

GENERAL AGREEMENT ON

RESTRICTED

SCM/117

11 July 1991

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TARIFFS AND TRADE

Committee on Subsidies and
Countervailing Measures

Original: English

UNITED STATES COUNTERVAILING MEASURES AGAINST FRESH AND CHILLED ATLANTIC SALMON

Request by Norway for Conciliation under Article 17 of the Agreement

I. BACKGROUND AND INTRODUCTION

In the 1960s, the idea of farming salmon on an industrial scale was conceived in Norway, where it was developed and commercialized in the mid-1970s. During the 1980s, the Norwegian salmon industry established and expanded an international market for fresh salmon on a year-round basis. In Norway, the industry has been developed on a commercial basis with no industry-specific support.

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

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On 28 February 1990, a petition was filed with the United States Department of Commerce (DOC), alleging that producers and exporters of fresh and chilled Atlantic salmon in Norway receive subsidies, and that imports of salmon from Norway were causing material injury to the United States salmon industry.

The DOC period of review (POR) was the calendar year of 1989.

In April 1990, the International Trade Commission (ITC) made a preliminary affirmative determination of material injury. On 22 June 1990, a preliminary affirmative determination was made by the DOC, and a preliminary countervailing duty of 2.45 per cent was found.

In the DOC final determination of 25 February 1991, a countervailing margin of 2.27 per cent was found. In its final determination, effective as of 16 April 1991, the ITC found that an industry in the United States is materially injured.

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

The imposition of the final countervailing duty has, together with the imposition of the final anti-dumping duties, had the effect of an embargo: imports from Norway have decreased from 1,261 tons in May 1990 to a mere 24 tons in May 1991.

It is the opinion of the Government of Norway that the duties imposed are not in conformity with the provisions of the Agreement on Subsidies and Countervailing Measures, and thus nullify or impair benefits accruing to Norway.

Consultations with the United States were held under Article XXII:1 of the General Agreement in March 1991. Consultations under Article XXIII:1 of the General Agreement were held on 2 May 1991. Norway and the United States have agreed to consider these consultations as consultations under Article 3:2 of the Agreement on Subsidies and Countervailing Measures. A further round of consultations was scheduled for 4 July 1991, but was cancelled at the request of the United States.

The consultations have failed to achieve a mutually acceptable solution.

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

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

II. STANDING OF THE PETITIONER

According to Article 2:1, an investigation of alleged subsidies shall normally be initiated upon a written request by or on behalf of the industry affected.

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

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

III. DETERMINATION OF SUBSIDIES

A. The Norwegian regional development programmes

Article 11 of the Subsidies Code recognizes important policy objectives like the elimination of industrial, economic and social disadvantages of specific regions.

The DOC has found that the programmes administered by the Regional Development Fund (RDF) confer subsidies.

The RDF programmes are generally available to and widely used by many industries in the regions covered by the RDF. The main objective of these programmes is to alleviate competition disadvantages due to location in remote and rural areas.

The United States has failed to demonstrate that the effect of RDF-programmes have led to distortion of trade in fresh and chilled Atlantic salmon.

B. Calculation of the benchmark

To determine whether loans granted by the Regional Development Fund and the National Fishery Bank are provided on terms inconsistent with commercial considerations, DOC compared the effective interest rates to a benchmark. The benchmark used by the DOC for the preliminary determination (14.9 per cent) is the national average long-term interest rate charged by commercial banks for corporate lending.

During verifications in Norway, United States officers were told by representatives of a commercial bank that the bank charged a risk premium of 0.75 per cent on all loans to fish farms. The DOC then added this risk premium to the national average long-term interest rate charged by commercial banks for corporate lending. The benchmark in the DOC's final determination therefore is 15.65 per cent.

This is incorrect, because the commercial bank did not use the national average rate. They used a different rate, and then added various risk premiums for separate industries and companies. The national average contains these risk premiums. Consequently, in the benchmark calculated by the DOC, the risk premium of the salmon industry is included twice.

C. Offsetting tax effect

The DOC has chosen not to take into account the offsetting tax effects on the alleged benefits to the salmon industry from the Norwegian payroll tax system.

If, purely for the sake of argument, one were to accept the United States countervailing decision in the present case, the offsetting tax effect of the alleged support should be taken into account. Some of the support given to an industry will increase the taxable profits of the industry. However, increased profits lead to increased taxes, and consequently a part of the alleged subsidies will therefore be paid back to the state.

As the government will recover a part of the alleged support as increased taxes, the percentage should have been adjusted by the tax effect so that it reflects the real benefit to the industry.

D. Conclusion

The countervailing duty imposed by the United States is a violation of the GATT Subsidies Code, in particular Article 4.

IV. DETERMINATION OF MATERIAL INJURY

A. Volume

According to Article 6:1 of the Agreement, determination of material injury shall involve an objective examination of the volume of the subsidized imports. Article 6:2 states that 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.

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

In April 1991, at the moment of the final material injury determination, Norway exported less than 15 tons to the United States, compared to 1,075 tons in April 1990 and 1,258 tons in April 1989.

Second, during the six months prior to the filing of the petition, Norway exported a total of 5,984 tons to the United States, as compared to 6,132 tons for the corresponding period during the previous year (September 1988-February 1989). Consequently, Norwegian exports actually decreased when the period six months prior to the filing of the petition is compared with the same period the previous year.

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

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

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

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

B. Prices

Article 6:1 obliges the investigating authorities to conduct an objective examination of the volume of the subsidized imports and their effect on prices in the domestic market.

According to Article 6:2, the investigating authorities shall consider whether the effect of the imports is to depress prices to a significant degree.

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

Import prices for Norwegian salmon, even if benefiting from an alleged 2.27 per cent subsidy, have, on a general yearly average, been above the average prices for salmon from other countries every year since 1987 (Table 3 and Figure 2).

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

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

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

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

C. Impact on the United States industry

According to Article 6:1, a determination of material injury shall involve the examination of the consequent impact of the imports on domestic producers.

Moreover, according to Article 6:3, the examination shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry. The list of such factors or indices is not exhaustive, nor can one or several of these factors necessarily give decisive guidance. The overwhelming evidence concerning relevant factors and indices shows that the United States industry was not harmed.

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

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

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

D. Causal link

According to Article 6:4, it must be demonstrated that the subsidized imports are, through the effects of the subsidy, causing material injury.

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

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

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

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

The United States has not demonstrated that an industry in the United States is being materially injured by reason of alleged subsidized imports of salmon from Norway within the meaning of the Article 6:4.

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

According to Article 6:4, it must be demonstrated that the imports are causing material injury to a domestic industry. The ITC has determined that the United States salmon industry is experiencing material injury. The ITC has disregarded the changed circumstances between the date of the petition and the date of the final determination, and has assumed that imports that may once have caused material injury continue to do so.

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

Article 4:9 clearly states that a countervailing duty shall remain in force only as long as, and to the extent necessary, to counteract subsidies which are causing material injury. Imports from Norway are at present almost non-existent.

Norway finds that the determination to impose a countervailing duty cannot be considered necessary to counteract any alleged subsidization.

Consequently, the United States action is not in conformity with Article 6:4 and 4:9.

F. Conclusions concerning material injury

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

V. CONCLUSIONS AND FURTHER PROCEDURE

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

As no mutually acceptable solution has been found through bilateral consultations, Norway requests the Committee on Subsidies and Countervailing Measures to examine the matter for conciliation under Articles 13:1 and 17 of the Subsidies Code.

FRESH AND CHILLED ATLANTIC SALMON - TABLES

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

COUNTRY	1987	1988	1989	1990	Change 1987-1989		Change 1987-1990	
					TONS	%	TONS	%
NORWAY	7,610	8,895	11,396	7,699	3,786	49.75%	89	1.17%
CANADA	700	1,137	2,958	4,889	2,258	322.57%	4,189	598.43%
CHILE	42	118	557	4,077	515	1,226.19%	4,035	9,607.14%
ICELAND	78	322	472	1,012	394	505.13%	934	1,197.44%
UK	529	353	1,011	901	482	91.12%	372	70.32%
IRELAND	47	310	426	333	379	806.38%	286	608.51%
OTHER	600	212	685	186	85	14.17%	-414	-69.00%
TOTAL	9,606	11,347	17,505	19,097	7,899	82.23%	9,491	98.80%

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

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

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

From	1987	1988	1989	1990
NORWAY		8,895	11,396	
CANADA		1,137	2,958	
CHILE		118	557	
US		862	1,412	
OTHER		1,197	2,594	
TOTAL (tons)		12,209	18,917	

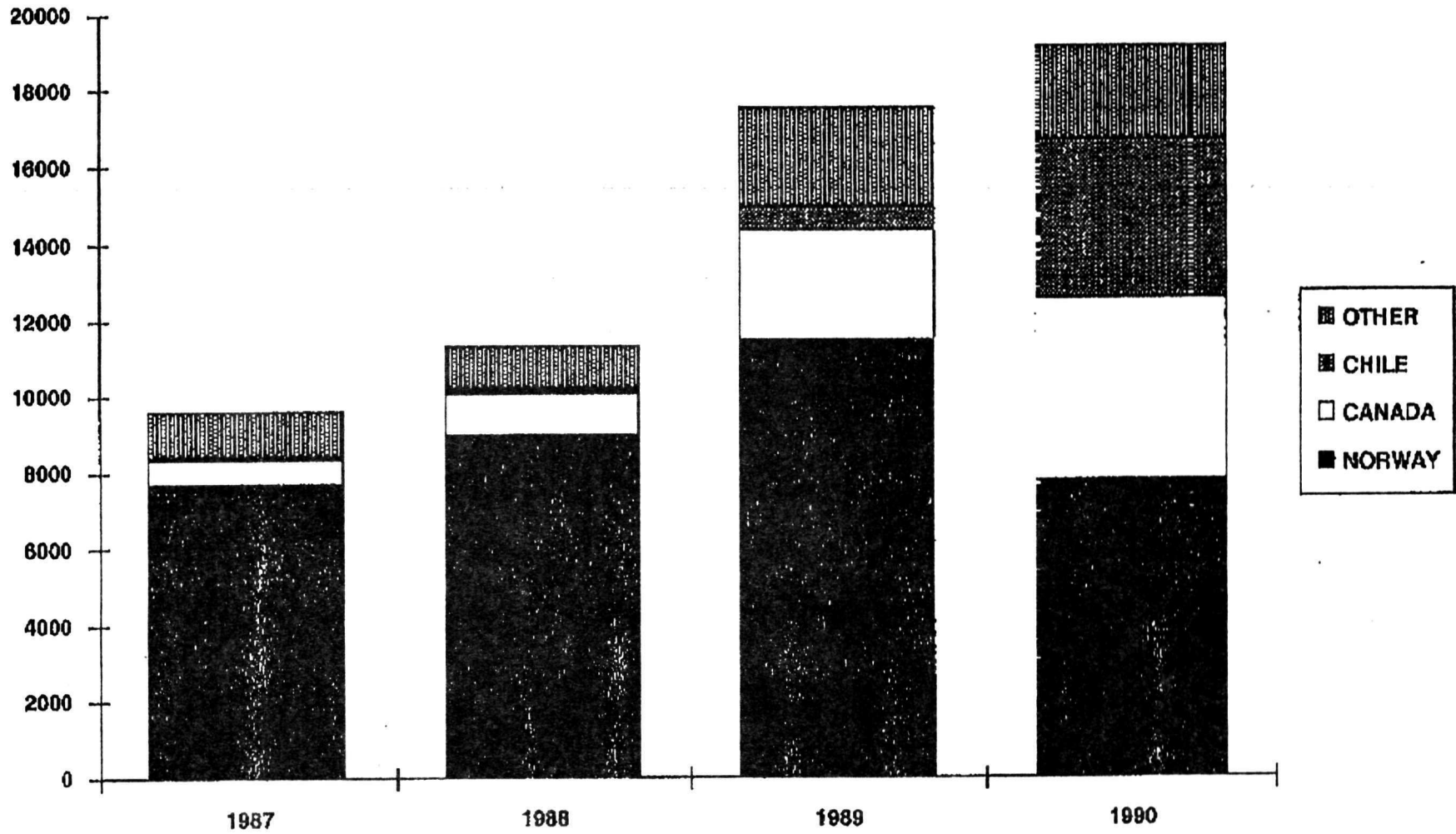
Table 3: US PRICES 1987-1990 (US\$ per Kg.)
Fresh and Chilled Atlantic Salmon

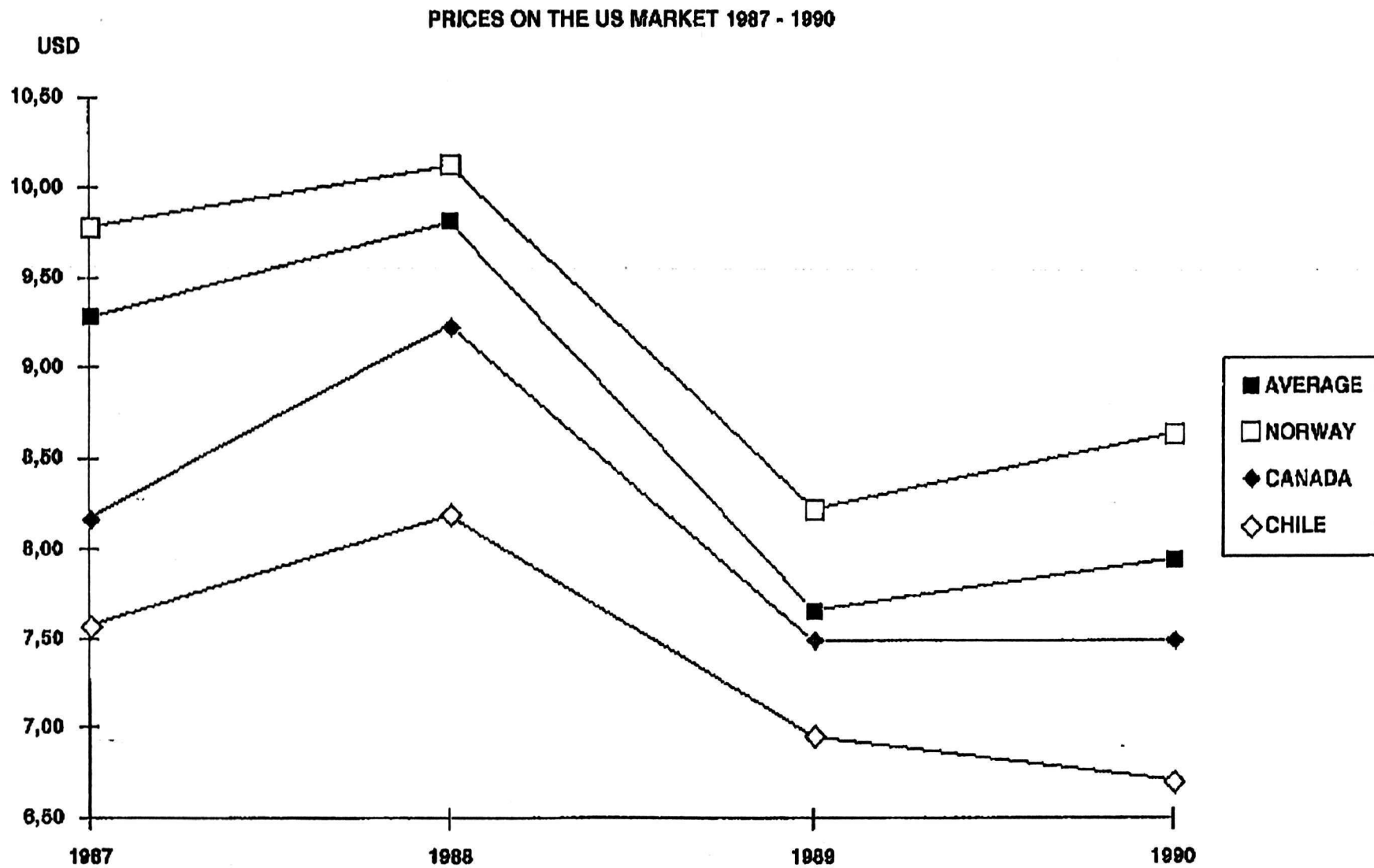
COUNTRY	1987	1988	1989	1990
NORWAY	9.78	10.12	8.22	8.63
CANADA	8.17	9.23	7.49	7.49
CHILE	7.58	8.19	6.95	6.7
ICELAND	10.14	9.52	6.91	7
UK	10.57	11.69	9.07	9.2
IRELAND	10.1	9.88	8.19	8.66
FAROE ISL.		10.08	7.26	7.87
OTHER	8.64	9.77	7.13	7.99
AVERAGE	9.28	9.81	7.65	7.94

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

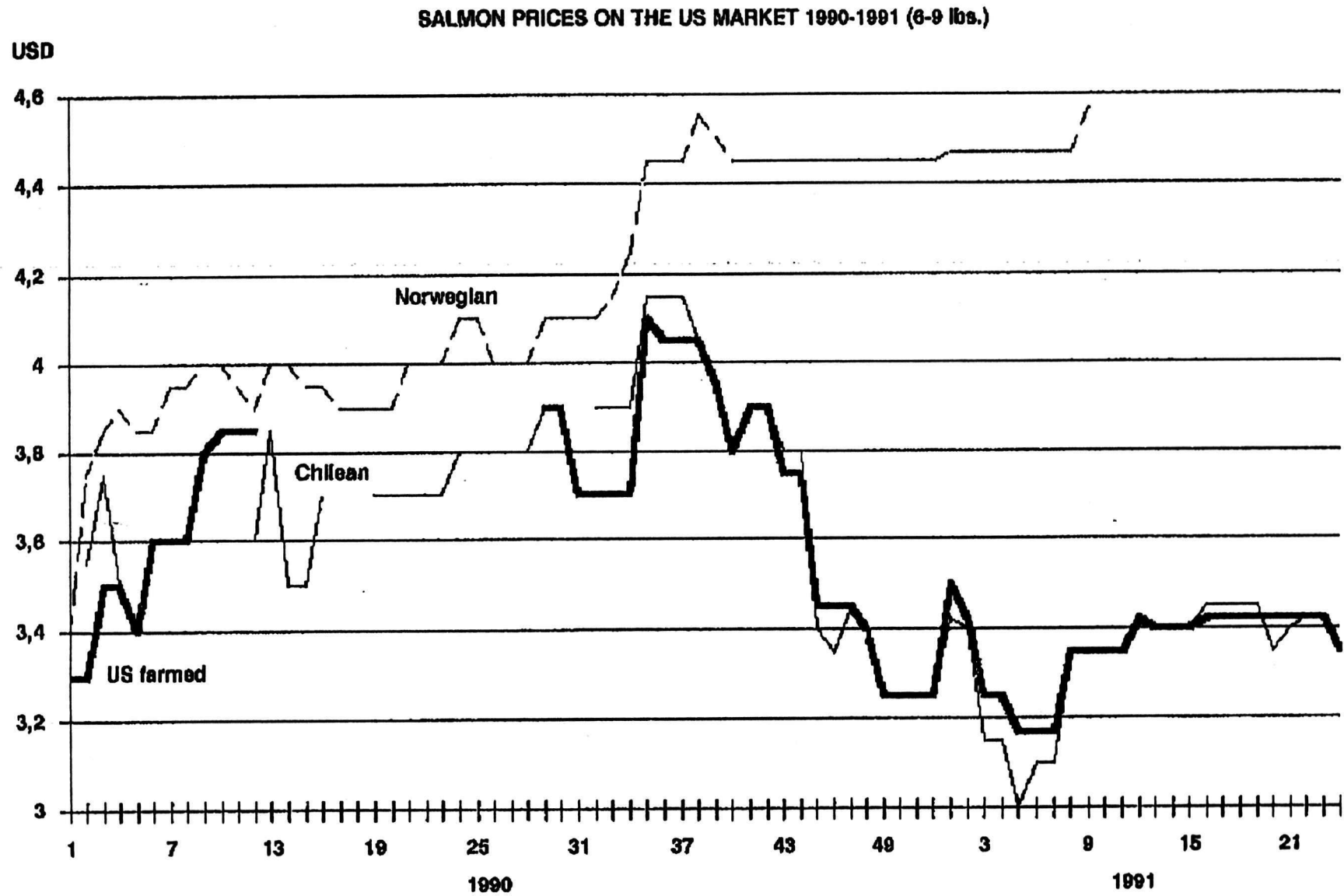
Fresh and Chilled Atlantic Salmon : FIGURE 1

US IMPORTS 1987 - 1990 (tons)





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



Source: Uner Barry weekly data