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

(WT/DS337)

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF THE UNITED STATES

November 16, 2006

I. SCOPE AND DEFINITION OF DOMESTIC INDUSTRY

1. **"Product Under Consideration".** Norway argues that the European Communities ("EC") acted inconsistently with Articles 2.1 and 2.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("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 of the AD Agreement. 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*. 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 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.[1] Thus, as previous panels have found, these provisions leave to the investigating authority's discretion how a product under consideration is to be established.[2]

2. **Definition of the Domestic Industry.** 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.[3] 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.[4] 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."[5] With regard to Norway's argument that the EC's definition of its domestic industry was inconsistent with the requirements

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

[2] Certain determinations of the U.S. Department of Commerce ("Commerce") and the U.S. International Trade Commission ("USITC") 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. The investigations cited by Norway do not support the claim that the AD Agreement contains rules for defining the "product under consideration."

[3] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 193 (hereinafter *US – Hot-Rolled Steel* (AB)); *see also* First Written Submission of Norway, para. 243.

[4] AD Agreement, Article 3.1.

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

of the AD Agreement because the EC analyzed only a sampling of the domestic industry,[6] while the Agreement does not explicitly permit an investigating authority to rely on a small sample of domestic producers when performing its injury analysis in antidumping investigations, it does make clear that sampling is an appropriate methodology when used in other contexts. 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.

II. DETERMINATION OF DUMPING

3. **Selection of Interested Parties When Limiting Examination to the Largest Percentage of Exports.** 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, as circumstances may exist in which an investigating authority may appropriately limit its examination to certain categories in accordance with Article 6.10. 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. 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.[7]

4. **Determination of Sales in Ordinary Course of Trade.** Norway incorrectly 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 of the investigation, was inconsistent with Article 2.2.1.[8] Article 2.2.1 does not 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. Furthermore, Norway is incorrect in asserting 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."[9] As the Appellate Body has observed, "Article 2.2.1 . . . 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

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

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

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

[9] *Id.*, para. 338.

trade.'"[10] 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.[11]

5. **Application of Antidumping Duty.** 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. Article 9.4 of the AD Agreement recognizes that a Member may utilize a prospective normal value system of assessing antidumping duties. 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. 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.

6. **Profit Calculation.** The United States agrees with Norway that 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. 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."[12] 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.[13] 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.

7. **Transparency.** In response to Norway's assertion that the EC acted inconsistently with Article 6.4, and in turn, Article 6.2, because certain documents filed by interested parties during the investigation were missing from the non-confidential record accessible at the EC Commission's premises, the EC incorrectly argues that, under Article 6.2 and 6.4, "the investigating authority may not disclose information it has received from one interested party to

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

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

[12] Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, para. 101 (hereinafter *EC – Cast Iron Fittings (AB)*).

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

another interested party, unless it is relevant for the preparation of the latter's case."[14] The United States agrees with Norway that transparency and procedural fairness are key principles of the AD Agreement. Article 6.4 operates as an affirmative obligation to disclose certain information to interested parties "whenever practicable," and 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.[15] "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.

8. **Cost Adjustments.** With regard to Norway's claim that the EC made several cost adjustments in a manner inconsistent with the AD Agreement, as the EC notes, Article 2.2.1.1 provides that costs shall be adjusted as provided "unless already reflected in the cost allocations under this subparagraph." Many of the costs Norway discusses in its submission 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."

9. **Facts Available.** In response to Norway's assertion that the EC failed to contact "non-cooperating companies" before assigning them a higher rate, inconsistent with Article 6.8 and Annex II,[16] the EC incorrectly suggests that it is 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." To the extent that the EC failed to give 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.

III. DETERMINATION OF INJURY

10. 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.[17] Although Article 3.5 of the

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

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

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

[17] *Id.*, paras. 574-624.

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

11. 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.[18] 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.

[18] *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.")