30 November 1992

UNITED STATES - IMPOSITION OF ANTI-DUMPING DUTIES ON IMPORTS OF FRESH AND CHILLED ATLANTIC SALMON FROM NORWAY

Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994
(ADP/87)

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I. INTRODUCTION

1. In a communication to the Committee on Anti-Dumping Practices ("the Committee") circulated on 17 June 1991 (ADP/57), Norway informed the Committee that on 2 May 1991 consultations had taken place under Article XXIII:1 of the General Agreement between the United States and Norway on the imposition of anti-dumping duties by the United States on imports of fresh and chilled Atlantic salmon from Norway. This communication stated that it was the understanding of Norway that these consultations were also to be considered as consultations under Article 15:2 of

II. FACTUAL ASPECTS

8. The dispute before the Panel concerned the imposition by the United States on 12 April 1991 of an anti-dumping duty order on imports of fresh and chilled Atlantic salmon from Norway. The imposition of this order followed an affirmative final determination of dumping by the United States Department of Commerce and an affirmative final determination of injury by the United States International Trade Commission (USITC) with respect to these imports.

9. The anti-dumping duty investigation which led to the above-noted determinations was initiated by the Department of Commerce on 20 March 1990 after the Department had on 28 February 1990 received a petition for the initiation of an investigation from The Coalition for Fair Atlantic Salmon Trade, comprised of domestic producers of fresh and chilled Atlantic salmon. Also on 20 March 1990 the Department initiated a countervailing duty investigation with respect to these imports.

10. As indicated in the public notice of the initiation of this investigation, the product covered by the investigation was the species Atlantic salmon. All other species of salmon were excluded. The notice explains that "Atlantic salmon is a whole or nearly whole fish, typically (but not necessarily) marketed gutted, bled and cleaned, with the head on. The subject merchandise is typically packed in freshwater ice ("chilled"). Excluded from the subject merchandise are fillets, steaks, and other

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questionnaires to eleven fish farmers who reportedly supplied the eight exporters with the subject merchandise during the period of investigation".[6]

14. An affirmative final determination of dumping ("sales at less than fair value") in this investigation was issued by the Department of

farmers had knowledge, at the time of their sales to exporters, of the ultimate destination of the salmon. Information about the possible knowledge of farmers of the ultimate destination of the product was considered necessary to determine whether the farmers or the exporters were to be treated as respondents in the investigation. It should be noted in this respect that Norwegian salmon exporters generally do not farm salmon and that Norwegian salmon farmers generally do not export salmon. Responses to this special questionnaire were received on 16 May 1990.

20. In order to obtain further information on the farmers' possible knowledge about the ultimate destination of the salmon sold to the exporters, the Department of Commerce on 12 June 1990 issued a supplemental questionnaire to the Norwegian fish farmers' organization, Fiskeoppdretternes Salgslag (FOS). Based on data provided by the FOS in response to this questionnaire, the Department selected a sample of eight farms which were provided with a modified Section A questionnaire on 25 June 1990. On 25 July 1990, the Department determined, based on a review of the responses by these eight farms and other information collected up to that point in the investigation, that Norwegian salmon farmers did not generally know the ultimate market into which their product was sold. The Department concluded that the farmers should be excused from responding to the remaining sections of the questionnaire and that it should continue to consider the exporters as the proper respondent in this case.

21. On 3 August 1990, the petitioner in the investigation requested the Department of Commerce to determine whether export sales of Norwegian salmon to the EEC were at prices below costs of production. In support of this request, the petitioner alleged that actual Norwegian sales prices (the prices submitted by the exporters in

Register Notice of the affirmative final determination of dumping.[11] Particularly relevant

any anti-dumping duties paid. **Norway** noted that this request was consistent with previous Panel Reports.[13]

27. The **United States** requested the Panel to find that the affirmative final determinations of the Department of Commerce and the USITC in the anti-dumping proceeding on imports of fresh and chilled Atlantic salmon from Norway comported with the obligations of the United States under the Anti-Dumping Code. In particular, the United States requested the Panel to find that:

(i) the affirmative final determination of dumping by the Department of Commerce was consistent with the relevant provisions of Articles 2 and 6 of the Agreement; and

(ii) the affirmative final determination of injury by the USITC was consistent with Article 3 of the Agreement.

28. The **United States** also requested the Panel to give a ruling that certain matters raised by Norway were not properly before the Panel (infra, Section IV).

29. However, at the request of the Panel, the **United States** presented its views on the merits of each of the issues raised by Norway which it considered were not properly before the Panel. The Panel indicated that this request to the United States was without prejudice to the Panel's ultimate decision on the preliminary objections of the United States. On this basis, the **United States** requested the Panel to find that (i) the initiation of the anti-dumping duty investigation was in accordance with Article 5:1 of the Agreement; (ii) the calculation by the Department of Commerce of the exporters' processing costs was consistent with Articles 6:5 and 6:8 of the Agreement, the inclusion of an eight per cent profit rate in the constructed normal values was consistent with Articles 2:4 and 6:8 of the Agreement, the comparison of an average normal value with individual export prices was consistent with Article 2:6 of the Agreement, and the Norwegian respondents had not been denied national treatment; and (iii) the arguments of Norway based on Article 9:1 of the Agreement were factually incorrect and without a legal basis in the Agreement.

IV. PRELIMINARY OBJECTIONS

30. The **United States** requested the Panel to give a preliminary ruling that certain issues raised by Norway were not properly before the Panel. Some of these issues had not (respondents) TjETBTlTjETBT1 0 0 1 314

by the Norwegian respondents before the investigating authorities i

dumping duty investigation or at any time after the initiation of the investigation. In its notice of the initiation of the anti-dumping duty investigation, the Department had invited interested parties to bring to its attention any information related to the petitioner's claim that it had filed the petition "on behalf" of the domestic industry. Yet the Norwegian respondents (all of whom had been represented by the same counsel) had not responded to this invitation. The Department had in recent years rescinded its initiation of investigations after having determined that the petition in question had not been filed on behalf of the relevant domestic industry in the United States.[14] However, the Norwegian participants had never once, during nearly a year of investigation and thousands of pages of filings, given any sign, or made any representation, which could have alerted the Department to the concern belatedly expressed by Norway in the proceedings before this Panel. Had any of the Norwegian participants done so, the Department could have addressed the situation.

of local remedies. The Vienna Convention did not support the incorporation of

of the affirmative final determination of dumping.[23] In response to these comments, the Department of Commerce had stated that it had used its "… normal practice of comparing individual US prices to weight-average home market or third country prices".[24] This response illustrated the futility of raising in the administrative proceedings issues contesting normal US practice or legislation. Since the United States would continue to apply its "normal practice", it was futile to raise such issues.

45. The **United States** submitted that it had not argued that the public international law rule of exhaustion of local remedies was applicable to dispute settlement proceedings under the Agreement but that the rationale of this rule was similar to the rationale of the Agreement-based requirements that an issue first be raised in the domestic administrative proceedings. Norway had not addressed the specific language of the Agreement relied upon by the United States to support its view that a matter not raised before the investigating authorities could not in the first instance be raised before a Panel. Rather, it had argued that the GATT system generally did not impose a requirement to go through national authorities before raising an issue in GATT dispute settlement proceedings. However, the Agreement established a rôle for domestic investigating authorities not found under other GATT provisions. Under Norway's argument, the investigating authorities were virtual appendages, which could be ignored at will. This view was inconsistent with the central and exclusive rôle provided under the Agreement for the investigating authorities.

46. The **United States** considered that, while Norway's discussion of the public international law rule of exhaustion of local remedies was possible point in that the United States had not argued that this rule applied to dispute settlement under the Agreement, Norway's interpretation of this rule was in any event erroneous. Historically, the rule of exhaustion of local remedies had been used in cases where the national of one country had been injured by another country. In these cases, the national was required to seek redress under the allegedly offending country's system before asking his own government to try to resolve the dispute on a government-to-government level. The doctrine did not apply to disputes solely between countries. This distinction had been clarified in a recent judgement of the International Court of Justice in the Elettronica Sicula S.p.A. case.[25] There, the United States had claimed that the doctrine did not apply because the United States was representing itself, not the two American companies involved. The Court had rejected this argument, stating that "the matter which colours and pervades the United States claim as a whole is the alleged damage to Raytheon

from the exhaustion doctrine ignored

the investigation and had had ample opportunities to rebut any arguments Norway might have elaborated upon since consultations and conciliation.

60. With regard to the issue of denial of national treatment and differing treatment of foreign and domestic respondents, the **United States** pointed out that these issues were not raised during consultations

-Dumping Practices held in July 1991 for purposes of conciliation under Article 15:3

ion and panel process. The national treatment requirement was included in the

treatment was specifically not required in the Agreement (e.g. the imposition of anti-dumping duties

ADP/61, page 5, reference had been made to the use by the Department of Commerce of the "best

ADP/M/33, paragraphs 28 and 29, at the conciliation meeting Norway had discussed the question

67. The **United States** argued that the question of the continued imposition of the anti-dumping duty order had not been raised by Norway during the consultations and the conciliation process preceding the establishment of the Panel.

V. ARGUMENTS OF THE PARTIES

1. Arguments on Article VI of the General Agreement as an exception

68. **Norway** argued that Article VI of the General Agreement constituted an exception to the obligations of Articles I and II of the General Agreement. The interpretative practice of the contracting parties confirmed that exceptions such as Article VI had to be interpreted narrowly and that the contracting party invoking the exception had the burden of proof of demonstrating that it had

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of the General Agreement. In any event, the US argument on Article VI was irrelevant since, whatever the nature of Article VI, in the case before this Panel the United States had not met express requirements of the Agreement.

71. **Norway** argued that the statement in Article VI of the General Agreement that injurious dumping was to be "condemned" provided no support for the view that Article VI was not an exception to fundamental principles of the General Agreement. When, at the second session of the CONTRACTING PARTIES, the text of Article VI of the General Agreement had been replaced by Article 34 of the Havana Charter, the Working Party had noted that there was no difference in meaning between the original Article VI and Article 34 of the Havana Charter.[31] This demonstrated that the inclusion of the word "condemned" was without significance If anything, the drafting history of Article 34 of the Havana Charter indicated that the term "condemned" had been added in order to limit, not expand, the use of anti-dumping measures. In November 1947, at the Havana Conference, Article 34 of the draft Charter had been considered by the sub-committee on general commercial policy provisions. A number of delegations to this committee had wanted to expand Article 34 to include a condemnation of dumping and to cover in addition to "price dumping" all forms of dumping without requiring an injury test. Another group of delegations had believed that the primary objective of the Article should be to restrict the abuse of anti-dumping measures. The result had been the current text of Article VI, which kept the main focus of the Article on limiting the use of anti-dumping duties but which included a statement that dumping was to be "condemned", but only dumping as defined in Article VI, and only if injury was also found. The inclusion of the word "condemned" had been necessary to reach a compromise under which the coverage of the Article was limited to instances of price dumping which caused injury. Norway noted that the United States had been among the delegations which had wanted the focus of the Article to be on restricting the use of anti-dumping duties, not on limiting the use of dumping in general.

72. **Norway** considered that Article II:2(b) of the General Agreement supported the view that Article VI was an exception. The language and placement of this provision demonstrated that the imposition of anti-dumping and countervailing duties was intended to

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competition") had been and remained one of

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other distortions of international competition", as claimed by the United States. In

To understand what the Panel had meant by "establishing the existence of dumping", it was instructive to note the context of the Panel's comment. The Panel had noted that the Swedish authorities "had not established that the export prices of the Italian exporters were less than the normal value".[42]

However, it was up to the party asserting a GATT and/or Code violation to demonstrate the basis - based on the express requirements of the GATT or the Codes - for the finding of a violation.

82. The **United States** argued that the conclusory statement - in dicta - by the Panel in "United States - Countervailing Duties on fresh, chilled and frozen pork from Canada"[48] concerning the scope of Article VI and its status as an "exception" to fundamental rights and obligations under the General Agreement found no support in the text of the General Agreement. The sources relied upon by this Panel when making this statement did not even relate to the interpretation and application of Article VI: the Report of the Panel in "Canada - Administration of the Foreign Investment Review Act"[49] concerned an interpretation of Article XX; the Report of the Panel in "Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies"[50] involved Article XXIV:12, and the Report of the Panel in "Canada - Import Restrictions on Ice Cream and Yoghurt"[51], involved an interpretation of Article XI:2(c)(i) of the General Agreement. Accordingly, the Panel's statement regarding Article VI as an exception was fundamentally in error and should be rejected by the Panel in this case.

83. **Norway** argued that previous Panel Reports supported the position that Article VI of the General Agreement was an exception to fundamental rules of the General Agreement. The Panel in "United States

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Transformers from Finland". The basis for Norway's claim in the present case appeared to be the view that it was sufficient for a contracting party challenging an action under Article VI to raise issues - whether or not founded on express requirements under the General Agreement - and then shift the burden onto the contracting party taking action under Article VI to prove the consistency of its action. However, Norway had not referred to specific legal requirements under the Agreement which would have been violated. Rather, Norway's entire argumentation was founded on the premise that, as the Party taking action, the United States bore some additional burden of proof. It was on the basis of this higher obligation of proof that Norway asked the Panel to find fault with the US determinations.

89. The **United States** considered that there were three basic problems with the approach taken by Norway in these proceedings. First, there was no basis for Norway's view that Article VI was an exception to fundamental rights and obligations under the General Agreement. Second, as the New Zealand Transformers Panel had held, a violation existed only when a determination was shown to be inconsistent with an express requirement. Norway had not shown that in the present case any express requirement of the Agreement had been violated. Finally, Norway's proffered rôle for panels as triers of fact was in fundamental conflict with the express provisions of the Agreement, which explicitly and exclusively empowered "the competent national authorities" to conduct the investigation. By contrast, dispute settlement provisions of the Agreement clearly contemplated that the important rôle reserved for panels was to resolve disagreements over interpretations of o

Norway was not asking for a "special" burden of proof. Rather, it was asking that the Panel apply the same rule applied by

2. Initiation of the anti-dumping duty investigation (Article 5:1)

93. **Norway** argued that the initiation by the United States of the anti-dumping duty investigation on imports of Atlantic salmon from Norway was inconsistent with Article 5:1 of the Agreement as a consequence of the failure of the United

> "…must have authorization or approval of the industry affected before the initiation of an investigation."[67]

Furthermore, according to the Report, investigating authorities were required, prior to the opening of an investigation, to take steps

than the facts of the case considered by the Panel in "United States - Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden". In the latter case, the Panel had found that the United States was under an obligation to satisfy itself that the petition was filed on behalf of the industry, even though the domestic industry had never provided any indication that it was opposed to the petition. In contrast, in the salmon case, at least one domestic producer in the United States had written to the Department of Commerce

103. The **United States** also submitted that the determination of the USITC demonstrated that the industry had supported the petition.[76] The data in the Report of the USITC included domestic producers who were related to exporters of the product under investigation and who therefore could have been excluded from the definition of the domestic industry under Article 4:1 of the Agreement. Had such producers been excluded from the industry, the extent of industry support for the petition would have been even higher.

104. Regarding the issue raised by Norway with respect to the participation of Ocean Products in the USITC's injury investigation, the **United States** pointed out that this company had responded to the questionnaire in the preliminary investigation of the USITC. However, the company had ceased operating and had been liquidated by September 1990. The USITC questionnaire in the final injury investigation had been sent in October 1990. There simply no longer was a corporate entity to respond. However, an official of the former Ocean Products provided the USITC with the necessary information, as was specifically noted in the USITC Report.[77] Connors Aquaculture, which had purchased the assets of Ocean Products, had provided a questionnaire response in the final investigation.

105. **Norway** noted that the Annex to the determination of the USITC stated in footnote 49 on page A-19 that one firm (unidentified but obviously Ocean Products) "would be unable to provide a questionnaire response in the final investigations". The note went on to state that the "data for Ocean Products presented in this report are based on its preliminary questionnaire and on those additional documents". Thus, the data were not based on a response by Ocean Products to the USITC's questionnaire in the final investigation. Moreover, in footnote 50 the USITC Report stated that "Connors Aquaculture was unable to provide data relating to the operations of Ocean Products" and thus did not answer the final questionnaire. This was the only information available to Norway and it indicated that Ocean Products had not answered the final questionnaire. The United States now claimed that Ocean Products had answered that questionnaire. Since the United States had access to data to which neither the Panel nor Norway was privy, Norway could not determine whether the USITC Report stated the facts incorrectly or whether the United States was now stating the facts incorrectly. Obviously, the two statements were contradictory.

106. **Norway** also noted in this context that Ocean Products had not been alone in not responding or in not providing a full questionnaire response. The USITC Report indicated that many of the approximately 25 firms farming Atlantic salmon in the United States had not submitted complete responses.[78] Thus, in contrast to the treatment of the Norwegian farmers and exporters, the domestic producers in the United States were not required to submit all the information requested by the investigating authorities and no adverse inferences had been made when the requested information was not supplied.

3. Determination of dumping

107. In summary, **Norway** argued that the affirmative final determination of dumping by the Department of Commerce in respect of imports of fresh and chilled Atlantic salmon from Norway was inconsistent with the obligations of the United States under the Agreement as a result of (1) a failure to follow fair and equitable procedures, (2) the calculation of constructed normal veTBT1 0 0 1 235.44 201./F8 11

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3.1 **Alleged failure to follow fair and equitable procedures**

108. **Norway** argued that the affirmative final determination of dumping made with respect to imports of Atlantic salmon from Norway was inconsistent with the obligations of the United States to accord fair and equitable procedures, as reflected in the Preamble of the Agreement and in the provisions of Articles 5 and 6. In particular, Article 6:1 contained a fundamental principle of fairness in that it required that all interested parties in an anti-dumping duty investigation have ample opportunities to provide

significantly affected the methodology employed by the Department in the construction of samples of farms for purposes of its costs of production investigation.[81]

111. In support of its contention that, at the time of the submission by the exporters of the responses to Section A of the questionnaires, the Department of Commerce had been informed that the lists of suppliers were not entirely accurate, **Norway** pointed to the following. The Department had asked that the exporters list all farms from which they had purchased salmon for export to the United States during the period 1 September 1989-28 February 1990. It was clear from the wording of the responses submitted on 16 May 1990 by three exporters that they had not been able to provide full information on this issue. Thus, one exporter, Skaarfish Mowi, had replied as follows:

> "Please note, however, that Exhibit H [the list of suppliers] is a complete list of salmon farms from whom Skaarfish purchased. Skaarfish's records do not permit it to break out the farms authorized for US sales, or farms purchased from during the POI, during the short time allowed for the Section A response."[82]

A second exporter, Chr. Bjelland Seafoods A/S, had stated in its response:

> "A list of farmers and packers that Chr. Bjelland dealt with during the period of investigation is contained in Exhibit C."[83]

Finally, a third exporter, Sea Star International A/S, had replied as follows:

> "A list of farmers and packers that Sea Star dealt with during the period of investigation is contained in Exhibit C."[84]

On the basis of these responses, it was clear as early as mid-May 1990 that the lists of farms supplied by the exporters were not entirely accurate.

112. The **United States** argued that the exporters had been given sufficient time to file their responses to Section A of the questionnaire issued by the Department of Commerce on 30 April 1990. The errors in the exporters' responses to Section A of the questionnaire could not be attributed to the allegedly insufficient period of fifteen days to respond to this Section. The exporters had requested, and had been granted an extension, and could have sought additional time, had they so desired. They had not done so, thus demonstrating that the response time was not a problem. Moreover, the Department of Commerce had welcomed amendments and corrections to these Section A responses for months afterward and the exporters had taken advantage of this option. The Department of Commerce had allowed the exporters to correct the lists of farms subsequent to their initial submission on 16 May 1990. Thus, in mid-June 1990, three exporters had submitted corrected lists of the farms with which they had dealt during the period of investigation.[85] On several other occasions, various exporters had

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[81] Infra, section 3.2.1

[82] Response of Skaarfish Mowi A/S to Section A of the Questionnaire of the US Department of Commerce, 16 May 1990, p.9.

[83] Response of Chr. Bjelland Seafoods A/S to Section A of the Questionnaire of the US Department of Commerce, 16 May 1990, p.9 (emphasis by Norway).

[84] Response of Sea Star International A/S to Section A of the Questionnaire of the US Department of Commerce, 16 May 1990, p.8 (emphasis by Norway).

[85] Letter from David Palmeter to Robert Mosbacher on behalf of Sea Star International A/S, 12 June 1990; Letter from David Palmeter to Robert Mosbacher on behalf of Chr. Bjelland Seafood A/S, 13 June 1990; Letter from David Palmeter to Robert Mosbacher on behalf of Salmon A/S, 14 June 1990.

submitted amendments to correct or revise other parts of their Section A responses. Each such submission had been accepted by the Department of Commerce without objection from the petitioner. Thus, the exporters had been provided, and had exercized, a very broad ability to amend their Section A responses throughout the period May-August 1990. The exporters had provided the false information and had failed for months thereafter to correct this information. In a letter dated 30 August 1990, counsel for the Norwegian respondents had reported for the first time to the Department that several of the exporters had given erroneous information in their Section A responses and that several of the farms selected for purposes of the Department's costs of production investigation had not sold any salmon during the period of investigation to the exporters to which they were linked.

113. The **United States** considered that the Department of Commerce had acted consistently with the Recommendation of the Committee on Anti-Dumping Practices[86] that respondents be given thirty days to respond to questionnaires. In fact, the respondents had been given well over thirty days to respond to the questionnaires. In response to Norway's argument that the Department of Commerce should have notified the exporters of the deficiencies in their lists of farms, the **United States** argued that only the exporters had known the deficiencies; the Department had been unaware of these deficiencies until the exporters' belated admission of error and therefore could not have advised the exporters of the flaw.

114. **Norway** considered that the contention of the United States that the Department of Commerce had complied with this Recommendation was incorrect; the Norwegian exporters had not been given "well over 30 days" to respond to Section A of the questionnaire issued on 30 April 1990.

115. The **United States** considered that Norway's argument that the Department of Commerce had provided less time for responses to the Section A questionnaire than was called for by the Recommendation

exporters.

123. **Norway** also submitted that the Department of Commerce had itself been responsible for the

farms whose

128. In response to Norway's reference to the Memorandum of 25 July 1990, the **United States** presented three arguments. First, this Memorandum had appeared well over two months after the Section A responses had been first submitted on 16 May 1990. Both Chr. Bjelland and Sea Star had provided amended lists within this time. Skaarfish surely could also have done so. If Norway's argument was that Skaarfish was in the process of working on a correction and decided not to pursue the matter after 25 July, this meant that

3.1.3 Denial of national treatment

131. **Norway** considered that, in granting more favourable procedural treatment to domestic respondents than to Norwegian respondents, the United States had acted in violation of the requirement of Article III:4 of the General Agreement. A recent Panel had applied the national treatment rule of Article III:4 to the procedures of Section 337 of the United States Tariff Act of 1930, as amended, with respect to "unfair methods of competition and unfair acts in the importation of articles."[94] In that case, the denial of national treatment had resulted from the fact that different procedures applied under Section 337 of the Tariff Act 0 0 1 500.16 654.96 Tm368.4 680.88 Tm/F8 11 654.96 Tm/F8 11 Tf(n)36 654.96 Tm/F8 11 Tf4 654.9

134. The **United States** denied that, in the investigations conducted by the Department of Commerce and the USITC, national treatment had been denied to the Norwegian respondents.[97] Regarding the question of the medium in which the domestic producers had been required to provide information to the USITC, the **United States** pointed out that, although the USITC had required extensive information from the domestic producers, the USITC had not allowed them to file their information on computer tape or floppy disk format, regardless of whether that would have been more convenient for the domestic producers. Rather, members of the domestic industry had been required to submit information on paper, the form most convenient for the USITC. Different types of information were necessary to analyse the existence and extent of dumping versus the information necessary to assess the condition of a domestic industry and the volume and price effects of imports and their impact on the domestic industry. To the extent that one group of farms or persons providing data might be treated differently, it was because that group

the questionnaire responses, when necessary with telephone contacts with the submitters of the questionnaire information. The Commission had not considered it to be necessary or appropriate to verify responses on-site for any category of questionnaire respondents.

138. On the issue of the consequences of a failure of respondents to provide full information to the USITC, the **United States** pointed out that the US industry had been required to respond to questionnaires in both the preliminary and final investigations. In the final injury investigation the questionnaire responses had provided nearly 95 per cent coverage of the US Atlantic salmon industry.[98] All of the US producers had been required to produce voluminous information. For example, Ocean Products, the large Marine company which had been forced to liquidate itself during the investigation had filed a response of 468 pages. This near perfect participation by US producers stood in stark contrast to the participation of the importers of Norwegian salmon. Fewer than half of the importers, representing just over half of all Atlantic salmon imports from Norway, had even returned their questionnaires.[99] Despite this poor response rate, the USITC had not made adverse inferences against the Norwegian importing interests.

3.1.4 Treatment of

141. **Norway** pointed out that it was not disputing that Article 2:4 of the Agreement permitted the use of either export prices to a third country or constructed value for purposes of establishing the normal value. However, if an importing country had a stated preference for the use of third country sales in the ordinary course of trade, the Agreement did not allow the country to arbitrarily determine that sales to a third country were not in the ordinary course of trade without examining what was the ordinary course of trade for the industry

3.1.5 Calculation of costs of production on the basis of the costs of production of the salmon farmers, rather than on the basis of the acquisition price paid by the salmon exporters

144. **Norway** considered as inconsistent with the requirement of the Agreement

> "Traditionally, the Department has used an exporter's cost of acquisition from an unrelated supplier as a measure of its production cost. Respondents strongly urged, and continue to urge, the Department to maintain this methodology."[103]

147. The **United States** argued that the Department of Commerce had properly based its costs of production calculation on the costs of producing salmon in Norway, not on the exporters' costs of acquiring already-produced salmon. Under the Agreement, this was the only way to determine production costs. Article 2:4 explicitly required that a constructed normal value be based on "the cost of production in the country of origin". There was no basis in the Agreement for Norway's view that the Department of Commerce should have relied on the acquisition costs of Norwegian exporters, rather than on the producers' costs of production, in preparing its costs of production calculation. The exporters produced nothing and, therefore, had no production costs. Indeed, with few exceptions, under Norwegian law the exporters were prohibited from producing salmon. Under the Agreement, the Department had been required to base its determination on the farmers' production costs.

148. The **United States** considered that the fact that exporters might not have knowledge of the farmers' production costs was irrelevant under the Agreement because it was the production costs which must form the basis for the establishment of the normal value. Similarly, the farmers'

and that the costs of producing the product should be based on the farmers' costs of production, as

element of the cost of production was inconsistent with Article 2:4. An adjustment to account for the freezing charge should have been made in the calculation of "the reasonable amount for profits".

156. **Norway** also pointed out that the FOS had an intermediary rôle in the trade between farmers and exporters. The exporters bought directly from the farmers. These sales were recorded by the FOS, which invoiced the exporters and paid the farmers. With respect to the financing of the freezing programme, **Norway** explained that when the FOS invoiced the exporters, it added the freezing charge of 5 NOK per kilogramme. Thus, the freezing charge was paid to the FOS by the exporters. The individual salmon producer neither received nor had any claims to this money.

157. The Panel asked Norway to clarify whether it considered that inventory costs were not part of a constructed normal value. In response, **Norway** explained that inventory costs would be included within the constructed value as part of the "reasonable amount for administrative, selling and any other costs" provided for in Article 2:4. However, such costs would reduce the "reasonable amount" for

of the costs of production of the farms in the sample should have been used.[110] In response, **Norway** noted that smaller farms were over-represented in number compared to their contribution to total production volume, thus creating a high probability that they would be over-represented in the sample. This would lead to an overestimate of the costs of production, unless smaller farms had lower costs of production than larger farms. However, this point was also relevant to the question of the use of a weighted average of the costs of production of the sampled farms. By weighting the average to reflect more closely the actual distribution of production supplied to exporters, the Department of Commerce could have adjusted for some of the bias inherent in the use of such a small sample.

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salmon from Norway. As explained in a letter dated 11 September 1990 to the Norwegian exporters, the Department had declined to use this information for a number of reasons.[112] The exporters had failed to provide the Department with adequate information describing the sampling methodology employed in the EEC investigation, which had prevented the Department from detecting any biases which might have been inherent in the EEC samples. In addition, the Department had reviewed the questionnaire sent by the EEC authorities to certain farms in Norway and had concluded that the responses to this questionnaire would be inadequate for purpose of its investigation. Moreover, the sample used in the EEC investigation had been prepared in part by the Norwegian parties to that investigation, raising doubts about whether the farms chosen were representative of the Norwegian industry. Second, the Department also could have relied on a study conducted in 1988 by the Government of Norway of the cost of production of Norwegian salmon farms. Indeed, the petitioner had strongly urged the Department to use the results of this study as a measure of adverse best information available. The Norwegian exporters had never urged the Department to rely in any manner on this study. Since this study had been for the period of one year prior to the period of investigation, and had been derived through procedures not wholly understood by the Department or in accordance with the Department's cost of production methodology, the Department had decided instead to attempt to develop an actual cost of production from farmers who had actually sold to the exporters during the period of investigation.

172. **Norway** rejected the argument of the United States that the Department of Commerce had been placed in an untenable position because of the erroneous information provided by the exporters in their responses to section A of the questionnaire. Any errors in the lists of farms provided by these exporters were the result of the fact that the Department had asked for the wrong information.[113] **Norway** also rejected the argument of the United States that the Department of Commerce had only been informed of these errors on 30 August 1990.[114]

173. In response to the argument of the United States that the sampling

had actually declined since then.[115] The Norwegian respondents

exporters was free to join the investigation and have its own dumping margin calculated. There had been no Norwegian exporters who had requested such treatment in this case. Second, Norway's consultant had criticized the selection by the Department of eleven fishfarms in the sample used for purposes of the cost of production analysis. The Department had determined that the methodology employed would provide a representative sample which

> "While petitioners postulate a single cost of production in Norway, the fact is that there are 700 different costs."[117]

On 22 August 1990, counsel for the Norwegian respondents had requested the Department of Commerce to use the sample of forty-two farms used by the EEC in its anti-dumping investigation of imports of salmon from Norway.[118] Finally, in a letter dated 30 August 1990, counsel for the Norwegian respondents had stated inter alia that:

> "Choosing one farmer to represent the costs of a particular exporter makes no theoretical or practical sense."[119]

181. **Norway** also argued that the sampling technique used by the Department of Commerce in its cost of production analysis in the salmon investigation differed significantly from sampling techniques used by the Department in similar cases. Thus, in Fall-harvested round white potatoes from Canada[120] the Department had examined the costs of both unrelated and related growers and growers/distributors. A random sample of nineteen farms had been taken, stratified by size of the farm, type of farm and by geographical location. The Department had determined that this sample provided a statistically valid 95 per cent certainty of accuracy. In Certain Fresh Cut Flowers From Colombia[121] the Department had selected at random fifteen farms after stratifying by size and taking relative market strength into account, while in Certain Fresh Winter Vegetables From Mexico[122] the Department of

alleged by the petitioner, there were in fact 700 different costs of production in the Norwegian salmon industry. Second, the sample of forty-two farms used by the EEC in its anti-dumping investigation had shown variations in the costs of production from NOK 12.60 to NOK 53.74. Third, the annual study conducted by the Norwegian Directorate of Fisheries in 1989, based on an examination of information provided by 293 salmon farms,

the cost of production data, **Norway** referred to a Memorandum dated 17 August 1990.[125] In response to a question by the Panel on the factors which should have been taken into account in the weighing of the cost of production data, **Norway** explained that these data should have been weighed by the production volume of the individual farms in the sample. The Panel asked Norway to explain how Norway's argument that the Department had before it sufficient

volumes which would allow stratification by size, the Department had concluded that a simple average of the production costs was preferable.

192. In response to Norway's reference to the use of a weighted average of growers' production costs in Fall-Harvested Round White Potatoes from Canada, the **United States** argued that in that case the Department of Commerce had not been faced with a situation in which the exporters were not the growers of the production under investigation. No attempt had been made to create a sample for each individual exporter in that case since the exporters themselves were the growers.

193. In response to the argument of the United States that weight-averaging the cost of production data would have given much greater importance to the Bremnes farm relative to the sample than large farms occupied relative to the Norwegian industry as a whole, **Norway** argued that Bremnes was not one of the ten largest salmon farms in Norway.[128] In any case, what mattered was the proportion of production supplied to exporters to the United States, not the proportion of total production in Norway.

194. The **United States** noted that in its questionnaire response filed on 28 September 1990, Bremnes had reported its production volume at 70,600 cubic metres, an assertion which had not been withdrawn or corrected at any time during the investigation. In its response of 15 May 1990 to the questionnaire in the countervailing duty investigation, the Government of Norway had reported that there were only thirteen farms with a size larger than 12,000 cubic metres. Norway had listed the ten largest farms, whose sizes ranged from 20,000 to 52,000 cubic metres and had stated that these farms accounted for about 4 per cent of Norwegian production.[129] The Department of Commerce had quite reasonably concluded that, given Bremnes' reported size, it

the **United States** argued that the information available to the Department of Commerce indicated that the main difference in costs between farms was related to geographic location. Therefore, geographic location

sample as the best information available for the calculation of the costs of production of Nordsvalaks.

Norway noted that the questionnaire

which the Department of Commerce had formulated its question. **Norway** noted in this respect that a Recommendation adopted by the Committee on Anti-Dumping Practices stated that:

> "even though the information provided may not be ideal in all respects, this factor, in itself, should not justify the investigating authorities from disregarding it since the interested party may have acted to the best of its ability."[133]

203. In response to the argument of the United States that the issues raised by the relationship between Nordsvalaks and F&Y would have required an entirely new set of responses, **Norway** argued that the Department of Commerce could have easily corrected the responses provided by Nordsvalaks. At verification, Nordsvalaks had demonstrated to the Department that Nordsvalaks and F&Y divided joint costs and revenues 50/50. Officials of the Department had spent almost two days verifying the information provided by Nordsvalaks.[134] The Department of Commerce could have used the verified information provided by Nordsvalaks and include the companion company by multiplying the figure by two. Ho

Attachment A to the questionnaire

Because for time reasons the Department could not receive

> "Information concerning profit should be provided. The information for the appropriate market (market used for the FMV) should be provided according to the following hierarchy for the period under investigation, based on your experience:
>
> (a) Profit on third country market sales of the such/similar products; or
>
> (b) Profit on third country sales of merchandise of the same
>
> "general class or kind" by your company. This should be an aggregated percentage for all third country markets.

Separate answers had been received from the farmers and exporters. From the farmers the response had been "N/A" - in other words, the farmers had thought the question was inapplicable. From the exporters, a similar, if lengthier answer had been received:

> "Because the Department has not yet decided whether a constructed value approach is appropriate, it is premature to request constructed value information. We will provide this information if the Department decides that the constructed value approach is necessary."[140]

Despite this non-compliance with the questionnaire request, the Department of Commerce had alerted each farmer in a deficiency questionnaire that constructed value information was required and that this information should be submitted. Nevertheless, no such profit information had ever been provided. Given that the

of Commerce had been presented with conflicting information by these exporters.[142] Faced with irreconcilably conflicting statements from the exporters, the Department had properly relied on the only verifiable information before it, which was the FOS average processing fee. For

216. With regard to the differences in sizes and qualities of salmon, **Norway** noted that a smaller fish would fetch a lower price per kilo than a larger fish of the same quality because the larger fish had proportionately more meat and less bones. The United States had calculated one single estimate of the normal value, even though salmon of all three weight categories of superior quality had been sold in the United States. The comparison of this single normal value to individual sales of fish to the United States would almost invariably create margins of dumping even where the shipment as a whole received a total price in the United States well above the correct cost of production (and well above the single estimated normal value) because the smaller fish would fetch prices lower than the single estimated normal value, while the larger fish would fetch prices above that single estimate. The feed costs were the same for all salmon, regardless of the quality grade of the

above

against

In those cases, prices had been compared only of sales of salmon of the same quality, the same weight, the same condition and sold in the same month. This demonstrated that the United States was aware that the normal value would reflect differences based on quality and weight factors; these differences therefore should have been taken into account in the calculation of the normal value based on the costs of production.

221. **Norway** argued that at the time of its investigation

normal

stocks beyond the initial maturation process. In its final determination, the Department of Commerce had made the following statement on the perishability issue:

> "We agree with petitioners that fresh salmon is not a perishable commodity for purposes of the cost analysis. Norwegian Atlantic salmon farmers have the ability to control the time of sale of their output by 'holding over' inventory and, since January 1990, by freezing fresh salmon. Regarding respondent's assertion that salmon is perishable in the hands of the exporters, the Department found at verification that the opposite is true. Exporters coordinate their salmon requirements in weekly telephone conferences with farmers, and with other exporters. By doing so, exporters can communicate their salmon requirements two

(United) TjETBT 184.96 Tm/F8 11 0 841 4 751 e 731r51infoTmerminities.

United States market for fresh salmon and had been before 1984 for all practical purposes the only supplier to the US market. **Norway** provided to the Panel monthly statistical data covering the period

240. **Norway** explained that it was not arguing that, as a matter of law, Article 3:2 of the Agreement permitted a finding of a "significant increase" of the volume of imports under investigation only

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244. The **United States** argued that in its analysis of the volume of imports of Atlantic salmon the USITC had done precisely what was required by Article 3:2 of the Agreement by determining that there had been a significant increase in dumped Norwegian imports, which had surged fully 50 per cent in the period 1987/1989 and had remained above their 1987 level. The **United States** considered that the increased imports from third countries did not in any way affect the consistency with the Agreement determination of the USITC regarding the volume of imports from Norway. Countries other than Norway had exported relatively little salmon to the United States in 1987, the first year of the period covered by the investigation of the USITC. Obviously, any increase in their exports to the United States in 1988 or 1989

the **United States** noted the following. First, the USITC had referenced its long experience in the dampening effects on import levels which can be caused by an investigation, by preliminary determinations and by the imposition of provisional measures. Second, the USITC had examined the specific circumstances surrounding the decline of the volume of imports of Atlantic salmon from Norway in 1990. It had linked the timing of the investigation to the development of import volumes, describing "the precipitous nature of the drop of the subject imports by the end of 1990, from record levels in 1988". The Commission had cited further evidence that the investigation had played a rôle in the decline in volume of imports, observing that "the drop in subject imports has been most pronounced since July 1990, subsequent to Commerce's preliminary CVD determinations".[165] Third, although there was no provision in the Agreement addressing the issue, the determination of the USITC had explicitly noted the

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on page A-56 of the Annex to the USITC determination, after mid-1990 the gap between prices of

and Norwegian prices in

prices. Norway noted that the use of the Urner Barry price figures which combined US and Canadian prices demonstrated, at most, that Canadian prices were likely to have a profound effect on the United States prices but did not demonstrate the effect of prices of imports from Norway.

260. The **United States** made the following comments in response to Norway's argument that in its analysis of price depression the USITC had relied on a comparison of United States/Canadian prices with Norwegian import prices. In an effort to gather as complete pricing data as possible, the USITC had sought data on US prices from two sources. The first source was the responses to questionnaires which the Commission had sent to producers and purchasers. These data were explicitly limited to prices for US produced salmon, and did not include any Canadian prices. Thus, through the questionnaires, the USITC had specifically relied on data limited to US prices. The second set of data was published data of the Urner Barry company, an established industry authority. These data were combined United States and Canadian prices. However, the inclusion of Canadian prices in the Urner Barry figures had had no material effect on the USITC's analysis. First, the Commission had been aware that the data included Canadian prices, and had specifically addressed the issue, noting that "prices for Atlantic salmon from the two countries are believed to be comparable".[173] Second, the Annex indicated that the questionnaire prices (which were limited to US prices) revealed the same trends over time, and the same pattern of overselling and underselling, as the Urner Barry data. Thus, this Annex noted that "Monthly net f.o.b. price data collected through questionnaires for US- and Norwegian-produced Atlantic salmon generally showed the same decline in price as the published price data" and "Similar to published price data and to reports from industry representatives, Norwegian importers' prices were generally higher than US producers' prices".[174]

261. The **United States** also noted in this context that, although Norway now took issue with the use by the USITC of the Urner Barry figures, the Norwegian respondents in the investigation had explicitly urged the Commission to use those figures while the matter was before the Commission. In arguing that the Commission should employ the Urner Barry data, the Norwegian respondents had described Urner Barry as "the recognized price authority in the industry".[175]

262. **Norway** contested that, as stated by the USITC on page 20 of its determination, "… until late 1990 prices for Norwegian and United States Atlantic salmon followed a very similar pattern".[176] Norway noted again that it had no access to the information underlying the data on which the USITC based its conclusions. All comparisons between Norwegian price trends and domestic price trends in the United States appeared to be based on United States and Canadian price information. If the USITC had based itself on this information, its determination was not based on positive evidence. At most, this information showed that Canadian prices were likely to ha

263. Regarding Norway's argument on the timing of the divergency of the price movements of Norwegian imported salmon and domestic salmon, the **United States** noted that in the Annex to the determination of the USITC it had been observed that "US/Canadian and Norwegian price trends for Atlantic salmon were similar from mid-1988 through mid-1989. In 1990, the two

and the similar price trends exhibited by US and Norwegian salmon. The USITC's determination made clear that the price depression finding was not dependant on any source being a "price leader" through undercutting the prices of other sources. Rather, the Commission's finding of price depression was grounded in increased supply of salmon to the US market, an increase to which Norwegian salmon had been the major contributor. It should come as no surprise that when supply of a commodity increased substantially,

by the USITC in order to dispel Norway's belief. Finally, **Norway** considered that the USITC had not correctly applied a legal requirement imposed by the Agreement in that it had not made a determination based on an objective examination of positive evidence.

270. In response to a question of the Panel as to whether Norway considered that the factors which it had mentioned (supra, paragraph 268) had not been considered by the USITC or whether it was of the view that the USITC had not given adequate weight to these factors, **Norway** stated that Article 3:3 provided a list of factors to be examined in an analysis of the impact of imports on the domestic producers of the like product and noted that "no one or several of the factors necessarily give decisive guidance". The USITC, however, had based its conclusion regarding the impact of the imports on domestic producers on just a few financial indicators, rather than on a thorough review of all factors. Thus, the USITC had allowed a few factors to give decisive guidance.

271. On the statement of the USITC that "the financial performance of the domestic industry stands in stark contrast to the production and trade figures", **Norway** observed that certain facts before the USITC discounted the financial indicators as evidence of harm from dumped imports. The pre-hearing brief on behalf of the Norwegian respondents had described many other factors which affected the financial performance of the domestic producers.[181] Thus, while the financial indicators might have been poor, their value as indicators of the consequent impact of subsidized imports was limited in this case.

272. The **United States** argued that, as required under Article 3:3, the USITC had considered the injurious impact which the volume and price effects of Norway's imports had on the domestic industry. The USITC had found that the price depressive effect of the large and increasing volume of Norwegian imports was directly reflected in the injured financial condition of United States producers:

> "Lower prices for the like product have meant lower sales revenues in 1989, which contributed to substantial gross and operating losses for the domestic industry. Depressed prices have also exacerbated cash-flow pressures that are inherent in the Atlantic salmon industry."[182]

The USITC had described the financial condition of the domestic industry as follows:

> "The financial state of the US Atlantic salmon industry declined precipitously in 1989. Net sales decreased from 1988 to 1989 while cost of goods sold rose and general, selling, and administrative costs increased. Operating losses in 1989 were enormous. US producers experienced a severe negative cash flow in 1989. The number of firms reporting operating losses increased from 1988 to 1989. For the period January-September 1990, net sales were well above the level recorded in the same period in 1989; nevertheless, the industry recorded a significant operating loss and negative cash flow. As a result of financial setbacks, the largest US producer, Ocean Products, Inc., ceased operations.".[183]

The USITC had also noted that the domestic industry's operating losses in 1989 totalled $4.3 million, or more than half of the industry's net sales for that year.[184] As a specific example of negative cash flow effects caused by depressed prices, the USITC had mentioned the experience of the largest US Atlantic salmon producer, Ocean Products, which had been forced into bankruptcy as a result of the impact of ever-decreasing prices, due to the downward spiral of Norwegian prices.

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[181] Pre-hearing Brief on behalf of the Norwegian Respondents, 20 February 1991, pp.27-47.
[182] USITC Determination, p.20.
[183] USITC Determination, p.14.
[184] USITC Determination, p.A-30, table 7.

273. The **United States** noted that the USITC had also described other negative

4.5 Causal relationship between the allegedly dumped imports and material injury to the domestic industry (Article 3:4)

275. **Norway** submitted that the affirmative final determination of the USITC in its investigation of imports of fresh and chilled Atlantic salmon from Norway was inconsistent with the requirements of Article 3:4 of the Agreement for the following reasons: first, the USITC had failed to isolate the effect of the allegedly dumped imports from Norway from the effects of other factors injuring the domestic industry. Second, the USITC had failed to demonstrate that the allegedly dumped imports from Norway had caused injury to the US domestic industry "through the effects of dumping". Third, the USITC had not shown that the imports from Norway had been causing material injury to the US domestic industry at the time the USITC made its determination.

4.5.1 Other factors affecting the domestic industry

276. **Norway** argued that an interpretation of Article 3:4 in accordance with the ordinary meaning of its terms indicated that the effects of the dumped imports, by themselves, must be sufficient to have caused material injury. The Vienna Convention on the Law of Treaties required in Article 31:1 that a treaty be interpreted in accordance with the ordinary meaning of its terms in context and in light of the object and purpose of the treaty. When Article 3:4 was read as a whole, the ordinary meaning of the phrase "through the effects of the dumping, causing injury" was that the effects of the dumped imports themselves must be causing injury. This was confirmed by the next sentence in Article 3:4 which provided that any injury caused by other factors could not be attributed to the dumped imports. Thus, according to the authoritative rules of treaty interpretation, an anti-dumping measure could not be imposed under the Agreement unless, after all injury caused by other factors was removed from consideration, material injury was caused by the effects of the dumped imports. Thus, those effects must be sufficient to cause injury in and of themselves. This interpretation of the language in Article 3:4 was consistent with the object and purpose of the Agreement which sought to prevent unjustifiable impediments to the flow of international trade, as stated in the Preamble. Therefore, anti-dumping duties were an exception to basic principles of the General Agreement and as such must be interpreted narrowly. Consequently, a strong demonstration was required that the injury to be prevented was caused by the effects of the dumped imports and thus, that the remedy would in fact offset this material injury. If the injury were to be caused by other factors, the anti-dumping duty would not offset that injury and would impede trade for no lawful purpose. Norway referenced that the standard applied by the United States did not conform to the requirement of Article 3:4. The USITC had stated that its standard of causation was to determine whether "imports are a cause of material injury". In the salmon case, the USITC had expressly relied on several US court cases which had articulated this standard. Norway mentioned in this context LMI - La Metalli Industriale, S.p.A. v. United States, 712 F. Supp. 959,

contained in the revised Agreement on Implementation of article VI of the General agreement (1979) as follows:

> "The new Code provides more realistic criteria in that the initial requirements that the dumped imports s

This conclusion was inconsistent with Article 3:4 under which Parties were obliged to exclude any injuries caused by factors other than the dumped imports under

domestic industry, a requirement reflected in both the Agreement and the United States legislation and which had been applied by the USITC in the case at hand.

283. The **United States** argued that in its analysis the USITC had applied the appropriate Agreement standard in finding a causal link between the dumped imports and material injury to the domestic industry. The Agreement provided that the standard was whether imports were "causing" injury. This was exactly what the USITC had found in the present case: it had found that injury to the domestic industry had been caused "by reason" of the dumped imports, or, stated in another way, that imports were a cause of injury. Norway's argument that the Agreement required the authorities to determine whether dumped imports were,

the domestic industry had been forced to sell its mature salmon right after harvest in order to maintain cash flow in the face of low prices. The inability to sell for a longer portion of the year was, therefore, a symptom of the injurious price effect of Norwegian imports rather than an alternate cause of the injury.

287. In response to a question of the Panel, the **United States** explained as follows how the USITC had arrived at the conclusion that, while other factors might have adversely affected the US domestic industry, the industry was materially injured by reason of imports from Norway. The USITC had conducted a thorough analysis of evidence concerning the volume of imports from Norway, their effects on prices in the United States, and their effects on US domestic producers, as provided in the Agreement. Article 3:1, 3:2 and 3:3 specifically envisioned that the focus of an investigation be on those factors. The determination of the USITC also contained findings relating to other suggested factors affecting the industry. As to non-subject imports, the USITC had found that the price depression which had injured the US industry "was due in large part to oversupply in the US market" and that it was "imports from Norway [that] accounted for a large portion of the increased imports in 1989".[191] This was fully supported by the facts before the Commission. With regard to Pacific salmon, the USITC had described in detail the many differences between Atlantic salmon and Pacific salmon which restricted their substitutability - and thus their degree of competition with each other. These differences included the form in which the salmon was marketed, distribution channels, prices, and geographical and seasonal differences. Third, as to possible production difficulties or the seasonal marketing of US Atlantic salmon, the USITC had explicitly taken into account these factors which related to the industry's young age, in its determination. For example, the USITC had concluded that the industry's financial performance

[191] difficulties

"The subsidized products must be [an important contributing

United States subsidy programme on the world price for corn and had given no consideration to the effects of

analysis, attributed the effects of imports "not sold at dumping prices" to the dumped imports. This was because the exact same set of imports from Norway had been found to be both subsidized and dumped. Of course, even in a case in which the subsidized and

"The GATT Subsidies Code explicitly states, 'It must be demonstrated that the subsidized imports are, through the effects of the subsidy, causing injury within the meaning of this Agreement'. This would seem to establish an international obligation to pursue a causal connection that would relate to the actual subsidization - i.e., the margin. A similar clause exists in the Anti-Dumping Code."[195] Moreover, this interpretation was consistent with the object and purpose of the Agreement. The

> to use margin analysis has softened. However, such a conclusion appears to be somewhat improbable."[196]

303. The **United States** considered that the statements from Professor Jackson cited by Norway concerning the meaning of the term "through the effects of …" did not analyze the text of footnote 4 but set forth a policy which Professor Jackson would like to see adopted. These proposals might be of interest to the negotiators of a new Agreement but were certainly not reflected in the text of the current Agreement.

304. **Norway** further argued in this context that the interpretation by the United States of the term "through the effects of …" in Article 3:4 was inconsistent with the drafting history of that provision. Since it appeared that the United States found the wording of Article 3:4 ambiguous, it was appropriate to have recourse to the drafting history of this provision. This drafting history supported an interpretation which accorded meaning to the term "through the effects of …". The Draft Subsidies Code dated 19 December 1978 had contained the following formulation of the provision now appearing in Article 6:4 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement:

> "It must be demonstrated that the subsidized imports are causing injury to the domestic industry. There may be other factors which at the same time are injuring the industry and the injuries caused by other factors must not be attributed to the subsidized imports."

This draft noted that this formulation had been developed by some but not all of the participating delegations. The mark-up of this draft at the Helsinki meeting of 12-13 February 1979 had resulted in what was virtually the final language:

> "It must be demonstrated that, through the effects of the subsidy, the subsidized imports are causing injury within the meaning of this Arrangement. There may be other factors which at the same time are injuring the domestic industry, and the injuries caused by other factors must not be attributed to the subsidized imports."

Thus, the drafters had deliberately inserted the "through the effects" clause in the text of this provision. They must have intended the clause to have meaning beyond mere consideration of the imports; if not, there would have been no reason to insert this language. The interpretation advocated by the United States would read Article 3:4 to have the meaning found

306. In response to a question of the Panel, **Norway** stated that footnote 4 ad Article 3:4 did not detract from the need to consider the effects of dumping. If Article 3:4 only required an analysis of the effects of the imports as stated in Articles 3:2 and 3:3, there would be no distinction between the determination of the existence of injury and the determination of the cause of the injury. In that case, the "through the effects of dumping" language in Article 3:4 would not have been necessary. Thus, Article 3:4 had to be interpreted to require more than a consideration of the effects of the imports as stated in Articles 3:2 and 3:3.

4.5.3 Whether the imports under investigation were causing present material injury to the domestic Atlantic salmon industry in the United States

307. **Norway** considered that the affirmative final determination of the USITC in its investigation of imports from Norway of fresh and chilled Atlantic salmon was inconsistent with

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315. The **United States** submitted that Norway's argument that the imports from Norway

causation. The Agreement required that sufficient evidence of the existence of these elements be provided in support of a request for the initiation of an investigation but did not require that a pre-initiation verification be carried out of the information provided on these elements. The position taken by Norway in the proceedings before this Panel would require investigating authorities to carry out an investigation to determine whether a petitioner had the requisite standing. The Agreement did not contain such a requirement.

319. With regard to the determination of dumping made by the Department of Commerce in its investigation of imports of Atlantic salmon from Norway, the **EEC** presented its views on the determination of normal values on the basis of constructed values, rather than on export prices to third countries, the use of the farmers' costs of

323. On the issues raised by Norway regarding the use of statutory minima for profits in the calculation of constructed norma 0 0 1 503.76 745.68 Tm Tm/F8 11 Tf(r) TjETBT1.2 (constructed) TjETBT1 0 0n

VII. FINDINGS

1. INTRODUCTION

328. The Panel noted that the issues before it arise essentially from the following facts: On 12 April 1991, the United States imposed an anti-dumping duty order on imports of fresh and chilled Atlantic salmon from Norway following an affirmative final determination of dumping by the United States Department of Commerce and an affirmative final determination of injury by the United States International Trade Commission (USITC) with respect to these imports. The investigation leading to these determinations was initiated by the Department of Commerce on 20 March 1990 in response to a petition for the initiation of an investigation submitted by the Coalition for Fair Atlantic Salmon Trade, comprised of domestic producers of fresh and chilled Atlantic salmon.

329. Norway requested the Panel to find that the imposition by the United States of the antidumping duty order was inconsistent with the obligations of the United States under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the "Agreement"). In particular, Norway requested the Panel to find that:

- the initiation of the investigation was inconsistent with the requirements of Article 5:1;

- the affirmative final

332. The Panel considered the first group of these objections in the light of the provisions of Article 15:2 through 15:7 of the Agreement concerning consultation, conciliation and panel proceedings. The Panel noted that in each paragraph the drafters of the text had chosen to refer to the subject matter of the dispute in identical terms as "the matter". Consultations would be requested under Article 15:2 "with a view to reaching a mutually satisfactory resolution of the matter"; if a Party considered that such consultations failed to achieve a mutually agreed solution it could refer "the matter" to the Committee for conciliation; in conciliation, the Committee would meet "to review the matter"; and if no mutually agreed solution emerged, a panel had to be established "to examine the matter" if any party to the dispute so requested. This choice of words reflected, in the view of the Panel, the decision to establish a three-step process of settlement of a dispute between Parties concerning a single "matter" and the individual claims of which a matter is composed, in which panel examination of a matter would be preceded by consultations concerning that same matter and conciliation concerning that same matter.

333. The Panel further observed that at the consultation phase, the parties to a dispute were required to consult and thereby provide at least an opportunity for reaching a mutually

as in the present dispute, in which the definition of the matter had been supplied by a written statement prepared entirely by the complaining Party. In the light of these considerations, the Panel concluded that a matter, including each claim composing that matter, could not be examined by a panel under the Agreement unless that same matter was within the scope of, and had been identified in, the written statement or statements referred to or contained in its terms of reference. The Panel further observed that Article 15:5 provided that the Committee "shall … establish" a panel based on such a written statement, and considered that it could therefore not be assumed that the Committee by establishing this Panel with standard terms of reference had decided that the Panel should examine any claim in the written statement, regardless of whether that claim had been the subject of consultations between the parties and conciliation in the Committee.

337. In the view of the Panel the foregoing conclusions were particularly appropriate in view of the nature of disputes concerning antidumping actions, relative to the powers accorded to panels by the Agreement. The requirement to engage in consultations and conciliation served an essential purpose in clarifying the facts and arguments in dispute, and framing the dispute concerning the matter in terms which a panel would be best equipped to resolve.

338. In light of the foregoing considerations, the

therefore considered that the claim in question was not identified in ADP/65 nor in Add.1, and thus reasonable notice had not been provided to the defending party nor to

claim regarding the use by the Department of Commerce of the FOS processing fees. The Panel noted in this context that while

Agreement is being nullified or

and developing the Atlantic salmon farming industry and the market for its

argued th

B. DETERMINATION OF THE EXISTENCE OF DUMPING

365. The Panel then proceeded to examine whether the imposition by the United States of the anti-dumping duty order on imports of fresh and chilled Atlantic salmon from Norway was inconsistent with the obligations of the United States under the Agreement by reason of the affirmative

(1) Procedural issues raised by Norway with respect to the investigation conducted by the Department of Commerce

371. The Panel noted that Norway had raised two specific procedural aspects of the investigation conducted by the Department of Commerce in support of its general claim that the United States had failed to follow fair and equitable procedures: firstly, the period of time given by the Department to exporters to submit responses to a part of the

The question before the Panel was whether, in granting a period of fifteen days for the responses to Section A of the questionnaire, the Department of Commerce had denied the Norwegian exporters "ample opportunity to present in writing all evidence" considered useful in respect of this investigation.

375. While Article 6:1 did not specify minimum periods of time which had to be allowed by investigating authorities to exporters to respond to questionnaires, Norway had referred to a Recommendation adopted by the Committee on Anti-Dumping Practices which provided for a period of thirty days to be given to parties to respond to questionnaires.[209] The Panel considered that Norway's reference to this Recommendation could raise a question as to the legal status to be accorded to this Recommendation in the interpretation of Article 6:1 of the Agreement. However, in the light of its analysis below, the Panel did not find it necessary to pronounce itself on this question.

376. The Panel found the following facts relevant to its consideration of Norway's arguments under Article 6:1 of the Agreement. On 16 May 1990, eight Norwegian exporters under investigation had submitted their responses to the Section A questionnaire issued by the Department of Commerce on 30 April 1990. While these responses were initially due on 15 May 1990, the Department of Commerce had granted a request received on 11 May from counsel for the Norwegian respondents for a one day extension until 16 May.[210] In June 1990, three Norwegian exporters informed the Department that in their responses filed on 16 May 1990 they had not properly responded to the Department's request for a list of farms with which the exporters had dealt during the period of investigation for export to the United States and had provided corrected lists of these farms.[211]

377. The Panel noted that the corrections provided by these three exporters in June 1990 to their initial responses to Section A of the questionnaire had not been rejected by the Department of Commerce as untimely. Thus as a matter of fact the Department had provided these exporters with more than thirty days to provide information in response to Section A of its questionnaire. Nothing in the information before the Panel indicated that, if other exporters (who were represented by the same legal counsel as the three exporters who had submitted the corrected lists) had at the same time submitted similar corrections to the initial lists of farmers provided in May 1990, the Department would have rejected such corrections. Consequently, even if Article 6:1 was interpreted in the light of the period of thirty days mentioned in the Recommendation of the Committee on Anti-Dumping Practices referred to by Norway and this period was interpreted to apply to parts of a questionnaire, the Panel could not find on the basis of the facts before it that the Department of Commerce had acted inconsistently with this provision.

378. The Panel noted Norway's argument that it was inconsistent with Article 6:1 if respondents to a questionnaire had to request for additional time to submit their responses; in the view of Norway, this improperly placed a burden on the respondents. Under Article 6:1 the burden was on the investigating authorities to provide sufficient time for respondents to submit their responses to questionnaires. The Panel considered, that under Article 6:1 investigating authorities were required to give "ample opportunity" to interested parties to present evidence in writing or, upon justification, orally. The Panel found that it could not reasonably be argued that it was inconsistent with this requirement if investigating authorities set an initial time period for responses to questionnaires and

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[209]BISD 30S/30.

[210]Letter from David L. Binder to David Palmeter, 14 May 1990.

[211]Letter from David Palmeter to Robert Mosbacher on behalf of Sea Star International A/S, 12 January 1990; Letter from David Palmeter to Robert Mosbacher on behalf of Chr. Bjelland Seafood A/S, 13 June 1990, and Letter from David Palmeter to Robert Mosbacher on behalf of Salmonor A/S, 14 June 1990.

then left it to respondents to request an extension of this period, if considered necessary by the respondents.

379. In any event, the Panel found that the relevance of this argument to the facts of the case before it was limited. As noted above, at least three exporters had provided the Department of Commerce with corrections to their initial questionnaire responses. These corrections had been submitted well after the expiration of the initial period for the filing of the questionnaire responses. There was no information before the Panel that these exporters had been obliged to somehow make a special request to the Department to be allowed to submit these corrections. Rather, the exporters had simply submitted these corrections, and these corrections had been accepted by the Department of Commerce. As noted above, all exporters had been represented by the same legal counsel and there was nothing in the information before the Panel to indicate that corrections made by other exporters would not have been accepted. The Panel failed to see how under these circumstances the Department of Commerce had somehow put an unreasonable burden on the exporters.

380. In the light of the foregoing considerations, the Panel concluded that the United States had not acted inconsistently with its obligations under Article 6:1 of the Agreement with respect to the time period granted to the Norwegian exporters to respond to Section A of the questionnaire of the Depar

information requirements imposed by the Department of Commerce did not constitute a ground to find that the United States had acted inconsistently with its obligations under the Agreement.

383. Regarding Norway's argument that the Norwegian exporters had been denied an opportunity to present evidence, as required under Article 6:1, in those instances in which the Department of Commerce had relied upon "the facts available" for purposes of calculating costs of production of Norwegian salmon farmers, because the exporters had not had the opportunity to rebut the information used by the Department of Commerce, the Panel considered that, insofar as this argument pertained to an alleged

(vi) inclusion in the constructed normal values of a "freezing charge"; and

(vii) comparison of normal values and export prices.

(2)(i) Export prices to third countries versus constructed normal values

386. The Panel first examined the merits of Norway's claim that, by determining the normal value of the imports of Atlantic salmon under investigation on the basis of constructed values rather than on the basis of prices at which Atlantic salmon was sold for export from Norway to third countries, the United States

resorting to constructed normal values. Article 2:4 did not make the choice of constructed normal values instead of export prices to third

392. The Panel noted in this connection that, as far as the absence of an order of preference between the two alternative methods for establishing the normal value was concerned, Article 2:4 of the Agreement was identical to Article VI:1(b) of the General Agreement. A Report of the Group of Experts on Anti-Dumping and Countervailing Duties, adopted on 13 May 1959, stated that:

> "The Group was of the opinion that paragraph 1(b)(i) and paragraph 1(b)(ii) laid down alternative and equal criteria to be used at the discretion of the importing country but only after it had failed to establish a normal market value under paragraph 1(a) of Article VI."[214]

393. The Panel thus found that under Article 2:4 the United States was not under an obligation to first consider the use of export prices to third countries as a basis for the establishment of normal values before resorting to the use of constructed normal values. In the case under consideration, the Department of Commerce had

397. Norway had also argued that the decision of the Department of Commerce not to use export prices to third countries as the basis for the establishment of the normal value of the imports of Atlantic salmon from Norway was inconsistent with the requirement that "equitable and open procedures" be used in anti-dumping procedures.

398. In this respect the Panel recalled its conclusion that a statement in the preamble of the Agreement could not constitute an independent legal basis upon which the Panel could review the consistency of the actions taken by the United States with the obligations of the United States under the Agreement.[215] Norway had not presented arguments as to how the decision by the Department of Commerce not to use export prices to third countries for the purpose of the determination of normal values was in conflict with specific operative provisions of the Agreement other than Article

of each of the many individual farmers from which they purchased salmon and that the farmers had no knowledge of the ultimate destination of the salmon sold to these exporters. Norway had also observed that in determining the costs of production of the salmon farmers, the Department of Commerce had relied on the acquisition prices paid by these farmers in their purchases of smolt (where these prices were arms-length prices) and had argued that the Department's refusal to rely on the acquisition prices paid by the exporters for the salmon purchased from the salmon farmers was inconsistent with the use of acquisition prices of smolt for the purpose of the calculation of the farmers' costs of production.

403. The United States had pointed out that under Article 2:4 of the Agreement constructed normal values had to be based on "the cost of production in the country of origin" and that, therefore, there was no basis in the Agreement for Norway's view that the Department of Commerce should have relied on the acquisition costs incurred by the Norwegian salmon exporters rather than on the costs of production of the Norwegian salmon farmers. Given that exporters did not produce Atlantic salmon, the

the case before the Panel, the text of Article 2:4 mandated the use of acquisition prices paid by exporters, Norway had not presented such arguments.[219]

407. With respect to Norway's argument concerning the lack of knowledge of exporters of the costs of production of individual salmon farmers and the lack of knowledge of the farmers of the ultimate destination of their sales of Atlantic salmon, the Panel found that their was no information before it indicating that in the circumstances of this case these factors were relevant to the calculation of "cost of production in the country of origin" under Article 2:4. For instance, there was no evidence that costs of production of salmon in Norway varied by destination of the sales.

408. In the light of the foregoing considerations, the Panel concluded that by including in the constructed values the costs of production incurred by the Norwegian farmers of Atlantic salmon, rather than the costs of acquisition incurred by the Norwegian exporters of Atlantic salmon, the United States had not acted inconsistently with its obligations under Article 2:4 of the Agreement.

(2)(iii) Sampling techniques used by the Department of Commerce in the selection of the Norwegian salmon farmers for purposes of its cost of production investigation

409. The Panel then turned to the Norway's claim that the calculation by the Department of Commerce of the cost of production of the Norwegian salmon farmers was inconsistent with the obligations of the United States under Articles 2:4 and 8:3 of the Agreement as a result of the sampling methodology used by the Department of Commerce. The Panel recalled that in

"To ensure complete verification of all sampled farms in a timely manner, we limited the sample for each exporter to a maximum of two farms. For each exporter, we compiled a list of all the farms serving that exporter. Information on the record indicated that production costs in the north exceed such costs in the south. Accordingly, we stratified the group of farms of each exporter."

"Using the lists of farms, we determined the percentage of farms in each region. We then allocated the sample for each exporter on the basis of these percentages. For example, if 60% of the farms were in the north and 40% were in the south, we multiplied 60% by 2 to get 1.2, which when rounded equals 1. We multiplied 40% by 2 to get .8, which when rounded equals 1. We then selected 1 farm for each region. We limited the total sample size to the extent possible by selecting two farms for an exporter only when the allocation scheme indicated that both regions should

not constitute a sample. The respondents also had urged the Department to use a sample of forty-one salmon farms developed by the EEC for purposes of its anti-dumping investigation. In addition, the Norwegian respondents had argued before the Department that there were wide variations of costs of production between individual salmon farmers in Norway and had referred in this context to information gathered by the Government of Norway in annual surveys of the profitability of the Norwegian salmon industry. The Panel considered that the Department of Commerce had thus been presented with a potentially significant issue as to the number of farms to be included in its samples for the purpose of ensuring that these samples would be representative. On the basis of the information before it, the Panel could not conclude that this issue had been properly considered by the Department.

427. Having concluded that this aspect of the sampling technique used by the Department of Commerce was inconsistent with the obligations of the United States under Article 2:4 of the Agreement, the Panel considered whether, as argued by Norway, this also meant that the Department of Commerce had acted inconsistently with the obligations of the United States under Article 8:3 of the Agreement.

428. The Panel noted that Article 8:3 provided that:

"The amount of the anti-dumping duty must not exceed the

investigation.[226] On the other hand, the Department had found that there was a need to develop sample strata in order to account for differences in location of farms in Norway.[227]

433. While the Norwegian respondents had objected to

437. The Panel noted Norway's argument that the Department of Commerce should have weighted the costs of production of the seven farms in the sample by the relative production volumes of the individual farms in order to account for significant cost differences per kg. between large and small farms. Norway had argued in this connection that the Department of Commerce had all the necessary data to compute such a

information before

of the "cost of production in the country of origin" in a manner consistent with Article 2:4. The Panel recalled its observations in paragraphs 413 and 414 regarding the conditions under which sampling techniques could be used for purposes of determining "the cost of production in the country of origin" under Article 2:4. The Panel was of the view that these observations were relevant to its examination of whether in the case before it the United States had properly invoked Article 6:8 with respect to the determination of the costs of production of the Nordsvalaks farm.

448. The Panel therefore considered that, even assuming that the United States could reasonably have found that Nordsvalaks had not provided necessary information within a reasonable period of time and that it was therefore necessary to make its findings regarding the costs of production of Nordsvalaks "on the basis of the facts available", an analysis of whether the United States had acted within its rights under Article 6:8 also required an examination of the data used for Nordsvalaks costs of production in the light of the stated purpose of the sample of seven farms.

449. The Panel observed that, taken literally, it could not be argued that, when the Department of Commerc(it) TjETBT1 0 0 1.96 Tm/F8 11 Tf(Unit9 0 1 198.96 732.72 Tm/F83 11 Tf(costs) TjETBT1 0b/F8 11

(2)(vi) Inclusion in the constructed normal values of a "freezing charge"

452. The Panel then examined Norway's claim concerning the treatment by the Department of Commerce of a NOK 5/kg. freezing charge for the purposes of its calculation of constructed normal values.

453. The Panel noted that the public notice of the affirmative final determination of dumping indicated that "In all cases, for salmon sold on or after January 1, 1990, a five NOK/kg. cost was added to the CV [constructed value] before profit".[233] This cost included in the constructed value corresponded to a fee charged in connection with the financing of a programme under which, beginning in January 1990, a part of the Atlantic salmon harvest in Norway was frozen. In the proceedings before the Department of Commerce, the petitioner and the Norwegian respondents had disagreed as to whether this freezing charge should be included in the constructed normal values as an element of the farmers' costs of production of fresh Atlantic salmon.[234] The Department of Commerce had formulated its position on this issue as follows:

> "This fee is a five NOK/kg. charge assessed on all sales of fresh salmon. Therefore, the amount of the fee incurred by each salmon farmer is completely a function of the amount of fresh salmon it sells. The fact that FOS uses this money to finance a freezing plan is not the deciding factor. The Department considers this fee to be a general expenses and included it as a cost of producing the fresh salmon."[235]

454. As the legal basis of its claim on this issue Norway had indicated that the treatment by the Department of Commerce of this freezing charge was inconsistent with the requirement of a fair and equitable treatment of the Norwegian exporters but had also referred to the provisions of Article 2:4 of the Agreement. In light of the Panel's observations in paragraph 369, the Panel decided to examine this issue on the basis of Article 2:4 which defined the components of a constructed normal value as follows:

> "… the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits."

The legal question before the Panel was whether the treatment by the Department of Commerce of the freezing charge as a general expense to be included in the cost of producing fresh Atlantic salmon by the Norwegian farmers was inconsistent with this part of Article 2:4.

455. In support of its claim on this issue, Norway had argued that the NOK 5/kg. charge was not paid by farmers but by exporters. Therefore, this fee did not represent a cost incurred by producers of Atlantic salmon. In addition, Norway had referred to the objective of the freezing programme; since the fee was charged to finance the freezing of ezing

fee

457. The Panel noted that a key factual element of Norway's argument was that the freezing charge was paid not by the producers of Atlantic salmon (i.e. the salmon farmers) but by the exporters.

458. The Panel reviewed the documentation before it and

taken account of these differences either by calculating separate constructed values for each weight category or, if a single constructed value was used, by comparing this single constructed value to an average export price across different weight categories.

465. The Panel considered that the question before it was whether in

469. As noted above, where normal values had been based on export prices to third countries, the Department of Commerce had made price comparisons for salmon of identical weight categories. The Panel found that this indicated that the Department was aware that differences in weight categories could affect the comparability between these export prices to third countries and the export prices to the United States.

470. The Panel further observed that it had not been contested

475. In support of its claim with respect to this issue, Norway had argued that neither the Agreement nor Article VI of the General Agreement authorized a comparison between an average normal value and individual

479. In reviewing the merits of Norway's claim, the Panel noted that this claim was based on Article 2:6 of the

had created margins of dumping where no such margins would have been found if an average-to-average comparison had been made.

484. The Panel therefore considered that, assuming that the concept of a "fair comparison" in the first sentence in Article 2:6 provided a basis upon which it could

491. In view of the factual nature of some of the disputed issues raised under these provisions the Panel found it appropriate to articulate certain general considerations by which it was guided in its review of the issues raised by Norway.

492. Firstly, the Panel noted the requirement of Article 3:1 of an "objective examination" of the volume of imports, their effect on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of like products. In the view of the Panel, a review of whether a determination of material injury was in conformity with this requirement necessitated an examination of whether the investigating authorities had examined all relevant facts before them (including facts which might detract from an affirmative determination) and whether a reasonable explanation had been provided of how the facts as a whole supported the determination made by the investigating authorities.

493. Secondly, the Panel noted that Articles 3:2 and 3:3 of the Agreement specified how the factors mentioned in Article 3:1 were to be examined by investigating authorities. Article 3:2 required that the authorities "consider" whether there had been a significant price undercutting, price depression or price suppression by the imports in question. Article 3:3 required the investigating authorities to include in their examination of the impact of the imports on the domestic industry "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and contained an illustrative list of those "factors and indices". The Panel noted that Article 3:4, which required a demonstration of a causal relationship between the allegedly dumped imports and material injury to a domestic industry, explicitly referred to the factors set fT.276.72 473.52 Tm/F8 1152 473.52 Tm/F8 11 Tf(fa

497. The United States had argued that the USITC had properly considered whether there had been a significant

502. With respect to the requirement of Article 3:1 that there be positive evidence as a basis for an affirmative determination of injury, the Panel observed that in its statements on the evolution of the (absolute and relative) volume of imports from Norway over the period of investigation, the USITC had relied on data in Tables 17 and 18 in the Annex to its determination.[248] Table 17 contained data on the absolute volume of imports (by quantity and by value) of imports of Atlantic salmon from Norway and other supplying countries for the period 1987-1990, while Table 18 contained data on the relative volume of imports (by quantity and by value) of Atlantic salmon from Norway during this period. The Panel found that the statements made on the volume of imports from Norway in the text of the USITC's determination were supported by the data in these tables and noted in this respect that it had not been argued by Norway that these data were not factually correct.

503. The Panel therefore considered that the statements by the USITC on the evolution of the volume of imports from Norway were based on positive evidence.

504. The Panel noted that Norway's principal claim regarding the USITC's findings on the evolution of the volume of imports was that, when analysed in

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the investigation

Norwegian and U.S. Atlantic salmon, we find that

until late 1990 prices for Norwegian and US Atlantic salmon followed a very similar pattern.".[252] The Panel noted that

if Atlan [redacted] itutable produc [redacted]
priced a [redacted] are, the logi [redacted]
that de [redacted] e United S [redacted]
produc [redacted] buyers [redacted] oduct rather than the
priced [redacted]

522. [redacted] at [redacted] failed to explain why domestic prices in the United [redacted] Norway, instead of Norwegian suppliers having to redu [redacted] ting by suppliers from third countries. Furthermore, the US [redacted] strating that prices of Norwegian Atlantic salmon had a "time [redacted]

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526. Given that, as stated above, the Panel did not consider that Article 3:2 required a finding of price leadership as a condition of a finding of price depression by imports, the Panel also saw no merit in Norway's argument that the USITC had not demonstrated that prices of imports from Norway had a "time lead" on prices for domestic Atlantic salmon in the United States. A finding of price depression under Article 3:2 was not conditional upon a finding that price declines of domestic products were preceded in time by price declines of imported products. The Panel also noted in this connection that Article 3:2 treated price undercutting and price depression as separate possible effects of imports on domestic prices, without giving any greater weight to either of the two. The fact that the USITC's determination did not indicate whether the declines of domestic prices had been preceded by price undercutting by the imports from Norway therefore did not mean that the USITC's finding of significant price depression by the imports from Norway was not based on positive evidence.

527. In light of the foregoing considerations, the Panel concluded that the finding of the USITC that imports of Atlantic salmon from Norway had a significant price depressing effect in the US market was not inconsistent with the obligations of the United States under Articles 3:1 and 3:2 of the Agreement.

(1)(iii) Impact of the imports of Atlantic salmon from Norway on the domestic industry

528. The Panel then examined Norway's claim that the examination by the USITC of the impact on the domestic industry of the allegedly dumped imports from Norway was inconsistent with the obligations of the United States under Articles 3:1 and 3:3 of the Agreement.

529. Norway had argued that the USITC's finding of a negative impact of these imports on the domestic industry had not resulted from an "objective examination" (Article 3:1) of "all relevant facts having a bearing on the state of the industry" (Article 3:3). In support of its view that the findings made by the USITC with respect to the negative impact of the imports from Norway on the domestic industry in the United States were unfounded, Norway had referred to several facts before the USITC which in the view of Norway indicated that this industry had expanded significantly since it had first begun production in 1984. Thus, Norway had pointed to data concerning annual increases in the volume of domestic production capacity to produce juvenile Atlantic salmon

533. In this connection, the Panel noted that the USITC had first discussed a number of non-financial indicators (consumption, capacity and production, shipments and employment) and had then examined a number of financial indicators. The discussion of these specific indicators of the condition of the industry was preceded by a general comment on what the USITC considered to be "distinctive features" of the domestic industry:

> "First, although we have found the industry to be 'established' for purposes of the statute, the industry is nevertheless young and emerging. Second, the Atlantic salmon industry is governed by a three-year production cycle. Some industries are such that firms can respond quickly to changing supply, demand, or other market conditions by adjusting output, employment or prices. Unlike these industries, the supply of U.S. Atlantic salmon, and the corresponding level of labor and other resources necessary to produce that supply, are largely fixed by production decisions made in previous years. Domestic producers' output of adult salmon is essentially a function of the amount of 'juvenile' Atlantic salmon produced in prior years."[257]

534. With regard to the non-financial indicators, the USITC had made the following observations. Firstly, the US market for fresh and chilled Atlantic salmon had grown strongly over the period of investigation, as indicated by data on annual apparent consumption, by quantity and by value. Secondly, production and production capacity of juvenile Atlantic salmon (eyed eggs, fry and smolt) had risen substantially from 1987 to 1989; however, this production and production capacity had leveled off in the full year 1990. Production of adult Atlantic salmon had expanded by more than 200 per cent from harvest season 1987-1988 to 1989-1990. Thirdly, annual shipments in terms of quantity of juvenile Atlantic salmon had grown from 1987 to 1989, followed by a leveling off in 1990. In terms of value, annual smolt shipments had increased several-fold from 1987 to 1989 and had further increased in 1990. Shipments by quantity of gutted Atlantic salmon had tripled from 1987-1988 to 1989-1990; in value terms these shipments had also reflected growth [illegible] of production and related workers had more than doubled in the period 1987 to 1989 and comparable increases had occurred in the hours worked and total compensation. Employment figures for January-September 1990 had been Some

536. After discussing these various indicators of the condition of the domestic industry, the USITC evaluated the data before it for purposes of determining whether the domestic industry in the United States was experiencing material injury. With respect to the non-financial indicators, the USITC observed that because the US Atlantic salmon industry was young, it was not unexpected to find expansion in such factors as capacity, production, shipments, and employment, as was seen between 1987 and 1989. It was also noted that steady or increasing employment was expected also because of the three-year production cycle in the industry. The USITC then noted that the increase in capacity and production of juvenile salmon had largely levelled off since 1989, despite increasing domestic demand in 1990 and observed that, given the nature of the production cycle, a flattering in growth of production of young salmon indicated that production of adult salmon would flatten as well. From these observations, the USITC concluded that:

> "… the US industry is not presently on the road to further expansion to achieve economies of scale in production

the USITC's determination. In the view of the Panel, the USITC had provided a reasonable explanation of why, in light of the negative financial performance of the industry, the industry was experiencing material injury, notwithstanding the growth of certain non-financial indicators.[261] The Panel therefore could not find that the USITC had not carried out an objective examination of the evidence before it.

540. For the same reasons,

industry and "isolate" and "exclude" the effects of such other possible causes of injury from the effects of the imports under investigation. By not conducting such an examination, the USITC had failed to ensure that it was not attributing to imports from Norway injury caused by other factors, and had failed to demonstrate that material injury was caused by the allegedly dumped imports from Norway.[262]

546. The United States had argued that the USITC had properly determined, based on volume and price effects of the imports from Norway, that these imports were causing material injury to the domestic industry in the United States. The USITC had explicitly considered the alternative factors mentioned by the Norwegian

> time are injuring the domestic industry, and the injuries caused by other factors must not be attributed to the dumped imports."

Footnote 4 provided: "As set forth in paragraphs 2 and 3 of this Article." Footnote 5 provided that:

> "Such factors can include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the pattern 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."

The Panel was presented with divergent interpretations by the parties to the dispute of the nature of the obligations of Parties under Article 3:4 with respect to the treatment of factors other than the imports under investigation which might cause injury to a domestic industry. The basic question of interpretation before the Panel was whether, in order to demonstrate that the allegedly dumped imports caused material injury to a domestic industry, the investigating authorities were required to carry out a thorough examination of all possible causes of injury and "isolate" or "exclude" injury cased by such other factors from the effects of the imports subject to investigation. In this connection, the Panel noted that Norway had not argued that Article 3:4 required that imports under investigation be the sole cause of material injury to a domestic industry. Rather, the issue before the Panel concerned the weight accorded under Article 3:4 to an analysis of the effects of factors other than the imports under investigation for purposes of determining whether the imports under investigation were causing material injury to a domestic industry.

550. The Panel found that two aspects of the text of Article 3:4 were particularly relevant to its analysis of this question. Firstly, footnote 4 to the first sentence of Article 3:4 linked the requirement to demonstrate that the dumped imports are, through the effects of dumping, causing material injury to a domestic industry to a specific analysis of the volume and price effects of the imports and the consequent impact of the imports on the domestic industry, as set forth in Articles 3:2 and 3:3. These latter provisions contained mandatory factors to be considered in each case by investigating authorities. Secondly, the specific and mandatory nature of the analysis required under the first sentence of Article 3:4 (through the reference in footnote 4 to Articles 3:2 and 3:3) contrasted with the second sentence of Article 3:4 which provided

Article 3:4 was explicit and specific with regard to the required analysis of the effects of the imports under investigation.

552. The Panel therefore found that the text of Article 3:4 did not support the view that this provision required a thorough examination of all possible causes of injury, which was to be somehow just as important as the analysis under Articles 3:2 and 3:3 of the effects of the imports. The primary focus of Article 3:4 was on the examination of whether allegedly dumped imports caused the effects described in Articles 3:2 and 3:3. The second sentence of Article 3:4 did not contain an express general requirement to consider all possible factors other than the imports under investigation which might be causing injury to the domestic industry. While the need for such a consideration might be implied from the requirement that injuries caused by other factors not be attributed to the imports under investigation, it followed from the wording of the beginning of the second sentence in Article 3:4 that the relevance of a consideration of other factors was to be determined on a case-by-case basis. Furthermore, the focus of the second sentence in Article 3:4 was on the requirement that injuries caused by other factors not be attributed to the imports under investigation, not on a precise identification of the extent of injury caused by these possible other factors.

553. The Panel was of the view that its interpretation of Article 3:4 was not contradicted by the reference made by Norway to the drafting history of this provision. Norway had referred to the following draft of the provision now appearing in Article 6:4 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement, contained in one of the draft Arrangements discussed

by factors other than these imports. The Panel therefore proceeded to consider whether in its investigation the USITC had conducted such an examination.

556. The Panel noted in this respect that Norway had argued that any material injury to the domestic Atlantic salmon industry in the United States was caused by factors other than imports from Norway, including (i) the significant increase in the volume of imports of Atlantic salmon from third countries; (ii) the effects of the increased supplies of substitute products, and (iii) the effects of internal problems in the domestic industry in the United States.

557. With regard to the first factor mentioned by Norway, the Panel noted that the USITC had before it data on the evolution of the volume of imports from all supplying countries.[266] The USITC had stated in its determination, with reference to these data, that:

> "Although other factors may have contributed, the decline in U.S. prices for Atlantic salmon in 1988 and 1989 was due in large part to oversupply in the U.S. market. Imports from Norway accounted for a large portion of the increased imports in 1989. This suggests that Norwegian Atlantic salmon played a rôle in the price deline."[267]

This statement indicated in the view of the Panel that the USITC had specifically found that imports from Norway, by reason of their proportion of the increased imports in 1989, had contributed to price declines in the United States market. The Panel considered that the USITC's finding regarding the proportion of increased imports in 1989 accounted for by imports from Norway was supported by the data before the USITC.[268] When the amount of the increase in absolute import volume from Norway from 1987 to 1989 was compared to the amount of the increase in absolute import volume from other supplying countries, it could not, in the view of the Panel, reasonably be found that the USITC had attributed to the Norwegian imports effects entirely caused by imports from other supplying countries.

558. With regard to the second factor mentioned by Norway (the effects of Pacificf

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"It must be demonstrated that the dumped imports are, through the

provided greater precision as to the manner in which the causal relationship between the subsidized imports and material injury to a domestic industry was to be established.

571. The Panel concluded that by treating the "effects of dumping" in the first sentence of Article 3:4 to mean the effects of dumped imports, set forth in Articles 3:2 and 3:3, the USITC had not acted inconsistently with the obligations of the United States under Article 3:4.

572. The Panel then analysed Norway's claim that the USITC had acted inconsistently with Arti

that Norwegian salmon

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the imports in question were no longer causing injury were sufficient to require a Party to terminate the imposition of these duties, the logical result would be that any anti-dumping duty which was effective

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1. FRESH ATLANTIC SALMON: U.S. IMPORTS FROM NORWAY, CANADA, CHILE, ICELAND, THE UNITED KINGDOM, IRELAND, THE FAROE ISLANDS, AND ALL OTHER COUNTRIES,[1] 1987-90
(USITC Publication No. 2371, Table 17, p.A-43)

Source	1987[2]	1988[2]	1989	1990[3]
	Quantity (1,000 kg.)			
Norway	7,610	8,895	11,396	7,699
Canada	700	1,137	2,958	4,889
Chile	42	118	557	4,077
Iceland	78	322	472	1,012
The United Kingdom	529	353	1,011	901
Ireland	47	310	426	333
The Faroe Islands	-	35	478	53
All other countries	600	177	207	133
Total	9,606	11,347	17,505	19,098
	Value (1,000 dollars)[4]			
Norway	74,404	89,987	93,672	66,440
Canada	5,719	10,499	22,145	36,636
Chile	316	962	3,876	27,296
Iceland	792	3,061	3,262	7,084
The United Kingdom	5,588	4,122	9,167	8,288
Ireland	471	3,058	3,486	2,887
The Faroe Islands	-	349	3,472	415
All other countries	5,189	1,699	1,473	1,064
Total	92,479	113,737	140,553	150,110
	Unit value (dollars per kg.)			
Norway	$9.78	$10.12	$8.22	$8.63
Canada	8.17	9.23	7.49	7.49
Chile	7.58	8.19	6.95	6.70
Iceland	10.14	9.52	6.91	7.00
The United Kingdom	10.57	11.69	9.07	9.20
Ireland	10.10	9.88	8.19	8.66
The Faroe Islands	(5/)	10.08	7.26	7.87
All other countries	8.64	9.62	7.13	7.99
Average	9.63	10.03	8.03	7.86

[1] Includes imports from countries where

3. FRESH ATLANTIC SALMON: U.S. MONTHLY IMPORTS FROM NORWAY JANUARY 1989-DECEMBER 1990, BY VOLUME AND VALUE

1989 imports from Norway

	Kilograms	$1,000
January	1,045,47	9,634
February	931,553	8,436
March	905,392	8,022
April	947,617	8,117
May	850,993	7,173
June	890,290	7,124
July	907,416	7,069
August	777,686	6,076
September	931,664	7,290
October	1,042,322	8,246
November	1,016,305	7,758
December	1,148,849	8,728
Total	11,395,566	93,672

1990 imports from Norway

	Kilograms	$1,000
January	779,602	6,285
February	743,648	6,147
March	829,449	7,075
April	977,763	8,393
May	916,710	8,030
June	830,847	7,302
July	847,433	7,183
August	650,351	5,784
September	426,714	3,794
October	287,832	2,651
November	230,270	2,073
December	188,646	1,723
Total	7,699,265	66,440

Source: Data included in the record of the USITC's investigation and provided by the United States to Norway on 8 June 1991.

4. LETTERS ADDRESSED TO THE PANEL BY NORWAY AND THE UNITED STATES ON 12 AND 13 NOVEMBER 1992 RESPECTIVELY, AND LETTER BY THE PANEL TO NORWAY DATED 20 NOVEMBER 1992

Letter from the Delegation of Norway[277]

Initiation Standards

The view of the Panels as stated in the panel reports is that it was reasonable for the DOC to initiate the investigations relying solely upon a statement in the petition concerning support from the US salmon industry, thus implying that the DOC is not required under the Codes to satisfy itself on its own, prior to investigation, that a petition is filed on behalf of the domestic industry.

Norway regards the Panels' view to be unpersuasive in respect of the matter of principle, i.e. the content of the requirement in the AD Code's Article 5:1 and the CVD Code's Article 2:1, respectively. In Norway's view, the Panels' findings are contrary to the Code requirements as expressed in previous panel reports.

Norway notes that in the Swedish Steel case, in which no member of the domestic industry stated any opposition or lack of support (Swedish Steel panel report at paragraph 3.19), the Panel found that the petition did not on its face support the statement in the petition that it was filed on behalf of the domestic industry because

Letter from the United States Trade Representative

13 November 1992

Dear Mr. Chairman,

My authorities have instructed me to respond to the letter of November 12 from the Government of Norway requesting that the Panels reconsider various issues in their Anti-Dumping and Countervailing Duty reports.

The United States does not share the views expressed by Norway. It believes that the Panels have fully and carefully addressed all of the issues cited in the enclosure to Norway's letter. 12Norway

Reply by the Panel to the Delegation of Norway

20 November 1992

Dear Ambassador Selmer,

The Panels in the disputes on anti-dumping and

it led the Panel to conclude that the United States had not acted inconsistently with its obligations under Article 5:1 of the Anti-Dumping Code. In paragraph 364, the Panel explicitly stated

must not attribute injury from other factors to

significant

information available to the Panel. With regard to the determination of dumping, the Panel in the anti-dumping dispute has carried out a detailed examination of whether certain decisions taken by the Department of Commerce were reasonable in light of the information before it. As reflected in the Panel's findings, with respect to three issues the Panel concluded that this was not the case. If, as you suggest, the Panel had not been prepared "… to take a stand regarding the United States decisions made on the basis of

concluded