GENERAL AGREEMENT ON

TARIFFS AND TRADE

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

REQUEST FOR CONCILIATION UNDER ARTICLE 15:3 OF THE AGREEMENT

Communication from Norway

I. BACKGROUND AND INTRODUCTION

In the 1960s, the idea of farming salmon on an industrial scale was conceived in Norway, where it was developed and commercialized in the mid-1970s. During the 1980s, the Norwegian salmon industry established and expanded an international market for fresh salmon on a year-round basis.

Today, more than 700 fish farms are located along the Norwegian coastline. Most of these installations are very small, some are run on a husband-and-wife basis or with one or two employees. Approximately 70 exporters process the fish and sell fresh Norwegian salmon on international markets.

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On 28 February 1990, a petition was filed with the United States Department of Commerce (DOC), alleging that imports of salmon from Norway were dumped and causing material injury to the United States salmon industry.

The DOC period of investigation (POI) was 1 September 1989 through 28 February 1990.

In April 1990, the United States International Trade Commission (ITC) made a preliminary affirmative determination of material injury. On 3 October 1990, a preliminary affirmative determination was made by the DOC, and preliminary anti-dumping margins ranging from 0.13 per cent to 4.9 per cent for eight exporters were found. An average of 2.96 per cent was applied to all other exporters.

In the DOC final determination of 25 February 1991, dumping margins for seven exporters were calculated, ranging from 15.65 per cent to 31.81 per cent. For the eighth exporter, the highest margin (31.81 per cent) was applied as Best Information Available (BIA). The average of the eight margins, 23.8 per cent, has been applied to all other exporters. In its final determination, effective as of 16 April 1991, a 3 to 1 majority in the ITC found that an industry in the United States had been materially injured by reason of the imports of Norwegian salmon.

Acting Chairman Brunsdale of the ITC came forward with the following dissenting views in the final determination by the ITC: "The majority's conclusion is unsupported by substantial record evidence and may well be contrary to law".

The imposition of the duties has had the effect of an embargo: the imports from Norway have decreased from 1261 tons in May 1990 to a mere 24 tons in May 1991.

It is the opinion of the Government of Norway that the duties imposed are not in conformity with the provisions of the Anti-Dumping Code, and thus nullify or impair benefits accruing to Norway.

Consultations with the United States were held under Article XXII:1 of the General Agreement in March 1991. Consultations under Article XXIII:1 of the General Agreement were held on 2 May 1991. Norway and the United States have agreed to consider these consultations as consultations under Article 15.2 of the Anti-Dumping Code. A further round of consultations was scheduled for 4 July 1991, but was cancelled at the request of the United States.

The consultations have failed to achieve a mutually acceptable solution.

The main issues in this case are the standing of the petitioner, the United States determination of dumping, and the United States determination of material injury.

Norway reserves the right to raise any subject at a later stage in the dispute settlement process.

II. STANDING OF THE PETITIONER

According to Article 5:1, an investigation of alleged dumping shall normally be initiated upon a written request by or on behalf of the industry affected. The industry is defined in Article 4:1 as the domestic producers as a whole of the like products or those of them whose output of the like products constitutes a major proportion of the total domestic production of those products.

In the panel report concerning the Swedish Stainless Steel Pipe Case (ADP/47, paragraph 5.19), the panel concluded that investigating authorities are required to satisfy themselves, before opening an investigation, that a written request has been made on behalf of a domestic industry within the meaning of the provisions in Articles 5:1 and 4:1. The DOC's failure to do so in the Steel Pipe case was found to be a violation of the Code.

Even so, it appears that the DOC did not conduct any investigation in this case to satisfy itself that the petition was made on behalf of the domestic salmon industry in the United States, notwithstanding statements by several US producers that they did not support the petition. Consequently, the investigation concerning Norwegian salmon was not initiated in conformity with the provisions of the Anti-Dumping Code.

III. DETERMINATION OF DUMPING

Article 2:4 states that if there are no domestic market sales of the like product in the ordinary course of trade or where the particular market circumstances do not permit a proper comparison, the investigating authority may look to either third country sales or cost of production plus reasonable administrative, selling and other costs plus profit.

The methods used by the DOC did not provide for a fair calculation for several reasons.

The DOC calculated the cost of production to the farmers plus exporters' expenses, instead of the cost of production to the exporters, which would be based on the acquisition costs.

The Norwegian farmers whose costs the DOC examined did not know the ultimate destination of the salmon. The exporters purchased from many farmers, and could not know their suppliers' cost of production. Consequently, the comparison should be based on exporters' acquisition price plus exporters cost.

Instead, the DOC requested information about the costs of only eleven farmers even though in the POI each exporter bought fish from eighteen to 100 farms. There are a total of approximately 700 farms in Norway. Of these, 307 farms have been subject to veterinary control according to United States procedures, a prerequisite for producing for the United States market, and consequently might have produced salmon that was exported to the United States during the POI.

The eleven farmers were selected as follows: for each exporter, if that exporter had 75 per cent of its purchases from either the north or the south of the country, one farm was chosen at random from the relevant portion of the country. If the exporter had less than 75 per cent from one of the two areas, then one farm was chosen at random from each of the two areas. As a result, eleven farms were chosen for the eight exporters. Consequently, only one or two farms were used to represent the cost figure to be applied to each of the eight exporters.

The DOC stated that these eleven farms constituted a representative sample of all salmon farms in Norway for purposes of determining the cost of production of salmon exported to third countries. The DOC used no recognized sampling technique to determine whether it had a statistically representative sample of farms supplying the United States, much less farms supplying third countries, which was the use to which the sample was put.

The DOC had drawn the names of the farmers from lists supplied by the exporters within a 15-day time-frame. The information on which these lists were based were collected early in the investigation and intended for general information. Moreover, the exporters had to manually search their records to provide this information. The DOC knew the information supplied was not completely accurate. Even so, the DOC chose the initial eleven farms from these lists, without seeking further information.

On review of the information, the exporters discovered, and notified the DOC, that four of the eleven farmers had sold at most minimal amounts of salmon to the exporters that were exported to the United States during the period of investigation. Therefore, these four farms were dropped from the sample and the DOC sent questionnaires to only the seven remaining farms.

Having determined that the remaining seven farms constituted a representative sample, the DOC nevertheless determined that costs for the seven remaining farms could not be weight-averaged because this would not give representative results. Instead, the DOC used a single simple average. Use of a simple average, rather than a weighted average, for farms of different sizes and cost levels greatly increased the average cost.

A GATT Anti-Dumping Code Committee recommendation (ADP/21) concerning the use of BIA has been adopted. Where the DOC determined information was missing or incorrect, it used BIA - normally the inference most adverse to the exporters. Since all costs were averaged together in a single simple average cost for all seven farms, the exporters that provided all the correct information requested were penalized for alleged failures by other firms. The DOC created a situation in which exporters, although they had withheld no information, but to the best of their ability responded to the DOC's extensive questionnaires, were penalized for the supposed failure of the farmers to provide "adequate" information, even though the exporters had no control over the information provided.

A GATT Anti-Dumping Code Committee recommendation (ADP/19) stipulates that respondents should have at least 30 days to respond to a questionnaire. Exporters were given only two weeks to respond to Section A of the DOC's questionnaire. In a case such as this one, where each exporter was supplied by many farmers, 15 days is not sufficient to determine accurately the exact day of sale for each sale to the United States. Consequently, the exporters cannot be considered unco-operative if some of the data supplied under such conditions was incomplete or inaccurate.

For calculation of the farmers' COP, the DOC divided the general and administration expenses and interest on the quantity sold. However, in any given year, the quantity of salmon being farmed will vary from the quantity sold in that year due to the 2-3 year lifecycle of the subject merchandise. General and administration expenses and interest therefore should be calculated as the expenses incurred during the 18-24 months prior to the POI for the yearclass sold during the POI.

In January 1990. the Norwegian salmon industry voluntarily introduced a freezing programme in order to stabilize the world market prices for fresh salmon. The Salmon Farmers' Sales Organization ("FOS") buys fresh salmon from farmers at fixed minimum prices. FOS freezes it and sells it later as frozen salmon. To finance this programme, farmers are assessed NOK 5,- per kilogram fresh salmon that they sell. DOC included the assessment for the freezing programme in the COP calculation for fresh salmon, and consequently in the dumping margin, even though the effect of the freezing programme is to raise prices for fresh salmon on world markets.

The DOC has a special methodology for perishable products which recognizes some of the market realities for such products. The DOC determined that fresh salmon is not a perishable product despite evidence on the record to the contrary and despite the ITC's information that salmon is highly perishable. The salmon must be slaughtered before it reaches sexual maturity. If not, it loses quality and cannot be exported.

The DOC compared Constructed Value (CV) with individual export prices, after having calculated one single average COP per pound for all sizes of salmon. When a single COP and CV is used for all sizes of salmon, then a fair comparison can be effected only be use of a single average export price.

CONCLUSION

The DOC i.a. calculated CV on the basis of farmers' costs and not on the exporters' costs, did not use statistically valid sampling and averaging techniques, used BIA in an arbitrary and unwarranted manner, did not respect time-limits agreed to by the Anti-Dumping Committee, arbitrarily allocated expenses, and did not recognize fresh salmon as a perishable product.

The methods and calculations used by the DOC could neither lead to a representative COP, nor possibly lead to a fair comparison between the export price and the CV.

Norway is of the opinion that the determination of dumping made by the DOC is not in conformity with the GATT Anti-Dumping Code, Articles 2 and 8 in particular.

IV. DETERMINATION OF MATERIAL INJURY

A. Volume

According to Article 3:1 of the Code, determination of material injury shall be based on positive evidence and involve an objective examination of the volume of the dumped imports. Article 3:2 states that the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country.

The ITC has determined that there was a significant increase in the imports from Norway during the period 1987-1989. In this respect, Norway would like to bring the following to the attention of the Committee.

In April 1991, at the moment of the final material injury determination, Norway exported less than 15 tons to the United States, compared to 1075 tons in April 1990 and 1258 tons in April 1989.

Second, during the POI (i.e. during the six months prior to the filing of the petition), Norway exported a total of 5984 tons to the United States, as compared to 6132 tons for the corresponding period during the previous year (September 1988-February 1989). Consequently, Norwegian exports actually decreased when the POI is compared with the same period the previous year.

Third, during the period 1987-1989, when United States shipments and imports from all countries rose sharply, imports from other countries rose relatively more than imports from Norway (Table 1).

As regards consumption, the United States market for fresh and chilled Atlantic salmon grew strongly during the period 1987-1990. The data made available show a 54 per cent increase in consumption in the United States market from 1988 to 1989 (Table 2).

Imports of fresh salmon from all countries except Norway grew rapidly from 1987 to 1990 (Table 1 and Figure 1). While imports from Norway stayed the same, imports from Canada and Chile showed a dramatic increase. The entire expansion in United States imports has been supplied by Canada and Chile. Consequently, the Norwegian market share declined; from 75 per cent in 1987 to 60.2 per cent in 1989 to 36.7 per cent in 1990.

In summary, an objective examination of the information concerning volume cannot lead to the conclusion that there has been a significant increase in imports from Norway.

B. Prices

Article 3:1 obliges the investigating authorities to conduct an objective examination of the volume of the dumped imports and their effect on prices in the domestic market.

According to Article 3:2, the investigating authorities shall consider whether the effect of the imports is to depress prices to a significant degree.

In its final determination, the ITC found that imports from Norway significantly depressed prices for the like product.

Import prices for Norwegian salmon have, on a general yearly average, been above the average prices for salmon from other countries every year since 1987 (Table 3 and Figure 2).

Moreover, the monthly wholesale market prices for Norwegian salmon were consistently higher than those for United States, Canadian and Chilean salmon during the entire POI (Figure 3).

Furthermore, the gap between prices for United States salmon and Norwegian salmon widened from the middle of 1990.

The available data demonstrate that Norwegian salmon has been sold at prices significantly above the prices for salmon from United States producers and main competing countries.

Norway finds that the United States has not made an objective examination of the volume of the alleged dumped imports and their effect on prices in the United States market.

C. Impact on the United States industry

According to Article 3:1, a determination of material injury shall involve the examination of the consequent impact of the imports on domestic producers.

Moreover, according to Article 3:3, the examination shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry. The list of such factors or indices is not exhaustive, nor can one or several of these factors necessarily give decisive guidance. The overwhelming evidence concerning relevant factors and indices shows that the United States industry was not harmed.

United States capacity and production rose strongly during most of the period 1987-1990, as producers responded to increased demand for the subject product. The United States market for fresh and chilled Atlantic salmon grew strongly during this period. Employment indicators also reflected growth during the period 1987-1989.

The salmon industry is governed by a three-year production cycle. Based on the data on record, it is the Norwegian view that the United States industry is going through a normal development, and that it has not suffered any material injury.

The United States has not demonstrated material injury to a domestic industry as required by the Code.

D. Causal link

According to Article 3:4, it must be demonstrated that the dumped imports are, through the effects of dumping, causing material injury.

The ITC has determined that an industry in the United States has been materially injured by reason of imports of fresh and chilled Atlantic salmon from Norway.

The ITC has made one collective determination concerning alleged material injury for both the anti-dumping case and the countervailing duty case. There has been no investigation and no determination concerning alleged material injury caused exclusively by alleged dumped salmon from Norway. Consequently, Norway is of the opinion that the United States has failed to demonstrate material injury through the effects of allegedly dumped salmon.

If the United States industry has been materially injured, then one or a combination of several other factors not related to the subject imports (e.g. the huge landings of wild Pacific salmon, problems due to mismanagement, the strong increase in imports from other countries, the fact that the United States industry is not capable of marketing its product on a year-round basis, as are the Norwegians) accounted for the alleged material injury to the United States industry.

If the effects of the alleged dumped salmon truly had been causing material injury, the embargo-like effect of the duties would have had an obvious and easily identifiable effect on the development of the United States salmon industry. However, this has not been the case. Prices for Norwegian salmon were well above those of salmon from competing countries before the DOC final determination. However, after the virtual disappearance of Norwegian salmon from the United States market, prices for United States produced salmon have not gone up.

The United States has not demonstrated that an industry in the United States is being materially injured by the effects of the alleged dumping of salmon from Norway within the meaning of Article 3:4.

E. Alleged material injury at the time of the final material injury determination and unnecessary duties

According to Article 3:4, it must be demonstrated that the imports are causing material injury to a domestic industry. The ITC has determined that the United States salmon industry is experiencing material injury. The ITC has disregarded the changed circumstances between the date of the petition and the date of the final determination, and has assumed that imports that may once have caused material injury continue to do so.

The situation at the time of the ITC final material injury determination was clear: no material injury was inflicted on a United States industry by reason of imports from Norway.

Article 9 clearly states that duties shall remain in force only as long as, and to the extent necessary, to counteract dumping which is causing material injury. The United States duties have had the effect of an embargo, and imports from Norway are at present almost non-existent.

Norway finds that the determination to impose prohibitive anti-dumping duties cannot be considered necessary to counteract any alleged dumping.

Consequently, the United States action is not in conformity with Articles 3:4 and 9.

F. Conclusions concerning material injury

The record does not support the ITC conclusion that an industry in the United States has been materially injured, neither at the time of the final determination, nor during the POI, nor in the period 1987-1990. Furthermore, no causal link has been proven, as the United States has failed to demonstrate that, even if there were a materially injured industry in the United States, the material injury is caused by the effects of the alleged dumping of salmon from Norway.

V. CONCLUSIONS AND FURTHER PROCEDURE

Norway fails to see that the United States has demonstrated dumping and material injury and a causal link between these as required by the provisions of the Code. Norway consequently considers that the duties imposed by the United States are in contravention of the United States obligations under the relevant provisions of the Anti-Dumping Code, and constitute a case of nullification or impairment of the benefits accruing to Norway.

As no mutually acceptable solution has been found through bilateral consultations, Norway requests the Committee on Anti-Dumping Practices to examine the matter for conciliation under Article 15:3 of the Anti-Dumping Code.

FRESH AND CHILLED ATLANTIC SALMON - TABLES

Table 1: US IMPORTS 1987-1990 (tons)
Fresh and Chilled Atlantic Salmon

COUNTRY	1987	1988	1989	1990	Change 1987-1989 TONS	Change 1987-1989 %	Change 1987-1990 TONS	Change 1987-1990 %
NORWAY	7610	8895	11396	7699	3786	49.75%	89	1.17%
CANADA	700	1137	2958	4889	2258	322.57%	4189	598.43%
CHILE	42	118	557	4077	515	1226.19%	4035	9607.14%
ICELAND	78	322	472	1012	394	505.13%	934	1197.44%
UK	529	353	1011	901	482	91.12%	372	70.32%
IRELAND	47	310	426	333	379	806.38%	286	608.51%
OTHER	600	212	685	186	85	14.17%	-414	-69.00%
TOTAL	**9606**	**11347**	**17505**	**19097**	**7899**	**82.23%**	**9491**	**98.80%**

Table 2a: US CONSUMPTION 1987-1990 (%)
Fresh and Chilled Atlantic Salmon

From	1987	1988	1989	1990
NORWAY		72.97%	60.20%	
CANADA		9.31%	15.64%	
CHILE		0.97%	2.94%	
US		7.06%	7.46%	
OTHER		9.80%	13.71%	
TOTAL(%)		**100%**	**100%**	

Table 2b: US CONSUMPTION 1987-1990 (Tons)
Fresh and Chilled Atlantic Salmon

From	1987	1988	1989	1990
NORWAY		8895	11396	
CANADA		1137	2958	
CHILE		118	557	
US		862	1412	
OTHER		1197	2594	
TOTAL (tons)		**12209**	**18917**	

Source: Based on USITC Publication 2371 - April 1991: Determination

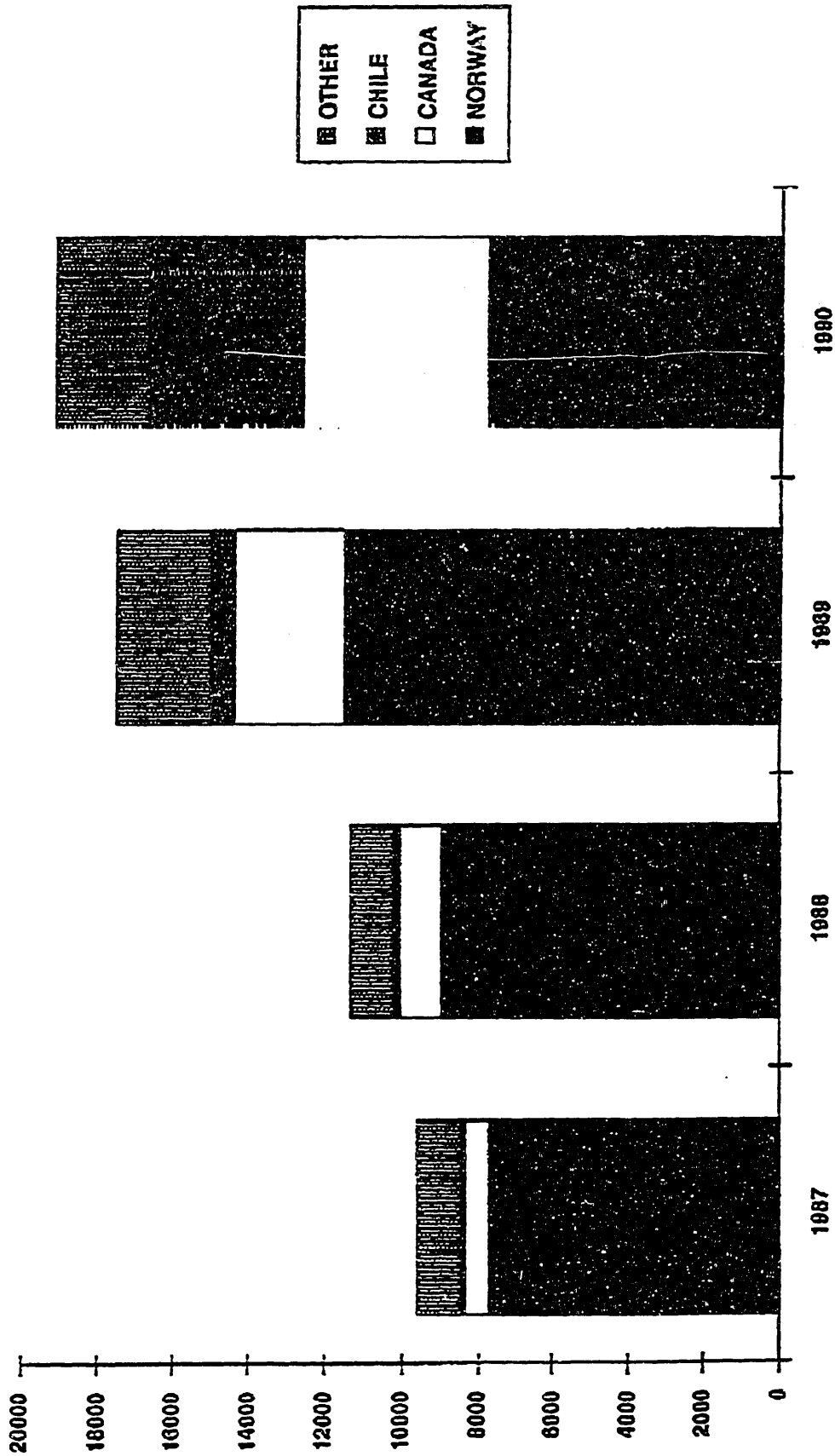
Table 3: US PRICES 1987-1990 (US$ PER KG)
Fresh and Chilled Atlantic Salmon

COUNTRY	1987	1988	1989	1990
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	6,7
ICELAND	10,14	9,52	6,91	7
UK	10,57	11,69	9,07	9,2
IRELAND	10,1	9,88	8,19	8,66
FAROE ISLANDS		10,08	7,26	7,87
OTHER	8,64	9,77	7,13	7,99
AVERAGE	**9,28**	**9,81**	**7,65**	**7,94**

Source: Based on USITC Publication 2371 - April 1991: Determination

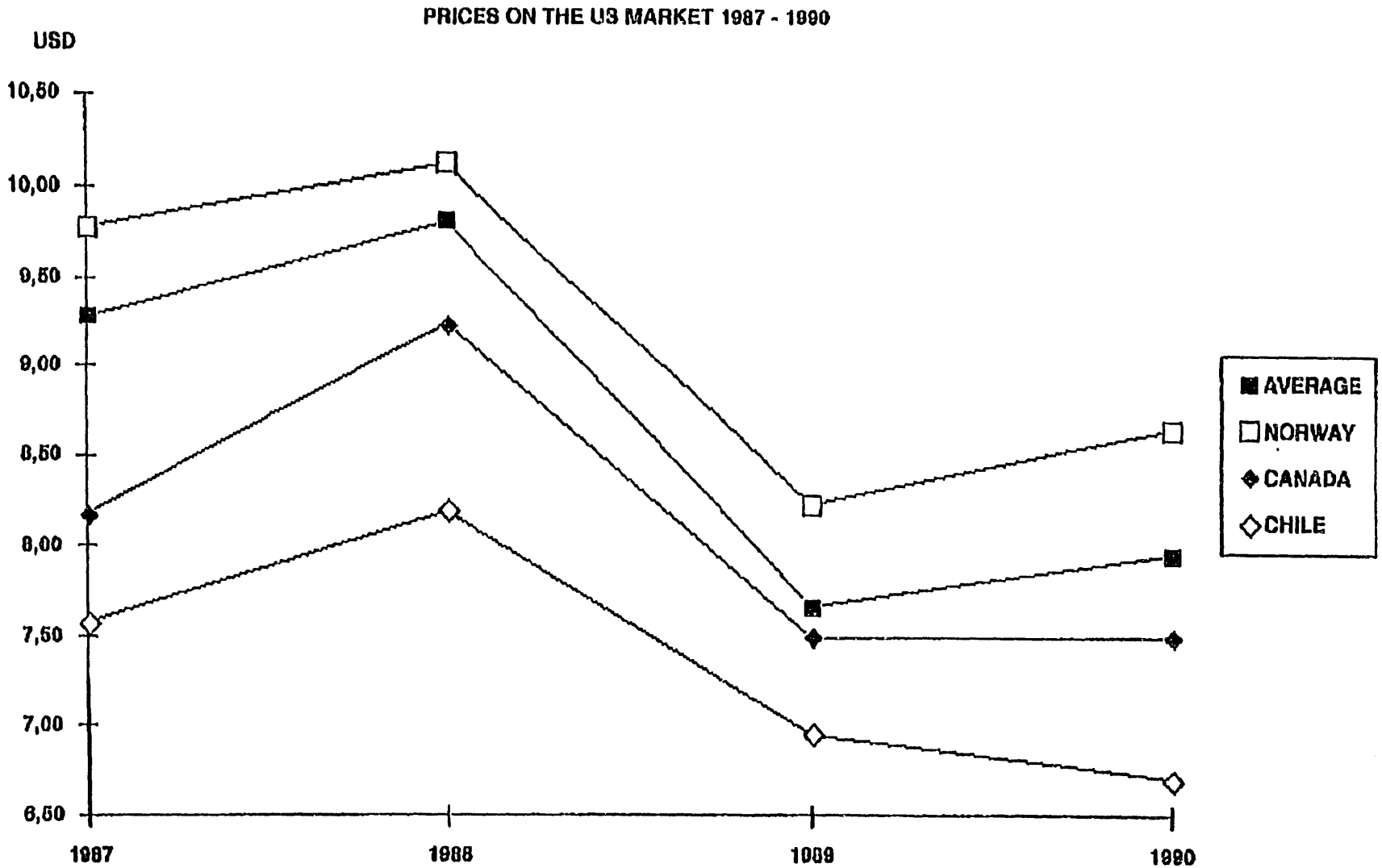
Fresh and Chilled Atlantic Salmon : FIGURE 1

US IMPORTS 1987 - 1990 (tons)



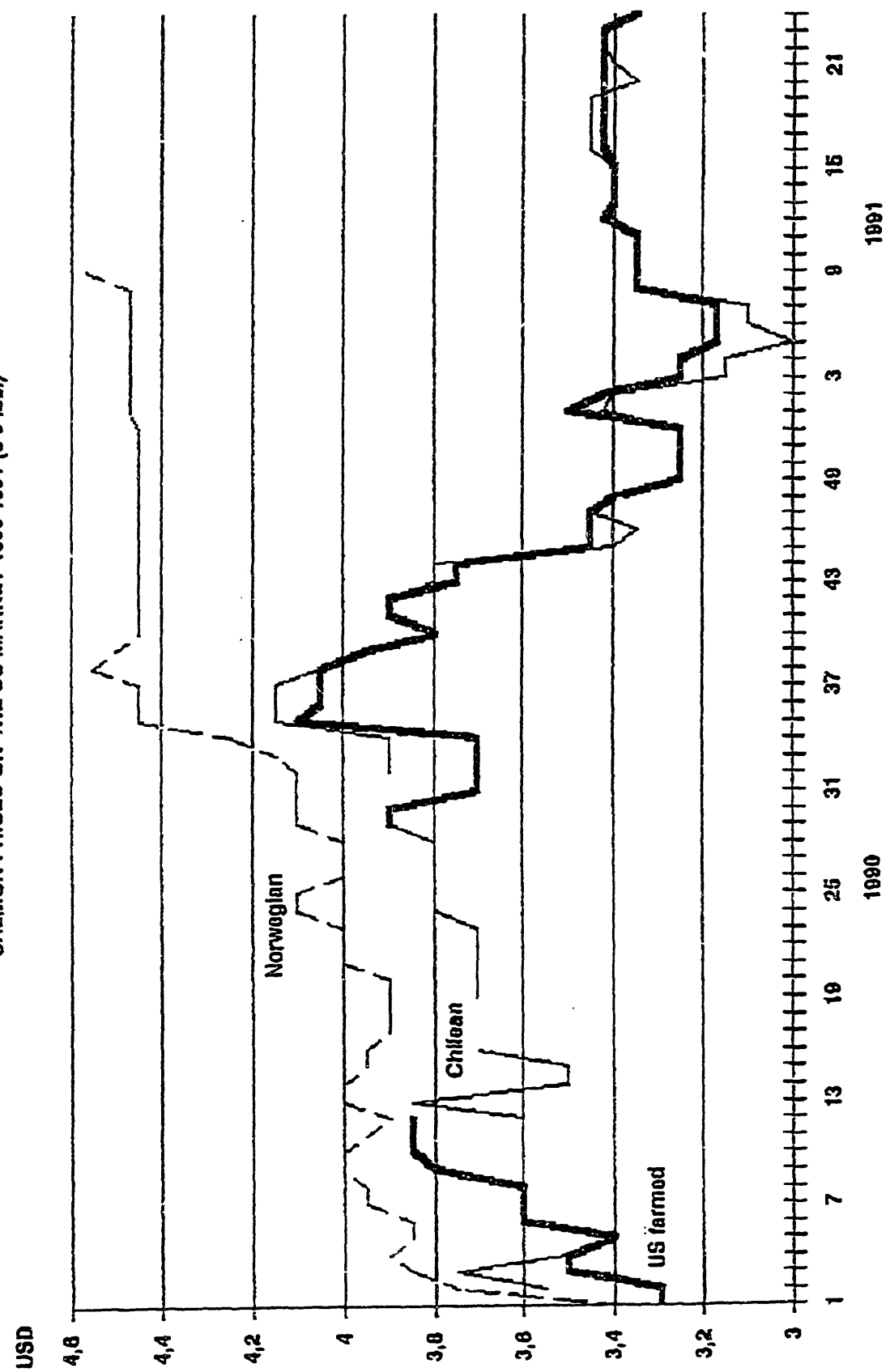
Source: Based on USITC Publication 2371 - April 1991 : Determination

Fresh and Chilled Atlantic salmon : FIGURE 2



Source: Based on USITC Publication 2371 - April 1991 : Determination

Fresh and Chilled Atlantic salmon : FIGURE 3



Source: Urner Barry weekly data