

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

*Report of the Panel adopted by the Committee on Subsidies and  
Countervailing Measures on 28 April 1994 (SCM/153)*

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## I. INTRODUCTION

1. In a communication to the Committee on Subsidies and Countervailing Measures ("the Committee") circulated on 17 June 1991 (SCM/115), 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 countervailing 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 3:2 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (hereinafter referred to as "the Agreement"). This understanding was confirmed by the United States in a communication circulated in document SCM/116, dated 17 June 1991.

2. A request by Norway for conciliation under Article 17 of the Agreement was circulated to the Committee on 1 July 1991 (SCM/117). The Committee held a meeting to examine this matter under Article 17:1 of the Agreement on 18 July 1991 (SCM/M/52).

3. On 22 August 1991, Norway requested that the Committee establish a panel in this dispute under Article 17:3 of the Agreement (SCM/123). On 19 September 1991, Norway supplemented its initial request for the establishment of a panel with a list of issues to be examined by the panel (SCM/123/Add.1).

4. At a special meeting held on 26 September 1991, the Committee decided to establish a panel in the matter referred to the Committee by Norway in documents SCM/123 and Add.1. The Committee agreed on the following terms of reference of this Panel:

"(to) review the facts of the matter referred to the Committee by Norway in SCM/123 and Add.1 and, in light of such facts (to) present to the Committee its findings concerning the rights and obligations of the signatories party to the dispute under the relevant provisions of the General Agreement as interpreted and applied by the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement." (SCM/M/53, paragraph 8)

The Committee authorized its Chairman to decide, in consultation with the parties concerned, on the composition of the Panel. The EEC reserved its right to present its views to the Panel as an interested third party.

5. On 6 November 1991, the Committee was informed by the Chairman in document SCM/129 that the composition of the Panel was as follows:

Chairman: Mr. Janusz Kaczurba

Members: Mr. Peter Gulbrandsen  
Mr. Meinhard Hilf

6. The Panel met with the parties to the dispute on 23-24 January, 5-6 March and 1 October 1992.

7. The Panel submitted its findings and conclusions to the parties on 23 October 1992.<sup>1</sup>

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<sup>1</sup>See also Annex 4.

## II. FACTUAL ASPECTS

8. The dispute before the Panel concerned the imposition by the United States on 12 April 1991 of a countervailing duty order on imports of fresh and chilled Atlantic salmon from Norway. The imposition of this order followed an affirmative final determination of subsidization 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 countervailing 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 an anti-dumping duty investigation with respect to those 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 cuts of Atlantic salmon. Also excluded are frozen, canned, smoked or otherwise processed Atlantic salmon"<sup>2</sup>

11. On 16 April 1990, the USITC issued a preliminary affirmative determination of injury in the countervailing duty investigation of imports of fresh and chilled Atlantic salmon from Norway.<sup>3</sup> An affirmative preliminary determination of subsidization by the Department of Commerce was published on 29 June 1990.<sup>4</sup> As a result of this affirmative preliminary determination, the US Customs Service was instructed by the Department of Commerce to suspend liquidation of all entries of fresh and chilled Atlantic salmon from Norway which were entered, or withdrawn from warehouse, for consumption, on or after 29 June 1990 and to require a cash deposit or bond for all entries of this product equal to NOK 0.77 per kilogramme, corresponding to the estimated net subsidy.

12. An affirmative final countervailing duty determination in this investigation was issued by the Department of Commerce on 25 February 1991.<sup>5</sup> The Department found that benefits which constituted subsidies within the meaning of section 701 of the United States Tariff Act 1930, as amended, were being provided to producers and exporters in Norway of fresh and chilled Atlantic salmon under six programmes and determined the estimated net subsidy to be NOK 0.71 per kilogram (2.27 per cent ad valorem) for all producers or exporters in Norway of fresh and chilled Atlantic salmon.

13. As explained in the Federal Register Notice of the final affirmative countervailing duty determination<sup>6</sup>, the following programmes were found by the Department of Commerce to confer subsidies: (i) Regional Development Fund Loans and Grants; (ii) National Fishery Bank of Norway Loans; (iii) Regional Capital Tax Incentive; (iv) Reduced Payroll Taxes; (v) Advance Depreciation of Business Assets; and (vi) Government Bank of Agriculture Grants. This Notice contains comments made by interested parties, and responses of the Department to these comments, on a number of aspects

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<sup>2</sup>55 Fed.Reg., 28 March 1990, p.11423.

<sup>3</sup>Fresh and Chilled Atlantic Salmon from Norway: Determination of the Commission in Investigation No. 701-TA-302 (Preliminary) under the Tariff Act of 1930, together with the Information obtained in the Investigation, USITC Publication 2272, April 1990.

<sup>4</sup>55 Fed.Reg., 29 June 1990, p.26727.

<sup>5</sup>56 Fed.Reg., 25 February 1991, pp.7678-7687.

<sup>6</sup>56 Fed.Reg., 25 February 1991, pp.7679-7681.

of the Department's determination that these programmes conferred countervailable subsidies and of the Department's methodology for determining the amount of the subsidies. Such comments were made *inter alia* regarding the methodology for calculating the benefits resulting from loans provided under the Regional Development Fund Loans and Grants, the treatment of alleged income tax effects of the reduction of payroll taxes, the question of whether an "upstream subsidy" analysis should be conducted to determine whether subsidies to producers of smolt were passed through to exporters of salmon, and the alleged conformity of the programmes at issue with Norway's obligations under the Agreement.

14. On 2 April 1991, the USITC issued one final determination for the purpose of both the anti-dumping and countervailing duty investigations of imports of fresh and chilled Atlantic salmon from Norway<sup>7</sup>, in which it concluded that an industry in the United States was materially injured by reason of imports from Norway of fresh and chilled Atlantic salmon which had been found by the Department of Commerce to be subsidized by the Government of Norway and sold in the United States at less than fair value.

### III. FINDINGS REQUESTED

15. **Norway** requested the Panel to find that the imposition by the United States of the countervailing duty order on imports of fresh and chilled Atlantic salmon from Norway was inconsistent with the obligations of the United States under the Agreement. In particular, **Norway** requested the Panel to find that:

- (i) the initiation of the countervailing duty investigation was inconsistent with the requirements of Article 2:1 of the Agreement;
- (ii) the imposition of countervailing duties in respect of regional development programmes was inconsistent with Article 11 of the Agreement;
- (iii) the calculation of the amount of the subsidies was inconsistent with Article 4:2 of the Agreement;
- (iv) the determination of material injury by the USITC was inconsistent with Article 6 of the Agreement; and
- (v) the continued imposition of the countervailing duty order was inconsistent with Article 4:9 of the Agreement.

16. **Norway** initially requested the Panel to recommend to the Committee that it request the United States to revoke the countervailing duty order on imports of fresh and chilled Atlantic salmon from Norway or otherwise bring it promptly into conformity with the obligations of the United States under the Agreement. At a later stage, Norway requested the Panel to recommend to the Committee

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<sup>7</sup>Fresh and Chilled Atlantic Salmon from Norway: Determination of the Commission in Investigation of the Commission in Investigation No. 701-TA.302 (Final) under the Tariff Act of 1930, together with the Information obtained in the Investigation, USITC Publication 2371, April 1991.

to request the United States to revoke the countervailing duty order and reimburse any countervailing duties paid. Norway noted that this request was consistent with previous Panel Reports.<sup>8</sup>

17. The **United States** requested the Panel to find that the affirmative final determinations made by the Department of Commerce and the USITC comported with the obligations of the United States under the Agreement. In particular, the United States requested the Panel to find that:

- (i) the determination by the Department of Commerce of the existence of countervailable subsidies was in accordance with the relevant provisions in Part I of the Agreement;
- (ii) the calculation of the amount of the countervailing duties was in accordance with Article 4:2 of the Agreement; and
- (iii) the determination of the existence of material injury by the USITC was in accordance with the provisions of Article 6 of the Agreement.

18. 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).

19. 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 to the parties that this request to the United States was without prejudice to the Panel's ultimate decision on the preliminary objections of the United States. The **United States** considered that (i) the initiation of the countervailing duty investigation was in accordance with Article 2:1 of the Agreement, (ii) the Department of Commerce had properly declined to conduct an upstream subsidy investigation, and (iii) the arguments of Norway regarding Article 4:9 of the Agreement were factually incorrect and without a legal basis in the Agreement.

#### **IV. PRELIMINARY OBJECTIONS**

20. The **United States** requested the Panel to give a preliminary ruling that the matter raised by Norway regarding the standing of the petitioner to request the initiation of an investigation on behalf of the relevant domestic industry was not properly before the Panel because this matter had not been raised in the administrative proceedings before the investigating authorities in the United States, and that the matters raised by Norway regarding the alleged failure of the United States to conduct an "upstream subsidy" analysis and regarding the continued application of the countervailing duty order were not properly before the Panel because they (1) were not within the Panel's terms of reference, and (2) had not been raised during consultations and conciliation preceding the establishment of the Panel.

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<sup>8</sup>e.g. "United States - Imposition of Anti-Dumping Duties on Seamless Stainless Steel Hollow Products from Sweden", ADP/47, paragraph 5.24; "United States - Countervailing Duties on fresh, chilled and frozen pork from Canada", DS7/R, BISD 38S/30, paragraph 5.2; "Canada - Imposition of countervailing duties on imports of manufacturing beef from the EEC", SCM/85, paragraph 5.6 and "New Zealand - Imports of electrical transformers from Finland", BISD 32S/55, paragraph 4.11.

**1. Alleged failure to raise the issue of the standing of the petitioner in the administrative proceedings before the investigating authorities in the United States**

21. Regarding the matter of the standing of the petitioner, the **United States** noted the following in support of its view that the failure of the Norwegian respondents to raise this matter before the investigating authorities in the United States precluded Norway from raising this issue in the proceedings before this Panel. The principle that a signatory must raise an issue, and present all facts, evidence and arguments on that issue before the investigating authorities and may not present any facts, evidence or arguments in the first instance to a reviewing body was manifest in the Agreement. The Agreement provided domestic investigating authorities with the exclusive authority to gather and consider evidence and make findings of fact and law concerning subsidization and injury issues (Articles 2, 4, 5, and 6). The determinations of the investigating authorities must be made on the basis of the information before the agency (Article 2:9). The investigating authorities must complete their investigation in one year (Article 2:14). In addition, the investigating authorities must give all interested parties, including the foreign respondents, "a reasonable opportunity, upon request, to see all relevant information" and "to present in writing, and upon justification orally, their views to the investigating authorities" (Article 2:5). Throughout the investigative process, therefore, the Agreement required that all parties have the opportunity to state all their arguments in order to influence the investigating authorities. Unless the investigating authorities had all the facts and information (and arguments as to how to interpret those facts and information) they could not take "final action" consistent with the procedural prerequisites of the Agreement. Accordingly, not only was there no provision in the Agreement for presentations ex post facto to a Panel of facts or arguments which had not been raised before the investigating authorities, but the terms of the Agreement, in fact, precluded this. Such untimely presentation of arguments would prevent the investigating authorities from conducting a full investigation, thus denying those authorities the opportunity to consider all the evidence and arguments and render determinations on that basis. In specific, untimely arguments would also deny the other parties their rights under Article 2:5 to see all relevant information and to present their views to the investigating authorities.

22. The **United States** argued that the procedural and public policy bases of the requirement that only matters raised in consultation and conciliation could be referred to a panel<sup>9</sup> also applied to the requirement to raise matters before the investigating authorities. Other rationales for this requirement were that it preserved the integrity of the administrative process and allowed all parties to the administrative proceeding an opportunity to consider and address the facts and arguments raised by other parties. The requirement prevented a reviewing tribunal from usurping the function of the administrative body which had the expertise to rule on the matter. Another purpose was to avoid duplication of effort and waste of resources by the reviewing tribunal. The public policies behind the doctrine of exhaustion of administrative remedies were virtually identical to the rationales underlying the public international law rule of exhaustion of local remedies. Under that rule, if a country offered a remedy under its local laws and procedures, the local remedy should be pursued before the country could be haled before an international tribunal for denying such a remedy.

23. The **United States** noted in this context that, while in the proceedings before the Panel Norway had claimed that the Agreement required investigating authorities, before initiating an investigation, to take steps to satisfy themselves that a request for the initiation of an investigation was filed on behalf of the domestic industry affected, in the case at hand neither the Government of Norway nor any of the private Norwegian respondents had ever asked the Department of Commerce to take such "steps" either during the period before the initiation of the countervailing duty investigation or at any time after the initiation of the investigation. Norway, having the right under the Agreement to demand consultations with the United States any time a petition was filed with respect to imports from Norway,

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<sup>9</sup>Infra, paragraph 40.



could have immediately requested, upon the filing of the petition in this case, that the Department of Commerce take whatever steps Norway believed were necessary for the Department to meet the obligations of the United States under the Agreement. Yet Norway had remained silent. In its notice of the initiation of the countervailing 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 Government of Norway and 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.<sup>10</sup> However, the Government of Norway and the private 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.

24. **Norway** contested that the doctrines of exhaustion of local remedies and of exhaustion of administrative remedies applied to dispute settlement proceedings under the Agreement.

25. With respect to the doctrine of exhaustion of local remedies, **Norway** submitted the following. First, under public international law, the rule of exhaustion of local remedies applied only to cases of diplomatic protection, as distinguished from cases involving "direct injury" to a state. In dispute settlement proceedings under the Agreement, a signatory was not bringing a claim on behalf of one of its nationals: the cause of action in such proceedings was the "direct injury" to a signatory in the form of nullification or impairment of benefits accruing to that signatory or in the form of the impedance of the achievement of any of the objectives of the Agreement. Second, there was no basis in the text of the Agreement for the application of the doctrine of exhaustion of local remedies. Unlike many other international agreements which included an exhaustion of local remedies requirement, the Agreement did not include such a requirement. Had the signatories intended to include such a requirement (which would have drastically changed the procedural steps delineated in the dispute settlement provisions of the Agreement), they would have done so explicitly. Third, there was no GATT practice recognizing the local remedies doctrine. N° GATT Panel had even hinted that exhaustion of local remedies was required. In fact, as demonstrated by recent Panel Reports, GATT practice was contrary to such a requirement.<sup>11</sup> The Vienna Convention on the Law of Treaties directed in Article 31:3(b) that subsequent practice was to be taken into account when interpreting the provisions of an international agreement. In the case of the General Agreement, such subsequent practice clearly did not require the exhaustion of local remedies. The Vienna Convention did not support the incorporation of unexpressed principles of international law. It did allow parties to rely on supplementary means of treaty interpretation when interpreting ambiguous terms of a treaty. However, it was one thing to use customary international law to interpret ambiguous terms of an international agreement; it was quite another to read into the Agreement such a major modification as the local remedies doctrine. If this principle was to be required, the decision had to come through reflective consideration and negotiation by all signatories at the multilateral level.

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<sup>10</sup>e.g. Gilmore Steel Corp. v. United States, 585 F. Supp. 670 (CIT 1984), aff'd sub nom. Oregon Steel Mills v. United States, 862 F. 2d 1541 (Fed. Cir. 1988)

<sup>11</sup>"United States - Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden, ADP/47 and "United States - Definition of Industry Concerning Wine and Grape Products, SCM/71, adopted on 28 April 1992.

26. **Norway** also submitted that the exhaustion of local remedies requirement was a narrow rule in public international law, applicable only to international adjudication, unless otherwise explicitly directed in an international agreement. There was no customary international law rule which required the exhaustion of local remedies in any other kind of international dispute fora. For example, international arbitration agreements were not subject to the requirement of exhaustion of local remedies. Furthermore, international tribunals which had applied the exhaustion of local remedies doctrine had taken a flexible approach in its application and had required exhaustion only after carefully balancing the practical and political pros and cons of doing so. In particular, public international law made the application of the exhaustion of local remedies dependent on criteria of reasonableness and did not require such exhaustion where local remedies were inadequate and ineffective.<sup>12</sup> No adequate remedy was available for Norway in the courts of the United States for a breach by the United States of its GATT obligations. US domestic law did "not provide a meaningful legal requirement that GATT law be observed".<sup>13</sup> In fact, a US trade statute specifically commanded that no provision of any trade agreement, nor the application of any such provision to any person or circumstance, in conflict with any United States statute, shall be given effect under the laws of the United States.<sup>14</sup> In addition, many courts in the United States refused to give full legal effect to the General Agreement.<sup>15</sup> Thus, there were no effective local remedies to exhaust in the United States in case of a breach of the General Agreement by the United States.

27. **Norway** further argued that strong policy considerations dictated that a local remedies doctrine not be applied to dispute settlement proceedings under the Agreement. The imposition of an exhaustion of local remedies requirement would result in years of delay in the dispute settlement process and would therefore be inconsistent with the Agreement's purpose of the effective and timely resolution of disputes. Finally, even if one were to apply the requirement of exhaustion of local remedies to dispute settlement proceedings under the Agreement, account had to be taken of the fact that, as confirmed in a recent judgement of the International Court of Justice, international law permitted the use of a rule of reason in the interpretation of the requirement; under this approach, the exhaustion requirement did not mean that each and every minute aspect of a claim had to be raised in the local fora before the claim could be raised at the international level.<sup>16</sup>

28. Regarding the principle referred to by the United States of exhaustion of administrative remedies, **Norway** submitted that this principle was a requirement of US administrative law but not a principle of public international law. Since this principle did not originate in public international law, the reasons for not applying it to dispute settlement proceedings under the Agreement were even stronger than in the case of the exhaustion of local remedies doctrine. In any event, the exceptions established under US jurisprudence to the application of the requirement of exhaustion of administrative remedies weighed against the application of this requirement to dispute settlement under the Agreement. Thus, United States courts enjoyed a degree of discretion in the application of this requirement and did not apply it when the administrative remedy was inadequate and when resort to agency proceedings would be futile. Given that US trade law was not required to be in conformity with relevant international agreements<sup>17</sup> there were no "effective" administrative remedies to exhaust in cases involving an action of the United States inconsistent with its obligations under the General Agreement. Since the United States Department of Commerce and other relevant agencies often did not apply GATT law on any consistent basis, it was also often futile for a contracting party to raise GATT related issues before these agencies.

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<sup>12</sup> Norwegian Loans Case, ICJ Reports (1957) p.9.

<sup>13</sup> Hudec, "The Legal Status of GATT in the Domestic Law of the United States", in: Hilf, Jacobs, Petersmann, (eds.) The European Community and GATT (1986) p.193.

<sup>14</sup> 19 .C. S2504(a) (1983 & Suppl. 1991).

<sup>15</sup> e.g. Algoma Steel Corp. v. United States, 865 F.2d 240 (Fed.Cir. 1989).

<sup>16</sup> Elettronica S.p.A. Case, 1989 I.C.J. Reports, p.94.

<sup>17</sup> Supra, paragraph 26.

29. **Norway** also observed in this context that a major rationale for the application of the requirement of administrative remedies was that it was inefficient and inappropriate to have courts review factual issues which could more effectively be considered by an agency having expertise in that area. In light of this, courts had often excused the exhaustion requirement when reviewing issues of law, as opposed to issues of fact. The issues raised by Norway before this Panel similarly concerned issues of law, not of fact. The questions before the Panel concerned not what the facts were but whether the interpretation and consideration of the facts by the United States were in conformity with the obligations of the United States under the Agreement.

30. **Norway** did not contest that the issue of the standing of the petitioner in the countervailing duty investigation had not been raised before the investigating authorities in the United States by the Norwegian respondents. However, the question of whether the petitioner was acting on behalf of the domestic industry had been raised in a letter to the Department of Commerce from a domestic producer, prior to the initiation of the investigation. The Department had ignored this letter. More importantly, the Panel established by the Committee on Anti-dumping Practices in the dispute between Sweden and the United States in "United States - Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden"<sup>18</sup> had held that, before initiating an investigation, investigating authorities were required to satisfy themselves that a written request for the initiation of the investigation was filed on behalf of the domestic industry. To satisfy themselves as to industry support, the investigating authorities had to take affirmative steps. The Panel had found that it was not sufficient to rely upon statements by petitioners claiming to be acting on behalf of the domestic industry. Thus, the question of the standing of a petitioner did not need to be raised by any party: investigating authorities were under an affirmative obligation to satisfy themselves that a petition was filed on behalf of the domestic industry. Indeed, in the case considered by the Panel in the dispute between Sweden and the United States, there had been no challenge of the petitioner's standing prior to the initiation of the investigation.

31. **Norway** further argued that it was consistent practice of the United States to assume that a petitioner was acting on behalf of a domestic industry until such time as a substantial proportion of the domestic industry come forth to oppose the petition.<sup>19</sup> The United States would not investigate the standing of a petitioner if the challenge came from foreign private respondents or from a foreign government. There had therefore been no reason for the Norwegian respondents to raise this issue during the investigation.

32. 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.

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<sup>18</sup>ADP/47.

<sup>19</sup>e.g. Certain Electrical Conductor Aluminium Redraw Rod from Venezuela, 53 Fed.Reg. p.24764 (1989).

33. The **United States** considered that, while Norway's discussion of the public international law rule of exhaustion of local remedies was beside the 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.<sup>20</sup> 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 and Machlett, said to have resulted from the actions of the Respondent".<sup>21</sup> The Court had thus ruled that the doctrine of exhaustion of local remedies applied when a nation was primarily representing its nationals, even if some issues of sovereignty were present.

34. In the view of the **United States**, the interests of the Norwegian exporters "coloured and pervaded" Norway's claim in the proceedings before this Panel. This dispute had arisen only after the United States had imposed countervailing duties on Norwegian imports of fresh and chilled Atlantic salmon. The arguments made by Norway were in most instances identical to those which were made or could have been made by the private Norwegian interests during the investigations. In fact, Norway was actually espousing the interests of its nationals in these proceedings. Norway's argument that it was adjudicating its own rights under the Agreement, separate and apart from the interests of its nationals would create an exemption to the local remedies doctrine which would effectively swallow the entire doctrine. By definition, any time one country brought a claim against another, international legal rights, usually treaty rights or the equivalent, were at issue. To argue, as did Norway, that in any such instance the international matter involves an offence by one country against another and is thereby exempt from the exhaustion doctrine ignored the international jurisprudence on this subject. The United States was not claiming that disputes involving fundamentally private interests in which there was an element of government-to-government obligations were not rightfully a subject for international dispute resolution, but only that such disputes would not be exempted from the principle of exhaustion of local remedies.

## **2. Matters allegedly not within the terms of reference of the Panel or not raised during consultations and conciliation**

35. The **United States** argued that the matter raised by Norway regarding the failure of the Department of Commerce to conduct an "upstream subsidy" analysis was not within the Panel's terms of reference and accordingly should not be considered by the Panel. During the consultation and conciliation process, Norway failed to address the issue at all, either under the category of "calculation methods" or as an issue that should be addressed in the injury investigation. Norway addressed the issue for the first time in the entire dispute resolution proceedings in its first submission before the Panel. Document SCM/M/53 defined the Panel's terms of reference by referring to "the matter referred to the Committee by Norway in SCM/123 and Add.1". Document SCM/123 referred to the Government of Norway's "reservations to the calculation methods of alleged subsidies". However, on page 2 of document SCM/123/Add.1, Norway had detailed these "reservations" as being (1) the failure of the United States to take account of secondary tax effects of the subsidies, and (2) the alleged double-counting of the

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<sup>20</sup>1989 I.C.J. Reports, p.15.

<sup>21</sup> Ibid., paragraph 52.

interest rate charged to the salmon farms. There had been no mention of "upstream subsidies" whatsoever. This matter was therefore outside the terms of reference of the Panel.

36. **Norway** argued first that in document SCM/123 it had not only stated a concern over whether the United States had applied the appropriate injury standard (which required a consideration of the trade effects of the subsidies) but had also raised a concern regarding the calculation of the level of alleged subsidization. In the addendum to this document, Norway had in paragraph 2 stated that it would raise before the panel to be established the issue of the calculation of the level of the subsidies which the United States had found to exist. In paragraph 3.C of the addendum, Norway had expressed concern over the failure of the United States to consider the trade effects of the subsidies. Second, the terms of reference of the Panel defined as the Panel's mandate the examination "of the matter referred to the Committee by Norway in SCM/123 and Add.1". The "matter" referred to the Committee was the imposition of countervailing duties by the United States on imports of fresh Atlantic salmon from Norway. The question of whether the United States had fulfilled its obligations under the Agreement by imposing countervailing duties without adjusting for the fact that most of the benefits of the programmes it had found to exist had gone to producers of smolt, not to producers of salmon, and by failing to consider the trade effects of the programmes it had determined to be subsidies was properly before the Panel. Indeed, the issue of the treatment of alleged subsidies to smolt producers had been at issue since the investigation which had resulted in the imposition of the countervailing duties and was thus part of "the matter referred to the Committee". Third, the signatory imposing countervailing duties in contravention of its tariff bindings had to justify its actions. In the case under consideration, the United States had to demonstrate that it had considered all relevant facts in determining whether to impose countervailing duties because previous Panels had established that anti-dumping and countervailing duties could be imposed only after certain facts had been established.<sup>22</sup> In this case, by failing to examine the trade effects of regional programmes (which included a determination of whether there were any trade effects from the alleged subsidies to smolt producers) the United States had not considered all relevant facts. Norway had consistently raised the question of the treatment by the United States of the subsidies to smolt producers as part of the concern that the United States had imposed a countervailing duty in excess of the level of subsidisation found to exist, as part of its concern that the United States had not applied the appropriate injury causation standard, and as part of its concern that the United States had not, as required by Article 11 of the Agreement, considered the trade effects of the subsidies.

37. **Norway** further argued in this context that in "United States - Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden", the Panel had determined that, rather than promulgating a general standard for considering facts and arguments not previously raised, the Panel would examine and decide on such facts and legal arguments as "they arose in relation to the specific matters in dispute".<sup>23</sup> This standard was correct. Where the facts or legal issues related to the general issue before a panel, the panel ought to consider all relevant arguments and issues. Moreover, as long as the issue was raised by the complaining party at the time of its first submission to the panel, the other party to the dispute would not be prejudiced since it would have several opportunities to respond.

38. Finally, **Norway** submitted that its request for the establishment of a panel had been more detailed than any previous request for the establishment of a panel. It would be ironic if Norway were to be penalized for providing greater information than any other complaining party had ever done.

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<sup>22</sup>e.g. "New Zealand - Imports of Electrical Transformers from Finland", BISD 32S/55, paragraph 4.4; "United States - Countervailing Duties on fresh, chilled and frozen pork from Canada", DS7/R, BISD 38S/30, paragraph 4.8.

<sup>23</sup>ADP/47.

39. The **United States** observed that in its first submission to the Panel Norway had treated the question of the treatment of subsidies to smolt producers entirely as an issue relating to the calculation of the amount of the subsidy. The argument that this issue pertained to Norway's claim that the United States had failed to consider the trade effects of the subsidies had appeared only at a later stage of the proceedings. Norway's attempt to place this issue under the injury rubric ignored the true nature of the issue and the substance of what Norway had argued in its first submission.

40. The **United States** also argued that the issue of the treatment of subsidies to Norwegian producers of smolt was not properly before the Panel because the issue had not been raised during consultations and conciliation preceding the establishment of the Panel. As illustrated by Articles 3, 17 and 18 of the Agreement, the Agreement embodied a fundamental principle of jurisprudence that certain procedures must be followed before a Panel could consider a matter. Before a signatory could initiate a conciliation process under Article 17 with respect to a countervailing duty procedure, consultations under Article 3 must have failed. Only if the Committee was unable to resolve the matter through conciliation could a panel be established. Therefore, an issue could not be presented in the first instance before a panel. The principle at issue here, closely akin to the notion of exhaustion of local remedies under international law, had a procedural component and a public policy component. The procedural component was that a signatory must advance through the appropriate fora in sequence, as reflected in the requirements of Articles 3, 17 and 18 that consultations be concluded before a signatory was allowed to resort to conciliation and that the Committee was not allowed to establish a panel until the conciliation process had ended. The public policy component was for the thorough and orderly resolution of disputes. This was reflected in the requirements that investigating authorities conduct the investigation and that consultations and conciliation concern the matters in that investigation. This policy would be defeated if signatories were allowed to raise issues for the first time before a panel. It was only by requiring that all relevant issues be raised throughout the dispute settlement process that the Agreement could provide any realistic chance of resolving that dispute in the most fair and effective way possible. Withholding any issue not only prejudiced the opposing party, but also undermined the structure of the dispute settlement system of the Agreement.

41. **Norway** argued that, even if the matter of the treatment of subsidies to smolt producers had not been raised during consultations and conciliation, this would not preclude the Panel from considering this matter in its proceedings. Referring to its comments on the principles of exhaustion of local remedies and of exhaustion of administrative remedies<sup>24</sup>, **Norway** rejected the application of these principles to the remedies provided for under the Agreement. In any event, the issue of the treatment of subsidies to producers of smolt had in fact been raised by Norway during consultations and conciliation, as demonstrated by written questions addressed by Norway to the United States as part of the process of consultations under Article 3 of the Agreement. In these questions Norway had asked the United States to explain how the US legislation complied with the provisions of Article 11 of the Agreement (which required a consideration of the trade effects of subsidies) and whether US legislation required that in determining whether injury was caused by subsidised imports the effects of the subsidies in question be taken into consideration. Furthermore, in its request for conciliation under Article 17 of the Agreement (SCM/117) Norway had stated that the United States had failed to demonstrate that the regional development programmes countervailed by the United States had caused a distortion of trade. This issue had also been raised by the representative of Norway at the meeting held by the Committee for the purpose of conciliation under Article 17 in July 1991.

42. The **United States** argued that the issue raised by Norway regarding the continued imposition of the countervailing duty order was not properly before the Panel because this issue had not appeared in Norway's request for the establishment of a panel (SCM/123 and Add.1) and was therefore outside

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<sup>24</sup> Supra, paragraphs 25-29.

the Panel's terms of reference. In addition, this issue had not been raised during the consultations and conciliation preceding the establishment of the Panel.

## V. ARGUMENTS OF THE PARTIES

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

43. **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 met all the requirements of the provision in question.<sup>25</sup> Article VI of the General Agreement provided that no anti-dumping or countervailing duties could be levied unless certain facts had been established and the contracting party invoking this Article had taken into account all facts necessary to meet the requirements of this Article.<sup>26</sup> The contracting party taking action under this Article must establish the existence of these facts when its action was challenged.<sup>27</sup> In the matter before this Panel, the United States had not demonstrated that it had met these requirements.

44. The **United States** considered that the proposition that Article VI of the General Agreement constituted an exception to fundamental rights and obligations under the General Agreement was contradicted by the text, structure and the drafting and interpretative histories of the General Agreement. The fact that with respect to no other commercial practice subject to provisions of the General Agreement the drafters had used language as strong as in Article VI, where they had expressly provided that injurious dumping was to be "condemned," was revealing of the key rôle intended by the drafters for the unfair trade remedies within the GATT framework. The structure of the General Agreement also confirmed that Article VI had not been drafted as an exception. Article VI was placed at the beginning of the General Agreement, where the primary subjects of the General Agreement were found. By contrast, where the drafters had intended to craft exceptions, they had placed them at the end of Part II of the General Agreement in Articles XX and XXI. Indeed, the placement of these Articles (grouped together at the end of Part II), their titles (expressly identified as exceptions) and their text (e.g. the requirement that measures taken under these provisions not be a "disguised restriction on international trade) all set them clearly apart from inter alia Article VI. Moreover, application of anti-dumping and/or countervailing duties had also not been encumbered with restrictions and requirements found elsewhere in the General Agreement, e.g. in Article XIX.

45. **Norway** argued that the proposition advanced by the United States that Article VI was not an exception to fundamental principles of the General Agreement was inconsistent with the plain language of this Article and the overall objectives of the General Agreement. This view was also incompatible

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<sup>25</sup>e.g. Report of the Panel in "Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies", BISD 35S/37; Report of the Panel in "Canada - Administration of the Foreign Investment Review Act", BISD 30S/140, and Report of the Panel in "United States - Countervailing Duties on fresh, chilled and frozen pork from Canada", DS7/R, BISD 38S/30.

<sup>26</sup>Report of the Panel in "Swedish Anti-Dumping Duties", BISD 3S/81, paragraph 15; Report of the Panel in "United States - Countervailing Duties on fresh, chilled and frozen pork from Canada, DS7/R, BISD 38S/30, paragraph 4.8.

<sup>27</sup>Report of the Panel in "Swedish Anti-Dumping Duties", BISD 3S/81, paragraph 15 and Report of the Panel in "New Zealand - Imports of Electrical Transformers from Finland", BISD 32S/55, paragraph 4.4.

with previous panel findings, views of well respected international legal scholars and the drafting history 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.

46. **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.<sup>28</sup> 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.

47. **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 be an exception to, not a fundamental right of, the General Agreement. In fact, one author had described the reference to anti-dumping and countervailing duties in Article II:2(b) as an "exception".<sup>29</sup>

48. In response to the argument of the United States with respect to the placement of Article VI within the General Agreement, **Norway** observed that this argument overlooked the fact there were exceptions scattered all over the text of the General Agreement, e.g. in Articles I:2, II:2(a), (b) and (c), III:3, III:6, IV, XII, XIV and XIX. There was therefore no basis for the view that the placement of Article VI in the General Agreement indicated that the Article was not an exception. With respect to the argument that the absence in Article VI of provisions regarding consultation confirmed that this Article was not an exception, **Norway** noted that this argument ignored the practice of many signatories to require consultations before imposing duties under Article VI. Moreover, this argument failed to take into account that consultation procedures had been included in the Agreement and in the Agreement on Implementation of Article VI of the General Agreement, which had been designed to elaborate upon the requirements of Article VI.

49. The **United States** further argued that the negotiating history of the General Agreement demonstrated that remedies for dumped and subsidized goods had from the beginning been a fundamental aspect of the General Agreement. As described in a recent GATT publication, the promotion of fair

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<sup>28</sup>BISD II/41.

<sup>29</sup>Jackson, World Trade and the Law of GATT (1969), p.210.



competition (defined as curbing government subsidies, dumping and "other distortions of international competition") had been and remained one of the fundamental objectives of the General Agreement.<sup>30</sup> This recent description of the fundamental nature of the rights under Article VI reflected the negotiating history of the General Agreement. The drafters of the General Agreement had recognized in 1947 that distortions to international competition caused by unfair trade practices could be so severe that effective remedies to curb such distortions were essential: indeed, as essential to an overall programme of liberalization of international trade as, for example, the m.f.n. principle and the national treatment principle. The essential balance reflected in the text of the General Agreement was that contracting parties would open their markets - principally through tariff reductions - in exchange for reciprocal access and the right to take action against unfairly traded imports. Without such disciplines, tariff reduction would have been of little or no value. The importance of disciplines governing unfair trade practices was reflected in the formal announcement by the United States Department of State of the accession of the United States to the General Agreement. Describing Part II of the General Agreement, which contained the commercial policy provisions (including Article VI), the Department had explained that:

"Part II deals with barriers to trade other than tariffs .... The provisions of Part II are intended to prevent the value of the tariff concessions from being impaired by the use of other devices, and also to bring about the general relaxation of non-tariff trade barriers, thus assuring a further quid pro quo for the action taken with respect to tariffs."<sup>31</sup>

50. Regarding the negotiating history of the General Agreement, the **United States** also observed that injurious dumping had been viewed with such concern during the original GATT negotiations that proposals had been considered to permit imposition of tougher countermeasures than merely offsetting duties.<sup>32</sup> However, in the end the Article VI remedy had been limited to such duties. This choice indicated clearly that the drafters of Article VI had been capable of narrowing the anti-dumping/countervailing duty instrument in the General Agreement in whichever way they chose. The negotiating record revealed that the drafters had narrowed the remedy. By contrast, there was no support for the view of Norway that the application of that remedy should be further narrowed by, inter alia, establishing a burden of proof or persuasion on parties invoking their fundamental rights under Article VI. Indeed, the narrow nature of the remedy suggested the contrary: if the imposition of offsetting duties alone was to bear the burden of remedying the harm caused by, and deterring these anti-competitive and unfair trade practices, the application of the remedy should be broadly construed. In particular, it should not be restricted except as expressly required by the terms of Article VI. The drafting history also demonstrated that no special burden of proof had been contemplated with respect to contracting parties imposing duties under Article VI. Early proposals that the importing country be required to prove dumping allegations had been rejected in favour of the weaker and broader language of Article VI as adopted, which simply provided that imposition of anti-dumping duties or countervailing duties should occur only after a determination by a contracting party that dumping and injury existed.<sup>33</sup>

51. **Norway** argued that the main objective of the General Agreement was the reduction of tariff rates on an m.f.n. basis. By contrast, nothing in the General Agreement obligated nations or firms to refrain from dumping.<sup>34</sup> While "promoting fair competition" might be one of the objectives of the General Agreement, the GATT had never defined this to mean "curbing government subsidies, dumping

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<sup>30</sup>GATT What It Is, What It Does (1990), p.4.

<sup>31</sup>17 Dept. State Bull., 1042, 1045 (1947).

<sup>32</sup>Jackson, World Trade and the Law of GATT, (1969), p.421, note 55.

<sup>33</sup>E/PC/T/C.II/32 (1946) (Note of the Benelux countries).

<sup>34</sup>Report of the Panel in "Canada - Administration of the Foreign Investment Review Act, BIDS 30S/140, 164.

and other distortions of international competition", as claimed by the United States. In fact, the arbitrary imposition of anti-dumping duties was regarded as a protectionist device in its own right, retarding the promotion of fair competition.<sup>35</sup> The GATT publication referred to by the United States did not define the promotion of fair competition in the manner suggested by the United States. Rather, it pointed out in a neutral fashion that "increasingly, the GATT is concerned with subsidies and dumping," and then pointed out more specifically that "the rules under which governments may respond to dumping in their domestic market by overseas competitors are contained in the GATT and an Anti-Dumping Code." Thus, the General Agreement and the Agreement on Implementation of Article VI of the General Agreement provided for limitations on the use of anti-dumping measures and did not regulate the practice of dumping as such. This publication further referred to Article I of the General Agreement as "the key article" of the General Agreement and described Article VI as a "technical article designed to prevent or control possible substitutes for tariffs". The publication also referred to Article VI as "lay[ing] down the conditions under which anti-dumping duties may be imposed", which again confirmed that Article VI dealt with limits on the use of anti-dumping measures. Moreover, the United States was incorrect in referring to dumping as "unfair trade" in its discussion of this GATT publication. This publication did not describe dumping as "unfair trade"; nor was dumping described as "unfair trade" in the text of the General Agreement or in the Agreement on Implementation of Article VI of the General Agreement.

52. In the view of **Norway**, the State Department publication referred to by the United States did not provide support for the view that Article VI remedies were a fundamental right of contracting parties to the General Agreement. The paragraph quoted by the United States referred to "non-tariff trade barriers" and did not discuss dumping. Interestingly, dumping was not mentioned in the introductory paragraph in which the State Department discussed the scope of the General Agreement, or in the paragraph which summarized the provisions of Part II of the General Agreement. By contrast, rules on tariffs, preferences, quotas, internal controls, customs regulations, state trading and subsidies were all identified in the introduction as key features of the General Agreement. This absence of a reference to the imposition of anti-dumping duties contradicted the view that from the outset the application of such duties had been considered a fundamental right under the General Agreement. To the contrary, the position of the State Department as reflected in this publication supported the view that Article VI had been intended to limit the application of anti-dumping measures, rather than to discipline dumping, as claimed by the United States.

53. The **United States**, referring to the Panel Reports in "Swedish Anti-Dumping Duties"<sup>36</sup> in "New Zealand - Imports of Electrical Transformers from Finland"<sup>37</sup>, argued that the interpretative history of the General Agreement strongly supported the view that Article VI should be construed as a remedial provision, rather than as an exception. The former Report was significant in that the Panel had held that a principle as important as the m.f.n. principle was not applicable to duties imposed under Article VI. By contrast, true exceptions, such as Article XX and XXI contained "soft" m.f.n. provisions, generally requiring or urging compliance with m.f.n. principles to the extent not inconsistent with the exception itself. Equally important was the Panel's holding that a party invoking Article VI bore no special burden of proof. Rather, the Panel had simply found that it:

"would be reasonable to expect that [a] contracting party should establish the existence of [dumping] when its action is challenged."<sup>38</sup>

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<sup>35</sup>See, e.g. Petersmann, "Need for Reforming Anti-Dumping Rules and Practices", in 45 *Aussenwirtschaft* 179 (1990).

<sup>36</sup>BISD 3S/83.

<sup>37</sup>BISD 32S/55.

<sup>38</sup>BISD 3S/83, 86.

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".<sup>39</sup> In the words of the Panel: "no definitive evidence had been brought forward to support the conclusion [of dumping]".<sup>40</sup> In other words, the Swedish authorities had not even collected the most rudimentary evidence of dumping; indeed, they appeared confused as to whether they believed that dumping had occurred on the basis of a comparison between home market prices and export prices, third country prices and export prices, or constructed values and export prices.<sup>41</sup> The facts of this case thus demonstrated that the Panel was to be taken at the plain meaning of its words when it had written that dumping must be "established" before action under Article VI was permitted.

54. With respect to the dispute in "New Zealand - Imports of Electrical Transformers from Finland", the **United States** observed that, while the Report of the Panel in this dispute was most frequently cited for reiterating the words of the Panel in the Swedish Anti-Dumping Duties case that a party invoking Article VI "must establish the existence" of injurious dumping, in fact the holding of the Panel in this case was far richer and consisted of two essential elements. First, the Panel had discussed the parties' respective allegations with regard to New Zealand's determination of dumping. After describing in detail the arguments of the parties to the dispute, it had reached the following conclusion:

"[The Panel] also noted that Article VI did not contain any specific guidelines for the calculation of cost-of-production and considered that the method used in this particular case appeared to be a reasonable one. In view of this ... the Panel considered that there was no basis on which to disagree with the New Zealand authorities' finding of dumping."<sup>42</sup>

The Panel's conclusion clearly indicated that, absent an express provision of the General Agreement which a complaining party could demonstrate to have been violated, and in the absence of evidence demonstrating that the factual basis of the determination did not conform to the requirements of the General Agreement, the party taking action under Article VI could be considered to have acted within its rights. In other words, the burden of producing evidence to the effect that the determinations were not made on a justifiable factual or legal basis rested with the complaining party.

55. Turning to the conclusions of the Panel on the injury determination, the **United States** noted that the Panel had faced an absolutist argument from New Zealand that the General Agreement did not permit any body other than a national investigating authority to make an Article VI determination or to review the basis for such a determination.<sup>43</sup> Not surprisingly, the Panel had rejected this attempt to escape GATT review, finding that what New Zealand was asking for would be "complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT".<sup>44</sup> Once again, it was in the context of responding to this argument that the Panel had concluded that a contracting party was under an obligation "to establish the existence" of dumping and injury.

56. The **United States** concluded that the two above-mentioned Panel Reports revealed that a contracting party acting under Article VI must be able to illustrate the factual basis of its determinations. In other words, the authorities must establish, quite literally, the facts on which their decision was

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<sup>39</sup>BISD 3S/87.

<sup>40</sup>BISD 3S/88.

<sup>41</sup>BISD 3S/88-89.

<sup>42</sup>BISD 32S/55, 67.

<sup>43</sup>BISD 32S/55, 61-62.

<sup>44</sup>BISD 32S/55, 67.

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

57. 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"<sup>45</sup> 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"<sup>46</sup> 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"<sup>47</sup> involved Article XXIV:12; and the Report of the Panel in "Canada - Import Restrictions on Ice Cream and Yoghurt"<sup>48</sup> 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.

58. **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 - Countervailing duties on fresh, chilled and frozen pork from Canada" had specifically stated that:

"Article VI:3, an exception to the basic principles of the General Agreement, ha[s] to be interpreted narrowly."<sup>49</sup>

The sources cited by this Panel in its statement on Article VI were relevant in that the Panel Reports referred to by this Panel had involved various exceptions to the basic rules of the General Agreement and had described how such exceptions were to be interpreted. Each of these exceptions required the contracting party invoking the exception to justify the use of the exception with specific evidence. The United States could not ask this Panel to ignore the findings of the Panel in the pork case given that GATT panels were to make their judgements based upon the provisions of the General Agreement and past panel reports. The Report of the Panel in the pork case had affirmed that Article VI was an exception (as done by other Panel Reports). Contrary to what had been argued by the United States, Norway was not asking this Panel to subject Article VI remedies to stricter scrutiny than actions taken under other provisions of the General Agreement. Rather, Norway was asking the Panel that, in accordance with previous panel cases referred to in the pork decision involving other exceptions to the General Agreement, this Panel require the party applying the exception to justify in factual detail the consistency with the Agreement of its determination of the existence of subsidization and injury.

59. **Norway** further observed in this context that the Report of the Panel on "EEC - Regulation on Imports of Parts and Components"<sup>50</sup> had also described Article VI as an exception.

60. **Norway** argued that the Panel in "Swedish Anti-Dumping Duties"<sup>51</sup> had found that the m.f.n. requirement did not apply to measures taken under Article VI not, as suggested by the United States,

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<sup>45</sup>BISD 38S/30, paragraph 4.4.

<sup>46</sup>BISD 30S/140.

<sup>47</sup>BISD 35S/37.

<sup>48</sup>BISD 36S/68.

<sup>49</sup>BISD 38S/30, paragraph 4.4.

<sup>50</sup>BISD 37S/132.

<sup>51</sup>BISD 3S/83.

because of the fundamental nature of the rights of contracting parties under Article VI, but precisely because of the nature of Article VI as an exception to the m.f.n. requirement.

61. The **United States** noted that, although Norway had not referred to these sources, recent advocates seeking to circumscribe the scope of action under Article VI might have in mind a statement in the first Report of the Group of Experts that anti-dumping and countervailing duties "were to be regarded as exceptional and temporary measures to deal with specific cases of injurious dumping or subsidization".<sup>52</sup> This statement, however, could not provide an argument in support of the view that Article VI was an exception. The word "exception" denoted "the act of excepting: EXCLUSION; a case to which a rule does not apply". By contrast, the word "exceptional" denoted something "RARE" or "deviating from the norm".<sup>53</sup> Anti-dumping and countervailing duties might have been intended to be "exceptional" in the sense that most products should not be subject to such measures because unfair trade should be the exception rather than the norm. However, to say that these measures were exceptional was completely different from asserting that the drafters had intended Article VI to be an exception to fundamental rights and obligations of contracting parties under the General Agreement, causing a party taking action under this Article to bear a special burden of proof to justify its action. Moreover, it was notable that the same Group of Experts, in a second Report, had clearly reaffirmed the broad nature of Article VI remedies when it had observed that:

"The fact that the granting of certain subsidies was authorized by the provisions of Article XVI of the General Agreement clearly did not debar importing countries from imposing, under the terms of Article VI, a countervailing duty on the products on which subsidies had been paid."<sup>54</sup>

If Article VI had been intended to be read narrowly, then surely subsidies specifically authorized elsewhere in the General Agreement would be among the first items read out of the purview of Article VI.

62. **Norway** argued that the first Report of the Group of Experts on Anti-dumping and Countervailing Duties confirmed that Article VI was an exception when it stated that anti-dumping duties and countervailing duties "were to be regarded as exceptional and temporary measures to deal with specific cases of injurious dumping or subsidization".<sup>55</sup> The United States had attempted to advance a semantic argument differentiating the term "exception" from "exceptional". However, the first meaning of the term "exceptional" in Websters Third New International Dictionary (the unabridged version of the dictionary cited by the United States), American Heritage, and Oxford English dictionaries was "forming an exception" or "being an exception". Both words meant the same: a deviation from the central principles of the General Agreement.

63. The **United States** concluded that an examination of the text as well as the drafting and interpretative histories of the General Agreement led to two basic conclusions concerning the status of Article VI in the framework of rights and obligations of the General Agreement. First, Article VI accorded rights to act against unfair anti-competitive trade practices which were essential to the establishment, essential balance and continued successful functioning of the GATT system. Second, the right under Article VI to impose offsetting duties was remedial in nature. In the case before the Panel, the United States had more than amply illustrated that the facts in the records of the US authorities established the existence of injurious subsidization within the meaning of Article VI and the Agreement, consistent with the findings in the Panel Reports on "Swedish Anti-Dumping Duties" and "New Zealand

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<sup>52</sup>BISD 8S/145.

<sup>53</sup>Webster's Ninth New Collegiate Dictionary at 432 (1990).

<sup>54</sup>BISD 8S/194,200 (paragraph 32).

<sup>55</sup>BISD 8S/145.

- Imports of Electrical 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 signatory 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.

64. 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 provisions of the Agreement.

65. **Norway** argued that even if one (incorrectly) assumed that Article VI was not an exception to fundamental GATT principles, a contracting party imposing anti-dumping or countervailing duties had to demonstrate that its determinations were consistent with the requirements of the General Agreement. The United States had argued that the contracting party taking action under Article VI need only meet a test of "reasonableness" and that it was up to the party asserting a violation of Article VI to demonstrate the basis for a finding of a violation. Under this proposed rule, the United States did not need to present all facts to the Panel to affirmatively demonstrate the "reasonableness" of its determinations but only needed to describe the methodology used and the conclusions it had reached and could then ask the Panel to assume that the determinations made were consistent with the requirements of the Agreement. Even if this standard of "reasonableness" were the correct standard, the United States had failed to demonstrate that its actions in the investigation of Atlantic salmon from Norway met this standard. Thus, the United States had failed to ask the petitioners even the most basic questions to determine whether they had in fact filed the petition on behalf of the domestic industry affected and the United States had imposed extremely onerous standards of response on Norwegian respondents but not on domestic respondents. While the United States claimed that Norway had not identified express requirements of the Agreement alleged to have been violated by the United States, Norway had in fact demonstrated how the actions of the United States violated specific requirements of the Agreement, including those contained in Articles 2:1, 6:4, 4:2 and 11.

66. **Norway** argued that, despite the claim of the United States, previous Panel Reports had not adopted a standard of "reasonableness" when reviewing actions taken under Article VI of the General Agreement. Rather, these Reports confirmed the view that the party taking action under this Article had to demonstrate that its actions were in conformity with the requirements of the Agreement and that it had established the requisite facts before imposing duties. In the proceedings before this Panel, the United States had neither provided the facts that formed the basis of its countervailing duty determination nor demonstrated that its countervailing duty measure was in conformity with the Agreement. **Norway** noted the argument of the United States that the Panel Report on "Swedish Anti-Dumping Duties"<sup>56</sup> case had concluded that a party taking action under Article VI bore no special burden of proof.

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<sup>56</sup>BISD 3S/83.

However, Norway was not asking for a "special" burden of proof. Rather, it was asking that the Panel apply the same rule applied by previous Panels, i.e. that the United States demonstrate to the Panel that its determinations were in conformity with the Agreement. In discussing the Swedish Anti-Dumping Duties case, the United States had asserted that the Panel had simply found that it:

"would be reasonable to expect that [a] contracting party should establish the existence of [dumping] when its action is challenged."

However, this was not "simply" what the Panel had found. The full statement of the Panel read as follows:

"It is clear from the wording of Article VI that no anti-dumping duties should be levied unless certain facts have been established. As this represented an obligation on the part of the Contracting Party imposing such duties, it would be reasonable to expect that that Contracting Party should establish the existence of these facts when its action is challenged."<sup>57</sup>

Thus, the Swedish Anti-Dumping Duties Panel required much more than clarity in the importing country's determination that dumping existed and confirmed the affirmative obligation of the contracting party imposing duties to demonstrate the existence of "certain facts."

67. **Norway** considered that the United States had failed to provide the full quotation from the New Zealand Transformers Case when describing that panel's conclusion regarding the standard of review. The full text of the second sentence in the statement quoted by the United States read as follows:

"In view of this and having noted the arguments put forward by both sides as regards the costing of certain inputs used in the manufacture of the transformers, the Panel considered that there was no basis on which to disagree with the New Zealand authorities' finding of dumping."<sup>58</sup>

The part of this sentence omitted by the United States was essential as it demonstrated that the Panel had accepted the view of New Zealand, not because Finland had failed to meet some burden of proof, but because the Panel had required New Zealand to demonstrate the specific facts underlying its decision and had evaluated that decision on the basis of those facts. The United States was incorrect in paraphrasing the above standard as meaning that "the burden of producing evidence to the effect that the determinations are not made on a justifiable factual or legal basis rests with the complaining party". The Panel could not have been more direct in confirming that it was the contracting party imposing anti-dumping duties which was obliged to establish to the satisfaction of the panel the factual basis and GATT-consistency of its determinations of dumping and injury. **Norway** further argued in this context that, if ever there were any doubts as regards the implications of the Swedish Anti-Dumping Duties and New Zealand Transformers cases with respect to the question of the obligation of a contracting party imposing duties under Article VI, this matter had been settled by the Panel in "United States - Countervailing Duties on fresh, chilled and frozen pork from Canada" when it had concluded that it was "up to the ... party invoking the [Article VI] exception, to demonstrate that it had met the requirements of Article VI:3".<sup>59</sup> This obligation of a contracting party to demonstrate that it had met the necessary requirements of Article VI was not conditioned on Article VI being an exception to fundamental GATT principles.

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<sup>57</sup>BISD 3S/83, 85.

<sup>58</sup>BISD 32S/55, paragraph 4.3.

<sup>59</sup>BISD 38S/30, paragraph 4.4.

## 2. Initiation of the countervailing duty investigation (Article 2:1)

68. **Norway** argued that the initiation by the United States of the countervailing duty investigation on imports of Atlantic salmon from Norway was inconsistent with Article 2:1 of the Agreement as a consequence of the failure of the United States' authorities to satisfy themselves before initiating the investigation that the request for the initiation of this investigation was filed on behalf of the domestic industry.

69. The **United States** argued that the petition had provided a satisfactory statement of industry support. In light of the certified statement that the major proportion of the domestic industry supported the petition, and the lack of significant opposition to the petition, the Department of Commerce had considered the petition to have been filed on behalf of the domestic industry and had satisfied itself of industry support prior to the initiation of the investigation.

70. **Norway** noted that the investigation had been initiated following a petition received by the United States' authorities on 28 February 1990 from the Coalition for Fair Atlantic Salmon Trade (FAST). This Coalition had requested the initiation of an anti-dumping and a countervailing duty investigation "on behalf of the United States' producers of fresh Atlantic salmon".<sup>60</sup> The petition had described FAST as "a limited trade association organized for the purpose of pursuing relief from unfairly traded Atlantic salmon from Norway under the US international trade laws". Its address was "c/o Ocean Products, Inc.", a firm which, shortly after the petition was filed, had been taken over by a Canadian firm. The petition listed in support of the petition 21 member companies which "to the best of the petitioner's information ... currently accounts for well over a majority of all production of this product in the United States".<sup>61</sup> In consultations held between the United States and Norway after the imposition of the countervailing duty order, the United States had indicated that in the case at hand it had followed its standard practice with respect to the question of the standing to file a countervailing duty petition: unless a substantial portion of the domestic industry came forth to oppose a petition, the Department of Commerce reasonably assumed that the domestic industry in question, or a major proportion thereof supported the petition. The United States interpreted the term "substantial portion" as more than half of the industry.

71. **Norway** considered that the assumption that, absent express opposition to a petition by domestic producers accounting for at least 50 per cent of production, the industry, or a major proportion thereof, supported the petition had been rejected in the Report of the Panel on "United States - Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden".<sup>62</sup> Although this Report addressed a dispute under the Agreement on Implementation of Article VI of the General Agreement, its findings were nevertheless relevant to the case under consideration because the requirements for the initiation of a countervailing duty investigation under Article 2:1 of the Agreement were identical to the requirements for the initiation of an anti-dumping duty investigation under Article 5:1 of the Agreement on Implementation of Article VI. In its Report the Panel had stated that:

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<sup>60</sup>Fresh, Chilled and Frozen Salmon from Norway: Petition for the Imposition of Anti-Dumping and Countervailing Duties Pursuant to Sections 701, 702, 731 and 732 of the Tariff Act of 1930, as Amended, on behalf of the Coalition for Fair Atlantic Salmon trade, 28 February 1990 (Public version), p.1.

<sup>61</sup> *Ibid*, p.6.

<sup>62</sup> ADP/47.



"... it did not consider that absence of opposition by domestic producers was a factor which, by itself, demonstrated that a written request for the initiation of an investigation was filed on behalf of the domestic industry."<sup>63</sup>

The Report also stated that a request for the initiation of an anti-dumping duty investigation:

"... must have authorization or approval of the industry affected before the initiation of an investigation."<sup>64</sup>

Furthermore, according to the Report, investigating authorities were required, prior to the opening of an investigation, to take steps which could reasonably be considered to be sufficient to ensure that the initiation of the investigation was consistent with the obligation of the authorities to satisfy themselves that the request was filed on behalf of the domestic industry affected.<sup>65</sup>

72. The **United States** considered that Norway's argument placed inappropriate support on the unadopted Panel Report on "United States - Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden". The Panel had noted in its Report that the Agreement on Implementation of Article VI of the General Agreement did not provide precise guidance with regard to standing and that the question of how this requirement was to be met depended on the circumstances of each particular case. The Panel's conclusion was that the initiation of an anti-dumping investigation in the circumstances of the case before the Panel was inconsistent with the obligations of the United States under the Agreement. The standards set forth by the Panel had been satisfied by the petition which had led to the initiation of the investigation of imports of salmon from Norway. The Panel had concluded that a written request filed on behalf of the industry affected "implies that such a request must have the authorization or approval of the industry affected before the initiation of an investigation". The petition filed in the salmon case had provided exactly such an authorization when it stated that:

"The members of these two trade associations include substantially all of the US growers of fresh Atlantic salmon."

Thus, the authorization which the Panel had not found in the Swedish steel case had been expressly presented to the investigating authorities in the salmon case. Also, no reason had been presented to the authorities to revisit the issue, despite the explicit request by the Department of Commerce for comments on the standing issue. The Panel Report on the dispute between Sweden and the United States described a factual scenario vastly different than that in the present case and Norway's reliance on this Report as the sole basis for its arguments on the question of standing was therefore misplaced. In any event, the Report had not been adopted. Moreover, even if the report had been adopted, it could not be given retroactive applicability to the present case.

73. **Norway** observed that there was no information indicating that the United States' authorities had taken any steps to satisfy themselves prior to the initiation of the investigation (or at any other time) that the petition had been filed on behalf of the domestic industry affected, despite the fact that one domestic producer had notified the Department of Commerce before the initiation of the investigation of its disagreement with the petition. The United States had thus been aware that a significant portion of the industry opposed the petition. **Norway** referred in this context to a letter received by the Department of Commerce on 19 March 1990 (one day before the initiation of the investigation) from a domestic producer, Global Aqua stating that this producer did not support the petition and did not

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<sup>63</sup>ADP/47, paragraph 5.17.

<sup>64</sup>ADP/47, paragraph 5.9.

<sup>65</sup>ADP/47, paragraph 5.10.

agree with the allegations contained therein. Norway noted that the facts of the salmon case made an even more compelling argument that the United States had not met its obligations under the Agreement than the facts of the case considered by the Panel in "United States - Imposition of Anti-Dumping Duties on Imports of 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 before the initiations of the investigation to state its disagreement with the petition.<sup>66</sup>

74. **Norway** also pointed to other facts which called into question the petitioner's claim to act on behalf of the domestic industry. First, while the petition had listed twenty-one firms as members of FAST, in January 1991 FAST had submitted a brief to the Department of Commerce in which only thirteen firms were listed as members of the association. Second, the petition had asserted that the request for the initiation of an investigation was supported by the Washington State Fish Growers Association (WFGA), whose members resided principally in the State of Washington. Had the United States' authorities investigated this assertion, they would have found that this Association was not supporting the petition, as was evident from a letter dated 16 March 1990 from the President of the WFGA to counsel for the petitioner.<sup>67</sup> Third, during the course of its investigation, the USITC had obtained information calling into question the assumption of industry support for the petition. The Annex to the final determination of the USITC indicated that producers representing approximately 50 per cent of the domestic industry (by production) either opposed or did not express support for the petition. Producers accounting for over one-third of production had expressed opposition to the petition. This figure was based on the 1988/89 harvest season and the 1987/88 smolt harvest. The USITC had noted that, based on earlier harvest seasons, the firms expressing opposition to the petition produced more Atlantic salmon than did the firms in support of the petition. Finally, the largest domestic producer, Ocean Products (the assets of which had been purchased by a Canadian firm during the investigation), while claiming to support the petition, had not provided a questionnaire response in the final investigation of the USITC, either as Ocean Producers or as its successor, Connors Brothers, and had thus expressed lack of interest in the outcome of the investigation.<sup>68</sup>

75. The **United States** noted that the petitioner, the Ad-Hoc Coalition for Fair Atlantic Salmon Trade had described itself in the petition as an organization consisting of 21 members who represented a major proportion of domestic production of fresh Atlantic salmon. The petition had stated that:

"Most of the coalition members are also members of either the Cobscook Bay Finfish Grower Association whose members reside principally in th[e] State of Maine, or the Washington State Fish Growers Association, whose members reside principally in the State of Washington. The members of these two trade associations include substantially all of the US growers of fresh Atlantic salmon. Both organizations have voted to support the petition."<sup>69</sup>

It was important to note that the petition did not state that the WFGA was a co-petitioner but rather that this association supported the petition. The petition contained certifications by both a member of the petitioner coalition and petitioner's legal counsel as to the completeness and accuracy of the

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<sup>66</sup>Letter from Global Aqua to FAST, 14 March 1990.

<sup>67</sup>Letter from the Washington Fish Growers Association to Michael Coursey, 16 March 1990.

<sup>68</sup>USITC Determination, p.A-19, note 49.

<sup>69</sup>Supra, note 60, p.5.

statements presented therein.<sup>70</sup> The petition also listed those firms which had expressed no opinion about the petition, including Global Aqua, a domestic producers of Atlantic salmon owned by a Norwegian farm. No firm had expressed opposition to the petition (although Norway had portrayed Global Aqua's statement of non-support as opposition). Global Aqua had never stated that other producers might or did oppose the petition and had never requested the Department of Commerce to revisit the prima facie showing of industry support contained in the petition.

76. The **United States** pointed out that, after the petition had been filed, the WSFGA had indicated that it did not support the petition. The Association, however, had not expressed opposition to the petition. Promptly upon receiving this notice, counsel for the petitioner had notified the Department of Commerce of this change and had amended the petition accordingly.<sup>71</sup> Norway had failed to even mention this amendment, creating the misimpression that the petitioner had ignored the change in the Washington Grower's sentiments. This was not the case. Norway was therefore wrong in arguing that the Washington Growers had not originally supported the petition and that their position had been misrepresented in the petition. The Washington Growers had supported the filing of the petition and had assumed a neutral stance only after the petition had been filed. In fact, the president of the Washington Growers had been the major proponent of the commencement of an investigation.<sup>72</sup> Many of the companies in the Washington Growers Association were owned by Norwegian salmon interests. The organization's actions after the filing of the petition were accounted for by pressure from the Norwegian owners to oppose or maintain a neutral stance in the investigations. The fact that in its brief filed in January 1991 FAST had listed thirteen, rather than twenty-one firms as members, reflected the decision of certain Washington State producers to take a position with respect to the investigation after filing of the petition. Even after some west-coast producers had changed their position to one of neutrality, the petition still had the support of a majority of the domestic industry, as it did throughout the entire investigation. The correctness of Commerce's original finding of the petitioner's standing had therefore not been affected by the post-filing statement of neutrality by the Washington Growers.

77. The **United States** further noted that in its notice of the initiation of the investigation, the Department of Commerce had specifically asked respondents for additional comments so that, if necessary, it could revisit its initial finding that the petitioner had filed the petition on behalf of the domestic industry. No comments had however been received in response to this initiation and the Department had thus not been presented with any reason to revisit its finding on the question of the standing of the petition.

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<sup>70</sup>The United States explained in this connection that, pursuant to amendments made in 1988 to the United States statute, the Department of Commerce required that factual information provided by parties be certified as accurate. This provision had been added to the law in order to ensure that proceedings

"... are not initiated or conducted based upon frivolous allegations and arguments which are either not supported by the facts alleged, or decided based on arguments that omit important facts known or reasonably available to the party making the submission of fact." S.Rep. No. 71, 100th Cong., 1st Sess. 114 (1987).

The Department of Commerce was currently working on proposals for the enforcement of this provision. To the extent a party's legal representative was found to have falsely certified information, there would be implications for that representative's standing with the bar.

<sup>71</sup>Letter from Michael Coursey to Robert A. Mosbacher and Kenneth R. Mason, 16 March 1990.

<sup>72</sup>The United States referred in this connection to an article in Seafood Trend, 13 November 1989, p.4.

78. The **United States** also submitted that the determination of the USITC demonstrated that the industry had supported the petition.<sup>73</sup> 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 6:5 of the Agreement. Had such producers been excluded from the industry, the extent of industry support for the petition would have been even higher.

79. 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.<sup>74</sup> Connors Aquaculture, which had purchased the assets of Ocean Products, had provided a questionnaire response in the final investigation.

80. **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.

81. **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.<sup>75</sup> 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 the existence of countervailable subsidies (Article 11)

82. **Norway** argued that the United States, by imposing countervailing duties in respect of regional development programmes, had acted inconsistently with Article 11 of the Agreement in that: (i) the United States had failed to take into account the fact that these programmes served economic and social policy objectives which had been explicitly recognized in Article 11, and (ii) the United States had failed to consider whether these programmes produced adverse trade effects, as required by Article 11.

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<sup>73</sup>USITC Determination p.A-14.

<sup>74</sup>USITC Determination, p.A-19, note 49.

<sup>75</sup>USITC Determination, p.A-14, A-24 and A-29.

83. The **United States** argued that (i) the imposition of countervailing duties in respect of these regional development programmes was consistent with the provisions in Part I of the Agreement which permitted signatories to levy countervailing duties for the purpose of offsetting any bounty or subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, and (ii) it had considered the trade effects of the subsidies in question, as required by Article 6 of the Agreement.

3.1 Economic and social policy objectives of the programmes found to constitute countervailable subsidies

84. **Norway** considered that in imposing countervailing duties in respect of regional development programmes the United States had failed to comply with Article 11 of the Agreement which provided inter alia:

"Signatories recognize that subsidies other than export subsidies are widely used as important instruments for the promotion of social and economic policy objectives and do not intend to restrict the right of signatories to use such subsidies to achieve these and other important policy objectives which they consider desirable."

This recognition of the use of subsidies other than export subsidies for the promotion of social and economic policy objectives was also reflected in the second recital of the Preamble of the Agreement. Article 11:3 provided that possible forms of subsidies to meet the social and economic policy objectives mentioned in Article 11:1 included grants, loans and guarantees. By failing to take into account that the use of regional development programmes was within Norway's rights as recognized by the Agreement, the United States had restricted Norway's rights to use such programmes to achieve social and economic policy objectives.

85. **Norway** considered that Article 11 of the Agreement be taken into account in the interpretation of provisions in Part I of the Agreement regarding the imposition of countervailing duties. Article 31:1 of the Vienna Convention of the Law of Treaties (1969) provided that:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Article 31:2 of the Vienna Convention provided that the "context" of a treaty includes its text and its preamble and annexes. Accordingly, Article 11, interpreted in its context, applied to the Agreement as a whole. Norway cited the language in the preamble of the Agreement, footnote 3, numerous references throughout Parts I and II, and footnote 23 to demonstrate that Article 11, interpreted in its context, applied to the Agreement as a whole. In addition, the text of the Agreement as a whole indicated that Article 11 applied equally to both Parts I and II of the Agreement.

86. **Norway** contended that the United States had accepted that Article 11 applied to the definition of a subsidy for purposes of implementing countervailing measures. In the proceedings before the Panel the United States had argued that the Norwegian programmes constituted subsidies under the definition contained in Article 11:3 of the Agreement. In addition, in 1986 former US Trade Representative Yeutter had stated in testimony before the United States House of Representatives that the United States had to include a specificity requirement in its countervailing duty law because such provision was required by the obligations of the United States under the Agreement. Since the specificity concept was found in Article 11 of the Agreement, the statement thus recognized that Article 11 placed constraints on the definition of what constituted a countervailable subsidy.

87. In addition to the specificity concept, another constraint in Article 11 on the definition of a countervailable subsidy was in the view of **Norway** the recognition in Article 11:1 of the important

rôle subsidies other than export subsidies could play in promoting social and economic policy objectives and the statement that signatories did not intend "to restrict the right of signatories to use such subsidies to achieve such objectives". The programmes found by the Department of Commerce to constitute countervailable subsidies in the case before the Panel were designed to provide increased, viable and profitable employment in regions with a high level of unemployment or a weak economic base. The Department of Commerce had agreed that this was the purpose of these programmes:

"We verified that the purpose of the RDF is to maintain the pattern of settlement within the country by equalizing the income, employment and living conditions between the northern and southern regions of Norway. The Government of Norway's restrictions on fish farm establishment in southern regions coincide with the RDF's policy of promoting certain regions of the country."<sup>76</sup>

Thus, even if these programmes constituted subsidies, the Department should have considered these programmes in light of the statement in Article 11:1 that the Agreement was not intended to "restrict the right of signatories to use such subsidies to achieve ... important policy objectives" before applying countervailing duties.

88. The **United States** pointed out that the investigation conducted by the Department of Commerce had included an examination of benefits provided to the Norwegian salmon industry under the Regional Development Fund (RDF). The analysis of the Department had revealed that only producers or manufacturers located in underdeveloped regions of Norway were eligible for assistance. The RDF officials had explained to the Department that the programme covered 93 per cent of the country, but only 36 per cent of the population. The benefits provided to the covered regions consisted of loan guarantees, long-term loans and grants. Such programmes were explicitly recognized as subsidies in Article 11:3 of the Agreement. With respect to loan guarantees, the Department had verified that these guarantees provided to the salmon farming industry were made on terms not inconsistent with commercial considerations. Therefore, these benefits had been determined to be non-countervailable. The Department had determined, however, that the long-term loans and grants provided countervailable subsidies. It had verified the interest rate charged for long-term loans under the RDF, and compared this rate to the long-term borrowing rate charged by commercial banks in Norway. The RDF rate was lower. The Department's conclusion, supported by evidence in the record, was that the RDF loans were countervailable because they were provided on terms inconsistent with commercial considerations. Moreover, the Department had determined that outright grants were provided to the salmon industry. Such grants were also countervailable.

89. The **United States** considered that Norway's view that, since regional subsidies were recognized in Article 11 they were not countervailable under Part I of the Agreement, ignored the express provisions of both the General Agreement and Part I of the Agreement. Article VI:3 of the General Agreement permitted the imposition of a countervailing duty to offset "any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production, or export or any merchandise". By Norway's own admission, the regional subsidies were bestowed upon the production of fresh Atlantic salmon. The Agreement incorporated this requirement of the General Agreement in Article 1 which in footnote 4 provided that:

"The term 'countervailing duty' shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in Article VI:3 of the General Agreement."

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<sup>76</sup>56 Fed.Reg., 25 February 1991, pp.7684-7685.

Neither the General Agreement nor the Agreement circumscribed the type of subsidies which may be subject to the imposition of countervailing duties. The plain language of each, to the contrary, expressly authorized a countervail proceeding against any subsidy. The fact that certain subsidies were mentioned in Part II of the Agreement did not affect the authority to impose countervailing duties against those same subsidies under Part I. With respect to Norway's argument that an interpretation of Article 11 in the context of the Agreement as a whole required that Article 11 be taken into account in the interpretation of the provisions of Part I of the Agreement, the **United States** took the view that Parts I and II of the Agreement were consistent with one another. There was no ban on countervailing subsidies identified in Part I. Nothing in the wording of note 4 ad Article 1 of the Agreement indicated that the right to impose countervailing duties was somehow limited by provisions elsewhere in the Agreement. The language at the end of the first sentence in Article 11:1 of the Agreement addressed the right of signatories to provide certain subsidies; it provided no restrictions on the rights of other signatories to impose offsetting duties. By the same token, the imposition of such duties by an importing signatory did not restrict the right of another signatory to provide subsidies; the two rights were independent of each other.

### 3.2 Trade effects of the programmes found to constitute countervailable subsidies

90. **Norway** argued that the United States had acted in violation of Article 11 not only by failing to take into account that the right of signatories to grant regional development programmes was expressly recognized in Article 11:1, but also by failing to consider whether these programmes produced adverse effects on trade within the meaning of Article 11:2.

91. **Norway** considered that the Agreement placed obligations on both the exporting and importing country with respect to programmes covered by Article 11. Article 11:2, for example, admonished the export party, when implementing such programmes, to consider the "possible adverse effects on trade", and presumably, to seek to avoid such adverse trade effects. This was precisely what the Norwegian authorities had done at the time Norway's regional policy instruments were introduced. After evaluating these instruments in light of the rules of the General Agreement and the EEC Treaty and considering that the objective of the RDF schemes was solely to influence the localization of domestic industries, the Norwegian Ministry of Local Government had concluded that the RDF programmes were consistent with Norway's trade policy obligations.

92. **Norway** observed in this context that both Article 11 and the Agreement as a whole required the importing country to consider the trade effects of subsidies other than export subsidies before implementing countervailing measures. The Agreement was intended to address the trade effects of a subsidy rather than just the subsidy's existence. In the Preamble the signatories had noted their desire to "ensure that the use of subsidies does not adversely affect or prejudice the interests of any signatory". Article 6:4 expressly required the importing country to demonstrate that the "subsidized imports through the effects of the subsidy" were causing material injury. Article 8 provided that "Signatories also recognize that subsidies may cause adverse effects to the interests of other signatories". Article 11:2 admonished signatories implementing such programmes to take account of the "possible adverse effects on trade". Since the Agreement sought to eliminate the adverse effects of any subsidy, not to eliminate the right of signatories to provide subsidies other than export subsidies, signatories could not impose countervailing duties unless they had examined, and had found to exist, adverse trade effects of the programmes they sought to countervail.

93. **Norway** pointed out that in the case under consideration the United States had provided no evidence that it had considered the trade effects of the regional development programmes. The position of the United States that there was no obligation under the Agreement to consider the trade effects of a subsidy before implementing countervailing measures and that the mere existence of a subsidy programme was sufficient to justify imposing countervailing duties was inconsistent with recent Panel decisions in

"Canadian Countervailing Duties on Grain Corn from the United States"<sup>77</sup> and in "United States - Countervailing Duties on fresh, chilled and frozen pork from Canada".<sup>78</sup> In the former Report, the Panel had determined that Canada had not properly considered the effects of the subsidized imports on the domestic industry, noting that it was insufficient that an overall depression in prices was caused by the foreign subsidy at issue. The Panel had found that Canada had to demonstrate that that subsidy had a specific effect on the Canadian industry - not just that such subsidies existed. In the case concerning countervailing duties on pork from Canada, the Panel had rejected the notion that the mere existence of a subsidy was sufficient to justify implementation of countervailing duties. The Panel had found that before implementing countervailing duties, the investigating authority had to investigate all relevant facts and determine whether the subsidy has been bestowed on the production of the exported product and what the trade effects of such subsidy were. Furthermore, the position of the United States was also inconsistent with Article 11:4 of the Agreement:

"Signatories further recognize that, without prejudice to their rights under this Agreement, nothing in paragraphs 1-3 above and in particular in the enumeration of forms of subsidies creates, in itself, any basis for action under the General Agreement as interpreted by the Agreement."

Thus, Article 11 could not be read to give an importing country *carte blanche* to impose countervailing duties any time a programme met the general definition of a subsidy in Article 11:3.

94. **Norway** considered that in determining to countervail Norwegian regional programmes, the United States had disregarded the fact that these programmes did not apply to specific industries, did not cover operational expenses and did not stimulate exports. The programmes were stable, transparent and had been in operation for a long time. The expansion of the Norwegian salmon farming industry was not the result of these programmes, which were incentives for relocation of investments which would have occurred regardless of the programme. Neither did this support provide incentives for enhanced production of farms in operation. Indeed, the Norwegian Government, far from providing incentives to promote the expansion of the salmon farming industry, had limited investment through its restrictive licensing practices. The United States had not addressed how such a situation could cause adverse trade effects that may be countervailed under the Agreement.

95. The **United States** argued that in the case under consideration it had considered the trade effects of the subsidy as required by the Agreement. The Agreement required that a determination of material injury be made before a countervailing duty could be levied. Article 6 provided that the investigation consider the volume and price effects of the subsidized imports and their consequent impact on the domestic industry (Articles 6:2-4). There was no additional "trade effect" analysis required before countervailing duties could be imposed. Norway sought to impose a Part II "trade effects" analysis into the requirements for countervailing duties under Part I of the Agreement. There was no such engrafting of the requirements Part II into a Part I investigation. The Agreement explicitly recognized in footnote 3 to Article 1 that the two were separate:

"The provisions of Part I and Part II of this Agreement may be invoked in parallel; however, with regard to the effects of a particular subsidy in the domestic market of the importing country, only one form of relief (either a countervailing duty or an authorized countermeasure) shall be available."

Therefore, there was no basis for Norway's assertion that a countervailing duty investigation must also take into account the provisions of Article 11 of the Agreement.

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<sup>77</sup>SCM/140, adopted on 26 March 1992.

<sup>78</sup>BISD 38S/30.



96. The **United States** also considered that Norway's claim that there was no relationship between the operation of the RDF programmes and expansion of the salmon industry in Norway was squarely contradicted by the findings of the Department of Commerce in its investigation. The Department had found that Norway's RDF programmes provided unfair subsidies which, when allocated over all salmon exported from Norway, including that exported to the United States, were at an estimated ad valorem rate of 1.75 per cent. These loans were provided by Norway "on terms inconsistent with commercial considerations", terms more favourable than the recipients would receive in dealing with a private creditor. Such loans would lower the recipient farms' cost of production, thereby encouraging greater production (and in this case, severe overproduction) than would otherwise be the case.

97. **Norway** also referred in this context to the rejection by the Department of Commerce of the argument of the Norwegian respondents that the Department had to determine whether any subsidy to smolt producers was passed through to the exporters of the gutted salmon.<sup>79</sup> The United States was required to examine whether the subsidy on smolt was in fact passed through to the exported product in order to meet its obligation under the Agreement to determine the trade effects of the subsidy on smolt. In the case of the countervailing duties imposed by the United States on pork from Canada, the United States had assumed, without examination, that a subsidy to hog growers was passed through to the pork products at issue. The Panel established by the GATT Council to examine the dispute between Canada and the United States regarding these countervailing duties had determined that information regarding this pass-through of the subsidy was relevant to the imposition of duties under Article VI of the General Agreement and that the United States had not abided by its obligations under Article VI:3 by failing to examine this issue.<sup>80</sup> Similarly, in the case before this panel, where the bulk of the alleged subsidies was provided to independent smolt producers and where there were two arms-length transactions intervening between the benefits to the smolt producers and the exported salmon, it was difficult to conceive that any subsidies to smolt were subsidies to salmon or had any adverse trade effect on the United States' salmon farming industry. By failing to examine the trade effects of alleged subsidies to smolt producers, or of alleged "subsidies" to the salmon farming industry, the United States had failed to consider all relevant evidence prior to imposing countervailing duties.

98. In a comment on the observation of the Department of Commerce that a smolt was not an input to an adult salmon but the same salmon at an earlier stage of production,<sup>81</sup> **Norway** noted that before the Panel established by the Committee on Anti-Dumping Practices in the matter of anti-dumping duties imposed by the United States on salmon from Norway, the United States had justified the use of the acquisition costs of smolt, rather than the cost of production of smolt, in the determination of the cost of production of salmon on the grounds that the production cost of the smolt by a smolt farmer not related to the salmon farmer was not relevant to the salmon farmer's cost of production. Thus, the United States would like to have it both ways. For the purpose of applying countervailing duties, smolt and salmon were one product and "subsidies conferred upon the production of the product remain with that product when sold through a trading company", regardless of any arms-length transactions along the way. However, for the purpose of applying anti-dumping duties, smolt and salmon were treated as separate products and the cost of production of smolt was therefore considered irrelevant to the determination of the cost of production of salmon. **Norway** considered that the United States had been correct in its analysis in the anti-dumping investigation when it found that the arms-length transactions were significant and that smolt and salmon were not the same product.

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<sup>79</sup>See section IV of this Report for the views of the parties on the admissibility of this matter in the proceedings before the Panel.

<sup>80</sup>BISD 38S/30, paragraphs 4.6 and 4.8.

<sup>81</sup>56 Fed.Reg., 25 February 1991, p.7686.

#### 4. Calculation of the amount of the subsidies (Article 4:2)

99. **Norway** considered that there were three aspects of the final affirmative determination of the Department of Commerce which were inconsistent with the requirement of Article 4:2 of the Agreement that a countervailing duty not be levied on an imported product "in excess of the amount of the subsidy found to exist". First, the Department of Commerce had failed to take into account that the reduction of payroll taxes had resulted in an increased liability for the purpose of income and profit taxes. Second, the Department had overstated the long-term interest rate benchmark used for the purpose of determining the amount of subsidization resulting from the loans provided in the context of the Regional Development Fund. Third, the Department of Commerce had failed to conduct an analysis to determine whether subsidies provided to producers of smolt had actually been passed through to exporters of salmon. As a result of the errors committed by the Department on these three issues, the amount of the countervailing duty imposed had exceeded the amount of the subsidy found to exist.

##### 4.1 Secondary tax effects

100. **Norway** pointed out that the alleged subsidies provided under the reduced payroll taxes programme resulted in a decrease in the amount of expenses deductible for the purpose of calculating the taxable income of the recipients of these benefits. Consequently, the firm's taxable income increased and was taxed at the marginal tax rate. This income tax effect of the reduction of payroll taxes reduced the actual value of the subsidy received. The Department of Commerce had refused to consider this reduction of the value of the subsidy in calculating the amount of the subsidy and had considered only the amount of the subsidy received, not the costs incurred by the recipient in receiving that subsidy. Thus, the United States had failed to consider all relevant information and had imposed a duty in excess of the amount of the subsidy found to exist.

101. **Norway** noted that the Department of Commerce frequently calculated the benefit resulting from programmes which reduced taxable income. Thus, an income tax exemption for export earnings was always countervailed, based on a calculation of the effect on the exporters' taxes.<sup>82</sup> The secondary tax effects of a subsidy were no more speculative than were the benefits resulting from such an income tax exemption for export earnings. The United States could easily adapt the methodology it used to calculate the benefit resulting from an income tax exemption of export earnings to calculate the reduction in the payroll tax benefits resulting from the increased income tax liability. In cases involving income tax exemptions for export earnings, the Department of Commerce found that there was a benefit only if there would have been more taxable income but for the exemption. The benefit worked to deduct from the gross earnings those earning attributable to exports, which reduced the taxable income for the firm claiming this benefit. The Department considered that the benefit occurred in the year in which the tax would have been payable (as opposed to the year in which the income was earned and the tax liability accrued). Thus, it was able to calculate the actual benefit by looking at whether there was, in fact, taxable income. In this manner, the Department avoided any speculative aspect of a programme that would only reduce tax liability if there was income on which to pay taxes in the first place. Similarly, in Norway firms which paid a lower payroll tax would increase their taxable income above what it would have been at the weighted average payroll tax rate (the rate the Department used to compare to the reduced rates to determine the benefit). This would only affect their tax liability if there was sufficient taxable income to generate a tax liability in the first place. Therefore, the United States maintained that such effects on the taxable income were speculative since there was no way to know at the time the benefit (from the reduced payroll tax) was earned whether there would, in fact, be taxable income. If the Department were to apply the same lag to this calculation as was applied in the case of income tax exemptions for export earnings, it would be able to adjust for the

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<sup>82</sup>See, e.g., Silicon Metal from Brazil, 56 Fed.Reg., 12 June 1991, p.26,998.

speculative nature of the secondary tax effects. Norway also pointed out that a draft version of the proposed Multilateral Agreement on Steel Trade Liberalization, which the United States had helped to prepare, contained a provision for the consideration of secondary tax effects in the determination of the value of a subsidy. This indicated that the drafters of this proposed Agreement did not consider that such effects were speculative.

102. **Norway** also pointed out that the United States had taken account of secondary tax effects of a subsidy in Certain Refrigeration Compressors from the Republic of Singapore.<sup>83</sup> In that case the Government of Singapore had imposed an export tax on all refrigeration compressors exported to the United States pursuant to a suspension agreement with the Department of Commerce. Since the export tax was a business expense deducted in the course of determining the amount of taxable income, the United States had calculated the benefits as the amount by which taxable income was reduced due to payment of this export tax. It thus appeared that the United States declined to consider secondary tax effects as "speculative" only when such effects would reduce the amount of the subsidy.

103. The **United States** argued that there was no requirement in the Agreement that potential secondary effects of subsidies, the size and very existence of which were speculative, be taken into account in calculating the amount of a subsidy. Numerous variables, which could change annually, affected a company's tax liability, including very importantly, whether each particular company receiving benefits earned a profit, and therefore had taxable income, in the year in question. Therefore, the effect of one variable, i.e. the subsidy, could not be predicted with sufficient certainty to allow an adjustment. That there was no legal requirement in the Agreement that the amount of a subsidy be calculated in the manner sought by Norway was evident from the text of footnote 15 ad Article 4:2 providing that "An understanding among signatories should be developed setting out the criteria for the calculation of the amount of the subsidy". There was therefore neither a factual nor a legal basis for Norway's argument that the secondary tax effects of the reduction of payroll taxes should have been taken into account by the Department of Commerce.

104. The **United States** considered that Norway had misread the determinations of the Department of Commerce in the investigations concerning Certain Refrigeration Compressors from Singapore and Silicon Metal from Brazil. It was the consistent practice of the Department of Commerce not to adjust for alleged secondary effects of subsidies. In Certain Refrigeration Compressors from Singapore, the Department of Commerce had included in its calculation of the net subsidy a deduction from the subsidy recipient's income tax liability of export charge payments. The deduction of the payments, imposed by the Government of Singapore under a suspension agreement to offset the subsidy, had the effect of reducing the recipient's total tax liability, so that the subsidy had not in fact been completely offset by the export charge payments. Thus, the Department had not accounted for a "secondary effect" of the subsidy, but rather the full amount of the subsidy itself. Likewise, in Silicon Metal from Brazil, the Department had also not taken account of any secondary tax effects. The issue in that case involved an income tax reduction for export earnings; under this programme, profits from export sales were taxed at a rate of three per cent, while profits from domestic sales were taxed at a rate of thirty per cent. The subsidy in that case was the difference in taxes paid on merchandise sold for export compared with merchandise sold in the domestic market.

105. In response to the observations of the United States on the Certain Refrigeration Compressors from Singapore case, **Norway** noted that in that case the firms in question had deducted from their gross earnings taxes paid in the course of business including the export taxes on exports to the United States. In Norway the firms had deducted from their gross earnings the taxes paid in the course of business, including the payroll taxes (the rate of which varied by region). The United States had

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<sup>83</sup>56 Fed.Reg., 5 December 1991, p.63713.

argued that the deduction of the export taxes in Singapore had the effect of reducing the recipient's total tax liability from what it would have been absent the export tax and, thus, had the effect of reducing the export payment. The United States claimed that this was not a secondary tax effect. In Norway, the payment of reduced payroll taxes had increased the recipient's income tax liability from what it would have been absent the reduced payroll tax rate, and thus, had the effect of reducing the recipient's benefit from the reduced payroll taxes (i.e. in essence, it had increased the payroll tax payment). Yet in this second situation, the United States treated the effect as a secondary tax effect. However, since in both cases the effect being measured was the effect on income taxes caused by the deduction from gross earnings of another tax payment, there was no reason to treat these cases differently.

4.2 Calculation of the interest rate benchmark for determining the benefits resulting from certain loans granted on terms inconsistent with commercial considerations

106. **Norway** claimed that the United States had violated Article 4:2 of the Agreement in the calculation of the interest rate benchmark used by the Department of Commerce for the purpose of calculating the benefits resulting from certain loan programmes. In order to determine whether loans to the Norwegian agriculture industry by the Regional Development Fund and the National Fishery Bank were granted on commercial or on subsidized terms, the Department of Commerce had compared the effective interest rates charged by these two institutions to a single average commercial interest rate. The interest rate used in this comparison for the purpose of the preliminary determination (14.9 per cent) was the national average long-term interest rate charged by commercial banks for corporate lending. During verification in September 1990 in Norway officials of the Department of Commerce had been informed by representatives of one commercial bank that the bank at that time charged a specific risk premium of 0.75 per cent on all loans to fish farmers. Representatives of another commercial bank had told the officials that this bank might charge a risk premium to borrowers in any industry. Based on the statement of the representatives of the bank which charged a specific risk premium to fish farmers, the Department had erroneously added the risk premium charged by that bank in 1990 to the national average long-term interest rate charged by commercial banks for corporate lending in 1989. Since this national average was an average of all long-term rates, it already included all risk premiums. By adding a specific risk premium of 0.75 per cent to this average rate, the Department had overstated the benchmark in its final determination.

107. **Norway** pointed to the requirement in Article 4:2 of the Agreement that a countervailing duty not be levied in excess of the amount of the subsidy found to exist "calculated in terms of subsidization per unit of the subsidized and exported product". The words "subsidy found to exist" did not give a signatory carte blanche to generate any number it chose. The amount of subsidization found to exist had to be supported by the facts. Therefore, the investigating authorities had to determine the actual level of subsidization per unit of the exported product. The facts established in the investigation at issue demonstrated that the interest rate benchmark constructed by the United States overstated the risk premium on loans to the salmon farming industry. In overstating this benchmark, the United States had calculated a countervailing duty in excess of the amount of subsidization per unit of the subsidized and exported product. The imposition of a duty in excess of that amount was in violation of the express terms of Article 4:2 of the Agreement.

108. The United States considered that Norway's argument overlooked the fact that the salmon industry in Norway was charged a risk premium in addition to the national average. At verification in Norway, a commercial bank had notified the Department of Commerce that Norwegian salmon farmers were required to pay an additional 0.75 per cent over the commercial loan rate. Norway's argument that the national commercial rate already had an average risk premium built in, while not literally false, disregarded the fact that the Atlantic salmon industry had a higher risk premium than the national average. Neither the General Agreement nor the Agreement established a specific methodology for calculating the amount of a subsidy. Indeed, footnote 15 ad Article 11 recognized the lack of such a methodology in suggesting that "an understanding among signatories should be developed setting

out the criteria for the calculation of the amount of the subsidy". No such understanding had yet been developed. In sum, Norway's argument was without foundation in fact or in law, and Norway had not pointed to any requirement in the Agreement that the Department of Commerce should have calculated the subsidy amount in a different manner.

109. **Norway** contested the view of the United States that the evidence before the Department of Commerce indicated that Norwegian banks in 1989 charged a risk premium on loans to the salmon industry "in addition to the national average". According to the report on the verification conducted in Norway, one Norwegian bank had informed officials of the Department of Commerce that in 1990 it charged a risk premium of 0.75 per cent in addition to its normal commercial lending rate on fish farm loans. Thus, the evidence demonstrated that one bank in 1990 charged a risk premium to fish farms in addition to its own commercial lending rate, not in addition to the national average interest rate calculated by the Department. The national average lending rate included all lending rates for all loans and therefore reflected premiums and discounts. To add a premium to the national average was to overstate the commercial lending rate because this premium was already included in the national average.

110. The **United States** noted that there were two parts to Norway's argument on the question of the calculation of the interest rate benchmark. First, Norway asserted that the Department had not determined that a risk premium had actually been in effect during the period of investigation but had assumed that because a risk premium was applied in 1990, it was also applied in 1989. Second, Norway claimed that the risk premium applied by the Department was overstated. Both claims were incorrect. At verification in Norway, officials of the Department had explicitly requested officials at the Christiania Bank to provide the effective interest rate for 1989 and had been told that this rate was between 14 and 15 per cent. The bank officials had added that they charged "a risk premium of 0.75 per cent on all fish farm loans".<sup>84</sup> This was the rate applicable in 1989. At the request of the Department, an official of a second bank, Den Norske Bank (DNB) had explained this bank's lending policies for fish farms:

Generally, the fish farming industry is charged higher premiums than other customers, since the industry's financial health has been poor ... The official stated that since March of 1989, the DNB is no longer making loans to new clients involved in fish farming due to the current financial situation of the industry."<sup>85</sup>

Thus, the Department's determination that the salmon farming industry was at risk, and its calculation of the risk premium, were supported by information provided by Norwegian officials. Norway had, belatedly, appeared to argue that the Department should have contacted every bank in Norway to determine the risk premium it charged. However, it was proper for the Department to contact two major banks to obtain representative lending rates. Moreover, Norwegian officials and the attorneys representing the Norwegian interests had been present at the verification process. If they had believed that the Department was relying on an unrepresentative rate, they had the opportunity to request the Department to meet with additional commercial banks. However, the Norwegian officials and the attorneys for the Norwegian interests had not requested that additional banks be contacted.

111. **Norway** observed that in discussing the report on the verification conducted in Norway, the United States omitted any reference to the section of the report on the verification conducted at the Central Bank of Norway (Norges Bank). This section discussed inter alia the method of calculation of the national average long-term interest rate which had been used by the Department in its preliminary determination:

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<sup>84</sup>Verification Report for the Government of Norway in the Countervailing Duty Investigation of Fresh and Chilled Atlantic Salmon from Norway, 10 December 1990, p.32.

<sup>85</sup>Ibid., p.33.

"The bank officials explained that these rates are based on commercial bank's average profit and loss accounts, plus the interest charged to all sectors, plus commissions and fees charged on all loans. The rates are calculated as a percentage of the mean of outstanding loans calculated from the monthly balance sheets of commercial banks."<sup>86</sup>

The average interest rate was calculated on the basis of reports submitted by all banks on their outstanding loans to all sectors including non-financial enterprises and households. The average incorporated all risk premiums imposed on loans for various sectors. The practice of applying a risk premium added to each commercial bank's own basic lending rate was by no means unique to the fish farming industry. Various risk premiums were applied by commercial banks also when they lent in various other sectors. In calculating the benchmark by adding the specific risk premium of the fish farming sector to the national average interest rate, the United States had overstated the benchmark because this average interest rate already comprised the risk premium for the fish farming sector as well as risk premiums for other sectors.

112. The **United States** pointed out that the verification report indicated that the Department was seeking an interest rate specific to the salmon farming industry. The Government of Norway had informed the Department in May 1990 that a salmon-industry specific rate was not available. Consequently, the Department had had to calculate an industry-specific rate itself. Regarding the possibility that, insofar as the national average rate reflected a risk premium applicable to the salmon farming industry, the addition of the industry-specific risk premium provided by Christiana Bank (one of the three largest banks in Norway) might have "double-counted" the risk premium, the **United States** noted that it was not clear that when banks reported their interest rate for inclusion in the national average rate, that reported rate included any risk premium that might be charged to any particular industry. A risk premium for a particular industry was always applied in addition to an average rate which could well already reflect that industry's additional risk premium. In this respect, the approach of the Department reflected general commercial practice. However, even if the national rate did reflect the salmon industry's risk premium (and Norway merely asserted that this was the case without providing any support for the proposition), it would be impossible to cull out from that rate the amount of the risk premium attributable to the salmon industry from the rate applied to all other industries in Norway. Certainly the Norwegian Government and the Norwegian respondents had never suggested during the investigation that such an exercise was either possible or appropriate and the Government of Norway had failed to provide any such methodology during the proceedings before the Panel. In reality, there would have been no way to reduce the amount of the national loan average by the risk premium supposedly attributable to the salmon industry. In sum, therefore the Department had based its determination on the information before it. It had sought industry-specific data from the Government of Norway and had been told that none was available. Consequently, the Department had been required - as authorized under the Agreement - to prepare the information itself. It had done so in a manner which had prompted no objection from the Norwegian Government (or any other party) during the investigation and which met the requirements of the Agreement.

113. **Norway** noted that the risk premium of 0.75 per cent had not been included in the interest rate used by the Department in its preliminary determination and had been added only in the final determination. Norway also noted that officials of the Department of Commerce had not indicated in the course of the investigations what methods they intended to apply for the calculation of the interest rate benchmark. The Norwegian officials thus had not had an occasion to anticipate that a double-counting of the risk premium could be the result.

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<sup>86</sup>Ibid, p.24.

#### 4.3 Upstream Subsidies

114. **Norway** argued that the United States had violated its obligations under Article 4:2 of the Agreement in that the Department of Commerce had assumed that any benefits accruing to smolt producers constituted subsidies on the exported salmon. The Agreement did not permit such an assumption. Many Panel decisions reflected the view that the imposition of anti-dumping or countervailing duties pursuant to Article VI of the General Agreement was only permitted when certain facts had been established. To assume a pass-through of subsidies on smolt to exported salmon did not establish its existence as fact. By applying the full subsidy received by the smolt producers to the calculation of the duty, the United States had levied duties in excess of the level of subsidization, in terms of subsidization per unit of the subsidized and exported product. Article VI:3 of the General Agreement only permitted the imposition of a countervailing duty on salmon if a subsidy was determined to have been bestowed on the exported salmon, not on smolt. As found by the Panel in the dispute between Canada and the United States on countervailing duties imposed by the United States on imports of pork from Canada:

"According to the clear wording [of Article V(3)] the United States may impose a countervailing duty on pork only if a subsidy has been determined to have been bestowed on the production of pork."<sup>87</sup>

Thus, as a result of the failure of the United States to determine the actual per unit amount of the subsidy bestowed on the exported salmon, the imposition by the United States of countervailing duties on salmon from Norway was inconsistent with its obligations under the Agreement.

115. The **United States** argued that in the case under consideration the Department of Commerce had properly declined to conduct an upstream subsidies analysis.<sup>88</sup> Throughout the investigation conducted by the Department of Commerce, the Norwegian Government and private respondents had not distinguished between smolt and salmon. Questionnaire responses had treated both smolt and salmon products as part of one, single industry. Accordingly, the Department had treated smolt and salmon as one in its preliminary determination of 29 June 1990. This had not been contested by the Norwegian respondents. On 10 December 1990, the Norwegian respondents had for the first time in their case brief before the Department raised an allegation that smolt and salmon were separate industries, and that, accordingly, any subsidies to smolt products should be treated as "upstream subsidies". This complex, factually-based issue thus had not been raised until long after the department had completed its factual investigation at a stage of the case at which the parties presented their comments on a previously compiled factual record and on the legal arguments of other parties. The "upstream subsidy" issue had been raised at an inappropriately late stage of the case, long after the necessary factual investigation could have been conducted by the Department within the time-limit prescribed by the Agreement. The Department had therefore based its determination on the facts available, as authorized under Article 2:9 of the Agreement.

116. The **United States** rejected the parallel drawn by Norway between the circumstances in the countervailing duty investigation of imports of pork from Canada and in the countervailing duty investigation of imports of salmon from Norway. For most of the subsidies provided to the fish farming industry in Norway, the Government of Norway had not distinguished between subsidies provided to smolt producers and subsidies provided to salmon growers - both smolt and salmon growers had been treated as one industry. The USITC had also determined in this case that salmon growers and

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<sup>87</sup>BISD 38S/30, paragraph 4.6.

<sup>88</sup>See also supra, Section IV, for the views of the United States on the admissibility of this claim of Norway.

smolt growers constituted one industry. The fact that the upstream subsidy issue had been raised virtually as an afterthought in this case showed that even the Norwegian respondents did not make the distinction between smolt and salmon growers. In the countervailing duty investigation of imports of pork from Canada, the Canadian respondents had argued that an upstream subsidy analysis should have been employed. The Department of Commerce had in that case not applied that type of analysis but had employed a specific provision of the countervailing duty investigation which pertained to the treatment of processed agricultural products. In that case, the USITC had found that swine growers and producers of the processed pork were separate industries.

117. **Norway** argued that the "upstream subsidy" issue had been raised and litigated before the investigating authorities in the United States. The Department of Commerce had made a clear ruling that the subsidies conferred upon smolt remained with that product through its subsequent processing and sale through a trading company. The Federal Register notice of the affirmative final determination by the Department did not mention that the respondents had raised this issue too late. It should therefore come as no surprise to the United States that Norway raised this matter in this dispute settlement proceeding. Throughout the process of consultations and conciliation Norway had questioned how the United States had calculated the level of subsidization of the exported product and the apparent failure of the United States to consider the trade effects of the alleged subsidies, both in terms of determining what constituted countervailable subsidies and in terms of the requisite finding of injury.

## 5. Determination of the existence of injury (Article 6)

118. In summary, **Norway** argued that the affirmative final determination of injury made by the USITC in its investigation of imports of fresh and chilled Atlantic salmon from Norway was inconsistent with the requirements of Articles 6:1, 6:2 and 6:3 regarding the examination of the volume of the allegedly subsidized imports, the effect of these imports on domestic prices in the United States of the like product, and the consequent impact of the imports on domestic producers in the United States of the like product. This final determination was also inconsistent with the requirements of Article 6:4 of the Agreement as a result of the failure of the USITC to determine that the allegedly subsidized imports were, through the effects of subsidies, causing present material injury to the domestic industry and to ensure that injuries caused by other factors were not attributed to these imports.

119. In summary, the **United States** argued that the consideration by the USITC of the volume of the imports subject to investigation, the price effects of these imports, and of the impact of the imports on the domestic industry were in conformity with the requirements of Articles 6:1, 6:2 and 6:3 of the Agreement and that the conclusions drawn by the USITC with respect to these factors were fully supported by the evidence before the USITC. The United States argued that Norway was asking the Panel to reweigh the facts before the investigating authorities. However, the United States pointed out, the Agreement did not envision this rôle for dispute resolution panels. Rather, under the Agreement, factual issues were entrusted exclusively to the investigating authorities. Therefore, the United States argued, the Panel should decline Norway's invitation to reweigh the facts, and instead consider whether the USITC considered the factors mandated by the Agreement and possessed positive evidence concerning its conclusions. This final determination was also consistent with Article 6:4 in that the USITC had determined that the subject imports were, through the effects of subsidies, causing present material injury to the domestic industry, as required by Article 6:4. The USITC had linked the effects of the imports from Norway to the materially injured condition of the domestic industry, and thus had not improperly attributed to the imports any injury from other factors.

### 5.1 Request by Norway for certain data

120. **Norway** asked the Panel to request the United States to provide all information relied upon by the USITC in its determination which, because of its confidential nature, had not been disclosed in



the published text of the determination or the Annex thereto. Norway specifically requested that the United States make available to the Panel monthly data for the period 1987-1991 regarding production and domestic consumption of Atlantic salmon in the United States, prices in the US market for various sizes of Atlantic salmon, and market penetration of imports of Atlantic salmon from Norway, Canada and Chile. In addition, **Norway** requested that the United States provide the Panel with data on imports from Norway, by volume and value, during the first months of 1991.

121. The **United States** responded that it had provided Norway with monthly data on 1989 and 1990 imports from Norway and 1990 imports from all other countries, and that the USITC had not gathered consumption or market penetration figures on a monthly basis. The same was true for figures on US production. With regard to prices, the Annex to the USITC's determination, at pages A-52-54, contained charts displaying publicly available prices for several weights of Atlantic salmon on a weekly basis for the years 1987 through 1989. The USITC had also collected pricing data in questionnaires, as described at page A-51 and pages A-59-61 of the Annex. However, the actual pricing figures in the questionnaires were not releasable because they were business confidential information. As noted at pages A-59-60 of the Annex, price trends and price comparisons had been similar for the questionnaire and publicly available data. With regard to monthly data on imports from Norway, the record of the USITC's investigation did not contain monthly figures for 1991.

## 5.2 Volume of the allegedly subsidized imports (Articles 6:1 and 6:2)

122. **Norway** submitted that the affirmative final determination of the USITC in its investigation of fresh and chilled Atlantic salmon from Norway was inconsistent with the requirement of Article 6:1 that there be an objective examination of the volume of allegedly subsidized imports, and with the requirement of Article 6:2 that the authorities consider whether there has been a significant increase in the volume of imports, either in absolute terms, or relative to production or consumption in the importing country.

123. In its determination, the USITC had concluded that the volume of imports from Norway over the period of investigation and the increases in the volume of the imports from 1987 to 1989 were significant. The USITC had also referred to the "effects of the large increase in salmon imports from Norway ... during the period of investigation through 1989".<sup>89</sup> **Norway** contested these assertions as partly incorrect and partly misleading. The evolution of the volume of imports into the United States of fresh and chilled Atlantic salmon from Norway had to be analyzed in the context of the recent development of the domestic market for this product in the United States. Norway had developed the United States market for fresh Atlantic salmon and had been practically the only supplier to the United States market until 1984. **Norway** provided to the Panel monthly statistical data covering the period 1986-1991 on indicators of the development of the salmon market in the United States. Domestic consumption of salmon in the United States had fluctuated somewhat but had shown a considerable growth in the long term which appeared to be continuing. This growth of consumption had gained momentum in mid-1988. During the six months prior to the filing of the petition in this investigation (end of February 1990) imports of Norwegian salmon into the United States had totalled 5,984 tons, compared to 6,132 tons during the period September 1988-February 1989.<sup>90</sup> Moreover, whereas market penetration of the Norwegian imports had decreased steadily during this period, imports from all other countries had nearly tripled their market share both by value and by volume.<sup>91</sup> By any measure (i.e., either in absolute terms or relative to consumption) imports from Norway had fallen from 1988

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<sup>89</sup>USITC Determination, p.18 and p.21.

<sup>90</sup>See Annex 3 to this Report.

<sup>91</sup>USITC Determination, p.A-45.

to 1990, the period covered by the investigation of the USITC. According to Article 6:2, it was the increase in the volume of imports which must be significant.

124. In response to a question of the Panel as to whether Norway contested that the data on import volume reported in Tables 17 and 18 of Annex A to the determination of the USITC were factually correct, **Norway** observed that these Tables contained only annual data. Data on monthly import volumes for 1989 and 1990 showed that imports from Norway had begun to decline significantly before the filing of the petition.<sup>92</sup> These Tables therefore did not provide a complete picture of the information available to the USITC. Absent a chance to review all the information before the USITC, Norway - and the Panel - could not evaluate whether the statements of the facts in the Report of the USITC were correct.

125. **Norway** further argued in this context that from the information available it appeared that in its analysis the USITC had failed to take account of the decrease in imports over the third part of the investigation period. When this decline, which could not be explained by the initiation of the anti-dumping and countervailing duty investigations, was seen in conjunction with the decline of the Norwegian market share throughout the period of investigation, the case became even stronger that the USITC had not carried out an objective examination of the evolution of the volume of imports from Norway. The evidence before the USITC showed an increase in the absolute volume of imports from Norway only during the first two years of the investigation period. In the last part of this period, prior to the initiation of the anti-dumping and countervailing duty investigations, imports had declined. To determine whether an increase in the volume of imports was "significant" within the meaning of Article 6:2 of the Agreement, the increase had to be seen in context. In the case of the investigation of imports of Atlantic salmon from Norway the context was that Norway's market share had been declining over the investigation period and that market shares of third countries and of domestic producers in the United States were increasing.

126. **Norway** did not contest that, as observed by the USITC on pages 16-17 of its determination, the absolute volume of imports of Atlantic salmon from Norway had increased from 1987 to 1989. However, the significance of this information was limited. First, the increase had not been of a continuing nature as monthly data on import volume from Norway showed that the volume of imports from Norway had declined in the last four months of 1989.<sup>93</sup> Second, the investigation period which was the basis of the USITC's determination included the year 1990, in which the absolute volume of imports from Norway had declined significantly before the initiation of the investigation. The information in the information on the increase from 1987 to 1989 in the absolute volume of imports therefore did not give an appropriate picture of the period investigated.

127. **Norway** explained that it was not arguing that, as a matter of law, Article 6:2 of the Agreement permitted a finding of a "significant increase" of the volume of imports under investigation only when the volume of imports at the end of a period of investigation was higher than the volume of imports at the beginning of that period. Article 6:2 referred to the significance of the increase of the volume of imports, either in absolute terms or relative to domestic consumption or production. Where there was no increase in the absolute volume of imports, the investigating authorities were required to examine two questions. First, what accounted for any decline of absolute import volumes toward the end of the investigation period, or for the absence of an increase in the absolute volume of imports, and second, whether imports had increased in relative terms. In the present case, the evidence did not support the conclusion that the decline in the absolute volume of imports in the last part of the investigation period was due to the imposition of the provisional measures. In the course of the investigation by

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<sup>92</sup>See Annex 3 to this Report.

<sup>93</sup>Id.

the USITC it had been repeatedly pointed out by the Norwegian respondents that this decline in absolute import volume was caused by a combination of several factors: lower domestic prices in the United States, the appreciation of the Norwegian kroner relative to the US dollar, and rising prices in alternative export markets. Regarding the second point, **Norway** reiterated that over the investigation period the market share held by Norwegian imports in the United States had declined. In this situation, where import volume was not higher at the end of the investigation period than at the beginning of that period, where the facts demonstrated that the decline in absolute import volume was not the result of the initiation of the investigation or of the imposition of provisional measures, and where the import volume declined in relative terms throughout the period of investigation, Article 6:2 of the Agreement did not, in the view of Norway, permit a finding of a "significant increase" in the volume of imports.

128. Responding to a question of the Panel, **Norway** explained as follows its views on the legal relevance of imports from third countries to an examination of whether, in the analysis of the evolution of the volume of imports of Atlantic salmon from Norway, the USITC had acted consistently with Articles 6:1 and 6:2 of the Agreement. First, Article 6:1 required the investigating authorities to examine the volume of the subsidized imports. Article 6:2 explained that the examination is to enable the authorities to determine whether there has been a "significant increase" in absolute terms or relative to production or consumption in the importing country. Third country imports affected the level of consumption in the importing country and were thus relevant to an objective examination of the volume of the subsidized imports. Second, Article 6:1 also required the investigating authorities to examine the effect of the subsidized imports on prices in the domestic market. Article 6:2 stated that this included a consideration of whether there had been significant price undercutting or price depression. In the case under consideration, the question was whether the allegedly subsidized Norwegian imports had led to price depression. Third country imports at prices lower than those from Norway had an impact on domestic prices and had to be considered in determining whether the price depression was the effect of the subsidized imports or the effect of imports of lower priced salmon from other sources. Finally, Article 6:1 required the investigating authorities to consider the consequent impact of these imports on domestic producers of the like product. Article 6:3 provided guidance on how the investigating authorities were to determine the consequent impact and required them to consider all relevant economic factors, including market share and factors affecting domestic prices. Third country imports affected both the market share of the domestic producers and the domestic prices and should thus be appropriately considered under these Articles.

129. Responding to a question of the Panel, **Norway** explained as follows its views on how the information which it had provided on the expansion of the domestic salmon market in the United States was legally relevant to an examination of whether the USITC had examined the volume of imports from Norway in a manner consistent with the requirement of Articles 6:1 and 6:2. Articles 6:1 and 6:2 together provided for a requirement of an objective examination of the volume of subsidized imports relative to production or consumption in the importing country. Domestic production and market share had to be considered as part of such an examination. Moreover, Article 6:1 also required an objective examination of the impact of the subsidized imports on prices in the domestic market. The increasing supply of domestic salmon could also have an effect on the prices in the domestic market and had to be considered to determine the impact of the subsidized imports. Finally, Article 6:1 required the authorities to make an objective examination of the consequent impact of the subsidized imports on domestic producers of such products. An objective examination had to include a consideration of whether the domestic producers were able to expand production and gain market share or whether domestic production or market share declined. Such factors were specifically mentioned in Article 6:3 of the Agreement. Article 6:3 stated that the examination of the impact on the domestic industry shall include an evaluation of all relevant factors including those "having a bearing on the state of the industry such as actual and potential decline in output, sales, market share ...". If the decline in such factors was relevant, so was the increase.

130. The **United States** noted that the USITC had determined that there had been a flood of exports from Norway to the United States in 1988 and 1989:

"Imports of Atlantic salmon from Norway surged from 1987 to 1989. Imports rose from 7.6 million kilogrammes in 1987, to 8.9 million kilogrammes in 1988, and then jumped further in 1989 to 11.4 million kilogrammes, for an overall increase of fully 50 per cent."<sup>94</sup>

Putting the magnitude of the increase in perspective, the USITC had noted that:

"... the amount of the increase in imports of Atlantic salmon from Norway alone was greater than the total amount of US-produced salmon shipped in harvest seasons 1988-89 or 1989-90."<sup>95</sup>

Over calendar year 1990, imports of Atlantic salmon from Norway had declined to 7.7 million kilogrammes. The USITC had considered this decline but, based on record evidence, had concluded that it was largely the result of the filing of the petition in February 1990 and the subsequent imposition of provisional countervailing duties in July 1990 and anti-dumping duties on 3 October 1990.<sup>96</sup> The USITC had explicitly considered the Norwegian respondent's alternative explanations that the 1990 decline resulted from the appreciation of the Norwegian Kroner against the dollar or the institution of a "freezing programme" by the Norwegian industry. It had found that such factors did not wholly explain the decline of imports in 1990, noting, for example, that the freezing programme resulted only in a slight decline in supplies of fresh Norwegian Atlantic salmon from 1989 to 1990. Because the decline in import volume in 1990 occurred concurrently with, and in apparent reaction to, the institution of the anti-dumping and countervailing duty investigations and imposition of provisional measures and was not the result of normal market forces, the USITC had given less weight to this decline. Moreover, even in 1990 Norway had remained by far the largest single supplier of Atlantic salmon to the United States, with Norwegian imports accounting for 42.2 per cent of the United States' market. In light of the evidence presented, the USITC had concluded that, although the relative market share of Norwegian Atlantic salmon had decreased since the investigation had begun:

"... the volumes of imports from Norway over the period of investigation, and the increases in those volumes from 1987 to 1989, are significant. The subject imports are particularly significant when viewed together with information concerning the nature of the US industry, the industry's condition over the period and information on prices for the like product."<sup>97</sup>

131. 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 6:2 of the Agreement by determining that there had been a significant increase in subsidized 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 of the 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 would necessarily represent a relatively larger percentage growth than the growth in the already huge Norwegian imports. The facts of the case remained that Norway was the dominant factor in the United States' market throughout the investigation, both in sheer volume of imports and in import market share.

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<sup>94</sup>USITC Determination, pp.16-17.

<sup>95</sup>USITC Determination p.19, footnote 83.

<sup>96</sup>USITC Determination, pp.17-18.

<sup>97</sup>USITC Determination, p.18.

132. The **United States** considered that Norway's argument regarding the decline of Norwegian imports in 1990 as compared to the level of imports in 1988 was without merit in fact or in law. Despite this "decline", Norwegian salmon had been imported in the first half of 1990 at an annual rate higher than the 1988 import rate and had only declined after the imposition of provisional measures in July 1990. Accordingly, the USITC had determined that the overall 1990 decline in Norwegian imports was attributable, at least in part, to the initiation of the investigation and the imposition of provisional measures and thus warranted less weight than the significant volume increases of Norwegian imports between 1987 and 1989. Even in 1990 Norway had remained the largest single supplier of the US fresh Atlantic salmon market. The **United States** also observed in this context that Norway's argument overlooked the purpose of provisional duties under Article 5:1 of the Agreement: "... to prevent injury being caused during the period of investigation". It was axiomatic that the provisional duties would ameliorate injury by reducing the volume and/or raising prices of the imports under investigation. Article 5:1 would be meaningless if the investigating authorities could not take into account the injury-preventive nature of provisional duties in evaluating import volume and other evidence.

133. In response to the view of Norway that in the case under consideration the USITC had considered the significance of the volume of imports of Atlantic salmon from Norway, rather than the significance of any increase in that volume, the **United States** submitted that the USITC had plainly considered whether there had been a significant increase in the volume of subsidized imports from Norway, as required by the Agreement. Under United States law the USITC was required to consider whether the volume of imports, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States was significant. In this case, the USITC had found both that the volume of imports was significant, and that there was a significant increase in the volume of imports over the period of investigation. The USITC had linked this increase in import volume with price depression, and with the negative effects on the United States' domestic industry. For example, the USITC had found that "the sheer volume of the increase in Norwegian Atlantic salmon imports in 1989" had led to significant price depression and that "the effects of the large increase in Atlantic salmon imports from Norway during the period of investigation through 1989 are being felt presently by the young US Atlantic salmon industry in such forms as financial losses, a scaled-back size, and difficulty in obtaining capital".<sup>98</sup> Thus, the USITC had satisfied the requirement of the Agreement to consider whether there has been a significant increase in the volume of subsidized imports.

134. In response to a question by the Panel as to how the USITC had arrived at its conclusion that a number of factors mentioned by the respondents in the investigation to explain the decline of the volume of imports from Norway in 1990 were less important in causing this decline than the initiation of the anti-dumping and countervailing duty investigations and the imposition of provisional measures, the **United States** noted the following. First, the USITC had referenced its long experience in the dampening effects on import levels which could be caused by an investigation, by preliminary determinations, or 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 1989".<sup>99</sup> The Commission had cited further evidence that the investigation had played a role in the decline in the volume of imports, observing that "the drop in subject imports has been most pronounced since July 1990, subsequent to Commerce's preliminary CVD determinations".<sup>100</sup> Third, although there was no provision in the Agreement addressing the issue, the determination of the USITC had explicitly noted the two alternative explanations suggested by the Norwegian respondents for the 1990

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<sup>98</sup>USITC Determination, p.21.

<sup>99</sup>USITC Determination, p.18.

<sup>100</sup>USITC Determination, pp.17-18.

decline in import volume from Norway: the institution of a freezing programme by the Norwegian industry, and the appreciation of the Norwegian kroner against the US dollar. The Commission had determined that these factors might have played a part in, but did not entirely cause the decline. With regard to the freezing programme, the Commission had observed that this programme "is believed to have resulted only in a slight decrease in supplies of fresh Norwegian Atlantic salmon from 1989 to 1990".<sup>101</sup> Thus, this programme could not explain the "precipitous" decline in Norwegian exports to the United States found by the Commission. As for the exchange rates, the Commission's staff report revealed that the kroner-dollar exchange rate had fluctuated strongly over the period of investigation, and yet, until 1990, there had been a steady annual increase in imports from Norway. What had been different in 1990 was the investigation itself.

135. **Norway** considered that the argument of the United States that the decline of the volume of imports of Atlantic salmon from Norway in 1990 was concurrent with either the initiation of the anti-dumping and countervailing duty investigations or the imposition of provisional measures in these investigations was contradicted by information on monthly import volumes for 1989 and 1990. These data demonstrated that in January and February 1990, i.e., before the filing of the petition and months before the imposition of provisional measures, imports of Atlantic salmon from Norway were 23 per cent lower than in January and February 1989. **Norway** also reiterated in this context that in the period September 1989-February 1990 imports of Atlantic salmon from Norway had been lower than in the period September 1988-February 1989. This was due, inter alia, to a considerable fall in the United States dollar exchange rate to the kroner. Moreover, in the Report on its investigation, the USITC had acknowledged that both the institution of a freezing programme and the appreciation of the kroner had helped to cause the decline in the volume of imports from Norway in the latter part of 1990. Nevertheless, before this Panel the United States was ignoring the evidence that imports had declined in absolute terms as well as relative to consumption during the period of investigation and was claiming that this decline was irrelevant because it had occurred after the initiation of the investigation and the imposition of provisional measures. This claim could not be supported.

136. On Norway's argument that imports from Norway had begun to decline prior to the filing of the petition on 28 February 1990, the **United States** observed that, as revealed by the data regarding monthly import figures<sup>102</sup>, Norway was correct that imports in January and February 1990 had been lower than imports in the immediately preceding months in late 1989. However, this short-lived decline had not marked the beginning of a longer-term pattern of decline. Rather, import volumes in the several months just after January-February 1990 had steadied or had even increased slightly. The decline in January and February 1990 had thus been a temporary phenomenon. This transitory decline could have occurred for a number of reasons. It was possible, for example, that the announcement of the freezing programme by the Norwegian industry in early 1990 had caused a temporary slowing-down in the volume of exports to the United States. However, the effect of this programme could not have lasted: as noted by the USITC in its Report, the freezing programme had ultimately resulted in only a slight decrease in available stocks of fresh salmon from Norway, and thus could not have accounted for the drastic decline in imports of Norwegian salmon experienced by the end of 1990.

137. The **United States** considered that the record did not bear out Norway's assertion that imports of Atlantic salmon from Norway in the last four months of 1989 had also been at reduced levels. As shown by the figures on monthly import volumes<sup>103</sup>, imports from Norway in September through December 1989 had been at levels as high as they had ever been; in three of those four months imports from Norway had exceeded one million kilograms. In sum, the only pre-filing decline in import

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<sup>101</sup>USITC Determination, p.18, footnote 78.

<sup>102</sup>See Annex 3 to this Report.

<sup>103</sup>Id.

volume had been the short-lived drop in January-February 1990. As the Commission had noted, the effects of the investigation were most clearly seen during the second half of 1990, subsequent to the affirmative preliminary countervailing duty determination of the Department of Commerce, which had resulted in the imposition of provisional measures. Not only was the January-February period separated in time from the events in the second half of 1990, but the amount of the temporary decline in those two months paled in comparison to the magnitude of the decline which began in the second half of 1990. By December 1990 imports from Norway had been below 200,000 kilogrammes. These facts of record plainly refuted Norway's claim that unspecified events prior to the investigation caused the decline of imports during 1990.

### 5.3 Price effects of the imports under investigation (Articles 6:1 and 6:2)

138. **Norway** submitted that in determining that imports of Atlantic salmon from Norway had significantly depressed prices for the like domestic product, the USITC had acted inconsistently with the requirement in Article 6:1 of an objective examination of the effect on prices of imports under investigation, and with the requirement in Article 6:2 that the investigating authorities consider inter alia whether the effect of the subsidized imports is to depress prices to a significant degree.

139. In its determination, the USITC had made the following statement regarding the price depressing effect it had found to have been caused by the imports subject to investigation:

"In sum, given the sheer volume of the increase in Norwegian Atlantic salmon imports in 1989, falling prices for those imports, closely tracking US and Norwegian Atlantic salmon price trends, and information suggesting significant substitutability between Norwegian US Atlantic salmon, we find that imports of Norwegian Atlantic salmon have significantly depressed prices for the like product.<sup>104</sup>

140. **Norway** argued that the above-mentioned conclusion of the USITC regarding the existence of price depression caused by the subject imports was without any basis. In support of this view, **Norway** pointed to the following. As demonstrated by data in the Annex to the determination of the USITC and by data gathered by Norway, during the period of investigation Norwegian salmon had been priced at a level higher than salmon of domestic producers in the United States. In mid-1990, prices of Norwegian salmon had begun to rise. Prices of domestic salmon in the United States had not followed this rise but had actually fallen. If the USITC had been correct in its finding that prices of domestic salmon "closely tracked" those of imported Norwegian salmon, prices of domestic salmon should have risen when the prices of imported Norwegian salmon had begun to rise. As was demonstrated by data on page A-56 of the Annex to the USITC determination, after mid-1990 the gap between prices of domestic salmon and imported Norwegian salmon had widened. Moreover, if the USITC had been correct in its conclusion that Norwegian imports had depressed domestic prices, one would logically expect that domestic prices for salmon would increase after the Norwegian imports had disappeared from the United States market in 1991. This, however, had not happened. Since February 1991, Norwegian imports of salmon had been brought to a halt as a result of the final countervailing duty determination of the Department of Commerce. During the first half of 1991, prices in the United States' market of salmon from all remaining suppliers had fallen as compared to the first half of 1990. This confirmed that the USITC had been incorrect in concluding that imports of Norwegian salmon had caused depression of domestic prices in the United States.

141. The **United States** pointed out that the USITC had found, and Norway had not contested, that prices for all Atlantic salmon in the United States market - regardless of origin - had dropped dramatically during the period of investigation: by "a third or even more between mid- to late-1988 and the end

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<sup>104</sup>USITC Determination, p.20.

of 1989".<sup>105</sup> The USITC had further found that United States domestic prices closely followed Norwegian prices because "US and Norwegian Atlantic salmon exhibit a high degree of substitutability, as Atlantic salmon is a near-commodity type product".<sup>106</sup> This high degree of substitutability had further strengthened the link between the imports of Atlantic salmon from Norway and the adverse effects on domestic prices in the United States. The USITC had also determined that "the subject imports' presence in the market place, even at premium prices, acted to keep domestic producers from pricing to recover costs and meet cash flow needs".<sup>107</sup> In short, the evidence of record overwhelmingly showed that, as found by the USITC, the decline in domestic prices in the United States was caused in large part by the large and growing glut of Norwegian imports. The USITC had observed that the collapse in prices for US Atlantic salmon closely tracked the downward spiral in prices for Norwegian salmon sold in the United States market.

142. Responding to Norway's argument that its imports had not caused the decline of domestic salmon prices in the United States because the Norwegian product was, in general, priced above the US produced Atlantic salmon, the **United States** considered that this argument suffered from a number of key weaknesses. First, the evidence of record before the USITC demonstrated that the sheer volume of Norwegian imports had forced prices down, a fact that Norway had not contested. Second, the evidence of record showed that Atlantic salmon was a highly substitutable product regardless of its source. Consequently, domestic producers had been forced to lower their prices in response to Norwegian price declines or face losing sales. Finally, there had been numerous instances in which Norwegian imports were priced below the prices for domestic salmon, notwithstanding the price premium that Norwegian salmon had typically commanded over the domestic product. It was for this reason, among others, that the Agreement, contrary to Norway's argument, did not require price undercutting as the basis for a finding of price depression or suppression. Rather, the Agreement provided that the administering authorities had to consider whether there was significant price undercutting or significant price suppression or depression. The USITC had found the latter to exist and had come to this conclusion on the basis of the evidence of record.

143. With respect to Norway's argument that there was no relationship between Norwegian and domestic prices because domestic prices had not continued to rise after mid-1990, the **United States** observed that from mid-1990 onward, there had been a decline in the volume of imports of salmon from Norway, so that Norwegian salmon imports no longer provided the downward pressure that had caused all Atlantic salmon prices in the United States to decline. In any event, the divergence of US and Norwegian prices in a period of declining market share of Norwegian imports was irrelevant to whether Norwegian production and prices had forced down US domestic prices during the earlier period. The **United States** noted in this context that Norway had presented extra-record information to the Panel to support its argument concerning current price levels. Such data had been compiled outside the period of investigation and were irrelevant to the proceedings before the Panel.

144. **Norway** contested the statement of the United States that the evidence before the USITC overwhelmingly showed that the decline in US domestic prices of Atlantic salmon had been caused in large part by the large and growing "glut" of Norwegian imports of Atlantic salmon. There had not been such a glut. Throughout the period of investigation, the US domestic market had grown faster than the volume of imports from Norway: from 1988 to 1989 apparent domestic consumption in the United States had grown by 55 per cent, while imports from Norway had increased by only 28 per cent. Norway's declining market share throughout the period of investigation thus showed that there had not been a "glut" of Norwegian imports.

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<sup>105</sup>USITC Determination, p.18.

<sup>106</sup>USITC Determination, p.19.

<sup>107</sup>USITC Determination, p.20.



145. In response to the argument of the United States that US domestic producers had been forced to lower their prices in response to price declines of the Norwegian imports or face losing sales, **Norway** observed that the US domestic industry had from 1987 to 1989 tripled its share of a domestic market characterized by strong growth in domestic demand, as demonstrated by the data on page A-45 of the Annex to the USITC determination.

146. In response to a question of the Panel as to whether Norway considered that the data on pages A-52-54 of the Annex to the USITC determination on price depression were factually incorrect or whether it considered that these data, while factually correct, did not provide evidence in support of the USITC's conclusion on price depression, **Norway** observed that it could not contest the correctness of data which it did not have. Pages A-52-54 of the Annex summarized some underlying data available only to the USITC. However, an examination of those pages indicated that the USITC had compared prices of Norwegian salmon to prices of United States and Canadian salmon to determine price trends and price depression. Articles 6:1 and 6:2 of the Agreement required the investigating authorities to make an objective examination, based on positive evidence, of the price effects of the subsidized imports in the domestic market of the importing country. The USITC had apparently not relied on positive evidence. A combination of United States and Canadian prices did not provide the requisite link between subsidized imports and price depression in the domestic market of the United States. Norway referred to the conclusion of the Panel in the dispute between the United States and Canada on the imposition by Canada of countervailing duties on grain corn from the United States.<sup>108</sup> That Panel had found that Canada had not met the requirements of Article 6:2 because it had relied on United States grain corn prices instead of on Canadian prices. The Panel in that dispute had rejected the argument that United States prices were sufficient even though the Canadian authorities had found that Canadian prices had tracked the US prices. Because the tables on pages A-52-54 of the Annex were not prices of United States producers, these tables did not provide evidence that imports of subsidized salmon from Norway had depressed prices of domestic salmon in the United States. Thus, regardless of whether these tables accurately reflected the published weekly prices (an issue Norway could not address since it did not have the underlying data) they did not support a finding that subsidized imports of Norwegian salmon had depressed United States domestic 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.

147. 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".<sup>109</sup> 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

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<sup>108</sup>SCM/140, adopted on 26 March 1992.

<sup>109</sup>USITC Determination, p.19.

data" and "Similar to published price data and to reports from industry representatives, Norwegian importers' prices were generally higher than US producers' prices".<sup>110</sup>

148. 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".<sup>111</sup>

149. **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".<sup>112</sup> 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 have a profound impact on domestic prices in the United States. The Annex to the USITC's determination stated that "United States/Canadian and Norwegian price trends for Atlantic salmon were similar from mid-1988 through mid-1989 (figures 5-7). In 1990, the two trends began to diverge...".<sup>113</sup> This statement implied that after mid-1989 the price trends in the two countries had not followed a "very similar pattern". Moreover, figures 5-7 supported the interpretation that the divergence had begun in mid-1989, not in late 1990, although it had become more pronounced in late 1990. Finally, figures 8-10 in the Annex demonstrated that United States/Canadian prices had tracked Chilean prices much more closely than they had tracked Norwegian prices after mid-1989.

150. 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 trends began to diverge...".<sup>114</sup> Contrary to what Norway attempted to read into these sentences, they did not state that price trends began to diverge at any time in 1989; they stated that prices had begun to diverge in 1990. Indeed, the text of the opinion of the Commission described Norwegian and US prices as following similar trends into 1990. This was confirmed by the price charts found at pages A-56-57 of the Annex. Even a cursory examination of those charts revealed that prices for Norwegian and US Atlantic salmon had exhibited similar trends through 1989 and the early part of 1990, and had only diverged to some degree starting in the second half of 1990, during the Commission's investigation.

151. In response to a question of the Panel, **Norway** explained that it was not arguing that, as a matter of law, the fact that imported products were priced above domestic products precluded a finding of price depression under Article 6:2 of the Agreement. However, Article 6.2 required that it be shown that price depression was the effect of the imports under investigation. When imported products were priced above domestic products it was obviously more difficult to demonstrate that those higher priced imports had caused price depression. **Norway** considered that in the present case the USITC had not demonstrated that price depression had been the effect of the Norwegian imports subject to investigation.

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<sup>110</sup>USITC Determination, p.A-59 and p.A-66.

<sup>111</sup>Prehearing Brief of Norwegian Respondents, 20 February 1991 at p.35, n.57.

<sup>112</sup>USITC Determination, p.20.

<sup>113</sup>USITC Determination, P.A-55.

<sup>114</sup>Id.

152. Regarding the manner in which the USITC had taken account of the substitutability between Norwegian imported salmon and domestically produced salmon, **Norway** considered that, if all imports of Atlantic salmon were highly substitutable and imports from third countries were both lower priced and increasing their market share, the logical conclusion was that it was the lower priced product which was depressing domestic prices in the United States, not the higher priced product. If the products were highly substitutable, buyers would buy the lower priced item, not the higher-priced one. Thus, the lower priced product would be dragging down the higher prices, not vice versa. United States prices had been constrained by the increasing volume of lower priced imports, not by the higher priced imports. **Norway** also argued in this context that the United States had not presented any valid explanation of why domestic prices in the United States had followed the development of prices of imports from Norway instead of Norwegian suppliers having to reduce their prices due to constant price undercutting by competitors from third countries. The United States had also not provided any data demonstrating that price developments of Norwegian salmon had a time lead on price developments for salmon produced in the United States.

153. The **United States** argued that it was a fundamental principle that price depression could occur even when the imported product was priced above the domestic product. If two products were substitutable for each other at a given price differential, the narrowing or increasing of the differential would have an effect on the demand and/or price for each product. In this case, as the price for Norwegian salmon declined, US producers had been forced to lower their prices to maintain the differential; if they had not lowered their prices, they would have lost yet more sales to the Norwegian imports. Thus, the Commission's citation to the fact that Atlantic salmon - including Norwegian and US salmon - was a "near-commodity type product" lent support to the Commission's finding of price depression by Norwegian salmon.

154. The **United States** further recalled in this context that the Commission's finding of price depression had been based on several factors, including the significant increase in the volume of imports of Atlantic salmon from Norway through 1989, the substitutability between US and Norwegian salmon, and the similar price trends exhibited by US and Norwegian salmon. The Commission'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, there might be adverse effects on prices. Not only did the analysis of the USITC comport fully with basic economic principles, but the Agreement expressly anticipated this kind of analysis. The Agreement mandated an examination of whether imports undercut domestic prices, "or" whether imports "otherwise" depressed or suppressed prices. Thus, price undercutting and price depression/suppression were treated in the Agreement as separate elements of an examination of price effects. A finding of price depression was not dependent on a finding of price undercutting. The present case was a good example of a situation in which imports under investigation "otherwise" depressed prices for the like product, through the imports' substantial contribution to increased market supply of a commodity type product. In sum, (1) substitutability between Norwegian and US Atlantic salmon had provided support for the Commission's finding of price depression; and (2) any notion that investigating authorities must look to see which supplier was undercutting to determine which was causing price depression was not supported by economic logic or by the text of the Agreement.

#### 5.4 Impact of the imports under investigation on domestic producers of the like product (Articles 6:1 and 6:3)

155. **Norway** submitted that the analysis of the USITC of the impact of the imports under investigation on domestic producers of the like product was inconsistent with the requirements of Articles 6:1 and 6:3 of the Agreement. Article 6:1 required an objective examination of the consequent impact of the

subsidized imports on domestic producers, while Article 6:3 required that such an examination include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry. The list of those factors contained in Article 6:3 was not exhaustive, nor could one or several of those factors necessarily give decisive guidance. **Norway** considered that the conclusion of the USITC regarding the negative impact of the imports on the domestic producers was unfounded. The record showed that the allegedly injured industry had experienced a most impressive growth since its start in 1984, as shown by data on the annual increases in the volume of production by the domestic producers.<sup>115</sup> During the period 1987-89, the capacity of United States' firms to produce juvenile Atlantic salmon had risen substantially. US shipments had increased more than fourfold in this period. Production of "adult" salmon had expanded by more than 200 per cent from harvest season 1987-88 to 1989-90. Data available also showed that the number of production and related workers had increased steadily, as had the hours worked, total compensation, and hourly compensation.<sup>116</sup> In the view of the foregoing, **Norway** submitted that the USITC had not carried out an objective examination of the impact on the domestic producers of the imports under investigation.

156. In response to a question of the Panel as to whether Norway considered that the information relied upon by the USITC in its analysis of the impact of the imports on domestic producers was factually incorrect, that the conclusions drawn by the USITC regarding this impact were not supported by the facts in the record of the investigation, or that the analysis by the USITC had not involved the correct application of a legal requirement imposed by the Agreement, **Norway** observed that it could not determine whether the information relied upon by the USITC was factually incorrect because it did not know what information the USITC had relied upon. From the information available to Norway, it did not appear that the conclusions drawn by the USITC were supported by the facts in the record of the investigation. The United States had had ample opportunity to provide the facts relied upon 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.

157. In response to a question of the Panel as to whether Norway considered that the factors which it had mentioned<sup>117</sup> 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 6:3 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.

158. On the statement in 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 subsidized 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. 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.

159. The **United States** argued that, as required under Article 6:3, the USITC had considered the injurious impact which the volume and price effects of Norway's imports had on the domestic industry.

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<sup>115</sup>USITC Determination, p.A-22.

<sup>116</sup>USITC Determination, p.A-29.

<sup>117</sup>Supra, paragraph 155.

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."<sup>118</sup>

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."<sup>119</sup>

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.<sup>120</sup> 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.

160. The **United States** noted that the USITC had also described other negative effects of the depressed prices on the industry:

"It is likely that the leveling off of production of juvenile salmon in 1990 was a response to the depressed prices prevailing in 1989. Moreover, there is record information to suggest that banks became more unwilling to provide financing to US producers at least in part because of the low prices prevailing in the market or because of Norwegian oversupply, and that this reluctance continues."<sup>121</sup>

All of the above-mentioned effects were specifically-enumerated factors under Article 6:3. The USITC had explained that the negative price effects due to the large volume of Norwegian imports were not past effects, but were present effects that were being experienced by US producers through 1990:

"In view of the particular nature of Atlantic salmon production in the United States, the effects of the large increase in Atlantic salmon imports from Norway during the period of investigation through 1989 are being felt presently by the young US industry in such forms as financial losses, a scaled-back size, and difficulty in obtaining capital."<sup>122</sup>

In sum, the USITC had demonstrated in step-by-step fashion how the subject imports had caused material injury, first describing volume of imports from Norway, relating that volume to negative price effects in the US market, and relating those price effects to the injured condition of US producers. It had

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<sup>118</sup>USITC Determination, p.20.

<sup>119</sup>USITC Determination, p. 14.

<sup>120</sup>USITC Determination, p.A-30, table 7.

<sup>121</sup>USITC Determination, p.21.

<sup>122</sup>Id.

found that price depression attributable to the Norwegian imports had resulted in lower sales revenues, which in turn had caused massive financial losses, substantially decreased cash flow, and significantly diminished production of juvenile salmon.

161. The **United States** considered that Norway ignored the negative financial data which underlay the determination of the USITC, arguing instead that production, shipments, and certain employment data showed increases. Thus, Norway argued that the domestic industry could not have been injured. Norway's argument was without merit for three reasons. First, Norway had focused on isolated factors and bits of information, including new information which had not been on the record before the USITC. The USITC, by contrast, had considered all of the factors specified in the Code and all of the evidence of record in reaching its determination. Factors mentioned in the Agreement ignored by Norway included profits, cash flow, growth, ability to raise capital, and factors affecting domestic prices. Second, the USITC had explained why the factors that Norway had presented were consistent with a finding of material injury by pointing out that an increase in capacity, production, and employment indicators was only to be expected in a new industry, especially one where there was a delay of several years between the decision to expand production and the actual harvesting of the mature product.<sup>123</sup> Third, Norway's argument disregarded the express admonition in Article 6:3 of the Agreement that "this list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance". The USITC, by contrast, had considered all the factors specified by the Agreement and all the evidence in reaching its determination. In sum, the seemingly positive indicators cited by Norway were belied by the industry's dire financial condition, which stemmed directly from the collapse in salmon prices caused by the oversupply of Norwegian imports. The USITC had considered the factors mandated by the Agreement and had determined that the domestic industry was materially injured by reason of the subsidized Norwegian imports. Its conclusions concerning the industry's condition were supported by positive evidence and were, for the most part, not even contested by Norway.

#### 5.5 Causal relationship between the allegedly subsidized imports and material injury to the domestic industry (Article 6:4)

162. **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 6:4 of the Agreement for the following reasons: first, the USITC had failed to isolate the effect of the allegedly subsidized imports from Norway from the effects of other factors injuring the domestic industry. Second, the USITC had failed to demonstrate that the allegedly subsidized imports from Norway had caused injury to the US domestic industry "through the effects of the subsidy". 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.

##### 5.5.1 Other factors affecting the domestic industry

163. **Norway** argued that an interpretation of Article 6:4 in accordance with the ordinary meaning of its terms indicated that the effects of the subsidized 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 6:4 was read as a whole, the ordinary meaning of the phrase "through the effects of the subsidy, causing injury" was that the effects of the subsidized imports themselves must be causing injury. This was confirmed by the next sentence in Article 6:4 which provided that any injury caused by other factors could not be attributed to the subsidized imports. Thus, according to the authoritative rules of treaty interpretation, a countervailing measure could not

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<sup>123</sup>USITC Determination, p. 14.

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 subsidized imports. Thus, those effects must be sufficient to cause injury in and of themselves. This interpretation of the language in Article 6:4 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, countervailing 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 subsidy and thus, that the remedy would in fact offset this material injury. If the injury were to be caused by other factors, the countervailing 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 6:4. 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 Industrialie, S.p.A v. United States<sup>124</sup> in which it had been stated that "it is sufficient that the imports contribute even minimally to material injury", and Main Potato Council v. United States<sup>125</sup>, in which it had been stated that the USITC had to make an affirmative finding of injury if it found that imports were more than a "de minimis" cause of injury.

164. In response to a question of the Panel, **Norway** explained that it was not arguing that the causation standard of Article 6:4 of the Agreement was met only when the subsidized imports were the sole cause of material injury to a domestic industry. That there could be several causes of material injury was recognized in the text of Article 6:4 and in footnote 20, which referred to other factors which might be causing injury to an industry. However, Article 6:4 stated that "injuries caused by other factors must not be attributed to the subsidized imports". Read together with the requirement to demonstrate that the subsidized imports, through the effects of the subsidies, must be causing material injury, this meant that the subsidized imports alone must be sufficient to cause material injury. This interpretation was confirmed by experts in the area. Thus, Beseler and Williams had analyzed the causation standard 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 should be 'demonstrably the principal cause' of the injury suffered by the domestic industry, outweighing all other factors combined, is now replaced by a requirement to segregate the injury caused by dumping from the injuries caused by other factors and then to make an assessment of injury caused by dumping alone."<sup>126</sup>

Thus, even though other factors may have caused more injury, the causation requirement of the Agreement was met as long as an adequate determination was made that the effects of the subsidies alone - without injury caused by other factors - were sufficient to cause material injury.

165. **Norway** argued that in the present case the USITC had not singled out the effect of the allegedly subsidized imports under investigation from the effects of other factors which had affected the domestic industry in the United States, thus potentially attributing injury caused by other factors to the subsidized imports. During the consultations preceding the establishment of the Panel, Norway had asked the United States several questions aimed at determining how the USITC had distinguished between injury caused by the effects of the subsidies and injury caused by other factors. The United States had not

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<sup>124</sup>712 F.Supp.959, 971 (CIT 1989).

<sup>125</sup>613 F.Supp. 1237. 1244 (CIT 1985).

<sup>126</sup>Beseler and Williams, Anti-Dumping and Anti-Subsidy Law: The European Communities (1986), p.15.

responded to these questions. In fact, the United States had refused to answer these questions on the ground that the questions concerned issues that might be raised before a panel.

166. **Norway** considered that, if the United States fresh Atlantic salmon industry had been materially injured, one or a combination of several factors not related to the subject imports accounted for the alleged material injury to that industry. Among such factors were the strong increase in imports from third countries, and growing supplies of close substitute products such as wild Pacific salmon. In support of its view that the information on Pacific salmon harvests was relevant to an examination of possible alternative causes of injury to the United States Atlantic salmon industry, **Norway**, responding to a question by the Panel, observed that nothing in Article 6:4 or in footnote 20 required that other factors which could cause injury to the industry be limited to sales of like products. Article 6:4 merely stated that "other factors" might be injuring the domestic industry. Footnote 20 provided an illustrative, not an exhaustive list of items which might constitute other factors in a given case. The term "like product" was found nowhere in Article 6:4 and in footnote 20. Moreover, while the USITC had found that Atlantic and Pacific salmon were not like products, it had found that there was some competition between Atlantic and Pacific salmon. Thus, the impact of Pacific salmon on the domestic Atlantic salmon industry was relevant as a possible alternative cause of injury. The effects of internal problems in the United States industry itself also did not appear to have been properly considered in light of the requirements of Article 6:4. These included problems due to mismanagement and the fact that the United States industry did not market its product on a year-round basis (as did the Norwegian industry). This of course affected continuity in contacts with purchasers. Such factors had been recognized during the proceedings before the USITC but had been disregarded when the USITC had drawn its conclusions. Thus, the USITC had concluded that:

"Although some of these factors may have adversely affected the US industry, we determine that an industry in the United States is materially injured by reason of subsidized and LTFV imports of fresh and chilled Atlantic salmon from Norway."<sup>127</sup>

This conclusion was inconsistent with Article 6:4 under which signatories were obliged to exclude any injuries caused by factors other than the subsidized imports under investigation. This necessitated a thorough examination of all possible causes of alleged injury.

167. In support of its view that Article 6:4 of the Agreement required that investigating authorities conduct a thorough examination of all possible causes of the alleged injury, **Norway**, responding to a question of the Panel, explained that, in order to ensure that the investigating authorities did not attribute injury caused by other factors to the effects of subsidized imports, the investigating authorities must be able to segregate the effects of other factors from the effects of the subsidized imports:

"Following the negotiations, the need to demonstrate that the dumped imports were the principal cause of the injury suffered was abandoned, as was the requirement to weigh the effect of the dumping against the effect of all other factors adversely affecting the industry. Instead, a new approach was adopted which consisted of isolating the injuries caused by each of the factors, including the dumping, and to treat each as a separate injury. It had then to be shown that the effect of the dumped imports was such as to cause injury within the meaning of the Code."<sup>128</sup>

In order to isolate the injuries caused by each factor, the investigating authorities must examine each such factor. Article 6:4 required that it "be demonstrated" that the effects of the subsidized imports

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<sup>127</sup>USITC Determination, p.22.

<sup>128</sup>Beseler and Williams, Anti-Dumping and Anti-Subsidy Law: The European Communities, (1986), p.167.



were causing material injury. This placed an affirmative obligation on the investigating authority to so demonstrate. A part of that demonstration included demonstrating that the investigating authority had not improperly attributed the injury caused by other factors to injury caused by the effects of the subsidies. Nothing in the language of the Agreement created an obligation for the party opposing the duties to demonstrate the negative, *i.e.*, that the effects of the subsidized imports were not causing material injury. In the present case, the United States had failed to provide any information on how the USITC had ensured that it did not attribute the injury caused by other factors to the effects of the subsidized imports and had failed to demonstrate that the subsidized imports, through the effects of the subsidies, were causing material injury.

168. In response to a question of the Panel as to whether Norway considered that the possible alternative causes it had identified had not been considered by the USITC, or whether it considered that these possible alternative causes had not been given sufficient weight by the USITC, **Norway** stated that, while the USITC was not obliged to weigh the different factors of injury, it was required to avoid attributing to the subsidized imports injury caused by other factors. While the USITC might perhaps have considered some of these other factors, it had made no effort to avoid attributing injury caused by those other factors to the effects of the subsidies.

169. The **United States** argued that the determination of the USITC amply demonstrated that Norway's surging exports of Atlantic salmon to the United States had caused material injury to the domestic industry. In the face of this evidence, Norway pointed to other factors which, it believed, might have caused material injury to the industry. The USITC, however, had determined that material injury was caused by the Norwegian imports; it had expressly considered and rejected the alternative causes proffered by Norway. The determination of the USITC therefore met the requirements of Article 6:4. Contrary to what was argued by Norway, Article 6:4 did not require a signatory to "exclude any injuries caused by factors other than subsidized imports". Rather, the Agreement admonished investigating authorities to consider whether other factors might be injuring the domestic industry. Thus, the investigating authorities must find a causal link between the imports and the injury to the 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.

170. The **United States** argued that in its analysis the USITC had applied the appropriate Agreement standard in finding a causal link between the subsidized 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 subsidized 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 subsidized imports were, by themselves, the cause of material injury found no support in the language of Article 6:4. A standard along the lines of the standard advocated by Norway had been contained in the 1967 Anti-Dumping Code, which in Article 3 provided that dumped imports must be the "principal" cause of injury. If "principal" cause was no longer the standard, it followed that imports need not be "the" cause of injury by themselves, which was an even higher standard. The test in Article 6:4 was whether subsidized imports "were causing material injury within the meaning of this Agreement". The meaning of this language had to be understood in the context of the change which had occurred in the causal link standard in moving from the 1967 Code to the present Agreement on Implementation of Article VI of the General Agreement. A number of commentators had concluded that the explicit removal of the "principal cause" standard in the present Agreement was a lessening of the causation standard to a standard requiring that the imports be a "contributing cause of injury".

171. In response to the points made by Norway regarding other factors which might have injured the domestic industry, the **United States** submitted that the USITC in its investigation had found that, although these other factors might have had an effect on the domestic industry, injury was caused by

the subsidized Norwegian imports. With respect to Norway's argument on imports from third countries as a possible alternative cause of injury, the **United States** considered that this argument ignored the dominant position held by Norway in the United States market despite the volume increases of imports from third countries. Imports in 1989 from the next largest importer, Canada, had been only one quarter those of Norway, the increase in Norway's import volume had dwarfed the increase in the volume of any other country's imports and the increase in Norway's imports was larger than the total import volume of Canada, the next largest importer. The USITC had properly focused on the overwhelming and increasing volume of Norwegian imports, rather than on the rate of increase of the volume of imports from the other, far smaller exporters of Atlantic salmon. In sum, Norway's argument was based on an invalid assumption that a smaller importer could have an injurious effect while its imports, which had represented 65 per cent of the market in 1989, did not have such an effect.

172. In the view of the **United States**, Norway's argument that the Pacific salmon catch had injured the domestic Atlantic salmon industry in the United States ignored the fact that Atlantic and Pacific salmon were commercially competitive only to a limited extent, as the USITC had found in defining the like product. Norway had not contested the USITC's finding that Atlantic and Pacific salmon were not like products. Norway had cited the Pacific salmon harvest totals for 1987-1989 but had failed to note that virtually all of this Pacific salmon was either frozen or canned and had thus been marketed to completely different purchasers than fresh Atlantic salmon. Norway also had failed to note that most of the remaining fresh Pacific salmon was exported from the United States and that nearly all of the 1989 increase in the Pacific salmon catch was chum or pink salmon, which were low quality fish sold in different markets than Atlantic salmon. Norway had not contested these facts; it had merely failed to note them.

173. With respect to Norway's argument that the domestic industry had been adversely affected by mismanagement, the **United States** considered that this argument overlooked the fact that low prices were the root cause of the industry's injured financial condition. Norway had also pointed to the US industry's marketing of Atlantic salmon on a less than year round basis. As the USITC had found, 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.

174. 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 6:1, 6:2 and 6:3 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".<sup>129</sup> 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,

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<sup>129</sup>USITC Determination, p.19.

in its determination. For example, the USITC had concluded that the industry's financial performance was "worse than would be anticipated even taking into account start-up conditions".<sup>130</sup> In sum, the USITC's determination provided a detailed explanation of how Norwegian imports were causing material injury. This explanation had its focus on the volume of imports from Norway, their price effects, and their effects on US producers, as required by the Agreement. The determination also contained an explicit recognition of respondent's arguments concerning other factors affecting the industry, and contained findings supporting the USITC's conclusion that these other factors did not detract from the fact that imports from Norway had caused injury.

175. **Norway** considered that the view of the United States that Article 6:4 "admonishes investigating authorities to consider whether other factors may be injuring the industry" rather than requiring the investigating authorities to exclude any injuries caused by other factors rested on a clear misreading of the ordinary meaning of this provision. Article 6:4 provided in relevant part that "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 sentence nowhere stated that the investigating authorities were only obliged to consider whether other factors were causing injury. Assuming arguendo that this language was ambiguous, an examination of the drafting history demonstrated that the drafters of this provision did not intend this sentence to require only a consideration of whether other factors were causing injury to a domestic industry.

176. In support of its contention on this latter point, **Norway** pointed out that in the Draft Subsidies Code, dated 10 July 1978 (document MTN/NTM/W/168), the provision now appearing in Article 6:4 of the Agreement read as follows:

"The subsidized products must be [an important contributing factor in causing or threatening] [a principal cause of] [the cause of] injury. All other relevant factors adversely affecting the industry shall be considered in reaching a determination."

This language indeed "admonished" the investigating authorities to consider other factors. However, this was not the final language. Had the signatories intended the interpretation proposed by the United States, they would not have changed the language to state that "injuries caused by other factors must not be attributed to the subsidized imports." The United States had presented no evidence that the causation analysis of the USITC was consistent with the requirements of Article 6:4 of the Agreement. Thus, the United States had failed to demonstrate that it had conducted an injury investigation in accordance with the requirements of Article 6:4.

177. The **United States** submitted that Norway's arguments regarding the requirements of Article 6:4 with respect to other factors which might be causing injury to a domestic industry were without merit in view of the text of that provision. Norway had argued that the Agreement required the investigating authorities to conduct a "thorough examination of all possible causes of alleged injury" and that, "in order to isolate the injuries caused by each factor, the investigating authorities must examine each factor". Norway had not cited any specific provision in the Code requiring its preferred analysis. What the Agreement stated was that investigating authorities must not attribute the effects of other factors to the effects of the subject subsidized imports. It did not require any particular analysis of other factors and the language of the Agreement did not support Norway's interpretation that a "thorough examination" of each possible other factor must be undertaken.

178. The **United States** considered that apparently Norway's argument was that the sentence in Article 6:4 concerning other factors implied that a specific examination of all other factors was required.

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<sup>130</sup>USITC Determination, p.15.

However, no such inference could be drawn from this language. As shown by the detailed text of Articles 6:2 and 6:3, required analyses were specifically set forth in the Agreement. The fact that no particular analysis had been set forth regarding the other factors was telling. It was not surprising that the Agreement was structured in this way. It was natural that the mandated focus of the analysis was on the effects of subsidized imports, rather than on some other factors; this was what countervailing duty investigations were all about - the subject imports. Norway would apparently turn the issue on its head and require that the investigating authorities examine, and eliminate, all other possible factors affecting the domestic industry and then decide whether what was left was sufficient for an affirmative determination. In this respect, the standard proposed by Norway was similar to the standard found in the 1967 Anti-Dumping Code. Article 3(c) of that Code provided that "in order to establish whether dumped imports have caused injury, all other factors which, individually or in combination, may be adversely affecting the industry shall be examined". Similarly, Article 3(a) of the 1967 Anti-Dumping Code provided that "the authorities shall weigh, on one hand, the effect of the dumping and, on the other hand, all other factors taken together which may be adversely affecting the industry". This language had been dropped from the present Agreement on Implementation of Article VI of the General Agreement. The 1967 Code had been denounced in Article 16 of that Agreement.

179. The **United States** further submitted in this context that, to the extent there was a Agreement standard for not misattributing effects of other factors, it was fulfilled through an examination of the effects of the subject imports, as provided in Articles 6:1, 6:2 and 6:3 which addressed the causal link to imports. This view was amply illustrated by the recent decision of the Panel established by the Committee on Subsidies and Countervailing Measures in the dispute between the United States and Canada regarding countervailing duties imposed by Canada on grain corn from the United States.<sup>131</sup> This Panel had found that the Canadian authorities had given primary emphasis to the effects of the United States subsidy programme on the world price for corn and had given no consideration to the effects of imports. The Panel had found a failure by Canada to meet the requirements of Articles 6:2 and 6:3. The Panel had also found that, because Canada had explicitly based its finding on the effects of something other than the subject imports - the world price for corn - Canada had violated the requirement of Article 6:4 not to attribute the effects of other factors to the subject imports. That decision presented a classic case in which the requirement of Article 6:4 was violated: a signatory's failure to offer any case that it was subsidized imports which were causing injury. The present case, however, was in marked contrast to the facts underlying the Panel's decision in the Grain Corn case. In the salmon case, the USITC had undertaken a detailed and Code-directed analysis of the effects of the subject imports - their volume, effects on prices, and consequent effects on domestic producers. The findings of the USITC regarding these effects were amply supported by the evidence before the USITC.

180. The **United States** further pointed out that under United States legislation the effects of other factors could not support an affirmative finding of injury. In this case, the USITC had explicitly considered the other factors suggested by the Norwegian respondents, including various US industry production difficulties, non-subject imports, the inability of United States domestic producers to market their product year-round, and the effects of Pacific salmon. The USITC had ultimately determined that the subject imports from Norway had caused material injury to the domestic industry in the United States and that, while other factors might have had some adverse impact on the industry, they did not detract from the fact that Norwegian imports were injurious.

181. **Norway** also objected in this context to the USITC having made one collective injury determination for both the anti-dumping and the countervailing duty case. This also violated the requirement under Article 6:4 of the Agreement to exclude injuries caused by factors other than the subsidized imports

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<sup>131</sup>SCM/140, adopted on 26 March 1992.

under investigation. The Agreement contained no basis for this type of cross-cumulation. In fact, there had been no investigation and determination concerning the alleged material injury caused by the effects of the subsidized imports without regard to injury caused by the dumped imports. Consequently, the USITC had failed to demonstrate that material injury to the domestic industry had been caused through the effects of the alleged subsidies.

182. The **United States** considered as misplaced Norway's objection to the issuance by the USITC of one injury determination for both the anti-dumping and the countervailing duty investigations. In accordance with Article 6:4, the USITC had considered whether "the effects of the subsidy" as defined by the Agreement, *i.e.*, the volume and price effects of the imports on the domestic industry, as set forth in Articles 6:2 and 6:3 were "causing injury within the meaning of this Agreement". Article 3:4 of the Agreement on Implementation of article VI of the General Agreement required the USITC to consider these identical factors in determining whether the effects of dumping were causing injury. Both Agreements required the investigating authorities to evaluate the impact which the imports were having on the domestic industry, and provided substantively identical criteria for making that evaluation. The dumped and subsidized imports from Norway were one and the same. The period of investigation was identical for both the anti-dumping and countervailing duty investigations. Consequently, the import volume and price effect and impact on the domestic industry had been identical for both investigations. In view of this complete congruity between the subject imports in both investigations, Norway's argument was without any basis.

183. Responding to a question by the Panel, the **United States** further submitted in this context that the issuance by the USITC of one injury determination for the purpose of both the anti-dumping and the countervailing duty investigation was not incompatible with the reference in footnote 20 ad Article 6:4 to "the volume and prices of non-subsidized imports" as a possible "other factor" causing injury to a domestic industry. In the present case the USITC had not, as a result of its "combined" analysis, attributed the effects of non-subsidized imports to the subsidized imports. This was because the exact same set of imports from Norway had been found to be both dumped and subsidized. Of course, even in a case in which the subsidized and dumped imports were not identical, the effects of non-subsidized, but dumped imports could render the domestic industry more vulnerable to injury from the subsidized imports. However, the present case did not involve differing dumped and subsidized imports.

#### 5.5.2 Material injury caused by the subsidized imports, through the effects of the subsidy

184. **Norway** further submitted that the standard applied by the USITC in the case under consideration did not conform to the requirements of Article 6:4 in that the USITC had failed to examine the effects of the subsidies in determining whether a domestic industry was materially injured and had only made a finding that a domestic industry was materially injured (or threatened with material injury, or the establishment of a domestic industry had been materially retarded) "by reason of imports of that merchandise". Since a domestic industry would always be more able to charge higher prices if supply was restricted (e.g. by eliminating imports), imports could always be found to be causing some injury to the domestic industry, even if minimal. Thus, the interpretation of the United States would allow the imposition of countervailing measures any time the domestic industry was materially injured by any cause, as long as there were imports which had received some subsidy. This would make a mockery of the causation standard in Article 6:4 and defeat the purpose of the Agreement.

185. In support of its claim that the USITC did not consider the effects of the subsidy in determining whether subsidized imports were causing material injury to a domestic industry, **Norway** also pointed out that the Courts in the United States had upheld the approach of the USITC, while acknowledging that the GATT would appear to require the investigating authorities to consider the effects of the subsidy. Specifically, the United States Court of International Trade, in discussing what the "effects" language

of Article 3 of the Agreement on Implementation of Article VI of the General Agreement required and how this language was implemented in the legislation of the United States had held:

"Whatever the ideal embodied in GATT, Congress has not simply directed ITC to determine directly if dumping itself is causing injury."<sup>132</sup>

The interpretation of Article 6:4 advocated by the United States in the proceedings before this Panel would have the Panel ignore the "through the effects" clause of Article 6:4 in its entirety. Such an interpretation was inconsistent with the ordinary meaning of the words and with the drafting history of the paragraph. The Vienna Convention on the Law of Treaties required that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Thus, international interpretive practice was to give meaning to all phrases in a text.

186. In response to a question of the Panel as to whether Norway considered that the term "through the effects of the subsidy" in Article 6:4 of the Agreement required the investigating authorities to consider factors other than those identified in Articles 6:2 and 6:3, **Norway** submitted that the investigating authorities must certainly consider the factors listed in Articles 6:2 and 6:3 but that a consideration of only those factors was not sufficient to meet the requirements of Article 6:4. For example, it would be odd not to consider the level of subsidization found to exist and its possible trade effects. This view had been recognized by United States scholars. Thus, one author had written that:

"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."<sup>133</sup>

Moreover, this interpretation was consistent with the object and purpose of the Agreement. The Agreement sought to prevent unjustified impediments to the flow of international trade. Consequently, the Agreement required a strong showing that the injury to be prevented was caused by the effects of the subsidies and thus, that the remedy (the countervailing duty measures) would, in fact offset this material injury. If the injury were to be caused by other factors, the countervailing duty measures would not offset the injury and would impede trade to no lawful purpose.

187. The **United States** considered that Norway erred in arguing that United States law did not require a consideration of the effects of the subsidy. In fact, both the Agreement and the United States' law required the USITC to consider identical factors in examining the effect of the subsidy on the domestic industry. Specifically, both required an evaluation of the volume and price effects of the imports on the domestic industry. Contrary to Norway's assertion, the USITC did not issue an affirmative injury determination whenever the domestic industry was injured and imports present in the market, as numerous USITC investigations make clear. United States law required precisely what the Agreement required: that subsidized imports cause material injury through volume and price effects, as specified in Article 6:2, and that material injury attributed to other causes cannot be the basis of an affirmative finding. Norway's argument was readily refuted by the number of negative determinations issued by the USITC in the circumstances described by Norway.

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<sup>132</sup>Algoma Steel Corp. v. United States, 688 F. Supp. 639, 645 (CIT 1988).

<sup>133</sup>Jackson, The World Trading System (1989), p.242.

188. The **United States** argued that as indicated by footnote 19 ad Article 6:4, "the effects of the subsidy" referred to in Article 6:4 of the Agreement were defined in Articles 6:2 and 6:3 as the volume and price effects of the subsidized imports, and the consequent impact of these imports on the domestic industry. The meaning of this language was clearly defined in the Agreement and there was no basis to attribute some other meaning to this language. Norway had not been able to define exactly what, in its view, the additional analysis was which was required by this language in Article 6:4 and its imprecise method of construing the Agreement stood in contrast to the plain meaning construction put forth by the United States. Contrary to Norway's assertion, the United States was not asking the Panel to disregard the "through the effects of the subsidy" language in Article 6:4. Rather, the United States asked the Panel to give that language the precise meaning set forth in the Agreement: the "effects of the subsidy" were measured through the volume and price effects of the imports and their impact on the domestic industry. While the Agreement specifically defined the meaning of the term "through the effects of the subsidy" and contained two paragraphs concerning the analysis of imports, it provided no guidance concerning the interpretation of this term beyond analysis of the imports. If the Agreement had required an additional mode of analysis beyond that set forth in Articles 6:2 and 6:3, one would expect at least a further definition of the "effect of the subsidy" and some guidance on the proper analysis to assess these effects. There was none, however, providing yet another strong indication that the Agreement imposed no requirement other than an examination of import volume and price effects and the impact of the imports on domestic producers.

189. **Norway** noted that the interpretation of the "through the effects of ..." language in Article 6:4 advocated by the United States had been refuted by Professor Jackson as follows:

"A counter argument has been raised in connection with footnotes to these clauses. These footnotes refer to paragraphs 2 and 3 in a way that have led some to argue that the notion of an obligation to use margin analysis has softened. However, such a conclusion appears to be somewhat improbable."<sup>134</sup>

190. 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 19 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.

191. **Norway** further argued in this context that the interpretation by the United States of the term "through the effects of ..." in Article 6:4 was inconsistent with the drafting history of that provision. Since it appeared that the United States found the wording of Article 6:4 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:

"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:

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<sup>134</sup>Jackson, The World Trading System (1989), p.242.

"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 of the Agreement 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 6:4 to have the meaning found in the draft of 19 December 1978, rather than in the final text. This could not be a proper interpretation of the Agreement requirements.

192. The **United States** denied that, as suggested by Norway, it considered the text of Article 6:4 to be ambiguous. On the contrary, the United States believed that this text was susceptible to only one interpretation. In any event, the documents referred to by Norway pertaining to the drafting history of Article 6:4 did not support the conclusion drawn by Norway. Rather, they demonstrated the opposite: that the drafters considered the earlier draft standard, that "imports are causing" injury, to be substantially identical. Norway had neglected to mention the relevant footnote in document MTN/NTM/W/210, which stated that "this formulation has been developed by some but not all of the participating delegations" and that "other delegations have suggested alternate texts for consideration". The standard ultimately adopted was simply another way of stating the earlier standard.

193. In response to a question of the Panel, **Norway** stated that footnote 19 ad Article 6:4 did not detract from the need to consider the effects of the subsidy. If Article 6:4 only required an analysis of the effects of the imports as stated in Articles 6:2 and 6:3, 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 the subsidy" language in Article 6:4 would not have been necessary. Thus, Article 6:4 had to be interpreted to require more than a consideration of the effects of the imports as stated in Articles 6:2 and 6:3.

194. The **United States** also noted that the Panel's decision in *Canada Grain Corn* stated that the proper focus of an investigation was on subsidized imports, and specifically rejected the view that investigating authorities may consider the effect of a subsidy in the abstract. The United States further noted that footnote 17 of the Agreement provided that, in the context of assessing threat of injury, the investigating authorities "may" consider the trade effects of export subsidies. This permissive language - "may consider" - was inconsistent with Norway's view that such consideration was mandatorily directed elsewhere in the Agreement.

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

195. **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 Article 6:4 of the Agreement in that imports of Atlantic salmon from Norway had not been a cause of present material injury to the domestic industry in the United States at the time this determination was made. Article 6:4 required that it be demonstrated that the subsidized imports under investigations "are ... causing" material injury. It followed from the present tense of the wording of Article 6:4 that material injury must be found to exist at the time the decision was taken to impose countervailing duties. The purpose of the imposition of such duties was not to punish past behaviour but to prevent future harm to the domestic industry resulting from imports which were currently causing material injury.



196. In the view of **Norway**, the majority of the USITC had ignored this requirement to focus on present injury caused by imports under investigation when it had given less weight to the decline in the volume of imports from Norway in 1990 than to the earlier increase in that volume. However, the acting Chairman had explicitly stated that the crucial question before the Commission was whether "material injury is being caused as of the day of our determination, not the date of the petition". She had taken this view based inter alia on relevant GATT provisions, such as Article 6:4 of the Agreement and in light of the necessity to interpret domestic legislation in conformity with international obligations of the United States.

197. **Norway** considered that, even if one were to assume that the domestic industry had been injured at the time of the filing of the petition in February 1990, such a conclusion was definitely not justified at the time of the final determination of the USITC in spring 1991. **Norway** reiterated in this respect that the market share held by Norwegian imports in the United States had been declining during the period covered by the USITC's investigation, mainly to the benefit of imports from third countries. This decline in market share had been caused inter alia by the combined effect of the large depreciation of the US dollar and declining prices in the US market. There was no evidence to suggest any kind of strategic behaviour of the exporters, as had been suggested by the voting majority of the USITC.

198. In response to Norway's argument that an affirmative final determination of injury was not justified because imports of Atlantic salmon from Norway had no longer been injuring the US domestic industry at the time of the USITC's determination, the **United States** made the following points. Norway reached this conclusion based on the decline in import volume and increase in prices in 1990, following the initiation of the investigation and the imposition of provisional measures. The decline in import volume was simply the expected result of the pendency of the investigation and, especially, the imposition of provisional measures, rather than of market forces. Moreover, Norway's argument ignored that the USITC had determined that the domestic industry was materially injured by Norwegian imports at the time of its determination. In particular, the USITC had pointed to the continuing injurious effects of the Norwegian imports, in the form of financial losses, reduced size, and difficulty in obtaining financing. The United States also observed that the grave financial losses suffered by the domestic industry - on the order of 50 per cent of net sales in 1989 - could not be expected to disappear some months later in early 1991. The negative effects of the industry's reduced production of young salmon which began in 1990 as a result of the price decline through 1989 was especially pernicious. Because production of Atlantic salmon for sale, i.e., the industry's capacity to produce marketable salmon, was the result of prior years' production of younger salmon, this reduction continued to injure the domestic industry throughout the period of investigation and beyond. Another ongoing negative effect cited by the USITC was the continuing reluctance of banks to lend to domestic producers.

199. In the view of the **United States**, the Agreement allowed signatories to take account of these continuing, present injurious effects on the industry's capacity and ability to raise capital attributable to recent imports. In an analogous context, the Agreement expressly contemplated examination of future effects of imports. Thus, Article 6 permitted the imposition of countervailing duties in cases in which imports had not yet caused injury but threatened to do so. If the future effects of present imports could thus be considered, it followed that the present, ongoing impact of imports which had entered in the recent past could also be taken into account.

200. The **United States** further considered that Norway's argument represented a flawed interpretation of the Agreement. Norway's theory would allow exporters to ensure a negative determination by reducing their exports and raising their prices. An unscrupulous exporter could guarantee the outcome of any investigation and simply resume its injurious subsidized exports once a negative determination had been entered. It would make no difference that their exports had caused injury at the time the case was filed. The Agreement did not provide for such a loophole. Article 6:2 directed investigating authorities to consider whether there had been a significant increase in subsidized imports and whether

there had been a significant price undercutting by the subsidized imports. This provision on its face permitted a retrospective analysis. Moreover, the intended consequence of provisional remedies under Article 5 was to remedy injury during an investigation, through a reduction of import volume or an increase in import prices. Norway's theory would undercut the purpose of provisional measures, for if injury were avoided within the meaning of Article 5:1, it would in all cases mandate a negative determination under Article 6:4. The Agreement did not envision such an absurd result.

201. **Norway** considered that the United States had mischaracterized Norway's position in arguing that Norway had concluded that there was no present injury caused by Norwegian imports based on the decline in import volume and increases in prices in 1990, following the initiation of the investigation and the imposition of provisional measures. Norway's position that there was no basis for a determination of present material injury caused by Norwegian imports at the time of the determination of the USITC was based on (1) the fact that the volume of imports from Norway had declined prior to the initiation of the investigation; (2) the decline in the market share held by the Norwegian imports throughout the period covered by the USITC's investigation; (3) the fact that Norwegian salmon commanded a price premium over United States salmon; (4) the fact that US domestic producers had tripled their market share in the same period; (5) the fact that the decline of the Norwegian import volume after the imposition of the provisional measures was essentially due to other factors such as changes in exchange rates, and (6) the failure of the United States to take action to prevent injury caused by other factors from being attributed to the imports from Norway.

#### **6. Continued imposition of the countervailing duty order (Article 4:9)**

202. **Norway** argued that the continued imposition of countervailing duties by the United States on imports of fresh and chilled Atlantic salmon from Norway was inconsistent with the requirements of Article 4:9 of the Agreement, which provided that a countervailing duty shall remain in force only as long as, and to the extent necessary, to counteract subsidies which are causing material injury. At the time of the affirmative final determination of the USITC in the salmon case, no material injury was caused to the domestic industry in the United States by reason of imports from Norway. In addition, imports of Atlantic salmon from Norway were certainly no longer causing any present injury to the domestic industry in the United States. Consequently, the United States was under an obligation to terminate the imposition of countervailing duties on imports of salmon from Norway.

203. The **United States** submitted that Norway's argument that the imports from Norway were not causing injury at the time of the USITC's determination was factually incorrect.<sup>135</sup> Furthermore, as to events occurring subsequent to the completion of the investigation, there were no such facts on that issue on the record of the USITC, simply because the USITC's investigation ended within the deadline set by statute for a final determination concerning the existence of material injury. Norway could seek a review investigation by the USITC, which, if warranted, would concern later developments. In any event, a lack of further injury following imposition of a countervailing duty order would not be surprising since the Agreement presumed that an order might remove the injury to the domestic industry caused by the subject imports. Apparently, Norway was arguing that once an order was imposed, it must be removed immediately. This was absurd on its face.

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<sup>135</sup>Supra, paragraph 198.

## VI. FINDINGS

### 1. INTRODUCTION

204. The Panel noted that the issues before it arise essentially from the following facts: On 12 April 1991, the United States imposed a countervailing duty order on imports of fresh and chilled Atlantic salmon from Norway following an affirmative final determination of subsidization 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.

205. Norway requested the Panel to find that the imposition by the United States of the countervailing duty order was inconsistent with the obligations of the United States under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII 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 2:1;
- the imposition of countervailing duties in respect of regional development programmes was inconsistent with Article 11;
- the calculation of the amount of subsidies was inconsistent with Article 4:2;
- the determination of material injury by the USITC was inconsistent with Article 6; and
- the continued imposition of the countervailing duty order was inconsistent with Article 4:9 of the Agreement.

Norway asked the Panel to recommend that the Committee request the United States to revoke the countervailing duty order and reimburse any countervailing duties paid.

206. The United States requested that the Panel:

- give a ruling that certain matters raised by Norway were not properly before the Panel; and
- find that the affirmative final determinations made by the Department of Commerce and the USITC were consistent with the obligations of the United States under the Agreement.

### 2. PRELIMINARY OBJECTIONS

207. The United States had raised a number of preliminary objections. Firstly, it had objected to the admissibility of two claims of Norway, regarding the United States' failure to carry out an "upstream subsidy analysis" in the countervailing duty investigation (concerning whether subsidies to smolt were passed through to salmon), and regarding continued application of the countervailing duty order under Article 4:9, on the grounds that these claims were not within the Panel's terms of reference and were otherwise not admissible because these claims had not been raised during the consultations and the conciliation phase which had preceded the establishment of the Panel. Secondly, the United States had argued with regard to Norway's claim concerning the initiation of the countervailing duty investigation, that the failure of Norway or private Norwegian respondents to raise this matter before the investigating authorities and "exhaust administrative remedies" precluded Norway from raising this claim before the Panel.

208. The Panel examined the relation between the scope of the matter before it and the terms of reference. The Panel considered that terms of reference served two purposes: definition of the scope of a panel proceeding, and provision of notice to the defending signatory and other signatories that could be affected by the panel decision and the outcome of the dispute. The notice function of terms of reference was particularly important in providing the basis for each signatory to determine how its interests might be affected and whether it would wish to exercise its right to participate in a dispute as an interested third party. The Panel observed that terms of reference often were standard terms of reference, as in the present dispute, in which the definition of the matter had been supplied by a written statement prepared entirely by the complaining signatory. 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 were within the scope of, and had been identified in, the written statement or statements referred to in its terms of reference.

**(1) Preliminary objections of the United States regarding matters allegedly not within the Panel's terms of reference or not raised during consultations and conciliation**

209. The Panel noted that its terms of reference were: "To review the facts of the matter referred to the Committee by Norway in SCM/123 and SCM/123/Add.1 and, in light of such facts, to present to the Committee its findings concerning the rights and obligations of the signatories party to the dispute under the relevant provisions of the General Agreement as interpreted by the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement." Examining documents SCM/123 and SCM/123/Add.1, the Panel found that Norway did not refer in them to upstream subsidies, nor did it refer to the continued application of the countervailing duty order under Article 4:9. The Panel noted Norway's arguments that documents SCM/123 and SCM/123/Add.1 should be interpreted to include upstream subsidies in the scope of this proceeding. First, Norway had argued that references therein to calculation of the level of alleged subsidies and to application of the proper injury and causation standard (including consideration of trade effects of subsidies) included upstream subsidy issue by implication; second, Norway had argued that the "matter" referred to the Committee in these documents consisted of the imposition of countervailing duties on salmon from Norway, which would therefore include the question of the treatment of upstream subsidies; third, Norway had argued that the United States was required to demonstrate that it had considered all relevant facts (including the trade effects of regional programmes) in determining whether to impose countervailing duties.

210. The Panel considered that, because Norway had in its request for the establishment of a panel (SCM/123 and Add.1) defined its concerns regarding the calculation of the amount of subsidies as pertaining to two specific issues (the failure of the United States to adjust the amount of subsidization for income tax effects, and the method of calculation of the interest rate benchmark for the valuation of loan subsidies), the alleged failure of the United States to conduct an upstream subsidy analysis was not within the Panel's terms of reference as an aspect of Norway's claim regarding the calculation of the amount of the subsidies.

211. The Panel further noted that while Norway had in document SCM/123 and Add.1 stated a claim regarding the failure of the United States to properly consider the trade effects of the subsidies under investigation, the four aspects of this claim identified in SCM/123/Add.1 did not include the question of a failure of the United States to conduct an upstream subsidy analysis. The Panel therefore found that this issue was not within the Panel's terms of reference as an aspect of the claim stated by Norway in documents SCM/123 and Add.1 regarding the failure of the United States to properly consider the trade effects of the subsidies under investigation.

212. The Panel considered that the "matter" referred to the Committee by Norway in its request for the establishment of a panel (SCM/123 and Add.1) was not the imposition of countervailing duties by the United States on imports of fresh and chilled Atlantic salmon from Norway; rather, this "matter"

consisted of the specific claims stated by Norway in these documents with respect to the imposition of these duties by the United States. The Panel considered that the logical implication of the definition advanced by Norway of the "matter" before the Panel was that whenever a panel was established in a dispute concerning the imposition of countervailing duties, such a panel could examine any aspect of the procedures followed and determinations made by the investigating authorities of the signatory which had imposed the countervailing duties, regardless of whether that aspect had been referred to in the complaining signatory's request for the establishment of a panel. There would then be practically no limit to the claims which could be raised before a panel without any advance notice to the defending party or to third parties. The Panel recalled in this connection its observations in paragraph 208 regarding the functions of panels' terms of reference.

213. The Panel then turned to Norway's argument that the upstream subsidy issue was within the Panel's terms of reference because the United States was under an obligation to demonstrate that it had considered all relevant facts before imposing countervailing duties. The Panel recalled that "the matter" before it consisted of the specific claims stated by Norway in the documents referred to in the Panel's terms of reference. A broad examination of whether the United States had considered "all relevant facts", including facts not mentioned in these documents, would be inconsistent with this definition in the Panel's terms of reference of the matter before the Panel.

214. Finally, the Panel noted that its examination of Norway's request for consultations under Article 3 of the Agreement (SCM/115) its request for conciliation (SCM/117) and the Minutes of the conciliation meeting held in July 1991 under Article 17 of the Agreement (SCM/M/52) also found no specific reference to the failure of the United States to conduct an upstream subsidy analysis.

215. Accordingly, the Panel concluded that its terms of reference did not include in the scope of this proceeding the claims of Norway with regard to upstream subsidies or the continued application of the countervailing duty order under Article 4:9.

**(2) Preliminary objections of the United States regarding matters not raised before the investigating authorities**

216. The Panel also noted that the United States had argued, with regard to Norway's claim concerning the initiation of the countervailing duty investigation, that the failure of Norway or private Norwegian respondents to raise this issue before the investigating authorities precluded Norway from raising it before the Panel. It was not contested by the United States that this issue had been raised in Norway's request for the establishment of a panel, and had also been raised in consultations and conciliation. In the view of the United States, the principle of preclusion of issues not raised to the administering authorities was manifest in the following provisions of the Agreement:

- Articles 2, 4, 5, and 6, which provided investigating authorities with exclusive authority to gather and consider evidence and make findings of fact and law concerning subsidization and injury issues;
- Article 2:14, which provided that investigations shall, except in special circumstances, be completed in one year after initiation;
- Article 2:9, which required that investigating authorities make their decision based on the agency record; and
- the transparency and due-process requirements applying to investigations.

217. The United States had argued that the rationale behind this concept of "exhaustion of administrative remedies" was akin to the rationale behind the public international law doctrine of exhaustion of local remedies. However, when Norway argued against application of the legal doctrine of exhaustion of local remedies in this dispute, the United States had clarified that it had not sought application of this doctrine. Consequently, the issue of application of the doctrine of exhaustion of local remedies to dispute settlement under the Agreement was not before the panel.

218. The Panel analyzed this argument in the light of the provisions applying to disputes concerning countervailing duty cases, in Articles 3, 17 and 18 of the Agreement. Article 18:1 defined the task of panels as follows: "A panel ... shall review the facts of the matter and, in light of such facts, shall present to the Committee its findings concerning the rights and obligations of the signatories party to the dispute under the relevant provisions of the General Agreement as interpreted and applied by this Agreement." Article 17 provided that "matters" could be referred to the Committee for conciliation, and that a panel could be requested should "the matter" remain unresolved thirty days after a request for conciliation. Article 3:2 provided a duty to afford an opportunity for consultations with a view to clarifying the factual situation and to arriving at a mutually agreed solution; footnote 13 to that paragraph provided that "Such consultations may establish the basis for proceeding under the provisions of Part VI of this Agreement." The Panel did not find in these provisions any basis for it to refuse to consider a claim by a signatory in dispute settlement under the Agreement merely because the subject matter of the claim had not been raised before the investigating authorities under domestic law. The Panel considered that had the drafters of the Agreement intended a limitation on the scope of dispute settlement of the nature advocated by the United States, they would have included a clear statement to that effect in the Agreement; no such statement existed in Articles 3, 17 or 18 or elsewhere in the Agreement, nor could one be implied from the provisions of these Articles.

219. The United States had cited certain Agreement provisions and argued that if a panel were to address claims of the type it had objected to on this basis, respondents and governments would be encouraged not to raise such arguments to the investigating authorities and the ability of governments to comply with these provisions would be undercut. In this respect the Panel noted that its conclusion pertained only to the question of admissibility, and did not imply that in reviewing the merits of a claim a panel should not take account of whether or not the issues to which the claim relates were raised before the investigating authorities in the domestic countervailing duty proceedings. The Panel considered therefore that a review of such claims would not in any way interfere with the ability of Parties to exercise their rights under those provisions. Accordingly, the Panel decided to reject the objection of the United States regarding the admissibility of Norway's claim concerning initiation of the countervailing duty investigation.

220. The Panel concluded that an examination of the merits of the claim of Norway with respect to the initiation of the countervailing duty investigation was not precluded by the alleged failure of the Norwegian Government or the Norwegian respondents to raise this issue before the investigating authorities.

### 3. MERITS

#### A. INITIATION OF THE COUNTERVAILING DUTY INVESTIGATION

221. The Panel then turned to the merits of the issue raised by Norway with regard to the initiation of the countervailing duty investigation under Article 2:1 of the Agreement. Norway had argued that the initiation by the United States of the countervailing duty investigation was inconsistent with Article 2:1 because the United States authorities had failed to satisfy themselves before the initiation that the request for the initiation had been filed on behalf of the domestic industry.

222. In particular, Norway had argued that the findings of the panel on "United States - Imposition of Antidumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden" (hereinafter "Swedish Steel Pipe")<sup>136</sup> with respect to initiation of antidumping investigations were relevant to the present dispute. Norway stated that the practice applied by the Department of Commerce in this case, that unless a substantial portion of the industry comes forth to oppose a petition, the Department reasonably assumes that the industry, or 'a major proportion' thereof, supports the petition, was inconsistent with United States obligations under Article 2:1 in the light of the findings of the "Swedish Steel Pipe" panel. Norway argued that these findings meant that the Department of Commerce was required to conduct an investigation to satisfy itself that the petition was made on behalf of the industry and that there was no information on the record indicating that the United States authorities had taken any steps to satisfy themselves prior to the initiation of the investigation (or at any other time) that the petition had been filed on behalf of the industry affected. Norway also pointed to certain facts which in Norway's view called into question the petitioner's claim to act on behalf of the domestic industry.

223. The United States argued that the petition had provided a satisfactory statement of industry support. In light of the certified statement that the major proportion of the domestic industry supported the petition, and the lack of significant opposition to the petition, the Department of Commerce had, prior to initiation, considered itself to be satisfied that the petition was filed on behalf of the domestic industry. Furthermore, facts obtained by the Department of Commerce and the USITC during the investigation had supported the decision to initiate. The United States argued against reliance on the findings of the "Swedish Steel Pipe" panel because the report of this panel had not been adopted by the Committee on Antidumping Practices. The United States also argued that even if this Panel should take those findings into consideration, the standards set forth in those findings had nevertheless been satisfied in the present case. In the view of the United States this case presented a factual scenario quite different from that in the "Swedish Steel Pipe" dispute.

224. The Panel noted the following facts with regard to the initiation of this investigation:

- On 28 February 1990 the Department of Commerce received a petition on Atlantic salmon from Norway, by the Coalition for Fair Atlantic Salmon Trade (FAST), which requested the initiation of an antidumping and a countervailing duty investigation "on behalf of the United States producers of fresh Atlantic salmon".
  - The members of FAST, listed as supporting the petition, were twenty-one firms, and the petition stated that to the best of the petitioner's information this accounted for well over a majority of all production of fresh Atlantic salmon in the United States.
  - The petition stated that most of these twenty-one supporter firms in FAST were concurrently members of one of two fish growers associations, the Cobscook Bay Finfish Grower Association and the Washington Fish Growers Association (WFGA); that members of these two associations included substantially all of the United States growers of fresh Atlantic salmon accounting for well over a majority of domestic production of Atlantic salmon; and that both organizations had voted to support the petition.
  - A member of FAST and the counsel for the petitioner both submitted as well a legal certification, required by law, that the factual material in the petition was complete and accurate to the best of their knowledge.

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<sup>136</sup>ADP/47, unadopted.

- On 16 March 1990, counsel for the petitioner received a letter from the president of the WFGA which stated that the Board of Directors of the WFGA did not support the FAST petition but that each company member of the WFGA was free to take an individual position on the petition. The petition was corrected accordingly.
- None of the twenty-one supporter firms in FAST indicated any change in its position in the period between the filing of the petition and the date of the decision on initiation of the petition, nor did any member of the WFGA that had been listed as supporting the petition.
- The Department of Commerce received on 19 March 1990 a copy of a letter from Global Aqua, an Atlantic salmon producer which was not a member of FAST and was listed in the petition as expressing no opinion on the petition. This letter stated that "We hereby make it clear that we do not support the Petition and do not agree with the accusations levelled against the Norwegian Salmon Producers. On the contrary, our company is of the opinion that Norwegian technology and expertise has been of vital importance in the process of establishing and developing the Atlantic salmon farming industry and the market for its products in the United States."
- Neither the 16 March letter from the president of the WFGA nor the 19 March letter from Global Aqua requested that the Department of Commerce take additional steps in order to be satisfied that the petition was supported or authorized by producers representing a major proportion of domestic production of Atlantic salmon. As of the date of its decision on initiation the Department of Commerce had received no other comments regarding the issue of support for the petition. The Norwegian government had not claimed that it had been denied an opportunity to consult under Article 3:1 of the Agreement before the decision to initiate; it had not used such consultations to raise the standing issue.
- On 20 March 1990, the Department of Commerce initiated a countervailing duty investigation of imports of Atlantic salmon from Norway.

225. The Panel noted that Article 2:1 provides in relevant part as follows:

"Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Article. An investigation to determine the existence, degree and effect of any alleged subsidy shall normally be initiated upon a written request by or on behalf of the industry affected. The request shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of the General Agreement as interpreted by this Agreement and (c) a causal link between the subsidized imports and the alleged injury....

The Panel noted that the provisions of Article 2, on "Domestic procedures and related matters", provide procedural requirements governing countervailing duty investigations. The Panel considered that the ordinary meaning of the first sentence of Article 2:1 was that an investigation which had been initiated and conducted in conformity with Article 2 was a condition precedent to the imposition of countervailing duties. This meaning was confirmed by the purpose of Part I, to provide rules regarding the use of countervailing duties by signatories to the Agreement. The Panel observed that the second sentence of Article 2:1 would permit initiation of an investigation either upon a written request "by" the domestic industry affected, or upon receipt of a written request "on behalf of" that industry; no priority was assigned to either of these alternatives. Since the written request in this case had been filed not "by" but "on behalf of" a domestic industry in the United States, Norway's claim concerned the requirement that a written request for the initiation of an investigation be "on behalf of" the industry affected.



226. The Panel then examined the interpretation to be given to the term "the industry affected" in Article 2:1. The sentence in question stated that "An investigation to determine the existence, degree and effect of any alleged subsidy shall ... be initiated upon a written request by or on behalf of the industry affected." As provided in Article 2:4, such an investigation would consider "the evidence of both a subsidy and injury caused thereby". Footnote 6 to Article 2:1 provided that "Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of Article 6." The Panel therefore considered that "the industry affected" referred to in Article 2:1 had to be a domestic industry in the importing country with respect to which material injury could be examined; in the light of footnote 6, the meaning of "the industry affected" had to be interpreted in the context of the definition of "domestic industry" in Article 6:5, as "referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products...."

227. The Panel therefore considered that a "written request ... on behalf of the industry affected" meant a request on behalf of the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

228. The Panel then turned to the question of the duty incumbent on investigating authorities to ensure that their actions with regard to the treatment of written requests for the initiation of a countervailing duty investigation were consistent with their obligations under Article 2:1. The Panel considered that, in light of the requirement in Article 2:1 that a written request be by or on behalf of the industry affected and contain certain evidence, the investigating authorities could not, consistently with Article 2:1, initiate investigations automatically in response to any written request received. The requirements of Article 2:1 clearly implied a duty for the authorities to evaluate each such written request to ascertain whether it contained the required information, and to screen out those requests that failed to provide it. The investigating authorities therefore had to evaluate whether a written request for the initiation of an investigation was made "on behalf of" the industry affected.

229. In this respect, the Panel observed that the parties had not advanced conflicting interpretations of the meaning of the term "on behalf of" in the second sentence of Article 2:1. Referring to the "Swedish Steel Pipe panel report, Norway had submitted that the requirement that a written request be "on behalf of" the industry implied that the request must have the authorization or approval of that industry before the initiation of the investigation. While the United States had argued against reliance on this unadopted panel report, it had submitted that in the case before the Panel the standard set by that report - authorization or approval by the industry - was nevertheless met. The United States had specifically argued that the written request "had provided a satisfactory statement of industry support".<sup>137</sup> It therefore appeared to the Panel that the issue in dispute concerning the initiation of this investigation by the United States did not pertain to the interpretation of the term "on behalf of" in the second sentence of Article 2:1 but to the question of how the United States had evaluated that the written request for the initiation of this investigation had been made with the authorization or approval of the industry in question.

230. The Panel noted that the Agreement did not provide precise guidance as to the procedural steps to be taken for such an evaluation, and considered that the question of how this requirement is to be met depends on the circumstances of each particular case. In the Panel's view, this question, or in this case the steps the United States was required to take as a prerequisite to initiating an investigation,

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<sup>137</sup>Supra, paragraph 69.

had to be evaluated on the basis of the information before the investigating authorities at the time of the initiation decision. The Panel examined whether in the case before it the United States had taken such steps as could reasonably be considered sufficient to ensure that the written request for initiation of an investigation had been made on behalf of the industry affected.

231. The Panel examined this matter on the basis of the facts in paragraph 224 and the analysis in paragraphs 226 through 230 above. The written request for the initiation of a countervailing duty investigation had been made with a legal certification as to its accuracy and completeness. It had been submitted by twenty-one firms representing well over the majority of all domestic production of Atlantic salmon. As of the date of the initiation decision, none of these firms had made known a change in its position; in the Panel's view, changes in position either way by firms in the domestic industry were irrelevant to its examination of the initiation decision under Article 2:1 if such changes took place after that decision had been made.

232. The Panel considered that under these circumstances, the Department of Commerce could reasonably have relied on the statements in the certified petition that these firms accounted for well over a majority of production of Atlantic salmon and that these firms supported and had authorized the petition. Under these circumstances, the Department could assume that these firms would continue to support the petition unless they had notified the Department of a change in position. Although one firm not in the petitioner group had made a statement which could be interpreted as nonsupport or opposition, as of the date of the initiation decision the twenty-one members of FAST still approved the petition and still represented well over the majority of all domestic production of Atlantic salmon. Under these circumstances the Department of Commerce could, in the Panel's view, reasonably treat this request as being "on behalf of the industry affected."

233. The Panel therefore concluded that the initiation of the countervailing duty investigation was not inconsistent with the obligations of the United States under Article 2:1 of the Agreement.

234. The Panel recalled that both parties to the dispute had presented arguments regarding the relevance to this case of the report of the panel in the "Swedish Steel Pipe" dispute<sup>138</sup> interpreting Article 5:1 of the Agreement on Implementation of Article VI of the General Agreement. In the Panel's view, the "Swedish Steel Pipe" panel had not ruled out that a written request on its face could provide sufficient indication that it is "by or on behalf of" the relevant domestic industry; rather, that panel had found that in that dispute, the information presented by the United States did not permit the conclusion that such was the case. The Panel considered that in this respect the factual situation presented to it differed significantly from the factual situation presented to the "Swedish Steel Pipe" panel.

#### B. DETERMINATION OF THE EXISTENCE OF COUNTERAVAILABLE SUBSIDIES

235. The Panel then proceeded to examine whether, as claimed by Norway, the United States had, in imposing countervailing duties in respect of regional development programmes, acted inconsistently with Article 11 of the Agreement, both by failing to take into account that the economic and social policy objectives served by these programmes were explicitly recognized in Article 11, and by failing to consider whether these programmes produced adverse trade effects.

236. Norway had argued that by failing to take into account that the use of regional development programmes was within Norway's rights as recognized by the Agreement, the United States had restricted Norway's rights to use such subsidies to achieve social and economic policy objectives. Norway had argued that Article 11 must be interpreted in its context; that nothing in Article 11 indicated that this

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<sup>138</sup>ADP/47, unadopted.

provision did not apply to the Agreement as a whole; and that the text of the Agreement as a whole indicated that Article 11 applied equally to both Parts I and II of the Agreement. Therefore, in Norway's view, Article 11 applied to footnote 4 to Article 1, which defines a countervailing duty as "a special duty levied for the purpose of off-setting any bounty or subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in Article VI:3 of the General Agreement." In Norway's view, Article 11 limited the scope of the reference to a countervailable "subsidy" in that footnote and thus imposed a limitation on the scope of countervailing duties.

237. The Panel noted that paragraph 1 of Article 11 provides that

"Signatories recognize that subsidies other than export subsidies are widely used as important instruments for the promotion of social and economic policy objectives and do not intend to restrict the right of signatories to use such subsidies to achieve these and other important policy objectives which they consider desirable...."

The Panel noted in addition that paragraph 2 of the same Article provides that

"Signatories recognize, however, that subsidies other than export subsidies, certain objectives and possible form of which are described, respectively, in paragraphs 1 and 3 of this Article, may cause or threaten to cause injury to a domestic industry of another signatory or serious prejudice to the interests of another signatory or may nullify or impair benefits accruing to another signatory under the General Agreement, in particular where such subsidies would adversely affect the conditions of normal competition. Signatories shall therefore seek to avoid causing such effects through the use of subsidies. In particular, signatories, when drawing up their policies and practices in this field, in addition to evaluating the essential internal objectives to be achieved, shall also weigh, as far as practicable, taking account of the nature of the particular case, possible adverse effects on trade. They shall also consider the conditions of world trade, production (e.g. price, capacity utilization etc.) and supply in the product concerned."

238. The Panel considered that the rights and obligations in Article 11 concerned the use of subsidies, not the use of countervailing measures. Recourse against an infringement of Article 11 was provided in Article 12:3 and 13:2 and could ultimately give rise to Committee authorization of countermeasures against the subsidizing signatory pursuant to Article 13:4. To the extent that the Agreement provided that a signatory, by merely granting a subsidy of a certain type, or by granting a subsidy with certain effects, would incur international responsibility and the possibility of Committee-authorized countermeasures under the Agreement, then the Agreement did indeed restrict signatories' rights to use such a subsidy; this was the very *raison-d'être* of Part II of the Agreement. A signatory's use of subsidies as such was not "restricted" in this sense by the possibility that another signatory could react to a subsidy by imposing countervailing duties on a particular subsidized product if material injury as defined by Article 6 of the Agreement had been caused thereby.

239. The Panel also considered the purpose of Article 11. The Panel noted that both in the General Agreement and in the Agreement, the provisions concerning subsidies and the provisions concerning countervailing duties served fundamentally different purposes. While Article XVI of the General Agreement and Parts II and III of the Agreement set out rules and procedures governing the use of subsidies, Article VI of the General Agreement and Parts I and IV of the Agreement provided for a right to react unilaterally to imports of subsidized products where the requisite conditions of subsidy, material injury and causal link have been met.<sup>139</sup> The Panel noted that this distinction had been recognized in the Report of the Group on Anti-Dumping and Countervailing Duties, adopted by the

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<sup>139</sup>BISD 38S/30, paragraph 4.6.

CONTRACTING PARTIES on 27 May 1960<sup>140</sup> which stated that "the fact that the granting of certain subsidies was authorized by the provisions of Article XVI of the General Agreement clearly did not debar importing countries from imposing, under the terms of Article VI, a countervailing duty on the products on which subsidies had been paid."

240. The Panel recalled that the present dispute concerned the application of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement. The drafters of this Agreement had provided a number of specific limitations and prerequisites to the imposition of countervailing duties, which were additional to those provided in Article VI of the General Agreement. The Panel considered that if the drafters of the Agreement had intended to impose limits on the scope of countervailable subsidies beyond Article VI, they would not have provided in the Agreement a definition of "countervailing duty" which was word-for-word identical to the definition of "countervailing duty" in paragraph 3 of Article VI. Thus, the General Agreement and the Agreement would permit a country to maintain subsidies if they were consistent with Article XVI and Parts II and III of the Agreement; however, the General Agreement and the Agreement would permit the imposition of countervailing duties by specific contracting parties on imports into their territory where the requisite conditions of subsidy, material injury and causal link had been met.

241. The Panel therefore concluded that, in imposing countervailing duties in respect of regional development programmes, the United States had not acted inconsistently with its obligations under Article 11 of the Agreement.

### C. CALCULATION OF THE AMOUNT OF SUBSIDIES

242. The Panel then turned to Norway's claim that the United States had acted inconsistently with Article 4:2 of the Agreement by calculating a countervailing duty which exceeded the amount of the subsidy found to exist. The Panel noted that Norway had raised this provision in connection with three issues: the failure to allow for the secondary tax effects of payroll tax reductions, alleged overstatement of the interest rate benchmark for assessing subsidies from loans, and failure to conduct an upstream subsidy analysis to assess whether subsidies on smolt had been passed through to salmon. As the Panel had already determined in paragraph 215 above that the upstream subsidy issue was not within its terms of reference, the Panel examined the merits of only the first two of these issues.

#### (1) **Secondary Tax Effects**

243. The Panel then turned to the issue that had been raised by Norway with respect to the reduction of payroll taxes. Norway had argued that for any firm receiving such a reduction, the reduction would result in a decrease in the amount of that firm's expenses deductible for the purposes of calculating its taxable income, and in consequence its final income tax would be increased. The increased income tax liability would then reduce the value of the subsidy received. Norway further argued that Article 4:2 of the Agreement required investigating authorities to determine the actual level of subsidization per unit of the exported product, and that therefore the Department of Commerce was required to reduce the countervailing duty assessed to account for this reduction in the "actual value of the subsidy received". Norway argued that since the United States had assessed countervailing duties in other cases based on its calculation of the benefits resulting from programs which reduced taxable income, the United States had demonstrated that it could take into account the income tax effects of subsidies.

244. The United States had argued that the Agreement contained no requirement that a signatory take into account potential secondary effects of subsidies; footnote 15 ad Article 4:2 regarding the future

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<sup>140</sup>BISD 9S/194, 200.

development of criteria for calculating the amount of a subsidy signified that there was as yet no legal requirement to calculate subsidies by any particular method. Since income tax liability of a firm depended on many variables, most importantly on whether the firm made a profit, the effect of one variable (the payroll tax reduction) could not be predicted. Adjustments based on factors that were essentially speculative were not required by the Agreement. The United States also indicated that the past countervailing duty cases cited by Norway had involved facts different from those here, and stated that it had been the consistent practice of the Department of Commerce not to adjust for secondary effects of subsidies.

245. The Panel noted that Article 4:2 of the Agreement states that "No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product."<sup>15</sup> Footnote 15 to this paragraph states that "An understanding among signatories should be developed setting out the criteria for the calculation of the amount of the subsidy." The Panel noted that no such understanding had been developed to date. The Panel therefore considered that Article 4:2 did not require that a subsidy calculation method be used which would require the adjustment requested by Norway in this instance.

246. The Panel therefore concluded that the United States' action in not taking account of secondary tax effects of the payroll tax exemption in calculating the subsidy was not inconsistent with its obligations under Article 4:2 of the Agreement.

## **(2) Calculation of the Interest Rate Benchmark**

247. The Panel then turned to Norway's claim that the United States had violated Article 4:2 of the Agreement in calculating the interest rate benchmark used by the Department of Commerce for the purpose of measuring the benefits from certain loan programmes. Norway had argued that the Department of Commerce had erroneously added a risk premium of 0.75 per cent for fish farm loans to the national average long-term interest rate for corporate lending of 14.9 per cent, that this national rate already included an average of all risk premiums charged to all industries in Norway, and that the resulting double-counting of the risk premium for the salmon industry led to an overstatement of the benchmark. Norway further argued that during the investigation the investigating authorities had not indicated how the benchmark would be calculated and therefore Norwegian officials had no occasion to anticipate that a double-counting of the risk premium could result. The Panel noted that Norway had not contested the methodology used by the United States to calculate the amount of subsidies (once the benchmark interest rate had been ascertained).

248. The United States had argued that the Agreement did not prescribe any specific methodology for calculating the amount of a subsidy. Concerning the interest rate benchmark, the United States argued that it had sought industry-specific lending rates and been told by the Government of Norway that none were available; that the banks it had contacted in its on-the-spot investigation indicated that the salmon industry in Norway was charged a risk premium on its loans; and that Norwegian officials and representatives of the Norwegian respondents had been present at the on-the-spot investigation and had not requested that additional banks be contacted. The United States further argued that it was not clear that when banks reported their interest rates for inclusion in the national average lending rate, this reported rate included any industry-specific risk premia; and that the Norwegian government and respondents had not suggested during the investigation that the national rate be reduced by the amount of the risk premium attributable to the salmon industry, if this were possible. The United States argued that in commercial practice a risk premium for a particular industry was generally applied in addition to an average lending rate, which might already reflect that industry's additional risk premium; in this respect the Department followed commercial practice. Having sought an industry-specific commercial lending rate, and having been told that it was not available, the United States had used the facts available, as authorized by the Agreement.

249. The Panel recalled its examination in paragraph 245 above, and considered that Article 4:2 did not preclude the calculation of the amount of a loan subsidy on a product by reference to an industry-specific lending rate. The Panel therefore considered that the request by the Department of Commerce for an industry-specific lending rate was not inconsistent with Article 4:2. As the United States had argued that it had used the "facts available" as authorized by Article 2:9, however, the Panel was presented with the issue of the relationship between Article 2:9 and the substantive provisions of the Agreement invoked by Norway.

250. The Panel noted that Article 2:9 provides: "In cases in which any interested party or signatory refuses access to, or otherwise does not provide, necessary information ...." The Panel considered that this reference to "necessary" had to be read in context with the other provisions of the Agreement concerning the conduct of a countervailing duty investigation, or "an investigation to determine the existence, degree and effect of any alleged subsidy" as provided in Article 2:1. The Panel therefore considered that the first question to be asked was whether the information requested from the Norwegian respondents was of a type that would make it possible to calculate the amount of a subsidy in a manner consistent with Article 4:2 and the other substantive provisions of the Agreement. If this were the case, then the provisions of Article 2:9 could be resorted to: if this information had been requested, and had not been provided, then subsidy findings could be made "on the basis of the facts available". The Panel considered that these "facts available" were those that related to the "necessary information" for making a subsidy determination consistent with the Agreement.

251. The Panel then noted that the United States investigating authorities did request information on an industry-specific benchmark commercial lending rate during the investigation, and that Norway and the Norwegian respondents had not supplied such a rate to the investigating authorities. Having made a detailed examination of the verification report<sup>141</sup> from the on-the-spot investigation, the Panel considered that on the basis of the facts stated in this report, it was reasonable for the investigating authorities to conclude that the facts indicated that a risk premium was assessed by commercial banks in lending to this industry, and that this should be reflected in the calculation of the benchmark lending rate. The issue raised by Norway concerned the addition of a risk premium to the national average lending rate. Norway had not asserted that there was no risk premium for fish farm loans, but had asserted that the national average lending rate already reflected that risk premium. However, Norway had not supplied information indicating that fish farm loans occupied so large a share of total Norwegian commercial lending that the risk premium for fish farm loans would in itself impart a significant upward bias to the national average lending rate. The Panel noted that the facts used by the Department of Commerce in its subsidy determination related specifically to the information necessary to calculate subsidies in accordance with a calculation method which the Panel had found was not inconsistent with Article 4:2. The Panel therefore considered that the Department of Commerce's reliance on the information in the verification report in determining a risk premium, and in adding it to the national average lending rate, was in conformity with Article 2:9 of the Agreement.

252. The Panel therefore concluded that the United States had not acted inconsistently with Article 4:2 of the Agreement by calculating a benchmark lending rate by adding the risk premium it had found during verification to the national average commercial lending rate.

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<sup>141</sup>Verification report for the Government of Norway in the Countervailing Duty Investigation of Fresh and Chilled Atlantic Salmon from Norway, 10 December 1990.

D. DETERMINATION OF THE EXISTENCE OF MATERIAL INJURY

253. The Panel then proceeded to examine whether the imposition by the United States of the countervailing 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 final determination of material injury of the USITC.<sup>142</sup>

254. Norway had argued that this determination was inconsistent with the requirements of Article 6 of the Agreement on two main grounds. Firstly, the findings of the USITC regarding the volume of imports under investigation, the price effects of these imports and the consequent impact of these imports on the domestic Atlantic salmon industry in the United States were inconsistent with Articles 6:1, 6:2 and 6:3. Secondly, the finding of the USITC of a causal relationship between the allegedly subsidized imports from Norway and material injury to the domestic Atlantic salmon industry in the United States was inconsistent with Article 6:4.

255. The United States had submitted that the findings of the USITC regarding the volume of the imports subject to investigation, the price effect of these imports, and the consequent impact of the imports on the domestic industry in the United States were consistent with the requirements of Articles 6:1, 6:2 and 6:3 of the Agreement and that the USITC's finding of a causal relationship between the subject imports from Norway and material injury to the domestic industry in the United States was consistent with Article 6:4 of the Agreement.

**(1) Volume of imports subject to investigation, price effects of the imports and consequent impact of these imports on the domestic industry in the United States**

256. The Panel first examined the claims presented by Norway regarding the alleged inconsistency with the requirements of Articles 6:1, 6:2 and 6:3 of the USITC's findings regarding the volume of imports subject to investigation, the price effects of the imports, and the consequent impact of these imports on the domestic industry in the United States.

257. 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.

258. Firstly, the Panel noted the requirement of Article 6:1 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.

259. Secondly, the Panel noted that Articles 6:2 and 6:3 of the Agreement specified how the factors mentioned in Article 6:1 were to be examined by investigating authorities. Article 6:2 required that the authorities "consider" whether there had been a significant price undercutting, price depression or price suppression by the imports in question. Article 6:3 required the investigating authorities to include in their examination of the impact of the imports on the domestic industry "an evaluation of

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<sup>142</sup>Fresh and Chilled Atlantic Salmon from Norway: Determination of the Commission in Investigation No. 701-TA-302 (Final) Under the Tariff Act of 1930, Together with the Information Obtained in the Investigation. USITC Publication 2371, April 1991 (hereinafter: USITC Determination).

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 6:4, which required a demonstration of a causal relationship between the allegedly subsidized imports and material injury to a domestic industry, explicitly referred to the factors set forth in Articles 6:2 and 6:3. Therefore an essential element of a review of whether a determination of material injury was in conformity with Article 6 was an examination of whether the factors set forth in Articles 6:2 and 6:3 had been properly considered by the investigating authorities. However, it followed from the last sentence in Article 6:2 and from the last sentence in Article 6:3 that Article 6 did not prejudge the weight to be given in a particular case to any of the factors listed in these provisions.

260. Thirdly, the Panel observed that footnote 17 ad Article 6:1 required that determinations of material injury be based on "positive evidence". A review of whether in a given case this requirement was met involved an examination of the stated factual basis of the findings made by the investigating authorities in order to determine whether the authorities had correctly identified the appropriate facts, and whether the stated factual basis reasonably supported the findings of the authorities. In this context, the Panel considered that the mere fact that in a given case reasonable, unprejudiced minds could differ as to the weight to be accorded to certain facts was not a sufficient ground to find that a determination of material injury based on such facts was not based on positive evidence within the meaning of footnote 17 ad Article 6:1. The question of whether a determination of injury was based on positive evidence therefore was distinct from the question of the weight to be accorded to the facts before the investigating authorities. The Panel, however, recalled in this connection its observations in paragraph 258 on the requirement of an "objective examination" as the basis of injury determinations under Article 6.

(1)(i) Volume of the imports under investigation

261. The Panel then examined the issues raised by Norway with respect to the findings made in the affirmative final determination by the USITC on the volume of imports of Atlantic salmon from Norway.

262. Norway had argued that these findings were inconsistent with the requirement of Article 6:1 of an "objective examination" of the volume of imports and that these findings were inconsistent with the requirement of Article 6:2 that investigating authorities consider whether there has been a "significant increase" in the volume of subsidized imports. The Panel considered that some of the arguments presented by Norway in support of these two claims also pertained to the question of whether the USITC's findings were based on positive evidence.

263. The United States had argued that the USITC had properly considered whether there had been a significant increase of the volume of imports of Atlantic salmon from Norway, as required by Article 6:2, and that the USITC's conclusion that these imports had increased significantly was supported by the evidence of record.

264. The Panel first examined whether, as required by Article 6:2, the USITC had considered whether there had been a significant increase in the volume of subsidized imports, either in relative or in absolute terms. The Panel noted in this connection Norway's argument that the USITC had considered the significance of the level of the volume of imports from Norway throughout the period of investigation (1987-1990) rather than the significance of any increase in that volume.

265. The Panel observed that in its determination the USITC had made the following statements on the evolution of the volume of imports of Atlantic salmon from Norway during the period of investigation:

"Imports of Atlantic salmon from Norway surged from 1987 to 1989. Imports rose from 7.6 million kilograms in 1987 to 8.9 million kilograms in 1988, and then jumped further in 1989



to 11.4 million kilograms for an overall increase of fully 50 per cent. In value terms, imports also increased strongly, but at a slower rate, from \$74.4 million in 1987 to \$93.7 million in 1989. Despite increases in absolute terms, in terms of market penetration Norwegian imports fell steadily by quantity from more than 75 per cent in 1987 to 60.2 per cent in 1989. A similar decline was posted in market penetration by value terms, from more than 75 per cent in 1987 to 62.5 per cent in 1989. In 1990, subject imports fell strongly to 7.7 million kilograms, valued at \$66.4 million. Subject imports by volume and value accounted for 36.7 per cent and 40.8 per cent, respectively, of apparent US consumption in 1990."<sup>143</sup>

After explaining why it had accorded less weight to the decline in imports in 1990<sup>144</sup>, the USITC had concluded its discussion of the volume of imports of Atlantic salmon from Norway as follows:

"We find that the volumes of imports from Norway over the period of investigation, and the increases in those volumes from 1987 to 1989, are significant. The subject imports are particularly significant when viewed together with information concerning the nature of the US industry, the industry's condition over the period and information on prices for the like product."<sup>145</sup>

266. On the basis of these statements, the Panel found that the USITC had specifically considered changes in import volume both in absolute terms and in relative terms and had indicated that it considered the increase in the absolute volume of imports from 1987 to 1989 to be significant. While the USITC had also considered the significance of "the volumes of imports from Norway over the period of investigation", the text of the USITC's determination made it clear that the USITC had not considered the significance of the volumes of imports in lieu of a consideration of the significance of the increase in these volumes.

267. The Panel therefore found that the USITC had not failed to consider whether there had been a significant increase in the volume of the subject imports, as required by Article 6:2.

268. With respect to the requirement of Article 6:1 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.<sup>146</sup> 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.

269. 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.

270. 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 the context of other facts before the USITC, the increase from 1987 to 1989 in the absolute volume of imports of Atlantic salmon from Norway was not significant within the meaning of Article 6:2.

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<sup>143</sup>USITC Determination, pp.16-17, footnotes omitted.

<sup>144</sup>Infra, paragraph 273.

<sup>145</sup>USITC Determination, p.18.

<sup>146</sup>See Annexes 1 and 2 to this Report.

271. In this connection, Norway had argued that, for purposes of determining the significance of the increase in the absolute volume of imports from 1987 to 1989, the USITC should have taken into account the fact that the market share in the United States of Norwegian imports had declined over the investigation period, while the market share of third countries and of US domestic producers had increased. Furthermore, the absolute volume of imports from Norway had started to decline in late 1989, well before the initiation of this countervailing duty investigation and application of any provisional measures. In Norway's view, Article 6:2 of the Agreement did not permit a finding of a significant increase in the volume of imports where (1) the absolute volume of imports at the end of the investigation period was not higher than at the beginning of that period and the facts demonstrated that the decline in absolute import volume was not the result of the initiation of the investigation and application of provisional measures, and (2) the relative volume of imports declined throughout the period of investigation.

272. In examining the legal and factual aspects of Norway's argument that, under the circumstances of this case, Article 6:2 did not permit a finding of a significant increase of import volume, the Panel first observed that Articles 6:1 and 6:2 of the Agreement did not contain a requirement that imports from third countries not subject to investigation be considered as part of an examination of the significance of an increase in the volume of imports from a country whose imports were the subject of a countervailing duty investigation. A consideration of the volume imports from such third countries might be relevant for the purpose of determining the existence of a causal relationship between the allegedly subsidized imports under investigation and material injury to a domestic industry. In that context, such imports might be relevant as one of the "other factors" referred to in Article 6:4. Footnote 20 expressly identified as one of these possible "other factors" "the volume and prices of non-subsidized imports of the product in question". However, nothing in the text of Articles 6:1 and 6:2 indicated that imports from third countries had to be examined as part of the analysis under Article 6:2 of whether the volume of imports under investigation had increased significantly. Likewise, the consideration of the market share of domestic producers was expressly mentioned in Article 6:3 as part of the analysis of the impact of the imports on the domestic industry concerned, but was not a mandatory factor under Article 6:2.

273. The Panel then considered Norway's argument that the significance of the increase in the absolute volume of imports of Atlantic salmon from Norway from 1987 to 1989 was limited, *inter alia*, because of the subsequent decline in the absolute volume of these imports starting in late 1989. The USITC had made the following comments on this decline:

"We have given less weight to the recent decline in imports in 1990 because it appears to be largely the result of the filing of the petition and/or the imposition of provisional anti-dumping and countervailing duties. The petition was filed in this investigation in February 1990, the Commission issues its preliminary determinations in April 1990: Commerce made its preliminary CVD determination in June 1990, imposing a 2.45 per cent *ad valorem* provisional duty; and Commerce rendered its affirmative preliminary anti-dumping duty determination in October 1990, imposing interim duties on most firms ranging from 1.6 to 4.9 per cent. The drop in subject imports has been most pronounced since July 1990, subsequent to Commerce's preliminary CVD determinations. In view of the precipitous nature of the drop in subject imports by the end of 1990, from record levels in 1989, it is likely that the Commission and/or Commerce proceedings played a rôle in the import decline.

Respondents claim that the decline in Norwegian imports in 1990 was the result of the appreciation of the Norwegian kroner against the US dollar, and the institution of a freezing programme in Norway to reduce the amount of fresh Norwegian salmon available for export. Although it is

possible that these factors may have played some rôle, they cannot entirely account for the drastic decline that occurred in the second half of 1990."<sup>147</sup>

Thus, the USITC had explained that it had accorded less weight to the more recent decline in the absolute volume of imports of Atlantic salmon from Norway because of the fact that this decline appeared to be largely the result of the filing of the petition and/or the imposition of provisional anti-dumping and countervailing duties.

274. The Panel noted that Norway had contested that, as stated by the USITC, the decline in the volume of imports from Norway was largely the result of the initiation of the investigation and/or the imposition of provisional measures. Norway had argued that this decline had begun well before the initiation of this investigation in March 1990. In support, Norway had presented monthly data on the absolute volume of imports from Norway in 1989-1990. These data, which were included in the record of the USITC's investigation, are reproduced in Annex 3 to this Report. The Panel reviewed these data and found that decline in imports levels in January and February 1990 had been preceded by a period of four months in which imports had increased. In December 1989 imports had been at a higher level than in January 1989. Furthermore, after the filing of the petition in February 1990, the monthly import levels had increased during March and April 1990. Finally, imports had begun to decline in May 1990, with the largest decline taking place in the period July-December 1990. In light of these data, the Panel concluded that there was no clearly discernible level of a declining absolute volume of imports in the period prior to the initiation of the countervailing duty investigation and that imports started to decline considerably only in July 1990. The Panel therefore considered that the USITC had not made an error of fact in its statements on the evolution of the absolute volume of imports in 1990.

275. In light of its findings in paragraphs 272-274, the Panel considered that there was neither a legal nor a factual basis for the view that, in the circumstances of this case, Article 6:2 did not permit a finding of a significant increase in the volume of imports. In the view of the Panel, where, as in this case, the facts before the investigating authorities indicated an increase of imports during part of the investigation period, followed by a decrease, it was not properly within a panel's task to make a judgement on the relative weight to be accorded to these facts. Rather, in such a situation a panel had to review whether the investigating authorities had carried out an "objective examination", by considering all information and by explaining why the data on the decrease in the volume of imports did not detract from a finding of a significant increase in the volume of imports. In the case before it the USITC had not failed to carry out such an objective examination: the USITC had considered the decline in the volume of imports from Norway in the latter part of the investigation period and had reasonably explained why it had accorded less weight to this decline. In determining that this decline deserved less weight, the USITC had not committed errors of fact.

276. In light of the foregoing considerations, the Panel concluded that the analysis and findings of the USITC with regard to the volume of imports of Atlantic salmon from Norway were not inconsistent with the obligations of the United States under Articles 6:1 and 6:2 of the Agreement.

(1)(ii) Price Effects of the Imports under Investigation

277. The Panel then proceeded to an examination of Norway's claim with respect to the finding of the USITC that imports of Atlantic salmon from Norway had significantly depressed prices of the like domestic product.

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<sup>147</sup>USITC Determination, pp.17-18, footnotes omitted.

278. Norway had argued that this finding was inconsistent with Article 6:1, which required an objective examination of the effect of the allegedly subsidized imports on prices for domestic like products and positive evidence as the basis of an affirmative determination, and with Article 6:2, which required that investigating authorities consider, *inter alia*, whether the effect of the allegedly subsidized imports was to depress prices of domestic like products to a significant degree.

279. The United States had argued that, consistently with Article 6:2, the USITC had considered whether the subject imports from Norway had significantly depressed domestic prices of Atlantic salmon in the United States and that its findings on this issue were supported by the evidence of record.

280. The Panel noted that the text of the determination by the USITC contained the following observations on the question of the price effects of the imports from Norway:

"Public and questionnaire information reveal that prices for . Atlantic salmon fell up to a third or even more between mid- to late- 1988 and the end of 1989. Prices rebounded during 1990, then fell back somewhat at the end of 1990, but generally remained at levels below those recorded in September 1988. Prices for the like product closely tracked prices for Norwegian Atlantic salmon over much of the period. Beginning in the middle of 1988, prices for Norwegian Atlantic salmon started to drop and continued to fall even after US Atlantic salmon had left the market in the spring of 1989. Prices for Norwegian Atlantic salmon reached their lowest point at the end of 1989, then climbed somewhat in 1990. Although other factors may have contributed, the decline in US prices for Atlantic salmon in 1988 and 1989 was due in large part to oversupply in the US market. Imports from Norway accounted for a large portion of the increased imports in 1989. This suggests that Norwegian Atlantic salmon played a role in the price decline. It is true that Norwegian Atlantic salmon generally oversold the like product during much of the period of investigation. This fact does not mean, however, that Norwegian Atlantic salmon did not contribute to the price decline for US Atlantic salmon. Indeed, US and Norwegian Atlantic salmon exhibit a high degree of substitutability, as Atlantic salmon is a near- commodity type product. Moreover, until late 1990 prices for Norwegian and US Atlantic salmon followed a very similar pattern. In sum, given the sheer volume of the increase in Norwegian Atlantic salmon imports in 1989, falling prices for those imports, closely tracking US and Norwegian Atlantic salmon price trends, and information suggesting significant substitutability between Norwegian and US Atlantic salmon, we find that imports of Norwegian Atlantic salmon have significantly depressed prices for the like product. The subject imports' presence in the market place, even at premium prices, acted to keep domestic producers from pricing to recover costs and meet cash flow needs as described below."<sup>148</sup>

Thus, on its face, the text of the USITC determination demonstrated that the USITC had not failed to consider the price effects of the imports of Atlantic salmon from Norway in terms of one of the factors explicitly identified in the second sentence of Article 6:2 of the Agreement (i.e. "whether the effect of such imports is otherwise to depress prices to a significant degree").

281. The Panel then examined whether the finding by the USITC of significant price depression caused by imports of Atlantic salmon from Norway was based on positive evidence, as required by footnote 17 ad Article 6:1.

282. In this connection, the Panel first considered the stated factual basis of the finding of the USITC that domestic prices for Atlantic salmon in the United States had fallen up to a third or even more between mid- to late 1988 and the end of 1989. As indicated in the text of the USITC's determination,

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<sup>148</sup>USITC Determination, pp.18-20.

in making this statement the USITC had relied upon public information on prices in the US market and on price data gathered on the basis of responses to questionnaires. The public data on prices, presented in a graphical form in figures 2, 3 and 4 in the Annex to the USITC determination, consisted of weekly price data for three different weight categories of Atlantic salmon during the period January 1987-December 1990. While these figures appeared to support the finding by the USITC regarding the extent of the decline of domestic prices in 1988 and 1989, the Panel noted Norway's argument that the data presented in these figures could not be properly relied upon in an analysis of the effects of imports on domestic prices because these data pertained not to US domestic prices but to combined US/Canadian prices. The Panel observed that this information had not been the only source relied upon by the USITC; the USITC had also relied upon price data obtained through responses to questionnaires. Unlike the published price information, the responses to these questionnaires had provided data specifically on US domestic prices. The Panel reviewed the data derived from these questionnaire responses and found that it was factually correct that, as stated in the Annex to the USITC determination,

"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. Prices generally declined between 20 and 34 per cent during September 1988 - November/December 1989 for most salmon sizes in each channel of distribution, then increased between 5 and 33 per cent during 1990 (table 19). In nearly all weight categories and distribution channels, prices were lower in October 1990 than in September 1988."<sup>149</sup>

The Panel therefore did not consider it necessary to pronounce itself on the question of whether the use by the USITC of price data which had included combined US/Canadian prices was proper. The price data derived from the responses to the questionnaires provided a sufficient factual basis for the statement made by the USITC regarding the evolution of domestic prices of Atlantic salmon in 1988 and 1989.

283. The Panel then examined the factual basis of the finding of the USITC that "prices for the like product closely tracked prices for Norwegian Atlantic salmon over much of the period" and that "... until late 1990 prices for Norwegian and US Atlantic salmon followed a very similar pattern."<sup>150</sup> The Panel noted that the Annex to the determination by the USITC contained the following statement on the pattern of prices of domestic and imported Atlantic salmon:

"US/Canadian and Norwegian price trends for Atlantic salmon were similar from mid-1988 through mid-1989 (figures 5-7). In 1990, the two trends began to diverge, and US/Canadian prices seem to have followed Chilean Atlantic salmon prices more closely (figures 8-10)."<sup>151</sup>

The Panel considered that the data presented in figures 5-7 of this Annex supported this statement. In particular, these data indicated that the two price trends had begun to diverge only in 1990, with Norwegian prices increasing and domestic prices decreasing. The Panel therefore considered that the findings of the USITC on the similarity of the price trends of domestic and Norwegian Atlantic salmon "over much of the [investigation] period" were based on positive evidence.

284. With respect to the link between imports from Norway and the development of domestic prices, the Panel observed that the USITC had referred to several factors in explaining its finding that the imports of Atlantic salmon from Norway had played a rôle in the decline of domestic prices. Firstly,

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<sup>149</sup>USITC Determination, p.A-59.

<sup>150</sup>USITC Determination, p.19 and p.20.

<sup>151</sup>USITC Determination, p.A-55.

the USITC had pointed out that the decline in US prices for Atlantic salmon in 1988 and 1989 was due in large part to the oversupply in the US market, and that imports from Norway had accounted for a large portion of the increased imports in 1989. Secondly, the USITC had noted that, while Norwegian Atlantic salmon was generally sold at prices higher than domestic Atlantic salmon, imports of Atlantic salmon from Norway had nevertheless had a depressing effect on domestic prices because of the high degree of substitutability of domestic and Norwegian Atlantic salmon, which the USITC characterised as a "near commodity type product".

285. The Panel found that the USITC's statement regarding the proportion of the increased volume of imports of Atlantic salmon in 1989 accounted for by imports from Norway was supported by the data before the USITC. In this connection the Panel referred to the data presented in Table 17 in the Annex to the USITC determination.<sup>152</sup> The Panel also noted that in 1989 imports of Atlantic salmon from Norway had accounted for 62.5 per cent of the US domestic market by value and for 60.2 per cent of the US domestic market by quantity. Furthermore, Norway had not contested the factual correctness of the USITC's statement that domestic and Norwegian Atlantic salmon were highly substitutable.

286. The Panel then turned to the arguments presented by Norway to contest the legal and factual sufficiency of the USITC's finding that imports of Atlantic salmon from Norway had contributed to price depression in the US market.

287. Norway had argued that the evidence before the USITC indicated that during the period of investigation prices of Atlantic salmon from Norway had generally been higher than prices of domestic Atlantic salmon in the United States. When, in mid-1990, prices of Atlantic salmon from Norway had begun to rise, domestic prices had not followed this rise but had actually fallen. Norway had also pointed to the fact that domestic prices in the United States had not risen in the first half of 1991, after the imports from Norway had virtually disappeared from the US market. In the view of Norway, these facts demonstrated that the USITC had been incorrect in concluding that prices of domestic Atlantic salmon "closely tracked" prices of Norwegian Atlantic salmon. In addition, Norway had argued that, if Atlantic salmon was a highly substitutable product and imports from third countries were both lower priced and increasing their market share, the logical conclusion was that it was the lower priced product that depressed domestic prices in the United States, not the higher priced Norwegian product. If the products were highly substitutable, buyers would buy the lower priced product rather than the higher priced product.

288. Norway had also argued that the USITC had failed to explain why domestic prices in the United States had followed prices of imports from Norway, instead of Norwegian suppliers having to reduce their prices in response to price undercutting by suppliers from third countries. Furthermore, the USITC had not provided any data demonstrating that prices of Norwegian Atlantic salmon had a "time lead" on price developments for domestic Atlantic salmon in the United States.

289. The Panel considered that the fact that domestic prices were lower than prices of imported products did not per se preclude a finding under Article 6:2 that the imports had a significant depressing effect on domestic prices. The USITC had not ignored the fact that prices of Atlantic salmon imported from Norway were generally higher than prices of domestic Atlantic salmon but had found that, because of the high degree of substitutability of domestic and imported Atlantic salmon the imports this did not mean that the imports had not depressed domestic prices. The Panel considered that the fact that domestic prices in the United States had fallen after mid-1990 while prices of imports from Norway had risen, did not invalidate the finding of the USITC that domestic prices had closely tracked Norwegian

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<sup>152</sup>See Annex 1 to this Report.

prices "over much of the [investigation] period". This divergent price movement had occurred during a relatively short period in the period of investigation (1987-1990). As to the information provided by Norway concerning price developments in the US market since the beginning of 1991, the Panel considered that, since this information pertained to a period following the period of investigation examined by the USITC, this information by definition could not be taken into account by the Panel for purposes of determining whether the data before the USITC constituted positive evidence in support of the USITC's finding that imports from Norway had contributed to price depression in the US market.

290. The Panel noted Norway's argument that the fact that Atlantic salmon was a highly substitutable product implied that imports from third countries, rather than the higher priced imports from Norway, had depressed domestic prices in the United States. However, the Panel considered that when products sold at different prices were substitutable this did not necessarily imply that consumers would buy the lower priced product. rather, substitutability meant that an expansion of supply of either product would affect prices of the products for which this product could be substituted. In this respect the Panel noted the increase in the absolute volume of imports of Atlantic salmon from Norway in the United States from 1987 to 1989, as recorded in Table 17 in the Annex to the Determination by the USITC. The Panel further observed that, while it was factually correct that imports from third countries had increased over the investigation period, in each of the calendar years covered by this period Norway had been the biggest supplier to the US market. During 1987-1989, Norway's market share had been larger than the combined market share of all third countries supplying Atlantic salmon to the US market.

291. The Panel considered that Article 6:2 did not require, as a condition of a finding of significant price depression by imports under investigation, that the authorities determine that the suppliers in question were price leader in the market. Even if prices of Atlantic salmon from Norway were influenced by prices of competitors from third countries this did not imply that the USITC could not reasonably have found (on the basis of the evidence before it regarding the increase in the volume of imports from Norway from 1987 to 1989, the similarity in price trends of these imports and domestic Atlantic salmon and the substitutability of imports from Norway and domestic Atlantic salmon) that imports from Norway had contributed to significant price depression in the domestic market in the United States. Therefore, Norway's argument regarding the possible effect of imports from third countries on prices of imports of Atlantic salmon from Norway did not detract from the fact that the USITC's finding of significant price depression was based on positive evidence.

292. Given that, as stated above, the Panel did not consider that Article 6:2 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 6:2 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 6:2 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.

293. 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 6:1 and 6:2 of the Agreement.

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

294. The Panel then examined Norway's claim that the examination by the USITC of the impact on the domestic industry of the allegedly subsidized imports from Norway was inconsistent with the obligations of the United States under Articles 6:1 and 6:3 of the Agreement.

295. 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 6:1) of "all relevant facts having a bearing on the state of the industry" (Article 6:3). 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, shipments, and employment in the Atlantic salmon industry in the United States.

296. The United States had argued that the USITC's finding concerning the impact of the imports from Norway on the domestic industry had resulted from a consideration of all the factors specified in Article 6:3 and was supported by the evidence of record.

297. The Panel noted that in its determination the USITC had discussed several indicators pertaining to the "condition of the industry" and had concluded from this discussion that the US domestic industry was experiencing material injury.<sup>153</sup> The USITC then had separately examined the question of whether material injury was caused "by reason of" the imports from Norway.<sup>154</sup> As the Panel understood Norway's arguments, Norway's objections raised under Articles 6:1 and 6:3 pertained to the first part of the USITC's analysis, i.e. the analysis of the "condition of the industry".

298. The Panel examined whether the USITC's finding that the domestic industry was experiencing material injury had involved "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry", as provided for in Article 6:3.

299. 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 US 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."<sup>155</sup>

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<sup>153</sup>USITC Determination, pp.11-15.

<sup>154</sup>USITC Determination, pp.15-22.

<sup>155</sup>USITC Determination, pp.11-12, footnote omitted.



300. 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 during the period of investigation. Finally, the number 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 higher than those for the same period in 1989.

301. With regard to the financial indicators, the USITC had stated that:

"The financial performance of the domestic industry stands in stark contrast to the production and trade figures. From 1987 to 1988, the industry's financial condition improved markedly. Net sales jumped more than four times. After posting a large operating loss in 1987, the domestic industry recorded an overall operating profit in 1988. However, 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 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 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. In August 1990, Ocean Products sold its assets to a Canadian firm, Connors Brothers Ltd., at terms that for purposes of confidentiality we can only describe as favorable. Connors Acquaculture, Inc., began operations in September 1990 using the assets purchased from Ocean Products."<sup>156</sup>

302. 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 flattening 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 which might enable it to lower unit costs and re-establish operating profits."<sup>157</sup>

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<sup>156</sup>USITC Determination, p.14, footnotes omitted.

<sup>157</sup>USITC Determination, p.15.

With respect to the financial indicators, the USITC considered that, while the financial performance of a new industry might be affected by start-up costs, given that the industry had been profitable in 1988, its more recent financial performance was worse than would be anticipated even taking into account start-up conditions. In addition, the USITC pointed to the fact that in 1990 the industry continued to post a failing financial performance despite having been in operation for several years. The USITC had summarized its conclusions as follows:

"In sum, we find that the US Atlantic salmon industry is experiencing material injury, based on its extremely negative financial performance including the failure of its largest producer in 1990. We also note the leveling of growth in production of juvenile salmon, which suggests a stagnation in the growth of the industry despite growing US demand."<sup>158</sup>

303. The Panel considered, in light of its review of the analysis undertaken by the USITC, that the USITC had not failed to carry out "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry "as provided for in Article 6:3. The factors considered by the USITC (consumption, production, production capacity, shipments, employment sales, profits and operating losses, cash flow) were specifically mentioned in the (illustrative) list of "relevant economic factors and indices" in Article 6:3.

304. The Panel further observed that the statements made by the USITC on the negative financial performance of the industry were supported by the data before the USITC. Table 7 on p.A-30 of the Annex to the USITC Determination contained data showing decreasing net sales, increasing costs of goods sold and general, selling and administrative expenses, and increasing operating losses (which in 1989 amounted to 52.3 per cent of net sales) and negative cash flows. Therefore, these statements could not be considered not to be based on positive evidence.

305. Having found that the statements made by the USITC on the financial performance of the industry were supported by the facts on record, the Panel considered that the arguments presented by Norway on the USITC's conclusions regarding the negative impact of the imports on the industry pertained to the weighing of the evidence before the USITC. However, it followed from the last sentence of Article 6:3 that the positive developments reflected in the indicators referred to by Norway could not per se have precluded the USITC from finding that the domestic Atlantic salmon industry was experiencing material injury. The Panel noted that these indicators had been discussed explicitly in 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.<sup>159</sup> The Panel therefore could not find that the USITC had not carried out an objective examination of the evidence before it.

306. For the same reasons, the Panel also did not consider that, as contended by Norway, the USITC had improperly "allowed a few factors to give decisive guidance". Rather, the USITC had explicitly discussed all the evidence before it regarding the condition of the domestic industry and had reasonably explained its conclusion regarding the relative weight to be accorded to the facts before it concerning financial and non-financial indicators.

307. In light of the foregoing considerations, the Panel concluded that the findings of the USITC regarding the condition of the domestic Atlantic salmon industry were not inconsistent with the obligations of the United States under Articles 6:1 and 6:3 of the Agreement.

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<sup>158</sup>USITC Determination, p.15.

<sup>159</sup>Supra, paragraph 302.

**(2) Causal relationship between the allegedly subsidized imports from Norway and material injury to the domestic industry in the United States**

308. The Panel then proceeded to examine Norway's claim that the affirmative final determination of material injury made by the USITC in its investigation of imports of fresh and chilled Atlantic salmon from Norway was inconsistent with the obligations of the United States under Article 6:4 of the Agreement.

309. Norway had based this claim on three main grounds. Firstly, in making this determination the USITC had failed to ensure that injuries caused by factors other than the imports from Norway were not attributed to these imports. Secondly, the USITC had failed to demonstrate that material injury was caused to the domestic industry in the United States by the imports of Norway "through the effects of the subsidy". Thirdly, the USITC had not demonstrated that the imports from Norway under investigation were causing present material injury at the time the affirmative determination was made by the USITC.

**(2)(i) Factors other than the imports under investigation**

310. The Panel first examined Norway's claim that the USITC's treatment of factors other than the allegedly subsidized imports from Norway as possible causes of injury was inconsistent with Article 6:4 of the Agreement.

311. 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. In this connection, Norway had mentioned the significant increase of the volume of imports of Atlantic salmon from third countries, increased supplies of substitute products, and internal problems in the United States domestic industry such as the inability of domestic producers to market Atlantic salmon on a year-round basis. These factors had been raised in the proceedings before the USITC but had been disregarded by the USITC in its determination. In the view of Norway, the treatment of these factors by the USITC was inconsistent with Article 6:4, which required that in order to demonstrate that subsidized imports were causing material injury to a domestic industry, investigating authorities carry out a "thorough examination" (rather than a mere consideration) of all possible causes of material injury to the domestic 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 subsidized imports from Norway.<sup>160</sup>

312. 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 respondents and determined that, while these factors might have had an adverse impact on the industry, material injury was caused by the imports from Norway. In the view of the United States, Article 6:4 of the Agreement did not require that imports under investigation be "the" or the sole cause of material injury. Nor did this provision require investigating authorities a thorough examination of all possible causes of injury in order to exclude injury caused by factors other than imports under investigation.

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<sup>160</sup>Norway had in this context also contested the consistency with Article 6:4 of the fact that the USITC had made one injury determination for the purpose of both its countervailing duty and anti-dumping investigation. See *infra*, paragraphs 338-340.

313. The Panel noted that in its affirmative final determination the USITC had made the following statement with respect to other possible causes of material injury referred to by the Norwegian respondents:

"Respondents claim that any injury being experienced by US producers is a result of factors other than the subject Norwegian imports. Among the alternative causes they suggest are: (1) various US industry production difficulties, (2) non-subject imports, (3) the inability of US producers to market their production year-round, and (4) the effects of Pacific salmon. Although some of these factors may have adversely affected the US industry, we determine that an industry in the United States is materially injured by reason of subsidized and LTFV imports of fresh and chilled Atlantic salmon from Norway."<sup>161</sup>

In the light of this statement, the Panel found that, as a matter of fact, the USITC had not "disregarded" possible other causes of injury. The USITC had expressly recognized that some of these factors might have "adversely affected" the domestic industry but that this did not detract from the fact that material injury was (also) caused by the imports from Norway subject to investigation. The Panel also noted in this connection that the factors mentioned in the above quoted statement by the USITC were identical to the factors referred to by Norway in the proceedings before the Panel. There was no evidence before the Panel indicating that during the investigation the Norwegian respondents had identified other possible causes of injury which had not been considered by the USITC.

314. Given that, as noted above, the USITC had not ignored the impact of factors other than the imports under investigation, the Panel considered that the basic question before it was whether the manner in which the USITC had treated these other factors was inconsistent with the obligations of the United States under Article 6:4 of the Agreement.

315. The Panel noted that Article 6:4 provided the following:

"It must be demonstrated that the subsidized imports are, though the effects<sup>19</sup> of the subsidy, causing injury within the meaning of this Agreement. There may be other factors<sup>20</sup> 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."

Footnote 19 provided: "As set forth in paragraphs 2 and 3 of this Article." Footnote 20 provided that:

"Such factors can include, inter alia, the volume and prices of non-subsidized imports of the product in question, 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 signatories under Article 6:4 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 subsidized 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 caused 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 6:4 required that imports under investigation be the

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<sup>161</sup>USITC Determination, pp.21-22.

sole cause of material injury to a domestic industry. Rather, the issue before the Panel concerned the weight accorded under Article 6:4 of 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.

316. The Panel found that two key aspects of the text of Article 6:4 were particularly relevant to its analysis of this question. Firstly, footnote 19 to the first sentence of Article 6:4 linked the requirement to demonstrate that the subsidized imports are, through the effects of the subsidy, 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 6:2 and 6:3. 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 6:4 (through the reference in footnote 19 to Articles 6:2 and 6:3) contrasted with the second sentence of Article 6:4 which provided that "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." Furthermore, footnote 20 stated that "Such factors can include, inter alia, ...." Thus, the second sentence of Article 6:4 did not impose an express requirement that investigating authorities examine in each case on their own initiative the possible effects of factors other than the imports under investigation. Rather, this sentence recognized the possibility that other factors were injuring the domestic industry and required that in that contingency "the injuries caused by other factors must not be attributed to the subsidized imports". Furthermore, rather than specifying a priori, which other factors were relevant in this context, footnote 20 provided a non-exhaustive, illustrative list of such factors.

317. In view of this difference between the specific and mandatory nature of the analysis required under the first sentence of Article 6:4 and the manner in which the second sentence of Article 6:4 treated factors other than the imports under investigation, the Panel considered that for purposes of the causation standard in Article 6:4 the rôle of an analysis of possible factors other than the imports under investigation was qualitatively different from the rôle of the analysis of imports under investigation. To the extent that the second sentence of Article 6:4 could be interpreted to require a consideration of factors other than the imports under investigation, such a requirement was an implicit one, following from the statement that "injuries caused by other factors must not be attributed to the subsidized imports." The type of analysis which might be necessary under this sentence was not specified. By contrast, Article 6:4 was explicit and specific with regard to the required analysis of the effects of the imports under investigation.

318. The Panel therefore found that the text of Article 6:4 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 6:2 and 6:3 of the effects of the imports. The primary focus of Article 6:4 was on the examination of whether allegedly subsidized imports caused the effects described in Articles 6:2 and 6:3. The second sentence of Article 6:4 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 6:4 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 6:4 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.

319. The Panel was of the view that its interpretation of Article 6:4 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, contained in one of the draft Arrangements discussed during the Tokyo Round negotiations:

"The subsidized products must be [an important contributing factor in causing or threatening] [the cause of] injury. All other relevant factors adversely affecting the industry shall be considered in reaching a determination."<sup>162</sup>

The Panel considered that, as far as the rôle of factors other than imports under investigation was concerned, the second sentence of the present Article 6:4 was less categorical than the second sentence of the above quoted draft.

320. The Panel then examined the USITC's finding of a causal relationship between the imports from Norway and material injury to a domestic industry in the light of its analysis above of the requirements of Article 6:4.

321. As noted above<sup>163</sup>, the Panel considered that the primary focus of the requirement in Article 6:4 of a demonstration of a causal relationship between imports under investigation and material injury to a domestic industry was on the analysis of the factors set forth in Articles 6:2 and 6:3, i.e. the volume and price effects of the imports, and their consequent impact on the domestic industry. In this connection, the Panel recalled its conclusions regarding the findings made by the USITC with respect to these factors. Under Article 6:4 the USITC was required not to attribute injuries caused by other factors to the imports from Norway. In the view of the Panel this did not mean that, in addition to examining the effects of the imports under Articles 6:1, 6:2 and 6:3, the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway. Rather, it meant that the USITC was required to conduct an examination sufficient to ensure that in its analysis of the factors set forth in Articles 6:2 and 6:3 it did not find that material injury was caused by imports from Norway when material injury to the domestic industry allegedly caused by imports from Norway was in fact caused by factors other than these imports. The Panel therefore proceeded to consider whether in its investigation the USITC had conducted such an examination.

322. 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.

323. 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.<sup>164</sup> The USITC had stated in its determination, with reference to these data, that:

"Although other factors may have contributed, the decline in US prices for Atlantic salmon in 1988 and 1989 was due in large part to oversupply in the US 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 decline."<sup>165</sup>

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<sup>162</sup>MTN.NTM/W/168, 10 July 1978.

<sup>163</sup>Supra, paragraph 318.

<sup>164</sup>See Annex 1 to this Report.

<sup>165</sup>USITC Determination, p.19, footnotes omitted.

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.<sup>166</sup> 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.

324. With regard to the second factor mentioned by Norway (the effects of Pacific salmon harvests) the Panel noted that the USITC had in its investigation gathered data on "related species".<sup>167</sup> The information before the USITC indicated, *inter alia*, that the vast majority of Pacific salmon was sold in frozen or canned form<sup>168</sup>, and that the majority of the US Pacific salmon catch was sold in export markets.<sup>169</sup> The USITC had discussed these and other factors and concluded that the similarities between Pacific and Atlantic salmon were limited.<sup>170</sup> While this discussion had taken place in the context of the USITC's examination of how to define the "like product", the Panel considered that the specific factors discussed by the USITC suggested that the increased availability of Pacific salmon could have had only a limited effect on domestic prices in the United States of fresh Atlantic salmon.

325. Finally, with regard to Norway's reference to internal industry problems as an alternative cause of injury to the domestic industry, the Panel noted that the USITC had stated that:

"... the financial performance of a newer industry may not be of a similar level or nature as a more mature industry due to start-up costs or other factors. However, given that the industry was profitable in 1988, its more recent financial performance is worse than would be anticipated even taking into account start-up conditions."<sup>171</sup>

326. The Panel considered on the basis of this examination of the data contained or referred to in the USITC Determination with regard to these alternative causes of material injury mentioned by Norway, that the USITC had not failed to conduct an examination of these factors sufficient to ensure that it did not find that material injury was caused by imports from Norway when material injury to the domestic industry allegedly caused by imports from Norway was in fact caused by factors other than these imports.

327. The Panel concluded, in the light of the foregoing considerations, that the analysis by the USITC of factors other than the imports from Norway under investigation was not inconsistent with the obligations of the United States under Article 6:4 of the Agreement.

(2)(ii) Material injury caused to the domestic industry "through the effects of the subsidy"

328. The Panel then turned to Norway's claim that the USITC's affirmative final determination of injury in this case was inconsistent with the obligations of the United States under Article 6:4 because the USITC had not determined whether material injury was caused by the imports from Norway "through the effects of the subsidy".

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<sup>166</sup>See Table 17 in Annex 1 to this Report.

<sup>167</sup>See in particular Appendix D at pp.B-45-61 of the USITC Determination.

<sup>168</sup>USITC Determination, pp.B-46-47.

<sup>169</sup>USITC Determination, p.B-48.

<sup>170</sup>USITC Determination, pp.6-7.

<sup>171</sup>USITC Determination, p.15, footnote omitted.

329. The arguments presented to the Panel by the parties offered different interpretations of the meaning of the first sentence of Article 6:4 of the Agreement.

330. Norway's argument was essentially that, in order to give effect to the phrase "through the effects of the subsidy" in the first sentence of Article 6:4, this sentence had to be interpreted to require that the injury analysis extend to factors other than those described in Articles 6:2 and 6:3. As an example of an additional element the consideration of which was required to give effect to the phrase "through the effects of the subsidy", Norway had mentioned the amount of subsidization found in a given case. Norway had referred to the drafting history of Article 6:4 in support of its view on the interpretation of this phrase. The United States had argued that footnote 19 ad Article 6:4 defined "the effects of the subsidy" in the first sentence of Article 6:4 as the effects of the imports under investigation, as described in Articles 6:2 and 6:3 of the Agreement. Under this interpretation, in order to give effect to the phrase "through the effects of the subsidy" it was not necessary to analyse any factors other than the effects of the imports as set forth in Articles 6:2 and 6:3. The United States argued that the drafting history of Article 6:4 did not support the interpretation advocated by Norway.

331. The Panel considered that the key legal question in this respect concerned the relationship between the term "through the effects of the subsidy" and the effects of subsidized imports described in Articles 6:2 and 6:3. Under the interpretation presented by Norway, the Agreement required an analysis in each case of whether and how the effects of the imports under Articles 6:2 and 6:3 were the "effects of the subsidy"; under the interpretation advanced by the United States, the effects of the imports under Articles 6:2 and 6:3 by definition were the "effects of the subsidy".

332. The Panel noted that, if the text of footnote 19 was included in the first sentence of Article 6:4, this sentence could be rewritten as follows:

"It must be demonstrated that the subsidized imports are, through the effects as set forth in paragraphs 2 and 3 of this Article of the subsidy, causing injury within the meaning of this Agreement."

333. What needed to be demonstrated according to this sentence was that "the subsidized imports are causing injury within the meaning of this Agreement". This demonstration required an analysis of the "effects as set forth in paragraphs 2 and 3 of this Article of the subsidy". In other words, subsidized imports cause injury through the effects described in Articles 6:2 and 6:3. However, this sentence did not state that it must be demonstrated that "the effects as set forth in paragraphs 2 and 3 of this Article" are "the effects of the subsidy". Rather, it defined "the effects of the subsidy" as the effects described in Articles 6:2 and 6:3, i.e. the volume and price effects of the subsidized imports and consequent impact of these imports on the domestic industry.

334. The Panel noted Norway's argument that, if Article 6:4 required only an analysis of the effects of imports under Articles 6:2 and 6:3, there would be no distinction between the determination of the existence of material injury and the determination of the cause of injury. The principle of effective treaty interpretation ruled out such an interpretation, under which the phrase "through the effects of the subsidy" would be superfluous.

335. The Panel considered that the principle of effective treaty interpretation required that effect be given to the entire term "through the effects as set forth in paragraphs 2 and 3 of this Article of the subsidy." Moreover, Article 6 did not treat the factors set forth in Articles 6:2 and 6:3 only as indicia of the existence of material injury but also as indicia of a causal relationship between the subsidized imports and material injury to a domestic industry. The text of the first sentence of Article 6:4 made it clear that "the subsidized imports" were at the centre of the causation analysis required under this provision. Therefore, Article 6 did not treat "the effects of the subsidy" as the cause of material injury and the effects of the imports under Articles 6:2 and 6:3 as mere indicators of the existence of material injury.



336. The Panel did not consider that the reference made by Norway to the drafting history of Article 6:4 warranted a different interpretation of the first sentence of Article 6:4. Norway had referred to a draft dated 13 February 1979 which read as follows:

"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."<sup>172</sup>

However, this draft was followed by a draft dated 21 February 1979 in which what was now footnote 19 was added after the word "effects".<sup>173</sup> Thus, what needed to be interpreted was not only the fact that the drafters of the Agreement introduced the term "through the effects of the subsidy" but also the fact that they almost immediately qualified this term by inserting a footnote referring to Articles 6:2 and 6:3. Taken together, the "through the effects of the subsidy" language and the footnote established a link between Article 6:4 and Articles 6:2 and 6:3, a link which had been absent from previous drafts. As such, the term "through the effects of the subsidy", together with the footnote, 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.

337. The Panel concluded that by treating the "effects of the subsidy" in the first sentence of Article 6:4 to mean the effects of the subsidized imports, set forth in Articles 6:2 and 6:3, the USITC had not acted inconsistently with the obligations of the United States under Article 6:4.

338. The Panel then analysed Norway's claim that the USITC had acted inconsistently with Article 6:4 by making one combined injury determination for purposes of both the anti-dumping and the countervailing duty investigation.

339. The Panel recalled its conclusion that the primary focus of the causation analysis required by Article 6:4 was on the effects of the subsidized imports, as set forth in Articles 6:2 and 6:3.<sup>174</sup> The Panel noted that Articles 3:2 and 3:3 of the Agreement on Implementation of Article VI of the General Agreement described in an identical manner the volume and price effects, and the consequent impact of imports on the domestic industry, to be considered in an anti-dumping duty investigation. Given that in the anti-dumping and countervailing duty investigations by the USITC of imports of Atlantic salmon from Norway the same imports had been investigated and that the investigation periods had been identical, it appeared to the Panel that there would have been no basis for the USITC to distinguish between the effects of the subsidized imports (in terms of Articles 6:2 and 6:3 of the Agreement) and the effects of the dumped imports under investigation (in terms of Articles 3:2 and 3:3 of the Agreement on Implementation of Article VI of the General Agreement).

340. The Panel therefore concluded that, by making one determination of injury for the purposes of both the anti-dumping and the countervailing duty investigation, the USITC had not acted inconsistently with the obligations of the United States under Article 6:4 of the Agreement.

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<sup>172</sup>Subsidies/Countervailing Measures, Working Paper prepared by some delegations, 13 February 1979, p.15.

<sup>173</sup>MTN.NTM/W/220, 21 February 1979, p.15.

<sup>174</sup>Supra, paragraph 318.

(2)(iii) Whether the imports under investigation were causing present material injury to the domestic Atlantic salmon industry in the United States

341. The Panel then proceeded to consider Norway's argument that the affirmative final determination of injury by the USITC was inconsistent with Article 6:4 because the USITC had failed to determine that at the time of this determination imports of Atlantic salmon from Norway were causing present material injury to the domestic industry in the United States.

342. In support of its claim, Norway had pointed out that Article 6:4 required that it be demonstrated that imports "are ... causing" material injury. It followed from the present tense of the first sentence of Article 6:4 that material injury had to be determined to be caused by the imports at the time of the determination. Norway had argued in this context that the purpose of the imposition of countervailing duties was to prevent future harm to a domestic industry resulting from imports which were presently causing material injury. In the case under consideration, even if imports from Norway were causing injury to the domestic industry at the time of the filing of the petition (March 1990) these imports were no longer causing such injury at the time of the final determination by the USITC (April 1991).

343. Norway had based its argument on the absence of present material injury at the time of the final determination by the USITC on six specific elements: first, the fact that the volume of imports from Norway had declined prior to the initiation of the countervailing duty investigation. Second, the decline over the period of investigation of the market share of Norwegian imports. Third, the fact that Norwegian salmon commanded a price premium over domestically produced salmon in the United States. Fourth, the fact that domestic producers in the United States had tripled their market share over the investigation period. Fifth, the fact that imports from Norway had declined after the imposition of provisional measures due to factors such as exchange rate changes and finally, the failure of the United States to take action to prevent injury caused by other factors from being attributed to the imports from Norway.

344. The United States had argued that the USITC had in fact determined that the domestic industry was experiencing material injury at the time of its final determination and had referred in this respect to the findings made by the USITC regarding the continuing injurious effects of the Norwegian imports, inter alia, in the form of financial losses. In addition, the United States had argued that the decline in 1990 of the volume of imports from Norway and the increase in prices of the Norwegian imports were the expected result of the investigation and of the imposition of provisional measures. The United States had also pointed out that Article 6:2 explicitly contemplated a retrospective analysis. If Article 6:4 were interpreted to require a negative final determination whenever imports declined and prices rose following the imposition of provisional measures, the purpose of provisional measures under Article 5 would be undermined.

345. The Panel found that, while Norway had made a separate claim under Article 6:4 as to an alleged failure of the USITC to determine whether imports from Norway were causing present material injury at the time of the determination made by the USITC, in fact each of the specific arguments raised by Norway in support of this claim had already been addressed by the Panel as part of its examination of Norway's claims on other aspects of the injury determination made by the USITC. Thus, Norway's arguments regarding the evolution of the volume of imports had been examined by the Panel under Articles 6:1 and 6:2 of the Agreement; Norway's argument on the premium commanded by imports from Norway had been addressed in the Panel's examination of the USITC's analysis of the price effects of the imports. Norway's argument regarding the increased market share of domestic producers had been addressed by the Panel under Article 6:3. Finally, Norway's argument concerning the alleged failure of the USITC to prevent injury caused by other factors from being attributed to the imports from Norway had already been examined by the Panel under Article 6:4.

346. The Panel considered that the requirement in the first sentence of Article 6:4 that it must be demonstrated that imports "are ... causing material injury" had to be interpreted consistently with other provisions of the Agreement. An interpretation of this sentence under which investigating authorities would somehow be obliged to continue to collect data up to the time of the final determination would undermine other provisions of the Agreement, in particular those relating to rights of interested parties concerning access to information used by the investigating authorities (e.g. Article 2:5). An adequate protection of procedural rights of interested parties therefore required that determinations of (present) material injury be based on a defined record of facts before the investigating authorities. In this respect, the Panel noted that the factors referred to by Norway in support of its claim pertained to factual developments over the period of investigation which had been considered by the USITC, on the basis of the record before it.

347. In light of the foregoing considerations, the Panel concluded that the United States had not acted inconsistently with its obligations under Article 6:4 with respect to the issue raised by Norway concerning the existence of present material injury caused by the imports from Norway.

348. In light of its conclusions in paragraphs 276, 293, 307, 327, 337, 340 and 347 the Panel concluded that the imposition by the United States of the countervailing duty order on imports of fresh and chilled Atlantic salmon from Norway was not inconsistent with the obligations of the United States under the Agreement by reason of the affirmative final determination of injury by the USITC.

## VII. CONCLUSIONS

349. The Panel recalled its conclusions with respect to the preliminary objections of the United States, that:

- (a) the Panel's terms of reference did not include in the scope of this proceeding the claims of Norway with regard to upstream subsidies or the continued application of the countervailing duty order under Article 4:9 (paragraph 215); and
- (b) an examination by the Panel of Norway's claim concerning the initiation of the countervailing duty investigation was not precluded by the alleged failure of the Government of Norway or private Norwegian respondents to raise this matter before the investigating authorities (paragraph 220).

350. The Panel further recalled its conclusion in paragraph 233 above that the initiation of the countervailing duty investigation was not inconsistent with the obligations of the United States under Article 2:1 of the Agreement.

351. The Panel further recalled its conclusions in paragraphs 241, 244 and 250 above with respect to the claims of Norway regarding the final determination of subsidies by the Department of Commerce, that (1) the imposition by the United States of countervailing duties in respect of regional development programmes was not inconsistent with the obligations of the United States under Article 11 of the Agreement, and (2) the United States had not calculated the amount of subsidies inconsistently with its obligations under Article 4:2 of the Agreement.

352. The Panel further recalled its conclusions in paragraph 348 above that the imposition by the United States of the countervailing duty order on imports of fresh and chilled Atlantic salmon from Norway was not inconsistent with the obligations of the United States by reason of the affirmative final determination of injury by the USITC.

353. The Panel therefore concluded that the imposition by the United States of a countervailing duty order on imports of fresh and chilled salmon from Norway was not inconsistent with the obligations of the United States under the Agreement.

ANNEXES

1. FRESH ATLANTIC SALMON: US IMPORTS FROM NORWAY, CANADA, CHILE, ICELAND, THE UNITED KINGDOM, IRELAND, THE FAROE ISLANDS, AND ALL OTHER COUNTRIES, 1987-90
2. FRESH ATLANTIC SALMON: APPARENT US CONSUMPTION AND SHARES OF CONSUMPTION SUPPLIED BY NORWAY, ALL OTHER COUNTRIES AND US PRODUCERS, 1987-89, JANUARY-JUNE 1989, AND JANUARY-JUNE 1990
3. FRESH ATLANTIC SALMON: US MONTHLY IMPORTS FROM NORWAY JANUARY 1989- DECEMBER 1990, BY VOLUME AND VALUE
4. LETTER ADDRESSED TO THE PANEL BY NORWAY ON 12 NOVEMBER 1992 AND LETTER BY THE PANEL TO NORWAY DATED 20 NOVEMBER 1992

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

Source	1987 <sup>2</sup>	1988 <sup>2</sup>	1989	1990 <sup>3</sup>
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
<b>Total</b>	<b>9,606</b>	<b>11,347</b>	<b>17,505</b>	<b>19,098</b>
Value (1,000 dollars) <sup>4</sup>				
Norway	74,404	89,987	93,672	66,440
Canada	5,719	10,499	22,145	36,636
Chile <sup>5</sup>	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
<b>Total</b>	<b>92,479</b>	<b>113,737</b>	<b>140,553</b>	<b>150,110</b>
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	<sup>5</sup>	10.08	7.26	7.87
All other countries	8.64	9.62	7.13	7.99
<b>Average</b>	<b>9.63</b>	<b>10.03</b>	<b>8.03</b>	<b>7.86</b>

<sup>1</sup>Includes imports from countries where no Atlantic salmon industry is known to exist. This product is believed to be misreported.

<sup>2</sup>1987-88 data were estimated by calculating the ratios of fresh whole Atlantic salmon to all fresh whole salmon as observed in 1989 US import data, and applying those ratios to comparable country-specific 1987 and 1988 quantity and value data for all fresh whole salmon. For Canada and Chile, further adjustments were made using port-of-entry import data and foreign production data, respectively.

<sup>3</sup>Includes imports under HTS statistic number 0302.12.0062, "fresh and chilled salmon not elsewhere specified or included", which are believed to be Atlantic salmon.

<sup>4</sup>Landed, duty-paid value.

<sup>5</sup>Not applicable.

Source: Compiled from official US import statistics, adjusted as specified.

2. FRESH ATLANTIC SALMON: APPARENT US CONSUMPTION AND SHARES OF CONSUMPTION  
SUPPLIED BY NORWAY, ALL OTHER COUNTRIES, AND US PRODUCERS,  
1987-89, JANUARY-JUNE 1989, AND JANUARY-JUNE 1990

(USITC Publication No. 2371, Table 18, p.A-45)

Item	1987	1988	January-June--		1990
			1989	1989	
Quantity					
Apparent US consumption (1,000 pounds)	***	26,916	41,705	20,449	26,502
Shares of apparent consumption supplied by--					
Norway (per cent)	***	72.9	60.2	60.1	42.2
All other countries (per cent)	***	20.1	32.3	33.8	51.1
All imports (per cent)	***	92.9	92.5	93.8	93.4
US producers (per cent)	***	7.1	7.5	6.2	6.6
Total (per cent)	100.0	100.0	100.0	100.0	100.0
Value					
Apparent US consumption (1,000 dollars)	***	134,349	165,504	86,844	101,734
Shares of apparent consumption supplied by--					
Norway (per cent)	***	74.0	62.5	61.7	47.0
All other countries (per cent)	***	19.5	31.3	32.2	47.3
All imports (per cent)	***	93.5	93.8	94.0	94.2
US producers (per cent)	***	6.5	6.2	6.0	5.8
Total (per cent)	100.0	100.0	100.0	100.0	100.0

Source: Compiled from data submitted in response to questionnaires of the US International Trade Commission and from official US import statistics.

Note: --Because of rounding, figures may not add to the totals shown.

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

1989 imports from Norway

	<u>Kilograms</u>	<u>\$1,000</u>
January	1,045,479	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

	<u>Kilograms</u>	<u>\$1,000</u>
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. LETTER ADDRESSED TO THE PANEL BY NORWAY  
DATED 12 NOVEMBER AND LETTER BY THE PANEL  
TO NORWAY DATED 20 NOVEMBER 1992

Letter from the Delegation of Norway<sup>175</sup>

12 November 1992

Dear Mr. Chairman,

The Government of Norway is in the process of reviewing the reports of the panels on anti-dumping duties and countervailing duties imposed on imports of fresh and chilled Atlantic salmon from Norway.

The panels appear in general as not having been prepared to question the contents of the information applied by the US authorities in the investigations, nor to take a stand regarding the US' decisions made on the basis of such information. In Norway's view, some aspects of the Panel reports raise questions of principle, and could have ramifications of significance for the international trading system. The Panels seem to have reached conclusions deviating from a number of previous panel recommendations, and they have apparently based themselves on a broad interpretation of the requirements expressed in the General Agreement's Article VI concerning the obligations incumbent upon a party invoking exceptions to the general GATT obligations.

Norway requests that the Panels reconsider the issues raised in this communication. Norway furthermore requests that the reports to the Committees reflect this request for reconsideration before circulating the reports to the members of the Committees, as well as the results of such consideration. Finally, Norway reserves its rights to pursue other aspects of the reports.

Sincerely,

Erik Selmer (signed)

Ambassador

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<sup>175</sup>The texts contained in this Annex have been circulated to the Committee for the sake of transparency and in response to the request by Norway that the Panel's Report to the Committee reflect its request for reconsideration of certain issues. This Annex does not constitute an integral part of the Report nor should the comments made in the letter by the Panel be seen as an interpretation of the Panel's findings and conclusions.



### 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 it provided no statistical information to support that position, nor did the DOC obtain such information prior to initiation. Swedish Steel panel report at paragraph 5.14. Neither did the petition on Salmon contain any statistical information to support its statement (beyond a number of companies which, by itself, could not indicate any proportion of production); nor did the DOC obtain any statistical information prior to initiation.

The requirements in Article 5:1 of the AD Code concerning initiation were also discussed in the Mexico Cement case (United States - Anti-dumping duties on grey Portland cement and cement clinker from Mexico). The Panel found that Article 5:1 contained a mandatory requirement for the investigating authorities to satisfy themselves, prior to initiation, that a petition was filed by or on behalf of the domestic producers. Mexico Cement panel report at paragraph 5.29. The Panel observed that the information on the extent of the support was not available to the investigating authorities prior to initiation and in fact had not been sought by the DOC or been provided to it by the ITC at any time during the investigation. Mexico Cement at paragraph 5.33. The Panel accordingly concluded that the US initiation of the AD investigation of cement from Mexico was inconsistent with Article 5:1 of the AD Code. Mexico Cement at paragraph 5.34 and 6.1.

The Panels are furthermore of the view that the DOC could continue to rely on the statement in the petition concerning industry support even though one member of the domestic industry had written in to state its opposition to the petition and one of the two Associations of US farmers had withdrawn its original vote of support for the petition. Subsidies Report at paragraph 29 and Anti-Dumping Report at paragraph 362.

In Norway's opinion, it is not reasonable to assume that every individual member of the Washington Fishgrowers Association continued to support the petition once the Association noted that it did not. One cannot assume that the Board of the Association's action in writing a letter stating that it did not support the petition was a unilateral act, not reflecting any change in opinion by any of the Association's members. This is borne out by the fact that in later submissions, there were only 13 members of the petitioning coalition (only 11 of whom were among the original 21 members), none of whom were members of the Association which withdrew support. Norwegian 1st Subsidies and AD Submissions at 10 and Appendix 7.

Finally, Norway notes that in the countervailing duty investigation it would have been futile for Norway to raise the standing issue since the DOC's stated policy is only to consider the issue if raised by a member of the domestic industry. Norwegian 1st Subsidies and AD Submissions at 8-9 and Norwegian 2nd Subsidies and AD Submissions at 9. DOC refuses to consult with parties potentially adversely affected by an investigation (e.g., exporters, importers, foreign governments) prior to initiation of an anti-dumping

investigation. Indeed, the DOC does not notify anyone of the opportunity to object until initiation. Mexican Cement, paragraph 5.32. Therefore, Norway had no opportunity to raise the issue prior to initiation of the anti-dumping investigation, and it would have been futile to do so in the countervailing duty investigation.

### Injury

Norway also requests the Panels to reconsider their views on three aspects of the injury investigation. The first concerns the Panel's determination that the first sentence of Article 6:4 of the Subsidies Code and Article 3:4 of the Anti-Dumping Code requires only the analysis provided for in Articles 6:2 and 6:3 or 3:2 and 3:3, respectively to determine causation. Subsidies Report at paragraph 134 and Anti-Dumping Report at paragraph 571. Such an analysis eliminates separate causation findings from the scheme of the injury investigation. If the analysis suggested by the Panels were correct, then once an investigating authority determined that injury existed in accordance with Article 6:1 or 3:1 of the Codes, based solely on the analysis in Articles 6:2 and 6:3 and Articles 3:2 and 3:3, it would automatically be found that a causal connection existed, since the analysis would be identical with regard to both the AD and CVD case. Norwegian 2nd CVD Submission at 30, 39-40 and Norwegian 2nd AD Submission at 54, 62.

The second aspect of the injury investigation which should be reconsidered is the interpretation of the second sentence of Article 6:4 or Article 3:4 of the Subsidies Code or the Anti-Dumping Code, respectively. The Panel determinations indicate that it is sufficient that the authorities do not ignore other factors rather than applying the Code language that the investigating authority must not attribute injury from other factors to the effects of the subsidies or dumping. Subsidies Panel Report at paragraph 110 and Anti-Dumping Panel Report at paragraph 547. If this analysis were correct, it would eliminate the need for this sentence in its entirety. Such a result is inconsistent with the accepted norms of treaty interpretation, as well as prior GATT panels. Canadian countervailing duties on grain from the United States, SCM, paragraph 5.2.8. The Panels thus endorse the US position in the present cases, i.e. that it is sufficient for a positive injury determination that the imports under investigation were found to be a cause of injury, as long as other possible causes of injury are enumerated. Norway regards the view of the Panels as being contrary to the requirements expressed in the second sentence of Article 6:4 and Article 3:4 of the Subsidies Code and the Anti-Dumping Code, respectively.

Thirdly, the ITC's injury determination was based on effects which occurred in 1989, and the ITC justified its finding of "present" material injury by referring to injury in the form of continuing effects (USITC report at 21). Norway is of the opinion that the Panels in their review of the US injury determination were incorrect in not contesting that the US could disregard the 1990 import records. Inclusion of the 1990 records would result in a finding of additional decline in Norwegian market share, and practically no increase in import volume even in absolute terms. Norway regards the Codes as containing a requirement for the investigating authorities as to consider whether the domestic industry were being injured by the present effects of subsidies or dumping at the time of the injury determination.

### The AD Panel's recommendations

Although the AD Panel concluded that the United States had imposed anti-dumping duties inconsistently with its obligations under the AD Code pertaining to certain aspects of the methodology for calculating margins of dumping, it did not recommend a specific remedy as requested by Norway, i.e. that the AD Committee request the United States to revoke the anti-dumping duty order and reimburse any duties paid or deposited under this order, as requested by Norway. In Norway's view, the AD Panel should, however, in keeping with previous panel recommendations, have made such a recommendation insofar as the methodology of calculating dumping margins to be applied by the US consistent with the Panel's findings results in a determination that no dumping existed, or to a reduction in the calculated duty margin.

New Zealand - imports of electrical transformers from Finland, BISD 32S/70, paragraph 4.11; Canada - imposition of countervailing duties on imports of manufacturing beef from the EEC, SCM/85, paragraph 5.17; United States - imposition of anti-dumping duties on imports of stainless steel hollow products from Sweden, ADP/47, paragraph 5.24; and United States - anti-dumping duties on grey portland cement and cement clinker from Mexico, ADP, paragraph 6.2. The exception to recommending reimbursement was Grain Corn where the complaining party, the United States, did not request reimbursement. Canadian countervailing duties on grain corn from the United States, SCM, paragraphs 3.1.1 and 6.2.

\* \* \* \* \*

Reply by the Panel to the Delegation of Norway

20 November 1992

Dear Ambassador Selmer,

The Panels in the disputes on anti-dumping and countervailing duties imposed by the United States on imports of salmon have carefully examined your request for a reconsideration of certain issues raised in your letter dated 12 November 1992. The points raised in your letter are virtually identical to arguments presented by Norway in the proceedings before the Panels and have been addressed by the Panels in their findings. Your letter does not identify specific questions of law or of fact which have been overlooked by the Panels. In addition, in a number of places the analysis in your letter seems to be based on a misreading of the Panels' findings. The Panels therefore have decided that the points raised in your letter do not provide a basis for a reconsideration of the Panel's findings. On 23 October, when I informed the parties to the disputes of the Panels' findings and conclusions, I indicated that the full Reports in the two disputes would be circulated to the members of the two Committees unless by 11 November 1992 both parties to the disputes requested an extension of this time period in order to continue their efforts to seek a mutually satisfactory resolution of the disputes. I conclude from your letter dated 12 November and from the letter from the delegation of the United States dated 13 November that there is no agreement between the two parties on such an extension. The Panels therefore have no choice but to direct the GATT secretariat to circulate the full Reports to the two Committees as soon as possible. In the interest of transparency, the Panels will annex to their Reports your letter dated 12 November, the letter received from the United States on 13 November and the Panels' response to your letter. I would like to offer, on behalf of the Panel, the following comments on the points raised in your letter:

1. Initiation of the anti-dumping and countervailing duty investigations

With respect to the initiation of the investigations your letter challenges the Panel's interpretation of the requirements of Article 5:1 of the Anti-Dumping Code and Article 2:1 of the Subsidies Code as being "contrary to the Code requirements as expressed in previous panel reports".

The statements in paragraphs 358-360 of the findings in the dispute on anti-dumping duties clearly indicate that the Panel considers that investigating authorities are required to evaluate, prior to the initiation of an investigation, whether a petition has been filed on behalf of the industry affected, i.e. whether such a petition has been made with the authorization or approval of the domestic industry. In this respect, the Panel's reasoning is entirely consistent with the findings of the Swedish Steel Panel and the Mexican Cement Panel (see paragraph 5.9 of the Swedish Steel Panel Report and paragraph 5.31 of the Mexican Cement Panel Report. There is therefore no basis to argue that with respect to the question of the obligations of investigating authorities to satisfy themselves that a petition has been filed "on behalf of" the domestic industry, the Panel has in any way deviated from past cases. The statements in paragraphs 358-360 also make it clear that the Panel's reasoning in no way implies, as suggested in your letter, "that the DOC is not required under the Code to satisfy itself on its own, prior to investigation, that a petition is filed on behalf of the domestic industry."

While the legal standard articulated by the Panel thus does not differ from the legal standard expressed in other cases, a review of the specific factual circumstances of the case before 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 that "the factual situation presented to it differed significantly from the factual situation presented to the 'Swedish Steel Pipe' panel." In paragraph 361 of its findings the Panel identifies the key factual elements which formed the basis for its conclusion.

For example, the Panel notes that the petition was made with a legal certification as to its correctness and completeness; this legal certification also covered the statement in the petition that it was made with the support of twenty-one firms representing well over the majority of all domestic production of Atlantic salmon. Thus, the Department of Commerce had before it a certified statement of industry support; no such certified statement of industry support was before the Department in the case considered by the Swedish Steel Panel.

Norway next takes issue with the Panel's view that it was reasonable for the Department of Commerce to assume that the individual members of the WFGA continued to support the petition after the WFGA had changed its position. However, as reflected in paragraph 355 of the findings of the Panel in the anti-dumping dispute, the letter in which the WFGA withdrew its support stated that the members of this association would be free to express an individual position on the petition. Nothing in the information before the Panel indicated that individual members of the WFGA in fact changed their position with respect to the petition.

Finally, you note that in the countervailing duty case it would have been futile for Norway to raise the standing issue and that in the anti-dumping case Norway did not have an opportunity to raise the standing issue before the initiation of the investigation.

While it is correct that in paragraph 21 of the findings in the countervailing duty dispute the Panel mentions the fact that the Government of Norway apparently had not raised the standing issue in pre-initiation consultations under Article 3:1 of the Subsidies Code, it is evident from paragraphs 28 and 29 of these findings that this element was not of decisive importance to the Panel's conclusions. In the anti-dumping duty dispute the Panel has nowhere in its findings made reference to the fact that the Government of Norway had not raised the issue of standing prior to the initiation of the investigation; this element was simply not among the factual elements upon which the Panel based its conclusion.

## 2. Determination of the existence of material injury

The first point made in your letter regarding the Panel's findings on the determination of injury concerns the interpretation of the term "through the effects of ..." in Article 3:4 of the Anti-Dumping Code and Article 6:4 of the Subsidies Code. The argument advanced in your letter was made in the course of the proceedings before the Panels and has been dealt with by the Panel in paragraphs 568-569 of the findings in the anti-dumping duty dispute and in paragraphs 131-132 of the findings in the countervailing dispute. In particular, the Panels in these paragraphs explain their view that Articles 3:2 and 3:3 of the Anti-Dumping Code and Articles 6:2 and 6:3 of the Subsidies Code are not limited to an identification of indicia of the existence of material injury but also deal with the causal relationship between the allegedly dumped and subsidized imports and material injury to a domestic industry.

Your second point concerning the Panels' findings on injury pertains to the Panels' interpretation of the second sentence in Article 3:4 of the Anti-Dumping Code and Article 6:4 of the Subsidies Code. You observe in your letter that:

"The Panel determinations indicate that it is sufficient that the authorities do not ignore other factors rather than applying the Code language that the investigating authority must not attribute injury from other factors to the effects of the subsidies or dumping. Subsidies Panel Report at paragraph 110 and Anti-Dumping Panel Report at paragraph 547."

This argument seems to be based on a misreading of the rôle in the Panel's analysis of the paragraphs referred to in your letter. These paragraphs simply note that the USITC had acknowledged the possible relevance of other factors as causes of injury but in no way imply that this by itself was sufficient to meet the requirement of Article 3:4 of the Anti-Dumping Code and Article 6:4 of the Subsidies Code (see paragraph 548 of the findings in the anti-dumping duty dispute and paragraph III of the findings in the countervailing duty dispute).

In paragraph 555 of its findings in the anti-dumping duty dispute the Panel sets forth its interpretation of the requirement of the second sentence of Article 3:4 of the Anti-Dumping Code. The Panel specifically states that:

"... the USITC was required to conduct an examination sufficient to ensure that in its analysis of the factors set forth in Articles 3:2 and 3:3 it did not find that material injury was caused by imports from Norway when material injury to the domestic industry allegedly caused by imports from Norway was in fact caused by factors other than these imports. The Panel therefore proceeded to consider whether in its investigation the USITC had conducted such an examination". (emphasis added)

In view of this statement, I cannot agree with your view that the Panel's reasoning would eliminate the need for the second sentence of Article 3:4 and would thereby be inconsistent with accepted norms of treaty interpretation. This statement also in no way contradicts the standard reflected in paragraph 5.2.8 of the Report of the Panel in the dispute on countervailing duties by Canada on imports of grain corn from the United States. In paragraphs 556-559 of its findings the Panel examines, on the basis of this interpretation of the second sentence in Article 3:4, the manner in which the USITC treated the alternative causes of injury mentioned by Norway. The standard formulated in paragraph 555 and the Panel's application of this standard to the facts before it in paragraphs 556-559 cannot reasonably be interpreted to mean that in the view of the Panel it is sufficient under Article 3:4 for investigating authorities to simply "enumerate" other possible causes of injury, as suggested on page 5 of your letter.

The third point raised in your letter in respect of the Panel's findings on the injury determination pertains to the alleged failure of the USITC to make a determination that imports from Norway were causing material injury to the domestic industry in the United States at the time of the USITC's determination. Your letter refers in particular to the evolution of the (relative and absolute) volume of imports from Norway during 1990. In this connection I would first like to point out that the Panels' findings do not imply that the USITC could "disregard the 1990 import records", as you suggest in your letter. In paragraph 507 of its findings in the anti-dumping duty dispute the Panel notes the USITC's statement about the limited weight to be accorded to the decline in absolute import volume in 1990, based on the fact that this decline appeared to be largely the result of the filing of the petition and/or the imposition of provisional anti-dumping and countervailing duties. In paragraph 508, the Panel reviews the data provided by Norway on the monthly import volumes in 1989-1990 and concludes that these data are not inconsistent with the explanation offered by the USITC of the decline in the volume of imports in 1990. Paragraph 509 recapitulates the legal standard of an "objective examination" by which the Panel was guided in its review of this aspect of the USITC's determination. This paragraph states quite clearly the Panel's view that the requirement of an "objective examination" means that the USITC was under an obligation to consider the information before it on the decrease in absolute volume of imports and to explain why this information did not detract from a finding of a significant increase in the volume of imports. In sum, the Panel's analysis in paragraphs 507-509 clearly indicate that the Panel was not of the opinion that the USITC could "disregard" the data on the evolution of the import volume in 1990. At the same time, however, the Panel found it inappropriate to make its own judgement as to the relative weight to be accorded to the facts before the USITC, as explained in paragraph 494.

The question of "present" material injury is also addressed in paragraphs 575-581 of the findings of the Panel in the anti-dumping dispute and in paragraphs 138-145 of the findings of the Panel in the countervailing duty dispute. As is evident from paragraph 580 of the findings in the anti-dumping duty dispute and paragraph 143 of the findings in the countervailing duty dispute, the Panels have not ignored the fact that the first sentence of Article 3:4 of the Anti-Dumping Code and of Article 6:4 of the Subsidies Code is in the present tense. However, in the view of the Panels, this sentence cannot be interpreted to mean that investigating authorities are required to continue to gather information up to the time of the final determination.

3. Nature of the recommendation of the Panel in the anti-dumping dispute

Let me now turn to your comments on the recommendation in paragraph 597 of the Panel in the anti-dumping dispute. The reasons why the Panel has decided not to make the recommendation requested by Norway are stated in paragraph 596. Leaving aside the question of the precedential value of previous reports, I note that in the four cases to which you refer in your letter the Panels had found that no anti-dumping or countervailing duties should have been levied at all. As explained in paragraph 596, the Panel in the present dispute has not arrived at such a finding. Under these circumstances the Panel did not find it necessary to pronounce itself on the question of reimbursement of the anti-dumping duties. At the same time, the Panel found it appropriate to make a recommendation which is more specific than recommendations generally appearing in GATT Panel Reports and which would require the United States to reconsider those aspects of its determination found by the Panel to be inconsistent with Articles 2:4 and 2:6 of the Anti-Dumping Code. It follows from the last part of paragraph 597 that the steps to be taken by the United States to bring its measures into conformity with its obligations are not limited to a mere reconsideration of the affirmative final determination.

4. General Comments

Finally, allow me to make a comment on some of the general observations in your covering letter. I respectfully disagree with your statement that "the Panels appear in general as not having been prepared to question the contents of the information applied by the United States authorities in the investigations, nor to take a stand regarding the United States decisions made on the basis of such information." With regard to the USITC's injury determinations, the Panels have carefully examined whether these determinations involved a consideration of the factors mandated by the two Codes and were based on positive evidence. Paragraph 494 of the findings in the anti-dumping dispute explicitly notes with regard to the requirement of "positive evidence" that:

"a review of whether in a given case this requirement was met involved an examination of the stated factual basis of the findings made by the investigating authorities in order to determine whether the authorities had correctly identified the appropriate facts, and whether the stated factual basis reasonably supported the findings of the authorities."

For each aspect of these determinations challenged by Norway, the Panels have examined in detail the precise factual basis of the USITC's findings. As you know, where the Panels found it necessary to review confidential information, they have requested the United States to make this 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 such information", it could not have concluded that in these respects the United States had not acted reasonably in light of the information before the Department of Commerce.

I remain, dear Mr. Ambassador,

Yours sincerely,

Janusz Kaczurba (signed)

Chairman  
Panels on the Imposition of  
Anti-Dumping and Countervailing  
Duties on Imports of Fresh and  
Chilled Atlantic Salmon from Norway