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U.S. TRADE LAW AND IMPORTED FARMED ATLANTIC SALMON: PROTECTIONISM OR PROTECTION OF FREE TRADE?

Mark T. Peterson*

I. INTRODUCTION

International trade in fishery products is becoming increasingly important. This is evidenced by the number of international disputes concerning fishery products. Conflicts have arisen between the environment and fish trade, as was the case in the U.S.—Mexican tuna—dolphin dispute.¹ Disputes have arisen over import regulations.² Disputes have

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1. Much has been written on this subject. See, e.g., Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON. 477, 508 (1991) (suggesting the U.S. might be able to project its conservation agenda internationally using other international treaties besides trade agreements); Hon. R. Kenton Musgrove and Garland Stephens, *The GATT—Tuna Dolphin Dispute: An Update*, 33 NAT. RESOURCES J. 957 (1993); Stanley M. Spracker and David C. Lundsgaard, *Dolphins and Tuna: Renewed Attention on the Future of Free Trade and Protection of the Environment*, 18 COLUM. J. ENVTL. L. 385 (1993); Thomas B. Skilton, *GATT and the Environment in Conflict: The Tuna—Dolphin Dispute and the Quest for an International Conservation Strategy*, 26 CORNELL INT'L L.J. 455 (1993).

2. See *February Council: "Other Business,"* GATT FOCUS NEWSL., Mar./Apr. 1994, at 3 (detailing U.S. complaint concerning French whitefish import restrictions); Ted L. McDorman, *Dissecting the Free Trade Agreement Lobster Panel Decision*, 18 CAN. BUS. L.J. 445 (1991); Gail Peabody, *The Lobster Size Conflict: Use of United States—Canada Free Trade Agreement Dispute Resolution Procedures*, 1 TERR. SEA J. 273 (1991) (examining dispute between the U.S. and Canada over the minimum lobster size that Canada could export into the U.S.); *Panel Established on Scallops*, WTO FOCUS NEWSL., Aug./Sept. 1995, at 4 (detailing Canadian complaint to GATT about French scallop labeling requirements).

also developed over the management of fishery resources within a state's 200 nautical mile Exclusive Economic Zone. One such disagreement, between the United States and Canada, concerned wild salmon and herring processing regulations.³

The United States is one of the most important seafood trading countries in the world. This importance is illustrated by the fact that the United States was the world's second largest importer of seafood products in 1991, importing some \$6 billion worth, and the world's largest exporter of seafood products, exporting \$3.5 billion worth.⁴ As the significance of seafood grows, and existing fisheries become depleted, the possibility for conflict between the United States and other seafood trading countries grows. International trade law and practice is a factor materially influencing world fishery production and trade, a better understanding of which is important to help avoid future costly dispute settlement.

One of the fish stocks important to the seafood trade of the United States is salmon. U.S. consumers consumed an average of 1.162 pounds of salmon in 1992, making it the fourth most popular seafood that year.⁵ In 1993, the average American consumed 15 pounds of seafood, 0.99 pounds of which was salmon, the fifth most popular U.S. seafood.⁶ The numbers for 1994 were essentially the same.⁷ The majority of salmon

3. Ted L. McDorman, *International Trade Law Meets International Fisheries Law: The Canada—U.S. Salmon and Herring Dispute*, 7 J. INT'L ARB. 107 (1990).

4. *Commodities 1991*, 73 U.N. FOOD & AGRIC. Y.B. 91 (1993) (chart entitled "Imports and Exports by Country and by Seven Fishery Commodity Groups").

5. *America's Top 10 Seafoods*, SEAFOOD BUS., Sept./Oct. 1993, at 35. Salmon moved up from the number five position it held in 1991. The top three were (in order, according to average edible weight consumed): tuna, 3.5 lbs.; shrimp, 2.5 lbs.; and Alaska pollock, 1.23 lbs. *Id.*

6. *Seafood's Top Ten*, NAT'L FISHERMAN, Oct. 1994, at 50. Although a large portion of this was wild Pacific salmon, farmed Atlantic salmon has become increasingly important, especially on the East coast. The remainder of the top ten, with rank and edible weight (pounds) consumed were: 1) tuna, 3.5; 2) shrimp, 2.5; 3) Alaska pollock, 1.2; 4) cod, 1.0; 6) catfish, 0.98; 7) flatfish, 0.6; 8) clams, 0.5; 9) crab, 0.3; 10) scallops, 0.2. *Id.* (figures obtained from the National Fisheries Institute).

7. *Tuna, Shrimp, Pollock are Tops in Seafood*, ST. PETERSBURG TIMES, Nov. 9, 1995, at D5. The top ten with edible weight (pounds) consumed were: 1) tuna, 3.3; 2) shrimp, 2.6; 3) Alaska pollock, 1.5; 4) salmon, 1.1; 5) cod, 0.9; 6) catfish, 0.8; 7) clams, 0.5; 8) flatfish, 0.36; 9) crabs, 0.31; 10) scallops, 0.29. *Id.* (figures obtained from the National Fisheries Institute). See also Joanna Ramey, *Seafood Consumption Reaches Record Levels According to National Fisheries Institute Annual Review*, SUPERMARKET NEWS, Sept. 4, 1995, at 13.

farmed in the United States comes from Maine.⁸ Maine salmon farmers contended with stiff competition from imported Norwegian farmed Atlantic salmon until 1989.⁹

In 1990, twenty-one Maine and Washington Atlantic salmon producers formed the Coalition for Fair Atlantic Salmon Trade (FAST), and filed a petition with the U.S. International Trade Commission (USITC) and the U.S. International Trade Administration (USITA) to complain about alleged subsidizing of the Norwegian Atlantic salmon farming industry by the Norwegian government. The petition also alleged that Norwegian Atlantic salmon was being sold at less than fair value in the United States and that this practice was harming the U.S. salmon industry.¹⁰ During its subsequent investigation, the USITA found that the subject imports were being subsidized and were being sold at less than fair value in the United States. The USITC found that these imports were materially injuring the domestic Atlantic salmon farming industry. Therefore, countervailing and antidumping duties were imposed on Norwegian imports of fresh and chilled farmed Atlantic salmon.

Norway then appealed these determinations to the U.S. Court of International Trade. This Court determined that the USITC had not properly evaluated a decline in Norwegian imports in 1990. The Court also felt that there was not sufficient evidence to support the USITC determination of injury to the U.S. industry at the time of its final determination. The Court reversed and remanded the final USITC determination because of these deficiencies.

The Court of International Trade's decision forced the USITC to reevaluate and justify its earlier determination of injury. On reconsideration, the USITC found that other factors, namely, the appreciation of the

8. OFFICE OF INTERNATIONAL AFFAIRS, NOAA, Tech. Memo. NMFS-F/SPO-3, WORLD SALMON CULTURE 320-321 (1992). In 1991, Maine harvested 4,704 metric tons (mt.) of farmed Atlantic salmon, worth \$29,970,392; Washington State harvested 1,980 mt. of farmed Atlantic salmon, and 210 mt. of farmed Pacific salmon. *Id.*

9. *Id.* at 318.

10. Mark L. Hermann et al., *Consequences of Tariffs Placed on Norwegian Farmed Atlantic Salmon by the United States and the EEC*, SALMON MARKET NEWSL., Sept. 1990, at 1. Atlantic salmon growers from Washington State later, on March 16, 1991, withdrew support for the action, but did not necessarily oppose the action, *Committee on Subsidies and Countervailing Measures, United States—Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway: Report of the Panel*, GATT at 34, GATT Doc. SCM/153 (1992) [hereinafter SCM/153]. See also *infra* Section II(A).

Norwegian kroner to the U.S. dollar, an increase in exports to the European Community,¹¹ and one exporter's decrease in exports to the United States, did not account for the decline in subject imports, but that the initiation of its preliminary investigations did. The USITC also explained that it had utilized 1989 import data instead of 1990 data when determining present injury, because the later data would have reflected the reduction in Norwegian imports to the United States resulting from the imposition of the duties.

When Norway appealed the final determinations of the USITC and imposition of duties by the USITA to the U.S. Court of International Trade, it also petitioned the General Agreement on Tariffs and Trade (GATT) to establish two panels, one to review the U.S. imposition of countervailing duties, the other to look into the U.S. imposition of antidumping duties. GATT agreed to establish the two panels, which each then heard the arguments of the two parties and rendered a decision.

The GATT Panel considering the countervailing duty agreed with the United States on all points. The Panel agreed with the determination of the United States, not because its methods had been prescribed by the text of GATT and its side agreements, but because there was no prescribed methodology in the Agreement to use in determining the existence of a subsidy, or in defining what types of programs were countervailable. The United States' determination of injury was found acceptable in the absence of such explicit criteria, because the United States had explained why it had used 1989 data to determine present injury and not 1990 data. Thus, the lack of a prescribed methodology worked in the favor of the United States.

The Panel examining the antidumping duty determination did not wholly agree with the United States. Although the Panel agreed with most of the U.S. practices in the case, it felt the United States had not properly obtained a representative sample of Norwegian salmon farms in determining the relevant cost of production. However, the Panel did not therefore find that the general determination and imposition of duties by the United States was inconsistent with its international obligations. This conclusion was again reached generally because there had not been a prescribed methodology in the GATT. Since the United States had at least considered alternative factors affecting the U.S. industry, and had

11. Now the European Union (EU).

justified why it used the information it had, U.S. practice was found to be compatible with its international obligations.

This dispute, as examined in this article, provides a case study of U.S. international trade law and practice and its compatibility with the General Agreement on Tariffs and Trade. The study is designed to answer four primary questions: 1) is U.S. trade law being used as a protectionist measure to protect U.S. industries from unfair foreign competition; 2) is U.S. practice incompatible with international trade law; 3) did the removal of Norwegian Atlantic salmon from the U.S. market open the door for other producer countries; and, 4) was the above opportunity capitalized on by Maine, the initiator of the investigations, or by other producer countries, namely Canada and Chile? Before addressing these questions in light of the U.S.—Norway dispute, the next section will provide some general legal background.

II. LEGAL BACKGROUND

A. U.S. Countervailing Duty and Antidumping Duty Provisions

The imposition of countervailing and antidumping duties on imports into the United States is governed by Title 19, Subtitle IV of the U.S. Code. According to these provisions, if it is determined that certain countries¹² or their nationals are providing subsidies to export industries and that those subsidized imports are 1) materially injuring a U.S. industry or 2) threatening a U.S. industry with such injury, a countervailing duty is to be imposed on the import in question which shall be equal to the net subsidy.¹³ In addition, if a class or kind of foreign merchandise being sold in the United States is sold at less than fair value (LTFV) and such activity is 1) materially injuring a U.S. industry or 2) threatening a U.S. industry with such injury, an antidumping duty, in an amount equal to the amount by which the foreign market value exceeds the U.S. price for the merchandise, is to be imposed on that merchandise.¹⁴

The authorities which administer these countervailing duty and antidumping duty provisions are the U.S. International Trade Commission (USITC) and the U.S. International Trade Administration

12. 19 U.S.C. § 1671(b) (1994).

13. 19 U.S.C. § 1671(a) (1994).

14. 19 U.S.C. § 1673 (1994).

(USITA).¹⁵ The USITC is “an independent, nonpartisan, quasi-judicial federal agency that provides trade expertise to both the legislative and executive branches of government, determines the impact of imports on U.S. industries, and directs actions against certain unfair trade practices involving patents, trademarks, and copyrights. [US]ITC analysts and economists investigate and publish reports on U.S. industries and the global trends that affect them.”¹⁶ The USITC was first established by Congress in 1916 as the U.S. Tariff Commission,¹⁷ but its name was changed to the U.S. International Trade Commission by section 171 of the Trade Act of 1974.¹⁸

The USITC acts in two primary capacities. The first is in a quasi-judicial capacity. It is acting in such a capacity when it determines whether certain imports injure or threaten to injure U.S. industry.¹⁹ USITC’s second role is as the government’s think tank on trade. It fulfills this role by collecting and analyzing trade data.²⁰

The U.S. International Trade Administration is part of the Department of Commerce. The USITA was established on January 2, 1980 by the Secretary of Commerce to “promote world trade and to strengthen the international trade and investment position of the United States.”²¹

15. When commencing either a countervailing or antidumping duty proceeding, the petitioner must simultaneously file with both the “administering authority” and the “Commission.” 19 USCS §§ 1671a(b), 1673a(b). 19 U.S.C. § 1677(1) defines the term “administering authority” as “the Secretary of the Treasury, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this subtitle are transferred by law.” In 1980, President Carter transferred this responsibility to the Department of Commerce. The USITA is a part of this Department. See Alexander Manganiello, *The Roles of the International Trade Administration and the International Trade Commission in Countervailing Duty Determinations*, 16 SUFFOLK TRANS’N L.R. 571, 578 (1993). 19 U.S.C. § 1677(2) defines the term “Commission” as the United States International Trade Commission.

16. UNITED STATES INT’L TRADE COMM’N, USITC PUB. NO. 2784, ANNUAL REPORT: FISCAL YEAR 1993 (1993) [hereinafter USITC PUB. 2784] (inside cover).

17. OFFICE OF PUBLIC AFFAIRS, UNITED STATES INT’L TRADE COMM’N, USITC PAMPHLET NO. OPA 994, U.S. INT’L TRADE COMM’N 1 (1994).

18. OFFICE OF THE FEDERAL REGISTER, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, THE UNITED STATES GOVERNMENT MANUAL 1994/1995 758 (1994). Six Commissioners, nominated by the President and confirmed by the Senate, head the USITC. USITC OFFICE OF PUBLIC AFFAIRS, *supra* note 17, at 2. The Commissioners serve for nine year terms, with a new term beginning every eighteen months. *Id.*

19. USITC PUB. 2784, *supra* note 16, at 5.

20. *Id.*

21. OFFICE OF THE FEDERAL REGISTER, *supra* note 18, at 166.

The Under Secretary for International Trade determines the organization's policy and coordinates and directs its programs and other activities.²²

The Import Administration, a division of the USITA, is also involved in antidumping and countervailing duty determinations. The primary function of the Import Administration is to protect U.S. industry from unfair trade practices. The Import Administration accomplishes this "by administering efficiently, fairly, and in a manner consistent with U.S. international trade obligations the antidumping and countervailing duty laws of the United States."²³ The Import Administration is a major force leading existing federal efforts to improve the GATT antidumping code.²⁴

The USITC and USITA work together in antidumping and countervailing duty determination cases. During preliminary duty determinations, the USITC determines whether there is a reasonable indication that a U.S. industry is being materially injured or threatened by material injury because of the imports which are the subject of the investigation.²⁵ The USITA then has to determine whether there is a reasonable indication that a subsidy is being provided to the subject importers or whether the subject imports are being sold at LTFV in the United States, and if so, by how much.²⁶ During final determinations, the USITC and USITA finalize their preliminary determinations.²⁷

The relationship between preliminary and final determinations is that preliminary determinations determine whether there are reasonable indications that a subsidy is involved, or that imports are being sold at less than fair value. A preliminary determination focuses on whether there is a reasonable indication that injury to an industry in the United States has occurred or is likely to result from the subject imports. A final determination determines whether a subsidy is actually being given and/or whether the subject imports are actually being sold at LTFV. It

22. Int'l Trade Admin.; Organization and Assignment of Functions, 45 Fed. Reg. 6148 (1980).

23. OFFICE OF THE FEDERAL REGISTER, *supra* note 18, at 166. Although not discussed extensively in the paper, the Import Administration conducted the investigation for the USITA in the Norway-U.S. salmon dispute.

24. 45 Fed. Reg. at 6150-51.

25. 19 U.S.C. §§ 1671b(a), 1673b(a) (1994).

26. 19 U.S.C. §§ 1671b(b), 1673b(b) (1994).

27. 19 U.S.C. §§ 1671d, 1673d (1994). See also Manganiello, *supra* note 15.

contains a finding as to whether material injury is or is not, in fact, threatening a U.S. industry. The final investigation, thus, is an elaboration of the preliminary investigation.

*B. International Trade Law and Practice:
The General Agreement on Tariffs and Trade (GATT)*

1. Development of GATT

After World War II, a few major countries, primarily the United States, United Kingdom, and France, started negotiations to form the International Trade Organization (ITO).²⁸ The ITO was to be an international agreement designed to address postwar protectionist trade controls in an orderly fashion.²⁹ GATT is all that remains of the early ITO negotiation efforts. GATT was initially meant only to be a temporary multinational trade agreement, one of the first, that was to later be incorporated into the ITO.³⁰ GATT's charter was signed by twenty-three governments on October 30, 1947.³¹ It entered into force on January 1, 1948.³²

Hope that the ITO would become a specialized agency of the United Nations faded in 1950 when the United States refused to ratify its

28. The ITO, along with the International Monetary Fund (IMF), and the International Bank for Reconstruction and Development (World Bank or IBRD), were all part of the system created at Bretton Woods. The hope was to initiate a new world order. Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349, 352 (1995).

29. ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 5-7 (2d ed. 1990). See this reference for a comprehensive discussion of the International Trade Organization and GATT negotiations, outcomes, and the emergence of GATT. See also KENNETH W. DAM, *THE GATT: LAW AND INT'L ECONOMIC ORGANIZATION* (1970); JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969); OLIVIER LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM* (1985). For a discussion of the Uruguay Round and its results, see JEFFREY J. SCHOTT & JOHANNA W. BUURMAN, *THE URUGUAY ROUND: AN ASSESSMENT* (1994).

30. HUDEC, *supra* note 29, at 50-51.

31. *Id.* at 50.

32. GENERAL AGREEMENT ON TARIFFS AND TRADE, TEXT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) preface, GATT Sales No. GATT/1986-4 (1986). Unless otherwise stated, all references to various Articles and provisions of GATT are from this source.

charter.³³ This is when GATT emerged as an informal international body.³⁴ It was not until ten years later that GATT started to take on a more permanent organizational structure.³⁵

During the first decade of GATT's existence, it handled issues on an ad hoc basis. After 1958, changing economic conditions required GATT to fulfill a role which exceeded its original mandate.³⁶ These changes can be attributed to the changing membership of GATT. The post-1958 world saw the emergence of the less developed countries and their agendas, Japan's rapid growth, and the formation of the European Economic Community.³⁷ By the mid-1960s, GATT had transformed into a large, bureaucratic international organization.³⁸ In 1992, GATT was a binding agreement on 105 countries which together accounted for approximately 90 percent of the world trade in merchandise. The Agreement was also applied by an additional 27 countries on a de facto basis and numerous countries and international organizations had observer status.³⁹ The latest round of negotiations, the Uruguay Round, took seven years. The fruits of the negotiations were adopted in April 1994.⁴⁰ The Uruguay Round resulted in the most comprehensive set of international trade agreements to date.⁴¹

33. HUDEC, *supra* note 29, at 59-61. Although the ITO was to be a specialized agency of the UN, GATT never was, and is not today. Since the adoption of the Uruguay Round negotiations in 1994 the GATT has been part of the World Trade Organization (WTO). SCHOTT & BUURMAN, *supra* note 29, at 14. The WTO acts as an administrative body that unifies the new and existing GATT/WTO obligations. Dillon, *supra* note 28, at 355-73.

34. AMERICAN TARIFFS LEAGUE, *THE STORY BEHIND GATT: FACTS ABOUT THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND THE ORGANIZATION FOR TRADE COOPERATION* 20-21 (1955); HUDEC, *supra* note 29, at 67.

35. HUDEC, *supra* note 29, at 209.

36. *Id.* at 209.

37. *Id.*

38. *Id.*

39. GENERAL AGREEMENT ON TARIFFS AND TRADE, *GATT: WHAT IT IS AND WHAT IT DOES* 1-4 (1992).

40. SCOTT & BUURMAN, *supra* note 29, at 3. Talks began in September 1986 at Punta del Este, Uruguay (source of "Uruguay Round" designation), and ended in late 1993. *Id.* The WTO and its Agreements entered into force on January 2, 1995. Dillon, *supra* note 28, at 349 n.*.

41. Because the dispute discussed in this article was initiated before the Uruguay Round was completed, these negotiations will be referred to only to note some of the differences between the old agreements and the new ones.

2. *Settling Disputes Under GATT*⁴²

The GATT has not always used panels to settle disputes, nor does the text of the GATT mention their use.⁴³ The use of panels has evolved through custom.⁴⁴ Initially, disputes were resolved by a simple procedure and a remedy was available whether or not a benefit granted under GATT was being impaired or nullified.⁴⁵ Early sugges-

42. A considerable amount has been written about settling disputes under the GATT. *See supra* note 29; Dillon, *supra* note 28 (providing a comprehensive look at the general history and negotiations of GATT and the WTO and the structure, scope and function of the new GATT/WTO dispute settlement process); Samuel C. Straight, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216 (1995); *see also* G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995) (looking at both the old and new GATT settlements and negotiating histories, and how GATT applies to various economic theories). For an easy to follow flow chart of how disputes in GATT proceed, refer to SCHOTT & BUURMAN, *supra* note 29, at 127, fig. 1.

43. GATT, *supra* note 32.

44. Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series No. 16: Settling Disputes in the GATT: The Past, Present, and Future*, 24 INT'L LAW 519, 521 (1990).

45. HUDEC, *supra* note 29, at 52; GATT, *supra* note 32, arts. XXII, XXIII. Articles XXII and XXIII comprise the dispute settlement provisions of GATT. They have been elaborated upon by various Agreements. Articles XXII (Consultation) and XXIII (Nullification or Impairment) state:

XXII: (1) Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

(2) The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

XXIII: (1) If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that attainment of any objective of the Agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any situation,

tions to have disputes settled by the International Court of Justice had been rejected.⁴⁶ By the third session of GATT, disputes were referred to informal, third party decision makers, acting within working parties.⁴⁷

However, at that time, the working parties were not meant to render decisions.⁴⁸ By early 1950, an improved method to settle disputes was being sought.⁴⁹

In 1952, during the seventh GATT session, a single panel was formed to hear all complaints.⁵⁰ The panel would hear arguments from the concerned parties, comments from interested parties, and would then meet alone to draft its report.⁵¹ The final report would be issued after

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

(2) If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or obligation is in fact suspended, that contracting party shall be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdrawal from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

46. HUDEC, *supra* note 29, at 52.

47. *Id.* at 78.

48. *Id.*

49. *Id.* at 79.

50. *Id.* at 85. Prior to this individual working parties were established for each dispute.

51. *Id.* at 86-87.

consultation with the concerned parties to the dispute.⁵² The panel procedure became recognized as the process to settle bilateral disputes during the tenth session in 1955.⁵³ It was not until the 1979 Understanding on Dispute Settlement Procedures that these unwritten rules became codified.⁵⁴

Panels are usually comprised of three members, chosen by the Director-General of GATT.⁵⁵ Parties directly involved in the dispute are not allowed to be represented on the panel.⁵⁶ Those that do serve on a panel are supposed to serve in their individual capacity, for the good of GATT, and not as governmental representatives.⁵⁷ Panels are allowed to request information and technical advice from qualified individuals.⁵⁸ Their purpose is to render an objective decision.⁵⁹ If any contracting party feels it has been harmed by another contracting party, it can start the procedures to establish a panel.⁶⁰

At the time of the Norway-U.S. salmon dispute, the procedure governing dispute resolution by panel had four basic steps:

52. *Id.* at 87.

53. *Id.* at 91-92.

54. Pierre Pescatore, *The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects*, 27 J. WORLD TRADE 5, 6 (1993). These procedures were further modified at the mid-term review of the Uruguay Round in 1989. *Id.* The new procedures were provisionally adopted on a trial basis until the end of the Round. See Improvements to the GATT Dispute Settlement Rules and Procedures, 28 I.L.M. 1031 (1989). They have become operative under the WTO, as codified in the Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 33 I.L.M. 112 (1994), reprinted in THE FINAL TEXTS OF THE URUGUAY ROUND AGREEMENTS INCLUDING THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION AS SIGNED ON APRIL 15, 1994 (Office of the United States Trade Representative ed. 1994) at 353 [hereinafter Dispute Settlement Understanding]. See Dillon, *supra* note 28, at 357-359.

55. Pescatore, *supra* note 54, at 7-9. Panels can also be comprised of five members.

56. Bello & Holmer, *supra* note 44, at 522.

57. *Id.*

58. *Id.*

59. *Id.*

60. Pescatore, *supra* note 54, at 7. See also Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, 4 J. INT'L ARB. 53 (1987) for a more complete discussion of how a Panel functions.

1. There had to be a consultation between the Contracting Parties having the dispute in an attempt to settle their differences on their own; if that failed,⁶¹
2. The complaining party could then ask the GATT Council to create a panel;
3. Once the panel was created, the parties would argue their case before the independent panel which then made findings and recommendations to the GATT Council;
4. The GATT Council would decide if it should adopt the panel's report.⁶²

Any Contracting Party, including either of the parties involved in the dispute, could block the Council's adoption of the report.⁶³ If a panel report is not adopted, GATT does not publish it, nor will its recommendations be binding on the offending Party or become precedent for future GATT determinations.⁶⁴

Until the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (Dispute Settlement Understanding), there was no right to appeal an unfavorable Panel Report.⁶⁵ This understanding establishes a standing Appellate Body to hear appeals from panel

61. Consultations between members are now optional. Straight, *supra* note 42, at 223.

62. Bello & Holmer, *supra* note 44, at 523. Steps two through three are substantially the same today. Pescatore, *supra* note 54, at 7-16. The GATT Council consists of the Assembly of CONTRACTING PARTIES. The member countries or organizations of GATT were once referred to as the CONTRACTING PARTIES. However, today they are referred to as the Members of the WTO. Straight, *supra* note 42, at 222 n.34. This paper will utilize the older terminology.

63. Bello & Holmer, *supra* note 44, at 523. Today, only a consensus is required to adopt a Panel Report, but appeals are allowed. This almost ensures that under the present system, Panel Reports will be adopted, unmodified. Dillon, *supra* note 28, at 376.

64. Erwin P. Eichmann, *Procedural Aspects of GATT Dispute Settlement: Moving Towards Legalism*, 8 INT'L TAX & BUS. LAW. 38, 60 (1990).

65. Bello & Holmer, *supra* note 44, at 523; Dispute Settlement Understanding, *supra* note 54. This Understanding was agreed to during the Uruguay Round of negotiations, recently completed. Only parties to the dispute can appeal a panel decision, and they can appeal only points of law and legal interpretation. *Id.* paras. 17.4 and 17.6.

decisions.⁶⁶ The Dispute Settlement Understanding also requires a consensus against the adoption of panel and Appellate Body reports before they are rejected. Because of this, the parties involved in a dispute cannot now singlehandedly block the adoption of such reports.⁶⁷

If and when a Panel Report is adopted by the GATT Council, the issue of enforcement arises.⁶⁸ Because panel recommendations are simply recommendations, it is up to the disputing parties to comply.⁶⁹ If a party fails to come into compliance with the panel's recommendations, international pressure may be required. In such cases, enforcement must often be worked out diplomatically.⁷⁰ These situations often favor stronger countries who can back up retaliation threats.⁷¹

3. *Status of GATT Under U.S. Law in 1992*

The status of GATT in U.S. law is unique.⁷² Because GATT is an international treaty to regulate foreign commerce, it should have been

66. Dispute Settlement Understanding, *supra* note 54, para. 17.1. The Dispute Settlement Body charged with administering the Understanding was established in the Agreement Establishing the World Trade Organization (WTO). *Id.* para. 2.1. This body is given the task of creating the appellate body. *Id.* para. 17.1. For a more complete discussion of dispute settlement under the World Trade Organization, *see supra* note 42; and *WTO Briefing: The WTO Dispute Settlement Mechanism*, GATT FOCUS NEWSL. May 1994, at 12.

67. *Id.* at 12-13; *see also supra* note 63.

68. The new GATT dispute settlement process allows for three levels of relief for the complaining party. First, respondents' non-complying measures can be brought into compliance. Dillon, *supra* note 28, at 376. Second, the complaining party may receive compensation for the sustained injury if the respondent does not bring the non-complying measures into compliance. *Id.* Third, if the parties cannot reach an agreement as to the appropriate compensation, the complaining party can retaliate within the same sector and agreement under which the non-complying nation is deficient or, if the complaining party believes that retaliation will be insufficient, it can seek authorization to retaliate across the sectors and agreements. *Id.*

69. Eichmann, *supra* note 64, at 66.

70. *Id.* Under the new GATT, there are no direct enforcement provisions, but a suspension of concessions and obligations under the Agreement in dispute can be used (i.e. a suspension of low tariff rates). *Id.*; *see also* Dillon, *supra* note 28, at 376.

71. Pescatore, *supra* note 54, at 15.

72. This discussion reflects the status of GATT under U.S. law in 1992. Since the end of the Uruguay Round negotiations, the 103d U.S. Congress has enacted enabling legislation. Straight, *supra* note 42, at 219. Although this discussion no longer reflects the status of GATT, it is important to an understanding of the legal background of the dispute discussed in this article.

presented to the U.S. Senate for acceptance.⁷³ However, GATT was signed by President Truman as an Executive Agreement and Congress never officially accepted it.⁷⁴ Since President Truman's acceptance of GATT, Congress had been careful to neither accept nor reject GATT while drafting U.S. trade law.⁷⁵ In the absence of Congressional action, the domestic legal validity of GATT has largely been established by case law,⁷⁶ and judicial interpretations of GATT's status have generally viewed the agreement as binding.⁷⁷

III: CASE STUDY: NORWEGIAN FARMED SALMON IMPORTS INTO THE UNITED STATES

A. Preliminary Determinations by the USITC and USITA

Countervailing and antidumping duty investigations under U.S. law can begin in two ways. The first is for the U.S. International Trade Administration (USITA) to start an investigation on its own.⁷⁸ The second is for an interested party to file a petition with the USITA and the USITC.⁷⁹ Following this second route, twenty-one Maine and

73. Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479, 480 (1990). For a more detailed discussion of this topic, see *id.*; Thomas William France, *The Domestic Legal Status of the GATT: The Need for Clarification*, 51 WASH. & LEE L. REV. 1481 (1994); David A. Gantz, *A Post-Uruguay Round Introduction To International Trade Law In the United States*, 12 ARIZ. J. INT'L & COMP. L. 1 (1995).

74. Brand, *supra* note 73, at 482. In light of the public distrust of international institutions after World War II, President Truman was forced not to seek Senate ratification for the ITO. President Truman adopted GATT by executive act to similarly avoid a controversy with Congress. *Id.*

75. *Id.* at 485. However, Congress authorized payment of GATT dues starting in 1974. *Id.*

76. *Id.* at 486.

77. *Id.* GATT's Binding nature seems more securely established with regard to state law than federal law. Federal decisions seem to imply the legal binding authority of GATT, without explaining the source of that authority. *Id.* at 489.

78. 19 U.S.C. §§ 1671a(a), 1673a(a) (1994). Section 1671 deals with countervailing duty investigations and section 1673 with antidumping duty investigations. Such investigations are to be commenced by the administering authority whenever it determines, from information available to it, that a formal investigation is warranted. *Id.* For a more complete explanation of administrative procedures of the USITA and the USITC see Gantz, *supra* note 73.

79. 19 U.S.C. §§ 1671a(b), 1673a(b) (1994); see also *supra* note 15.

Washington Atlantic salmon producers, forming the Coalition for Fair Atlantic Salmon Trade (FAST), filed a petition on February 28, 1990, alleging that a U.S. industry was being "materially injured or threatened with material injury" due to subsidized imports of fresh and chilled Atlantic salmon from Norway and also that the subject imports were being sold at less than fair market value (LTFV) in the United States.⁸⁰ FAST wanted the USITA and USITC to investigate whether the Norwegian Atlantic salmon farming industry was being subsidized, and whether Norwegian farmed Atlantic salmon was being sold at less than fair value in the United States resulting in harm to the domestic industry.

After receiving the petition, the USITA then had to determine whether there were grounds to proceed with an affirmative determination or whether the investigation was to be terminated.⁸¹ The USITA preliminarily determined that the subject imports were receiving subsidies, estimated at 2.45 percent *ad valorem*⁸² for all imports, from the Norwegian government.⁸³ The USITA also preliminarily determined that the subject imports were or were likely to be sold at less than fair

80. U.S. INT'L TRADE COMM'N, USITC PUB. 2272, FRESH AND CHILLED ATLANTIC SALMON FROM NORWAY: DETERMINATION OF THE COMMISSION IN INVESTIGATION NO. 701-TA-302 AND 731-TA-454 (PRELIMINARY) UNDER THE TARIFF ACT OF 1930, TOGETHER WITH THE INFORMATION OBTAINED IN THE INVESTIGATION 1 (1990) [hereinafter USITC PRELIMINARY]. All of the actions in this paper relate to fresh Atlantic salmon, defined as:

fresh whole and nearly-whole Atlantic salmon, including cleaned and/or gutted fresh Atlantic salmon, whether or not with the head. Atlantic salmon is the species *Salmo salar*. Fresh Atlantic salmon is generally marketed packed in ice ('chilled'). Excluded from the subject product are fresh Atlantic salmon fillets, steaks, or other cuts; Atlantic salmon that is frozen, canned, smoked, or otherwise further processed; and other species of fish, including other species of salmon, and their meats.

Id.

81. 19 U.S.C. §§ 1671a(c)-(d), 1673a(c)-(d) (adminstrating authority shall determine whether the petition alleges the elements necessary for the imposition of a duty within 20 days after petition is filed).

82. BLACK'S LAW DICTIONARY 51 (6th ed. 1990) defines an *ad valorem* duty as "when the duty is laid in the form of a percentage of the value."

83. Preliminary Affirmative Countervailing Duty Determination; Fresh and Chilled Atlantic Salmon from Norway, 55 Fed. Reg. 26,727 (Dep't Comm. 1990). The following Norwegian programs were found to preliminarily confer subsidies: Regional Development Fund Loans and Grants, National Fishery Bank of Norway Loans, Regional Capital Tax Incentive, Reduced Payroll Taxes, Advance Depreciation of Business Assets, and, Government-Funded Research and Development. *Id.* at 26,727-28.

value.⁸⁴ The USITA published these preliminary determinations in June and October of 1990.⁸⁵

B. The USITC Final Determination

Following the preliminary affirmative investigation,⁸⁶ the USITC instituted a final investigation as to whether sales of imported Norwegian salmon had been subsidized by the Norwegian government and sold at less than fair value, injuring the U.S. industry.⁸⁷ In making its decisions the USITC had to determine what comprises "like product" and "domestic industry" under the statute.⁸⁸ Some of the factors the USITC

84. Preliminary Determination of Sales at Less Than Fair Value; Fresh and Chilled Atlantic Salmon from Norway, 55 Fed. Reg. 40,418 (Dep't Comm. 1990). Margin percentage of sales at LTFV were determined to be between .13 and 4.76 percent, depending on the exporter. *Id.* at 40,421.

85. 55 Fed. Reg. 26,727; 55 Fed. Reg. 40,418.

86. USITC PRELIMINARY, *supra* note 80, at 30. As discussed above, preliminary and final determination investigations are very similar, the primary difference being the standard of review utilized. See *supra* notes 25-27 and accompanying text. Because of this, only the final determination investigation will be discussed in the text.

87. UNITED STATES INT'L TRADE COMM'N, USITC PUB. 2371, FRESH AND CHILLED ATLANTIC SALMON FROM NORWAY: DETERMINATION OF THE COMMISSION IN INVESTIGATIONS NO. 701-TA-302 AND 731-TA-454 (FINAL) UNDER THE TARIFF ACT OF 1930, TOGETHER WITH THE INFORMATION OBTAINED IN THE INVESTIGATION 1-2 (1990) [hereinafter USITC FINAL]. After the preliminary determination, the USITC has seventy-five days, unless otherwise allowed, to make a final determination as to whether:

(1)(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise with respect to which the administering authority has made an affirmative determination

19 U.S.C. §§ 1671d(b), 1673d(b) (1994). The term "material injury" is defined as harm which is not inconsequential, immaterial, or unimportant. 19 U.S.C. § 1677(7)(A) (1994). A discussion of how the various agencies and courts have defined these terms is beyond the scope of this paper.

88. "Domestic like product" is a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to [a countervailing duty or antidumping] investigation 19 U.S.C. § 1677(10) (1994). For a more complete discussion of the concept, negotiation history, and an analysis of like product in GATT cases, see Rex J. Zedalis, *A Theory of the GATT "Like" Product Common Language Cases*, 27 VAND. J. TRANSNAT'L L. 33 (1994).

"Industry" is defined, under federal law, as: "the producers as a whole of a

considers in making a like product determination are: "(1) physical characteristics and uses, (2) interchangeability, (3) channels of distribution, (4) customer and producer perceptions, (5) common manufacturing facilities and employees, and (6) price."⁸⁹ For the purposes of this investigation, the USITC determined that the product in the United States most "like" the subject import was fresh and chilled Atlantic salmon.⁹⁰

The USITC decided not to include the different Pacific salmon species as "like product" due to several distinctions between them and Atlantic salmon.⁹¹ First, the Atlantic and the various Pacific salmon species were judged to be different species and genera.⁹² Pacific salmon was also not included as a "like product" because of the difference in methods of production in the two industries.⁹³ Pacific salmon are generally harvested wild, while Atlantic salmon are farmed in both the United States and in Norway due to bans on the commercial catch of Atlantic salmon.⁹⁴ The two methods result in completely different "processes, equipment, and employees."⁹⁵

The third distinction between Pacific and Atlantic salmon was the limited interchangeability between the two species.⁹⁶ This limited

domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." 19 U.S.C. § 1677(4)(A) (1994).

89. USITC FINAL, *supra* note 87, at 3. Again, functional definitions of these terms are beyond the scope of this Article. However, the actions taken in these investigations shed some light on their meanings.

90. This determination was initially made during the preliminary investigation. *Id.* at 4. All of the actions in this paper relate to fresh Atlantic salmon, defined as in footnote 80 *supra*.

91. If the various Pacific species, with their lower average unit price, had been included in the definition, there would have been a smaller difference between the average (lower) price of Norwegian salmon and U.S. salmon. This might have eliminated any duties assessed.

92. USITC FINAL, *supra* note 87, at 6. Pacific salmon consists of five species, chinook, sockeye, chum, pink, coho; whereas Atlantic salmon is comprised of only one species, *Salmo salar*. Pacific and Atlantic salmon belong to different genera as well. *Id.* at 4-6.

93. *Id.* at 5-6.

94. *Id.* at 5. Norway argued that the differences in production of Pacific and Atlantic salmon should not be considered because the differences are the result of the legal prohibition on the commercial catch of Atlantic salmon, and not from inherent differences between the fish. *Id.* The USITC did not agree with this argument. *Id.*

95. *Id.*

96. *Id.* at 6.

interchangeability is due to the fact that most Pacific salmon is eventually frozen or canned, and exported, whereas most Atlantic salmon is sold fresh in the United States.⁹⁷ In addition, because Atlantic and Pacific salmon are processed differently, they pass through different channels of distribution. This was the fourth distinction.⁹⁸ The different channels of distribution and processing methods result in the fifth difference, lower prices.⁹⁹ Because frozen and canned salmon generally do not “share similar distribution channels or end-users [as fresh salmon] . . . the former [Pacific salmon] is largely sold to further processors and resold in the lower-end of the market in value-added form, whereas Atlantic salmon is sold largely for resale to restaurants, the so-called white tablecloth market.”¹⁰⁰ The USITC included Atlantic salmon smolts within its definition of “like product,” however, because, although smolts and adult salmon are not interchangeable, smolts have no other use than to become adult salmon.¹⁰¹

Because the USITC had determined in its preliminary investigation that a U.S. Atlantic salmon industry was established¹⁰² and because no new evidence was presented in contradiction to that conclusion, the USITC proceeded to consider whether that domestic industry was materially injured or threatened with material injury by LTFV imports and/or subsidized imports from Norway.¹⁰³ In determining the condition of the domestic industry, the USITC accounted for two distinct characteristics of the industry: 1) although established, the industry was still young and emerging, and 2) a three-year production cycle governs the Atlantic salmon farming industry.¹⁰⁴ The USITC determined that the domestic Atlantic salmon industry was being materially injured due to

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* Although this is the reasoning the USITC used, a trip to a local fish market or fish counter at a large supermarket will most likely yield inexpensive fresh Atlantic salmon.

101. *Id.* at 9.

102. USITC PRELIMINARY, *supra* note 80, at 16-17.

103. USITC FINAL, *supra* note 87, at 10-11. Were there no U.S. industry in existence, the determination of the USITC would have focused on whether the development of a U.S. industry was being materially retarded by the subject import. 19 U.S.C. §§ 1671(a)(2)(B), 1673(2)(B) (1994).

104. USITC FINAL, *supra* note 87, at 12.

negative financial performance and a leveling in the production of smolts in spite of growing U.S. demand.¹⁰⁵

The USITC then had to determine whether the subject imports were the cause of this material injury or of any threat thereof.¹⁰⁶ To determine this, the USITC had to consider the volume of imports, the effect of the imports on prices of like products in the United States, the impact of imports on the domestic producers of the like products, as well as other relevant economic factors.¹⁰⁷ The USITC was not required to determine that the subject imports were the primary cause of injury to make an affirmative determination, only that the subject imports were a cause of such injury.¹⁰⁸

When the USITC examined the volume and value of Norwegian imports, it noted that they rose significantly between 1987 and 1989.¹⁰⁹ Although imports increased in absolute terms, Norway's percentage of market share, by volume, decreased from in excess of 75.0 percent in 1987 to 60.2 percent in 1989.¹¹⁰ A similar decline in market share, by value terms, also occurred, from more than 75.0 percent in 1987 to 62.5 percent in 1989.¹¹¹ By 1990, imports from Norway had decreased significantly.¹¹²

The USITC discounted the decline between 1989 and 1990 because it felt the decline appeared to be "largely the result of the filing of the petition and/or the imposition of provisional antidumping and countervailing duties."¹¹³ Norway claimed that the decline in imports was due to the appreciation of the Norwegian kroner against the U.S. dollar, and the imposition of a Norwegian freezing program making less fresh

105. *Id.* at 15.

106. *Id.* This requirement is stipulated in 19 U.S.C. § 1671d(b)(1) and § 1673d(b)(1), *see supra* note 87 for relevant text of these sections.

107. 19 U.S.C. § 1677(7)(B) (1994).

108. USITC FINAL, *supra* note 87, at 16.

109. *Id.* at 16-17. When the USITC examines volume of subject imports in such an investigation, it must evaluate "whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i) (1994).

110. USITC FINAL, *supra* note 87, at 17.

111. *Id.*

112. In 1990, Norwegian imports accounted for, by volume, 36.7 percent, and, by value, 40.8 percent of apparent U.S. consumption. *Id.*

113. *Id.* The decline in imports was most pronounced after July 1990, which was after the Department of Commerce's preliminary countervailing duty determination. *Id.* at 17-18.

salmon available for export.¹¹⁴ The USITC did not believe that these factors could entirely explain the decrease in imports in the second half of 1990.¹¹⁵ Because of the above reasoning, the USITC determined that the increase in imports between 1987 and 1989 was significant, especially given information concerning the nature of the U.S. industry, the condition of the U.S. industry, and prices of like product.¹¹⁶

The USITC noted that the price for the domestic like product and the price of the subject imports closely tracked each other over much of the investigation period.¹¹⁷ The USITC blamed the decline in price between 1988 and 1989 on an oversupply of Atlantic salmon in the U.S. market.¹¹⁸ Although other factors might have contributed to depressed prices for U.S. salmon, the USITC reasoned that because Norway accounted for a large percentage of the U.S. market supply, it "played a role in the price decline."¹¹⁹ Due to this decline, U.S. producers were less able to obtain bank financing. Additionally, the USITC found that the volume of Norwegian imports and the inability of U.S. producers to secure financing were responsible for keeping U.S. producers' prices low, and kept them from recovering their costs and meeting cash flow needs.¹²⁰ Thus, the USITC found that the U.S. industry was being materially injured by the subject imports.¹²¹

Norway advanced a number of alternative factors that could have been negatively affecting the U.S. industry. It suggested various difficulties in U.S. production, third country imports, the inability of U.S. producers to market their product year-round, and the effects of the wild Pacific harvest, as all contributing to U.S. producer difficulties.

114. *Id.* at 18.

115. *Id.*

116. *Id.*

117. *Id.* at 19. When evaluating price information, the USITC must consider whether:

(I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

119 U.S.C. § 1677(7)(C)(ii) (1994).

118. USITC FINAL, *supra* note 87, at 19.

119. *Id.* This was determined in light of the fact that Norwegian Atlantic salmon generally oversold domestic U.S. Atlantic salmon. *Id.*

120. *Id.* at 20-21.

121. *Id.* at 21-22.

The USITC agreed that these factors might have contributed to U.S. difficulties, but felt that the U.S. industry nonetheless was being "materially injured by reason of subsidized and LTFV imports of fresh and chilled Atlantic salmon from Norway."¹²²

The USITA published its final duty determinations on April 12, 1991.¹²³ The USITA instituted an antidumping duty margin of 23.80 percent for all but eight Norwegian exporters.¹²⁴ For those eight exporters, the duties ranged from 15.65 to 31.81 percent.¹²⁵ The final countervailing duty order required a cash deposit of 0.71 kroner per kilogram for all subject imports.¹²⁶ Because the USITA had determined that the subject imports were being subsidized and were being sold at less than fair value, and because the USITA had determined that the subject imports were materially injuring the domestic industry, customs officers were directed to assess the said duties on the subject imports.¹²⁷ This

122. *Id.* at 22. Acting Chairman Anne E. Brunsdale dissented with the final affirmative determination. Because Norway was exporting very little salmon to the U.S. at the time of the final determination, those imports could not have materially injured U.S. producers. Instead, she blamed world market conditions, the sharp decline in Norwegian imports, and the increase in imports from other countries. *Id.* at 23-38.

123. Antidumping Duty Order: Fresh and Chilled Atlantic Salmon from Norway, 56 Fed. Reg. 14,920 (Dep't Comm. 1991), and Countervailing Duty Order: Fresh and Chilled Atlantic Salmon from Norway, 56 Fed. Reg. 14,921 (Dep't Comm. 1991).

124. Antidumping Duty Order: Fresh and Chilled Atlantic Salmon From Norway 56 Fed. Reg. 14,921 (Dep't Comm. 1991).

125. *Id.*

126. Countervailing Duty Order: Fresh and Chilled Atlantic Salmon From Norway, 56 Fed. Reg. 14,921 (Dep't Comm. 1991).

127. 19 U.S.C. § 1671e(a) (1988) (current version as amended at 19 U.S.C. § 1671e(a) (1994)) states, in part:

Assessment of Duty.

. . .

[T]he administering authority shall publish a countervailing duty order which—

(1) directs customs officers to assess a countervailing duty equal to the amount of the net countervailable subsidy determined or estimated to exist . . . within which the merchandise is entered, or withdrawn from warehouse, for consumption,

(2) shall presumptively apply to all merchandise of such class or kind exported from the country investigated, except that if—

(A) the administering authority determines there is a significant differential between companies receiving subsidy benefits . . . the order may provide for differing countervailing duties[.]

(However, a 1994 amendment to 1671e(a) has struck out paragraph 2). 19 U.S.C. § 1673e(a) (1988) (current version as amended at 19 U.S.C. § 1671e(a) (1994)) states, in

was done by requiring the importers to post a bond, cash deposit, or other security in the amount of the duty, which is ultimately passed on to consumers.¹²⁸ It is this increase in price of farmed Norwegian Atlantic salmon that is responsible for essentially eliminating the import of Norwegian salmon into the United States. It is still possible to import fresh and chilled farmed Norwegian Atlantic salmon into the United States, it is just cost prohibitive. In response to the actions taken by the USITA, Norway appealed concurrently to the U.S. Court of International Trade¹²⁹ and to GATT.¹³⁰

C. Norway's Appeal to the U.S. Court of International Trade

The U.S. Court of International Trade is the appeals body to which a country may domestically challenge final affirmative countervailing and antidumping duty determinations.¹³¹ In 1980, Congress passed the Customs Court Act of 1980, which, among other things, changed the name of the U.S. Customs Court to the U.S. Court of International Trade.¹³² The 1980 Customs Court Act also clarified and expanded the jurisdiction of the U.S. Court of International Trade in order to increase the availability of judicial review in the field of international trade.¹³³

part:

Assessment of Duty.

...

[T]he administering authority shall publish an antidumping duty order which—

(1) directs customs officers to assess an antidumping duty equal to the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise . . .

(3) requires the deposit of estimated antidumping duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited.

128. OFFICE OF INT'L AFFAIRS, NOAA, *supra* note 8, at 264.

129. CHR. Bjelland Seafoods A/C (now Norwegian Salmon A/S), et al. v. United States, et al. and Coalition for Fair Atlantic Salmon Trade, No. 91-05-00364, 1992 Ct. Int'l Trade LEXIS 213 (Ct. Int'l Trade Oct. 23, 1992).

130. See *infra* sections III(E) and (F).

131. The Honorable Gregory W. Carman, *Jurisdiction and the Court of International Trade: Remarks of the Honorable Gregory W. Carman at the Conference on International Business Practice Presented by the Center for Dispute Resolution on February 27-28, 1992*, 13 NW. J. INT'L L. & BUS. 245, 249 (1992).

132. *Id.* at 248.

133. *Id.* Until then there had been some confusion as to whether federal district courts or the Customs Court had jurisdiction in a case. *Id.*

After the USITC final affirmative determination of dumping and subsidization, Norway challenged those determinations and the associated duties that were placed on imported Norwegian salmon in the U.S. Court of International Trade.¹³⁴ The court does not "conduct a *de novo*"¹³⁵ review of determinations by [the USITA] and [the USITC] in anti-dumping and countervailing duty cases."¹³⁶ Rather, the court is "charged to hold unlawful any determination which is not supported by substantial evidence on the record, or otherwise not in accordance with law."¹³⁷ Norway argued against three specific aspects of the USITC's determination. Norway argued that: 1) the USITC improperly discounted the volume of imports in 1990, thereby incorrectly finding that the volume of Norwegian imports was at a significant level; 2) there was not substantial evidence to support the USITC's finding that the volume of imports significantly depressed prices; and 3) the finding that imports from Norway were adversely affecting the domestic industry at the time of the final USITC determination was faulty and contrary to law.¹³⁸

The Court of International Trade determined that: 1) the USITC had not properly assessed the subject imports in 1990; 2) there was not significant evidence to support the final determination of injury when it was made at the time of the determination; and 3) that the determination of injury was, therefore, contrary to law.¹³⁹ The court thereby reversed and remanded the final USITC determination.¹⁴⁰

The USITC had given less weight to 1990 import data, which showed a marked decrease in imports from 1989, because the decrease was most pronounced after the USITC had instituted preliminary countervailing duties.¹⁴¹ Norway claimed that this was improper, specifically attributing the decrease of imports in 1990 to the appreciation

134. CHR. Bjelland Seafoods A/C (now Norwegian Salmon A/S), et al. v. United States, et al. and Coalition for Fair Atlantic Salmon, 1992 Ct. Int'l Trade LEXIS at *1-2.

135. BLACK'S LAW DICTIONARY 435 (6th ed. 1990) defines *de novo* as "a second time."

136. CHR. Bjelland Seafoods A/C (now Norwegian Salmon A/S), et al. v. United States, et al. and Coalition for Fair Atlantic Salmon, 1992 Ct. Int'l Trade LEXIS at *8.

137. *Id.*

138. *Id.* at *10.

139. *Id.* at *11.

140. *Id.* Because the court reversed the USITC decision on other grounds, the court did not look at the price depression complaint. *Id.*

141. *Id.* at *14-*15.

of the Norwegian kroner against the U.S. dollar.¹⁴²

The court noted evidence that imports had decreased as the kroner appreciated.¹⁴³ It also found that imports from one exporter which was found not to be receiving subsidies, and therefore did not have countervailing duties leveled against it, had also decreased dramatically during 1990.¹⁴⁴ The court noted that the USITC had failed to sufficiently account for the possibility of the effects of the appreciated kroner.¹⁴⁵ The court also found that the USITC failed to account for the fact that exports of Norwegian salmon to the European Community increased during similar investigations.¹⁴⁶

Additionally, the USITC and Norway differed in their interpretation of "present injury."¹⁴⁷ This forced the court to examine the issue. The USITC argued that the continuing effects of a past injury can constitute present injury.¹⁴⁸ Norway argued that the injury must be currently happening to constitute present injury.¹⁴⁹ The court decided that it had to determine whether "imports from Norway were causing present material injury to the domestic industry at the time of the [USITC's] determinations."¹⁵⁰ The court held that the USITC could not base present injury on lingering effects of past injury.¹⁵¹ The court reasoned that basing its decision on such lingering effects would "frustrate the solely remedial purposes of the antidumping and countervailing duty statutes, which are intended to 'equalize competitive conditions between the exporter and American industries affected'."¹⁵² Thus, the Court reversed USITC's final determination and remanded the case to that body.¹⁵³

142. *Id.* at *15.

143. *Id.* at *16-*17.

144. *Id.* at *17-*18.

145. *Id.* at *18.

146. *Id.* at *19.

147. *Id.* at *20.

148. *Id.*

149. *Id.*

150. *Id.* at *23.

151. *Id.* at *28.

152. *Id.*

153. *Id.* at *28-*29.

D. USITC Views on Remand

The Court of International Trade, thus, indicated two errors in the final USITC determination.¹⁵⁴ First, it indicated that the USITC had not sufficiently explained the 1990 decrease in volume of Norwegian imports.¹⁵⁵ This decrease was to be examined on remand. The USITC was to take into account the appreciation of the Norwegian kroner against the U.S. dollar. It was also to examine an increase in Norwegian exports to the EC, in light of similar investigations, as well as evidence that one Norwegian exporter, not subject to duties, had also decreased its exports to the United States during the period of investigation.¹⁵⁶

On remand, the USITC again found that the appreciation of the kroner did not account for all of the decline in 1990 imports.¹⁵⁷ This finding was based partially on the observation that the price charged for Norwegian salmon did not increase in proportion to the appreciation of the kroner, as would be expected.¹⁵⁸ Although Norwegian exports to the EC did not decline during similar investigations, the USITC did not believe that this detracted from its finding that its investigation resulted in reduced Norwegian exports to the United States.¹⁵⁹ One factor supporting this finding was that the EC, during their investigations, did not impose provisional antidumping duties.¹⁶⁰ For the above reasons, the USITC again determined that the 1989-1990 decline in Norwegian imports was due largely to its investigations.¹⁶¹

Second, the Court of International Trade found that the USITC had improperly determined present injury by basing its finding of a negative impact on the domestic industry on 1989 data, not 1990 data.¹⁶² The court wanted the USITC to make a determination on present injury based on the evidence at the time of its initial final determination.¹⁶³

154. UNITED STATES INT'L TRADE COMM'N, USITC PUB. 2589, VIEWS ON REMAND IN INVESTIGATIONS NOS. 701-TA-302 AND 731-TA-454 (FINAL) 1 (1992) [hereinafter USITC REMAND].

155. *Id.*

156. *Id.* at 2.

157. *Id.* at 10.

158. *Id.*

159. *Id.* at 12.

160. *Id.*

161. *Id.* at 13.

162. *Id.* at 2.

163. *Id.*

On remand, the USITC decided to limit its price data on the subject imports to pre-July 1990.¹⁶⁴ The USITC did not feel the court's decision precluded this approach, as long as the USITC explained why it did this.¹⁶⁵ The USITC did not want to use the post-June 1990 price data because that data would have reflected the intended results of the duties.¹⁶⁶ The USITC determined that pre-July 1990 price data and the large amount of LTFV salmon from Norway in the first half of 1990 was affecting the price for domestic salmon, and supported its earlier determination that present injury was occurring.¹⁶⁷ The USITC also noted that the subject imports hindered the domestic industry from obtaining capital and investment.¹⁶⁸

In accordance with the above reasoning, the USITC reaffirmed its earlier affirmative determinations.¹⁶⁹ However, Vice Chairman Watson and Commissioners Brunsdale and Crawford dissented with the above views, because they did not feel the domestic industry was experiencing present injury at the time of the USITC final determination.¹⁷⁰

164. *Id.* at 15.

165. *Id.*

166. *Id.*

167. *Id.* at 16.

168. *Id.* at 20.

169. *Id.*

170. *Id.* at 35. The USITC commission was comprised of six members: Chairman, Don E. Newquist; Vice-Chairman, Peter S. Watson; and four commissioners, David B. Rohr, Anne E. Brunsdale, Carol T. Crawford, and Janet A. Nuzum. *Id.* at inside cover. A tie vote is considered an affirmative determination.

Following these actions, including the international actions discussed in the following chapter, the USITA reviewed some of its decisions. The USITA has corrected clerical and mathematical errors and conducted administrative reviews for some or all Norwegian exporters, but has upheld that some level of margin exists. Fresh and Chilled Atlantic Salmon from Norway; Final Results of Antidumping Duty Administrative Review, 58 Fed. Reg. 37,912 (Dep't Comm. 1993); Fresh and Chilled Atlantic Salmon from Norway; Preliminary Results of Antidumping Administrative Review, 58 Fed. Reg. 65,333 (Dep't Comm. 1993); Fresh and Chilled Atlantic Salmon from Norway; Final Results of Antidumping Duty Administrative Review, 59 Fed. Reg. 12,242 (Dep't Comm. 1994); Fresh and Chilled Atlantic Salmon From Norway; Partial Termination of Antidumping Duty Administrative Review, 59 Fed. Reg. 47,610 (Dep't Comm. 1994); Fresh and Chilled Atlantic Salmon from Norway; Amended Final Results of Antidumping Duty Administrative Review, 60 Fed. Reg. 11,070 (Dep't Comm. 1995); Fresh and Chilled Salmon From Norway; Preliminary Results of Antidumping Duty Administrative Review, 60 Fed. Reg. 49,579 (Dep't Comm. 1995); Fresh and Chilled Atlantic Salmon From Norway; Termination In-Part of New Shipper Antidumping Duty Administrative Review, 60 Fed. Reg. 53,162 (Dep't Comm 1995); Fresh and Chilled Atlantic Salmon

As noted above, Norway challenged the duties imposed by the United States both before the U.S. Court of International Trade and under GATT. In contrast to the USITA and the USITC who essentially treated the countervailing and antidumping investigations as one investigation, at Norway's request, GATT established two separate dispute settlement panels to deal with each aspect of the case.

E. GATT Countervailing Duty Determination

GATT's Committee on Subsidies and Countervailing Measures established a Panel to review the affirmative finding by the USITC that countervailing duties¹⁷¹ should be imposed on the import of fresh and chilled Atlantic salmon from Norway. Norway requested that this panel find that the U.S. imposition of countervailing duties was inconsistent with its international obligations under the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, April 12, 1979 (the Agreement).¹⁷² Norway specifically asked the panel to find: 1) that originating the countervailing duty investigation was contrary to Article 2:1 of the Agreement; 2) that imposing countervailing duties related to Regional Development Fund programs was contrary to Article 11 of the Agreement; 3) that the calculation of the amount of subsidies by the U.S. agencies was contrary to Article 4:2 of the Agreement; 4) that the USITC's finding of material injury was inconsistent with Article 6 of the Agreement; and 5) that continuing the use of the countervailing duties

From Norway: Termination of New Shipper Antidumping Duty Administrative Review, 60 Fed. Reg. 58,043 (Dept. Comm. 1995); and Fresh and Chilled Atlantic Salmon From Norway; Antidumping Duty Administrative Review; Time Limits, 61 Fed. Reg. 26,878 (Dep't Comm. 1996).

171. Article VI:3 of GATT defines a countervailing duty as: "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." GATT, *supra* note 32, at 10. Norway requested that a Panel be established by the Committee on Subsidies and Countervailing Measures on August 22, 1991. A Panel was established on September 26, 1991. SCM/153, *supra* note 10, at 4.

172. SCM/153, *supra* note 10, at 7. The Agreement is reprinted in 31 U.S.T. 513, 1186 U.N.T.S. 204 (1987). The Agreement entered into force on January 1, 1980 for Norway and the U.S. 1186 U.N.T.S. at 204. Article VI of GATT concerns antidumping and countervailing duties; Article XVI concerns subsidies; and Article XXIII deals with nullification or impairment (dispute settlement). GATT, *supra* note 32.

was inconsistent with Article 4:9 of the Agreement.¹⁷³ Norway originally asked the panel to request the United States to remove the countervailing duties. It later expanded that request to include U.S. reimbursement of any duties already paid.¹⁷⁴

The United States also asked the panel for some determinations. It wanted the panel to find that the USITC's determinations were consistent with the obligations of the United States under the Agreement. The United States asked the panel to find: 1) that the Department of Commerce's determination of countervailable subsidies was consistent with Part I of the Agreement; 2) that the calculation of the amount of countervailing duties was consistent with Article 4:2 of the Agreement; and 3) that the determination of material injury was consistent with Article 6 of the Agreement.¹⁷⁵

1. *The Arguments of the Parties*

a. Article VI as an Exception to GATT

Article VI of GATT is concerned with antidumping and countervailing duties and gives countries a way to protect themselves, under GATT, against what they believe to be unfair trade subsidies. Article VI condemns practices which materially injure the industries of other countries and permits antidumping and countervailing duties to be levied upon a proper showing.¹⁷⁶ Norway argued that Article VI is an

173. SCM/153, *supra* note 10, at 7.

174. *Id.*

175. *Id.* at 8.

176. GATT, *supra* note 32, at 10-11. Article VI of GATT, Anti-dumping and Countervailing Duties, Sections one and two deal solely with anti-dumping practices. The rest of Article VI states, in part:

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product . . .

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

exception to Articles I and II of GATT, and therefore must be interpreted narrowly, in view of the fact that the primary objective of GATT is to reduce tariff rates on a Most Favored Nation basis.¹⁷⁷ It stated that the party using this exception, the United States in this instance, carried the burden of proof, and had to demonstrate that it had considered all the necessary criteria.¹⁷⁸ It was Norway's contention that the United States had not met these requirements.¹⁷⁹

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(b) The CONTRACTING PARTIES may waive the requirement of subparagraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of subparagraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. Waivers under the provisions of this sub-paragraph shall be granted only on application by the contracting party proposing to levy an anti-dumping or countervailing duty, as the case may be.

(c) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in sub-paragraph (b) of this paragraph without the prior approval of the CONTRACTING PARTIES; Provided that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

177. SCM/153, *supra* note 10, at 19, 22. Article I of GATT relates to Most-Favored-Nation treatment. Article II relates to schedules of concessions. GATT, *supra* note 32.

178. *Id.* at 19.

179. *Id.*

The United States argued that the drafting, language and practice of the contracting parties in the past demonstrated that Article VI was not an exception.¹⁸⁰ It relied partly on the strong language of Article VI, stating that language such as "condemned" was not indicative of exceptions, but of obligations.¹⁸¹ The United States also argued that the GATT drafters placed exceptions at the end of Part II and not at the beginning, like Article VI. It also noted that exceptions were labeled as exceptions, which Article VI is not.¹⁸² In addition, the United States pointed to evidence in the negotiating history and practice of GATT indicating that the promotion of fair competition was, and remains, a fundamental objective of GATT.¹⁸³ For example, during initial negotiations for GATT, proposals were considered to allow the imposition of tougher countermeasures than the duties eventually included in GATT.¹⁸⁴

*b. Initiation of the Countervailing Duty Investigation:
Article 2:1 of the Agreement*

Article 2 of the Agreement concerns the domestic procedures required to initiate countervailing duties.¹⁸⁵ Norway contended that U.S.

180. *Id.*

181. *Id.* "Condemned" is located in paragraph 1 of Article VI. GATT, *supra* note 32.

182. SCM/153, *supra* note 10, at 19. The last four articles of Part II of GATT, Articles XX-XXIII are: Article XX: General Exceptions; Article XXI: Security Exceptions; Article XXII: Consultation; and Article XXIII: Nullification or Impairment. GATT, *supra* note 32.

183. SCM/153, *supra* note 10, at 21-26.

184. *Id.* at 22.

185. The Agreement, *supra* note 172, art. 2, 31 U.S.T. at 519-520, 1186 U.N.T.S. at 206. Article 2, Domestic Procedures and Related Matters, states, in part:

1. Countervailing duties may only be imposed pursuant to investigations initiated [footnote omitted] 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 [footnote omitted] and (c) a causal link between the subsidized imports and the alleged injury. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have sufficient evidence on all points

authorities did not adequately ensure that the request to initiate the investigation was filed on behalf of the domestic industry before the U.S. initiated the investigation.¹⁸⁶ It believed that the U.S. practice of assuming that the domestic industry was represented unless at least fifty percent of the concerned industry opposed the investigation, was contrary to past panel reports.¹⁸⁷

The United States argued against the importance of the panel report relied upon by Norway. First, it had not been adopted by the GATT Council. In addition, the panel report relied upon by Norway addressed the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, not the Agreement now at issue.¹⁸⁸ Furthermore, the United States argued that because the "major portion" of the domestic industry supported the petition that initiated the investigation, it had adequately demonstrated industry support and had satisfied the requirements for initiating the investigation.¹⁸⁹

c. Determination of Counter-vailable Subsidies: Article 11 of the Agreement

Article 11 of the Agreement provides that local, regional, and national subsidies are often used by governments to promote social, economic, and national interests, and that GATT should not be applied to these governmental actions, even though they might affect international trade.¹⁹⁰ Arguing that its Regional Development Fund programs,

under (a) to (c) above.

Id. The term "initiated" as used in this Agreement means "procedural action by which a signatory formally commences an investigation as provided in paragraph 3 of this Article." *Id.* 31 U.S.T. at 519 n.5, 1186 U.N.T.S. at 206 n.t. Also, under this Agreement the term "injury" shall, unless otherwise specified, be defined as "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." *Id.* 31 U.S.T. at 519 n.6, 1186 U.N.T.S. at 206 n.tt.

186. SCM/153, *supra* note 10, at 31.

187. *Id.* at 32.

188. SCM/153, *supra* note 10, at 32-33.

189. *Id.* at 31.

190. The Agreement, *supra* note 172, art. 11, 31 U.S.T. at 532-534, 1186 U.N.T.S. at 224. Article 11, Subsidies Other Than Export Subsidies, states, in part:

1. 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

providing aid to the salmon industry, involved the types of subsidies

subsidies to achieve these and other [important] policy objectives which they consider desirable. [footnote omitted] Signatories note that among such objectives are:

- (a) The elimination of industrial, economic and social disadvantages of specific regions,
- (b) To facilitate the restructuring, under socially acceptable conditions, of certain sectors, especially where this has become necessary by reason of changes in trade and economic policies, including international agreements resulting in lower barriers to trade,
- (c) Generally to sustain employment and to encourage re-training and change in employment,
- (d) To encourage research and development programmes, especially in the field of high-technology industries,
- (e) The implementation of economic programmes and policies to promote the economic and social development of developing countries,
- (f) Redeployment of industry in order to avoid congestion and environmental problems.

2. Signatories recognize, however, that subsidies other than export subsidies, certain objectives and possible forms 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.

3. Signatories recognize that the objectives mentioned in paragraph 1 above may be achieved, *inter alia*, by means of subsidies granted with the aim of giving an advantage to certain enterprises. Examples of possible forms of such subsidies are: government financing of commercial enterprises, including grants, loans or guarantees; government provision or government financed provision of utility, supply distribution and other operational or support services or facilities; government subscription to, or provision of, equity capital.

....

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

identified in Article 11 of the Agreement, Norway believed the United States erred in imposing countervailing duties in relation to these programs.¹⁹¹ It argued that the objective of these subsidies was solely to influence the localization of domestic industries. This fact, Norway believed, exempted it from GATT.¹⁹² Norway also felt the United States failed to consider whether these programs produced adverse trade affects, as required by Article 11.¹⁹³

The United States argued that Norway's salmon subsidies were countervailable and that levying a countervailing duty was consistent with Part 1 of GATT which allows a signatory nation to levy such duties to offset improper bounties or subsidies bestowed, directly or indirectly, to the subject industry.¹⁹⁴ Since the Regional Development Program loans charged a lower interest rate than commercial banks, the loans were countervailable "subsidies" or "bounties" provided on terms inconsistent with commercial considerations.¹⁹⁵ The United States further noted that nothing in GATT or the Agreement circumscribed the types of subsidies which may be subject to the imposition of countervailing duties. The plain language of each, to the contrary, expressly authorized countervailing duties against any subsidy.¹⁹⁶ In addition, Norway's contention that trade effects be considered was not relevant to the current proceedings according to the United States.¹⁹⁷

d. Calculating the amount of the Subsidies: Article 4:2 of the Agreement

Article 4:2 of the Agreement says that countervailing duties shall not be levied in excess of the amount of the subsidy.¹⁹⁸ Norway felt that the

191. SCM/153, *supra* note 10, at 37-41.

192. *Id.* at 41.

193. *Id.* at 37-41.

194. *Id.* at 37, 40.

195. *Id.* at 43.

196. *Id.*

197. *Id.* at 42.

198. The Agreement, *supra* note 172, art. 4, 31 U.S.T. at 523, 1186 U.N.T.S. at

212. Article 4, Imposition of Countervailing Duties, of the Agreement states:

2. No countervailing duty shall be levied [footnote omitted] 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. [footnote omitted]

Id. "Levy" is defined in the Agreement as "the definitive or final legal assessment or

United States had failed to consider three aspects of the subsidies, and, therefore, had miscalculated their amounts, resulting in excessive countervailing duties.¹⁹⁹

The first complaint Norway raised was that the United States failed to account for increased income and profit tax liability when it looked at the reduction of payroll taxes levied on the industry.²⁰⁰ It pointed out that the alleged subsidy reduced deductible expenses available in calculating taxable income. The government's action actually increased the amount of taxable income, and thus, tax liability, of the industry.²⁰¹ This increase in taxable income, Norway claimed, reduced other benefits otherwise conferred by its programs. By not accounting for this result, U.S. authorities levied improper countervailing duties.²⁰²

Norway also felt that the United States had overstated the commercial long-term standard interest rate to which the Regional Development Fund loans were compared to when it calculated the amount of the Norwegian subsidy.²⁰³ Norway advanced the idea that one commercial bank in Norway, in 1990, charged a risk premium to fish farmers above the bank's standard commercial loan interest rate but not above the national average. Because of this, Norway believed the United States overstated the average commercial lending rate.²⁰⁴

The United States was also accused of failing to determine whether subsidies provided to smolt growers benefitted the exporters of the salmon in question in its third complaint.²⁰⁵ Norway stated that the assumption that subsidies to smolt growers was passed on to salmon exporters would result in an overstatement of the amount of subsidies to be countervailed. This would, in return, unjustly inflate the amount of the countervailing duties.²⁰⁶

collection of a duty [or] tax." *Id.* 31 U.S.T. at 523 n.14, 1186 U.N.T.S. at 212 n.*. The Agreement also provides that "an understanding among signatories should be developed setting out the criteria for the calculation of the amount of the subsidy." *Id.* 31 U.S.T. at 523 n.15, 1186 U.N.T.S. at 212 n.**.

199. SCM/153, *supra* note 10, at 44-45.

200. *Id.* at 44-45.

201. *Id.*

202. *Id.* at 45.

203. *Id.* at 44-45.

204. *Id.* at 49.

205. *Id.* at 44.

206. *Id.* at 51.

In response to Norway's first argument, the United States said that there was no legal requirement that it consider potential secondary subsidies when determining the amount of a subsidy,²⁰⁷ because there are too many variables to accomplish this effectively, and the variables are often speculative.²⁰⁸

Replying to Norway's allegation that it had miscalculated the commercial lending long-term interest rate, the United States stated that commercial banks in Norway charged a 0.75 percent premium to salmon farmers because of the risk involved.²⁰⁹ Since Norway had failed to consider this premium, the United States believed the rate it had computed was correct.²¹⁰

Countering the point that the United States was not entitled to calculate upstream subsidies to exporters based on subsidies to smolt growers, the U.S. stated that it had only lumped exporters and smolt growers together because the Norwegian government combined these two groups when responding to U.S. questionnaires on subsidies.²¹¹ The United States assumed that Norway considered these two groups as one industry because the Norwegian government lumped the two industries together.²¹² The Panel declined to decide this issue finding that the matter was not within the scope of the Panel's jurisdiction.²¹³

e. Determining the Existence of Injury: Article 6 of the Agreement

Article 6 requires that, in determining the state of their domestic industry for purposes of imposing duties, a country must examine: the volume of subsidized imports to determine if a significant increase has occurred; their effect on prices of like product in the domestic market to see if price undercutting has resulted; and the impact of the imports on

207. *Id.* at 46. The U.S. cited footnote 15 to Article 4(2) of the Agreement which indicates that parties should develop criteria to calculate the amount of a subsidy. *See supra* note 198.

208. *Id.*

209. *Id.* at 48.

210. *Id.* at 48-50.

211. *Id.* at 52.

212. *Id.*

213. *Id.* at 93.

the domestic industry.²¹⁴ Norway asserted that the USITC

214. The Agreement, *supra* note 172, art. 6, 31 U.S.T. at 527-528, 1186 U.N.T.S. at 216-218. Article 6, Determination of Injury, states, in part:

1. A determination of injury [footnote omitted] for purposes of Article VI of the General Agreement shall involve an objective examination of both (a) the volume of subsidized imports and their effect on prices in the domestic market for like products [footnote omitted] and (b) the consequent impact of these imports on domestic producers of such products.

2. With regard to volume of subsidized imports the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing signatory. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing signatory, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3. The examination of the impact on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices: actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment and, in the case agriculture, whether there has been an increased burden on Government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

4. It must be demonstrated that the subsidized imports are, through the effects [footnote omitted] of the subsidy, causing injury within the meaning of this Agreement. There may be other factors [footnote omitted] 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.

Id.

In this Agreement, determinations of injury shall be based on positive evidence. In determining threat of injury the investigating authorities, "may take into account the evidence on the nature of the subsidy in question and the trade effects likely to arise therefrom." *Id.* 31 U.S.T. at 527 n.17, 1186 U.N.T.S. at 216, n.*.

Throughout this Agreement the term like product shall mean "a product which is identical, i.e., alike in all respects to the product under consideration or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." *Id.* 31 U.S.T. at 527 n.18, 1186 U.N.T.S. at 216 n.**.

Factors (referred to in Section (1) which may be injuring the domestic industry can include, "the volume and prices of non-subsidized imports of the product in question,

findings were inconsistent with this Article²¹⁵ and questioned whether there had been an objective examination of the volume of imports, or a significant increase in imports.²¹⁶ Norway pointed out that between 1988 and 1990, the years of the initial USITC investigation, imports into the United States of fresh and chilled salmon from Norway significantly decreased, not increased.²¹⁷

Norway further claimed that the USITC had erred in its determination that the price for imported Norwegian salmon was depressing the domestic price, pointing out that the price paid for Norwegian salmon in the United States had been consistently higher than the price paid for domestic salmon.²¹⁸ In addition, if Norwegian salmon had been depressing the price paid for domestic U.S. salmon, Norway believed that the price paid for domestic U.S. salmon should have increased when Norwegian salmon was removed from the U.S. market in 1990, which did not happen.²¹⁹

Claiming its application and interpretation of the above Article was consistent with its obligations, the United States asserted that the Agreement did not foresee the use of Panels to determine factual issues. Instead, factual issues were to be left to the investigating authorities (the USITC here).²²⁰ The United States felt that the Panel should only consider *whether* the USITC had considered required mandates of the Agreement, not *how* they were considered.²²¹

The United States argued the decrease in imports from Norway in 1990 was attributable to instituting preliminary countervailing and antidumping duties.²²² The United States, therefore, based its action on the large increases in imports of Norwegian salmon between 1987 and 1989, not 1990 and post 1990 import data.²²³ The United States also

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." *Id.* 31 U.S.T. at 528 n.20, 1186 U.N.T.S. at 218 n.**.

215. SCM/153, *supra* note 10, at 53.

216. *Id.* at 55.

217. *Id.*

218. *Id.* at 63.

219. *Id.*

220. *Id.* at 53-54.

221. *Id.* at 54.

222. *Id.* at 58-59.

223. *Id.* at 59.

argued, in defense against Norway's claim that it erred in its finding on the effect of prices, that the price paid for U.S. salmon and Norwegian salmon closely paralleled each other, and that when the price of Norwegian salmon fell, the price for U.S. salmon also fell.²²⁴

f. Continued Imposition of Countervailing Duties: Article 4:9 of the Agreement

Article 4:9 of the Agreement states that "[a] countervailing duty shall remain in force only as long as, and to the extent necessary to counteract the subsidization which is causing injury." Norway argued that at the time of the USITC final determination, no material injury was being done to the U.S. industry, therefore, the countervailing duties should be eliminated.²²⁵ Even if past imports had caused injury, Norway claimed that the level of imports of fresh and chilled salmon from Norway had declined so much that they clearly were not causing present injury.²²⁶ However, the United States disagreed with this claim, pointing out that countervailing duties are supposed to eliminate the harm done prior to their enactment, whether or not the injury is continuing.²²⁷ Otherwise, an order would have to be eliminated as soon as it was established.²²⁸

2. The Panel's Findings on Countervailing Duties

The Panel found that the United States had lived up to its obligations under Article 2:1 of the Agreement in initiating the investigation.²²⁹ Since the USITC had received a written request on behalf of the appropriate domestic industry to bring the investigation, the Panel believed that the United States had acted appropriately.²³⁰

In response to Norway's argument that the Regional Development Fund was exempt from having countervailing duties levied against it, per Article 11 of the Agreement, the Panel found that although Article 11 allowed for the subsidy, it was acceptable for other governments to react

224. *Id.* at 64.

225. *Id.* at 89.

226. *Id.*

227. *Id.*

228. *Id.* The United States called Norway's argument, "absurd on its face."

229. *Id.* at 98.

230. *Id.* at 99.

to it with countervailing duties.²³¹ Therefore, although Norway could establish subsidies aimed at improving social and/or economic conditions within their country, the United States was entitled to counteract those subsidies when they interfered with fair international trade.²³²

In interpreting Article 4:2 of the Agreement and calculating the amount of subsidization provided by the payroll tax reduction, the Panel noted that there was not an established method to determine the amount of a subsidy.²³³ This lack of an established legal requirement allowed the United States to calculate the subsidy as it had.²³⁴ It also felt that the United States had used an acceptable method to determine the benchmark long-term interest rate to use in evaluating loans.²³⁵ The United States was also found to have acted consistently with Article 6 of the Agreement when it determined whether a domestic industry was facing present injury.²³⁶ Since all of the Panel's conclusions supported the United States, it upheld the USITC's practice and its imposition of countervailing duties. This Panel Report was adopted by the GATT Council on April 28, 1994.²³⁷ Thus, the Panel Report is binding and is precedent for future determinations under GATT.

F. GATT Anti-Dumping Duty Determination

The Committee on Anti-Dumping Practices established a sister Panel²³⁸ to the one created by the Committee on Subsidies and Countervailing Measures.²³⁹ This Panel's Report, the Anti-Dumping Practices Panel Report, deals with Norway's appeal from the USITC's affirmative dumping determination of April 1991.²⁴⁰ Norway asked this Panel to

231. *Id.* at 102.

232. *Id.*

233. *Id.* at 103.

234. *Id.* at 104.

235. *Id.* at 106.

236. *Id.* at 134.

237. Letter from J. E., GATT Information Division, Geneva, Switzerland, to Mark T. Peterson (May 9, 1994) (on file with the OCEAN & COASTAL L.J.).

238. COMMITTEE ON ANTI-DUMPING PRACTICES, UNITED STATES—IMPOSITION OF ANTI-DUMPING DUTIES ON IMPORTS OF FRESH AND CHILLED ATLANTIC SALMON FROM NORWAY: REPORT OF THE PANEL, GATT, GATT Doc. ADP/87, (1992) [hereinafter ADP/87]. Norway requested that a Panel be established for this dispute on September 24, 1991. The Panel was established on October 21, 1991. *Id.* at 5.

239. SCM/153, *supra* note 10.

240. ADP/87, *supra* note 238, at 6.

find that the United States' imposition of antidumping duties was inconsistent with its international obligations under GATT and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (hereinafter Article VI Agreement).²⁴¹ In reaching this conclusion, Norway asked the Panel for four specific findings: 1) that the United States' initiation of an antidumping duty investigation was contrary to Article 5:1 of the Article VI Agreement; 2) that the final affirmative determination of the existence of dumping made by the Department of Commerce was inconsistent with Articles 2:4, 2:6, 6:1, and 8:3 of the Article VI Agreement, and Article III of GATT; 3) that the final affirmative determination of injury made by the USITC was contrary to Article 3 of the Article VI Agreement; and, 4) that the continued imposition of antidumping duties by the United States was inconsistent with Article 9:1 of the Article VI Agreement.²⁴²

The United States requested that the Panel find that the Department of Commerce (USITA) and the USITC had acted consistently with their international obligations when making their determinations, and in initiating their antidumping investigation.²⁴³ It asked the Panel for two specific findings: 1) that the final affirmative determination of dumping made by the Department of Commerce was consistent with the United States' obligations under the appropriate sections of Articles 2 and 6 of the Article VI Agreement and 2) that the USITC acted consistently with Article 3 of the Article VI Agreement in its final affirmative determination of injury.²⁴⁴

241. *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, Apr. 12, 1979, 31 U.S.T. 4919, 1186 U.N.T.S. 2. The Article VI Agreement entered into force on January 1, 1980 for Norway and the United States. 11 U.N.T.S. at 2. Although Article VI of GATT deals with both antidumping and countervailing duties, the Article VI Agreement only deals with antidumping.

242. ADP/87, *supra* note 238, at 11. Similar to the Countervailing Panel Report (SCM/153, *supra* note 10), Norway initially asked the Panel to have the U.S. eliminate its antidumping duties on the import of fresh and chilled Atlantic salmon from Norway, then expanded that request to have the Panel request the U.S. to reimburse Norway for any duties already paid as well. *Id.*

243. *Id.*

244. *Id.* at 12.

1. *The Arguments of the Parties*

a. *Article VI as an Exception to GATT*

Norway presented the same argument before this Panel as it did before the Committee on Subsidies and Countervailing Measures Panel. Because Norway's arguments and the United States' responses were essentially the same and were covered in the last section, they will not be discussed again.²⁴⁵

b. *Initiation of the Anti-Dumping Duty Investigation: Article 5:1 of the Article VI Agreement*

Article 5:1 of the Article VI Agreement requires that the initiation of an antidumping duty investigation be started by the appropriate

245. See *supra* notes 176-184 and accompanying text. Paragraphs 1 and 2 of Article VI of GATT, which deal solely with anti-dumping practices, state:

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and other differences affecting price comparability.

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

GATT, *supra* note 32, at 10.

industry.²⁴⁶ Arguing again that U.S. authorities failed to adequately ensure themselves that the petition requesting the initial investigation was filed on behalf of the domestic industry, Norway felt that the United States should not have acted on the petition.²⁴⁷ It argued that the U.S. practice of assuming that a petition to initiate an investigation was supported by the domestic industry unless at least fifty percent of the industry expressed opposition to it was insufficient.²⁴⁸ There also appeared to be evidence that not all salmon growers in the United States supported the petition.²⁴⁹

Once again, the United States argued that the initial petition came from a majority of U.S. salmon growers and, thus, was filed on behalf of the domestic industry. It pointed out that, although some salmon growers in the United States did not affirmatively support the petition, they did not expressly oppose it.²⁵⁰ Because of this, the United States felt it had acted appropriately.

246. Article VI Agreement, *supra* note 241, art. 5, 31 U.S.T. at 4928, 1186 U.N.T.S. at 10. Article 5, Initiation and Subsequent Investigation, of the Article VI Agreement states, in part:

1. An investigation to determine the existence, degree and effect of any alleged dumping 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) dumping; (b) injury within the meaning of Article VI of the General Agreement as interpreted by this Code and (c) a causal link between the dumped imports and the alleged injury. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have sufficient evidence on all points under (a) to (c) above.

Id. Article 4, Definition of Industry, of the Article VI Agreement states, in part:

1. In determining injury the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of 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

Id. art. 4, 31 U.S.T. at 4927, 1186 U.N.T.S. at 8.

247. ADP/87, *supra* note 238, at 36-37.

248. *Id.* at 37-38.

249. *Id.* at 40. This is mainly due to a letter from the Washington State Fish Growers Association to U.S. authorities. *Id.* at 41.

250. *Id.* at 37, 41.

c. Determination of Dumping

Norway claimed that the United States had failed to live up to its obligations under the Article VI Agreement when reaching its final affirmative dumping determination. Norway argued: 1) that the Department of Commerce (DOC) did not follow "fair and equitable procedures"; 2) that the dumping margins had been calculated incorrectly, contrary to Articles 2:6 and 8:3 of the Article VI Agreement; and, 3) that the DOC failed to conduct a fair comparison between the normal value of the subject import and its export price, also contrary to Articles 2:6 and 8:3 of the Article VI Agreement.²⁵¹

There were a number of arguments put forth by Norway to support its claim that the United States had not acted fairly and equitably. First, Norway felt that the DOC had not allowed Norwegian exporters ample time to answer a questionnaire designed to solicit information needed to make the dumping determination.²⁵² Norway felt this caused the DOC to act on incorrect or insufficient evidence. In its own defense, the United States pointed out that Norway's allegations were only relevant to one section of the questionnaire. In addition, it referred the Panel to the fact that Norwegian respondents could have requested an extension to answer the questions. Because of this, the United States felt it had acted fairly and equitably.²⁵³

It was also claimed by Norway that the U.S. respondents had been favored in the application of questionnaire procedures by the DOC, and that this violated Article III:4 of GATT.²⁵⁴ It was argued that the Norwegian respondents were held to more stringent standards both when

251. *Id.* at 43.

252. *Id.* at 44-46.

253. *Id.* at 46.

254. *Id.* at 53. Article III, National Treatment on Internal Taxation and Regulation, of GATT states, in part:

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

GATT, *supra* note 32, at 6.

responding to the questionnaire, and when the information provided was verified by the DOC.²⁵⁵

The United States countered these claims by stating that it had requested the information it needed in the most useful media. Since different information was required of the U.S. and Norwegian respondents, different media were requested.²⁵⁶ The United States also noted that 95 percent of U.S. respondents answered the questionnaire completely, while fewer than half of the Norwegian exporters answered at all. The DOC could only base its findings on available information.²⁵⁷

Norway also challenged the finding of the DOC that third-country sales below the costs of production did not fall within the ordinary course of trade. The DOC had refused to use sales to the European Economic Community (EEC) as the appropriate third-country benchmark against which to compare sales to the United States. Norway claimed that this violated Article 2:4 of the Implementation Agreement.²⁵⁸ It believed the EEC should have been used as the third-country because it was the world's largest importer of fresh salmon and because Norwegian Atlantic salmon had the largest share within that market.²⁵⁹ Therefore, if Norway sold salmon below costs to the EEC, that sales price should be considered "in the ordinary course of trade."²⁶⁰

Because the majority of Norwegian salmon sold in the EEC was sold below the costs of production, the United States felt that it was entitled

255. ADP/87, *supra* note 238, at 54.

256. *Id.* at 55.

257. *Id.* at 56.

258. *Id.* Article 2, Determination of Dumping, of the Article VI Agreement states, in part:

4. When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling, and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.

Article VI Agreement, *supra* note 241, art. 2, 31 U.S.T. at 4925, 1186 U.N.T.S. at 4-5.

259. ADP/87, *supra* note 238, at 56-57.

260. *Id.* at 57.

to, and required by law to use a constructed value of Norwegian salmon rather than third-country sales data.²⁶¹ The United States further stated that since Article 2:4 of the Article VI Agreement did not give preference to the use of third-country sales data over a constructed value to determine the normal value of a product, the United States was entitled to determine the normal value as it had.²⁶²

In addition to these claims, Norway also argued that the United States calculated the costs of production that it used in its determination on the basis of costs to salmon farmers, not salmon exporters. Norway believed that since salmon farmers did not set the export price, or even export the salmon, their costs should not be used.²⁶³ Instead, Norway believed that the cost of salmon acquisition to the exporters should be the appropriate cost of production, because the exporters would not know, or care, about the actual costs to the farmers.²⁶⁴ This practice of the United States, Norway believed, overstated the actual costs of production to exporters who negotiated with growers for the best purchase price and then set the export price.²⁶⁵

The United States pointed out that Article 2:4 required them to use “the cost of production in the country of origin” in their calculations, not the acquisition costs to the exporters.²⁶⁶ Since the exporters generally did not produce the fish, as a result of Norwegian law that prohibited exporters from producing salmon, they had no actual “production” costs, thus giving further reason for why the DOC had to rely on the salmon farmers’ costs.²⁶⁷ Accordingly, the United States contended that it acted within its obligations.

Norway further argued that, even if the use of constructed values and costs to salmon producers was proper, the DOC’s methodology in determining those constructed values was contrary to Articles 2:4 and 8:3²⁶⁸ of the Article VI Agreement for a number of reasons. This

261. *Id.*

262. *Id.*

263. *Id.* at 59.

264. *Id.*

265. *Id.*

266. *Id.* at 60 (citing Article VI Agreement, *supra* note 241, 31 U.S.T. at 4925, 1186 U.N.T.S. at 6).

267. *Id.*

268. See *supra* note 258 for text of Article 2:4. Article 8, Imposition and Collection of Anti-Dumping Duties, of the Article VI Agreement states, in part:

3. The amount of the anti-dumping duty must not exceed the margin of

contention was supported by allegations that the United States had sampled too few fish farms in determining the price of production, resulting in an overstated costs of production figure.²⁶⁹ This conclusion was supported by the fact that the U.S. figure was significantly higher than that reached by an EEC investigation into Norwegian salmon dumping in the EEC, and because the figure was higher than a figure arrived at by Norwegian officials.²⁷⁰ Norway claimed the United States failed to account for differences in costs of production between different-sized farms.²⁷¹

The United States responded by stating that it had done its best to obtain a representative sample of farmers from which exporters purchased salmon during the investigation period.²⁷² The sample might not have been as representative as Norway or the United States might have liked, but, due to faulty reporting by Norwegian exporters and time constraints, the sample was as representative as possible.²⁷³

Norway further argued that by using a simple average, not a weighted average, the United States further skewed its calculation of the constructed normal price in determining the cost of production.²⁷⁴ This U.S. practice, according to Norway, more than doubled the dumping margin, from 9 percent to 23.8 percent.²⁷⁵ Norway argued that the United States should have accounted for the fact that differently sized producers of salmon had different average costs of production. By not weighting various figures to account for these differences, it concluded, the United States erred in its calculations.²⁷⁶

dumping as established under Article 2. Therefore, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

Article VI Agreement, *supra* note 241, art. 8, 31 U.S.T. at 4932, 1186 U.N.T.S. at 16.

269. ADP/87, *supra* note 238, at 64.

270. *Id.*

271. *Id.*

272. *Id.* at 66-67.

273. *Id.* at 67.

274. *Id.* at 75.

275. *Id.*

276. *Id.* Norway pointed out that the largest farm in the sample had a cost of production of 26.24 NOK/kg, while smaller farms had costs up to 48.06 NOK/kg. *Id.* Norway also pointed out that the seven farms used in the sample had an average cost of production of 35.45 NOK/kg, while an annual survey conducted by the Norwegian Directorate of Fisheries determined an average cost of production at 30.47 NOK/kg. *Id.*

Claiming that it had correctly used a simple average, the United States pointed out that 96 percent of salmon farming in Norway takes place on small farms.²⁷⁷ It also argued that one of the farms sampled was one of the largest in Norway. Therefore, if a weighted average had been used, that farm would have been given undo importance and the constructed price would have been too low.²⁷⁸

The final problem that Norway had with the U.S. dumping determination centered on the failure of the United States to account for the different sizes and qualities of the salmon produced in Norway.²⁷⁹ The DOC calculated one average cost for all sizes and qualities of salmon, and compared that value to the prices of individual exports.²⁸⁰ Norway said that this methodology biased the comparison in favor of the U.S. domestic industry, by creating dumping margins where none would have existed if the United States had made a "fair comparison."²⁸¹

In supporting of the DOC's methodology, the United States pointed out that the Article VI Agreement does not prohibit such a comparison, nor does it specify any particular methodology for comparison.²⁸² The

at 76.

277. *Id.*

278. *Id.*

279. *Id.* at 87. Norway produces three qualities of salmon: production, ordinary, and superior; and three size classes: 2-3 kilos, 3-4 kilos, and 4-5 kilos. The three sizes of superior quality salmon were sold for export to the United States. *Id.*

280. *Id.*

281. *Id.* This is so because the average normal price of production lowered the average constructed cost of production for larger, higher quality salmon, thereby increasing the dumping margin on higher value and priced salmon. *Id.* Norway supported its argument with the following illustration:

To illustrate how this method of comparing export prices and normal values inevitably led to findings of dumping, Norway gave the example of a situation in which in the domestic market [(representing Norway)] three sales [(representing different weight classes of salmon)] were made at different points in time at prices of 80, 100 and 120. If there were three export sales at different points in time, also at prices of 80, 100 and 120, the comparison of an average normal value [(100)] with individual export prices (80) would inevitably result in a finding of dumping in respect of the first of these three export sales.

Id. at 87-88 n.143. Such a result could have the effect of classifying one-half of all exports as being dumped, when in reality, they have been sold at the same price abroad as in the domestic market.

282. *Id.* at 89.

Article VI Agreement only requires that a price comparison be fair.²⁸³ The United States found further support for its position in the fact that the type of comparison that it employed was used by most countries with antidumping laws.²⁸⁴

d. Determination of Injury: Article 3 of the Article VI Agreement

Norway argued that the USITC determination of injury was inconsistent with Articles 3:1, 3:2, 3:3, and 3:4 of the Article VI Agreement. First, Article 3:1 of this agreement requires that an "objective examination" of the relevant imports be made to determine injury.²⁸⁵ Norway claimed the United States had failed to properly

283. *Id.*

284. *Id.*

285. Article VI Agreement, *supra* note 241, art. 3, 31 U.S.T. at 4926-4927, 1186 U.N.T.S. at 7-8. Article 3, Determination of Injury, of the Article VI Agreement states, in part:

1. A determination of injury for the purposes of Article VI of the General Agreement shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

2. With regard to volume of the dumped imports the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country. With regard to the effect of the dumped product on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing country, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3. The examination of the impact on the industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

4. It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Code. There may be

examine the volume of the subject imports, their effect on the price of like product in the United States, and their the impact on U.S. producers. This was necessary, according to Norway, to ensure that the allegedly dumped Norwegian imports were actually causing present material injury, and failing to determine whether the effects of other factors causing injury were attributed to the Norwegian imports.²⁸⁶

Second, noting that Article 3:2 requires a "significant increase" in imports during the investigation period for an affirmative injury determination to be made, Norway argued that imports actually fell between 1988 and 1990, the period of the investigation, whether measured in relative or absolute terms.²⁸⁷ It further claimed that the USITC failed to account for this decline, instead relying on an increase in imports between 1988 and 1989.²⁸⁸ Claiming the decline in exports to the United States between 1988 and 1990 was attributable to factors other than the initiation of dumping and countervailing duty investigations by the United States, Norway blamed this decline on lower domestic prices, appreciation of the Norwegian kroner against the U.S. dollar, and rising prices in alternative export markets.²⁸⁹ Because there was an absolute decline in farmed Norwegian Atlantic salmon imports into the United States during the USITC investigation period, and since this decline could not, it claimed, be attributed to the initiation of U.S. dumping and countervailing investigations, Norway concluded that the United States failed to live up to its international obligations in imposing an antidumping duty.²⁹⁰

In response to the above accusations, the United States argued that the decline in imports between 1988 and 1990 was directly attributable to the filing of the initial petition by FAST, and the subsequent investigations.²⁹¹ It also said that the other factors highlighted by Norway had

other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports.

Id.

286. ADP/87, *supra* note 238, at 94.

287. *Id.* at 96. The United States imported 8,895,000 kg of salmon in 1988, and 7,699,000 kg of salmon in 1990, from Norway. *Id.* at 220.

288. ADP/87, *supra* note 238, at 97. In 1989, the United States imported 11,396,000 kg of salmon from Norway. *Id.* at 220.

289. *Id.* at 98.

290. *Id.* at 96, 98.

291. *Id.* at 100.

been examined,²⁹² but that it had been determined that they did not wholly explain the decrease in imports. In addition, there had been a finding that the “sheer volume of the increase in Norwegian Atlantic salmon imports in 1989” alone had led to significant price depression.”²⁹³ These conclusions led the USITC to believe it had satisfied its international obligations during its proceedings.²⁹⁴

The USITC finding that imports of Norwegian Atlantic salmon significantly depressed domestic U.S. prices, as required under Article 3:1 of the investigation, was also disputed by Norway.²⁹⁵ Norway demonstrated that the price received for Norwegian salmon increased during the investigation period, while the price paid for domestic salmon decreased. If prices for domestic salmon “closely tracked” Norwegian salmon prices, as the USITC claimed, then domestic prices should also have risen, not fallen.²⁹⁶ Further, if Norwegian salmon was depressing the price for U.S. salmon, the removal of Norwegian salmon from the market should have allowed the price of U.S. salmon to rise, which it did not.²⁹⁷ In further support of its position, Norway noted the existence of other, lower-priced salmon in the U.S. market from third-party countries. These imports were logically more likely to have been the cause of a depression in U.S. domestic prices, not the higher-priced Norwegian salmon imports.²⁹⁸

The United States believed that it was the “large and growing glut of Norwegian imports” that was depressing domestic U.S. prices, and that the decline in U.S. salmon prices closely tracked the decline in the price paid for Norwegian salmon.²⁹⁹ Because of the combination of the above factors, the United States felt it had sufficiently demonstrated that imports of Norwegian Atlantic salmon had depressed the price received by domestic producers.³⁰⁰

Norway also disputed the existence of a causal relationship between Norwegian imports and injury to the domestic industry. Such a relationship is required, under Article 3:4 of the Article VI Agreement,

292. See *supra* note 289 and accompanying text.

293. ADP/87, *supra* note 238, at 101 (quoting USITC FINAL, *supra* note 87, at 20).

294. ADP/87, *supra* note 238, at 101.

295. *Id.* at 104.

296. *Id.*

297. *Id.* at 105.

298. *Id.* at 109.

299. *Id.* at 105.

300. *Id.* at 110.

before duties can be imposed. Norway claimed that the USITC had not distinguished between the effect of Norwegian imports and the effects of other factors on the U.S. industry. It believed that USITC had not sufficiently demonstrated that harm to the U.S. industry had been caused by Norwegian imports "through the effects of dumping."³⁰¹ In addition, Norway complained that the USITC had not shown that Norwegian imports were causing material injury to the U.S. industry at the time of the USITC final determination.³⁰²

Again, the United States argued that the USITC had amply considered, and then rejected, the impacts of other factors on the U.S. industry.³⁰³ Pointing out that Article 3:4 of the Article VI Agreement requires only that investigating authorities must *consider* other factors in determining injury, the United States argued that it was not required to "exclude any injuries caused by factors other than dumped imports" when reaching its injury determination.³⁰⁴ The United States stated that the USITC acted appropriately in determining a causal relationship between Norwegian fresh and chilled salmon imports and material injury to the domestic industry.

In support of the USITC's finding of material injury at the time of the final USITC determination, the United States claimed that the Article VI Agreement allowed parties to counteract continuing, injurious effects by imposing duties. Injury, thus, can include an industry's continued difficulty in raising capital.³⁰⁵ Otherwise, the United States pointed out, exporters would be able "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 dumped exports once a negative determination had been entered."³⁰⁶

301. *Id.* at 114.

302. *Id.* at 114-115.

303. *Id.* at 118.

304. *Id.*

305. *Id.* at 130.

306. *Id.*

e. Continued Imposition of Antidumping Duties: Article 9:1 of the Article VI Agreement

Norway also argued that the continued imposition of antidumping duties was contrary to Article 9:1 of the Article VI Agreement.³⁰⁷ It felt that, since no material injury was being done at the time of the final affirmative dumping determination made by the USITC, and since no injury was currently being done, the United States was obligated to remove the antidumping duties on the importation of farmed Norwegian Atlantic salmon.³⁰⁸

Once again, the United States refuted this claim by pointing out that the purpose of antidumping duties is to eliminate the harm being done prior to their imposition. Therefore, it is to be expected that such harm would end after their imposition. Such a result, thus, should not justify the elimination of the duty.³⁰⁹

2. The Panel's Findings on Antidumping Duties

In deciding the merits of Norway's arguments that the initiation of the antidumping investigation by the United States was improper, the Panel looked at whether the United States had taken reasonable steps to confirm that the written petition submitted to start the investigation was filed "with the authorization or approval of the industry affected."³¹⁰ The Panel decided that the DOC could rely on the statements in the petition that the petitioning firms accounted for over 50 percent of the domestic industry, and could assume, absent express notification that firms no longer supported the petition, that their support for the petition continued.³¹¹ Thus, the Panel concluded that the initiation of the antidumping investigation was consistent with the United States' obli-

307. *Id.* at 131. Article 9, Duration of Anti-Dumping Duties, of the Article VI Agreement states, in part: "1. An anti-dumping duty shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury." Article VI Agreement, *supra* note 241, art. 9, 31 U.S.T. at 4933, 1186 U.N.T.S. at 18.

308. ADP/87, *supra* note 238, at 131.

309. *Id.* A quote from this Report sums up this request: "Apparently, Norway was arguing that once an order was imposed, it must be removed immediately. This was absurd on its face." *Id.*

310. *Id.* at 146.

311. *Id.* at 147.

igations under Article 5:1 of the Article VI Agreement.³¹²

The Panel then examined the final determination by the United States that dumping was occurring in light of the United States' obligations under the Article VI Agreement. The Panel first addressed Norway's contention that "fair and equitable procedures" must be used by the United States. It concluded that, since the language relied upon by Norway was contained in the preamble of the Article VI Agreement and because the language of the preamble does not "constitute . . . legal obligation[s] of Parties," Norway's argument was without merit.³¹³

The Panel then addressed Norway's arguments regarding the amount of time allotted to the Norwegian respondents to complete the DOC questionnaire, and the manner in which those responses were verified. The Panel concluded that, because the DOC had granted extensions to those requesting them, and accepted corrections from respondents after the allotted time frame without question, it had acted consistently with its obligations under Article 6:1 of the Article VI Agreement.³¹⁴

The next issue the Panel decided concerned the methodology used by the DOC to determine the existence of dumping. Norway complained that the United States had used a constructed normal price instead of using a third-country price comparison. The Panel found that there was no preferred method outlined or required by the Article VI Agreement.³¹⁵ This lack of specificity allowed the United States to utilize either methodology, as it determined appropriate.³¹⁶

The Panel then decided whether the United States should use the price of acquisition of salmon to exporters to determine production costs or whether the DOC could use the costs of production incurred by Norwegian farmers in its calculations. It decided in favor of the United States since the plain language of the Article VI Agreement called for the use of the cost of production in the country of origin. To use the cost of acquisition to exporters would be inconsistent with this requirement,³¹⁷

312. *Id.*

313. *Id.* at 148. However, the Panel determined that the "fair and equitable procedures" statement in the Preamble "could guide the Panel's interpretation of the specific operative provisions of the Agreement." *Id.* This conclusion was based on Article 31:2 of the Vienna Convention on the law of Treaties. *Id.*

314. *Id.* at 151.

315. *Id.* at 158.

316. *Id.*

317. *Id.* at 160-161.

and would ignore the meaning of the term "cost of production."³¹⁸

The DOC's simple averaging of only seven farms to determine the cost of production was also protested by Norway. The Panel found no requirement in the Article VI Agreement to use a certain sampling methodology.³¹⁹ Because no method was specified, the Panel had to determine whether the method used was sufficient to determine the cost of production.³²⁰ The Panel concluded that the United States had acted inconsistently with its obligations under Article 2:4 of the Article VI Agreement because the DOC had failed to "ensure that these samples were representative."³²¹ It concluded that the DOC had not sufficiently considered the number of farms that should be sampled to determine the average cost of production.³²² In light of this conclusion, the Panel then had to determine whether the United States had also acted inconsistently with Article 8:3 of the Article VI Agreement.³²³

When faced with the above question, the Panel found that it "had no basis to pronounce itself on what margins of dumping would have resulted if the United States had not determined those values inconsistently with Article 2:4."³²⁴ As a result of the Panel's inability to determine what the dumping margin would have been if the U.S. had acted consistently with Article 2:4, it concluded that it could not find that the United States had acted inconsistently with Article 8:3 of the Article VI Agreement because it could not say that the United States had necessarily determined an excessive duty margin.³²⁵

Norway had also contested the use of a simple average versus a weighted average to determine the cost of production. Again, the Panel noted that the Article VI Agreement contained no specific sampling methodology requirements. Accordingly, it concluded that the United States had acted reasonably, and within their obligations under Article 2:4 of the Article VI Agreement.³²⁶

The Panel then decided whether the United States could compare an average, constructed value to individual export prices, given that the

318. *Id.* at 162.

319. *Id.* at 164.

320. *Id.*

321. *Id.* at 169.

322. *Id.*

323. *Id.* See *supra* note 268.

324. ADP/87, *supra* note 238, at 170.

325. *Id.*

326. *Id.* at 173.

DOC failed to account for the three different salmon weight categories.³²⁷ The Panel determined that the DOC had not properly accounted for the different weight classes in comparing the average value to export price, and, therefore, its behavior was inconsistent with Article 2:6 of the Article VI Agreement.³²⁸ However, in examining the U.S. practice of comparing average normal values to export prices, the Panel found that Article 2:6 of the Article VI Agreement simply calls for a "fair comparison" and concluded that the United States had acted consistently with this provision.³²⁹

Norway's third major argument focused on the determination of injury made by the USITC. Norway had argued that the USITC acted inconsistently with Article 3 of the Article VI Agreement by incorrectly considering the effects of the Norwegian imports on the U.S. industry, and by incorrectly determining a causal relationship between Norwegian imports and material injury to the U.S. industry.³³⁰ In its deliberations, the Panel determined that its scope of review was limited to discerning whether the USITC had examined all the relevant facts and had provided sufficient explanations of how the facts supported its determination.³³¹ Finding that the USITC had properly examined and explained the relevant facts relating to volume, price, and impact on the domestic industry, the Panel concluded that the United States lived up to its obligations under Article 3 of the Article VI Agreement.³³²

The Panel then investigated whether the USITC had properly found a causal relationship between imports and material injury of the U.S. industry. The Panel found that the investigating authority did not have to do a thorough examination of all possible factors injuring the domestic industry, just on the effects of the allegedly dumped products.³³³ Stating that the USITC had sufficiently examined other factors, the Panel found that the USITC acted within its obligations.³³⁴

The Panel next decided whether the imports were causing injury at the time of the final USITC determination. It stated that investigating authorities were not expected to continue to collect data up until the time

327. *Id.* at 179.

328. *Id.* at 181.

329. *Id.* at 184-185.

330. *Id.* at 185.

331. *Id.* at 186.

332. *Id.* at 188, 191, 193-195, 197, 198, 201-202.

333. *Id.* at 205.

334. *Id.* at 208.

of the final determination, as that would undermine other parts of the Article VI Agreement.³³⁵ Therefore, the USITC had acted appropriately.³³⁶

Given these conclusions, the Panel in sum found that the USITC had acted within its obligations in imposing an antidumping duty on Norwegian salmon.³³⁷ The Panel also found that the continued imposition of the antidumping duty was proper. Otherwise, it held, any effective antidumping duty order would have to be removed immediately upon its imposition.³³⁸

Thus, the Panel found that the United States acted in general accordance with its international obligations under the Article VI Agreement. Although the Panel had a few problems with the methodology utilized by the DOC in calculating the margin of dumping, the Panel "found that in this situation it could not recommend that the 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."³³⁹ The Panel did recommend that the Committee request the United States to reconsider its final affirmative determination of dumping, and to make it consistent with the Panel's findings regarding Articles 2:4 and 2:6 of the Article VI Agreement. This Panel Report was adopted by the GATT Council on April 27, 1994.³⁴⁰

3. Conclusion

From the two panel reports, now adopted by the GATT Council and thereby part of GATT law, it can be concluded that as long as a country: 1) acts reasonably in determining the existence of an injury to its industries and in determining the existence of a foreign subsidy or dumping practice; 2) justifies its actions; and 3) does not violate the few methodologies proscribed by GATT, their practice will be held acceptable under GATT. This was what happened to the United States. Because GATT did not prescribe a specific methodology to determine the

335. *Id.* at 213.

336. *Id.*

337. *Id.*

338. *Id.* at 214-215.

339. *Id.* at 218.

340. J.E., GATT Information Division, *supra* note 237.

existence of a subsidy or its amount,³⁴¹ to determine whether a domestic industry was being materially injured,³⁴² or to determine if the imported product was being sold at LTFV,³⁴³ U.S. practice was found to be consistent with its international obligations. This lack of specificity allows countries to implement trade laws which are suitable to their needs while still being true to the general international trade laws.

The other reason that U.S. trade practice was held to be acceptable was because the USITC considered alternatives and justified its actions. If the United States had not at least: 1) considered factors other than the subject imports; 2) justified its decision that those factors were not the entire problem; and 3) determined that the imports were a cause, although not necessarily the primary one, of material injury to a U.S. industry, it is unlikely that United States practice would have been found consistent with its international obligations.

IV. CHANGES IN THE ATLANTIC SALMON SUPPLY OF THE U.S. MARKET

The end result of FAST's petition, and the resulting action taken by the U.S. government was to give the Maine salmon aquaculture industry a valuable opportunity to expand. In 1988, Norway held 72 percent of the U.S. market share for Atlantic salmon, while U.S. producers controlled 8 percent, and other foreign growers 20 percent (all by

341. Although earlier versions of GATT did not contain a detailed definition of a subsidy, one was adopted in the Uruguay Round negotiations. Agreement on Subsidies and Countervailing Measures, Annex IA: Multilateral Agreements on Trade in Goods, *reprinted in* FINAL TEXTS OF THE URUGUAY ROUND AGREEMENTS INCLUDING THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION AS SIGNED ON APRIL 15, 1994 229 (Office of the U.S. Trade Representative ed., 1994). Part I of this agreement outlines the basic definition of a subsidy. Part II discusses prohibited subsidies; Part III, actionable subsidies; and Part IV, non-actionable subsidies. Annex I of the agreement even provides an "Illustrative List of Export Subsidies." *Id.* at 262.

342. Again, earlier versions of GATT did not contain a detailed methodology for determining injury, but the new GATT does. The new procedures are contained in Article 3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Annex IA: Multilateral Agreements on Trade in Goods, *reprinted in* FINAL TEXTS OF THE URUGUAY ROUND AGREEMENTS INCLUDING THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION AS SIGNED ON APRIL 15, 1994 145, 148 (Office of the U.S. Trade Representative ed., 1994).

343. A new refinement to determine dumping is contained in Article 2 of the above Agreement. *Id.* at 145.

weight).³⁴⁴ However, by 1990, while Norway's share dropped to 42 percent, the shares of other foreign suppliers, most notably Canada and Chile, expanded to 51 percent and the U.S. suppliers' share *dropped* to 7 percent.³⁴⁵ It is apparent from these figures that Maine did not fully capitalize on the opportunity presented by the FAST-Norway dispute. Even so, the actions taken during the dispute reportedly saved the Maine Atlantic salmon farming industry from extinction.³⁴⁶

Maine's failure to significantly capitalize on the void created by the removal of Norwegian salmon from the U.S. market is evidenced by data representing changes in imports and production from 1987 to 1992. Between 1987 and 1992, Chile increased its exports of fresh and chilled Atlantic salmon to the United States by about 24,000 percent (see table 1 for import data). Approximately 1,734 percent of this increase occurred between 1989 and 1992. Canada increased its exports to the United States by 1,382.20 percent between 1987 and 1992. Approximately 251 percent of this increase occurred between 1989 and 1992. Maine did increase its total production of Atlantic salmon between 1987 and 1992, but by only 1,186.97 percent. Between 1989 and 1992, Maine increased its production by 546.54 percent, an amount greater than the increase in Canadian imports during that same time. Yet, the 1989 to 1992 comparison figures demonstrate that, although Maine was able to increase its Atlantic salmon production, its growth was not nearly as significant as that of Chile, based on percentage increases.

One reason Chilean farmed Atlantic salmon is so abundant in the United States is because it was effectively eliminated from the EU market by Norway when Norwegian imports to the United States were severely restricted. When this happened, Norwegian Atlantic salmon exporters concentrated their efforts on expanding the EU market.³⁴⁷ In response, Chile focused the sale of their huge supply of low-priced Atlantic salmon in the U.S. market.³⁴⁸ That action forced U.S. producers to meet Chile's low price and sell at a loss.³⁴⁹ This caused Washington and Maine growers to complain that Chile was subsidizing its industry and dumping

344. SCM/153, *supra* note 10, at 138. These figures are rounded.

345. *Id.* These figures do not equal 100 percent due to rounding.

346. Personal Interview with Mike Hastings, Director, Maine Aquaculture Innovation Center (Oct. 14, 1994).

347. Dan Kowalski, *Low Prices and Too Much Supply: Fishermen and Farmers Seek Salmon-Marketing Secrets*, NAT'L FISHERMAN, Mar. 1994, at 16, 16.

348. *Id.*

349. *Id.*

Table 1: Total Volume Imported or Produced**

	1987	1988	1989	1990	1991	1992	1993
Norway	7,610,000	8,895,000	11,396,000	7,699,000	166,626	223,707	291,510
Canada	700,000	1,137,000	2,958,000	4,889,000	3,991,268	10,375,234	14,022,843
Chile	42,000	118,000	557,000	4,077,000	3,018,585	10,213,377	12,701,093
Maine	N/A	453,592	902,897	2,081,902	4,550,729	5,837,585	6,743,400
Washington	1,421,105	2,369,567	1,814,369	1,421,105	2,517,438	3,719,457 est	N/A
Iceland	78,000	322,000	472,000	1,012,000	256,443	363,907	345,113
UK	529,000	353,000	1,011,000	901,000	264,474	299,883	229,953
Ireland	47,000	310,000	426,000	333,000	17,332	17,326	113,513
Faroe Isls	N/A	35,000	478,000	53,000	213,436	392,385	245,458
Others	1,254,000	1,197,000	2,594,000	2,432,000	829,011	1,167,948	1,091,679
TOTAL	11,029,092	14,172,147	20,224,255	22,601,997	15,075,648	31,539,300	34,852,518

The above table represents the amount of fresh and chilled farmed Atlantic salmon imported in kilograms. The Figure for Maine represents total production of farmed Atlantic salmon, this data was not collected prior to 1988. N/A=not applicable or available.

** U.S. Bureau of the Census, U.S. General Imports by All Methods of Transportation, Rep. IM145, Commodity: Fresh and Chilled Farmed Atlantic Salmon (1992-1993); SCM/153, *supra* note 10, at 137; Fax from National Marine Fisheries Service, Resource Statistics Div., Portland, Maine, to Mark Peterson (Apr. 22, 1994), Preliminary Commercial Landings, Maine, Atlantic Salmon (Maine data); *Maine Finfish Aquaculture Harvest Update*, THE BOOTHBAY REG., Oct. 21, 1993, § II, at 1 (Maine data); KENNETH K. CHEW AND DERRICK R. TOBA, WESTERN REGIONAL AQUACULTURE INDUSTRY SITUATION AND OUTLOOK REPORT 5 (1993) (Washington data). The Washington 1992 figure is an estimate. *Id.* The 1991 drop is apparently due to differences in reporting, the Census did not differentiate farmed and wild salmon.

the product on the U.S. market.³⁵⁰ The Chileans denied this allegation, saying that they have no control over market prices, and have developed efficient operations in ideal conditions.³⁵¹ Chile suggested that salmon growers marketing their product in the United States combine their efforts to design a generic marketing campaign to increase demand for Atlantic salmon from U.S. consumers instead of engaging in an expensive legal battle between themselves.³⁵²

The reasons why Maine Atlantic salmon growers did not capitalize upon the situation presented by the duties on Norway and experience dramatic growth, like Chile did, are unclear. Norwegian salmon imports might have already injured the Maine industry to a point where recovery will now take a long time. There is a three-year production cycle for growing and harvesting salmon. It is possible that Maine growers, in the face of curtailed Norwegian imports, have increased the number of smolts in the water that will be harvestable in one to two years. If this is true, Maine salmon farmers may yet realize the benefits of their petition.

Since the elimination of Norway from the U.S. market did little to significantly improve the standing of the domestic industry, other factors besides foreign competition must be hindering Atlantic salmon aquaculture in the United States. For example, increased regulation of the industry has imposed costs on the industry which may have hampered its growth. The first year the State of Maine's Department of Marine Resources (DMR) required aquaculturalists to obtain a DMR aquaculture lease was 1991.³⁵³ The DMR also instituted much stricter environmental regulations, and increased the scope of a water quality monitoring program at that time.³⁵⁴ All of these new programs increased the costs of fish farming in Maine. They also increased the time required to obtain new permits to allow the industry to expand. This could be delaying an increase in growing capacity.

The Maine industry has also been affected by superchilled water. Superchilled water is being blamed for killing thousands of fish in Maine

350. *Id.* at 17.

351. *Chileans Refute Salmon-Dumping Charge*, SEAFOOD BUS., Jan./Feb. 1994, at 33, 33.

352. *Id.*

353. ME. REV. STAT. ANN. tit. 12, § 60721-A(B) (West 1992).

354. *Id.*

and New Brunswick, Canada during the 1992-1993 winter.³⁵⁵ The superchilled water is thought to be the result of global warming which has melted the polar ice cap. The melted ice has cooled the surrounding waters, and is being blamed for reduced crab, lobster, and shrimp landings in Maine.³⁵⁶

Another potential problem facing Maine salmon growers is increased competition from Canada as a result of the North American Free Trade Agreement. The effects this Agreement have and will have on the domestic Atlantic salmon farming industry are beyond the scope of this paper, but warrant study in the future. A global increase in the wild salmon catch might also have driven down the price of farmed salmon, making it less profitable, and potentially unprofitable, for U.S. growers to farm Atlantic salmon. However, with recent developments in the Pacific U.S. wild salmon harvest, the impact of this type of salmon product should soon be reduced.³⁵⁷

Whatever the cause, the United States has switched from importing large quantities of Norwegian farmed Atlantic salmon to importing it from Chile and Canada, in absolute numbers, rather than promoting, developing, and marketing salmon aquaculture domestically. The reason that the United States, Maine in particular, was not able to gain a larger share of the U.S. market after the regulatory actions were imposed upon Norway, is worthy of further study. Also worthy of further study is the effect the actions discussed in this paper have had on the price structure and economic viability of the U.S. Atlantic salmon aquaculture industry, but that is better left to resource economists.

V. CONCLUSIONS

Before drawing specific conclusions in answer to the four initial questions posed by this paper, it seems appropriate to make a few general observations about the role and relevancy of international trade agreements such as the GATT so as to place these specific conclusions

355. Ken Kelly, *Colder Oceans Put the Chill on Northern Fisheries*, NAT'L FISHERMAN, Mar. 1994, at 22, 23.

356. *Id.*

357. The federal government placed a complete ban, except for limited Indian fishing, on ocean salmon fishing off the Washington coast, and imposed heavy limits on catches off Oregon and the northern California coast in 1994. Brad Warren, *A \$15.7 Million Painkiller for Salmon 'Disaster'*, NAT'L FISHERMAN, Aug. 1994, at 10, 10. These restrictions were implemented to protect declining coho and chinook stocks. *Id.*

in their proper perspective. While the objective of GATT is to "provide a secure and predictable international trading environment for the business community and a continuing process of trade liberalization in which investment, job creation and trade can thrive,"³⁵⁸ many specific sovereign rights are relinquished when a country becomes party to GATT. Each contracting party, however, does retain the right to protect its industries from unfair foreign competition, primarily through the use of punitive tariffs, rather than quotas.³⁵⁹ GATT defines how parties will act toward each other to increase international trade through a prescribed set of rules which are subject to differing interpretations and which evolve over time. The rules and penalties agreed upon in GATT are not overly specific to minimize the sovereignty relinquished by the contracting parties by signing. In the view of the author, international agreements such as GATT are frequently vague in certain respects to entice the largest number of countries to join the agreement, and thereby be obligated to some standard. These agreements, thus, address some of the primary concerns of the various countries but they leave objectionable enforcement standards and obligations to impartial review boards or other groups established by the treaty to deal with disputes between signatories, or they are left to the countries themselves.

The vagueness discussed above is evidenced in the outcome of the two panel reports in the Norwegian salmon case. In both cases, U.S. trade law and practice was held to be acceptable, not because it was prescribed by GATT, but because no specific alternative method was prescribed by GATT. Such an interpretation gives countries a fair amount of latitude in implementing and enforcing their own trade laws. As more international trade disputes are addressed by GATT Panels, and as the text of GATT and its side agreements are refined and expanded, the vagueness at issue here may be reduced and replaced by more specific requirements.³⁶⁰

Another observation is that international trade agreements such as GATT permit national policy pertaining to commerce between two signatories to be heavily driven by a few affected domestic industries, rather than by the nation as a whole and/or its populace. This is because an affected industry in the United States, no matter how small, can petition the government to initiate an investigation into the alleged unfair

358. GATT: What It Is and What It Does, *supra* note 39, at 1.

359. *Id.* at 7-8.

360. This is exactly what the Uruguay Round negotiations have accomplished.

trade practices of another country. It could be argued that consumers in the United States, for example, would be required to pay higher prices for a domestic product that could be supplied at a reduced cost by foreign industries restrained by the imposition of a duty. By requiring consumers to pay higher prices for products produced by the domestic industry, the consumer is forced to support the inefficiencies of the domestic industry. This can be construed as a form of economic subsidy to the domestic industry. This, and most types of subsidies, can lead to national inefficiency due to insufficient competition, and can decrease the nation's wealth.³⁶¹ Although the lack of import duties might result in the short term dislocation of some segments of the domestic work force, the author believes that the long term health of a nation's economy is more important than the prevention of short term hardship.

If a foreign company or industry is selling its product below cost, or "dumping" the product, it will not be able to maintain that strategy for long. Eventually, all companies must make a profit to stay in business.³⁶² If a foreign industry is being subsidized by its government, that means some other industry is not, since no country has the resources to subsidize all of its industries for long. Even though the lack of trade barriers might harm a few domestic industries because they are unable to produce a quality product at a competitive price, or at least comparable to that of the foreign industry, other domestic industries should be able to flourish.

In determining the relative competitive positions of industries in importing and exporting countries in order to determine the appropriateness of a duty, the issue of what exactly constitutes a subsidy arises. Compensating for a subsidy by imposing a duty is supposed to level the competitive playing field between the two countries. However, there are

361. In 1776, Adam Smith wrote, "The wealth of nations isn't built by keeping barriers high to protect jobs. It is created by concentrating on what a country does best." *THE WEALTH OF NATIONS*, quoted in *Perspective: Free Trade, More Wealth*, INVESTOR'S BUS. DAILY, Aug. 3, 1994, at B1. The above article also states that "trade increases wealth by increasing competition and specialization." See also Bernard M. Hoekman and Michael P. Leidy, *Dumping, Antidumping and Emergency Protection*, J. WORLD TRADE, Oct. 1989, at 27 (saying that antidumping laws reduce competition, leading to inefficiency); Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199 (1989) (an economic efficiency analysis of countervailing duty law, advocating for a reform of countervailing duty law).

362. In making this statement, the author is assuming the business is operating to make money.

bound to be disputes over what types of governmental actions should be construed as "subsidies" subject to corrective measures. One area, for example, which could cause controversy is environmental regulation. If an industry in an importing country is subject to strict environmental regulation, which raises production costs and prices, less stringent environmental regulations in another, exporting, country could possibly be construed as a subsidy. Different taxation structures and/or tax levels for activities such as development activities, and differing depreciation schedules for capital expenditures could also result in varying costs of production between countries. These "indirect subsidies" might not normally be considered subsidies, but are of such a nature that perhaps they should be defined as such in agreements like the GATT. The definition of "subsidy" was an important topic during the subject dispute. The lack of such a definition in GATT or its side agreements benefitted the United States by allowing it to develop its own practice and policy on the issue.³⁶³

Finally, although GATT can provide an avenue for a country to protect its domestic industries from foreign competition,³⁶⁴ it can not help domestic industries resolve their problems or become more competitive, and thus prosper, even within their domestic market. Put another way, GATT does not and can not require a domestic industry to address or correct basic deficiencies in how it operates and manages its individual producers. It merely provides a mechanism to stop or regulate inroads into the market for the subject product unfairly created in other signatory countries. This was evidenced in the present investigation. Although Maine Atlantic salmon growers were able to eliminate their primary competition from the U.S. market, this action did not significantly help Maine farmer's own position within the market. If foreign competition was not and is not now the real problem facing the domestic industry, duties imposed on foreign competitors will not help.

The case studied in this Article has highlighted some aspects of how U.S. international trade disputes are settled. In this case, U.S. trade legislation was held acceptable by two GATT Panels, again, not because U.S. practice and policy was mandated by GATT provisions, but largely

363. See *supra* footnotes 233-236 and accompanying text.

364. See, e.g., J. Wesley Bailey, *Trade Law: The Protectionist Use of Antidumping Laws—Should the Law Be Changed?*, 7 FLA. J. INT'L L. 433 (1992) (saying that antidumping law is contrary to free trade and the interests of U.S. consumers, but that the law should be changed to protect important U.S. industries).

because GATT lacked specific requirements on how countries should deal with the circumstances involved. While this vagueness is probably required to entice nations to sign GATT, it also works to lessen the effectiveness of the requirements which do exist. Because the United States was the importing country here, and because the GATT was vague on its requirements, the United States was able to handle the initial investigations by the USITA and USITC as it wished. It appears that as long as an importing country's trade laws and practices are reasonable and thorough, it can do what it wants.

It also appears to the author that the four original questions posed by this Article have been answered. The four questions were: 1) is U.S. trade law being used as a protectionist measure to protect U.S. industries from unfair foreign competition; 2) are U.S. and international trade law and practice incompatible; 3) did the removal of Norwegian Atlantic salmon from the U.S. market open the door for other producer countries; and, 4) was the above opportunity capitalized on by Maine, the initiator of the event, or by other producer countries, namely Canada and Chile?

With regard to question one, it appears that, in this instance, the United States did successfully use its trade laws in a protectionistic manner in an attempt to protect the U.S. salmon industry from what it believed was unfair foreign competition. However, as stated above, this author does not believe that dumping or subsidies are necessarily unfair to the importing country as a whole. This is because foreign products priced lower than domestically produced products can benefit consumers. They can also benefit the domestic industry. Competition from foreign producers will force domestic producers to make their operations more efficient, which might result in even lower prices to consumers and/or a better product. The protectionist measures taken in the Norway case may have prevented this from occurring.

As to question two, although certain minor aspects of U.S. trade practice were found incompatible with the United States' international obligations under the GATT, its trade laws and practices as a whole (at least those relevant here) were found to be consistent with its international trade rights and obligations. This conclusion is based on the conclusions of the two GATT Panel Reports which upheld the United States' position, determination of injury, and imposition of duties on the subject imports. Both of these Reports found that it was within the United States' international rights and obligations to levy duties upon the subject imports.

Concerning the third question, import data and Maine production data shows that other producers were able to enter the U.S. market and fill the gap left by the removal of Norwegian salmon from the U.S. market. In 1989 the amount of farmed Atlantic salmon in the United States market was 20,224,255 kg. By 1992, that amount was 31,539,300 kg (see table 1 for volume of import data).³⁶⁵ This shows that the level of farmed Atlantic salmon in the United States actually increased after the removal of the Norwegian product.

The same data answers the fourth question. Although Maine was able to increase its annual production of salmon in the years following the curtailment of Norwegian product in the U.S. market, Chile far exceeded that increase, based on percentage increase in U.S. imports and Maine production, and has become the current dominant producer for the U.S. market (see table 1 for volume of import data). However, Maine was able to outperform Canada between 1989 and 1992, as discussed above. Although Maine made inroads, based on percentage increases between 1989 and 1992, into the U.S. fresh and chilled Atlantic salmon market, it still lags behind Chile and Canada in absolute terms. This conclusion is based on import data for foreign countries and production data for Maine. The reasons for Maine's failure to more significantly capitalize on the removal of Norwegian salmon from the U.S. market is unclear from this investigation, but warrants study in the future.

365. 1989 was chosen because it was also chosen by the USITC. 1992 was chosen because the author believes the reliability of 1992 data are better than 1991 data, due to how data are collected and reported by the Census Bureau.

