contended that the Panel should adopt a deferential approach to this issue: "[i]t is not for the Panel, still less for Norway, to reach alternative conclusions and claim that the EC was therefore wrong".[132] The difficulty for the EC is that, with respect to the impact of the increase in costs, there is no conclusion to which the Panel can defer because the EC simply ignored this factor.

201. It is an established fact that the costs of the sampled Scottish companies rose sharply from 2001 to 2002, and remained at that high level throughout the period considered.[133] FHL explained the significance of this factor to the EC during the investigation.[134] In violation of Article 3.5, the EC failed to undertake any evaluation of this factor. The EC had *no discretion* to ignore this factor because Article 3.5 *requires* to examine any known factor that was simultaneously causing injury to the domestic industry.

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

202. Norway refers the Panel to the more detailed arguments in paragraphs 591 to 622 of its First Written Submission and paragraphs 137 to 142 of its Opening Statement.

203. The EC concluded that salmon imports from Canada and the United States consist mostly of wild salmon that, it found, does not compete with farmed salmon. However, the EC fails to disclose any facts in support of these conclusions, far less set forth "an evidentiary path" leading from the evidence in the record to its determinations. As stated by the

[132] EC's Opening Statement, para. 17.
[133] EC's FWS, para 413. *See* also the graphs in para. 192 above.
[134] Norway's FWS, paras. 582 – 583.

Appellate Body, a reasoned and adequate explanation "is not one where the conclusion does not even refer to the facts that may support that conclusion".[135]

204. The provision of an explanation is not a matter of discretion for the EC. It is a requirement that must be satisfied in order to comply with the substantive requirements of Articles 3.1 and 3.5. In the absence of an explanation, there is no valid determination under these provisions.

IX. THE MIPS IMPOSED BY THE EC VIOLATE ARTICLE VI:2 OF THE GATT 1994 AND ARTICLE 9 OF THE *ANTI-DUMPING AGREEMENT*

205. Norway makes three claims against the EC's MIPs:

- *First*, the EC's MIPs exceed the normal values determined for the investigated producers. This is a violation of Article VI:2 of the GATT 1994 and Article 9.2 of the *Anti-Dumping Agreement*.
- *Second*, the MIPs exceed the weighted average normal value of the individually examined producers, which is the maximum limit for *non-sampled companies*. This is a violation of Article VI:2 and Article 9.4(ii) of the *Anti-Dumping Agreement*.
- *Third*, the amount of duties imposed on individually examined producers is not limited by the margin of dumping for those producers. This is inconsistent with Article VI:2 of the GATT 1994, and Articles 9.1 and 9.3 of the *Anti-Dumping Agreement*.

A. *The EC's MIPs Exceed Normal Value*

206. Norway arguments are set forth, in detail, in paragraphs 591 to 622 of its First Written Submission and paragraphs 137 to 142 of its Opening Statement, as well as in its replies to Questions 67 to 69 and 90 to 91.

207. Norway and the EC agree[136] that any MIPs imposed may not exceed the individually determined normal values, or the weighted average normal value in respect of non-sampled companies. Norway has addressed the legal basis for this position in reply to Question 90.

208. The EC has refused to provide calculations showing the relationship between the MIPs and normal value. However, Norway has provided evidence to demonstrate that the

[135] Appellate Body Report, *US – Steel Safeguards*, para. 326.
[136] The EC refers to a normal value "adjusted … to a CIF Community frontier level". (EC's FWS para. 463) To the extent that the EC is suggesting that the limit of MIPs is normal value *plus some additional amount*, Norway disagrees. The EC is unable to point to any text that authorizes a Member to increase the prospective reference price beyond normal value, which provides the threshold of fair pricing in Article 2.1 and Article VI:1.

EC's MIPs exceed the individually determined normal values, and also the weighted average normal value. Table 9 in Norway's First Written Submission demonstrates that the MIPs exceed the relevant individual *normal values* in 38 out of 42 examined instances (7 companies and 6 product bundles). Moreover, the MIPs exceed the *weighted average normal values* for all six product bundles. Norway has therefore made *a prima facie* case that the EC's MIPs exceed individual and weighted average normal values and are, therefore, in violation of Articles 9.2, 9.4 and VI:2.

209. As set forth in Norway's Opening Statement,[137] the EC has made no attempt, whatsoever, to refute Norway's carefully substantiated calculations. The EC's only response is the bald assertion that Norway is "wrong", without providing any supporting reasons, facts or figures.[138] This plainly does not amount to a rebuttal.

210. Norway also claims that the EC acted inconsistently with Article 9.2 by calculating the MIPs using a three year average exchange rate to convert the constructed normal values from Norwegian kroner to euros. Norway has addressed this claim in reply to Question 69, including providing an illustrative example.

211. In sum, normal value serves as the ceiling for a MIP because, based on the determinations in the investigations, this price marks the dividing line between "fair" and "unfair", pricing. However, by relying on historical exchange rates, the EC has overstated by 5.2 percent the normal value that was determined during the investigation. Thus, the EC's MIPs overstate the "fair" price for Norway's exports and, in so doing, provide its domestic industry with additional, unwarranted protection.

B. *The EC's MIPs Are Not Limited by the Individual Margins of Dumping*

212. Norway also claims that the EC may not impose variable anti-dumping duties, using MIPs, in excess of the *individual dumping margins* determined for sampled companies. By so doing, the EC violates Articles 9.1, 9.2, 9.3 and Article VI:2 of the GATT 1994. These provisions impose an express textual requirement to limit the amount of duties imposed to the margin of dumping. Thus, following an investigation, and prior to any review, the level of the duties imposed cannot exceed the margin determined in the investigation. The EC's measure violates these requirement because it contains no mechanism to limit the amount of

[137] Norway's Opening Statement, paras. 144 – 148.
[138] EC's FWS, para. 496.

duties initially imposed to the dumping margin. Norway's arguments are set out in detail in paragraphs 658 to 667 of Norway's First Written Submission and paragraphs 149 to 156 of its Opening Statement. Norway also addresses this issue in its answer to Question 68.

213. The EC's defense appears to be that, when variable duties are imposed, the margin of dumping does *not* operate as a ceiling on the duties initially imposed. Thus, the duties could exceed the margin by far. The EC does not attempt to reconcile this position with the text of the *Agreement*.

214. For the EC, this interpretation is acceptable because "importers" can always seek a refund under Article 9.3.2.[139] However, this ignores an important reason why duties are limited to the margin of dumping. Because duties may exceed the bound tariffs under Article II:2(b) of the GATT 1994, the multilateral disciplines in Article 9 and Article VI:2 limit the amount of duties that can be imposed *at any point in time* on sales to the margin of dumping.

215. That ceiling serves to protect *exporters* and the *exporting Member* from the level of duties imposed on exports.[140] The ceiling provides *certainty* for exporters (and importers) as to the maximum amount of the duty. Also, even though duties must be paid, exporters can still engage in price competition by following price developments in the marketplace.

216. However, if there is *no* ceiling for the amount of variable duties imposed at the time of importation, exports are subject to an *uncertain* amount of duties that *eliminates price competition* below the MIP. As a result, exporters will lose market share when prices fall because importers and consumers will switch to cheaper sources of supply that are not subject to a minimum price. Indeed, importers may simply shun exporters from countries that are subject to a minimum price even before market prices fall.

217. It does not, therefore, suffice that *importers* are granted a right under Article 9.3.2 to seek a refund long after the exports have taken place because, at that stage, a *exporter's* lost market share cannot be restored. As noted, rather than incur the cost of a process that would involve a refund more than a year after the duties are first paid, importers may simply opt for an alternative source of supply.

[139] EC's FWS, para. 487.
[140] Appellate Body Report, *US – Zeroing (Japan)*, paras. 155 and 156.

218. Also, under the *Anti-Dumping Agreement*, an exporter can only be denied the right to engage in price competition if the exporter makes an undertaking on prices under Article 8. Through such an undertaking, an exporter agrees that its prices will not fall below a guaranteed minimum threshold. In substance, therefore, a MIP and a price undertaking have identical effects on pricing. Both involve a minimum price threshold and both produce the same protective and price stabilizing effects on the domestic market through the elimination of price competition.

219. However, there is a crucial difference between MIPs and price undertakings. Under Articles 8.1 and 8.5 of the *Anti-Dumping Agreement*, price undertakings are "*voluntary*" and that "*no exporter shall be forced to enter into such undertakings*". In other words, under Article 8, an exporter can refuse a price undertaking and, instead, is entitled to pursue price competition. In sharp contrast, MIPs are *imposed* on exporters under Article 9.

220. Consequently, if Members were entitled unilaterally to *impose* a minimum import price, without consent, exporters would be deprived of their unfettered right to refuse price undertakings. In short, by regulatory *fiat*, exporters would be "forced to enter into [price] undertakings". This view is confirmed by the fact that the *Anti-Dumping Agreement* envisages that anti-dumping duties and price undertakings as mutually exclusive forms of action.

221. For these reasons, a Member cannot impose MIPs without limiting the amount of duties imposed to the margin of dumping. By failing to do so, the EC violated Articles 9.1, 9.2, 9.3 and Article VI:2 of the GATT 1994.

X. THE EC'S FIXED DUTIES ARE IN VIOLATION OF ARTICLES 9.1, 9.2, AND 9.3 OF THE *ANTI-DUMPING AGREEMENT*

222. The EC violated Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement* because, in certain circumstances, it imposes fixed duties on examined producers that exceed the margins of dumping determined for these producers. For a number of the investigated companies, the *ad valorem* equivalent of that duty exceeds the dumping margin. Norway has demonstrated this in Table 10 of its First Written Submission.[141] This issue is addressed more fully in paragraphs 669 to 684 of Norway's First Written Submission, in paragraphs 157 to 163 of Norway's Opening Statement, and in answer to Question 92. The EC has, therefore, violated Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement*.

223. The EC does not contest the correctness of Norway's calculations. Instead, the EC argues that its fixed anti-dumping duties are *not* actually anti-dumping duties, but instead "a very specialized [duty] designed to deter evasion of lawfully imposed anti-dumping duties" through fraudulent customs declarations.[142] Therefore, according to the EC, the fixed duties do not represent "specific action against dumping".[143] Although creative, this argument is wrong. As set forth in Norway's Opening Statement, the EC characterizes the fixed duties as a "fixed anti-dumping duty"; it adopted the duty under the EC Basic Regulation that permits action against dumping; and the EC has no authority to impose penalties for customs fraud.[144]

224. In sum, the EC's fixed duties are a form of specific action against dumping, within the meaning of Article 18.1 of the *Anti-Dumping Agreement*. They must, therefore, be imposed consistently with Article VI of the GATT 1994 and the *Anti-Dumping Agreement*. However, in imposing these duties, the EC violated Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement*.

[141] Norway's FWS, para. 679.
[142] EC's FWS, para. 501.
[143] EC's FWS, para. 508.
[144] Norway's Opening Statement, paras. 157 - 163.

XI. THE EC VIOLATED THE PROCEDURAL REQUIREMENTS IN ARTICLES 6 AND 12 OF THE *ANTI-DUMPING AGREEMENT*

225. Norway makes three claims that the EC violated several procedural rules in the *Anti-Dumping Agreement*:[145]

- *First*, the EC violated Articles 6.4 and 6.2 by failing to disclose non-confidential information contained in the record of the investigation.
- *Second*, the EC violated Articles 6.9 and 6.2 by failing to disclose the essential facts that formed the basis for its decision to impose duties.
- *Third*, the EC violated Articles 12.2 and 12.2.2 by failing to provide a reasoned and adequate explanation for its findings and conclusions.

A. *The EC Failed to Ensure an Adequate Opportunity For Interested Parties to See Relevant Information in the Record of the Investigation*

226. To recall, the EC failed to provide Norway with access to all the information in the record of the investigation that was relevant to Norway's case, thereby violating Articles 6.2 and 6.4 of the *Anti-Dumping Agreement*. Norway's claims and arguments are set out in paragraphs 686 to 704 of its First Written Submission, and in paragraphs 168 to 173 of its Opening Statement. Norway's concerns were also set out in its letter of 4 August 2006 to the Panel.

227. In Annex 3-A to its letter of 4 August 2006, Norway attached a list of all the documents that were shown to Norway as part of the non-confidential record of the investigation pursuant to Article 6.4.[146] In Annex 3-B to that letter, Norway provided the Panel with a list of 68 documents that Norway knows, or has reason to believe, were submitted in the investigation but that were missing from the record it was permitted to inspect.[147]

228. In addition to the 68 documents in Annex 3-B, the EC also failed to show Norway the information contained in Exhibits EC-2, EC-10, EC-12, EC-13, EC-14, EC-15 and EC-16. Norway has requested that these exhibits be rejected because they include information that was not before the investigating authority during the investigation. If the Panel disagrees, and accepts that this information was before the authority, the EC violated Article 6.4 by failing to show Norway that information during the investigation.

[145] Norway's FWS, Section X, paras. 685 – 779.
[146] Exhibit NOR-13.
[147] Exhibit NOR-13.

229. The EC does *not* argue that it was not "*practicable*" to show the 68 missing documents to Norway during the visits to the authority in November and December; nor that any of the missing documents was not "*relevant*" to Norway's case; nor that any were not "*used*" by the authority. In principle, therefore, the EC accepts that it was obliged to show the 68 missing documents to Norway under Article 6.4.

230. The EC claims instead that it "made available to Norway all the non-confidential information that it had gathered by other interested parties"[148]. This is incorrect because, leaving aside Norway's own submissions, there are 53 missing documents in Annex 3-B submitted by other interested parties and, in addition, the seven missing exhibits contested by Norway.

231. The EC also contends that it "provided an opportunity to Norway to see all non-confidential information that was actually submitted by Norwegian exporters"[149]. This is also incorrect. Annex 3-B refers to 37 documents submitted by Norwegian exporters that were not provided to Norway by the EC.

232. The EC further asserts that it "allowed Norway to consult the whole non-confidential information as it stood at the time of the request"[150]. It says that the only reason that documents may be missing in Norway's files is because "[Norway] failed to copy them"[151]. These statements are simply false. As explained by Norway in its letter of 4 August, in its First Written Submission, and in its Opening Statement, Norway drew up a comprehensive list of *all* the documents that it was shown. The problem is simply that many documents were missing from the EC's files.

233. By way of example, Norway has presented the Panel with a letter from the so-called "EU Salmon Producers Group" (the complainants) of 3 October 2005.[152] In that letter, the EU Salmon Producers Group comments upon statements submitted to the EC in a letter by Dr. Jaffa, in response to a letter from the authority of 23 September 2005.[153] Neither the

[148] EC's FWS, para 533.
[149] EC's FWS, para. 533.
[150] EC's FWS, para. 534.
[151] EC's FWS, para. 535.
[152] Exhibit NOR-160.
[153] The letter from Dr. Jaffa to the EC was listed in Annex 3-B to Norway's letter of 4 August 2006, at point 2.1.4.

letter from the EC nor the letter from Dr. Jaffa were disclosed to Norway nor, to Norway's knowledge, to other interested parties.

234. By definition, Norway does not know which documents were submitted to the EC, and which were not, because the EC declined to provide a list or an index of the documents gathered during the investigation. It is therefore impossible for Norway – or the Panel - to know what information was gathered by the authority. Again, the EC expects Norway – and the Panel – to trust its assertions.

235. In conclusion, because the EC failed to provide full access to the non-confidential record of the investigation, Norway and other interested parties were unable properly to defend their interests. The EC, therefore, violated Article 6.4 of the *Anti-Dumping Agreement*. The EC, in consequence, also violated Article 6.2 of that *Agreement*.

B. *The EC Failed to Inform the Interested Parties of the Essential Facts that Form the Basis for its Decision to Impose Definitive Measures*

236. Norway submits that the EC violated Article 6.9 of the *Anti-Dumping Agreement* because it failed to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." In consequence, the EC also violated Article 6.2 of the *Agreement*, because it did not provide for "a full opportunity" for all interested parties to defend their interests.

237. Norway makes particular arguments relating to the disclosure regarding the dumping determination, the definition of the domestic industry, causation, and the remedy determination. These are set out in detail in paragraphs 705 to 754 of Norway's First Written Submission and in paragraphs 175 to 193 of Norway's Opening Statement. Norway's answers to questions 71 and 72 also address this claim.

238. To summarize the legal argument:

- Article 6.9 requires investigating authorities to disclose all essential facts that will form the basis for the decision whether to apply definitive measures.
- Contrary to what the EC asserts, the obligation relates to the facts themselves, not just to the authority's factual findings.[154] If the authority merely discloses factual findings, but not the underlying facts, interested parties are not in a

[154] EC's FWS para 547, where it makes reference to its disclosure obligation as sending out the draft of the forthcoming Council Regulation.

position to fully exercise their rights of defense *inter alia* by commenting on the correctness of those facts or introducing rebuttal evidence.

- The obligation relates to the facts that will form the basis for the decision. Each such fact must be disclosed at least once. Where an authority makes a disclosure of one set of facts, and subsequently decides that other facts, which have never been disclosed, are "essential", it must disclose those other facts.[155]

239. Regarding the dumping determinations, the EC admits that it "reassessed" the dumping margins of three producers subsequent to the definitive disclosure, without informing them in writing of the facts underlying that "reassessment".[156] The EC was obliged to disclose the essential facts that formed the basis for the revised dumping determinations. By definition, the facts that supported the revised dumping determination cannot be exactly the same as the facts that supported the original determination – otherwise the margin would not have changed through the "reassessment". Norway addressed this issue further in reply to Question 71.

240. With respect to the definition of the domestic industry and causation, the EC merely asserts that it was *not* obliged to disclose the "facts" that support its "factual findings" on these issues. Norway disagrees for the reasons stated in its First Written Submission[157] and its Opening Statement.[158]

241. With respect to the remedy determination the Parties agree that the EC re-calculated the MIPs after the definitive disclosure. The EC explicitly "based" this re-determination on "new" facts that were gathered *after* the definitive disclosure. These new facts are essential to the final determination and have never been disclosed. Norway addressed this issue further in reply to questions 71 and 72, and in paragraphs 192 to 193 of Norway's Opening Statement.

242. In addition to these examples, the EC also failed to disclose the essential facts contained in Exhibits EC-2, EC-10, EC-12, EC-13, EC-14, EC-15 and EC-16. Norway has requested that these exhibits be rejected because they include facts that were not before the investigating authority during the investigation. If the Panel disagrees, and accepts that these facts were before the authority, the EC violated Article 6.9. The EC relies heavily on the facts contained in these exhibits to defend its measure from Norway's claims. These facts

[155] *See* Norway's answer to Questions 71 and 72.
[156] EC's FWS, para. 555.
[157] Norway's FWS, paras. 734 - 746.
[158] Norway's Openings Statement, paras. 190 and 191.

were, therefore, essential facts that formed the basis for the EC's decision to impose definitive measures.

243. Finally, the EC presents a misguided argument that the Panel should not examine the issue of disclosure of essential facts because this "enters very deep into the realm of factual assessments".[159] The EC's appears to argue that the deference afforded to an authority under Article 17.6(i) of the *Anti-Dumping Agreement* bars the Panel from examining whether an "essential" fact was disclosed.

244. This is absurd, and well illustrates the EC's misguided understanding of the deference that its authority enjoys. Norway is not asking the Panel to interfere in the EC's establishment and evaluation of the "essential facts". Rather, Norway claims that – having established and evaluated those facts – the EC failed to disclose them to interested parties. As with so many other instances in which the EC pleads for deference, the authority's decision to disclose essential facts is not a matter of discretion, but is an obligation under Article 6.9.

C. The EC Failed to Provide a Reasoned and Adequate Explanation in Support of Its Conclusions

245. Norway submits that the EC violated Articles 12.2 and 12.2.2 of the *Anti-Dumping Agreement* because it failed to provide a reasoned and adequate explanation for many of its findings. Norway considers that the EC's published determination – the Definitive Regulation – is characterized by a general failure to explain how the facts in the record support the factual and legal determinations. Almost every determination – from the product determination to the level of the MIPs – is shrouded in obscurity. Typically, the EC presents bald conclusions that make no reference to the facts in the record that support the conclusion.

246. Norway's arguments regarding the requirements for a "reasoned and adequate explanation" are set out in detail in paragraphs 32 to 43 (Section II) and 755 to 778 (Section X.C) of its First Written Submission, and paragraphs 194 to 199 of its Opening Statement. Norway has also addressed the requirements of a reasoned and adequate explanation in paragraphs 64 to 78 above.

[159] EC's FWS, para. 546.

247. To recall, bald, unsubstantiated assertion is simply not good enough to meet the requirements of the *Anti-Dumping Agreement*. As the Appellate Body held, "a 'reasoned conclusion' is not one *where the conclusion does not even refer to the facts that may support that conclusion*."[160] Moreover, a "reasoned and adequate explanation"

> … must be *clear and unambiguous*. It must *not merely imply or suggest* an explanation. It must be a *straightforward explanation* in express terms.[161]

248. In sum, the investigating authority must provide an explanation that does not leave the reader guessing either why the authority made its determinations or what facts in the record supported those determinations. If an authority's explanation of a determination is not adequate, it cannot demonstrate that is has respected the substantive requirements of the *Anti-Dumping Agreement* governing those determinations.

249. Again and again, the EC's published determination states conclusions, without referring to facts that support that conclusion. Norway has made claims regarding five specific examples of this generalized failure (product, domestic industry, dumping, causation, and MIPs). The EC's defense is that there is no requirement to give an explanation that addresses the facts supporting a determination. In essence, the EC says that it suffices for an authority to state its factual conclusions.

250. The EC, thereby, asks the Panel to reverse a long line of cases in which panels and the Appellate Body have articulated the standard on which Norway relies. Moreover, the EC would deprive panels of the tools to conduct an effective review of an authority's determination. With no transparency on the basis for determinations, panels would be expected to trust the authority that there was, indeed, a basis in fact for its findings and conclusions. This is not an acceptable basis on which to permit Members to depart from bound tariffs. There would be no transparent way of ensuring that Members respected the conditions in the *Anti-Dumping Agreement* governing the imposition of anti-dumping duties. Norway, therefore, requests the Panel to follow the earlier case-law and find that the EC violated Article 12.2 and 12.2.2 of the *Anti-Dumping Agreement*.

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

XII. THE EC'S DETERMINATION OF NORMAL VALUE VIOLATED ARTICLE 2 OF THE *ANTI-DUMPING AGREEMENT* BECAUSE OF IMPROPER ADJUSTMENTS TO INDIVIDUALLY EXAMINED PRODUCERS' COST RELATED DATA

A. Introduction

251. In constructing normal value for the sampled producers, the EC systematically revised the reported costs of production ("COP") and SG&A costs upwards by significant amounts – on average by 22 percent.[162] As a result of the elevated costs, the margin of dumping for seven of the producers was significantly elevated and, for one producer, dumping was found where there was none.

252. Norway's claims in this Section concern a series of improper adjustments made by the EC in calculating the COP for six companies: [[xx.xxx.xx]]. These adjustments relate to:

(1) non-recurring costs ("NRC");[163]

(2) finance costs;[164]

(3) smolt costs;[165]

(4) SG&A costs;[166] and

(5) costs of purchased salmon.[167]

253. Norway maintains that, in making these various adjustments, the EC violated Articles 2.1, 2.2 and 2.2.1.1 of the *Anti-Dumping Agreement* because it failed to determine the company's respective COP correctly and, as a result, improperly determined normal value. Norway has set forth the details of its claims and arguments in paragraphs 780 to 1078 of its First Written Submission, and Norway has responded to the EC's arguments in paragraphs 200 to 231 of its Opening Statement. Norway's answers to Questions 61 to 63 also address these claims.

254. The disagreement between the EC and Norway does not relate to the establishment of the facts, for example whether the amount of a particular cost item should be 100 NOK or 120 NOK, but rather relates to the correct legal interpretation of Article 2.2.1.1 of the *Anti-Dumping Agreement* and the legal characterization of the relevant facts. Furthermore, the

[162] *See* Summary Table of the EC's Cost Adjustments. Exhibit NOR-99.
[163] *See* paras. 255 to 282 below; *see* also Norway's FWS, paras. 803 – 814 and 815 – 959.
[164] *See* paras. 283 to 286 below; *see* also Norway's FWS, paras. 960 – 991.
[165] *See* paras. 287 to 289 below; *see* also Norway's FWS, paras. 992 – 1026.
[166] *See* paras. 290 to 302 below; *see* also Norway's FWS, paras. 1027 – 1061.
[167] *See* paras. 303 to 307 below; see also Norway's FWS, paras. 1062 – 1077.

disagreement concerns the lack of a reasoned and adequate explanation for the authority's cost adjustments and, in some cases, outright mistakes made by the investigating authority.

B. The EC's Improper Inclusion of NRC and Operating Losses in the Costs of Production

(i) "Costs of production" pay for resources used in production

255. An important issue in Norway's claims on the EC's improper inclusion of costs is the meaning of the term "cost of production". Norway set out its views in paragraphs 803 to 814 and 815 to 959 of its First Written Submission. Question 63 correctly identifies that Norway and the EC disagree sharply over what costs can properly be included in normal value as costs of production. For the EC, any cost of running a business is a cost of producing salmon, as is any cost that either impacts profits or decreases the wealth of an enterprise that produces salmon as part of its business. Thus, for the EC, there is no enquiry as to whether a cost contributed to the *production and sale* of the like product during the IP.

256. Norway has explained in answer to Question 63 that this is an overly broad view. Norway argues that, for a cost to be a "cost of production", there must be a relationship between the cost and production. The term "costs of production", therefore, measures *the value of the resources that are used to produce a good*.[168] This relationship is captured by the matching principle: the cost of the resources used to produce goods must always be related to the revenue earned from the sale of those goods.

257. The requirement for a cost to be related to production is set forth in several treaty provisions. In the phrase "cost *of* production", the word "of" already establishes that a relationship must be established between a cost and production. Not all "costs of *business*" are relevant, but only those that pertain to production. The first sentence of Article 2.2.1.1. confirms this relationship, by providing that the relevant costs are those "*associated with* the production". Article 2.2.2 also speaks of costs "incurred" "*in respect of* production and sale". And, finally, Article 2.2.1.1 refers to costs that "*benefit*" production.

258. The authority's duty under Article 2.2.1.1 to consider evidence on cost allocation is also premised on the view that only those costs contributing to production during the IP can be included in normal value. Cost relating to other periods cannot be included.

[168] Norway's FWS, para. 798.

259. Each of these provisions requires that a link be established between a cost and the producer's production activities. It is not sufficient that a cost defray any business expense; rather, the cost must pay for *resources that are used to produce* the product, or that contribute to production.

260. In some parts of its argument, the EC concedes the importance of the relationship between costs and production because it bases its argument on project accounting on the matching principle.[169] The EC also "agrees" that *cost allocation* "is based on the expected *relationship* between the *use of resources in production* and revenues earned from the *sale of that production*."[170] The EC's formulation is the same as Norway's: production costs pay for resources used in the production of goods.

261. It follows that, when resources are not used in production, no goods are produced, and no sales revenues earned, as a result of the commitment of those resources. There is no relationship between the cost and production. In that event, the EC must also agree that the resources in question do not give rise to a cost that can be allocated to production.

262. In its Opening Statement, the EC concedes that the disputed costs do not have the required relationship with production. The EC refers to these costs as: "*non-benefiting*, non-recurring costs". [171] Norway agrees.

263. In its First Written Submission, Norway explained in considerable detail why certain NRC and operating losses do not benefit production in the IP. These are: (1) [[xx.xxx.xx]] NRC biomass write-down and destruction of fry; (2) the NRC of [[xx.xxx.xx]] and [[xx.xxx.xx]] facility closures; (3) the NRC of [[xx.xxx.xx]] write-down of salmon licenses; (4) the NRC of [[xx.xxx.xx]] restructuring and severance; (5) [[xx.xxx.xx]] operating losses; (6) and, [[xx.xxx.xx]] non-recurring investment losses.

264. Absent any argument by the EC that the contested costs provide a benefit to salmon production in the IP, the issue that the Panel must decide is whether costs that do not provide resources benefiting production in the IP can be included in normal value as "costs of production".

[169] *See, for example*, EC's FWS, para. 618.
[170] EC's FWS, para. 618.
[171] EC's Opening Statement, para. 22.

265. Because the EC has not argued that any of these costs did contribute to, or otherwise benefit, production of salmon in the IP, Norway will not repeat its arguments. Norway does, however, make certain observations regarding specific comments made by the EC that have not previously been addressed.

(ii) [[xx.xxx.xx]] closure of smolt facilities

266. Norway's claims are set out in paragraphs 924 to 939 of its First Written Submission. Norway argues that the EC made an improper adjustment to [[xx.xxx.xx]] costs of production for the NRC on closure of smolt facilities.[172] The EC argues that it did not make any such adjustments, and points to depreciation costs of [[xx.xxx.xx]] that relates to other items.[173] This statement is incorrect. Norway refers the Panel to its First Written Submission[174] where the correct sequence of events is set out. Norway notes that Exhibit EC-23, on which the EC relies, is dated 10 January 2005. It does not correspond to the later provisional and definitive disclosures made to [[xx.xxx.xx]] that include the adjustment for the write down of fixed assets associated with the closure of one of the company's smolt facilities.[175]

(iii) Closure of selling operations in [[xx.xxx.xx]]

267. Norway's arguments are set out in paragraphs 890 to 893 of its First Written Submission. Norway claims that the EC improperly included the costs [[xx.xxx.xx]] incurred on the closure of sales operations in [[xx.xxx.xx]].[176] The EC now admits that it was incorrect to include these costs.[177] However, it suggests that "[b]eing insubstantial such an adjustment does not alter the conclusions of the investigating authority".[178] This is incorrect. As the EC itself admits, this adjustment amounts to 2.4 percent of the COP and must be excluded because it will lower the margin of dumping.[179] Based on this alone, the Panel should find that the EC violated Article 2.2.1.1 and in consequence also violated Articles 2.1 and 2.2.

[172] Norway's FWS, paras. 924 - 939.
[173] See EC's FWS paras. 685 – 686 and Exhibit EC-23.
[174] Norway's FWS, paras 924 - 939
[175] Exhibit NOR-[[xx.xxx.xx]] and [[xx.xxx.xx]].
[176] This is explained in detail in Norway's First Written Submission, paras. 890 – 893.
[177] EC's FWS, para. 676.
[178] EC's FWS, para 676.
[179] EC's FWS, para. 676.

(iv) Write-down of salmon farming licenses

268. Norway's claim is set out in paragraphs 874 to 877 of its First Written Submission. Norway claims that the EC made an improper adjustment to [[xx.xxx.xx]] costs of production for the NRC of the write-down of salmon farming licenses.[180] These licenses were written down before the IP began. The EC argues that these costs must be included in the COP because the company invested in farming licenses, and subsequently lost that investment.

269. This issue relates to the asset value of licenses that were written off after the closure of production facilities. The value of a license appears as an asset on the balance sheet of a company. Under GAAP rules, a production license does not have a finite useful life and is not subject to depreciation or amortization. Thus, there is no annual depreciation cost for licenses.

270. However, when [[xx.xxx.xx]] closed the production facilities, it was obliged to write-off the value of the licenses authorizing production at those facilities. This lowered the wealth of the company, but did not contribute any resources that were used to produce the product sold during the IP.

271. With the benefit of hindsight, the company should have depreciated the asset in *previous years* to reflect its ultimately finite lifespan. That would have increased production costs in previous years. However, the failure to include a depreciation cost in those years does not mean that the write-down relates to production in the IP. In fact, as noted, the licenses were written down before the IP even began.[181] On any view, the required relationship between the write-down and production *in the IP* is, therefore, missing.

(v) Operating losses

272. Norway's claim is set out in paragraphs 884 to 885 of its First Written Submission. Norway claims that the EC improperly included in the COP operating losses incurred by [[xx.xxx.xx]] at two production facilities that were closed before the IP.[182] As Norway has explained, an operating loss is not a cost of production, but is the amount of the costs not

[180] Norway's FWS, paras. 874 – 877.
[181] *See* Norway's FWS, Table 12, para. 846. Norway pointed this fact out expressly in its FWS, para. 877.
[182] Norway's FWS, paras. 884 and 885.

recovered through sales revenues. The EC does not address this issue in its First Written Submission.[183]

(vi) Investment losses

273. Norway's claim is set out in paragraphs 895 to 923 of its First Written Submission. Norway claims that the EC improperly included [[xx.xxx.xx]] investment losses as costs of production. Whatever the business activity of the investee company, [[xx.xxx.xx]] investment activities were a totally separate line of business from its salmon production. As a result, the losses had no effect whatsoever on [[xx.xxx.xx]] cost of producing salmon, but only impacted the company's equity.

274. In relation to investments in companies involved in the salmon industry, the EC states that "[a]ll these costs were considered non-recurring but being an *integral part of the salmon activity* were taken into account".[184] Besides this statement of conclusion, no further explanation is given by the EC. The EC does not even attempt to explain how the investment losses had any impact on [[xx.xxx.xx]] production costs. The EC cannot offer an explanation because the commercial activities of the investee companies were wholly separate from, and did not contribute in any way to, [[xx.xxx.xx]] salmon production.

275. In relation to investments in companies that were not involved in the salmon industry, the EC seems to agree that the losses are not part of [[xx.xxx.xx]] cost of producing salmon. It now argues that [[xx.xxx.xx]] claimed adjustments for losses in companies was not accepted solely because "this was never backed up with documented proof"[185]. This is incorrect.

276. [[xx.xxx.xx]] was first made aware of the inclusion of these items as cost of production in the Information Note on Cost of Production, sent to [[xx.xxx.xx]] on 8 March 2005, and immediately responded on 16 March with its comments, and again on 27 May 2005. The EC never asked for more information from [[xx.xxx.xx]][186], or pointed to any deficiencies in the information given. It is also difficult to see what additional information could possibly have been necessary. The EC was made perfectly aware that these

[183] EC's FWS at para 673 is incoherent, and addresses a different point – if anything at all.
[184] EC's FWS, para. 682.
[185] EC's FWS, para. 683.
[186] *See* Norway's FWS, paras. 897 – 903, where the sequence of events is described in more detail.

investments related to companies that were unrelated to the salmon industry (involved in catching and producing, e.g. herring, cod, halibut and lye).

277. With regard to the loss in [[xx.xxx.xx]], the EC admits that it "agreed to its exclusion at [the] provisional stage."[187] However, it says that it changed its mind "...given the *impossibility* to obtain a sufficient degree of detail regarding losses on investment activities *overall*"[188]. As noted in paragraph 276 above, this is false because [[xx.xxx.xx]] provided all necessary information on its investment losses. If the EC required more information, it was obliged to ask for it. Although the EC says it was "*impossible*" to obtain further particulars on the investment losses, it never asked the company for any information.

278. With respect to [[xx.xxx.xx]], the EC was well aware of the nature and extent of the loss because the EC excluded it at the provisional stage. The EC could not include this loss – which it admits was not part of the COP – simply because it considered that information was missing with respect to *other* investment losses. If the EC considered that other information was missing, it was required to follow the procedures in Article 6.8 and Annex II in order to fill the gap with "best information available". The EC could not simply include the losses in [[xx.xxx.xx]] that it knew were not relevant to the COP. The loss on [[xx.xxx.xx]] amounts to [[xx.xxx.xx]] in 2003, and formed the major part of [[xx.xxx.xx]] investment losses.

C. Averaging of NRC Over a Three Year Period for Several Companies

279. Norway has set out its criticism of the three-year averaging approach in its First Written Submission[189], and in rebuttal to the EC's arguments in paragraphs 217 to 226 of Norway's Opening Statement.

280. The EC has attempted to justify its use of a three year period for averaging NRC on the grounds that it calculated all costs using project accounting (PA). Norway explained to the Panel at the first meeting that this is false:

- The EC requested information from the companies based on IP accounting, and only one company ([[xx.xxx.xx]]) reported some cost elements based on project accounting (PA).[190]

[187] EC's FWS, para. 684.
[188] EC's FWS, para. 684.
[189] Norway's FWS, paras. 940 – 959.
[190] Exhibit NOR-157.

- The EC calculated certain cost elements for only one company, [[xx.xxx.xx]], using a PA approach. For all other companies, and for [[xx.xxx.xx]] other costs, the EC used an IP approach.

- In the Definitive Regulation, the EC's three-year averaging approach for calculating NRC is justified on the basis of the duration of the smolt-to-salmon growth cycle. The EC now admits that the growth period from *eggs* to *smolt* is at least 9 months, making the period it relied on in the Definitive Regulation considerably shorter than three years.[191]

- With *ex post* rationalization, the EC now justifies the three year period on the basis that it is the average growth cycle from *eggs* to salmon.[192] The EC also states that companies using PA accumulate costs over the three year period from eggs-to-salmon.[193] This is factually incorrect because smolt production is treated as a *separate* project.[194] Furthermore, this egg-to-salmon period is not used by companies that do not grow smolt, but purchase it from other companies.

- In fact, only one of the ten sampled companies indicates an egg-to-salmon growth cycle with a *maximum* duration of 36 months. Even that company stated a range for the egg-to-salmon period from 27 to 36 months.[195]

- The EC seeks to justify its three-year averaging approach to calculating NRC on the basis of the growth cycle of salmon. However, there is no rational relationship between that cycle and the period during which a particular NRC could – if at all – contribute to salmon production. Further, companies do not account for NRC on the basis of PA, so PA cannot justify a three-year approach to NRC.

- In any event, the companies were treated differently in respect of which three year period the EC applied, and for one company the EC did not use the three year approach.

281. In sum, the PA approach was, essentially, not used by the EC and cannot, therefore, justify its three-year averaging approach for calculating NRC. Further, the EC's three-year averaging approach to NRC is characterized by inconsistent application, inconsistent justifications, and a lack of legal basis.

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[191] EC's FWS, para. 695.
[192] *Compare* Definitive Regulation, recital 18 (Exhibit NOR-11) *and* EC's FWS, paras. 617, 618, 692 and 695.
[193] EC's FWS, para. 692.
[194] Smolt is produced in fresh-water tanks, separate from the salt-water pens used to produce salmon.
[195] *See* [[xx.xxx.xx]] Questionnaire Response at Section F-2.1.b, with a chart showing that the average sea-water production period from smolt to harvested salmon is between 15 and 19 months, and that the full production cycle from eggs to harvested salmon is between 27 and 36 months. *See* Exhibit NOR-[[xx.xxx.xx]]. *See also* [[xx.xxx.xx]] Questionnaire Response at Section F-1.8, which states that average growth period from smolt to harvested salmon is 570 days (which is less than 19 months). *See* Exhibit NOR-[[xx.xxx.xx]].

282. Finally, Norway also submits that the NRC concerned do not benefit current or future production. Accordingly, none of the costs subject to the three-year averaging approach may be included in the COP under Article 2.2 and 2.2.1.1 because they are not "costs of production".

D. The EC's Improper Adjustments Relating to Finance Costs

283. Norway also contests the EC's use of a three-year average period to calculate the finance costs of [[xx.xxx.xx]]. This is set out in detail in paragraphs 960 to 991 of Norway's First Written Submission. The EC readily admits that its approach led to finance costs that were higher than would have been the case using the IP.[196] This was particularly important for [[xx.xxx.xx]] and [[xx.xxx.xx]], as can be seen from Table 13 and paragraph 968 of Norway's First Written Submission.

284. The EC's justification for using a three-year averaging approach for the finance costs is the same as its justification for using a three-year approach to calculating NRC.[197] That is, the EC claims that, because it used PA for all costs, it could use a three year approach for finance costs. As Norway explained in the previous section, and in other submissions, the EC did not use a PA approach in calculating costs.[198] It used an IP approach. There is, therefore, no rational justification for calculating finance costs over a three year period. Furthermore, the EC calculated finance costs over a three year period for only three companies, with two *different* three year periods used, and the EC used the IP for at least three *other* companies.

285. Regarding [[xx.xxx.xx]], the EC now claims that it excluded the losses on the investment in [[xx.xxx.xx]] based on the revised consolidated accounts for 2003 and 2002.[199] This is incorrect because the revised accounts still included this loss. Moreover, the EC's definitive disclosure also shows that this loss was included in [[xx.xxx.xx]] finance costs.[200]

286. Norway addresses the use of facts available to calculate Grieg's finance costs in paragraphs 155 to 160 in the section addressing Article 6.8 and Annex II.

[196] EC's FWS, para. 697.
[197] EC's FWS, para. 697.
[198] Exhibit NOR-157.
[199] EC's FWS, para. 703 and 704.
[200] [[xx.xxx.xx]] Comments on Definitive Disclosure, 8 November 2005, page 8. Exhibit NOR –[[xx.xxx.xx]]

E. The EC's Improper Adjustments Relating to Smolt Cost

287. Norway makes claims regarding improper adjustments for smolt costs incurred by [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]]. Norway set out its views in paragraphs 992 to 1026 of its First Written Submission. The EC now asserts that it remedied the situation for [[xx.xxx.xx]] and for [[xx.xxx.xx]][201] between definitive disclosure and the Definitive Regulation. This change necessarily entailed a change in the dumping margins. Although this statement may be correct, Norway has no basis for confirming its correctness. The EC's did not disclose the "essential facts" underlying the revised dumping determinations for the two companies, implying a breach of Article 6.9. Nor did the EC's published determination provide any explanation, as required by Article 12.2.2, regarding "the acceptance or rejection of relevant arguments or claims made by the exporters" on this issue. The Panel has nothing but the EC's assertion in these WTO proceedings to rely on. This is unacceptable and Norway maintains its claims on this issue.

288. Regarding [[xx.xxx.xx]], the EC refused to exclude the cost of smolt bought in the last month of the IP and delivered after the end of the IP. This cost could not possibly be related to the cost of producing salmon sold during IP. The EC also refused to make an adjustment to take into account that [[xx.xxx.xx]] produced smolt for sale to unrelated parties. The cost of that smolt made no contribution to [[xx.xxx.xx]] costs of producing salmon. The EC had all the information it needed to make appropriate adjustments to [[xx.xxx.xx]] costs, but refused to do so. Norway's claims and arguments are set out in paragraphs 1012 to 1026 of its First Written Submission.

289. The EC argues that, in its questionnaire reply, [[xx.xxx.xx]] "project accounting approach was badly implemented", and "rejected", and that [[xx.xxx.xx]] could not, therefore, expect a "lenient alternative".[202] Norway disputes that [[xx.xxx.xx]] responses were "badly implemented", whatever that means. Certainly, the EC did not see fit to send a deficiency notice explaining the perceived difficulties of [[xx.xxx.xx]] PA approach. In any event, the inclusion of costs must be based on the rules in the *Anti-Dumping Agreement*, and not on the investigators' subjective views as to whether "leniency" is appropriate.

[201] EC's FWS, para. 705.
[202] EC's FWS, para. 710.

F. The EC's Improper Adjustments Relating to SG&A Costs for [[xx.xxx.xx]]

(i) Norway's arguments

290. Norway's arguments on the EC's improper adjustments to [[xx.xxx.xx]] SG&A expenses are provided in Norway's First Written Submission[203] and summarized below:

- The EC violated Article 2.2.2 of the *Anti-Dumping Agreement* because it failed to determine [[xx.xxx.xx]] SG&A costs based on amounts actually incurred by the company during the IP and reported to the EC.
- The EC did not establish an adequate reason for its rejection of [[xx.xxx.xx]] actual SG&A costs and therefore failed to properly establish that it was entitled to have recourse to the alternative calculation method under Article 2.2.2.
- The EC further violated Article 2.2.2 because it failed to adopt a "reasonable method" when recalculating [[xx.xxx.xx]] SG&A costs. As Norway has demonstrated, the SG&A calculation methodology relied upon by the EC resulted in a substantial double counting of [[xx.xxx.xx]] costs.

(ii) The EC's arguments

291. In its defence, the EC makes the following arguments:[204]

- The EC contends that there was no "documented evidence" to support [[xx.xxx.xx]] assertion that the company's normal costs included an allocated share of parent-company administrative expenses. The EC further contends that, during the on-site inspection, [[xx.xxx.xx]] was unable to demonstrate the existence of such an allocation in its normal accounting records.
- The EC also argues that there was no market-based benchmark for the sales administration fees invoiced to [[xx.xxx.xx]] by its affiliated sales company, [[xx.xxx.xx]], and reported by [[xx.xxx.xx]] as selling expenses.
- Lastly, the EC argues that in order to "resolve confusion over allocation", the EC relied on the consolidated "other operating expenses" of the [[xx.xxx.xx]] Group as a proxy for recalculating [[xx.xxx.xx]] SG&A costs.

(iii) The EC's arguments reflect ex-post rationalization of its determination to reject [[xx.xxx.xx]] reported SG&A costs

292. Each of the above arguments now offered by the EC as a pretext for its rejection and subsequent recalculation of [[xx.xxx.xx]] SG&A costs appears for the first time in these proceedings. They are, therefore, inadmissible *ex-post* rationalization. Indeed, the EC's latest *rationale* in no way resembles the reasons proffered by the EC during the investigation,

[203] Norway's FWS, paras. 1027 – 1061.
[204] EC's FWS, paras. 711 – 714.

which were themselves constantly changing. To recall, in the Information Note on Cost of Production the EC stated:

> "SGA costs were not reported in the format requested. In particular, no break-down was given on SGA relating to total turnover, product concerned sold on the domestic market and for export, to related and unrelated customers."[205]

In the Provisional Disclosure:

> "The principles of assessing SGA have not changed compared to the methodology set out in the information note. However, in order to allocate SGA to domestic sales to unrelated customers a re-assessment was made on the basis of the turnover ratio of unrelated sales against total sales."[206]

And, in the Definitive Determination:

> "Selling, general and administrative costs have been re-assessed on the basis of 'other operating expenses' borne by the group company. By taking recourse to this approach, it is ensured that the full SGA incurred are actually allocated on the product concerned. It is also noted that normal value is constructed on the basis of SGA applicable on domestic sales to unrelated customers. This SGA should be higher than the SGA incurred for sales to related customers ([[xx.xxx.xx]])."[207]

293. None of the above determinations mentions [[xx.xxx.xx]] alleged failure to fully document its reported *G&A* costs, including the allocation of G&A costs from [[xx.xxx.xx]] parent company. Instead, in each determination, the EC cites only [[xx.xxx.xx]] reported domestic *selling* expenses as the reason for the EC's outright rejection of the full amount of the company's SG&A costs.

294. Norway adds that, to the extent there is any legitimacy to the EC's *ex-post* rationalization regarding the validity of transfer prices charged between [[xx.xxx.xx]] and [[xx.xxx.xx]] for sales administration services, the appropriate action was not to reject [[xx.xxx.xx]] SG&A costs *in* their *entirety* as the EC did. This blunt approach fails to take account of the fact that the *G&A* portion of [[xx.xxx.xx]] SG&A costs, which was based on actual amounts incurred during the IP, was properly stated in accordance with the company's normal accounting records.

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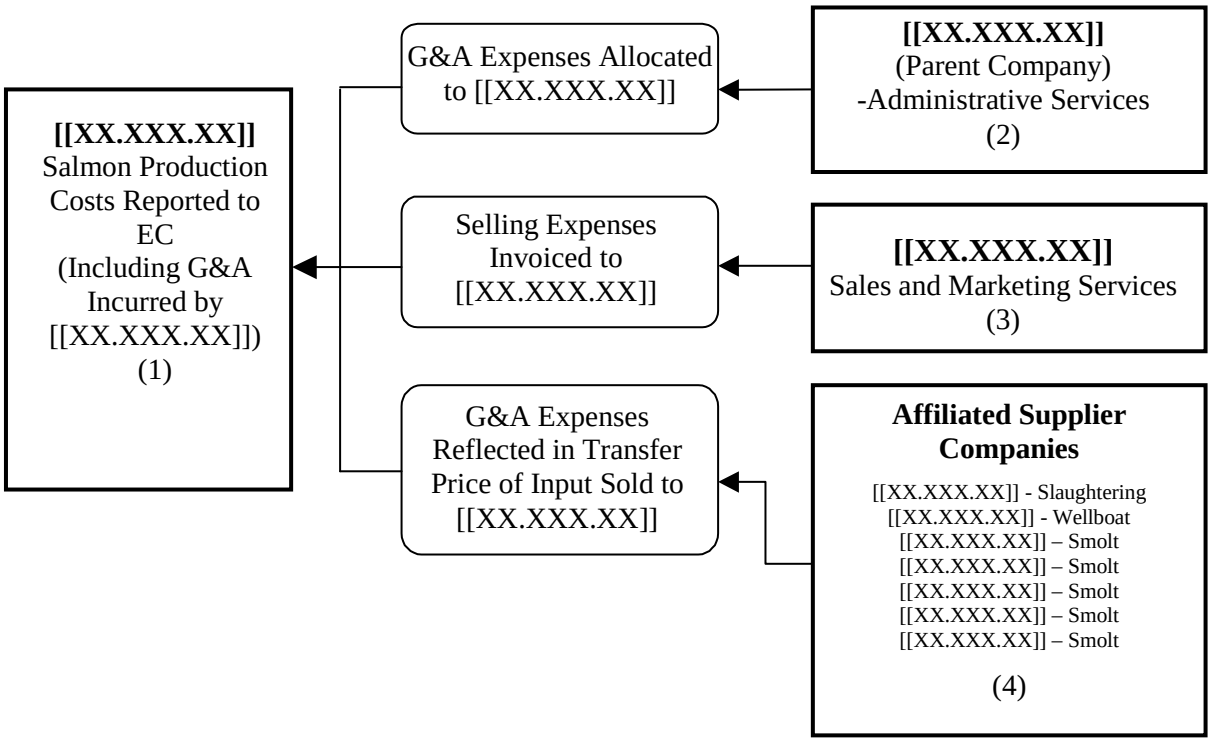
[205] Information Note on Cost of Production from the Commission to [[xx.xxx.xx]], 8 March 2005. Exhibit NOR-[[xx.xxx.xx]].
[206] Provisional Disclosure from the Commission to [[xx.xxx.xx]], 22 April 2005, Annex 2, point 2.1. Exhibit NOR-[[xx.xxx.xx]].
[207] Definitive Disclosure from the Commission to [[xx.xxx.xx]], 28 October 2005, Annex 2, point 2.1. Exhibit NOR-[[xx.xxx.xx]].

295. Moreover, if the EC was concerned about transfer pricing between [[xx.xxx.xx]] and [[xx.xxx.xx]], it should have attempted to verify whether there was any basis for its concern by examining [[xx.xxx.xx]] costs to determine if the transfer price covered such costs plus a reasonable profit. There is no evidence in the record that the EC ever undertook such an analysis.

(iv) The EC's reliance on the consolidated "other operating expenses" of the [[xx.xxx.xx]] as a "proxy" for [[xx.xxx.xx]] SG&A costs is unreasonable

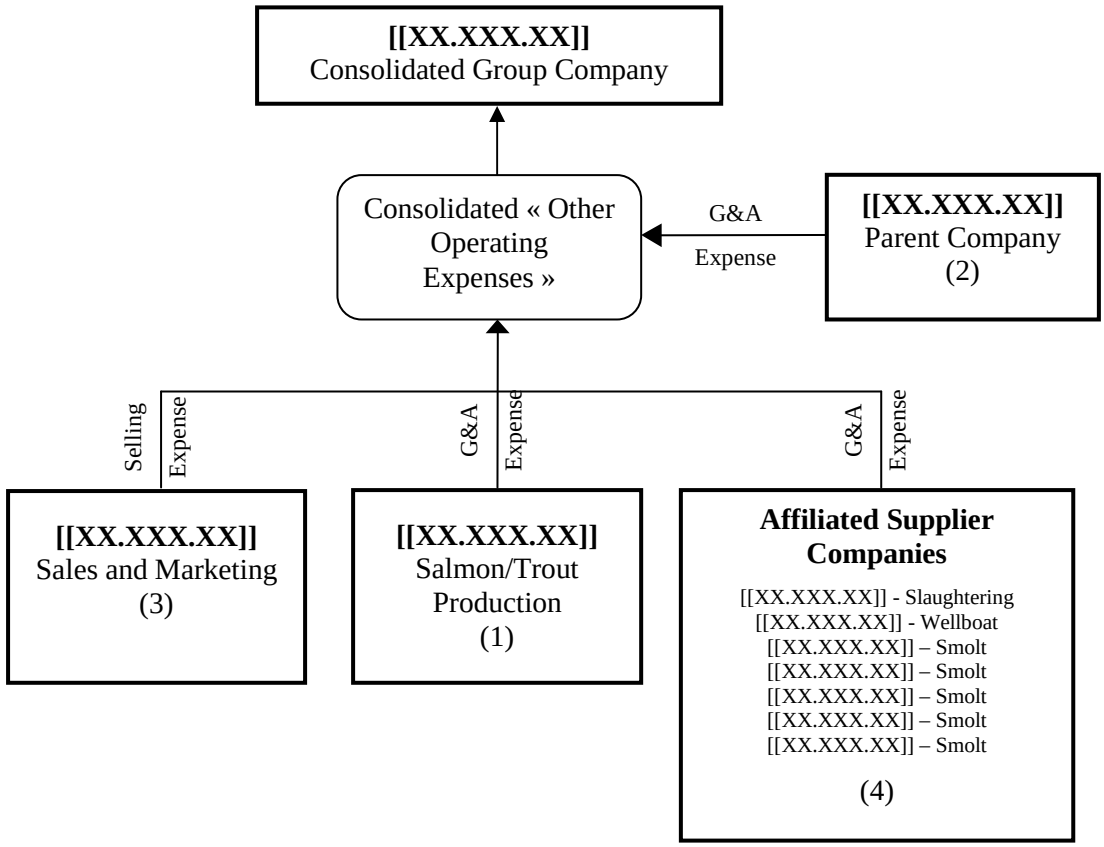
296. In its First Written Submission, Norway showed how the EC's reliance on the consolidated "other operating expenses" of the [[xx.xxx.xx]] as the basis for its recalculation of [[xx.xxx.xx]] SG&A costs resulted in the double counting of a substantial portion of the company's reported production costs. Norway argued that such an unfair methodology failed to meet the standard of an "other reasonable method" for computing SG&A expenses under Article 2.2.2(iii) of the *Anti-Dumping Agreement*.

297. The diagram below illustrates the various components of [[xx.xxx.xx]] cost of production related to SG&A costs. These are: (1) the G&A costs incurred by [[xx.xxx.xx]] itself, (2) G&A costs charged to [[xx.xxx.xx]] by its parent, [[xx.xxx.xx]], (3) selling costs invoiced by [[xx.xxx.xx]] to [[xx.xxx.xx]], and (4) G&A costs incurred by affiliated input suppliers (e.g., smolt producers).



298. [[xx.xxx.xx]] reported items (1) and (2) to the EC as G&A costs of [[xx.xxx.xx]]. It reported item (3) as selling expenses of [[xx.xxx.xx]]. Item (4), the G&A costs of affiliated input suppliers, was reported by [[xx.xxx.xx]] as a component of the transfer price for each input purchased by the company from affiliated suppliers. That is, for example, the transfer price charged to [[xx.xxx.xx]] for smolt grown by one of its affiliated producers covered all costs incurred by the producer, including G&A costs, plus an amount for profit.

299. *Without deducting the SG&A costs already included* by [[xx.xxx.xx]] in its cost of production (i.e. (1), (2), (3), and, in the transfer price of inputs, (4)), the EC *added on top of those costs* the consolidated "*other operating expenses*" of the [[xx.xxx.xx]]. This is illustrated in the diagram below, which shows how the same four SG&A figures are combined to form part of the consolidated "other operating expenses" of the Group.



300. There are three problems with this approach. First, it resulted in the double counting of the SG&A expenses already reported as part of [[xx.xxx.xx]] cost of production. Second, it involved the unfair inclusion of SG&A costs incurred within the [[xx.xxx.xx]] that were *not associated* with salmon produced by [[xx.xxx.xx]] (e.g., G&A costs incurred for smolt sold to unaffiliated customers). Third, and most importantly, by relying on the broad category of "*other operating expenses*" as a "proxy" for SG&A costs, the EC double counted a significant number of other operating costs items that had already been accounted for in [[xx.xxx.xx]] reported cost of production for salmon (e.g. costs for smolt, feed, harvesting, and other farming and processing operations). These are identified in paragraphs 1039 to 1042 of Norway's First Written Submission.

301. As a result, under its unreasonable methodology, the EC added 3.35 NOK/kg WFE in SG&A costs to [[xx.xxx.xx]] reported SG&A costs, *increasing the company's costs by nearly 20 percent*. Indeed, with the exception of feed costs, the EC's revised SG&A costs for [[xx.xxx.xx]] far exceeded all other salmon cost elements reported by the company, including the cost of smolt.

302. For these reasons, Norway maintains that, by failing to use a "reasonable" method to compute [[xx.xxx.xx]] SG&A costs, the EC violated Article 2.2.2 of the *Anti-Dumping Agreement*.

G. The EC's Improper Adjustments Relating to Costs of Purchased Salmon for [[xx.xxx.xx]]

303. In calculating the margin of dumping for [[xx.xxx.xx]], the EC included costs that the company had incurred in purchasing salmon from other, unrelated salmon growers. In so doing, the EC overstated the costs of the purchased salmon to [[xx.xxx.xx]] by [[xx.xxx.xx]] NOK. Without the overstatement of these costs, [[xx.xxx.xx]] margin of 2.6 percent disappears below zero. Norway's claims and arguments in this respect are set out in paragraphs 1062 to 1077 of its First Written Submission and in paragraphs 228 to 230 of its Opening Statement.

304. The EC's *sole* argument in reply to Norway's claim is 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.[208]

305. This is demonstrably false and, yet again, shows that the EC simply does not know the record of its own investigation. The [[xx.xxx.xx]] was reported to the EC in [[xx.xxx.xx]] *questionnaire response* as a *deduction* from the company's salmon processing costs.[209] In the Definitive Disclosure, *the EC itself actively eliminated* this deduction of [[xx.xxx.xx]] from the slaughtering costs, thereby increasing [[xx.xxx.xx]] slaughtering costs by the same amount.[210]

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[208] EC's FWS, para. 715.
[209] *See* the figure of [[xx.xxx.xx]] in DMCOP, worksheet COP Gutted Packed Salmon, cell E 6. Exhibit NOR-[[xx.xxx.xx]].
[210] *See* [[xx.xxx.xx]] (Exhibit NOR-[[xx.xxx.xx]]). The corresponding electronic Excel file was submitted as Exhibit NOR-[[xx.xxx.xx]].

306. There is, therefore, no doubt that the EC was thoroughly familiar with the figure and had ample opportunity to verify it. Indeed, Norway assumed that, under Article 6.6 of the *Anti-Dumping Agreement*, the EC had "satisfied" itself as to the "accuracy" of the figure before adding it to [[xx.xxx.xx]] costs.

307. The Panel should therefore find that the EC violated Articles 2.2 and 2.2.1.1 of the *Anti-Dumping Agreement.*

XIII. CONCLUSION

308. The EC has not presented a credible defense to Norway's claims. Its First Written Submission is replete with factual errors, mischaracterizations of the facts of the investigation, and mischaracterizations of Norway's claims and arguments. Time and again the EC shows a lack of knowledge regarding the record of its own investigation.

309. The EC tries to portray many of the claims as issues of fact that it suggests deserve deference under Article 17.6(i) of the *Anti-Dumping Agreement.* In so doing, the EC repeatedly portrays legal determinations as factual findings. The EC seeks to persuade the Panel not to conduct a "critical and searching" review of its authority's determination. However, contrary to the EC's arguments, the Panel must be satisfied that the EC's authority adequately explained, in the published determination, *how the facts on the record supported its findings and conclusions.*[211] Norway has shown that the EC has not met this requirement.

310. Norway maintains all its claims and respectfully reiterates the requests that are set forth in Section XII of its First Written Submission.

[211] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 93 – 99.