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

(WT/DS337)

THIRD PARTY SUBMISSION OF THE UNITED STATES

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I. INTRODUCTION

1. The United States makes this third party submission to provide the Panel with its view of the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") that are relevant to this dispute. The United States addresses in this submission certain aspects of Norway's claims regarding the EC's definition of the product under consideration and the domestic industry, as well as the EC's antidumping and injury determinations. The United States recognizes that many of the issues raised in this dispute are solely or primarily factual in nature. The United States takes no view as to whether, under the facts of this case, such measures are consistent with the AD Agreement.

II. SCOPE AND DEFINITION OF DOMESTIC INDUSTRY

A. AD Agreement Does Not Contain Rules for Defining "Product Under Consideration"

2. Norway argues that the EC acted inconsistently with Articles 2.1 and 2.6 of the AD Agreement in identifying the product under consideration, and as a consequence issued affirmative dumping and injury determinations inconsistent with Articles 2.1, 3.1, 3.2, 3.4, 3.5, 3.6, 5.1 and 5.4. It claims that the EC's definition of the "product under consideration" is inconsistent with Articles 2.1 and 2.6 of the AD Agreement because it includes "a broad range of products"[1] that are not all "like" within the meaning of Article 2.6.[2] Norway's argument however, rests upon an incorrect reading of Article 2.6, which contains a *definition* of the *like product* (*i.e.*, the product to which the product under consideration is compared) not an *obligation* with respect to the *product under consideration*. Norway's argument implies obligations that cannot be found in the text of the AD Agreement.

3. Article 2.6 provides that:

> [T]he term 'like product'. . . shall be interpreted to mean a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

Thus, Article 2.6 contains a *definition* of the *like product*, not obligations with respect to the product under consideration.[3] Article 2.1 in turn provides that "a product is to be considered as being dumped . . . if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for

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[1] First Written Submission of Norway, para. 78.

[2] *Id*., paras. 131-165.

[3] *See* First Written Submission of the EC, paras 17-18; *cf.* First Written Submission of Norway, para. 85.

consumption in the exporting country." This general statement regarding the comparison between the product under consideration and the like product likewise does not provide guidance on how the product under consideration is to be defined.[4] Thus, these provisions leave to the investigating authority's discretion how an investigating authority is to be established. Therefore no inconsistency with either provision would arise based on the approach an investigating authority selects.

4. Previous panels have reached the same conclusion. In *US – Softwood Lumber V*, the panel rejected Canada's claim that Article 2.6 requires "that there must be 'likeness' within both the product under consideration and within the like product," stating that:

> As the definition of 'like product' implies a comparison with another product it seems clear to us that the starting point can only be the 'other product', being the allegedly dumped product. Therefore, once the product under consideration is defined, the 'like product' to the product under consideration has to be determined on the basis of Article 2.6. However, in our analysis of the AD Agreement, we could not find any guidance on the way in which the 'product under consideration' should be determined. . . . It is not our role as a panel to create obligations which cannot clearly be found in the AD Agreement itself.[5]

5. Likewise in *Korea – Certain Paper*, the panel stated, "We see no basis in Article 2.6 for the proposition that the like product definition also applies to the definition of 'the product under consideration'. We are aware of no provision in Article 2.6, or any other article in the Agreement, that contains a definition of 'the product under consideration' itself."[6]

6. Norway points to the determinations of the U.S. Department of Commerce ("Commerce") and the U.S. International Trade Commission ("USITC") in their investigations of antifriction bearings and magnesium to support its argument that an investigating authority must establish that products are like or "closely resembling" one another in order to consider them collectively the product under consideration.[7] Norway's reliance on these cases is misplaced.

7. As a general matter, the United States notes that a complaining party must demonstrate the existence of an obligation in the text of the AD Agreement: an investigating authority's practice with regard to the examination of product coverage in an investigation does not lead to the conclusion that such practice is *required* by the AD Agreement. To the extent they are

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[4] First Written Submission of the EC, paras. 19-21; *cf.* First Written Submission of Norway, para. 85.

[5] *US – Softwood Lumber V (Panel)*, paras. 7.153, 7.156-7.158;

[6] *Korea – Certain Paper (Panel)*, paras. 7.219-7.221.

[7] First Written Submission of Norway, paras. 118-128.

relevant at all, the investigations cited by Norway simply demonstrate that Commerce and the USITC define the "product under consideration" on a case-by-case basis, taking into consideration the particular facts available to them, including the product coverage proposed by the petitioning domestic parties. In doing so, they apply U.S. statutes and regulations, as well as legal principles developed by U.S. domestic courts interpreting these statutes and regulations.[8] The investigations cited by Norway do not support the claim that the AD Agreement contains rules for defining the"product under consideration."[9]

8. The United States does not express a view as to the separate question of whether, under the facts of this case, the EC identified a like product which was "identical" or had "characteristics closely resembling" the product under consideration; however, whatever the merits of this claim, it cannot serve as the basis for the conclusion that the EC's definition of the product under consideration was inconsistent with obligations in the AD Agreement.

B. An Authority May Define the Domestic Industry to Include Producers Accounting For a Majority of Total Domestic Production

9. In its submission, Norway contends that the EC's definition of its "domestic industry" is inconsistent with Article 4.1 of the Agreement, in that the EC excluded several categories of domestic producers from the industry that were not "related" producers.[10] According to Norway, under Article 4.1, the only category of producers that an investigating authority may exclude from the industry in its injury analysis is producers that are related to the exporters or importers of the product being investigated.[11]

10. Relying on this interpretation of Article 4.1, Norway claims that the EC improperly excluded from the industry several categories of salmon producers that should have been included in the industry, including producers of salmon fillets, producers that did not take a position on the antidumping complaint, producers that fell into receivership during the investigated period, producers of organic salmon, and producers that did not provide data to the EC as requested.[12] Norway claims that, by excluding these producers from the industry, the EC

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[8] *US – Softwood Lumber V (Panel)*, para. 7.158 n.308 (finding the United States did not act inconsistently with, *inter alia*, Article 2.6 of the AD Agreement with its definition of the "product under consideration" in that investigation).

[9] With respect to Norway's assessment of the EC's explanation of its product under consideration determination, the United States does not express a view as to whether the EC's explanation adequately addressed the facts on the record in this case – however, to the extent it did not, such action would properly be analyzed under AD Agreement Article 12, with due regard for the standard of review set forth in Article 17.6(i). It would not support a claim under Article 2.1 and 2.6.

[10] First Written Submission of Norway, paras. 177-271.

[11] *Id.*, para. 208.

[12] *Id.*, paras. 225-271.

therefore failed to carry out the objective examination of injury to the industry required by Articles 3.1, 3.4, and 3.5 of the Agreement.[13]

11. The United States takes no position with respect to the issue of whether the EC reasonably excluded, as a factual matter, certain categories of salmon producers from its domestic salmon industry. The United States does not, however, agree with Norway's argument that an investigating authority may only exclude "related" producers from the definition of the domestic industry under Article 4.1 when performing its injury analysis. As Norway notes, the text of Article 4.1 makes clear that an authority may exclude from the industry any producers that are "related" to exporters and importers of the product being investigated by the authority.[14] Article 4.1 also states that an investigating authority is required to include in the industry those domestic "producers whose collective output of the products constitutes a major proportion of the total domestic production of those products."[15]

12. The United States would note that an investigating authority's definition of the domestic industry under Article 4.1 must be based on "positive evidence and involve an objective examination" of the evidence relating to injury.[16] According to the Appellate Body, "an 'objective examination' [under Article 3.1] requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favoring the interests of any interested party, or group of interested parties, in the investigation."[17] Accordingly, if the EC's definition meets the "major proportion" of domestic production standard of Article 4.1, the Panel still should assess whether the EC's exclusion of certain categories of salmon producer from the industry was biased or designed to favor the interest of any group of interested parties in the investigation, including the producers who filed the petition.[18]

13. Norway also argues that the EC's definition of its domestic industry was inconsistent with the requirements of the AD Agreement because the EC analyzed only a sampling of the domestic industry.[19] According to Norway, the EC did not focus on the "totality of the domestic industry," but relied on an analysis of five of fifteen salmon producers included in the salmon industry by the EC.[20] The United States takes no position concerning the EC's method for selecting the sample of companies it analyzed. In this regard, Norway correctly states that the Agreement does

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[13] *Id.*, para. 282.

[14] AD Agreement, Article 4.1(i).

[15] *Id.*, Article 4.1.

[16] AD Agreement, Article 3.1.

[17] *US – Hot-Rolled Steel* (AB), para. 193.

[18] *Id.*; *see also* First Written Submission of Norway, para. 243.

[19] First Written Submission of Norway, paras. 272-281.

[20] Definitive Regulation, paras. 48 and 49.

not explicitly permit an investigating authority to rely on a small sample of domestic producers when performing its injury analysis in antidumping investigations. However, the Agreement does make clear that sampling is an appropriate methodology when used in other contexts. For example, the Agreement permits the "us[e of] samples which are statistically valid" for the purpose of calculating dumping margins,[21] and it permits the use of "statistically valid sampling techniques" to determine an industry's support for an antidumping petition when the industry is a fragmented one.[22]

14. Moreover, as the Appellate Body stated in *Mexico - Rice*:

> Articles 3.1 and 3.2 [of the Agreement] do not prescribe a methodology that must be followed by an investigating authority in conducting an injury analysis. Consequently, an investigating authority enjoys a certain discretion in adopting a methodology to guide its injury analysis. Within the bounds of this discretion, it may be expected that an investigating authority might have to rely on reasonable assumptions or draw inferences.[23]

In other words, the EC could reasonably decide to rely on a sample of the domestic industry, as long as its decision was based on a reasonable set of assumptions or inferences as to the validity of the sample.

III. DETERMINATION OF DUMPING

A. Article 6.10 Does Not Preclude Investigating Authorities from Selecting Some Types of Interested Parties and Not Others When Limiting Examination to the Largest Percentage of Exports

15. For purposes of its dumping analysis, the EC limited its examination to the "ten largest Norwegian exporting producers, representing almost 80% of the export volume to the Community of all co-operating exporting producers."[24] Norway argues that the EC breached the requirements of Article 6.10 because it excluded exporters that did not produce the subject merchandise and therefore failed to select the companies with the largest percentage of exports to the EC.[25] According to Norway, Article 6.10 requires that exporters "and" producers "must both be considered for inclusion in the sample."[26]

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[21] AD Agreement, Article 6.10.

[22] *Id.*, Article 5.4, note 13.

[23] *Mexico - Rice (AB)*, para. 204.

[24] First Written Submission of Norway, para. 288 (citing Provisional Regulation, para. 17).

[25] *Id.*, para. 296.

[26] *Id.*, paras. 313-314.

16. Article 6.10 states that, where the number of investigated producers or exporters is so large as to make individual determinations for each impracticable, investigating authorities may limit their examination in one of two ways: either they may choose a "reasonable number of interested parties or products" by using statistically valid samples, or they may select "the largest percentage of the volume of the exports from the country in question which can reasonably be investigated." Once an investigating authority has opted for the second approach, Article 6.10 does not specify how the investigating authority is to arrive at the largest percentage or which companies must be included in the result.

17. Without expressing a view as to the validity of the EC's justification for excluding a category of interested parties from the companies selected, the United States submits that circumstances may exist in which an investigating authority may appropriately limit its examination to certain categories in accordance with Article 6.10. Therefore, the United States disagrees with Norway's view that, as a general rule, Article 6.10 precludes an investigating authority from limiting the selection of investigated parties to particular categories.

18. Furthermore, Article 6.10 does not oblige investigating authorities using the second methodology to generate a "statistically valid" sample, a requirement that applies only when the first methodology is used. Therefore, the extent to which the companies selected by the EC were representative of the industry as a whole, such as through their cost structure and pricing behavior, is immaterial to evaluating the WTO-consistency of the EC's application of the second methodology. Norway's assertion that the companies selected by the EC were unrepresentative is therefore not relevant to an assessment of whether the EC complied with Article 6.10.[27]

B. Determining Sales in Ordinary Course of Trade Using Cost Test and Period of Investigation as "Reasonable Period of Time" Is Not Inconsistent With Articles 2.2 and 2.2.1

19. In its determination, the EC applied a profitability test to determine whether to disregard certain sales as not within the ordinary course of trade. Based on this test, Norway states that the EC excluded both profitable and unprofitable sales from five companies whose profitable sales constituted less than 10% of total sales. Norway alleges that the EC violated Articles 2.2 and 2.2.1 of the Agreement because, "in deciding that it could construct normal value for five companies, it discarded below-cost sales without first determining that the sales were made at prices that failed to provide for the recovery of costs within a 'reasonable period of time.'"[28]

20. Norway argues that the EC's use of the investigation period as a reasonable period of time, without "determining" that such period was in fact reasonable based on the particular facts

[27] *Id.*, paras. 300-307.

[28] *Id.*, para. 332.

of the investigation, was inconsistent with Article 2.2.1.[29] Article 2.2.1 does not however preclude an investigating authority from using the period of investigation as "a reasonable period of time" or oblige the investigating authority to define the reasonable period of time differently from case to case. Indeed, the cost recovery test described in Article 2.2.1, second sentence, deems the period of investigation to be the reasonable period of time. There, it states that " [i]f prices which are below per unit costs at the time of the sale are above weighted average per unit costs for the *period of investigation*, such prices shall be considered to provide for recovery of costs within a *reasonable period of time*" (emphasis added). As this provision suggests, using the investigation period to assess whether costs were recovered in a reasonable period of time is not necessarily inconsistent with Article 2.2.1.[30]

21. Norway also asserts that unless three conditions exist (*i.e.*, below-cost sales are made within an extended period of time, in substantial quantities, and at prices that do not provide for the recovery of all costs within a reasonable period of time), "below-cost sales must be treated as made in the ordinary course of trade."[31] However, sales may be treated as outside the "ordinary course of trade" for reasons other than those set forth in Article 2.2.1, first sentence. The Appellate Body recognized that:

> Article 2.2.1 of the Anti-Dumping Agreement itself provides for a method for determining whether sales below cost are "in the ordinary course of trade". However, that provision does not purport to exhaust the range of methods for determining whether sales are "in the ordinary course of trade", nor even the range of possible methods for determining whether low-priced sales are "in the ordinary course of trade".[32]

22. As the Appellate Body suggested, Article 2.2 does not specify all the circumstances in which an investigating authority may determine that sales are "not in the ordinary course of trade"; Article 2.2.1 provides just one method for making such a determination. Thus, the fact that the EC identified sales as outside the ordinary course of trade based on criteria other than those identified in Article 2.2.1 would not alone support the conclusion that it acted inconsistently with that provision.[33]

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[29] *Id.*, paras. 362-63.

[30] The United States disagrees with the suggestion that the definition of the term "extended period of time" as "normally. . . one year" in Article 2.2.1 requires the conclusion that "reasonable period of time" must be a period other than the period of investigation. First Written Submission of Norway, para. 348. The mere fact that an "extended period of time" is defined in a particular manner in the text does not preclude an investigating authority from identifying a reasonable period of time that coincides with that period.

[31] First Written Submission of Norway, para. 338.

[32] *US – Hot-Rolled Steel (AB)*, para. 141.

[33] First Written Submission of the EC, paras. 218-19 (discussing ordinary course of trade test for profitable sales).

C. A Member May Not Apply An Antidumping Duty To An Import In Excess of the Difference Between the Export Price and a Properly Determined Reference Price

23. Norway claims in its submission that the EC acted inconsistently with its obligations under Article VI:2 of the GATT 1994 and Articles 9.1, 9.2, 9.3 and 9.4(ii) of the AD Agreement by imposing antidumping duties in excess of the difference between export price and normal value.[34]

24. Article 9.2 provides:

> When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted.

25. Consistent with Articles 9.1 and 9.3, the amount of any antidumping duty may not exceed the margin of dumping. Article VI:2 of the GATT 1994, read in conjunction with Article VI:1, provides that the margin of dumping is the price difference when a product is being introduced into the commerce of the importing country at a price less than normal value.

26. Article 9.4 of the AD Agreement recognizes that a Member may utilize a prospective normal value system of assessing antidumping duties. As the United States understands such systems, the Member establishes a prospective normal value, or a reference price, which it then compares to the export price of transactions as they enter the Member's customs territory. If the export price of the transaction is less than the reference price, an antidumping duty is assessed equal to the difference between the reference price and the export price. Assuming Norway's description of the EC's minimum import price ("MIP") system is accurate, and based on the EC's description in its own submission, the system appears to operate in a similar fashion to a prospective normal value system.

27. Under such a system, when a Member compares the export price to the reference price, it calculates a price difference. Consistent with the EC's logic, this difference is the margin of dumping for that export transaction.[35] Consistent with Articles 9.1 and 9.3 of the AD Agreement, the Member may assess an antidumping duty on that import equal to the margin of dumping. In terms of the EC's system, the appropriate antidumping duty would be the price

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[34] First Written Submission of Norway, para. 642.

[35] *See* First Written Submission of the EC, para. 490 (noting that "the Appellate Body explicitly qualifies its comments regarding the level of duty by stressing the right of WTO Members to *base the liability for payment of anti-dumping duties* on prospective normal values") (emphasis added).

difference between export price and the MIP, provided that the MIP is properly established and not in excess of normal value (for imports from exporters or producers not individually examined, the MIP must not exceed the weighted average normal value of the selected exporters or producers, calculated pursuant to Article 9.4(ii)).

28. To the extent that the EC used MIPs that exceed properly established normal values, the antidumping duties calculated on the basis of such MIPs would exceed the margin of dumping. If this is the case, such action would be inconsistent with Article VI:2 of the GATT 1994, and Articles 9.1, 9.2, 9.3 and 9.4 of the AD Agreement.

D. Article 2.2.2 Requires That All Sales In the Ordinary Course of Trade Be Used in the Calculation of Profit

29. Norway argues that in calculating profit for constructed normal value the EC "improperly rejected actual data pertaining to sales in the ordinary course of trade on the ground that the volume of those sales was too low."[36]

30. Article 2.2.2 provides that "the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation." As the Appellate Body explained in *EC – Cast Iron Fittings*, Article 2.2.2 "excludes actual data outside the ordinary course of trade, but does not exclude data from low-volume sales."[37] As such, an investigating authority may not exclude actual data from the calculation of the profit and selling, general and administrative ("SG&A") ratios solely because sales were made in low volumes.

31. The United States disagrees, however, with Norway's assertion that because the EC accepted actual SG&A cost data, it must also have accepted the actual profit data.[38] An investigating authority may use actual SG&A data even when actual profit data is rejected because SG&A costs relate to the actual selling and general operations of a company. In other words, a fluctuation in prices does not necessarily result in a related fluctuation in SG&A.[39] In contrast, profit on sales is directly impacted by the sales price. Thus, depending on the facts, it may not be unreasonable for an investigating authority to reject actual profit data, while accepting SG&A data.

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[36] First Written Submission of Norway, paras. 374, 376 (citing Provisional Regulation, para. 19).

[37] *EC – Cast Iron Fittings (AB),* para. 101.

[38] First Written Submission of Norway, para. 383.

[39] First Written Submission of the EC, para. 250.

E. Proper Application of Articles 6 and 12 Ensures Transparency, Procedural Fairness, and Opportunity For Effective Participation By All Interested Parties

32. Norway asserts that certain documents filed by interested parties during the investigation were missing from the non-confidential record accessible at the EC Commission's premises, and that as a result the EC acted inconsistently with Article 6.4, and in turn, Article 6.2.[40] The United States agrees with Norway that transparency and procedural fairness are key principles of the AD Agreement. Failure to ensure transparency and procedural fairness frustrates a party's opportunity for defense of its interests.

33. Article 6.4 provides that "[t]he authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information." Norway argues that the EC failed to comply with this obligation because a range of documents submitted by interested parties, including questionnaire responses filed on behalf of the Government of Norway and Norwegian producers, were not available in the public record maintained by the EC. As a result, Norway additionally argues that the EC violated Article 6.2, which provides that "all interested parties shall have a full opportunity for the defence of their interests" throughout an antidumping investigation, and to that end establishes certain obligations relating to granting requests for meetings of the parties.

34. While the United States does not provide a view on the facts underlying Norway's claim,[41] the United States notes that it disagrees with the EC's assertion that, under Article 6.2 and 6.4, "the investigating authority may not disclose information it has received from one interested party to another interested party, unless it is relevant for the preparation of the latter's case."[42] Article 6.4 does not itself *prohibit* the disclosure of information, but rather operates as an affirmative obligation to disclose certain information to interested parties "whenever practicable." Nor is the purpose of the provision limited, as the EC suggests, to "ensuring the individual rights of defence of an interested party which are protected in Article 6.2." Rather, by its terms, Article 6.4 requires disclosure of all non-confidential information "relevant to the presentation" of a party's case that is used by the authorities in the antidumping investigation,

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[40] First Written Submission of Norway, paras. 687, 698.

[41] The United States agrees with the EC that neither Article 6.2 nor Article 6.4 specifies the precise mechanism a Member must use to comply with the obligations they contain, and therefore an investigating authority is not precluded from doing so through a mechanism other than the maintenance of a public record. However, if a public record is the means by which a Member complies with these obligations, failure to maintain that record properly could give rise to a finding that a Member acted inconsistently with these provisions.

[42] First Written Submission of the EC, para. 531.

whether or not providing such information would ensure the defense of a party's interests.[43] "Relevant" information includes all information relevant from the perspective of the interested party, and is not limited to that which the investigating authority deems relevant. As the Appellate Body noted in *EC – Cast Iron Fittings*, "[W]hether or not the investigating authorities regarded . . . information . . . to be relevant does not determine whether the information would in fact have been 'relevant' for the purposes of Article 6.4."[44]

F. Article 2.2.1.1 Permits Adjustments To Reasonably Reflect the Costs Associated with the Production and Sale of the Product under Consideration

35. As a general matter, Norway claims that the EC made several cost adjustments in a manner inconsistent with the AD Agreement. Norway casts many of these adjustments as non-recurring costs that it claims should have been excluded because they did not benefit current and/or future production, as required by Article 2.2.1.1.[45] The United States does not express an opinion on the specific facts at issue; however, as the EC notes,[46] Norway omitted relevant language from its quotation of Article 2.2.1.1:

> *Unless already reflected in the cost allocations under this subparagraph*, costs shall be adjusted appropriately for those non-recurring items of costs which benefit future and/or current production (emphasis added).

36. As the omitted language suggests, many of the costs Norway discusses may be captured appropriately under the first sentences of Article 2.2.1.1 without the requirement of the last sentence that they "benefit future and/or current production."

G. Use of MIP to Impose Antidumping Duty Does Not Excuse Investigating Authority from Complying with Obligations Regarding the Use of Facts Available Under Article 6.8 and Annex II

37. Norway asserts that the EC failed to contact "non-cooperating companies" before assigning them a higher rate, inconsistent with Article 6.8 and Annex II.[47] Although the United States does not express an opinion on the facts at issue, to the extent that the EC failed to give

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[43] While Norway has not asserted that the EC has acted inconsistently with Article 6.1.2, the United States notes that the requirement that "evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation" is an important principle governing the disclosure of information by investigating authorities, and is not limited to "relevant" information or whenever disclosure is "practicable".

[44] *EC – Cast Iron Fittings*, para. 146.

[45] First Written Submission of Norway, paras. 815-952.

[46] First Written Submission of the EC, paras. 620-625.

[47] First Written Submission of Norway, para. 490.

proper notice of the investigation before applying facts available to the alleged "non-cooperating" companies, its application of a higher margin would be inconsistent with Article 6.8 and Annex II. As the Appellate Body noted in *Mexico – Rice*, under paragraph 1 of Annex II, "an exporter shall be given the opportunity to provide the information required by the investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests."[48]

38. Contrary to what it suggests in its submission, the EC is not excused from complying with Article 6.8 and Annex II merely because it used the MIP as the basis for imposing antidumping duties on these companies. The obligation contained in Article 6.8 is not by its terms limited to determinations that are "determinative of the duty imposed," as the EC claims; rather, Article 6.8 provides that it applies to the use of facts available in "preliminary and final determinations, affirmative or negative."

III. DETERMINATION OF INJURY

A. Under Article 3.5 of the Agreement, an Investigating Authority Has the Discretion to Choose a Reasonable Methodological Approach And Rely on Particular Information When Analyzing the Injurious Effect of Other Factors

39. Norway also claims that the EC violated Articles 3.1 and 3.5 of the Agreement because it failed to ensure that injury allegedly caused by two other factors was not attributed to dumped imports. According to Norway, the EC failed reasonably to explain why increases in the EC salmon industry's costs and an increase in non-subject imports from the United States and Canada were not the causes of injury to the EC's salmon industry.[49]

40. The United States takes no position with respect to the factual issue of whether the EC's analysis ensured that any injury caused by these two factors was not attributed to dumped imports. Nonetheless, the United States would point out that, although Article 3.5 of the Agreement sets out several factors that "may" be considered by investigating authorities in ascertaining whether there is a "causal relationship" between dumped imports and injury to the domestic industry,[50] it does not specify the type of information that an authority must collect and examine for this purpose, or identify the detail in which the authority must explain its analysis of the information. Rather, Article 3.5 simply provides that the investigating authority must

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[48] *Mexico – Rice* (AB), para. 259.

[49] First Written Submission of Norway, paras. 574-624.

[50] Article 3.5 provides that "[f]actors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry."

determine, on the basis of "all relevant evidence" before it, whether such a causal relationship exists.

41. Similarly, Article 3.5 provides that the investigating authorities must examine any known factors other than the dumped imports which at the same time are injuring the domestic industry to ensure that injury caused by these other factors is not attributed to the dumped imports. As the Appellate Body has recognized, however, the AD Agreement does not prescribe the particular methods to be used by investigating authorities to separate and distinguish the injurious effects of unfair imports from the injurious effects of the other known causal factors.[51] Further, the decision as to the types and amount of information concerning "other factors," including non-subject imports, that will be collected and examined by the investigating authorities is left to their discretion.[52]

IV. CONCLUSION

42. The United States thanks the Panel for providing an opportunity to comment on the issues at stake in this proceeding and hopes that its comments will prove to be useful.

[51] *EC – Cast Iron Fittings (AB)*, para. 189 (stating that "provided that the investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury.")

[52] *See Egypt – Rebar (Panel)*, para. 7.102 ("We note that neither of the provisions cited above [Articles 3.1 and 3.5] refers to any of the particular kinds of evidence that Turkey argues should have been gathered and examined, or indeed to any kind or type of evidence at all.")