

2589

# FRESH AND CHILLED ATLANTIC SALMON FROM NORWAY

Views on Remand  
in Investigations  
Nos. 701-TA-302 and  
731-TA-454 (Final)



**USITC PUBLICATION 2589**

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**United States International Trade Commission  
Washington, DC 20436**

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**COMMISSIONERS**

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**Peter S. Watson, Vice Chairman**

**David B. Rohr**

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In April 1990, the U.S. International Trade Commission determined that an industry in the United States was materially injured by imports of fresh and chilled Atlantic salmon from Norway that the Department of Commerce had determined to be subsidized and sold in the United States at less than fair value (USITC Publication No. 2371 (April 1991)). The Commission's determination was appealed to the U.S. Court of International Trade ("CIT") and, on October 23, 1992, the CIT remanded the Commission's determinations (Chr. Bjelland Seafoods A/C v. United States, slip op. 92-196 (CIT October 23, 1992)). The attached views were submitted to the court in response to the remand.

Note.--Information that would reveal confidential operations of individual concerns may not be published and therefore has been deleted from these views. Such deletions are indicated by asterisks.



## VIEWS OF THE COMMISSION<sup>1</sup>

Based on the record in these investigations, and pursuant to the order of the U.S. Court of International Trade (CIT) in Chr. Bjelland Seafoods A/C v. United States,<sup>2</sup> we determine that an industry in the United States is materially injured by reason of imports of fresh and chilled Atlantic salmon from Norway that the Department of Commerce has determined to be subsidized and sold in the United States at less than fair value (LTFV).

### I. Procedural Background

The Commission originally reached affirmative determinations in these investigations on April 1, 1991.<sup>3</sup> Respondents subsequently filed suit in the CIT challenging the Commission's determinations.

The CIT issued a decision and order on October 23, 1992 remanding the Commission's determinations.<sup>4</sup> The court held that the Commission's determinations that a domestic industry was materially injured by reason of subsidized and LTFV imports of fresh and chilled Atlantic salmon from Norway was defective in two respects. First, the court concluded that the Commission did not adequately explain the significance of a 1990 decrease in the volume of subject imports. The court directed the Commission on remand to explain

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<sup>1</sup> Vice Chairman Watson and Commissioners Brunsdale and Crawford have reached negative determinations and do not join this opinion. See their dissenting views.

<sup>2</sup> Slip op. 92-196 (October 23, 1992).

<sup>3</sup> Fresh and Chilled Atlantic Salmon from Norway, Inv. Nos. 701-TA-302 and 731-TA-454 (Final), USITC Pub. 2371 (April 1991) ("April 1991 Determination"). Chairman Newquist and Commissioner Rohr made affirmative determinations in the original investigations. Commissioner Nuzum was not a member of the Commission at the time of the original investigations and consequently did not participate in them.

<sup>4</sup> Chr. Bjelland Seafoods A/C v. United States, slip op. 92-196 (CIT October 23, 1992).

the significance of this decrease in light of: (1) the appreciation of the Norwegian kroner against the U.S. dollar during 1990; (2) record evidence indicating that the volume of Norwegian exports to the European Community increased during the same period notwithstanding the pendency of an antidumping investigation there; and (3) evidence indicating that the one Norwegian producer not subject to provisional duties had a decrease in exports to the United States during the latter part of 1990.<sup>5</sup>

Second, the court determined that "[a]ll of the Commission's examples of negative impact [caused by the subject imports] on the domestic industry appear to be effects of an injury which occurred in 1989."<sup>6</sup> It concluded that the Commission's analysis did not comport with its obligation to determine whether the domestic industry was experiencing "present" material injury. The court directed the Commission on remand to render a determination based on the impact of the imports at the time it originally issued its final determinations.<sup>7</sup> It ordered the Commission to file a remand determination no later than December 22, 1992.

Accordingly, the Commission on November 12, 1992, issued a notice authorizing the parties to file comments concerning the issues on remand and indicating that in the remand investigation "the Commission will only examine information contained in the administrative record compiled in the original

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<sup>5</sup> See id. at 14-15.

<sup>6</sup> Id. at 20.

<sup>7</sup> See id. at 21-22.

investigation."<sup>8</sup> The parties submitted their comments on the remand proceeding on November 20, 1992.<sup>9</sup>

## II. Like Product and Domestic Industry

In its original determinations, the Commission found there to be one like product in this investigation -- fresh and chilled Atlantic salmon including Atlantic salmon smolt.<sup>10</sup> It further determined that the domestic industry consisted of the U.S. producers of that like product, and that the domestic Atlantic salmon industry was established.<sup>11</sup> These findings were not at issue in the litigation before the CIT and are not among the subjects of the court's remand order. We reaffirm these findings in this remand determination.<sup>12</sup>

## III. Condition of the Domestic Industry

The Commission concluded in its original determinations that, although production and employment trends rose during the period of investigation, "[o]n the financial side, the condition of the industry is dire."<sup>13</sup> The Commission concluded that the domestic industry was experiencing material

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<sup>8</sup> 57 Fed. Reg. 54416 (November 18, 1992).

<sup>9</sup> Petitioners, in a letter submitted to the Commission on November 24, 1992, contend that respondents' comments address topics outside the scope of those permitted under the Commission's remand notice and should therefore be rejected or disregarded by the Commission. We do not agree. We believe that respondents' comments have a sufficient nexus to the topic of the significance of the 1990 decrease in the volume of subject imports so as to be within the scope of what was permitted under the remand notice.

<sup>10</sup> April 1991 Determination at 3-10.

<sup>11</sup> April 1991 Determination at 10-11.

<sup>12</sup> Commissioner Nuzum, upon de novo review of the record, concurs with the like product and domestic industry determinations of the Commission as set forth in its original determinations and reaffirmed here.

<sup>13</sup> April 1991 Determination at 15.

injury, based on its extremely negative financial performance.<sup>14</sup> The Court's remand order does not expressly direct the Commission to amend or reexamine these findings. We nevertheless have reexamined the record with respect to the condition of the domestic industry in this remand.<sup>15</sup>

A. Conditions of Competition

Under the statute, we must consider the condition of the domestic industry "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."<sup>16</sup> The U.S. Atlantic salmon industry faces a number of distinctive conditions of competition.

There are, for example, unusual constraints on producers related to the developmental stage of the U.S. industry, the extended production cycle, and the concentrated selling season. As the Commission noted in its original determinations, this is a new and emerging industry.<sup>17</sup> Because of the long salmon growth cycle,<sup>18</sup> producers generally incur costs for several years before seeing any returns on their investment. Thus, producers accumulate substantial debt before their first harvest season and often have significant demands on cash flow. The importance of a successful harvest season is not limited to new entrants, however; all domestic producers rely on sales during a concentrated selling season to finance their operations until the beginning of the next season. Specifically, sales commencing in September and

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<sup>14</sup> Id.

<sup>15</sup> Commissioner Nuzum notes that her analysis of the condition of the industry is based on a de novo review of the record.

<sup>16</sup> 19 U.S.C. § 1677(7)(C)(iii).

<sup>17</sup> April 1991 Determination at 11-12; see Report at A-14-18.

<sup>18</sup> See Report at A-6-8.

continuing until the producer is "fished out" sustain operations until the next harvest's revenues start to flow.<sup>19</sup>

There are additional constraints imposed on U.S. producers once the harvest commences. Domestic producers supplied a very small share -- approximately 6 to 8 percent throughout the period of investigation -- of total U.S. consumption.<sup>20</sup> With such a small market share, U.S. producers act as price takers, with prices determined largely by total supply. Norwegian imports, by contrast, accounted for at least a substantial, and at times an overwhelming, share of total supply throughout the period of investigation.<sup>21</sup> As with any perishable product, producers are at the mercy of prevailing prices when they bring their harvest to market.<sup>22</sup> In fact, U.S. producers are generally forced to sell their less-established product at a discount relative to the more familiar Norwegian product.<sup>23</sup> Another condition of competition in this investigation is the steady increase in consumption observed during the period of investigation.<sup>24</sup>

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<sup>19</sup> See Report at A-8. The Norwegian industry, due to its size and maturity, harvests salmon in substantial quantities year-round. Report at A-46 n.100.

<sup>20</sup> Report, Table 18.

<sup>21</sup> Report, Tables 17, 18.

<sup>22</sup> Producers reportedly had a maximum "window" -- in terms of production constraints -- of four months during which to harvest their salmon. Tr. at 90 (McLernon). Due to cash flow demands, however, domestic producers were forced to sell their salmon early during the 1989-90 harvest season, coinciding with the period during which import levels peaked and prices bottomed out. Tr. at 34 (Simon); Preliminary Investigation Tr. at 36 (McLernon).

<sup>23</sup> See INV-O-048 at 12.

<sup>24</sup> See Report, Table 1.

B. Difficulties of the Industry during 1990

Our further examination indicates that the domestic industry was experiencing serious problems at the time of the original determinations. We emphasize that this finding is not based solely or principally on data from 1989, when, as the original Commission opinion noted, "the financial state of the U.S. Atlantic salmon industry declined precipitously."<sup>25</sup> The finding is fully supported by the most contemporaneous data in the record -- those from 1990.<sup>26</sup>

The lack of growth in several 1990 production and capacity indicators, at a time when domestic consumption was increasing significantly,<sup>27</sup> the worldwide salmon market was characterized by strong growth,<sup>28</sup> and the domestic industry was still relatively new,<sup>29</sup> demonstrates industry problems rather than stability. There was only an insignificant 1.5 percent expansion in smolt capacity from 1989 to 1990, although this indicator increased by 151.6 percent between 1987 and 1988 and by 186.0 percent between 1988 and 1989. Additionally, although the 1990 capacity utilization rate for smolt improved relative to 1989, it remained below the 1988 level.<sup>30</sup> Smolt shipments

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<sup>25</sup> April 1991 Determination at 14. The original determination fully states the specific factors supporting this characterization.

<sup>26</sup> A full discussion of all pertinent factors the Commission is directed to examine pursuant to 19 U.S.C. § 1677(7)(C)(iii) appears at pages 11-15 of the April 1991 Determination. We see no need to repeat that discussion here. Instead, the following discussion merely emphasizes the particular factors that support our determination on remand concerning "present" material injury.

<sup>27</sup> Report at A-13-14.

<sup>28</sup> Report at A-11-12.

<sup>29</sup> See Report at A-14.

<sup>30</sup> Report, Table 2. Smolt capacity determines freshwater production capability. Report at A-21.

declined by 2.0 percent in 1990 after strong expansion the two previous years, highlighted by a 171.8 percent increase between 1988 and 1989.<sup>31</sup>

Another negative indicator is the average unit value of U.S. shipments. In the 1989-90 harvest season this unit value decreased 29.2 percent from 1988-89 and 35.3 percent from 1987-88.<sup>32</sup> Although the January-June 1990 average unit value of \$3.35 showed an improvement over the extraordinarily depressed July-December 1989 unit value of \$2.67, it remained well below the levels of 1987 and 1988.<sup>33</sup>

Financial indicators pertaining to the domestic industry were particularly poor. The domestic industry sustained operating losses and negative cash flow during the first nine months of 1990.<sup>34</sup> Overall industry losses may be attributed in part to the entry of new firms, because producers generally lost money while in start-up mode. For those firms reporting sales in 1988, however, overall financial performance in interim 1990 also showed a substantial deterioration compared with 1988.<sup>35</sup> The largest domestic producer, Ocean Products, Inc., ceased operations, liquidated, and sold its assets to another company on August 31, 1990.<sup>36</sup> Other producers indicated difficulties in obtaining working capital and credit.<sup>37</sup>

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<sup>31</sup> Report, Table 4.

<sup>32</sup> See Report, Table 5.

<sup>33</sup> Report at A-27.

<sup>34</sup> Report at A-31; Confidential Report at A-40-42.

<sup>35</sup> Confidential Report at Tables 8, 9, 11, 13, A-54, A-57, A-58.

<sup>36</sup> Report at A-19, A-31. \*\*\*. Confidential Report at A-48.

<sup>37</sup> Tr. at 21-23 (McLernon); Confidential Report at B-70-71. \*\*\*. Confidential Report at A-39.

Chairman Newquist and Commissioner Rohr consequently reaffirm their original determinations that the domestic industry is experiencing material injury. Commissioner Nuzum does not reach a separate conclusion on material injury.

#### IV. Material Injury by Reason of LTFV and Subsidized Imports

In determining whether the domestic industry is materially injured by reason of the imports under investigation, the statute directs the Commission to consider:

(I) the volume of imports of the merchandise which is the subject of the investigation;

(II) the effect of imports of that merchandise on prices in the United States for like products, and

(III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States.<sup>38</sup>

In making this determination, the Commission may consider "such other economic factors as are relevant to the determination . . . ." <sup>39</sup> Although we may consider information that indicates that injury to the industry is caused by factors other than the LTFV imports, we do not weigh causes.<sup>40</sup>

##### A. Volume of Subject Imports

We first consider the volume of the subject imports. Between 1987 and 1989, the quantity of subject imports rose sharply: from 7.6 million

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<sup>38</sup> 19 U.S.C. § 1677(7)(B)(i).

<sup>39</sup> 19 U.S.C. § 1677(7)(B)(ii).

<sup>40</sup> The Commission need not determine that imports are "the principal, a substantial or a significant cause of material injury." S. Rep. No. 249, 96th Cong., 1st Sess. 57, 74 (1979). Rather, a finding that imports are a cause of material injury is sufficient. See, e.g., Metallwerken Nederland, B.V. v. United States, 728 F. Supp. 730, 741 (CIT 1989); Citrosuco Paulista v. United States, 704 F. Supp. 1075, 1101 (CIT 1988).

kilograms in 1987; to 8.9 million kilograms in 1988; and then to 11.4 million kilograms in 1989.<sup>41</sup> In the first six months of 1990, the quantity of subject imports declined somewhat from the comparable period in 1989. In the second six months of 1990, however, the quantity of subject imports declined substantially from the previous year's levels.<sup>42</sup> The value of fresh Atlantic salmon imported from Norway displayed similar trends, increasing steadily from \$74.4 million in 1987 to \$93.7 million in 1989, declining somewhat between January-June 1989 and January-June 1990 and declining sharply between July-December 1989 and July-December 1990.<sup>43</sup> The average unit value of the Norwegian product increased from \$9.78 per kg in 1987 to \$10.12 per kg in 1988, then declined to \$8.22 per kg in 1989.<sup>44</sup> The average unit value during January-June 1990 also declined compared with that during January-June 1989.<sup>45</sup> U.S. market penetration of the subject imports declined throughout the period of investigation. In each year over the period of investigation, however, U.S. market penetration of the subject imports substantially exceeded that of both the domestic industry and imports from any other individual country.<sup>46</sup>

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<sup>41</sup> Report, Table 17.

<sup>42</sup> The decline was 9.0 percent in the first half of 1990 and 54.9 percent in the second half. Monthly import data are found in the Administrative Record ("AR") submitted to the CIT at List 2, Document 26C. Full year 1990 subject imports decreased in quantity by 32.4 percent from 1989. Report, Table 17.

<sup>43</sup> Report, Table 17; AR List 2, Doc. 26C. The value of subject imports for calendar year 1990 was \$66.4 million. Report, Table 17.

<sup>44</sup> Report, Table 17.

<sup>45</sup> AR List 2, Doc. 26C. The full-year 1990 unit value, \$8.63 per kg, was up slightly from 1989 but was still substantially below 1987 and 1988 levels. Report, Table 17.

<sup>46</sup> Report, Tables 17, 18.

The Commission's original determination found the volume of subject imports to be significant, and stated that it gave "less weight to the recent decline in imports in 1990 because it appears to be largely the result of the filing of the petition and/or the imposition of provisional antidumping and countervailing duties."<sup>47</sup> The CIT determined that the Commission did not adequately explain this conclusion. It specifically instructed the Commission to consider whether the 1990 decline in the volume of subject imports was the result of the appreciation of the Norwegian kroner against the dollar.<sup>48</sup>

Pursuant to the court's direction, we have considered this issue. For the reasons stated below, we conclude that the 1990 decline in subject import volume was not principally a function of the appreciation of the Norwegian kroner.

In this regard, we believe that it is especially significant that the unit value of imports from Norway did not increase commensurately with the appreciation of the kroner. One would expect that, if price increases associated with the kroner appreciation led to the decline in import volumes, the prices charged by Norwegian exporters, in dollar terms, would increase at roughly the same rate that the kroner was increasing in value against the

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<sup>47</sup> April 1991 Determination at 17. Commerce published its preliminary affirmative countervailing duty determination on June 29, 1990, 55 Fed. Reg. 26727, and its preliminary affirmative antidumping determination on October 3, 1990, 55 Fed. Reg. 40418.

<sup>48</sup> The CIT's assignment of error was that "[t]he Commission fails to explain, as it must, its conclusion. . ." Slip op. 92-196 at 15 (emphasis added). The court supported this statement by citing a number of cases holding that administrative agencies must explain their determinations in adequate detail. This discussion indicates that the purpose of this part of the CIT's remand is to obtain a more complete explanation from the Commission concerning the reasons for the decline in volume in 1990 subject imports. It does not support the view, advocated by respondents, that the CIT directed the Commission as a matter of law to find that the 1990 decline in subject import volume was not caused by the filing of the petition or the imposition of provisional duties.

dollar. The material in the record that provides the best information available concerning prices charged by Norwegian exporters is the unit value statistics reported in Customs Service import data. The monthly data compiled by the Customs Service<sup>49</sup> indicate that the unit value of subject imports increased by 3.9 percent from \$8.76 per kg in May 1990 to \$9.10 per kg in September 1990. During the same period, however, the kroner appreciated 6.1 percent against the dollar.<sup>50</sup> The significant disparity between the increase in unit values and the rate of currency appreciation over this period raises substantial doubt that exchange-rate motivated price increases were the primary cause of the severe volume decreases in the second half of 1990, as typified by the 54.5 percent decrease from May to September.<sup>51</sup>

U.S. importers, by contrast, displayed different patterns in the prices they charged to their customers. Between May and September 1990, the prices charged by U.S. importers of Norwegian salmon increased much more rapidly than the prices Norwegian exporters charged to them. Prices charged by U.S. importers during this period increased 14.3 percent for 2-3 kg salmon, 14.0 percent for 3-4 kg salmon, and 15.0 percent for 4-5 kg salmon.<sup>52</sup> Thus, at the same time that Norwegian exporters' prices were increasing significantly less

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<sup>49</sup> These data are located at AR List 2, Doc. 26C.

<sup>50</sup> See Respondents' Prehearing Brief, app. 17. The disparity between the rate of the appreciation of the kroner and the rate of increase in unit values grew throughout the remainder of 1990. Compare Respondents' Prehearing Brief, app. 17 with AR List 2, Doc. 26C. However, because the distribution of subject imports among different weight classifications shifted materially in October 1990, the average unit value statistic for the period following October 1990 may not be as reliable a surrogate for the price charged by Norwegian exporters as it is for earlier months. In the May through September 1990 period, by contrast, the distribution of subject imports among different weight classifications did not materially change.

<sup>51</sup> In 1989, by contrast, volumes increased from May to September.

<sup>52</sup> Respondents' Prehearing Brief, app. 12.

than the rate of currency appreciation, the prices U.S. importers were charging increased substantially more than the currency appreciation rate.

The record shows that the principal reason for this disparity was the posting of bonds necessitated by the imposition of provisional countervailing duties on Norwegian exports that began in late June 1990. Contemporaneous reports in trade publications indicate that some U.S. importers were moving away from handling Norwegian salmon because of administrative and financial burdens associated with the posting of bonds.<sup>53</sup> When compared with these burdens, currency fluctuation-related increases in the acquisition cost of imports are not the principal reason that U.S. importers substantially increased their prices during the second half of 1990.<sup>54</sup> Consequently, in our judgment, the precipitous drop in monthly export volumes during that period is not principally a function of the appreciation of the kroner.

The fact that the volume of Norwegian exports to the European Community (EC) did not similarly decrease during the pendency of an antidumping investigation there between December 1989 and March 1991 does not detract from this conclusion. In contrast to the instant U.S. investigations, provisional duties were not imposed in the EC investigation and thus could not have served as a disincentive to EC importers of Norwegian salmon.<sup>55</sup>

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<sup>53</sup> Seafood Trend (June 25, 1990), AR List 1, Doc. 188(Y)(19).

<sup>54</sup> Other information in the record also militates against the conclusion that the 1990 decrease in subject import volume was due principally to currency fluctuations. The Norwegian kroner appreciated significantly against the dollar at other times during the period of investigation, most notably in 1988. Report, Table 22. Yet the quantity of subject imports increased between 1987 and 1988. Report, Table 17.

<sup>55</sup> See Commission Decision of 15 March 1991 terminating the anti-dumping proceeding concerning imports of Atlantic salmon originating in Norway, Official Journal of the European Communities, no. L 69/32 (March 16, 1991). Even during its pendency, it was considered highly unlikely that the EC investigation would result in the imposition of antidumping duties against

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The experience of the Norwegian exporter Sea Star International, whose export shipments were not subject to provisional duties between November 1990 and January 1991, also does not detract from this conclusion. An examination of Sea Star's U.S. export data indicates that its export decline does not track those of other Norwegian producers and cannot be attributed to the kroner appreciation.<sup>56</sup> Furthermore, Sea Star was only one of eight exporters examined by Commerce and accounted for less than \*\*\* percent of total export volume for the portion of the period of investigation for which complete data are available.<sup>57</sup>

We continue to accord little weight to the sharp decline in the volume of subject imports in the second half of 1990, because we find it was in significant part attributable to the pendency of these investigations.<sup>58</sup> Even taking all of 1990 into account, however, we still find the volume of the imports significant for purposes of establishing a causal link to the depressed condition of the U.S. industry. Notwithstanding the 1990 decrease,

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<sup>55</sup>(...continued)

Atlantic salmon from Norway. See Preliminary Investigation Report at A-27; Confidential Preliminary Investigation Report at A-52 n.63.

<sup>56</sup> \*\*\*. See Petitioners' Remand Brief, attachment 9.

<sup>57</sup> See 55 Fed. Reg. 40418 (October 3, 1990); Petitioners' Remand Brief, attachment 9.

<sup>58</sup> Another factor that may have contributed to the decline in subject import volumes during 1990 was the Norwegian "intervention plan," which resulted in the removal from the fresh fish market of nearly one-third of the 1990 Norwegian salmon harvest. The actual decline from 1989 to 1990 of worldwide sales of fresh Norwegian salmon was small, however. Report at A-39. Had the decline in subject imports been primarily due to the intervention program, we would expect to see a similarly small, and steady, decline in those imports. There was a substantially steeper drop-off in Norwegian exports to the U.S. market concentrated after July 1990, however, which leads us to conclude that the intervention program was not the primary reason for that drop-off. To the extent that the program contributed to the decline in exports, we note that the program was intended for short-term stabilization. See Tr. at 110-11 (Steinsbro). This fact underscores our reluctance to put considerable weight on the 1990 decline in subject import volumes.

the quantity of subject imports that year remained 409 percent above U.S. producers' shipments.<sup>59</sup> We consequently determine that the absolute volume of the subject imports was significant throughout the entire period of investigation.

#### B. Effect of Subject Imports on Prices

In determining the effect of subject imports on prices, we bear in mind that the CIT has instructed the Commission in this remand that its determination must focus on the "present" impact of subject imports as of the time of the original April 1, 1991, determination, and that the Commission cannot base an affirmative determination on "the effects of an injury which occurred in 1989."<sup>60</sup> To comply with the court's remand order, we have based our analysis on the most current import pricing data which we believe is reliable. In so doing, we neither concede that the analytical approach followed in the original Commission determination was in error nor endorse the approach that the CIT has directed us to follow in this remand.<sup>61</sup>

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<sup>59</sup> Report at Table 17 and Memorandum INV-0-050 at 1.

<sup>60</sup> Slip op. 92-196 at 20.

<sup>61</sup> The basis for the standard the CIT applied in its review of "present" injury, which respondents advocated neither before the Commission nor the court, is not entirely clear. The CIT relied principally on Chapparral Steel Co. v. United States, 901 F.2d 1097 (Fed. Cir. 1990), to support its conclusion that the Commission can make an affirmative determination only if injury is caused by imports contemporaneous with the vote. Chapparral, however, did not limit the evidence the Commission could consider in evaluating present material injury. Instead, the issue that the Federal Circuit addressed concerned whether the Commission could refuse to cumulate imports from non-subject countries that had been subject to investigation until the countries entered voluntary restraint agreements during the pendency of the investigation at issue. The court ruled that the Commission properly interpreted the statutory phrase "imports . . . subject to investigation" in 19 U.S.C. § 1677(7)(C)(iv) to encompass "only imports still under investigation on vote day and imports which were proven 'unfair' and to have continuing effect as of vote day." Id. at 1104. It concluded that "[w]e cannot say the ITC was unreasonable in evaluating candidates for cumulation on

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We believe that the most current reliable import pricing information is for the period ending June 1990. For the reasons stated above, we believe that data concerning prices charged by U.S. wholesalers for the subject imports starting in July 1990 are skewed by the imposition of provisional duties in June 1990. We do not believe that the CIT's order precludes us from declining to give dispositive weight to the post-June 1990 data, as long as we have explained why they are not probative to a present injury analysis. Indeed, established case law that the CIT neither distinguished nor criticized in its decision holds that the Commission has the discretion to place less weight upon contemporaneous data that have been skewed by post-petition activities.<sup>62</sup> Requiring use of such data would also have the anomalous effect of making an affirmative determination more difficult to issue merely because the most contemporaneous data available could reflect that the provisional duties have had their intended price and volume effects on subject imports.<sup>63</sup>

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<sup>61</sup>(...continued)

the basis of their unfair trading or effects of proven unfair trading as of vote day." Id. at 1105 (footnote omitted; emphasis added). The court's express recognition and approval of the Commission's consideration of the "effects" of previously unfairly traded imports indicates that it did not intend to rule that only contemporaneous imports are pertinent to a present material injury determination.

The CIT's discussion additionally indicated that its disposition of the Commission's material injury determination was motivated by a desire to construe U.S. laws in a manner consistent with what it perceived to be required by GATT. See slip op. 92-196 at 17. We note that GATT obligations do not override U.S. law. Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 667 (Fed. Cir. 1992). In any event, as has been reported in the press, there has been a GATT Panel Report (which has not yet been presented for approval) upholding against a challenge by Norway the Commission's original determinations as consistent with the United States's GATT obligations.

<sup>62</sup> See USX Corp. v. United States, 655 F. Supp. 487, 492 (CIT 1987); Philipp Bros., Inc. v. United States, 640 F. Supp. 1340, 1346 (CIT 1986); Rhone Poulenc, S.A. v. United States, 592 F. Supp. 1318, 1324 (CIT 1984).

<sup>63</sup> The statutory scheme itself recognizes that imposition of provisional duties can have a material impact on both the domestic industry and subject  
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Based on our examination of the pre-July 1990 pricing data, we conclude that the subject imports had a significant "present" effect on prices for the domestic like product.<sup>64</sup> Published prices and questionnaire data show that after reaching a peak in 1988, prices for both the domestic product and the subject imports trended downward. As of June 1990, these prices remained below their 1987 and 1988 levels.<sup>65</sup> In light of the conditions of competition, we find that a causal link exists between these price trends, the substantial volumes of subject imports during the same period, and the depressed condition of the domestic industry. Domestic salmon producers have little flexibility in adjusting production to short-term changes in market conditions. Atlantic salmon take approximately three years to grow from egg stage to harvestable size, and must be marketed in the very short period of time in which they are harvestable.<sup>66</sup> Thus, if market conditions are not favorable, salmon cannot simply be held in inventory.<sup>67</sup>

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<sup>63</sup>(...continued)

imports. For this reason, whenever the Commission makes an affirmative final threat determination, it must also determine whether it would have made an affirmative determination on present material injury but for the imposition of provisional duties. 19 U.S.C. § 1673d(b)(4)(B).

<sup>64</sup> As previously stated, we are examining "present" effects pursuant to the direction of the CIT. We continue to believe, however, that the nature of the Commission's inquiry requires a dynamic analysis over a period of time of both the condition of the domestic industry and the effects of imports upon that industry. The CIT has recognized that the Commission may select an appropriate period of investigation to analyze the effects of imports on the industry's condition in historical perspective. See Kenda Rubber Industrial Co. v. United States, 630 F. Supp. 354, 359 (CIT 1986). Consequently, while the statute requires that there be a sufficient causal link between the imports and present material injury, we do not believe that material injury analysis should be based upon a "snapshot" of the imports at any particular moment.

<sup>65</sup> See Report at A-52-55, A-59; Confidential Report at Table 19.

<sup>66</sup> Report at A-6-8.

<sup>67</sup> See Report at A-24.

When Norway flooded the market with LTFV and subsidized salmon in 1989 and the first half of 1990, domestic producers could not respond by withholding product from the market.<sup>68</sup> Nor did they have established export markets to which they could shift salmon sales.<sup>69</sup> Instead, they were forced to sell their domestic production in the domestic market for whatever price they could receive.<sup>70</sup> That price was reduced because of the substantial amount of unfairly traded subject imports available in the market and the high degree of substitutability between domestic and Norwegian salmon.<sup>71</sup> In other words, the subject imports depressed and suppressed the price of the domestic like product throughout that portion of the period of investigation for which reliable pricing data are available. Indeed, the data show that prices for the two products generally moved in tandem through June 1990.<sup>72</sup> And when the volume of subject imports decreased thereafter due to the imposition of preliminary duties, the immediate effect was to allow prices for the domestic like product to increase.<sup>73</sup>

### C. Other Effects of Subject Imports

The adverse effects of the subject imports were not limited to their effects on domestic prices. As explained below, the subject imports also had "actual and potential negative effects on [the domestic industry's] cash flow,

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<sup>68</sup> The level of subject imports was at an all-time high in December 1989. See AR List 2, Doc. 26C.

<sup>69</sup> See INV-0-048 at 7.

<sup>70</sup> See also Tr. at 34 (Simon); Preliminary Investigation Tr. at 36.

<sup>71</sup> See INV-0-048 at 12.

<sup>72</sup> See Report at A-56-58. Norwegian salmon, which was heavily promoted and advertised as a "premium" product, sold at consistently higher prices than domestic salmon. INV-0-048 at 12.

<sup>73</sup> Confidential Report, Table 19; Tr. at 35, 78-80.

. . . growth, ability to raise capital, and investment."<sup>74</sup> We emphasize that these effects were manifested in 1990, the most recent full year for which data were available.

The record contains numerous examples of the subject imports' adverse effect on the ability of the domestic industry to raise capital and investment in 1990.<sup>75</sup> The most prominent example is the liquidation during 1990 of what had been the largest domestic producer, Ocean Products, Inc. (OPI). When OPI ceased operations and sold its fixed and swimming assets to Connors Brothers, Inc. on August 31, 1990, \*\*\*.<sup>76</sup> One reason that \*\*\* was that OPI was unable to obtain the price for its assets that it initially sought. A representative of the purchaser of OPI testified at the public hearing that the impact of Norwegian imports helped explain why his firm paid a lower price than OPI sought for its assets:

OPI was far more optimistic than we were concerning future price trends. OPI's negotiating position was driven, of course, by their desire to salvage what they could for their investors. In contrast, our position was dictated by our experience with the price crash of the selling season just being completed, and our acute awareness of the amount of fish still in the water in Norway, including the smolts that would lead to continued high level of production in future years.<sup>77</sup>

Another U.S. producer similarly testified that the subject imports were causing his company current problems in obtaining investment:

The view in the investment community throughout 1990 and today, as reported by our principal investor in London, is that the Norwegians will be back in the U.S. market immediately upon the

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<sup>74</sup> 19 U.S.C. § 1677(7)(C)(iii)(III).

<sup>75</sup> A number of the most prominent examples are discussed below. Others are described at Appendix E to the Confidential Report.

<sup>76</sup> Confidential Report at A-48.

<sup>77</sup> Tr. at 27 (Hirtle). See also Confidential Report at A-48; Confidential Preliminary Investigation Report at B-19.

dismissal of this case, and that they will attempt to retake the market share they have forfeited by beating everyone on price.<sup>78</sup>

The producer concluded that this negative investment climate caused his company to have considerable difficulty raising capital and obtaining financing.<sup>79</sup>

The same producer additionally testified that, because of the adverse competitive conditions caused by the subject imports, he was currently reducing the amount of smolt he was planting for future production. He noted that, as a result, his plant would not be operating at the most efficient size.<sup>80</sup>

We believe that the foregoing considerations -- a number of which were cited in the Commission's original determinations -- support our conclusion that the domestic industry was experiencing "present" material injury at the time of the original determination by reason of the subject imports. We do not believe that a demonstration that each of these manifestations of "present" problems is a result of imports being entered at the time of the original determination is either necessary as a matter of law<sup>81</sup> or feasible as a matter of fact. When the record closed on March 25, 1991, data on imports were available only for the period through 1990. Thus, the Commission could not possibly have gauged the full impact of subject imports in the 1990-91 harvest season, even assuming arguendo that such information is probative in

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<sup>78</sup> Tr. at 22 (McLernon).

<sup>79</sup> Tr. at 23 (McLernon). Another producer reported similar problems. Tr. at 61 (Ayres).

<sup>80</sup> Tr. at 24-25 (McLernon). See also Confidential Report at B-69-70.

<sup>81</sup> See City Lumber Co. v. United States, 311 F. Supp. 340, 348 (Cust. Ct. 1970) (three-judge court), aff'd, 457 F.2d 991 (C.C.P.A. 1972).

view of the imposition of provisional duties.<sup>82</sup> Consequently, we conclude that our consideration on the other effects of the subject imports on the domestic industry is based on the most current reliable information available.

#### V. Conclusion

In light of the subject imports' significant volume, their adverse price effects on the domestic industry, and their adverse effects on the domestic industry's growth and ability to obtain capital and investment, we conclude that the domestic industry was experiencing "present" injury by reason of the subject imports at the time the Commission made its original determination. We accordingly make affirmative determinations in these remand investigations.

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<sup>82</sup> The U.S. Atlantic salmon harvesting season extends from September into the following spring. Report at A-8. Of course, the Commission cannot extend its statutory deadlines pending the availability of more timely or complete data.

DISSENTING VIEWS OF VICE CHAIRMAN WATSON AND  
COMMISSIONERS BRUNSDALE AND CRAWFORD

Based on our de novo review of the record in these final investigations,<sup>1</sup> we find that the domestic Atlantic salmon industry is not materially injured or threatened with material injury by reason of dumped and subsidized Atlantic salmon from Norway. In making this finding, we have given full consideration to the views expressed by Judge Richard W. Goldberg in the Memorandum and Order of the U.S. Court of International Trade.<sup>2</sup>

We concur with and adopt herein the majority views expressed in the final determination of the Commission that: 1) fresh and chilled Atlantic salmon produced in this country is the like product to fresh and chilled Atlantic salmon imported from Norway; and 2) U.S. producers of the like product are the domestic industry, and that the domestic industry is already established in this country, so that material retardation is not an issue.<sup>3</sup>

We also concur with and adopt the dissenting views of Acting Chairwoman Anne E. Brunsdale in the final investigations.<sup>4</sup> In addition, we express

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<sup>1</sup> Vice Chairman Watson and Commissioner Crawford have based their remand determination on a de novo review of the entire record covering the full period of investigation. In these investigations the Commission gathered data for the years 1987 through 1989. In addition it was able to gather domestic industry financial data through three quarters of 1990, and volume and pricing data through all or most of 1990. Commissioner Brunsdale joins in this opinion and confirms her prior views.

<sup>2</sup> See, Chr. Bjelland Seafoods A/C v. United States, --- F. Supp. ---, Slip Op. 92-196 (Ct. Int'l Trade October 23, 1992) (hereinafter referred to as CIT Opinion).

<sup>3</sup> See, Fresh and Chilled Atlantic Salmon from Norway, Inv. Nos. 701-TA-302 and 731-TA-454 (Final), USITC Pub. 2371 (April 1991) at 3-11. The Commission's final determination was issued on April 1, 1991.

<sup>4</sup> Id., at 23-38. We do acknowledge an arithmetic error in that opinion. Norwegian exports to the EC did not increase 56%, but 20.4%. See, Petitioners' Remand Brief at 7, n.3.

(continued...)

herein certain additional views and observations on the salient points raised by the parties on remand.<sup>5</sup>

1. The volume data concerning subject imports for 1990 should not be given diminished weight.

The CIT has held that the Commission majority improperly minimized the evidentiary weight of the declining volume of the subject imports during 1990.<sup>6</sup> On remand, we have reevaluated the volume data and determine that the Commission should not have assigned reduced weight to the data regarding the volume of the subject imports in 1990. We concur with Commissioner Brunsdale's finding in the final investigations that there was substantial evidence in the record to rebut a presumption that the decline in subject imports was primarily the result of the filing of the petition and/or the imposition of antidumping and countervailing duties. The record indicates that the substantial decline in imports during 1990 and thereafter was primarily the result of the appreciation of the Norwegian kroner against the U.S. dollar in 1990 and the effects of the Norwegian market stabilization

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<sup>4</sup>(...continued)

Vice Chairman Watson does not, however, join in the concurrence with and adoption of the discussion of present injury at 29, nor the discussion of the lingering effects theory at 31-33.

<sup>5</sup> Vice Chairman Watson notes that there have been reports in the press that a GATT panel has reviewed the ITC final determination in these investigations, and found it to be consistent with U.S. obligations under the GATT. The GATT panel report has not yet been adopted.

<sup>6</sup> Focusing on the period of the Commission's investigation, we note that the subject imports in 1989 averaged over 900,000 kilograms per month. In January of 1990 they declined to approximately 779,000 kilograms, rising again to approximately 977,000 kilograms by April of 1990. Thereafter, the subject imports rapidly declined to a mere 188,000 kilograms by the end of December 1990. Petitioner's Pre-hearing Brief, Exhibit 23; Administrative Record List 2, Document 26C. As of the date of the Commission's final determination there were almost no Norwegian salmon entering the domestic marketplace. Transcript of the hearing at 35-36.

program instituted in early 1990.<sup>7</sup> Any effect that the imposition of provisional antidumping and countervailing duties had on the volume of the subject imports was reduced by the fact that those duties were relatively minimal.<sup>8</sup> Not only were those duties minimal compared to the 15% appreciation of the kroner, but they were not put in place until well after the declines in the volumes of the subject imports had begun in 1990.

The Court held that "there is not substantial evidence on the record to support a finding by the Commission that the decline in imports in 1990 was the result of the imposition of antidumping and countervailing duties..."<sup>9</sup> In its reasoning, the Court stated that "[t]he Commission fails to explain, as it must, that the decrease in the volume of imports in 1990 cannot be the result of the appreciation of the Norwegian kroner against the U.S. dollar."<sup>10</sup> (Emphasis added) Therefore, record evidence must establish that the appreciation of the kroner did not result in the decrease in Norwegian imports.

In their remand brief, petitioners attempt to demonstrate that the decline in imports of Norwegian salmon in 1990 should be attributed to the imposition of interim antidumping and countervailing duties and not to the

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<sup>7</sup> Report at A-39. On January 4, 1990 the Norwegian Government instituted a market intervention plan to stabilize prices. The plan set a minimum price and guaranteed that the Norwegian Fish Farmers Sales Organization would pay that price when the export market would not. The surplus salmon were frozen. We note that in 1990 nearly 50,000,000 kilograms of salmon were frozen. That amount is more than four times the amount of Norwegian salmon exported to the U.S. in 1989.

<sup>8</sup> See, 55 Fed. Reg. at 40421 (October 3, 1990). As a result of Commerce's preliminary findings, countervailing duties of less than 3% were placed on the subject imports in June of 1990 and additional antidumping duties of less than 5% were placed on the subject imports in September of 1990.

<sup>9</sup> CIT Opinion at 15.

<sup>10</sup> CIT Opinion at 15.

appreciation of the kroner against the dollar. Their analysis has two parts. The first is a comparison of the actual monthly average CIF unit values of all imported Norwegian salmon during the second half of 1990 (as reported in official import statistics) with average unit values reflecting a hypothetical full pass-through of the appreciation of the kroner. They also compare the actual monthly average CIF unit values with monthly average "first receiver" prices, which are defined to be the published wholesale prices for 6 to 9 pound Norwegian salmon.

Petitioners use the monthly average CIF unit value of all imported Norwegian salmon as a surrogate for prices paid by importers after the imposition of interim duties. Because these average unit values increased less rapidly than the average unit values reflecting the hypothetical full pass-through, and because the average wholesale prices increased more rapidly than the average unit values, they conclude that the increase in the importers' average unit values during the second half of 1990 could not be the result of exchange rate changes, but must be instead due to the interim duties.<sup>11</sup>

Both an appreciating kroner and the imposition of interim duties would tend to increase the price of Atlantic salmon from Norway. The difficulty lies in disaggregating the effects of each. Petitioners' analysis is flawed in three major respects.

First, it ignores the considerable evidence that Atlantic salmon from various countries is nearly fungible and that substitutes for Atlantic salmon are readily available.<sup>12</sup> This makes it extremely unlikely that the effects of either an appreciating kroner or the imposition of interim duties would be

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<sup>11</sup> Petitioners' Remand Brief at 1-4.

<sup>12</sup> See Brunsdale opinion at 29.

reflected solely in an increase in price, instead of a decrease in the quantity demanded. Yet this is precisely the assumption implicit in petitioners' comparisons of average unit values both with hypothetical kroner-adjusted average unit values and with average wholesale prices.

Second, petitioners do not acknowledge that the data they use seriously limit the conclusions that can be drawn. Significant differences in the composition of the underlying data series seriously restrict any conclusions that may be drawn by comparing these series. Imports of Norwegian salmon enter the United States under Harmonized Tariff Schedule (HTS) heading 0302.12.00, which covers "Pacific salmon (Orcorhynchus spp.), Atlantic salmon (Salmo salar) and Danube salmon (Hucho hucho)."<sup>13</sup> While statistical breakouts are provided for each species, there are no breakouts by other determinants of price, such as the size of the fish.<sup>13</sup> Thus, the monthly average unit value data used by petitioners include all sizes of Atlantic salmon imported from Norway.

The record, however, attests that the price of salmon varies considerably with, among other factors, the size of the fish. For example, during the last half of 1990, the price of a Norwegian salmon weighing between 4 and 6 pounds ranged from \$3.66 per pound to \$4.15 per pound, while the price of a Norwegian salmon weighing between 9 and 11 pounds ranged between \$4.25 per pound to \$4.75 per pound. The gap between the price of the smaller and larger fish ranged from \$0.46 per pound in June to \$0.85 per pound in December.<sup>14</sup> The record shows that in 1990, there was a substantial change in

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<sup>13</sup> Indeed, up until the middle of 1991, no data were collected distinguishing between farm-raised and wild Atlantic salmon. (See United States International Trade Commission, Harmonized Tariff Schedule of the United States, 1991, USITC Pub. 2333).

<sup>14</sup> Data from Urner Barry Publications, Inc., submitted as Attachment 13 to Petitioners' Remand Brief.

the percentage of fish in the larger size categories as the mix of importers' sales shifted away from the higher-priced 9 to 11 pound salmon toward the lower-priced 4 to 6 pound salmon.<sup>15</sup>

Furthermore, the price paid also varies depending on whether the purchaser is a regional distributor, grocery chain, restaurant, or processor.<sup>16</sup> Evidence in the record shows a shift in sales from regional distributors to processors, which pay lower prices.<sup>17</sup>

These shifts toward salmon that are smaller and buyers who are processors result in a corresponding decline in the average unit value of Norwegian salmon imports, whether or not the kroner appreciated or interim duties were imposed. Because petitioners' analysis is based on a flawed assumption and insufficiently precise data, it is not surprising that changes in the average unit value for all imports of Norwegian salmon did not exactly match either the change in the exchange rate or the change in the wholesale price for a single size of fish (i.e. 6 to 9 pound salmon). Accordingly, the lack of such exact concordance does not, in our view, establish that exchange rates did not have a large effect on prices.

Third, petitioners also argue that respondents' own questionnaire responses in this investigation undercut Commissioner Brunsdale's argument in her original opinion that changes in relative exchange rates led Norwegian producers to reduce their sales in the United States and increase those in the

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<sup>15</sup> See memorandum EC-P-670.

<sup>16</sup> Staff Report at A-59, Table 19. The record does not clearly show why there should be such a difference. It might reflect different proportions of small, medium and large fish among the different types of purchasers; or may reflect differences in the terms of trade among them; or maybe something else entirely. The point is that it is a variable that petitioners do not account for, or even acknowledge.

<sup>17</sup> See memorandum EC-P-670.

EC during 1990.<sup>18</sup> It is important to again stress, however, that the average unit value data used by petitioners are averages of all Norwegian salmon imports, irrespective of size and type of purchaser, and all Norwegian salmon sales in all countries other than the United States and Norway.<sup>19</sup> Norway has important markets other than the United States and the EC.<sup>20</sup> In addition, differences in any number of factors could lead the average unit value received in one market to differ from that received in another, such as more large than small fish sold or additional services provided to purchasers in one market but not in another. Thus, simple comparisons of average unit values from one country to another may be misleading.

But even if we adopted petitioners' flawed assumption and limited data, their position would still be unpersuasive. The data they cited actually support fully Commissioner Brunsdale's view that sales were diverted in response to an increase in the European price relative to the U.S. price of Norwegian salmon. However, the confidentiality of the individual numbers restricts what we can say about this analysis in a public opinion.<sup>21</sup>

What is certain is that, as Commissioner Brunsdale pointed out, the kroner appreciated by over 10 percent between June and November 1990 while neither of the interim duties exceeded 5 percent ad valorem for most exporters. And, the interim countervailing duty was lifted in October 1990.<sup>22</sup>

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<sup>18</sup> Petitioners' Remand Brief at 6.

<sup>19</sup> See id., at Attachment 12.

<sup>20</sup> See Respondent's Prehearing Brief, Exh. 15.

<sup>21</sup> The unit values calculated from \*\*\* show \*\*\* unit values on U.S. sales than on sales in other markets throughout the period of investigation. However, the difference between the two values is \*\*\* in interim 1990, suggesting an \*\*\* in the relative price in Europe during that period.

<sup>22</sup> See Brunsdale opinion at 33-34.

Of course, it is true that the uncertainty of future duties would be reflected in the price and volume of the subject imports after the investigation began. That is why Commissioner Brunsdale found an analysis of Norwegian exports to the EC while an investigation was pending there so instructive in the final investigation. In their comments on remand, petitioners discount this analysis by theorizing that duties were never imposed in the EC, and that everyone knew that EC duties would not be imposed. This theory, however, is based on the tacit assumption that price increases in the EC would result only from the imposition of duties. But, petitioners themselves rely on a statement that if the EC reached an affirmative determination it "will negotiate a price undertaking with Norway, whereby the Norwegians would guarantee a certain price level for exports to the EC," rather than impose duties.<sup>23</sup> In other words, settlement would increase the price of Norwegian salmon in the EC.<sup>24</sup>

Petitioners' attempt to establish that the appreciation of the kroner did not play a major role in the extraordinary changes in Norwegian salmon imports in late 1990 is unpersuasive. Prices of Norwegian salmon in the United States did increase as the kroner appreciated, and the volume of imported Norwegian salmon did decline. Further, the relative price of Norwegian salmon in European markets appears to have increased, which is

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<sup>23</sup> Petitioners' Remand Brief at 7.

<sup>24</sup> Of course, there is no evidence that the EC investigation actually did cause a price increase in the EC any more than the U.S. investigation caused a price increase in the United States. (The EC's official reason for terminating its investigation was that the Norwegian government's price support system and freezing program had already led to a sufficiently large increase in EC prices from the beginning of 1990.)

consistent with the shift in sales to those markets and away from the United States.<sup>25</sup>

2. The subject imports were not materially injuring the domestic industry in March 1991.<sup>26</sup>

The Commission majority in the final investigations found that the impact of the low-priced subject imports in 1989 caused lower sales revenues that year, contributed to operating losses, and exacerbated cash-flow pressures in the domestic industry.<sup>27</sup> The majority also noted that it was likely that the depressed prices prevailing in 1989 caused a leveling off of production of juvenile salmon in 1990 and led to continuing financing problems.<sup>28</sup> The CIT found that this analysis of the "lingering effects" of the subject imports was contrary to law in that it did not satisfy the present-injury requirement of the antidumping and countervailing duty statutes. As a result, the CIT also found the Commission's affirmative

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<sup>25</sup> Petitioners make much of the apparent differences between the surrogate prices and the wholesale prices in late 1990. This difference ranged from 12 cents per pound in September 1990 to 37 cents per pound in November 1990. But this difference is small when compared to the difference in wholesale price attributable to the size of the fish. The per pound price difference for 4 to 6 pound salmon, compared to 9 to 11 pound salmon, ranged from 60 cents per pound in September to 81 cents per pound in November. It is also small when compared to the actual price per pound of a salmon, which is measured in dollars, not cents.

<sup>26</sup> The Court specifically found that "the Commission's determination that the subject imports were negatively impacting on the domestic industry in March 1991 is unsupported by substantial evidence and contrary to law." CIT Opinion at 9. The Court went on to note that the material injury factor considered by the Commission which is most relevant to whether the Commission made a present injury determination is the impact of the subject imports on the domestic industry. Id. at 18.

<sup>27</sup> Fresh and Chilled Atlantic Salmon from Norway, Views of the Commission at 20.

<sup>28</sup> Id. at 21.

material injury determination to be unsupported by substantial evidence on the record.<sup>29</sup>

On remand, the CIT directed the Commission to reevaluate the record "and determine whether (the domestic) industry was being materially injured by subject imports from Norway at the time of the Commission's final determination."<sup>30</sup> We agree that "the Commission's charge is to determine whether subject imports are causing present injury to the domestic industry."<sup>31</sup> Commissioners Brunsdale and Crawford do not, however, read the CIT's remand order to require the Commission to collect and examine data up until the date of our final determination, or to examine only data as of the date of our final determination. They believe that the Commission must consider changed circumstances between the date of the petition and the date of the final determination. They also agree with the petitioners that the Commission should attempt to evaluate what the volume of the subject imports at the time of the final determination would have been but for the provisional duties. Vice Chairman Watson notes that the CIT has specifically ordered the Commission to determine whether the domestic industry was being materially injured by subject imports at the time of the Commission's final determination.<sup>32</sup>

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<sup>29</sup> Vice Chairman Watson is concerned that Plaintiff's counsel did not argue that the continuing impact of earlier imports was not legally relevant either before the Commission in the final investigations or before the CIT on remand. Counsel for the Commission, therefore, did not have an opportunity to brief the Court on this issue.

<sup>30</sup> Chr. Bjelland Seafoods A/C v. United States, at 23.

<sup>31</sup> Id. at 18.

<sup>32</sup> Vice Chairman Watson believes that it is appropriate to follow this instruction to the Commission explicitly. See, Keyes Fibre Co. v. United States, 691 F.Supp. 376 (CIT 1988). He notes, however, that the view expressed in the Court's opinion could be interpreted as an unprecedented step  
(continued...)

Our review of the record on remand indicates that although the domestic industry may have been experiencing material injury by reason of the subject imports through the end of 1989, such was not the case as of the date of our final determination on April 1, 1991.<sup>33</sup> We recognize that despite increasing market share the industry suffered huge operating losses in 1989 and during

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<sup>32</sup>(...continued)

requiring the Commission to base its determination of material injury on inferences about a period during which the Commission cannot, as a practical matter, collect data.

Although the industry may well have been experiencing some degree of injury by reason of the subject imports that entered the domestic marketplace throughout most of the period of investigation including a substantial portion of 1990, the CIT's direction that the Commission make its present injury finding at the time of our final determination on April 1, 1991 mandates a negative determination in this case. See, Slip Op. 92-196 at 23.

<sup>33</sup> Vice Chairman Watson notes that the Commission did not attempt to expand its period of investigation beyond 1990. As the evidentiary record before us does not contain data beyond that time, an analysis of whether the subject imports were causing injury on or immediately prior to April 1, 1991 is difficult if not impractical. Moreover, he notes that if the Commission were to continue to collect data up until the time of its final determination, it would require a focus on data that was unavailable for comment by the parties. While the Commission is permitted to consider last minute data without allowing for comment by the parties, too great a focus on such data might undermine Congress' concern that data central to the determination be available under APO for comment by the parties. See, S.Rep No. 71, 100th Cong., 1st. Sess. 112 (1987); H.R. Rep. No. 576, 100th Cong. 2d. Sess. 624 (1988).

Vice Chairman Watson also notes that the 1990 interim data collected in these investigations is substantial and reliable. Often, however, interim data collected in other Commission investigations is incomplete or represents only a limited period of time such as a quarter of a year. He is mindful that the Commission has in the past declined to place great weight on interim data or draw conclusions regarding an entire year based on interim data. See, e.g., Minivans from Japan, Inv. No. 731-TA-522 (Final) at 34. He notes that the CIT has consistently stated that the ITC is responsible for weighing the evidence and determining its probative value. See, e.g., Iwatsu Electric Co. v. United States, 758 F.Supp 1506, 1517 (Ct. Int'l Trade 1991).

The CIT's remand in these investigations appears to require the Commission to place more weight on the most recent data gathered by the Commission. If the Commission is directed to make its causation determination based on the impact, volume and price effects of the imports on "vote day" (often months after the end of any interim period), it would seem contrary to that direction to dismiss interim data even when it is unreliable.

the three quarters of 1990 for which we have financial data.<sup>34</sup> Moreover, we note that competition from non-subject imports increased rapidly and domestic prices for all sizes of salmon (although rising somewhat during the first half of 1990) continued to fall into 1991.<sup>35</sup>

In its final determination, the Commission majority appeared to justify its present injury determination by finding that the domestic industry still suffered in 1990 from the continuing effects of the large increase in the subject imports during earlier years. Although the domestic industry in 1990 may still have been feeling some of the continuing effects of the subject imports that were dumped during the early part of the Commission's period of investigation, we note that the CIT has, in this case, explicitly found that a Commission present-injury finding based on continuing or lingering effects is contrary to law.<sup>36 37</sup> Commissioners Brunsdale and Crawford concur with the

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<sup>34</sup> Report at A-29-31.

<sup>35</sup> Report, Table 17.

<sup>36</sup> Vice Chairman Watson notes that the application of a "lingering effects" theory is not without support. In fact, the case of Chaparral Steel Co. v. United States, 901 F.2d 1097 (Fed. Cir. 1990), which was relied on by the Court in its remand decision, can be read to support the examination of lingering effects. The Chaparral court stated, "(w)e cannot say that the ITC was unreasonable in evaluating candidates for cumulation on the basis of their unfair trading or the effects of proven unfair trading as of vote day." Id. at 1105 (emphasis added). A footnote off of this sentence reads: "There are no facts on the record before us to prove residual effects of unfairly traded imports that cause present injury to the domestic industry. We therefore need not determine whether any such effects have dissipated." Id., n.8.

Vice Chairman Watson also notes that the statute requires the Commission to consider the effects of imports on investment. See, 19 U.S.C. Section 1677(7)(C)(iii).

<sup>37</sup> There can be some situations where past sales may create or threaten present injury such as where they establish an exclusive channel of distribution through which unfair imports are entering or where producers continue to experience credit and financing difficulties due to future uncertainty.

In these investigations, we note that petitioners have contended that banks and investors continue to be unwilling to invest in or lend the domestic  
(continued...)

CIT's view that a present-injury finding requires that subject imports are causing material injury to the domestic industry as of the date of the Commission's final determination.<sup>38</sup> Accordingly, a present-injury finding would be appropriate when the Commission determines that material injury by reason of the subject imports is continuing up to the date of the Commission's final determination. In this case, for reasons we have already explained, it is not.

We also determine that our finding that the domestic salmon industry is not experiencing present material injury by reason of the subject imports is consistent with the Commission's duty to evaluate the impact of the imports "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."<sup>39</sup> We agree with the CIT that Congress intended this provision to ensure that the Commission examine the impact of unfair imports on the industry in the context of its particular dynamics.<sup>40</sup> Congress also intended that the Commission closely examine whether the business cycle of the domestic industry is causing current data to indicate that the industry is not being injured by reason of the subject

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<sup>37</sup>(...continued)

industry capital because of their fear of a second round of dumping. Petitioners' Post-hearing Brief at 4. We find this evidence, however, to be unsubstantiated.

<sup>38</sup> Vice Chairman Watson interprets the CIT's remand to prohibit a present injury finding where the Commission finds that subject imports are no longer causing material injury to the domestic industry as of the date of its final determination. Although the unusual circumstances of these immediate investigations have provided us with evidence to make that determination here, in other investigations the Commission may lack such evidence.

<sup>39</sup> 19 U.S.C. Section 1677(7)(C)(iii).

<sup>40</sup> H.R. No. 40, 100th Cong., 1st Sess. 128 (1987).

imports, when in fact, it is.<sup>41</sup> Here, the situation is reversed: the current data indicate injury that occurred earlier in the business cycle.

In reaching our remand determination, we are mindful that the domestic salmon industry is cyclical by nature of its aquaculture production process. It takes about three years for an Atlantic salmon to grow from the egg stage to harvestable size.<sup>42</sup> Production decisions made each year necessarily affect the salmon harvest three years later. Evidence in the record does not, however, convince us that the domestic industry curtailed its production during the period of investigation as a result of the subject imports. Data indicate that eyed egg, fry, and smolt production have all steadily increased since 1987.<sup>43</sup> Moreover, it does not appear that the operating losses experienced by the domestic industry were the result of unfavorable production decisions forced upon the industry as a result of the subject imports. Rather, those operating losses suffered by the domestic industry in 1989 and 1990 appear to have been the result of price suppression and depression caused by both subject and non-subject imports.<sup>44</sup>

In these investigations, our most current data indicate that if the domestic industry was experiencing some injury as of the date of our final determination, that injury was not being caused by the subject imports. Nor do we find any injury that was masked by the operation of the industry's business cycle. Simply put: a worldwide oversupply of salmon in 1988 and 1989, declining worldwide prices, and increased competition from non-subject

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<sup>41</sup> S. Rep. No. 96th Cong., 1st Sess. 88 (1979).

<sup>42</sup> Report at A-6.

<sup>43</sup> Id.; Table 2.

<sup>44</sup> Report at Tables 1,3,7. We note that although production and shipments of domestic salmon increased steadily each harvest season from 1987 to 1990, unit values and net sales began to decline rapidly after 1988.

imports have caused the domestic industry to continue to experience significant financial difficulties.

In conclusion, we find that fresh and chilled Atlantic salmon from Norway are not currently causing material injury to the domestic industry producing the like product, nor do they pose a threat of material injury to the domestic industry.<sup>45</sup>

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<sup>45</sup> The CIT Opinion does not address the issue of threat of material injury by reason of the subject imports and we do not discuss it here. We have incorporated by reference, as noted above, Commissioner Brunsdale's views on this issue in her dissenting opinion in the final investigations.

