VIII. CONCLUSIONS AND RECOMMENDATION

A. CONCLUSIONS

8.1 In light of the findings we have set out in the foregoing sections of our Report, we conclude that the European Communities acted inconsistently with:

(i) Article 4.1 of the AD Agreement because its approach to defining the domestic industry in this case resulted in an investigation concerning a domestic industry that did not comport with the definition set forth in Article 4.1 of the AD Agreement, and consequently

- Article 5.4 of the AD Agreement in determining support for the application for initiation on the basis of information relating to a wrongly-defined domestic industry, and

- Articles 3.1, 3.4 and 3.5 of the AD Agreement in undertaking injury and causation analyses on the basis of information relating to a wrongly-defined domestic industry;[945]

(ii) Article 6.10 of the AD Agreement because it failed to include Salmar in the ten companies selected for investigation pursuant to the second limited investigation technique described in the second sentence of Article 6.10;[946]

(iii) Article 2.2.2 of the AD Agreement when it disregarded actual domestic profit margin data pertaining to domestic sales of eight investigated companies, and actual SG&A data pertaining to domestic sales of one investigated company, on the basis of the low volume of those sales (5 per cent representative sales test);[947]

(iv) Article 2.2.2 of the AD Agreement when it disregarded actual domestic profit margin data pertaining to domestic sales of three investigated companies on the basis of the less-than-10 per cent profitable sales test;[948]

(v) Article 6.8 and paragraph 3 of Annex II of the AD Agreement when it disregarded the filleting cost information submitted by Grieg Seafood AS and inappropriately resorted to "facts available";[949]

(vi) Article 6.8 and paragraph 3 of Annex II of the AD Agreement when it disregarded the finance cost information submitted by Grieg Seafood AS and inappropriately resorted to "facts available";[950]

(vii) Article 9.4(i) of the AD Agreement because it imposed a fixed amount of anti-dumping duty on non-investigated cooperating companies on the basis of a flawed finding that the weighted average "injury margin" was less than the

[945] Para. 7.124.
[946] Para. 7.205.
[947] Para. 7.309.
[948] Para. 7.318.
[949] Para. 7.372.
[950] Para. 7.386.

weighted average margin of dumping calculated for the investigated companies;[951]

(viii) Article 6.8 and paragraph 1 of Annex II of the AD Agreement because it applied "facts available" for the purpose of establishing the margin of dumping of 33 of 67 companies that did not receive the "sampling questionnaire" and which were not members of the FHL or the NSL;[952]

(ix) Article 2.2.1.1 of the AD Agreement when it made upward adjustments to the costs of production of [[XXX]] and [[XXX]] to account for NRCs on the basis of a three-year average of the NRCs incurred for each company between 2002 and 2004;[953]

(x) Article 2.2 of the AD Agreement because it calculated the finance costs used in the determination of the costs of production of [[XXX]] and [[XXX]] on the basis of a three-year average of the finance costs incurred between 2002 and 2004, thereby failing to properly establish these companies' constructed normal values;[954]

(xi) Article 2.2 and 2.2.1.1 of the AD Agreement because the EC rejected smolt cost adjustments to [[XXX]] and [[XXX]] cost of production and could not demonstrate that the investigating authority accepted these adjustments between Definitive Disclosure and adoption of the Definitive Regulation;[955]

(xii) Article 2.2 of the AD Agreement because it rejected the adjustment for income earned on the sale of smolt during the period of investigation that was requested by [[XXX]];[956]

(xiii) Article 2.2.2 of the AD Agreement because it rejected [[XXX]] reported G&A costs;[957]

(xiv) Article 2.2.2(iii) of the AD Agreement because it applied a methodology that involved double-counting and was thereby not "reasonable" to determine [[XXX]] SG&A costs;[958]

(xv) Articles 2.2 and 2.2.1.1 of the AD Agreement when it added revenue earned by [[XXX]] from slaughtering services provided to third parties to its cost of production;[959]

(xvi) Articles 3.1 and 3.2 of the AD Agreement because in finding material injury it treated imports attributable to a company for which a de minimis margin

[951] Para. 7.428.
[952] Para. 7.462.
[953] Paras. 7.510 and 7.515.
[954] Para. 7.543.
[955] Para. 7.554
[956] Para. 7.572.
[957] Para. 7.592.
[958] Para. 7.605.
[959] Para. 7.609.

was calculated, and all imports from unexamined producers and exporters, as dumped;[960]

(xvii) Articles 3.1 and 3.2 of the AD Agreement because in finding material injury it failed to take into account the price premium enjoyed by domestic salmon products in considering whether there was significant price undercutting;[961]

(xviii) Articles 3.1 and 3.4 of the AD Agreement because in finding material injury it failed to take into account arguments alleging a distortive effect of using EUR, instead of GBP, in determining price trends and thereby failed to provide an adequate explanation of its finding of declining prices;[962]

(xix) Article 3.5 of the AD Agreement because it failed to properly examine known factors other than the dumped imports which at the same time were causing injury to the domestic industry, and failed to ensure that injuries caused by these other factors were not attributed to dumped imports;[963]

(xx) Article 9.2 of the AD Agreement when it imposed MIPs on the investigated companies on the basis of a flawed finding that the "non-injurious" MIPs were less than the investigated companies' respective normal values, thus failing to ensure that anti-dumping duties were collected in the "appropriate amounts";[964]

(xxi) Article 9.4(ii) of the AD Agreement because there was no objective factual basis to support the conclusion that the MIPs imposed on non-investigated companies were lower than the weighted average of the normal values for the investigated parties;[965]

(xxii) Article 6.4 of the AD Agreement by failing to provide timely opportunities for interested parties to see:

- all non-confidential information contained in 68 documents which were relevant to the presentation of their cases,[966]
- a letter received from Dr. Jaffa,[967]
- 15 *Notes Verbales* submitted to the investigating authority by the Norwegian government,[968] and
- relevant Eurostat information obtained by the investigating authority for purposes of the investigation.

8.2 In light of the findings we have set out in the foregoing sections of our Report, we conclude that the European Communities did *not* act inconsistently with:

[960] Paras. 7.636 and 7.646.
[961] Paras. 7.640 and 7.646.
[962] Paras. 7.645 and 7.646.
[963] Para. 7.669.
[964] Para. 7.727.
[965] Para. 7.739.
[966] Para. 7.774.
[967] Para. 7.775.
[968] Para. 7.776.

(i) Articles 2.1 and 2.6 of the AD Agreement with respect to the product under consideration, nor as a consequence, Articles 2.1, 3.1, 3.2, 3.4, 3.5, 3.6, 5.1 and 5.4 of the AD Agreement;[969]

(ii) Articles 3.1, 3.4 and 3.5 of the AD Agreement by having had recourse to sampling in making its injury determination;[970]

(iii) Article 6.10 of the AD Agreement in excluding all non-producing exporters from the selection of companies to investigate pursuant to the second limited investigation technique described in the second sentence of Article 6.10;[971]

(iv) Article 6.10 of the AD Agreement for not having included Bremnes in the ten companies selected for investigation pursuant to the second limited investigation technique described in the second sentence of Article 6.10;[972]

(v) Articles 2.2 and 2.2.1 of the AD Agreement in excluding the domestic sales of certain investigated companies from the determination of normal value, on the grounds that they were outside of the ordinary course of trade by reason of price;[973]

(vi) Article 9.4(i) of the AD Agreement in attributing a 20.9 per cent margin of dumping to non-cooperating companies;[974]

(vii) Article 6.8 and paragraph 1 of Annex II of the AD Agreement in applying "facts available" for the purpose of establishing the margin of dumping of 34 of 67 companies that did not receive the "sampling questionnaire" and which were members of the industry associations represented by the FHL;[975]

(viii) Articles 2.1, 2.2 and 2.2.1.1 of the AD Agreement in making adjustments to the costs of production of [[XXX]], [[XXX]] and [[XXX]] for certain NRCs;[976]

(ix) Article 2.2 of the AD Agreement in rejecting the adjustment for the cost of purchased smolt relating to salmon harvested outside of the period of investigation that was requested by [[XXX]];[977]

(x) Article 2.2.2 of the AD Agreement in rejecting [[XXX]] reported selling expenses;[978]

(xi) Articles 9.1, 9.2 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by not adopting a mechanism to ensure that the MIPs imposed on investigated parties could not result in the collection of anti-dumping duties

[969] Para. 7.76.
[970] Para. 7.129.
[971] Para. 7.181.
[972] Para. 7.195.
[973] Para. 7.279.
[974] Para. 7.433.
[975] Para. 7.461.
[976] Para. 7.488.
[977] Para. 7.570.
[978] Para. 7.599.

in excess of the *ad valorem* equivalent of those parties' respective margins of dumping calculated in the original investigation;[979]

(xii) Articles 9.1, 9.2 and 9.3 of the AD Agreement because of the fact that at certain price levels, the fixed anti-dumping duties imposed on investigated parties could result in the collection of anti-dumping duties in excess of the *ad valorem* equivalent of those parties' respective margins of dumping calculated in the original investigation;[980]

(xiii) Article 6.4 of the AD Agreement by failing to provide timely opportunities for interested parties to see confidential information contained in 68 documents;[981]

(xiv) Articles 6.2 and 6.9 of the AD Agreement with respect to disclosure of the essential facts regarding:

- dumping by PFN, Hydroteck and Sinkaberg-Hansen, and minimum import prices,[982]

- the definition of the domestic industry, causation and non-attribution;[983] and

(xv) Article 12.2 and 12.2.2 of the AD Agreement in setting forth its conclusions as to the product under consideration in the Definitive Regulation.[984]

8.3 Finally, in light of the findings we have set out in paragraphs 8.1 (iv)-(vi), (ix), (x) and (xvi)-(xxii), we make no findings, based on judicial economy, in respect of Norway's claims under:

(i) Article 2.2 of the AD Agreement, in respect of the less-than-10 per cent profitable sales test applied by the EC to determine whether domestic sales are made outside of the ordinary course of trade;[985]

(ii) Paragraph 6 of Annex II of the AD Agreement, in relation to the EC's reliance on "facts available" for the purpose of calculating the filleting costs of Grieg Seafood AS;[986]

(iii) Paragraph 6 of Annex II of the AD Agreement, in relation to the EC's reliance on "facts available" for the purpose of calculating the finance costs of Grieg Seafood AS;[987]

(iv) Articles 2.1 and 2.2 of the AD Agreement, as regards the upward adjustments made to the costs of production of [[XXX]] and [[XXX]] for NRCs on the basis of the three-year average of NRCs incurred between 2002 and 2004;[988]

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[979] Paras. 7.749-7.752.
[980] Para. 7.761.
[981] Para. 7.773.
[982] Para. 7.803.
[983] Paras. 7.809 and 7.810.
[984] Para. 7.830.
[985] Para. 7.319.
[986] Para. 7.373.
[987] Para. 7.387.

(v) Article 2.2 of the AD Agreement, in relation to the EC's inclusion of a loss of NOK [[XXX]] million that the [[XXX]] incurred in 2002 on the write-down of shares held in [[XXX]] into its calculation of [[XXX]] finance costs;[989]

(vi) Article 3.5 of the AD Agreement, as regards the EC's consideration of dumped imports, price undercutting and pricing trends in its finding of injury;[990]

(vii) Article 3.1 of the AD Agreement, in relation to the EC's determination of causation;[991]

(viii) Article VI:2 of the GATT 1994, in relation to the imposition of the MIPs on both investigated and non-investigated parties at the level of the "non-injurious" MIPs;[992]

(ix) Article 6.2 of the AD Agreement, as regards the failure to provide timely opportunities for interested parties to see all non-confidential information relevant to the presentation of their cases;[993] and

(x) Articles 12.2 and 12.2.2 of the AD Agreement, in relation to the sufficiency of the notice given to interested parties of the definition of the domestic industry, the preliminary or final determinations of injury and causation, the level of the minimum import prices, as well as the sufficiency of the explanation pertaining to the determination of dumping.[994]

B. RECOMMENDATION

8.4 Pursuant to Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the European Communities has acted inconsistently with the provisions of the AD Agreement, it has nullified or impaired benefits accruing to Norway under that Agreement.

8.5 We recommend that the Dispute Settlement Body request the European Communities to bring its measure into conformity with its obligations under the AD Agreement.

8.6 Norway requests that the Panel suggest that the EC implement the recommendations and rulings of the DSB by withdrawing the contested measures. Norway argues that the Panel would be justified in making such a suggestion in the present case because of the nature and scope of the EC's violations of the AD Agreement and of the GATT 1994.[995]

8.7 The EC does not address Norway's specific request in respect of the implementation of the recommendations and rulings of the DSB.[996]

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[988] Paras. 7.510 and 7.516.
[989] Para. 7.544.
[990] Paras. 7.636 and 7.646.
[991] Para. 7.669.
[992] Paras. 7.728 and 7.739.
[993] Para. 7.777.
[994] Paras. 7.831-7.834.
[995] Norway, FWS, para. 1081.
[996] EC, FWS, paras. 717-727.

8.8 Article 19.1 of the DSU provides:

> "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations". (Footnote omitted.)

Thus, a panel must ("shall") recommend that a Member found to have acted inconsistently with a provision of a covered agreement "bring the measure into conformity", but has discretion to ("may") suggest ways in which a Member could implement that recommendation. Clearly, however, a panel is not required to make a suggestion should it not deem it appropriate to do so, and in fact, most panels have not made such suggestions.

8.9 In this case, we exercise our discretion to not make any suggestions concerning ways in which the EC could implement our recommendation to bring its measure into conformity.