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A discussion of the economic rationale and estimation methods of anti-dumping

Making reference to the EC/WTO case of Norwegian salmon

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Abstract

This thesis examines the economic rationale of anti-dumping. The matter is first approached from a fundamental level comparing anti-dumping with competition law. Thereafter the case of Norwegian salmon is presented and industry context added, before the anti-dumping proceedings are presented comprehensively. The main focus is on the alternative methods to establish normal value when there is no viable home market, as this exercise raises a number of intriguing cost allocation problems. Finally, status quo on the salmon case and anti-dumping rules expected evolution is briefly addressed.

Key words: Anti-Dumping, Constructed normal value, Salmon.

Preface

This thesis has been written as part of my Master in International Business. This work also concludes my five years as student at Norwegian School of Economics and Business Administration (NHH). I have learned a lot during my years at NHH and I am especially grateful for the close friends I have got, with whom I have shared both festivity, and long hours before mind-numbing exams.

Working alone on a master thesis is undoubtedly a lonesome venture. However, I will thank my employer Price Waterhouse Coopers for giving me both time, and admittance to one of the worlds most significant knowledge centre's for the seafood industry. In particular I would like express my gratitude to lawyer Eirik Andersen and accountant Trond Julshamn for sharing their considerable insight both in the field of anti-dumping and the salmon industry in general. I will also thank my counsellor, associate professor Kenneth Fjell, for his valuable guidance and friendly attitude. Needless to say, all mistakes are the author's own.

This paper has given me considerable insight to the complex and interesting field of anti-dumping law, and the salmon industry. I both hope and believe that I will be able to continue working within this field in the future, and look forward to expand my knowledge and gain more practical experience, in an inspiring environment here in Bergen.

Finally, I will thank my lovely girlfriend Gøril for her non-academic support, and for not dumping me during this particularly work loaded spring of 2007.

Bergen, 20 June 2007 Jan Krister Rullan Rosenlund

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Abbreviations and short list of central terminology

Abbreviation used in thesis	Full meaning
Commission **Council** **Panel** **AB** **IA** **USDOC**	European Commission Council of Ministers WTO Anti-dumping Panel WTO Appelate Body Investigating authority USA department of commerce
(EC) Basic Regulation **(WTO) ADA**	EC Council Regulation 384/96, with amendments Agreement on implementation of article VI of the General Agreement on Tariffs and Trade
NV **CNV** **EXP** **DP**	Normal Value Constructed Normal Value Export Price Domestic price
AVC **ATC** **MC** **NRC**	Average variable cost Average total cost Marginal cost Non-recurring cost
Like product	The product which is compared to the product concerned, the term includes at least the product concerned, but might be wider. The like product's definition is often disputed as it central for several determinations.
EC **EU**	European Community European Union
MIP	Minimum import price
Product concerned or product under investigation.	The product allegedly dumped/exported.
PNC	Product Control Number
EJC **CFI**	European Court of Justice Court of First Instance
IP / POI **PP** **PC**	Investigation period / Period of investigation Production Period Period concerned
CI	Community Industry; covers the whole salmon industry of the community, the complaining part of the industry and the sample for injury determination.
SG&A **R&D**	Selling, General and Administrative (cost) Research & Development (costs)
WFE **HOG**	Whole fish equivalent (Starved and bled fish) Head on gutted
Salmon case	The term chiefly relates to the joint WTO & EC salmon case, but does also relate to the historical salmon disputes.
WTO Salmon case	Relates to WT/DS 337 and the WTO dispute.

EC Salmon case	Relates mainly to Council Regulation 85/2005, but also to other official documents of the EC case.
COP	The use of COP in this thesis relates to *either* COM (Cost of manufacture) or COM + SG&A (full cost) depending on the context. The reason the term COP is used both in a wide and a narrow sense is the inconsistent use of the term in anti-dumping literature.
GAAP	Generally accepted accounting principle
IFRS	International financial reporting standard
P&L	Profit and loss (financial accounts)

Introduction

This thesis is written with the overall intention to approach international trade law from an economic rather than a juridical point of view. The author is convinced that an in-dept study of this legal field's economic rationale is valuable. The thesis provides a comprehensive understanding of the legal agreements economic rationale, with illustrative examples from the ongoing Salmon case.

It is also the author's aim to transfer an idea of the complexity surrounding anti-dumping proceedings and the arbitrariness that can trigger legal actions under the Anti-Dumping Agreement (ADA)[1].

The ADA and its related proceedings are extensive and provide multiple possibilities to problematize from a juridical point of view. However, as an economist it is more interesting to assess how the juridical provisions fulfil economic rationality standards. In an extensive legal area this thesis focuses primarily on those legal aspects with most economic substance both on a general and more detailed level. Thus, within the boundaries for this kind of thesis and in order to provide the reader with both breadth for general understanding and dept for detailed analysis, the level of interpretation differs between the thesis' sections and parts[2]. The legal articles covered in this thesis, although relatively few in number and length of text, are the most substantial for basic comprehension of anti-dumping.

It should also be clarified that this is not a thesis on socio economic effects from distortion of trade. These effects are well documented[3]. This thesis rather shows on what foundation these trade interventions are based.

Finally, the thesis could be read by anyone with academic or professional interest within the field of anti-dumping. The most practical chapters on cost allocations should be especially relevant for salmon farming companies. As the thesis also shows the integration between politics, law and economics the author would also recommend the reading for legal practitioners and policy makers.

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[1] Article VI of the GATT
[2] An overview of the thesis with respect to the different articles of the legal provisions is given in annex I.
[3] Asche et al. (2005) and any textbook on international trade

1.1 Outline

The first part of this thesis gives the reader an introduction to the field of anti-dumping law. Special emphasis is put on the fundamental rationale behind the agreement, in an economic perspective. Without the necessary understanding of the basic assumptions and intentions behind this legal instrument, further analysis would easily fall victim to a lack off perspective and reference.

The second part starts with a general introduction to the dynamics of the salmon industry, and continues with an overview of the most important features in anti-dumping proceedings, with a main focus on the legal concept of normal value (NV).

The third part on constructed normal value (CNV) goes deeper into, and discusses some intriguing technicalities of the agreement. There are also other areas within the agreement where economic implications are of relevance. However, in the author's view the procedure of CNV's is a specific area where accounting and economic logic is essential. Throughout this part, the case of Norwegian salmon will provide the reader with illustrative examples.

The fourth and last part explains how dumping is finally determined, and measures imposed. The last part also addresses general perspectives on the ADA negotiations in the Doha round. Finally, there is a conclusion linking the different parts together, and summarizing the most important findings regarding the economic rationale of anti-dumping.[4]

1.2 Methodology

This thesis is based on a broad base of literature and juristic writing. The literature consists of textbooks and articles, especially on anti-dumping, but also on the salmon industry and general economics. The case law is from both the EC and WTO systems, whereas the recent EU/WTO case of Norwegian salmon is a focal point. In this case the voluminous written pleadings have been studied in order to gain deeper knowledge on practical issues. Owing to strict confidentiality clauses the case data is not fully comprehensive; even so it has been possible to identify the main areas of disagreement for further analysis.

[4] Appendix II shows the scope of this thesis with respect to the ADA provisions.

PART I

2 General overview of dumping.

This chapter will provide the reader with basic insights to the concept of dumping. Firstly, dumping[5] is presented as it applies in domestic law. This is not analogous as to how dumping is defined in an international context (anti-dumping), which is explained subsequently. In the last section the economic rationale of anti-dumping will be thoroughly discussed.

2.1 Domestic dumping

In a domestic setting dumping is rightfully and commonly understood as selling a product under its cost. The problem of this test is related to which cost to use. Economic textbooks will usually recommend the use of marginal cost (MC), as it can hardly be rational under any circumstance to sell under MC.

In practice it has proven difficult to measure MC, thus alternative methods have investigated. One alternative as suggested by Areeda and Turner (1975) has been the use of average variable cost (AVC) as this lower threshold. As an upper threshold is the average total cost (ATC). Pricing below ATC is prohibited in EC law given predatory intentions. [6]

Selling under full cost of production (COP), (but over VC), is thus not illegal *per se*. It is a generally accepted business practice, especially in cyclical industries, that firms occasionally sell under full COP. [7]

The harmful effect of dumping happens when firms are driven out of an industry, and new firms discouraged to enter, by a dumping firm that later takes advantage of the monopolistic situation to recoup losses. This is called *predatory pricing* and is anticompetitive behaviour which EC law seeks to prevent (Pindyck & Rubinfeld, 2001).

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[5] Normally, predatory pricing or predation is used in the domestic setting while dumping is reserved for the international variant. As we will learn the legal meaning is very different.
[6] This holds at least for EEA countries and USA.
[7] Take notice that the municipal laws between the US and the EC differ fundamentally on the question of how domestic dumping is defined. Basically, while the EC approach is average cost based while the US uses variable cost. Consequently, the latter method is considerably more restrictive upon findings of dumping, penalizing just the most extreme cases.

There are few proven examples of successful implementations of predatory pricing strategies even though scholars have been studying the field for decades. According, to McGee (1958) it can often be illogical to engage in predatory pricing if one wishes to monopolize a market because it is less expensive to acquire them. Thus, it can be argued that predatory pricing is most a theoretical notion. Even though e.g. the recent and well-known EC French Telecom/Wanadoo case shows that it certainly *can* be a rational long run business strategy[8].

The undesirable effects emerge when predatory pricing is used as a strategy to drive competitors out of the market. This entails the situation where the firm abandons its short term profit maximisation (loss minimisation) strategy and is running at a self inflicted loss. From an economic point of view (and legal), this *practice* could be harmful to competition and is therefore regulated by domestic competition law. Thus, the competition law protects competition not the competitors (Steiner & Woods, 2003).

Predatory pricing further suggests that the firms must benefit from some significant degree of market power. Predatory pricing makes no sense in a perfectly competitive market. Finally, predatory pricing does not relate to selling below the COP of competitors. It is not illegal to be more cost efficient and to use this competitiveness to undercut prices. This is commonly accepted as fair competition, and is the fundamental mechanism that market economy is built on.

2.1.1 European Community law: Article 82

In EC law dumping is governed by Article 82 of the EC Treaty. Given that a company has a *dominant position* in the relevant market, certain behaviour of non-competitive nature is perceived as illegal. Identical behaviour would be legitimate if performed likewise by a non-dominating firm. Abusive behaviour includes exploitative abuse and anti-competitive abuses (ibid). An example of exploitative abuse is found in the canonical *United brands* case where discriminatory and unfair pricing was found[9]. An example of the anti-competitive abuse (predatory pricing) was given in the AKZO case where the Commission stated that it was necessary to assess *both* the firms cost efficiency and motives. The ECJ agreed with the

[8] Reputation for toughness (American Airlines) and the ability to decrease the potential for external financing of competing firms can be additional reasons for predatory behaviour.

Commission that there was a distinction in law terms, between lowering prices in order to win new customers and trying to eliminate a competitor (Steiner & Woods, 2003).

2.2 International Anti-dumping

"*If a company exports a product at a price lower than the price it normally charges on its own home market, it is said to be "dumping" the product. Is this unfair competition? The WTO agreement does not pass judgement*"[10]. (wto.org)

As informally stated above, within the legal framework of the ADA the meaning of dumping is different from the domestic case, as it does not necessarily relate to selling under (variable) cost. Furthermore, it does not include any reference to non-competitive behaviour and there is not even a consideration of objective,[11] as can be seen underneath.

> ADA Art. 2.1: "For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country".

The ADA merely states, stripped of its juridical language, that dumping *by law* relates to the practice of selling under domestic prices in another members market. This applies regardless of any profit margins. Thus, a firm can sell with a profit both in the home market and in the foreign market and still be charged with dumping allegations when the export price is lower than domestic price.[12]

There is also an additional condition[13] that must be met before a dumping allegation can be filed. There must be actual injury[14] to the domestic industry of the importing country and a causal link must be established between the dumped imports and the injury affecting the

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[9] However, this was reversed dumping (charging excessively *high* prices).

[11] Koulen (1995)

[12] As prices, as we will see later are adjusted for differences back to an ex-factory level, it is stringently more correct to say mark-up than price.

[13] In the EC there is an additional condition of Community interest which will be discussed later.

[14] Threat of injury or material retardation is also included but this provision is "very rarely used" (Stevenson, 2005).

domestic industry[15]. This is intuitive as there would be no need to impose trade restrictions in the absence of a domestic industry[16].

The following figure summarizes the fundamental question of economic rationale which will be discussed next. A flow diagram of the entire anti-dumping process can be found in **Appendix I**.

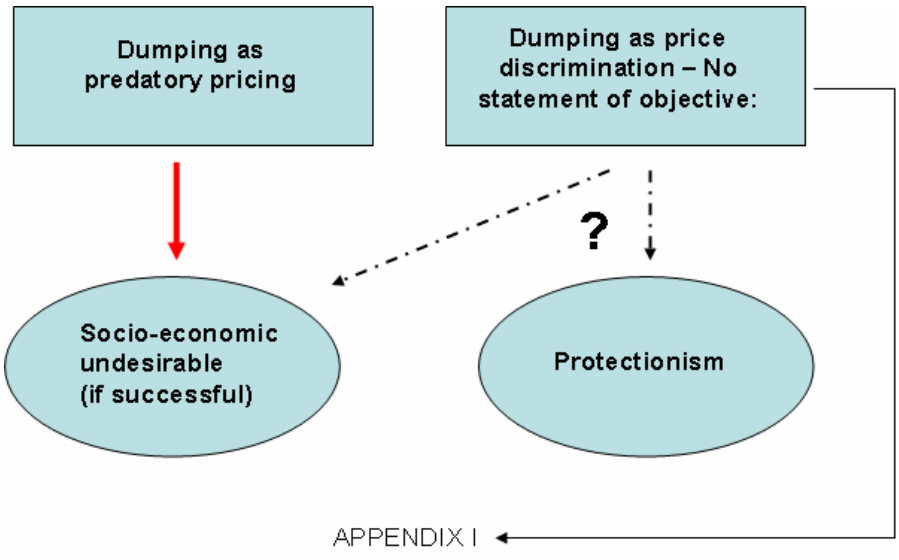


Figure 1: Basic differences between domestic and international legislation.

2.3 Economic reasoning for Anti-Dumping

This section presents and discusses the economic rationale of anti-dumping in a general sense. The direct implications for the salmon case will de discussed in chapter 5 and thereafter.

The scientific definition of dumping was first formulated by Viner (1923), as "price discrimination between national markets". This definition also includes the cases where products are sold at a higher price in the foreign market; so-called reversed dumping. In the ADA reversed dumping is not treated as an illegal practice[17]. Viner also introduced two alternative approaches, now formalized in the ADA, when there are no domestic sales. They are both evenly included in the ADA. However, the use of full cost as a surrogate for the

[15] ADA Art 5.2
[16] Note that dumping in the competing industry's most important export market is not illegal under the ADA.
[17] Obviously this is bad news for a country like Norway where the purchasing power is very high.

domestic price is strongly preferred. It is important to note that the alternatives are not to be used together with the price discrimination method. The cost based alternative to a certain degree moves the economic sense back to the domestic definition of sales below cost. As an illustration of what constitutes as dumping, the following table will clarify, but not rationally explain as such a table can the legal concept (Stevenson, 2005):

	Situation 1	**Situation 2**
Normal Value (Domestic price)	100	60
Cost of production	80	80
Export price	90	60
Dumping?	YES	YES

Table 1: Stylized example of dumping

The price discrimination criteria is used in situation 1, as there is no price discrimination in situation 2, but sales under cost the alternative criteria is used here. Both methods lead to finding of dumping and the labelling of exporters selling at "unfair prices".

It is quite clear that the *economist* Viner has had a material impact on the current ADA wording and the common understanding of dumping as an unfair practice even though Viner himself did not use the term unfair but rather addressed dumping as questionable. The whole concept of dumping and many misinterpretations are related to the massive development of trade and economic theory without the ADA being reformed e.g. at Viner's time there were no separate anti-subsidy laws. (Kerr, 2001)

As noted in Van Bael & Bellis (2005) a number of economists argue that the perception that dumping is unfair is mistaken and some even suggest there is no economic justification. The various arguments will be evaluated next, having the above table in mind.

The only truly illegitimate dumping from an economic perspective, is thus behaviour relating to injuring predatory pricing, which mostly intentionally but in some extraordinary cases also unintentionally lead to loss of healthy competition by ruining the industry in the target market.

Unfortunately, the injury is often difficult to assess a priori and uncompetitive behaviour difficult to define exactly. This might be the reason why the ADA's dumping definition in

practice is considerably wider than both anti-trust law and the economic view on illegal practice. While anti-trust law shall protect competition and ultimately the consumers, anti-dumping law seeks to protect the competitors from what is de jure defined as "unfair" practice[18].

2.3.1 Dumping as unfair practice

The term "unfair trade" [19] is commonly utilized by anti-dumping supporters in connection with dumping. Unfairness is undoubtedly a discussable concept. The use of the negatively charged words "dumping" and "unfair price" will give the complaining industry public and political support, even though the substance of the allegations is not necessarily as clear cut as the negative labels would indicate. In this respect it will certainly be beneficial to assess the basic rationale of firm's price discriminating or under cost sales. First, the EC view on "unfairness" will be cited:

"Dumping is an unfair trade practice, because the lower export prices are not a result of greater efficiency on the part of the exporting producers, but of distorted market conditions illustrated by the segregation of the domestic market". (ec.EUROPA.eu, 2007, NR1)[20]

The explanation given to why greater efficiency could not be a relevant factor is the following: "*If the exporting producer had a comparative advantage vis-à-vis the producers in the importing country, this would, in open international markets, not only lead to low export prices but also to low prices on the domestic market of the exporter"* (ibid) .

In order to investigate the rationale of firms market behaviour in light of the dumping-related statements of the EU. First the relevant aspects of the domestic market will be addressed. In the next section this insight is coupled with firm's rational profit maximizing behaviour.

2.3.1.1 Domestic market conditions

The EC further states that a common feature for dumping countries is a distorted or sanctuary home market which enables cross-subsidization. "*Typical examples of distortions leading to dumping include: Significant tariff and non-tariff barriers, insufficient*

[18] Advocate General Van Greven in the Nölle case, Van Bael and Bellis (2005)
[19] In that context it can be mentioned that the concept of unfair pricing was raised by Canadian customs authorities as there existed a practise of invoicing artificially low prices to escape duty. (Kerr, 2001)

enforcement of competition rules, export tax breaks, artificially low raw material and/or energy prices". A sanctuary market to subsidize from is the major argument in favour of the current ADA for current anti-dumping law supporters, according to Van Bael & Bellis (2005). The argument, *per se*, is to some extent valid but also relates to the anti-subsidy and countervailing agreements as will be shown subsequently:

- Subsidies; are unfair and distorting as long as they apply dissimilarly between industries. This is commonly accepted by economists as unfair. There are explicit provisions under the WTO Agreement dealing specifically with subsidies. The anti-subsidy agreement makes sure that legal and political conditions are uniform across a nation, so no particular industry is given support relative to others. The basic idea is that if the same political and legal rules apply to all companies they do not form part of a national strategy to outdistance certain foreign industries in an unfair manner (wto.org).

- Segregated markets; are created by market barriers as e.g. tariff and non-tariff barriers. The basic idea is that price discrimination between domestic sales and exports imply some kind of market protection in the domestic market, allowing the producers to cross subsidize their "dumped" exports. In cases were the home market is protected by tariffs and non-tariff barriers etc. the relevant provision should be the GATT 1994 agreement and the EC Trade Barrier Measures (Stevenson, 2005). Segregated markets can also steam from other external factors as uncompetitive markets caused by e.g. few competitors or strong customers preferences for the home product/brand. If no objectionable market protection measures are in place, others than those of the natural competitive forces no economically unfair segregation of markets exist, apart from an imbalance of opportunities. (Van Bael & Bellis 2005) The natural factors creating diverging framework conditions can relate to multiple interrelated and complex factors given by e.g. country development, labour markets, natural endowments, political and legal systems, culture etc. Adjusting for all these factors is evidently not possible, thus all companies to some degree compete on different premises. Is this unfair? One might argue, but economists would not.

[20] These are not formal interpretations. Nevertheless, they illustrate the ambiguity of AD in a forceful manner.

Anyway, it is unrealistic to try to make them equal across borders, as it is perfectly normal that basic conditions differ also within countries.

The above discussion shows the problem of mixing arguments, even though they might be right they are not relevant for anti-dumping. The other basic aspect to take notice of and which will be further discussed is that the Commission does not take natural explanations into account when determining dumping by law.

In any case, the existence of these sanctuary markets would, from an economic point of view, be more interesting as an internal affair of the exporting country. A sanctuary market subsidizing foreigners at the domestic consumer's expense *should* be a matter for that county's antitrust law and not antidumping. That is however another debate.

2.3.1.2 Firms profit maximising behavior

The factors related to sanctuary markets are linked to both COP through subsidization and the possibility to price discriminate. Further and perhaps more relevant for anti-dumping the companies pricing behaviour will be discussed in order to establish under what conditions and in which situations firms decide to price-discriminate or sell under costs. After all current anti-dumping law *in practice* applies to firms.[21]

- Market power: In EC domestic anti-trust law a dominant position is a prerequisite to be charged with dumping. With no market power, there is no pricing power, and with no pricing power, anti-competitive behaviour should not be rational. A dominant position implies at least 20-25 % market share in the relevant market for one single firm. Firms can also have collective dominance, typically in oligopolies, but then the problem is usually excessively high prices not dumping (Steiner & Woods, 2003). Firms without individual market power are "price takers" and cannot affect the market price significantly. Price takers are forced to accept the price the market provides if they want to continue in business.

[21] Formally measures apply to export from a country "imports of farmed salmon originating in Norway". Council Regulation (EC) 85/2006. ADA art: 6.10 "The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation"

- Supply conditions: Every firm will try to fix its volume according to expectations about competitor's behaviour and demand development in order to maximize profits. The resource commitment at determining volume is essential for the firm's later profit maximizing alternatives. The firm's decision to produce *more* than the profit maximizing with the intention to depress prices can be a predatory action, even though the pricing at a later stage is not.

- Price discrimination: The economic rationale of price discrimination between national markets is quite obvious and stretches far beyond those few situations where price discrimination is not profit maximizing (loss-minimizing). As far as the price elasticity of national markets differ, companies with monopolistic power will have perfectly rational incentives to perform price discrimination (Pindyck & Rubinfeld, 2001). So when price elasticity is higher in foreign markets than in the home market there are economic incentives to charge lower international prices or using ADA terminology; to engage in "condemnable dumping" (Vermulst, 2005). Price elasticity can differ between markets for numerous reasons. Most important factors are competition from other firms and demand conditions. Rational firms will accommodate to those exogenously given factors. Firms will typically have less market power in a foreign market forcing them to sell at lower prices.

- Price strategies: The pricing behaviour discussed above is classical market or competition based pricing dependent on price elasticises. There are also other pricing strategies as e.g. penetration pricing which is to undercut prices in order to win market shares in a market where the exported product is unknown and the domestic firms has some degree of market power built up over years. (Pindyck & Rubenfeld, 2001)

- Sunk cost: The economic concept of "sunk cost" is essential to understand the pricing behaviour of individual firms. The definition in Horngren et al (1999) is: "*a cost that has already been incurred and, therefore, is irrelevant to the decision process*". While there might undoubtedly be predatory motives in exceptional cases there are also important non-predatory explanations to selling at lower or under cost prices in some business situations. Cyclical dumping or occasional dumping happens

when supply or demand conditions lead to excessive supply. Under these conditions there are two loss minimizing alternatives:

i) Reduce production; this is only possible if resource commitment is low, production period short and fixed costs are low.

ii) Sell at reduced prices; if the product is already produced, as might be the case for perishable products the seller must accept any price the market is willing to give. If a product's "sunk cost" is NOK 10, the cost to finish the product is NOK 3, and the market price is NOK 5. It will be rational to sell at NOK 5 and incur a NOK 8 instead of NOK 10 loss. Thus, in the short run all costs can be fixed.[22].

As we have seen EC competition law does not prohibit sales at under average cost when the intention is not predatory, the reason being that it is rational business behaviour to pursue loss minimizing strategies. Price discrimination is a problem only if unreasonable *high* prices are charged. In the domestic context this behaviour is not condemned as it is not subsidized by any sanctuary market with supra-normal profits (Van Bael & Bellis, 2005) However, there is nothing in the ADA referring to the investigation of cross subsidization possibilities hence this argumentation is not robust.

In an international context sales below cost are claimed to export unemployment, as cyclical downturns can shift production volumes to export markets. This might be somewhat true, but it should be an inherent feature of global markets to share market volatility risks. Countries cannot choose only the benefits of international integration when the trade practices employed by competing nations are economic sound. In addition, the cyclical downturn can result from multiple factors some that are not necessarily linked to the exporter concerned. Finally, an alternative measure to avoid large volumes of low priced exports is the safeguard measure, which is designed for the case of fair but injurious imports. (ibid)

[22] Note that there might be differences between the perceptions of what constitutes fixed cost; this might affect firms behaviour. E.g. countries as Japan where labour is seldom laid of will continue producing where countries with more flexible labour reduce production. (Van Bael & Bellis, 2005).

2.3.2 The inherent problem

The inherent problem with economic theory is that there is no clear definition of what is actually predatory behaviour. It is obvious that the true intention of a business setting is much easier to asses in posterior, than in advance. Thus, there is a danger that the damage is done before the measures are imposed, as firms engaged in strong but healthy competition might be unrightfully charged with dumping. A suggestion to reform anti-dumping law has been to apply both the price discrimination and the sales under cost simultaneously. (Kerr, 2001) The problem is however that predatory pricing using the "deep pocket" strategy cannot be ruled out, conversely it is not difficult to prove that firms can both sell under cost and price discriminate at the same time without there being any predatory motive at all.

The reasons explained above are also the reasons that competition law differ between developed countries. While the US set high hurdles for predatory pricing the EC is slightly less restrictive on its use of competition law. Nevertheless the basic sense is chiefly in line. At the other extreme is the ADA which can be applied in a wide range of cases as long as injury can be detected[23]. As we will se injury can easily be established in depressed markets. Even though no perfect legal framework has yet been proposed by economists, there is little doubt that the ADA is in need of a serious theoretical makeover and that almost any confining contribution signify a strengthening of the law's economic substance. (ibid)

2.3.3 Summary of economic reasoning

The ADA seeks to level for differences in pricing behaviour between national markets or subsidiary the practice of selling under full cost. With no statement of objective, the ADA has a very broad definition of what can be determined as dumping and thus, "unfair trade". There is little doubt that there within the definitions can be identified uncompetitive and hence unfair trade practices. However, the problem of a broad and ambiguous definition is that also normal and commonly accepted business practice can potentially fall victim to this definition.

Regarding the "sanctuary market" logic, there is unfortunately little emphasis on grouping explanations for cost differences like effectiveness, unique capabilities, and natural resources etc. on one "natural" side and "artificial" explanations like differentiated taxes,

subsidies etc. in order to apply the appropriate measures, this will be better emphasized in later sections.

Regarding firms pricing behaviour, there is no legal emphasis on investigating possible rational and acceptable justifications for the behaviour observed. This is a central aspect of domestic dumping proceedings, but irrelevant according to anti-dumping law. The EC reasoning that true competitive advantage would lead to overall lower prices in open markets is flawed because it does not take into account that even though markets are open, they do not necessarily have identical market dynamics. Firms will react rationally towards those market differences.

To sum up, the most disturbing feature of anti-dumping supporter's argumentation is its lack of sound economic substance. As noted by Van Bael & Bellis (2005): "*The popularity of anti-dumping as an instrument of trade policy seem to have less to do with economic theory than with the fact that constitutes a form of safeguard action permissible under the WTO*".

The repeated use of the term "unfair trade"[24] is a common feature in populist argumentation, which is often without a deeper economic rationale. The lack of fundamental understanding of the WTO agreement and its facets and the confusing introduction of political arguments certainly does not ease the rationality debate. (ec.EUROPE.eu, 2007).

2.4 Political issues

The field of international anti-dumping is pervaded by international politics. Anti-dumping law is a possible way to protect domestic industry against foreign competition when other trade barriers are built down. The political dimension of international anti-dumping law makes this field especially complex and arbitrary as the disputes and their outcome are often lifted to a political level.

2.4.1 Biased of investigating authorities

The factor of prejudice is a potential problem in anti-dumping cases as the law enforcement is the competence of quasi judicial national competition authorities. In the EU the relevant

[23] In the US defence based on the non-existence of injury has proven to be the only successful defence. (Stevenson, 2005)
[24] E.g. recital 117 in Council Regulation 85/2006.

authority is the Commission. The inherent biasness is a problem which is avoided in competition law, when only involving domestic firms. Expanding the WTO institutions authority to also include anti-dumping investigation could have eased the problem of inconsistent law application and biased investigating authorities (IA). However, it is unlikely that nations will accept a loss of control over their trade policies.

2.4.2 High politics; the Doha negotiations.

There are two major blocks in the current Doha negotiations, "the friends of Anti-Dumping" vs. EU/USA[25]. Generally speaking, the political block of the friends of anti-dumping wants to narrow the IA's discretion margin and pursue a more objective anti-dumping legislation. The opponents (mainly USA/EU) have political interest in having as much manoeuvrability in their trading policies as possible. In paragraph 28 of the Doha Declaration on WTO rules, the negotiation room was effectively confined through the following statement:

> "In light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under Article VI of the GATT…, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives…" (WTO.org)

As we can understand the basic concepts, principles and effectiveness implies that no fundamental changes can be expected during the ongoing negotiations. Despite this negotiators constraints to enhance fundamental changes to the ADA, many smaller suggestions, especially from the "friends" of anti dumping have a sound economic rationale. Some of them are presented briefly underneath.

Basic issues discussed at the Doha summit with relevance for this thesis:

I) The friends suggest that alternative explanations for injury as e.g. internationally depressed prices, to avoid situations as in the US-Canada tomato case where bilateral anti-dumping cases were launched in a slump and with farmers at both sides of the boarders incurring losses[26];

II) moreover the friend suggests that the levels of industry support for a anti-dumping complaint must be raised considerably to avoid anti-dumping launches for

[25] Note that the friend's are the most reformists.
[26] Barichello, 2002

harassment purposes. As the costs of the case are normally born by the IA, barriers are low to file an Anti-dumping complaint;

III) moreover the friends suggest increased transparency and fairness in anti-dumping proceedings. This is now also supported by the US/EC as faced with increased number of anti-dumping charges from developing countries;

IV) moreover the friends want abolished the practice of excluding sales below cost when determining NV;

V) moreover the friends suggests that the practice of adding normal profits to full cost when constructing NV and the tendency to "err to the high side" when COP is established should be reformed. Especially taking into account that dumping often coincides with depressed markets;

VI) moreover the practice of zeroing should be completely abandoned[27].

In the Doha negotiations it is evident that protectionist motives play an important role for many countries standpoint in the legal debates, especially those who traditionally are the most eager to apply these measures. Ideally protectionist motives should have been replaced with more objective ones based on socio-economic optimization. This would certainly limit the "effectiveness" of the ADA as a protectionist weapon.

2.5 Other protective measures in the EC.

As already mentioned the Basic Regulation is not the only trade protection measure instrument allowed under the WTO Agreement[28]. In order to properly set the context the other two most relevant measures will briefly be explained in turn. Both these measures are or have been relevant for the salmon case. Practices falling under these measures should be targeted with the most appropriate measures, even though overlapping cases might exist.

2.5.1 Safeguards

In cases where no price discrimination or other unfair trade practices exists, safeguard measures can temporarily be imposed if there is serious injury to domestic industry related to sudden and sharp increases to import volumes. Safeguards are often used in cases where

[27] The issues will be revisited subsequently.
[28] The EC has five basic measures of trade protection. (Van Bael & Bellis, 2005)

dumping conditions are not met; the character of a safeguard is more explicitly protectionist than anti dumping and can be described as a political “safety valve”. The economic rationale of the safeguards is to give the troubled industry protection during a reasonable time to adjust to new market conditions, so they are per definition temporary. (WTO.org)

2.5.2 Anti-subsidy & countervaillance

Anti-dumping should not be confused with different kinds of illegal state subsidies, as these are regulated by separate WTO legal texts. The ADA concerns the potential unfair pricing decisions of the individual firm in an international context, not direct and discriminatory acts by governments. Whereas the ADA targets indirect effect of favourable domestic market condition, the Anti-subsidy Agreement targets specific government subsidies to singular or segments of firms or industries. This point is important to bear in mind when trying to understand the underlying rhetoric behind the ADA. Even though there are many differences between these two fields of law, they converge at many points. Consequently, some countries have incorporated these provisions jointly into their domestic law. This is not the case for the EC law and this paper (WTO.org).

3 Investigation bodies and sources of law

The institutional and legal aspects of anti-dumping are far-reaching. From a legal point of view the relationship between EC municipal law and WTO law, the institutional status, the law enforcement and direct effects etc. are substantial and important questions. It is outside the scope of this thesis to go in further detail. This section will therefore take a descriptive approach highlighting the most relevant aspects from a pragmatic point of view.

3.1 WTO and the Anti-dumping Agreement

The WTO is a supranational organization which is created in order to help facilitate trade and trade negotiations. The WTO agreements and institutions have gradually evolved since GATT 1947. The ADA is found implemented in the GATT 1947 as chapter VI and set the standards for the member’s domestic implementations. The dispute settlement bodies are supranational institutions created to solve trade disputes between members.

3.1.1 The anti-dumping agreement

The ADA is the main provision for the WTO salmon case. The ADA is also the most important overall, as the Basic Regulation must be in conformity, hence interpretations will normally be done with reference to the ADA for the purpose of this thesis.

The ADA is the international agreement regulating common anti-dumping legislation for trade among its members. The national states have discretion to implement their own dumping legislation within the legal frames set out by the ADA. In the fields where the ADA is blurry, there is more room for discretion in domestic law and its interpretations. There is no obligation on the member states either to adopt or enforce any anti-dumping law under the WTO Agreement[29]. (wto.org).

The Anti-dumping measures provided by the WTO Agreement have gained popularity during the last years as other trade barriers have been built down. Anti-dumping trade restrictions are now utilized y a greater number of trading countries than ever. The growth has been most substantial among developing and emerging countries. (Vermulst, 2005)

3.1.2 WTO Dispute settlement bodies

WTO member's municipal anti-dumping law must be implemented in conformity with the ADA. In cases where members claim unlawful application of municipal anti-dumping law the case can be put before a Panel, created on member's specific request. The WTO does encourage the use of negotiations in order to solve trade disputes. This is normally perceived as a less aggressive from a political point of view. However, if no amicable solution can be achieved a Panel is finally established.

The panel will not make any review of the case, but investigate whether the complaining members IA has manoeuvred within the discretion they are provided by the ADA. The panel investigates both whether the municipal implementation is in accordance with the ADA and whether the IA's proceedings have been in line with the principles drawn in the ADA. Roughly one could say that the Panel evaluation is based on what an objective investigating authority could do, not necessarily what they should do. This is a notable

[29] The proportion that has adapted the ADA provisions into domestic law is xxx

point as many disputes stem from diverging views in questions with some room for interpretation.

The Panel generally has limited authority and a very confined discretion. Consequently, rulings are seldom neither path-breaking nor unambiguous. When forced to make interpretations an incremental and conservative approach is favoured.

The Panels decision can be appealed to the appellate body. It is not unusual that cases are appealed as there is considerable political prestige involved and little to loose. There are several examples of the appellate body overruling some of the Panels interpretations.

3.2 The European Community and the Basic Regulation

Private entities are not faced with the ADA. The relevant provisions for third countries exporting to the EC, is the Basic Regulation[30]. Even though some EC regulations are plain copies from the ADA and the Basic Regulation is, or at least should be, consistent with the ADA. However, as will be further developed, differences exist in practice. The EC investigating authority is the Commission which decisions are applicable for legal scrutiny revision by the domestic courts.

As already touched upon the main authority in EC antidumping law is the Commission. The Council, with delegates from member states, also has a formally expressed role. The EC member states have additional participation through the Advisory Committee which is a body entitled to comment on Commission decisions.

3.2.1 The EC bodies

The Commission is the EU's investigating authority (IA). The Commission is politically independent and shall represent the interests of the EC as a whole. The Commission enjoys the most fundamental role in the anti-dumping proceedings under the EC anti-dumping law. Being the IA the Commission is also empowered with considerable discretion margin during the entirety of the proceedings.

[30] Council Regulation 384/96 with amendments.

The Council is the relevant body to issue final trade measures (Regulations) [31], on the importers, found by the Commission to be in breach of the Basic Regulation. Indeed these measures are based on proposals from the Commission. There is a wide range of different trade restricting measures which can be imposed.

In addition, the Council enjoys legal power to overrule some of the Commission's decisions as e.g. imposition of provisional anti-dumping measures. However, in practice, it is evident that the real power of decision is overwhelmingly attributed to the Commission.

The CFI is the legal body that shall ensure that the proceedings of the Commission and the following regulations issued by the Council are consistent with EC law. Private entities are entitled under EC law to challenge directly any regulation from the Commission or Council affecting their operations. The ECJ is normally the appellate body. (Van Bael & Bellis, 2005)

Conclusion Part I

The comparison of Art. 82 with the ADA, shows that the two provisions lay down strikingly different standards when assessing and legally restricting anti-competitive behaviour. Most importantly, the ADA has no statement of objective and thus depends upon a *de jure* definition of dumping, which is either based on price discrimination or under cost sales. There is no doubt that both these practices, even when conducted simultaneously can be part of economically justifiable and rational business behaviour. The notion of unfairness must therefore refer to the juridical and not the economic definition. The ease of finding dumping in cases where the industry as a whole is suffering from a downturn is an inherent problem of the current Agreement from an economic perspective.

Anti-dumping supporters main argument about dumping using cross-subsidizes from a sanctuary market, should be evaluated taking into account the difference between natural and artificial trade barriers. When artificial barriers exist alternative trade remedies should be considered.

[31] Provisional measures are imposed by the Commissions.

Each member state's investigating authority has considerable discretion in applying the anti-dumping legislation. There is also a danger the IA can be politically biased in favour of defending national industry's interests. Whereas the IA has considerable discretion, the Panels discretion is confined, parties should therefore not expect to find support in Panel disputes on other ground than the purely juridical.

Considering the initial stand before the Doha negotiations there is no reason to expect any radical change which might make the anti-dumping agreement more economically sensible.

PART II

4 Introduction to the case of Norwegian Salmon

The data relevant for the Norwegian salmon industry will be presented here[32]. Seafood is Norway's second most important export article[33]. The value of salmon and trout exports in 2006 is estimated to NOK 16.8 billion, constituting about 45 % of the total value of seafood exports (EFF, 2007).[34]

4.1 Salmon trade disputes

The salmon dispute has been ongoing more or less uninterruptedly for two decades. As salmon is a particularly important export article for Norway, the salmon case has been high on political agendas. There is no doubt that the salmon case would have been resolved with a Norwegian EU membership. While Norway's EU membership still waits, the case could be used as a coercion tactic for other political matters.

The Scottish farmers have lobbied their case well, and have also filed complaints against other countries such as Chile and the Faroe Islands[35]. Additionally, there has been separate disputes regarding dumping of trout[36]. There is a clear connection between downturn's in salmon cycles and allegations of dumping from Scottish farmers, indicating their continuous need for protection during downturns. The cyclicality of the industry makes it especially vulnerable to different trade interventions. (Asche et al. 2005).

YEAR	The chronology of the Salmon case
1989	First dumping allegations from Scottish salmon producers.
1990-2	Anti-dumping duty of 11,32 % proposed, but suspended due to a governmental programme to reduce exports (freezing). Minimum import price (MIP) is put in place.
1997	The Commission imposes anti-dumping duties and countervailing duties.
1997-2002	The "salmon agreement". Export duty of 3 % and MIP of € 2,9
2003	The "salmon agreement" suspended, only minor restrictions on trade.

[32] Note that data are subject to some uncertainty, due to different standards of reporting, misstatements etc, and that aggregate presentation level out nuances in the information. The salmon industry has been suspected of manipulating sales data (Asche et al.).
[33] Oil & Gas is the most important export sector
[34] Some data are aggregate for salmon and trout. The share of trout is 10 %.
[35] Council Regulation (EC) No 930/2003
[36] Council Regulation (EC) No 437/2004

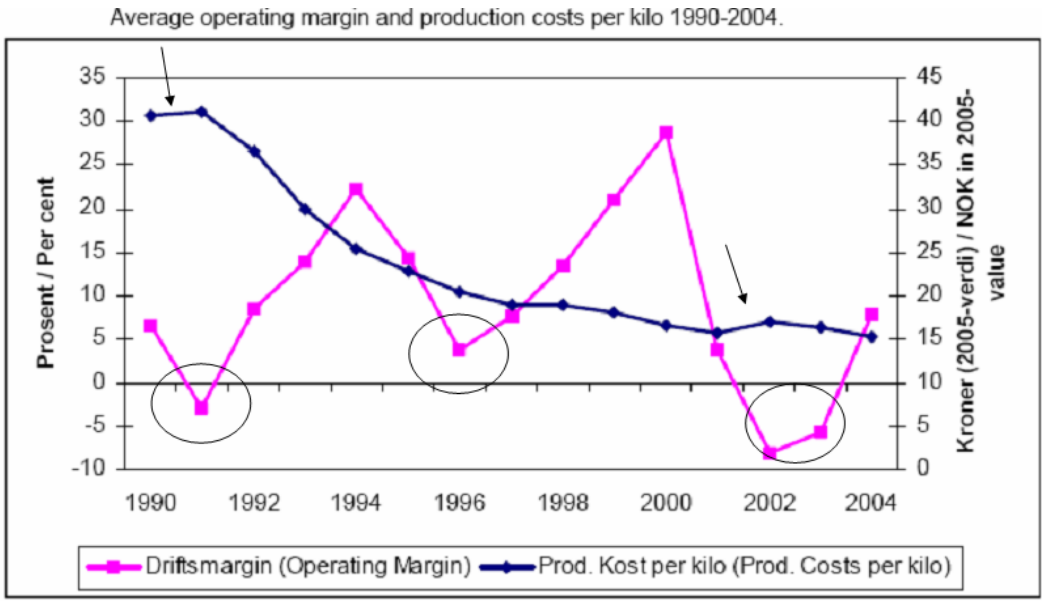
2004	Safeguard initiations and safeguard actions (quotas)
2005	Safeguard measures replaced by anti-dumping duties varying from 6,8 - 25,4 %
2005-	These provisional duties are revoked and replaced by MIP's. Norway has brought the matter before the WTO Panel. At present the case has not been concluded

(Source: Utenriksdepartementet, 2007)

Trade protection has been important for the Scottish salmon industry and there is no reason to believe they will abandon their successful protection strategy. The outcome of the WTO salmon case could be decisive in this respect, and might force the EU politicians to withdraw their Scot support.

4.2 The farmed salmon business

The salmon sector has some distinctive dynamics which should be properly understood in order to asses the anti-dumping case. These dynamics will be presented next.



(Source: Fiskeridirektoratet, 2005)

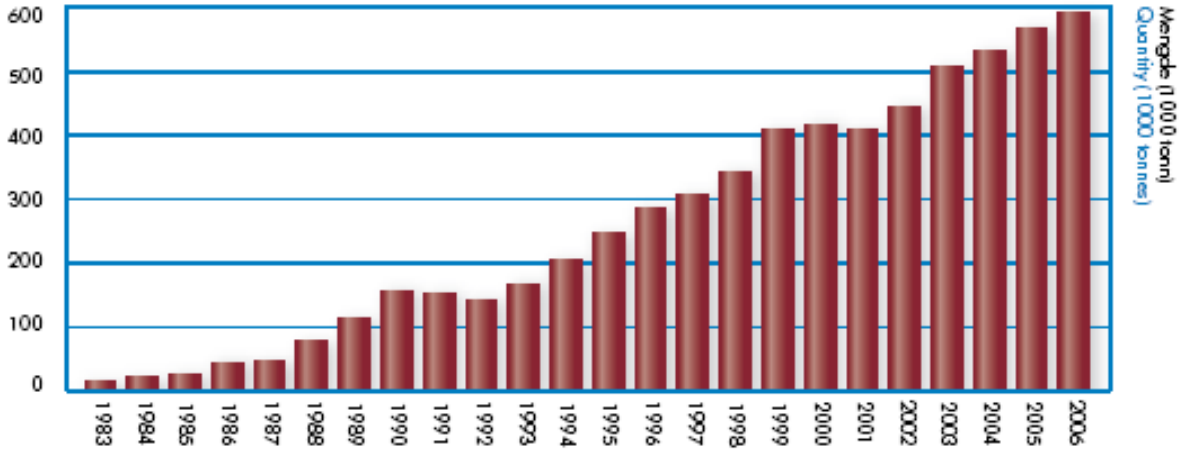
Figure 2: Average COP/kg and operating margin for salmon (and trout).

As can be seen from figure 2;

I) The average COP has been subject to a steady and considerable decrease, resulting from increased efficiency. Employment in the salmon business has also declined in connection

with to continuous structural changes[37].

II) The salmon business has profitability cycles of approximately six years, as indicated by the circled troughs in figure 2. This corresponds to two production cycles of salmon. The down-turns and cost rationalization pressure has resulted in several shakeouts, putting non-competitive firms out of business. Note that the decrease in production cost during downturns, as the one experienced in 1990-1992 and 2001-2004, is flatter or even negative. There also appears to be higher volatility of returns with increasing volume, which implies incremental risk.



(Source: EFF, 2007)

Figure 3: Production volume of farmed Norwegian salmon.

III) Massive, and steady increase in salmon production during the last 20-25 years, helping Norway keeping its position as the world's largest farmed salmon.

4.3 International salmon markets

The domestic consumption of farmed salmon in Norway was only 12.000 tons in 2004, or about 2,5 % of the total production. The rest of the production was exported (EFF, 2007). Thus, the Norwegian salmon industry is highly export oriented. Internationally, Norway had a 43 % market share in 2006. Chile's global share has been rising sharply the last decade, and was 34 % in 2006. Together, the salmon giants, Norway and Chile, produced 77 % of the world's total volume of farmed salmon.

[37] Detailed figures can be found in **Appendix IV**

4.3.1 EU Salmon market and prices

In 2004 Norway sold 74 % of its salmon volume to the EU market (Fiskeridirektoratet, 2005). Norway's share of the total EU market was 60 % in 2004, up from 55 % in 2001 (Lorentzen, 2006). Obviously, the EU is the core market for Norwegian salmon. The size of the EU market and the volume of imports of the product concerned are given in the appendixes.

Chile still only has a minor market share of frozen salmon in the EU, 4 % in 2004, but is currently expanding its volumes considerably. Norway's main competitor in the EU is Great Britain (Scotland), with 10 % of the total production of about 170.000 tons in 2004[38]. As the Scottish salmon has a considerable EU home market, export volumes are small[39]. Consequently, there is fierce competition between Scottish and Norwegian producers in the EU market, with Norway as market leader. The Scottish share of the EU market was 28 % in 2004, down from 33 % in 2003 (Lorentzen, 2006). The general trend in relative market shares between Norway and Scotland since 1990 has been a loss of market share from Norway to Scotland, from 1990 - 2000. Norway lost 10 % to Scotland, but recouped 5 % in the next period (including the Investigation Period - IP). [40]

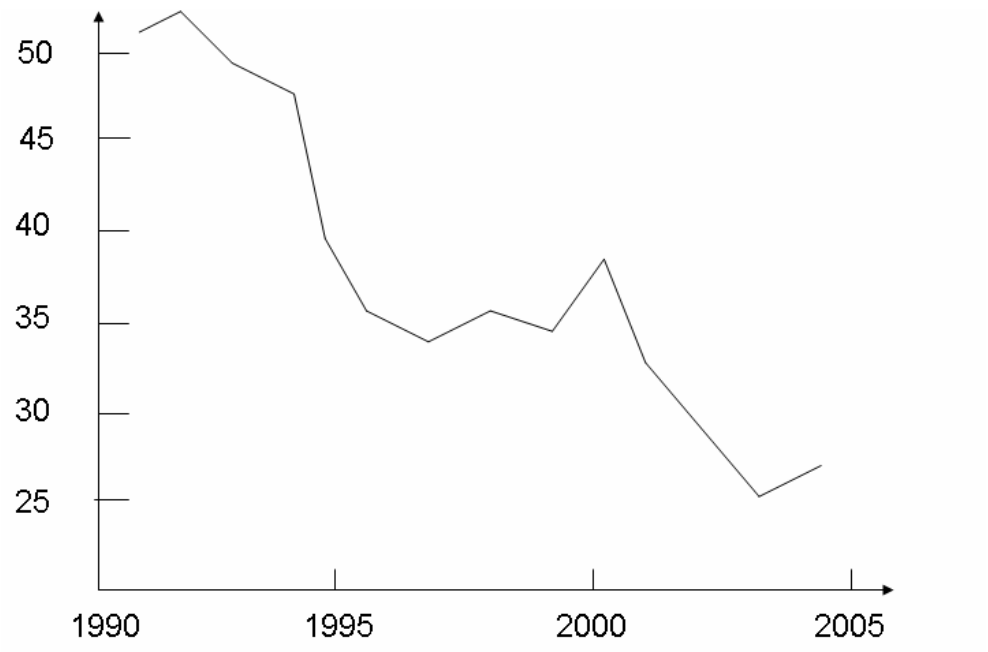
4.3.2 Salmon prices

Salmon prices are very volatile both in the short and in the long run. This relates strongly to the cyclicality of the sector, and the nature of salmon as a perishable product. There is also some seasonal variability. Norwegian producers refer to the prices as being set internationally, with little room for individual pricing, thus firms are chiefly price takers. Thus, the salmon is either sold on the spot market or on short contracts. They also hold that short term raw material price fluctuation do not affect the export price. Atlantic farmed salmon is mainly sold whole and this is perceived largely as a relatively homogeneous product (USITC, 2006). The existence of a salmon exchange for financial contracts supports this assertion[41].

[38] Calculated with data from Council Regulation (EC) 85/2006 and figures of Norwegian market share in EU.
[39] About 2 %, according to Council regulation (EC) 85/2006 using figures of non-sampled CI.
[40] Salmon volumes which some calculations are base don are given in Appendix III.
[41] Fish Pool, www.fishpool.eu

The Scottish salmon has a price premium in the EU of 12 %, and has obtained the French quality distinction “Lable rouge” (NOR1). This is relevant for the relative prices between Norwegian and Scotch salmon as Norway is alleged of undercutting prices.

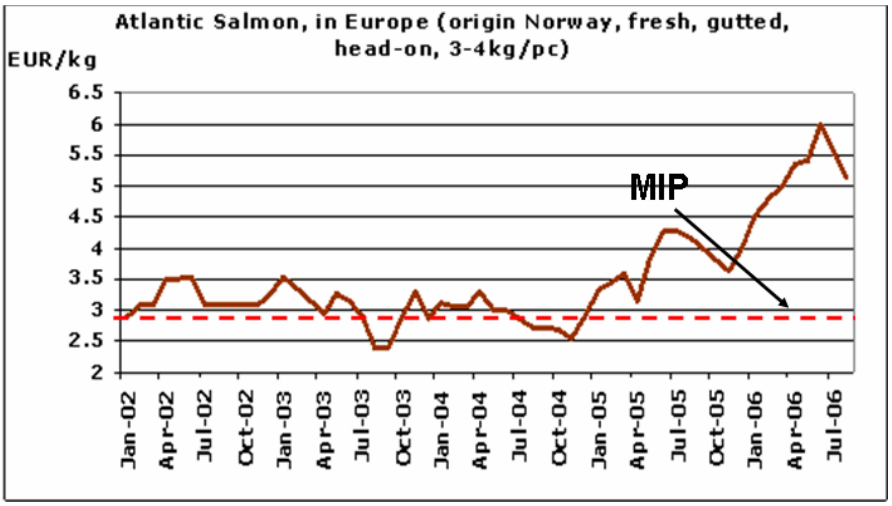
Price data on exported Norwegian salmon in the long, intermediate and short run, is shown in the next figures. From figure 4 it is clear that the price on fresh salmon hit a low point in the EC during the summer of 2003. This corresponds with start of the anti-dumping period of investigation.



(Source: SSB, 2005, in Lorentzen)

Figure 4**: Export NOK/KG, 2005-value, farmed Norwegian salmon to EU**

Figure 4 shows the general trend in salmon price from 1990, in 2005-values. It is clear that the real price has dropped sharply in this 15-year period, but with considerable fluctuation around the downwards trend.

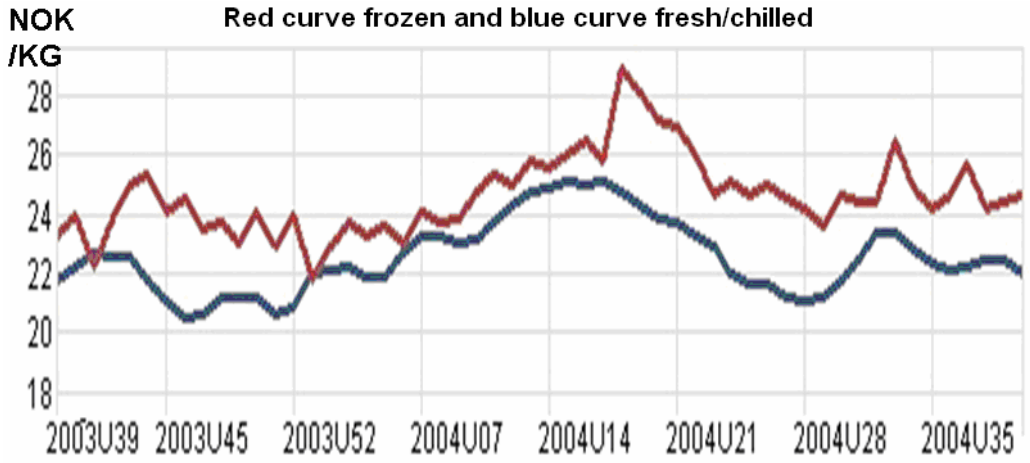


(Source: Globefish/ERP, 2006)

Figure 5: Export NOK/KG, farmed Nor-HOG salmon to EU

In the intermediate run there was a period before the summer 2003, where prices where quite stable, most likely due to the salmon agreement. When the salmon agreement was abandoned it resulted in a further fall in the price (Finansdepartementet, 2007 and Lorentzen, 2006).

The low prices in this period made farmers put low quantities of smolt in the sea, which led to high prices two to three years later, as can be seen from figure 5 The salmon price is currently dropping again, owing to the considerable amounts of smolt put in the sea in 2005-2006, the price is now touching the MIP floor of € 2,8[42].



(Source: SSB, 2007)

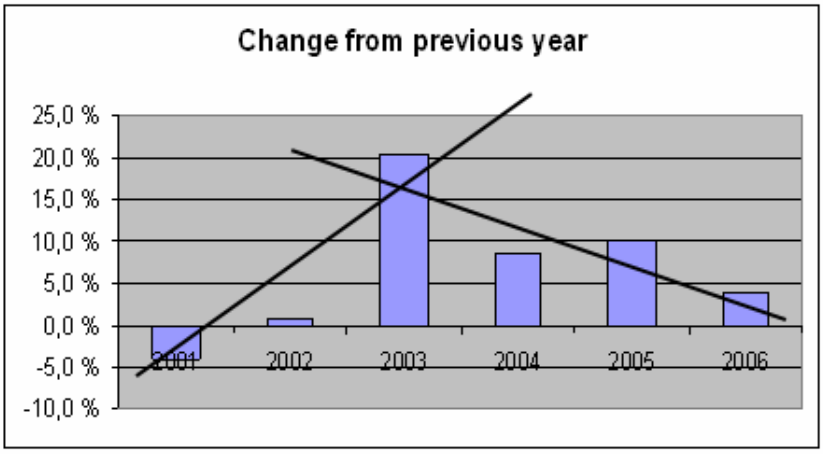
[42] Week 23, 2007 price fresh salmon/kg NOK 25,83 (SSB.no)

Figure 6: Export NOK/KG during POI, frozen and fresh (upper)

The last figure shows the price development during the IP. The price on frozen fish was above the fresh prices during almost the entire period. The price data is given on a weekly basis, which if shown in even more detail, would also reveal considerable intra week-volatility.

As can bee seen from the aggregated graph, frozen and fresh prices do not differ substantially. The quantities exported are about ¾ fresh, whole salmon and 15 % frozen salmon. The last 15 % are fresh fillet, smoked salmon etc. Thus, the price of whole fresh salmon as expressed by the lower curve is the most important for the anti-dumping case.

The increase of imports per annum of Norwegian exports and the total export volumes are given under. Note the 20 % increase in volumes exported from 2002-2003 which coincides with the bottom of a downturn. This confirms the expected correlation between export volumes and prices. As can be seen from the figure the trends show augmenting volume growth contributing to the slump experienced around the IP and vice versa.



(Source: ssb.no, 2007)

Figure 7: Trends in export volumes

According to Lorentzen (2006) paper on salmon prices in the EU, in addition to the Commissions dumping hypothesis, there are four complementary hypotheses concerning salmon price formation.

I) Innovation and productivity hypothesis: The annual decline in production costs is on average 7,2 %, this production cost decline explains 90 % of the fall in salmon prices in the long run. Furthermore, the strong competition makes the prices converge with the COP. Even though production cost data are not available from the Scottish farmers, there is little doubt that the efficiency pressure is considerable and that firms who are not able to follow the downwards spiral will soon become unprofitable. The supply side is thus the most influential for the price of salmon. The analysis also shows that the effect on salmon prices that the prices of salmon are affected by what happens with the COP two years in advance. Lorentzen further states: "*In a situation where a branch is alleged of dumping it is especially important that there is consistency between the methodology used to calculate costs and prices*" (p. 28).

II) Market hypothesis: The EU market has increasing supply from various salmon producing countries, also contributing to the lowering of prices through the supply side, assuming demand is stable and not infinitely elastic.

III) Instability hypothesis: As salmon is a source of proteins, many substitutes exist as e.g. other fish types and white meat. There is little doubt that the development of these industries affects salmon demand. As the salmon market is chiefly a spot market short run instability in demand can create considerable price fluctuations, and sales at a loss.

IV) Business policy: The salmon market is subject to a number of explicit and implicit trade restrictions, and other distorting aspects of political nature, affecting the natural price formation. The unexpected closure of the important Russian salmon market in 2005 is an example of a situation event which affects prices in other markets.

In 1998, using the representative French salmon market, and applying a dynamic reformulation of the Lau-Bresnahan model, in an error correcting framework. Steen and Salvanes found that the salmon market is competitive in the long run, but that the largest producing nation, Norway, has some market power in the short run. The short-run market power is linked to the seasonal migrations in wild salmon fisheries, where the market power is low when cheaper substitutes are available. Outside the volatile wild salmon harvest

season, Norway aggregately has some market power. Norway's market share in the fast growing European salmon market has had a decline since 1990, so there is no reason to suggest that the market power has increased significantly. The study of Steen (1995)[43], further suggest one integrated European salmon market.

4.3.3 Market structure and competition

The Herfindahl Hirchman index (HHI), is a measure of industry concentration. In Vassdal (2002) the figure for the Norwegian salmon industry is very low at 0,02 for 2002. The EC anti-dumping case involves 102 salmon companies, showing the considerable fragmentation of the industry (EU1). Norwegian salmon industry has been subject to strong consolidation the last years. But, concentration at least in 2003-2004, seem to have been well under the 0,1 US anti-trust threshold, between low concentration and moderate concentration.

As Norway holds a 60 % market share and the Scotland an additional 28 %, the HHI on a nation's level in the EU was high, with 0,45 in 2004. This exceeds the set threshold for a strongly concentrated industry. Consequently, at an aggregate national level the HHI is high, but low at the private entity level. The trends are, however, opposite with an increase in the competition between different salmon producing nations, and at the same time consolidation at the firm level (Lorentzen, 2006).

An empirical study by Hyun (1998) of the U.S market based on industry concentrations revealed that *in over 90 % of the anti-dumping cases a predatory motive could not be identified*. The conclusion was then drawn that the anti-dumping measures imposed were chiefly motivated by protectionist motives. Taking into account the current degree of fragmentation in the salmon market and among the Norwegian exporters, it does not seem unreasonable to draw a similar conclusion in this case.

[43] In Steen 1998.

4.3.3.1 Cyclical markets and cobweb dynamics

The cyclicality of the salmon industry has many similarities with other agriculral industries. The hog/cattle - cycles are well-known from the US. Teory on these volatilities is called cobweb, and relates to the rational behavior of individual firms in a fragmented industry where each individual producer cannot affect market price. One would expect firms to learn from previous downturns, in practice, the number of smolt put in the sea *somewhat* correlates with the market price at the moment (Heyes & Smith, 1987). This price is taken as an estimate of price at harvest. The plunge in price in 2002-2004 owed to excess quantities of smolt put in the sea during the upturn around 2000. The new upturn in 2005-2006 is expected to give a similar fall in prices in 2007-2008, as the positivism has made producer's put great quantities of salmon in the sea, again. Thus, the cyclicality of the industry is strongly related to production decissions wich are made approximately two years before harvest. Nevertheless, many other factors also apply such as diseases, meteorological conditions etc. (Asche et al., 2005)

4.4 The salmon value chain

The value chain of Norwegian salmon is especially lengthy and complex. The complexity is increased by the number of legal organizations, and the fact that the product is sold in a large number of different varieties (PNC's).

In order to properly understand the mechanisms governing the assessment and allocation of costs in the COP calculations of salmon, it is necessary to understand the value chain of the salmon production and the life cycle of the salmon. How companies are legally organized varies considerably, from highly specialized to fully integrated.

As can be seen from figure 8, the production value chain can be divided into four main steps. The number of product variants increases exponentially by each step.

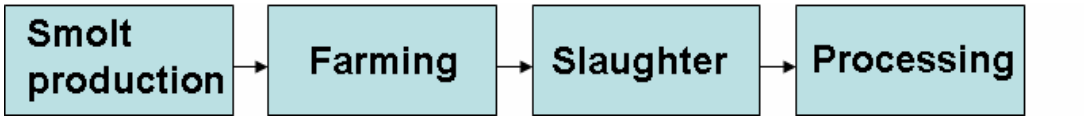


Figure 8: Value chain of salmon production

Step one is the production of smolt, from the fertilization of the egg to the smolt is ready to be put in sea cages. At farming the harvestable salmon is already subject to a variety of sub-products dependent on weight and qualities, 9 - 16 variants are normal at this stage. The growth of salmon is not linear, and is slowest at the start and at the end of the life-cycle.

Farming is the core business activity. Salmons are grown in the sea, in big cages with thousands of salmon swimming together. In each cage the salmons are quite homogeneous as they are given the same feed and are subject to the same natural conditions. As they are put in the sea at the same time they belong to one salmon generation and will be harvested within a harvesting window of a few months.

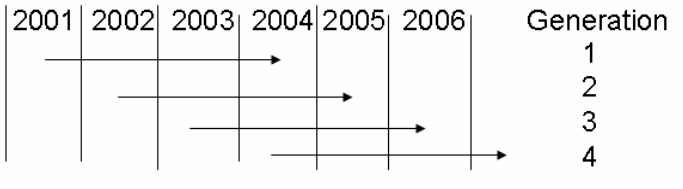


Figure 9: Salmon generations

The figure shows the concept of overlapping generations. When one generation has been harvested, a new one will more or less immediately be put in the sea. Salmons can be grown all year long and there is no particular harvest season. Consequently, salmon is harvested several times a year providing a continuous supply of fresh salmon to the markets.

The quality of the salmon depends on several factors such as fitness, skin, meat colour etc. These quality categorizations can to a certain degree be done before slaughter, but will often be part of the slaughter process, as some quality differences are not visible until the fish is gutted. Most of the salmon will fall within the superior quality category, while the fish with major or minor flaws, are categorized as either ordinary or production fish. These are normally sold at a lower market price. Norway does not sell production fish to the EU. At the fourth and last stage, the fish is further processed into different cuts of salmon or into smoked, fillet, canned etc. Freezing can happen at every stage after slaughter.

The base product is technically called whole fish equivalent (WFE), and is the starting point for all further variants of processing. The WFE is a fish which is starved and bled, reducing the weight to the upper of 90 % of a live salmon. The WFE is an important concept as all

other cuts and variants are calculated as a standard percentage of the WFE. There are both standard industry conversion coefficients and firm specific ones.

The transition between the production value chain and the distribution chain is not clear cut. The distribution chain is essential as dumping cannot exist before the salmon crosses the EU border. Also the distribution chain is characterized by a number of different legal arrangements. Firstly, there is a distinction between salmon production and exporting which is particularly prominent in the organization of the Norwegian industry. Secondly, many Norwegian salmon companies have ownership interests in the EC both among importers and processors (NOR1). Therefore, the product is not necessarily completely processed at the time of export, as the EC has a considerable processing industry using whole Norwegian salmon as their intermediate input. The production value chain can also end with domestic sales to related or non-related exporters.

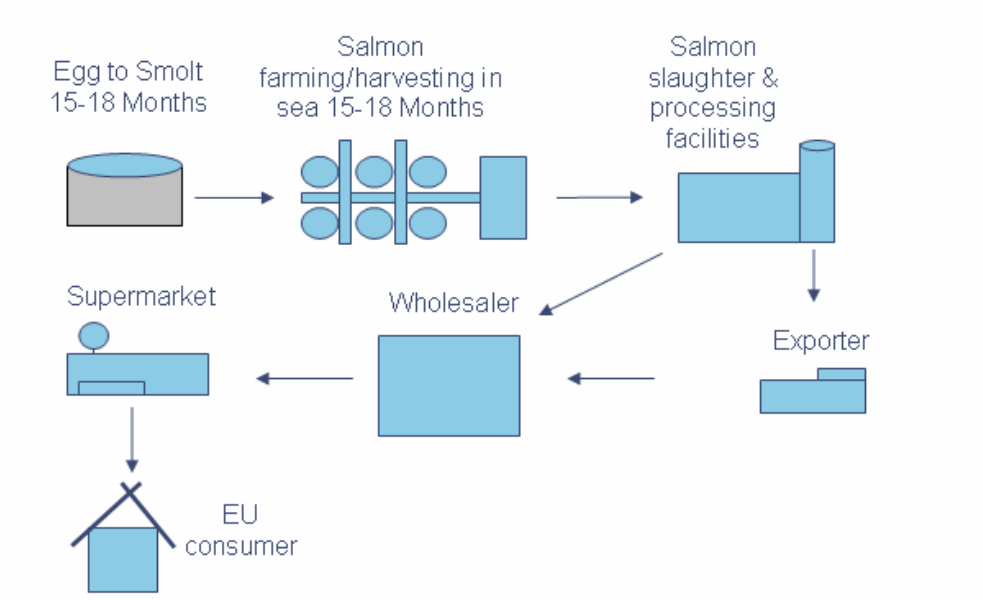


Figure 10: Value chain of Norwegian Salmon production

The time from slaughter to consumption is very short for fresh salmon taking into account the lengthiness of the production value chain. According to USITC (2006), the shelf time for chilled (not frozen) salmon is 10-14 days. Thus, if not frozen or otherwise preserved, salmon is a highly perishable product.

4.4.1 Production time & timing

A decision to start hatching smolt must also be done 15 to 18 months before the smolt is put in sea water. If there has been hatched to many smolt, the fry might need to be destructed. This adds costs to the remaining smolt of that generation. The smolt is put in the sea at time X and can be harvested at Y-Y[1]. During the growing period, which takes 15-18 months depending on water temperature, the producer cannot stop feeding the salmon. The only alternative if markets appear to be depressed is to slaughter the fish at a premature stage. Premature salmon weighing less than 1 kg have no market, furthermore fish of less than 2 kg have higher slaughter costs as the fish does not fit into the gutting machines and less fish is processed for each man hour. The optimal harvest weight is normally 4-6 kg and the average harvesting weight is over 4 kg/gutted. At a certain age, about 3-4 years, the salmon gets mature and must be used for row production.

Even though the farmer has a certain time window in which to harvest the salmon it is quite evident that once the smolt is put in the sea, considerable resources are compromised. The basic nature of the salmon market implies that the cost of discontinuation when the smolt is in the sea is higher than carrying through with the production process.

Clearly the farmer has no rational alternative but to bring the salmon to the market at any price the market will offer at the time of harvesting. At this stage the only choice is then *when* within the harvesting window the farmer decides to slaughter the salmon. There is also a possibility to freeze the fish and wait for higher prices.[44]

When the salmon is decided to be sold fresh the flexibility is low, if no contract exist the merchandize is subject to the volatile spot market of fresh salmon. At the end of the day the producer can be forced to accept any price payable to avoid the fresh salmon being spoilt.

5 Anti-dumping proceedings

Anti-dumping investigations in the EC are initiated by the Commission on behalf of a complaining industry. Central to the dumping determination is the establishment of a normal value and an export price. These are compared in order to determine a dumping margin. Injury determination is also central, but not a special focus in this thesis. Additional procedural aspects will also be presented for the overall comprehension of anti-dumping proceedings[45].

5.1 Procedures

This section will briefly address how the proceedings are carried out by the EC institutions. The important role of the Commission as the central IA, will be further enlightened.

Brief overview of the relevant procedural aspects to be presented.

The dumping practice must be injurious, section 5.2. A complaint must be filed by the Community Industry (CI) in section 5.2.1 and the injury cased must be linked to the dumped exports section 5.2.2. The complaint must have support, and the interest of the Community as a whole shall be taken into account section 5.2.3. There must be dumped product, section 5.2.4. The dumping must have happen during a certain period, section 5.2.5. When the exporting industry is extensive there must be created a representative sample section 5.2.6. The charged industry must provide evidence, section 5.2.7.

5.2 Determination of injury

Even though the injury analysis is central in any anti-dumping investigation and highlighted both in the salmon case and in the anti-dumping literature, it is outside the scope of this thesis to include a full coverage of the different aspects of injury determinations. Still, as to provide the reader with the full picture, some central aspects relevant to the injury determination and the rest of the proceeding are presented next.

Norwegian salmon farmers should note that the most effective defence in anti-dumping cases is based on the injury analysis. (Stevenson 2006)

5.2.1 Community industry

The definition of the Community industry (CI) is important and states as:

I) the industry must agree on filing the case with a minimum of 25 % support and[46];

II) the industry is central to determine injury.

The CI, for this purpose, includes the producers of the "like product". The EU farming of salmon chiefly takes place in Scotland. An interesting feature is that the Commissions definition of industry does not include all producers. The most central criteria relevant to the EC salmon case is that the CI must be independent of the Norwegian industry. (Andersen, 2006) As Norwegian firms have broad ownership interests in the EC industry, this excluded a considerable share of the producers in the determination of the CI. The 25 % support threshold was consequently applied to a small fraction of the total community industry. The support finally amounted approximately 12 % of EU farming production[47]. The relevant CI employs only 221 persons[48] and is therefore a minor branch of the total EC salmon industry, taking into account the considerable processing industry employing several thousands on the continent[49].

5.2.2 Injury and a causal link

A fundamental prerequisite for dumping findings is injury to the CI and the establishment of a causal link. The *sample* for determination of injury constituted five producers with a total production in the IP of 9.000 tons. The figures used by the Commission for the injury assessments are given next, for the period between 2001 and the IP (the period concerned):

I) The community industry (injury): The production of the CI increased with 17 % while the capacity utilization fell with 4 %. The market share was stable around 3.3 %. The prices received fell by 6 % and the profitability on CI sales fell from 7.2 % to - 4 %, while the ROI fell from 36.7 % to - 21.4 %. However, investments in IP were approx. the double of those in

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[45] A schematic overview is given in **appendix IV**

[46] If less than 50 % support, the share opposing the complaint must be lower than the share supporting in order for it to pass.

[47] Calculated with data from Commission Regulation (EC) 826/2 006 and figures of Norwegian market share in EU.

[48] Council Regulation 85/2006

[49] No exact figure available, but considerable processing industry in Demark and many other EU countries.

2001, showing ability to raise capital. Productivity went slightly up, while labor costs fell with 19 %. (ibid)[50]

II) The Norwegian exports were also examined (link): A volume increase of 35 % was found, compared to a community increase in consumption of 15 %. Consequently, Norway's market share increased with 17 %, from 50 to 60 %. While prices fell simultaneously with 16 % (averaging 2.61 €/kg).

> Taking account of all of these factors, the provisional conclusion reached is that the Community industry has suffered material injury within the meaning of Article 3 of the basic Regulation. [51]

As can be understand the Commission linked an increase in imports during a slump with poor performance (injury) of the CI in the same period. The Commission did not hesitate to conclude that the injury requirement of the Basic Regulation was fulfilled. The wording in the Regulation appears to be biased in favor of finding injury and contradicting evidence is largely neglected. No consideration of the cyclical nature of the business is mentioned. (ibid)

The Commission firmly rebutted the objection that Scottish firms were less efficient and stated that both industries had some cost advantages and that "*Overall, it is noted that whilst the Community producers are incurring significant losses in the current market, so too are Norwegian producers*". [52] The additional export and transport cost of Norwegian producers, the 3.05 % export and imports duty (EFF, 2007), and the 12 % premium enjoyed by Scottish producers were apparently not included in that reasoning.

The imports of 118.000 tons of salmon from third countries at an average prices of € 2.23 (38 cent below Norway's price) [53], were not considered to affect the CI performance, because wild salmon did not affect the CI (read: EU market/prices). This last assumption can be rebutted by Steen et Salvanes (1997) Even though not defined within the like product definition, wild and farmed salmon are close substitutes for *consumers*. Supply of wild

[50] Commission Regulation (EC) 628/2006
[51] Commission Regulation (EC) 628/2005 at recital 89.
[52] Commission Regulation (EC) 628/2005 at recital 108
[53] Includes wild salmon. Chile was the only country above Norwegian level. The explanation might be that the prices for frozen salmon at the moment were higher, at least frozen from Norway was indeed (table xx).

salmon is seasonable, very volatile and can be supplied at low prices[54]. Neglecting the wild salmon's effect on the market price for farmed salmon is gibberish.

The view that the Commission made a too superficial injury and link assessment can be supported by the price formation hypothesis suggested by Lorentzen (2006). Even though Norwegian imports might have had an impact on prices and Scottish farmer's results there is undoubtedly more to this issue than the Commission states in its Regulation 628/2006[55].

5.2.2.1 Injury margin

The injury margin is established as the effect of the dumped goods on the price received by the CI. The difference between the non-injurious price and the dumped price is called price underselling. The size of the injury margin is important for the level of the final anti-dumping duty (Stevenson, 2005). This will be revisited.

5.2.3 Community interests

The Basic Regulation contains a stakeholder clause in Art. 21, where it states that: *"A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole…"* There is no analogue provision to this in the ADA.

This provision has apparently played a trivial role in the Commissions investigation and has been a source of conflict between the Scottish farmers and the interests of other important groups, most notably among them the EC processing industry.

In an evaluation of EC trade defence instruments by Stevenson (2005), a general point raised by some anti-dumping opponent respondents was the bias towards finding that that measures are in the Community's interest. Supporting this view is a very limited number of published terminations on the grounds of Community interest.

The Commission base their lack of dismissals on theoretical implications saying that price volatility might go down and possibly a more stable supply could be ensured. However, this

[54] Commission Regulation, 628/2005 at recital 94

is a weak argument as it only affects the volatility providing low prices, which are beneficial for both processing industry and consumers[56].

There is thus little evidence to refuse the argument that a small group of Scottish farmers receive protection with other groups within the EC paying the price. Even though this can seem unreasonable, it is at the Commissions full discretion to evaluate internal effects. A rather simplistic argument from the Commission is that since complaints from consumer's (organizations) are few, there is no serious threat to their interests (Stevenson, 2005). If they find that the cost of fighting the allegedly unfair trade practice is worth the losses incurred upon other community groups, there is little Norwegians can do apart from convincing the EU's unprivileged groups to lobby their case. "*Given the importance of lobbying, it is essential that interested parties engage in it as appropriate. However, as highlighted elsewhere, it is not easy for a company – particularly an SME – to identify the appropriate officials in each Member State to whom they might speak"*. (Ibid, p 33).

Asche et al. (2005) estimated that the EC consumer's loss of welfare, due to the recent salmon case amounted to a *minimum* of MNOK 1000. The additional costs of the proceeding and other parties add to this staggering sum. The Commission has expressed little concern for this as they find that the loss is pulverized among the mass of consumers and consequently be trifling at the individual level.[57]

5.2.4 The like product and product concerned

The definition of what constitutes the product under investigation, and the like product[58], is essential for the anti-dumping proceedings, especially the determination of injury and might have a different meaning between them. The product under investigation is the product exported. The product under investigation is also analogous to the product concerned. The like product is a product which is identical to or closely resembles the product concerned. (EU1).

A single investigation will normally include various sub-products each of them just

[56] Council regulation 628/2005 at recital 130
[57] Commission Regulation (EC) 628/2005.
[58] ADA Art. 2.6, gives the definition, the provision also uses the French term "*Producit similaire"*.

marginally different from the other. In the salmon case we have salmon in different presentations e.g. fillet, HOG, but also of different qualities as superior and ordinary.

> "Four criteria were taken into account: (1) three qualities of fish: superior, ordinary, or low; (2) whether it was fresh/chilled, or frozen, (3) eight successive stages in the processing of the fish from whole fish to fillet, (4) seven different sizes of fish (in the case of whole fish). In theory the different combinations of these criteria could lead to a great number of PCN, but the number that arises in practice is more limited". (EU4 at recital 69)

In the salmon case the product under investigation and the like product are the same "*farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen*"[59], however, non-exported models will fall outside the product under investigation. Exported salmon products outside the definition include e.g. smoked salmon and canned salmon.

As in domestic competition law, product definitions are fundamental for the scope of the anti-dumping cases, and have great relevance for the proceedings and their outcome. The vague wording of the legal provisions and the considerable case-by-case assessment often make the definitions subject to great disagreement. Consequently, these definitions have played an important and controversial role, both in the Commission proceedings, and in the current WTO Salmon case.

5.2.5 Period of investigation

In order to determine if salmon has been dumped an investigation period (IP/POI) is established. According to Czako (2003, p.36) "*The period of investigation (POI) is therefore the period for which data to be used in the (dumping) investigation are collected by the investigating authorities*".

The POI is normally one year, but shall never be less than six months, one year is the standard length. The POI should end as close as possible to the initiation of the proceedings. (Czako, 2003). The POI in the Salmon case was chosen by the Commission to be from 1 October 2003 to 30 September 2004. The period for determining injury is normally longer. The Commission chose a period from 1 January 2001 to 30 September 2004 as the period for

[59] Council Regulation (EC) 85/2006

injury assessment (period concerned).

5.2.6 Sampling

In some investigations there are considerable fragmentation in either, or both, the CI and the exporting industry. Even though anti-dumping investigations are performed on a business to business basis highly fragmented branches constitutes a challenge when it comes to the administrative capacity of the IA.

As a consequence the practice of sampling is now implemented in the ADA Art. 6.10. Regarding the sampling of exporters or (CI) the IA must choose a representative sample in order to establish dumping margins (injury). The sampled companies should normally include the largest exporters.

In the salmon case ten exporters representing 37.2 % of the Norwegian exports to the EC, where chosen to represent the industry (NOR1). Companies which did accept to form part of the sample, but was still excluded, were automatically given the average of the dumping margins of the sample. The highest dumping margin found in the sample was given to all companies who did not to cooperate with the IA.

The EC sample excluded all Norwegian traders from the sample. The Norwegian authorities have contested the exclusion of this part of the industry as the independent exporters have unique cost structures and trade great volumes (NOR1). This is not unique; IA's do not calculate individual dumping margins for traders, who are given the highest of the sample (residual margin). The reason is that traders can easily shift their source of supply (Vermulst, 2005).

<u>It is obvious that the sampling practice can provide considerable injustice to many parties:</u>

I) The producers who are involuntarily excluded from the sample and therefore given the average dumping-margin, when no dumping for that company has factually been observed, and the company has tried to cooperate.

II) The effect can be especially punitive for trading companies as they are treated as *de facto* non-cooperating, while they might be fully co-operative. (Van Bael & Bellis, 2004)

5.2.7 Facts available and company information

The parties involved in the proceeding will get different questionnaires from the Commission with strict deadlines. The Basic Regulation states in Art 18 (1), that companies refusing access to, or otherwise do not provide necessary information within time, or supplies false or misleading information, can be subject to the use of "facts available".

This point is relevant for all companies forming part of an investigation. Basically, when the Commission resorts to facts available the company concerned will be disadvantaged as a punishment for not providing the right information in the right manner. Companies should make every effort necessary to avoid the application of facts available.

Another important provision is ADA Art. 6.2: "*Throughout the anti-dumping investigations all interested parties shall have a full opportunity to defend their interests*". Accordingly, individual firms have a right to get their opinion taken into account. Companies should use this opportunity as they cannot expect the Commission to base its rulings on other information than the one provided and properly justified.

5.3 Determination of dumping

Dumping determination consists of two fundamental elements.

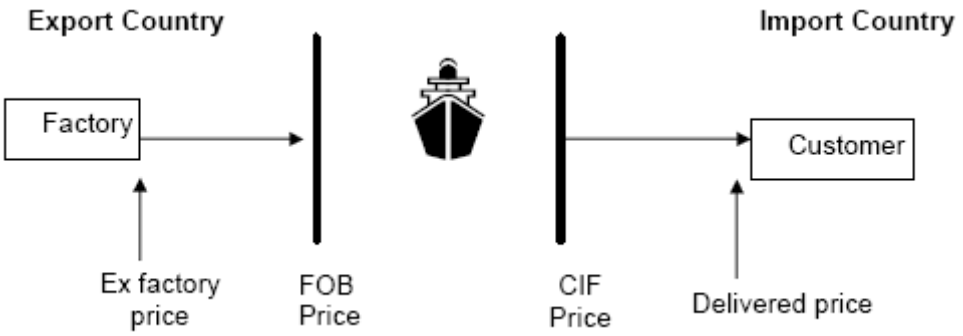
I) The establishment of an export price (EXP) and;

II) the establishment of a normal value (NV).

Chiefly, if the NV exceeds the EXP, there is evidence of price discrimination between the two national markets, the basic condition for dumping in international cases.

5.3.1 Export price

The EXP is normally easier to establish, as exports should be well documented transactions (Vermulst, 2005). The relevant price is the price to the first independent customer. Transaction costs will be deducted in order to arrive at an ex factory price.



(Source: Stevenson, 2005)

Figure 11: Export price

When the exporter and importer are related parties or compensatory agreements exist, the ex factory price is constructed from the price to the first independent customer, deducting importers additional costs, or on any reasonable basis[60].

5.4 Normal value

The normal value (NV) is the value to be compared with the export price in order to determine the potential existence of dumping. Normal value is defined in ADA Art. 2.1, as: "*the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country*".

NV's are normally established, as average values of the comparable domestic sales transactions in the IP, for each sub-product category. The sub-product NV's are later aggregated to one company or product concerned value. The NV is an art of legal craftsmanship, related to the economic term; domestic market price. However, the term NV is broader and more flexible than the domestic market, price and can apply to more complex business situations where domestic prices are not viable or available. (Li, 2001)

In market economies NV is established using the following methods under the Basic Regulation[61]:

[60] ADA Art 2.3

[61] Normal Value can also be established on (any)*"facts available"* for non-cooperating companies. Normal Value is *not* established for independent trading companies as they do not manufacture the product.

I) Comparable domestic sales prices of the producer concerned[62].

Art. 2 (1):"*The NV shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country"*.

If the conditions for establishing NV under I) are not fulfilled this implies a departure from the preferred method. The Commission must then employ alternative II).

II) Comparable domestic sales prices of *other* producers.

Following implicitly from Art. 2(1), when sales under I) does not exist, NV can be based on prices from comparable sales of other producers/exporters.

When NV cannot be properly established under I) and II), alternatives to NV methods based on domestic transaction must be utilized. The "departure rule" is given by ADA Art. 2.2: "*When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison*".

There are two alternative methods which do not use domestic sales transactions. The alternative methods, which will be described further in chapter 7 and section 6.5, are:

III) Constructed NV (CNV)

IV) Export prices to an appropriate third country

5.4.1 Rules for domestic sales in NV (I & II)

Pursuant to the "departure rule" set out above there are four cumulative conditions that must be fulfilled in order to determine whether domestic sales transactions are suitable to form the basis for NV's[63];

I) domestic sales must exist;

II) the domestic sales must be representative;

[62] For simplicity, and consistent with this thesis' case, the country of origin and the exporting country are the same. The implications when divergences from these conditions exist will not be treated here.

[63] Note lower price elasticity in the domestic market or monopoly power does *not* affect the suitability of domestic transactions to form the basis for NV and is either adjusted for at a later stage.

III) the sales must have been done in the ordinary course of trade;

IV) the sales must permit a proper comparison.

According to the "single economic unit approach", established by the EC courts, the relevant price is the price charged to *the first independent customer*. As can be seen this is analogous to the establishment of the EXP (Muller et al., 1998).

The court further held in *Matsuchita II* (ibid), that the producer and the sales company does not need to have share majority in the sales company to be treated as a single unit. This applies as long as the distribution company performs tasks which are "normally" part of a company's internal sales department.

Levels of trade inconsistencies and other relevant factors affecting price comparability must be taken into account, either when establishing the NV or before the final comparison with the export price. An example of this can be differences between sales to consumers or wholesalers[64].

5.4.1.1 The 5 per cent - low volume test

Domestic sales are assumed to be unreliable if they amount to less than 5 % of the exports.[65] The test is applied both overall and on <u>each</u> of the sub-products (PNC's). E.g. a PNC can be whole gutted salmon (HOG).

The 5 % test is a benchmark[66], and not an absolute test as price formations in domestic markets depend on many other factors than such a test can absorb e.g. absolute volumes. The test is done on an exporter to exporter basis, thus in order to offer *some* legal certainty exceptions are only made under special circumstances (Müller et al 1998).This test can be illustrated assuming that the fictitious company Salmon Ltd. has the following sales:

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[64] ADA Art. 2.4

[65] The 5 % was introduced by the Commission in the Electrical Typewriters case (Van Bael and Bellis, 2004), and has consistently been applied since. The 5 % criterion was explicitly included in the ADA in 1994 in note 2 and in the Basic regulation Art. 2 (3)

[66] In Farmed Atlantic Salmon where the Norwegian market was found to be competitive and exporter's domestic sales of 4 % relative to community exports were accepted. Council Regulation (EC) No 1890/97 at recital 15.

Table 2: Salmon Ltd's sales

Product	Export (kg/WFE)	Domestic sales	Percentage	Under/over threshold
Whole	1000	100	10 %	Over
HOG	500	1000	200 %	Over
Fillet	2000	50	2,5 %	*Under*
Total (all PNC's)	3500	1150	33 %	Over

In this case the test holds for the company's aggregate domestic sales and the sales for the sub products; whole and HOG. NV cannot be determined on the basis of domestic sales for fillet, due to the low volume of sales (2.5 %). The 5 % test can be re-applied by the IA, after sales not "in the ordinary course of trade" has been excluded (Czako, 2003).

5.4.1.2 The ordinary course of trade

Sales transactions may[67] be excluded from NV calculations if they are found not to be *"in the ordinary course of trade"*. The ADA is silent on the specific conditions which must apply in order to deem sales to be outside the ordinary course of trade, except for sales under COP. The Basic Regulation, on its own account, lists one additional circumstance which can make sales unreliable for NV. As the Regulation is open-ended, bullet III: "other circumstances", is also included[68].

I) Sales below full cost:

Complicated and ambiguous rules apply to ascertain whether sales have been made under COP[69]. According to Lindsey & Ikeson (2002) "*empirically, the cost-test is among the most significant causes of inflated dumping margins*". The test is governed by ADA Art. 2.2.1.

> "Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the

[67] According to Vermulst, at least for sales under cost there is no obligation to exclude these sales. Regarding sales between related parties the ECJ has held that the Council *must* exclude prices which are affected by the relationship. Case c-76/00 par 79-93

[68] According to Vermulst, sales under cost and sales to related parties are the most common grounds for deeming sales to be outside the ordinary course of trade internationally. Furthermore, it should be noted that the investigating authorities discretion margin is considerable.

recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time".

The provision also includes several footnotes. The basic steps of this test for most practical purposes are given next:

- The first step is to establish a benchmark to consider whether sales are made at a loss. This benchmark is the COP plus SG&A. The rules are consistent with the ones for CNV except for the non-inclusion of profits.

- In order to be deemed outside the ordinary course of trade sales under cost must be done within an "extended period of time". The extended period of time is given in Article 2 (4), being normally one year, but not less than six months. In practice this implies that sales under cost should be quantified relative to the IP. The concept is included to avoid penalizing sporadic sales made at a loss[70].

The most important rule regards the determination of what is "*substantial quantities*". This can either imply;

- i) the weighted average sales price in the "extended period of time" is under the full cost or;

  ii) the average Dprice is larger than COP, but the volume of sales under COP is more than 20 % of the sales being used to establish NV for each model, in the same period, and those sales;

[70] According to Czako et al. the "extended period of time" test is an initial test and the "substantial quantities" a second test to apply if the first one is positive. In Van Bael & Bellis p. 56, Muller et al.p 78 at 2.37 and Vermulst p. 28 the concept does not appear to be clear. Vermulst remarks that the "substantial quantity" test in practice is often the most important, but uses a one month example to illustrate the whole concept ignoring eventual implications of the first test. In the doctorial thesis of Li, Wenxi the matter is equally unclear or confused: "Under this note, at least sales below cost for less than six months should be treated as being in the ordinary course of trade rather than as not being in the ordinary course of trade". The author is sceptical to the "extended period of time" criteria as it appears to be rather superfluous. In his view it would be more intuitive and simple to just set out that the "substantial quantity" test should apply on the whole of the IP. As the matter stands now the tests implications are vague. The possibility of using an extract of 6 months from which to apply the quantity test cannot be ruled out. This hypothetical possibility, with no obvious purpose, could easily have been erased simplifying the legal text.

iii) "are at prices which do not allow for recovery of costs within a reasonable period of time"[71].

The "substantial quantity" concept is explained in detail through the flow-diagram under. Situation i) is shown in the right path situation while ii) is shown in the left:

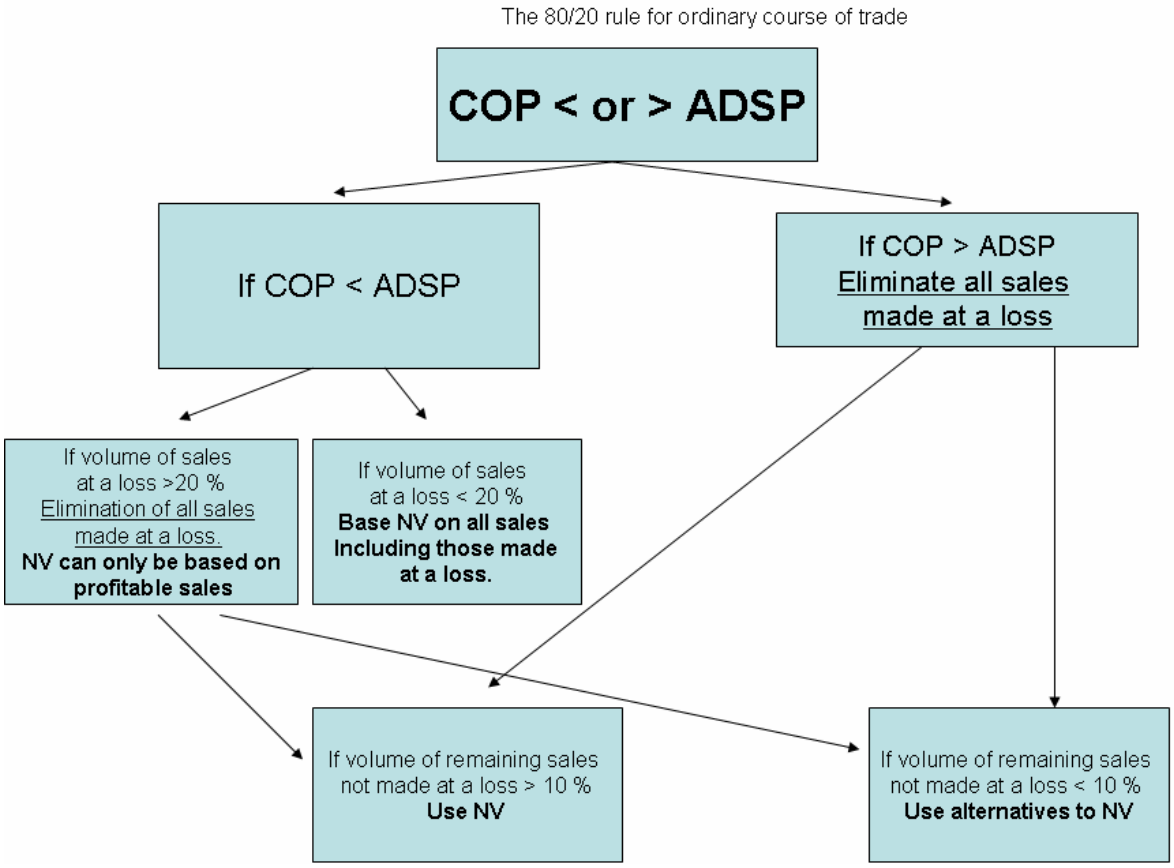

Figure 12: The 80/10 for ordinary course of trade

- If average domestic sales price, Dprice is under full cost of production (COP), all transactions under COP will be disregarded and NV calculated on remaining sales when volumes not made at a loss are larger than 10 % of total sales.

- If average domestic sales price (Dprice) is over full cost (COP), sales will only be disregarded as not being in the ordinary course of trade if they amount to more than 20 % of the total sales when volumes of sales not made at a loss are larger than 10 % of total sales.

[71] This relates to cases with declines of production costs during the IP e.g. due to short life cycle of the product concerned. As the production cost of salmon in this respect is (at least assumedly) quite stable during an IP the implications of iii) will not be further discussed.

- NV cannot be based on the transactions concerned where the 10 % threshold is not met.

Table 3: Hypothetical example for Salmon Ltd.

	Full cost = 18 and CNV profit 2														
1	**Strong seasonal variation in prices, cyclical downturn**														
	Average Dprice < FCOP, exclude all sales at a loss, use remaining sales as > 10 %														
		Jan	Feb	Mar	Apr	May	June	July	Aug	Sep	Oct	Nov	Dec	Misc	
	Dprice	16	17	17	16	17	25	26	23	16	15	14	16	17,9	
	Elimination Y/N	Y	Y	Y	Y	Y	N	N	N	Y	Y	Y	Y	25 % > 10 %	
	NV						25	24	23					24	34,1 %
2	**General cyclical downturn**														
	Average Dprice < FCOP, use alternative (e.g. CNV), as sales are < 10 %														
		Jan	Feb	Mar	Apr	May	June	July	Aug	Sep	Oct	Nov	Dec	Misc	
	Dprice	15	17	16	18	17	18	19	17	15	16	13	14	16,3	
	Elimination Y/N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	8,3% < 10 %	
	CNV													20	22,7 %
3	**Seasonal cyclical prices**														
	Average Dprice > FCOP, sales volume under cost > 20 % --> exclude sales under cost														
		Jan	Feb	Mar	Apr	May	June	July	Aug	Sep	Oct	Nov	Dec	Misc	
	Dprice	16	17	17	17	19	22	25	22	19	14	14	15	18,1	
	Elimination Y/N	Y	Y	Y	Y	N	N	N	N	N	Y	Y	Y	60 % > 20 %	
	NV					57	110	150	110	76				21,9	20,8 %
4	**Serious slump to get rid of excess stock.**														
	Average Dprice > FCOP, sales volume under cost < 20 % --> include sales under cost														
		Jan	Feb	Mar	Apr	May	June	July	Aug	Sep	Oct	Nov	Dec	Misc	
	Dprice	18	19	19	20	19	22	23	22	20	18	8	9	18,1	
	Elimination Y/N	N	N	N	N	N	N	N	N	N	N	N	N	17,5 % < 20 %	
	NV													18,1	0 %

As can be seen from the examples, the existence of cyclical markets can seriously affect the NV. Both the existence of seasonal price fluctuations and cyclical fluctuation, can contribute to findings of sales under COP. This applies independently of any similar price variations also in the export markets.

In situation (4), there are sales considerably under COP in November and December, which *could* be rightfully deemed outside the ordinary course of trade. This cannot be penalized in that situation as the sales do not constitute 20 %. In the other situations with more reasonable business patterns, NV is artificially inflated with 20-35 %.

Lindsay and Ikenson (2002) constructed a similar example and showed that fictitious dumping margins could easily be created using this methodology and concluded: "*one of the most egregious methodological distortions in contemporary antidumping practice is the so-called cost test*". One might rightfully wonder how this test's reasoning passes muster.

Regarding the sanctuary market discussion in section 2.3.1.1, sales under cost should be affirmative evidence that these conditions do not exist (Ibid). Furthermore, the test is flawed because it treats home sales at a loss as not in the ordinary course of trade, while exports at identical prices are included in the export price as dumped goods. This is clearly unsymmetrical. The unreasonableness of this method gets particularly extreme in industries selling perishable goods as in the salmon business, as there is a strong sunk cost element, with under COP sales being perfectly rational behaviour in many ordinary business situations.[72]

II) Sales to associated parties and parties having a compensatory agreement:

Prices to related customers[73] or between parties having a compensatory agreement *may* be considered as not being in the ordinary course of trade, if the relation between the companies affects prices. Prices are compared to unrelated sales to assess whether they are comparable. If prices examined are not consistently different from sales to unrelated parties they can be assumed to be in the ordinary course of trade. This could be an important issue e.g. when including such sales make the difference in the 5 % test. [74]

III) Other circumstances:

The following are some case law examples of other circumstances which have been considered outside the "ordinary course of trade" are (Czako, 2003, p.61):

- *Colour picture tubes*: Second quality products.
- *Electronic weighting scales*: Sample sales
- *Cotton yarn*: Domestic prices fixed by government

[72] Consequently the USDOC uses a more liberal benchmark on perishable goods. There is no analogous practice in the EC. The USDOC has found that salmon is not to be within this category, as there is a harvesting window of several months. (Alberta, 2000).
[73] The definition of related parties is found in Article 143 of the Community Customs Code.
[74] The USDOC has used a test which excludes sales if they are in average more than 0,5 % lower priced, than sales to related parties. The AB has held that these kinds of tests are within the discretion to member states to apply as long as they are applied even-handedly. Thus, both lower priced and higher priced sales should be likely able to be found outside the ordinary course of trade. On these grounds some countries consistently regard all sales between related parties as being outside the ordinary course of trade. (Vermulst, 2005)

5.4.2 Substitutes to normal value

This thesis deals specifically with the case when there is no, or not sufficient sales, in the ordinary course of trade, of the like product in the domestic market. This is often the case when a small country is a world leading supplier of a specific product, as is the case for salmon from Norway. The situation also applies to cases where a special variant of the product is produced exclusively for the export markets, and another variant is produced for domestic sales.

If no other exporter has sufficient domestic sales, there are two substitute options left. The ADA and the Basic Regulation leaves the investigation authorities full discretion to choose among the two alternatives:[75]

I) Constructed normal value (CNV):

The CNV calculates an artificial domestic price based on COP, SG&A and a reasonable amount for profits, as if the product had been sold on the domestic market.

II) Prices to third countries:

This alternative utilizes the EXP price from any appropriate third country, as NV.

However, the Commission has repeatedly shown reluctance to apply alternative II) as allegedly "*there is no way to exclude the possibility that the product is also dumped in other foreign markets*"[76]. (Li, 2003 p.89)

The only country using third country EXP as a substitute for NV is the US. However, according to Vermulst (2005, p 33): "*As the very definition of dumping depends in part on the price of the third country exports, one may wonder whether such (the Commission's) simplistic reasoning passes muster*". (parenthesis added).

[75] ADA Art. 2.2.1
[76] Ferro-silicone case.

CNV calculations are often controversial because the ADA gives IA wide discretion regarding how to calculate and allocate costs. As the IA view often differs from the companies concerned, CNV issues are often argued fiercely[77].

5.5 Discussion on CNV vs. third country export prices

It would be awkward if policy makers did implement an alternative with no practical use, therefore it is interesting to assess whether the Commission's reasoning holds.[78] There is no literature known to the author treating this alternative methods usefulness.

As Vermulst (2005) indicates without further evaluating his argument, one common assumptions of international dumping is subsidizations from a protected home market. In case there is no significant home market there can be no such cross-subsidizing. The only viable option in order to cross-subsidize in this case is to use profits from other export markets, a sanctuary third country market. An alternative is to subsidize dumping practice by using shareholders equity. The reasonableness of this logic should be evaluated in each particular case.

Moving to a hypothetical salmon case with no competition from other countries, cross-subsidising from a sanctuary export market *could* be a way to subsidize predatory pricing in absence of a significant domestic market. To investigate this possibility, seems more reasonable than assuming that dumping is intentionally subsidised through incurring losses in the home market, and in all other markets, to avoid dumping allegations based on price discrimination.

In this hypothetical case dumping could then be detected by comparing EXP to the EU[79] with EXP to e.g. Japan or Russia. *If* prices are higher in third markets this would indicate price discrimination. This could provide an explanation to where the sanctuary market subsidizing the dumping activities actually is. Why other producing countries should not

[77] WTO Salmon case

[78] EC reasoning: Ferro-silicon (Iceland, Norway, Sweden etc) and Large rainbow trout (Norway, Faroe Islands) in Van Bael and Bellis (2004)

[79] To arrive at this there is a presumption that the costs of serving the markets are similar, implying that the NV and export price must be comparable. This presumption makes sense as anti-dumping depends upon the pricing behaviour of the company. If price differences are not a result of the pricing behaviour but market specific cost factors these should be adjusted for in the comparability process

take part in the premiums earned in this market could be an additional question. If the reasons were specific trade-barriers put upon the Scottish salmon providers, one could start seeing the outline of a "real" anti-dumping case. If not, price discrimination could be found as a consequence of different competitive pressures, a normal and reasonable explanation.

In case prices *are* under COP in all significant export markets as assumed by the Commission, and there is no significant home market, can firms be behaving in an unfair manner?

I) Predatory pricing: Only possible when taking on heavy equity losses in all significant markets.

II) Price discrimination: Not possible, as the same "dumped" price exist in all markets. However, as IA understand it can be created artificially by using CNV.

If there is "dumping" in all markets there should be no price discrimination and with no market to subsidize from, this kind of predatory pricing will in most cases be unreasonably costly, and is consequently just a theoretical notion. Overall low prices are therefore most likely related to cyclical markets, *not* predatory behaviour.

As mentioned only the US uses third country prices as surrogates for NV on a regular basis. In the Panel rapport of the US-Norway salmon case, one can verify that the US attempted to use the third country alternative with EU import prices:

> "*After finding that substantially all (over 90 per cent) of the third country sales of seven of the exporters were at prices below costs of production, the Department had based the NV for these seven exporters on the costs of production*"[80]. (ADP/97)

As can be understood Norway also sold under cost in the EU market, and probably all salmon producers did, as the alleged dumping in that case, as in the current salmon case, did coincide with a general market slump. Instead of evaluating whether low third country export prices could imply that there might be no unfair behaviour at all, the US just restored to the use of CNV. The Commission normally does not even bother to check the third

[80] For an eight exporter the normal value was actually based on third country prices.

country prices. However, if they actually did, one would not expect a different attitude than the one shown by the US[81].

The actual and relevant Norwegian FOB EXP for 2004 were: Japan $ 1.57/pound, Russia 1.51 $/pound and the EU 1.51 $/pound (USITC, 2006). This *could* indicate a dumping margin of 4 % compared with the Japanese market. However, one would probably find that this was just a reasonable premium on Norwegian salmon (which might also apply to Scottish), and thus far from any evidence of cross-subsidization and unfair behaviour.

Conclusions Part II

The salmon industry and salmon markets have some distinctive characteristics, which are fundamental for understanding pricing behaviour. The salmon COP has been falling steadily for a number of years; this has affected the volumes produced and the prices. Companies which have not been able to keep up with this downwards spiral of industry rationalization have been driven out of business, as prices follow costs closely.

Norwegian salmon has a small home-market, thus the sanctuary home market theory can be rejected. The most important export market is the EU where Norway has 60 % market share and Scotland about 30 %. Even though this concentration suggests market power, there is little evidence of this as firms operate largely on an independent basis. The market price is formed globally, and firms are price takers.

The most significant impact on prices except from the decline of COP is related to the volumes harvested, even though demand factors are also significant. Individual firms will tend to base their production decisions on projections of future prices, which are established on basis of the present price level. As there is a considerable lag between the decision to appropriate resources and the sales, volume setting might not be optimal, creating cyclic patterns. Furthermore, as salmon to a great extent is a perishable product and its production can not be set on hold, *sunk cost* implications are important as at harvest time the farmer might need to accept any price.

In relation to the formal proceedings, firms should be particularly attentive to the Commissions possibility to resort to *facts available*. Firms should also be aware of their explicit right of being allowed to present their view and defend themselves against allegations. In addition firms should recognize the importance of lobbying the case both directly to decision makers, but also to other interest groups in the EC.

The sampling technique is justifiable from a practical perspective but is undoubtedly unfair at the individual level, especially when firms are involuntary excluded from the sample. The randomness of using averages on non-sampled companies is unquestionable.

The injury determination is one of the few areas where anti-dumping cases might be successfully challenged. In order to avoid the Commission being able to draw simplistic conclusions, the provision of documentation is essential. The Commission will only take into account information which it has received from interested parties, and will draw its conclusions on that basis. The Norwegian industry must therefore make sure that the Commission is submitted *all* necessary documentation which might support their case.

Several of the industry related factors contribute to the considerable volatility of salmon prices, both in the short and the long run. The dynamics of the salmon market is also common for other agricultural markets. In these markets the existence of sales transactions and shorter periods with sales under COP is perceived as normal and justifiable market behaviour in a competitive market.

In agricultural markets the use of a test to exclude domestic sales at under cost is gibberish, as the domestic price will be artificially inflated and thus not be comparable to the export price. It is striking that EXP under cost are not subject to the concept of “not in the ordinary course of trade”, but are rather treaded as “unfairly dumped prices”.

When NV cannot be based on domestic sales the preferred alternative is CNV. However, this test does not take into account that market prices might be globally depressed. The non-utilization of third country prices as substitutes to domestic transactions is also non-sense, as CNV uses the price of the product with a normal profit. This is undoubtedly not comparable to transactions in a depressed market, which could better be verified by checking EXP to third countries.

Even though global dumping is possible in theory, it does not appear to be sensible business strategy for small price-taking companies. Even at an aggregated national level it would be a questionable strategy, as long as there where are no markets to subsidize from.

PART III

6 Constructed Normal Value

The CNV is the preferred substitute to domestic transactions as NV. Hence, the purpose of the CNV is to construct a price for the *exported* product, as *if* it would have been sold on the domestic market. (Vermulst, 2005, p.34) Thus, the CNV should basically reflect the *full COP plus a reasonable amount for profits*[82]. This calls for detailed cost analysis of the companies concerned.

The COP should be identical as for the exported product. However, the actual SG&A on domestic sales does not necessarily exist as there might be no domestic sales. SG&A must then be based on alternatives, as will be discussed subsequently (Van Bael & Bellis, 2004)

There are diverging views with respect to these cost calculation exercises, Lorentsen (2006) states: "*There is currently disagreement between Norwegian authorities and the salmon farming industry of Norway on one side, and the Commission about how prices and costs shall be calculated, this was clear from CR 85/2006, this problem ought to be solved*" (p. 35, emphasis added).[83]

The core disagreement in the Salmon case relates to whether the COP of salmon is equal to, or lower than, the total cost of running a salmon business. In addition, there should also be a question of whether a more normalized COP should be established to reflect the possible correlation between certain cost elements as NRC and cyclical downturns.

Addressing the core disagreement first, these are in essence the main standpoints of the parties:

> The EC view: "costs…inherent to the salmon business" (EU1 at recital 672).
>
> Norway's view: "The Panel's question contrasts costs that are associated with *production*, and costs that are associated with *"running" a salmon business*. According to the *Anti-Dumping Agreement*, solely those business costs that are

[82] ADA Art. 2.2.1

[83] There is a very limited body of relevant caselaw, in the WTO system of a total of 20 anti-dumping disputes from 1995-2000 only 12 did have rulings on article 2 and only 5 on normal value calculation. Much legal ground is thus still to be paved.

> "associated with" *production* in the IP may be included in the COP". (NOR4, at recital 169)

It is obviously in Norway in the best interest of Norway to assess the COP as *narrowly* as possible to reduce the chance of finding dumping. Especially with respect to non-recurring costs (NRC). The Commission has a *broad* definition of COP, including as many cost items as possible..

The question whether CNV should reflect some *standard* COP or the *actual* COP is also intriguing, in this respect:

> Norway further claims: "If the COP included costs that could not be reflected in the selling price, the NV would necessarily be higher than export price and the comparison would be distorted". (NOR1, at recital 814)

There is logic in this claim as some cost elements might increase during cyclical downturns as e.g. severance pay and asset write-downs. Furthermore, individual firms are not able to adjust their selling prices upwards to take into account these cycle dependent costs as most companies are price takers[84].

The result of an actual cost based CNV can affect individual dumping margins considerably, as firm's costs will not affect pricing in the short run. Economic rational would give Norway support, however there is little in the ADA or the Commissions approach which would suggest that an actual cost based CNV will not be utilized, even if so does unreasonably reflect the pricing alternatives for a price taker. [85]

[84] In this respect Lorentzen's evidence of two year lag in the effect on price could be relevant, however, subject to how the costs are measured in time.

[85] According to (Müller et al. p 98, 2005) "..if data are based on standard, rather than actual costs, the exporter or producer must describe the method used to establish the standards, the frequency of their revision and the treatment of variances". It is then most likely that the Commission will adjust the standard data to comprise actual variances. In ADA article 2.2.2 on SG&A reference is made to the use of actual costs.

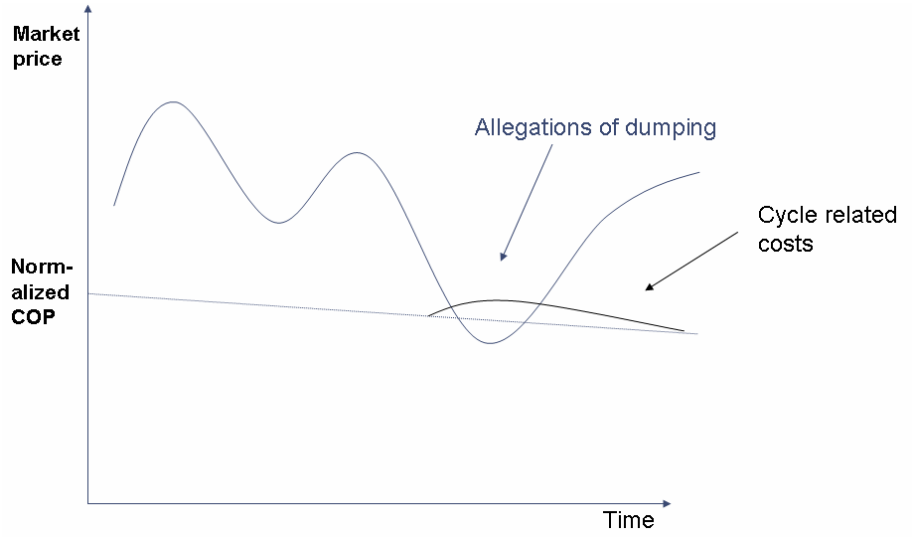

Figure 13: Normalized vs. actual costs.

It is the author's opinion that these questions should be seen in light of the CNV being a substitute to a domestic selling price for the IP. In this respect the rational pricing alternatives of the companies should be taken into account. Notwithstanding, as nor law, practice, or anti-dumping literature seem to oppose an interpretation using actual production cost as base for CNV, this question will be kept open[86].

Another fundamental issue not answered by the relevant provisions, is whether the cost of production/growth only within the IP could serve as CNV comparable to EXP. The WTO salmon case has several indications that the COP is calculated on growth as there is made reference to the cost of production in the IP: "*only those costs contributing to production during the IP can be included in normal value*" (NOR2 recital 258), but also the opposite: "*The references to 'cost of production' in the Provisional Regulation mean weighted average cost of production attributable to sales during the period of investigation*". (EU3 at recital 63). Consequently, references will be made to both alternatives.

The use of costs of the sales made in the IP, raises fundamental questions on the method of allocating costs to inventory. If costs could be perfectly attributed to inventory the cost of goods sold in the IP could be found as the production costs incurred in that period. However, in practice cost allocation and is ambiguous with basic allocation challenges related to the

nature of the business, but also different standards applying between firms depending on their legal status, technology, accounting expertise and exactness.

The approach of full allocation of costs will be referred to as project accounting (PA) while the inclusion of only direct costs to inventory as annual accounting (AA), as many expenses are charged directly to the P&L the year they incur.

6.1 Central provisions for the determination of CNV

The fundamental provision for CNV is Basic regulation, art 2.5: "*Costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration"*[87].

As can be derived from the Basic Regulation, the IA must use the records of the company under investigation, as long as:

I) they are in accordance with the country's GAAP[88] and;

II) they <u>reasonably</u> reflects the costs associated with production and sale of the product under consideration and;

III) the cost allocations has been historically utilized.

Thus, if the sampled company's records are consistent not consistent with generally accepted accounting principles (GAAP)[89], or the records do not reasonably[90] reflect the costs of production, the EC can reject the company's costing documentation. The same applies to allocation methods which are not historically utilized. According to Müller et al. (1998, p.89): *"It would appear that a period of four years meets in any case this criterion".)*

[87] Note that there is no requirement of normality.
[88] Generally accepted accounting practices. (http://www.regnskapsstiftelsen.no)
[89] In Norway, as in most other European countries the GAAP is <u>now</u> set by the IFRS system for listed companies, however IFRS did not apply in 2003-2004 (IP) and the factual situation is that firms do not use uniform standards.
[90] The reasonability requirement can either not preclude the use of actual data.

Basic Regulation Art. 2.5 allow the IA to exercise a substantial degree of discretion when constructing the NV. If the companies' records are wholly or partly GAAP inconsistent the Commission can choose to dismiss them. In case they *are* consistent, the Commission can still dismiss them if an alternative allocation method gives a more accurate and reasonable reflection of the costs involved (ibid). As cost accounting is not an exact science, objections on costing practices can always be presented. In this respect the Commission does not hesitate from taking full advantage of the discretion offered by BR Art. 2.4.[91]

In addition, the Basic Regulation exclusively includes a specific provision expressing preference to allocation of costs on the basis of turnover[92]. The Commission has historically reflected wide preference for this allocation method in their investigations. (Van Bael & Bellis, 2005).

6.2 The basics of constructed normal value.

CNV can be divided in two parts which will be treated subsequently. First, the COP and second the Selling General & Administrative costs (SG&A)[93] plus a reasonable amount for profits[94]. Individual CNV are calculated for the different sub-products (PNC), which jointly constitute the product under investigation.

Standard accounting practices do not necessarily provide the right information for this specific and juridical purpose[95]. The reason is that companies do not need to know their CNV in order to run the business. Undoubtedly, one could argue that it would make sense to have own accounts specifically for the anti-dumping purpose as this is an inherent risk associated with the business. However, in practise this information would not be relevant for

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[91] This attitude can be verified through both the Salmon case and in Van Bael & Bellis (2005) p. 75.

[92] *Consideration shall be given to evidence submitted on the proper allocation of costs, provided that it is shown that such allocations have been historically utilized. In the absence of a more appropriate method, preference shall be given to the allocation of costs on the basis of turnover.* ADA Art 2.2.1.1

[93] The EC investigating authorities, in conformity with Article 2 of the *Anti-Dumping Agreement*, follow a full COP approach, where all cost items that are related to the product concerned are taken into account, wherever they are reported in the financial statements. IAS/IFRS does not contain any rules on COP as such. (emphasis added). EU at recital 616.

[93] Note that the COP shall be calculated as for the exported product, while the SG&A costs and Profit should be calculated as if they incurred on a domestically sold product (Van Bael and Bellis, 2004).

the business decision making and therefore valueless. Internally made anti-dumping calculations provided by companies to the Commission would probably be disregarded as unreliable anyway[96].

The categorization of costs both between but also within COP and SG&A[97] can often be unclear and dependent upon ambiguous internal accounting practices. Accounting for management purposes normally has a prospective function as this is most relevant for decision making (Zimmerman, 2003). This in contrast to anti-dumping calculations which look at costing retrospectively.

The accounting discussion in this part should therefore be considered as analytical or theoretical accounting, relevant only for the specific AD purpose. However, the logic in this thesis shall not compromise the fundamental accounting principle of giving an economically sound picture of the business concerned. On the contrary, analogous with the intentions of the ADA, where the GAAP consistent cost documentation from producers do not reflect the economic reality in an objective manner, adjustments shall be made analogously with the reasonableness criteria discussed above.

The cost documentation for CNV calculations are thus a combination of the financial accounts supplemented by questionnaires relating to the internal accounts and other supporting documentation. Owing to strict confidentiality clauses internal cost information is not publicly available. For the purpose of this paper illustrative examples must consequently be made using fictitious data, as the publicly available case records only provide fractions of all the relevant documentation in the case.

Even though the public documents provide considerable insight, deeper insight is only given through case documentation which mostly include the legal disputes of diverging juridical (and a few factual) interpretations. Notwithstanding, the information publicly available through written pleadings is perceived to be sufficient to establish a comprehensive picture of the economic implications of anti-dumping law and its related proceedings[98].

[96] Bicycles (Taiwan) in Van Bael and Bellis (2004)
[97] The salmon cases official documents.

6.2.1 Financial accounts and management accounts

As mentioned, the difference between financial accounts and management accounts is fundamental. The Commission systematically requires questionnaire responses from the companies concerned both regarding their "COP" (management accounts) and their financial accounts. The Commission has treated divergences between internal and external accounts as attempts of hiding costs.

> "…reported COP was tailor-made to serve the purpose of avoiding a finding of dumping". (EU1 at recital 701)

Still, there is no reason to believe that this is actually the case. The management accounts are for prospective decision making and do not necessarily reflects the financial accounts. The Commission has tacitly demanded "COP" in the(ir) legal sense while the companies have provided their "COP" as reflected in management accounts.

6.3 Allocation of costs.

As a substantial part of WTO salmon disputes relate to the ambiguous nature of cost allocations and accounting practices. Recalling Basic Regulation Art. 2 (5): *" Authorities shall consider all available evidence on the proper allocation of costs,..".* In *United States-Softwood lumber (Vermulst 2005 p.38)* the Panel addressed the basic role of the investigating authority regarding cost allocation. The AB, on appeal, held that the IA when *considering*, must "reflect on" and "weight the merit of" all available evidence, on the proper allocation of costs, which may include a comparison between allocation methods. Consequently, the IA is provided with both discretion, and an obligation to evaluate different allocation methods.

Ad hoc cost allocations to accommodate anti-dumping investigations will be disregarded[99]. Thus, if cost allocation is not done properly in the first place, the discretion passes on to the IA.

[99] Bicycles (Taiwan) in Van Bael and Bellis (2004)

6.3.1 Allocation amongst different products

Normally cost allocation between a manufacturer's different models is one of the most challenging aspects when constructing NV. In the salmon case the product concerned is defined quite broadly - as farmed salmon in any presentation. Even though some of the sampled companies also produce farmed trout and other species, the farming processes are well-separated. As the same production facilities and production lines are seldom used for multiple species, at least not simultaneously. Still, some cost allocation challenges regarding product varieties arise after the farming stages, when the salmon is further processed into its final cutting and category. Allocation problems are also prominent in the determination of SG&A in companies with multiple business activities.

6.3.2 Cost allocations in time

The most relevant question here is whether the company concerned uses:

I) annual accounting (AA) or,

II) project accounting (PA)

There is evidence that among the sampled companies both methods were utilized in different variants. (NOR2, at recital 280)

One of the distinctive aspects of salmon farming is the lengthy production period, compared to most goods manufacturing. To get better financial oversight, some producers use "project accounting" as their preferred financial reporting method. The method is also indicated by the Commission to be the most suitable for salmon farming usefulness. [100]

- Project accounting (PA): Using this method costs are accumulated for each salmon generation, from the fertilization of the egg (or smolt), until the slaughter of the fully grown salmon. During the farming period the costs are recognized as assets in inventory section of the balance sheet. Not until the salmon in eventually sold, the accumulated costs are recognized as expenses and entered into the Profit and Loss account. (EU1 recital 609). Project accounting with perfect costs allocation would make it possible to

[100] The potential allocation challenge of sales stock of frozen salmon is not taken into account. Anyhow the question does not appear to be significant for the salmon case.

determine the *exact production cost of the salmon sold in the IP* and would also charge to expense the relevant costs in the IP.

- Annual accounting (AA): When using this method the financial account recognises several overhead and indirect costs in the year where they incur and not when sales are made. This makes it *challenging to find the true cost of the salmon sold in the IP*, as inventory is not perfectly valuated.

  The most practical method when using AA is to calculate the *salmon production cost of the IP*, this method was used in the salmon case. COP is then based of the biological growth of the IP[101].

Inventory

BB biomass in kg	1100000
EB biomass in kg	800000
Sales in kg, IP	1000000
Production IP	700000

Costs

Smolt	NOK	360 000
Feed	NOK	8 300 000
Insurance	NOK	100 000
Labour	NOK	1 500 000
Depreciation	NOK	450 000
Other operating	NOK	400 000
Net financial	NOK	325 000
Slaughter cost kilo	NOK	960 000
Total costs	NOK	**12 395 000**
Production	KG	700 000
COP	NOK/KG	17,71

Table 4: COP of biomass growth in IP

Evaluation of cost allocation methods:

The first approach is most consistent with the matching and cost recovery of principle of financial accounting and would be the most accurate to find the actual COP of the salmon sold in the IP.

[101] This method makes sense in e.g. forestry as the exact cost of each tree is very difficult to assess, as they might have been growing for a hundred years.

The second alternative finds COP of the growth of salmon in the IP. Including inventory it is an estimation of the COP of the products *sold* in the IP. Excluding inventory the COP of the IP growth is found. The practicality of these methods for companies using AA is evident.

In the Salmon case the producers used PA, AA or a combination. It is difficult to verify the exact practices employed by the sampled companies, notwithstanding the fact that this is also contested by the parties in the WTO salmon case. The next example shows the difference in COP between two companies using respectively AA (with inventory valued at direct cost) and PA.

	2000	2001	2002	2003	2004	2005	2006	SUM
Gen 5 (20 units)					40	30	20	**90**
Gen 4 (10 units)				15	20	15		**50**
Gen 3 (10 units)			10	15	20			**45**
Gen 2 (10 units)		10	10	15				**35**
Gen 1 (10 units)	10	10	10					**30**
Feed cost per unit	1	1	1	1,5	2	1,5	1	
Total Overhead	10	10	10	15	30	10	5	**90**
BB cost	0	10	30	30	40	75	70	
EB cost	10	30	30	40	75	70	0	
Total cost CY	20	30	40	60	110	55	20	**340**
Sales in units	0	0	10	10	10	10	20	**60**
Financial statement								
AA	10	10	40	50	75	60	95	340
COP UNIT	-	-	4	5	7,5	6	4,75	
PA	0	0	48,3	48,4	60,8	65,8	117	340
COP UNIT	0	0	4,8	4,8	6,1	6,6	5,8	

Table 5: Differences in COP using PA and AA

Table 5 shows how the use of PA with perfect cost allocation gives a realistic COP while the AA, due to non-absorption of all costs generate a different COP for the different years due to the practice of charging overheads to the P&L the year they incur.

6.3.2.1 Period of investigation and production period

Recalling section 5.2.5 on the POI and the abovementioned accounting practise it is worth emphasising that the costs incurred in the POI are chiefly irrelevant if one is to determine the costs of salmon sold in the IP, especially if AA on growth is utilized as the accounts from the POI simply does not then reflect the costs of producing salmon sold in the POI. It

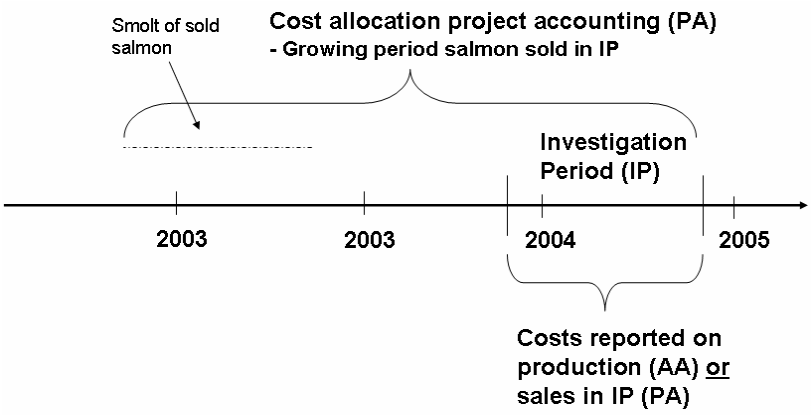
appears that the practice and legal status is rather diffuse on this particular matter as companies are normally asked to report POI data in the questionnaire.

However, as appears in the recent WTO case documentation, and as cited under it seems that the reality of salmon farming has (finally) been taken into account expanding the cost data collection outside the POI to reflect the fact that costs related to sales in the POI incur during the lengthy production cycle particular to the salmon business.

> "The costs that have to be compared to the sales of harvested salmon during the investigation period are precisely those that have been accumulated over the farming lifespan of the salmon, i.e. three years". (EU1 at recital 618)

Since there is difference between the POI and the production period (PP) in this particular case, it is needed to differentiate between the two terms. The concepts of POI and PP are not clearly distinguished in the Salmon case which obviously leads to confusion.

Figure 14: Cost allocation project accounting



6.3.2.2 Depreciation and writedowns

Assets with finite lifespan shall be depreciated according to their expected lifetime or market value evolution. When the book value of an asset is higher than the market value and it is not a short time fluctuation, the asset must be written down pursuant to GAAP[102]. The same applies to realization of the asset e.g. shut down or sale.

Ideally, the depreciation should have been subject to running adjustments, so no massive write-down was ever necessary. Unfortunately, this is difficult in practice as market value is

[102] Note that the cost allocations according to IFRS/GAAP are not necessarily relevant for the COP. However, at least the GAAP might explain how and why cost allocation problems emerge.

not always easy available and market price fluctuations difficult to assess right and appropriately. If depreciation charges were to be attributed exactly right to the COP of relevant salmon the assets value loss should be attributed directly to the production on an instant basis. This is utopia.

Still, with accurate accounting, yearly value loss should be possible to calculate and allocate appropriately. The problem is moreover that write-downs in practice are ultimately necessary because this task has not been performed scrupulously enough in the past. For an IA it is difficult to assess retrospectively, when in the period from the acquirement or the last write-down, the asset has been subject to the loss of value. Linear re-amortization can then be the best available alternative.

Write-down's on assets are done because the depreciation scheme has not provided the right charge to expense of the costs associated with the assets loss of value or because the basis for the assets value has changed. As depreciations are normally charged the COP, the following statement from the Commission makes sense:

> "..the asset was depreciated too slowly and that therefore the COP in past years was underestimated". (EUR1 at recital 654).

As far as the product under investigation has had advantage of the particular asset, it makes sense to attribute a portion of the write-down to the COP of IP. The same would then also apply if there was a gain, as the asset would have hade to high depreciations in the past. It is worth noting that the Commission does indicate that it would have included an eventual gain as a negative cost. (EUR1 Recital 660-661).

In the salmon case the concept of non-recurring costs is central. Write-down's or write down related costs are an important part of NRC.

6.3.2.3 The three year weighted average approach

Since no companies included NRC in their COP submissions, the Commission initially took the approach of allocating all NRC from the IP to the production.

> "At the provisional stage, the Commission included all extraordinary expenses applicable to the product concerned, which had been reported by companies during the IP". [103]

The Commission partly corrected this logic in its definitive determination as explained underneath.

> "..the Commission has decided to take the extraordinary costs reported by companies in the sample during the last three years, based on the most recently available financial statements, and to allocate one third of these costs to salmon production in the IP, on the basis of turnover[104]. Three years was considered an appropriate time period as this is the average length of time that it takes to grow a salmon from a smolt to a harvestable salmon". (ibid)

The averaging of costs reported for the last three years including the IP could be seen as a step in direction of a sounder cost allocation (normalizing). However, there is no rational linkage between a third of all the non-recurring costs of a three year period and the amount of costs incurred in production of the relevant salmon, as there is no link between asset life and a salmon cycle, which anyhow varies between 30 and 36 months (Kredittilsynet, 2007).

> "It is, however, true that allocation of the costs over a period of time would remove any undue effect caused by the timing of the decisions of the companies to report these costs. Ideally, all extraordinary costs reported for each separate asset should be allocated over the useful life of that asset to arrive at an average annual cost. However, it is to be noted that none of the companies concerned carried out this exercise". (Ibid)

Recalling the discussion in the precedent sections, the Commission apparently justifies its flawed allocation practice by noting that the companies concerned did allocate NRC neither prospectively nor retrospectively. It is also noteworthy that the Commission explicitly states that the *ideal* allocation is over the useful life of an asset, while contra intuitively using other standards in the dumping determinations. Norway later made similar contests to the Commissions approach in its panel submissions.[105]

NRC by nature are irregular and difficult and thus difficult to allocate to the COP. Even when using a full cost PA approach, they will not be allocated to production. Consequently,

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[103] Council regulation (EC) 628/2006 at recital 16-18
[104] The allocation of costs by turnover must relate to the allocation between business segments in order to make sense.

the problem of allocating NRC is universal and applies independently of the allocation method. The three year average, as applied by the Commission is an attempt to apply a consistent approach to this matter.

6.4 Cost of production

The first part of the CNV calculation is to determine the production cost. Normally the *questionnaire* sent by the Commission to the exporters under investigation split production costs into three categories.[106] The COP are the costs which can be relate to the production of the product concerned, this in contrast to the SG&A costs which normally apply to the business as a whole and is not necessarily related to the production process.

The three COP categories with their problem areas:

I) **Cost of materials**
- Problem area: transfer pricing.

II) **Cost of direct labour**
- Problem area: none of specific interest

III) **Manufacturing overheads**
- Problem areas: write downs, capital cost, depreciation, allocation.

The questionnaires sent to companies concerned:

It is evident that this considerable information requests can be burdensome, especially for SME, which is also recognized by the Commission. The Commission has shown more flexible to accept minor errors and information holes when receiving information, without restoring to "facts available", than the case is for the USDOC. Salmon companies are seldom "top heavy" and have few management and accounting resources compared to their turnover. It is important to establish a dialogue with the Commission, especially for smaller non-listed companies. More generally companies should also know that the Commissions officials are normally not competent on the specific industry, as the internal policy is prepared to deal with any case. The Commission has also expressed a concern for its shortage of accountant competence. This implies that the companies must be ready to supply detailed evidence on the reasonableness of their different accounting practices. (Stevenson, 2005)

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[105] Norways WTO submissions
[106] Van Bael & Bellis (2004)

6.4.1 Cost of materials

The cost of materials is the cost of input needed for the production of farmed salmon. There are two main cost drivers, the smolt cost witch summarizes the cost of the first stage of salmon farming and the additional feed cost in order to bring the smolt into harvestable salmon. (Fiskeridirektoratet, 2005) Both cost elements have been subject to disagreements in the prevailing case.

6.4.1.1 Transfer pricing

According to Zimmermann, (2003, p 755) "*the transfer price is the cost charged by one segment of an organization for a product or service supplied to another segment of the same organization*". Transfer prices can be applied for a variety of reasons including internal profitability measurement, opportunity cost assessment and tax purposes.

In the PSF case (Van Bael & Bellis, 2004)purchasing prices from related parties were disregarded as these where significantly lower than the prevailing market price. Analogously, in *Certain iron or steel ropes and cables (ibid)* the Commission stated that it does not allow for subtraction of profits in transfer pricing cases involving related companies.

In the Norwegian Salmon case[107] the Norwegian salmon industry also claimed that the profit margin of related smolt suppliers should be deducted when assessing the cost of raw materials purchased from related parties. It was argued that this approach would be consistent with the approach taken for integrated companies, where the smolt COP, net of profit, is included in the cost calculation of the product concerned which corresponds to a cost based transfer price of smolt[108].

The Commission responded that it had no data to verify any profit or loss on the purchase of smolt from related companies. Furthermore it claimed that there was: "*no evidence to suggest that the use of these transfer prices affected the reliability of the constructed NV for salmon*"[109]. Hence, disregarding the adjustment claim of the Norwegian industry.

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[107] Council Regulation (EC) 85/2006
[108] This does not take into account the opportunity cost of smolt.
[109] Council Regulation (EC) 85/2006 at recital 24.

The basic economic logic in this respect must be that, everything else held constant, how the company is legally organized should not affect the CNV, hence adjustments should be done to level for differences deriving from legal structure.

One alternative could be to calculate arm's length prices on processes that are internalized in integrated companies and outsourced by others to related or non-related parties. For that purpose it would be necessary to define which business activities are core for the industry under investigation, and which are not and compute arm's length prices for the non-core activities.

The other alternative could be to reflect differences in business activities through different final profit mark-up. The mark-up is currently a flat 8 % for all salmon producers[110], irrespective of legal structure and transfer pricing practices. The mark-up should then be adjusted to take into account different integration and hence value-adding business activities.

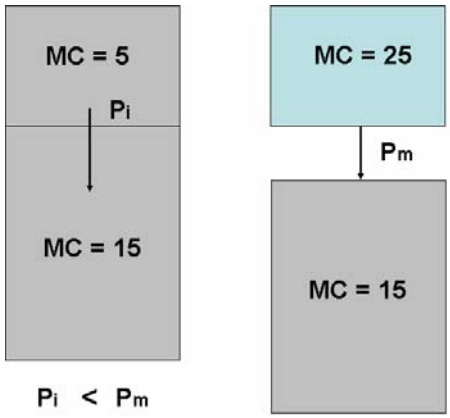

Figure 15: Integrated and non-integrated company

As demonstrated by Hirschleifer (1956) when there is separate ownership in the non integrated companies we get double mark up when profit is added at each link. This gives higher CNV for the same value chain depending on legal integration.

Mathematically:

$CNV_i = (1+k)MC_{total,i} = (1+k)(MC_{salmon}+P_{smolt\_internal})=(1+k)(MC_{salmon}+MC_{smolt})$

$CNV_s = (1+k)MC_{total,a} = (1+k)[MC_{salmon}+P_{smolt\_market}]=(1+k)(MC_{salmon}+(1+k)MC_{smolt})$

Which approach is chosen is of secondary importance, what matters is the consistent application of either adjustments of input prices to arm's length for the business activities defined to be "non-core" or alternatively adjust the profit margin to encompass differences in the value chain. The current regime of a flat profit margin and differences in the criteria for input costing is not consistent and will yield skewed results. Thus, in contrast with the Commissions view, it is evident that transfer prices, are relevant for proper calculation of NV.

When a smolt company is owned by a farmer the profit margin paid on smolt will theoretically be paid back as dividends. If dividends from related companies are fully deducted from CNV in the SG&A calculations, is it not necessary to deduct the profit margin element, as claimed by Norwegian producers[111].

The use of arm's length prices and inclusion of dividend will only reflect reality in the long run, and is therefore not a viable alternative for CNV calculations. Thus, using the full cost of smolt and not including any profit/loss from subsidiaries will probably be the best alternative when different ownership interests are present. When the smolt company also sells smolt externally, profit or loss from these non-relevant smolt business activities should not be included or deducted in the CNV of salmon. In any case, the main issue here is that the profit/loss on smolt should only be included once.

6.4.2 Manufacturing overheads

The manufacturing overheads are typically incurred at the farming site or at the slaughter. While the SG&A incur at a company or group level. As salmon is normally farmed alone there should be few problems of manufacturing overhead allocation between salmon and other species[112].

The main challenge is then the allocation of overheads between the different salmon generations. As salmon is harvested all year round several generations are in the sea simultaneously. If three generations are harvested each year there will on average be nine different generations, at nine different stages of development from smolt to harvestable salmon.

How should the administration and the insurance costs etc. be allocated on a yearly or generational basis is then the relevant question. The answer is not straightforward as one generation might be put in the sea in December and another has been growing the whole year. The best approach is probably then to allocate the overheads according to the increase in biomass value of the particular generation for each year. A (direct) cost based value assessment might be reasonable in this respect. Thus, the salmon that grows the most is attributed the highest portion of overheads. Even though, advanced growth supervision system now exists, these allocation issues are still ambiguous.

6.5 Non-recurring costs

The concepts of non-recurring and extraordinary costs have been disputed vigorously in the WTO Salmon case. The thesis will now discuss objective cost allocation from an economic viewpoint, with respect to relevant legal guidance and the particularities of the salmon case.

Cost allocation of NRC is not straightforward and raises a number of intriguing questions. This relates to the fact that NRC usually relate to wider periods of time than the one where they incur. It further relates to the basic way the NV is constructed, as firms own accounts shall normally be the primary source of information allocation of non-recurring costs is often an area where firms can show no records, hence the Commission having considerable discretion.

The relevant legal provision for this particular problem area is Article 2.2.1.1 WTO & EC Basic regulation 2(5): "*Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production (or for circumstances in which costs during the period of investigation are affected by start-up operations)*". (Parenthesis added)

The extreme standpoints of respectively Norwegian farmers and the Commission in the prevailing EC case, has been respectively to exclude all NRC or include all NRC as they have incurred. [113]

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[111] Council Regulation EC 86/2006
[112] Salmon and trout might be slaughtered at the same facility but never at the same time.
[113] Council Regulation (EC) 86/2006

EC view (EUR1): "..the EC confirms that when a cost is not explicitly qualified as related to the discontinuation of the salmon business as a whole nor as an extraordinary cost outside the decision power of management, but rather is inherent in the risks associated with the salmon business, it is part of the result of continuing operations and should therefore be counted as part of the full COP of salmon" recital 633.

Norway's (NOR1): At recital 809. Under Article 2.2.1.1, the COP cannot include *all* NRC. Instead, it can include solely an allocation of "*those*" NRC that "benefit" current or future production…" and at recital 870: "Under Article 2.2.1.1, the EC was not entitled to include the NRC that resulted from the closure of these production facilities in the COP for the IP. The costs were not incurred in order to support or otherwise benefit production in that year".

Thus, basically the EC wants to include all NRC except those subject to the strict condition of being extraordinary. Norway's view is somewhat confusing, as it has a special interpretation of art. 2.2.1.1 and of the word "benefit". (NOR1 & NOR2)

Norway seeks to justify the exclusion of several NRC items, using as their main argument that they do not benefit or contribute to production of the like product in the IP or in the future. (NOR1) The issue of current and future benefit is raised by ADA 2.2.1.1. The exact meaning of the law's text is however difficult to understand. In any case, the rational interpretation should be on allocation according to the benefit from the NRC on the product produced or sold in the IP.

According to Czako et al. (2003), non-recurring costs are typical for entering or exiting markets and take place at one particular point in time as opposed to recurring costs that incur on an even basis. Restructuring costs are exemplified explicitly by write-off of assets made redundant or severance payments to staff.

Müller et al (1998), emphasize that "*only a cost item which has been written off over one year, which normally would have been written down over a number of years (may) qualify for such an adjustment*". They add that these assessments are subject to the particular circumstances of each case.

Also costs written down prior to the IP might be re-amortized if the *current* production did benefit from it. This is relevant for the salmon case as non-recurring costs falling within 2001-2003 but outside the POI have been included in the COP with one-third. The re-amortization of non-recurring costs falling outside the POI and PP is only possible to take

into account in they have incurred historically. Future NRC which fall prospectively of the POI cannot be accounted for.

In simple terms following economic rationale should be benchmarked:

- Costs which benefit future production should somehow be deducted if included in the COP of the IP's sales.
- Costs which have benefited current production, independently of when they are charged as expenses, should be included in the COP of the IP, when there is a reasonable connection between the cost and the production.
- Costs that benefited previous production should be deducted if they are included in the COP of the IP sales, as they should not have been included in the first place.

General example on *future benefit*:

Assume a salmon company makes two annual salmon specific TNOK 1.000 R&D investments in 2003 and 2004. Then, if the investments are charged as expenses directly it is evident that R&D cost to COP in 2003 and 2004 would be unreasonably high. The rationale of accruing the cost over a longer period is evident as long as the value of the R&D investment is not limited to the period in which these costs are charged as expenses. [114]

Table 6: R&D investment example, prospective depreciation

	2003	2004 ("IP")	2005	2006-8
Year of cost incurred	1000'	1000'		
Adjustment when benefits for current/future production	200'	400'	400'	1000

Thus, the IA is given discretion by law to make this adjustment if they believe this to be more correct than the conservative approach suggested by GAAP. As can be seen in the table, following this alternative approach, if the IP happened to be in 2008 some costs would have to be allocated to that production, even though the cost were charged as an expense back in 2004.

An example of benefit to past production:

There is no direct indication in the provision that non-recurring cost could also be accrued backwards to production sold before the IP. Even so, it makes a whole lot of sense that a

write-down from a close-down should be attributed backwards to whatever relevant production, to reflect that the yearly depreciation amount had been to low in the past.

Including the whole write-down would make companies, which more or less coincidently did incur heavy write-downs in the IP, an unreasonable addition to COP. On the other hand, excluding these write-downs would unlawfully benefit those companies which have underestimated depreciation, hence previously underestimating COP.

Table 7: Retrospective depreciation

	2001	2002	2003	2004 (IP)→
Investment of 1000'[115]	200'	200'	200'	200'
Sales price				100
Write-down				100
Backwards allocation due to "too low depreciation"	25'	25'	25'	25'
Sum	225	225	225	225 (300)

Evidently it is not possible to go back in time to adjust depreciations. The example however shows that it is viable when the purpose is to establish a reasonable COP for the anti-dumping purpose. Using the Commissions "standard" three year average method the yearly amount would be higher as historical lifetime of the asset was *longer* than three years.

Unfortunately there is an inherent problem with this approach as it can only adjust for flaws in historical data. If the last available data reported to the IA belongs to the IP, it will not be possible to take into account write-downs done *after* the IP. As long as the write downs exceed the write ups this will lead to a systematic underestimation of COP. It would be necessary to wait to conclude investigations for several years to assure that depreciations during IP have been correct.

6.5.1.1 Extraordinary costs

The question of extraordinary costs has also been raised in the WTO salmon case. Extraordinary costs are by nature not derived from normal business activity or risks associated with continuous business operation. Hence, it seems rational in accordance with Art. 2 of the Basic Regulation, to exclude extraordinary costs from CNV.

However, for most practical purposes, there are few costs items which can rightfully be labelled extraordinary costs and some commentators have even suggested to exclude the item from accounting standards[116].

Other costs which are not included in the (gross) P&L are cost related to business discontinuation and change in accounting standards. What constitutes business discontinuation necessarily has some degree of flexibility in interpretation, while the latter is not subject to extensive interpretation.

6.5.2 Biomass: Mortality

There is consensus among the parties that the cost of dead salmon (mortality) must be allocated to the COP of the product under investigation. It is important that no double counting of both the cost of feed etc. and mortality occur. Thus when calculating the COP using AA on growth, mortality shall affect only the denominator if the value of the dead fish is zero. Using PA the cost's already allocated to the dead fish must be reallocated to the live.

6.5.3 Biomass: market price volatility writedowns

When the expected market price of salmon drops under the cost based book value, the biomass' value must be written-down pursuant to GAAP. In Council Regulation (EC) 85/2006 the Commission refers to two companies which claimed the *write-downs of the values of biomass* should not be included in salmon COP. It was further claimed that these write-downs refer to accounting adjustments based on the projected future sales value of salmon, and are not a true cost.

In the same Regulation the Commission[117] reversed the initial inclusion of write-downs of biomass in the COP. This approach is inconsistent with the Commissions standpoint in the other questions on write-downs:

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[115] Depreciation: linear 5 years

[116] E.g: Exxon Mobile did not categorize their costs associated with the Exxon Valdez catastrophe as extraordinary costs as this was indeed an inherent risk of being in the oil industry. On the other, costs associated with natural disasters as hurricanes and earthquakes, which are at least not business specific, can be treated as extraordinary costs. (EC1 at recital 629).

> "Where the companies were able to demonstrate that these write-downs were indeed simply a result of changing market values and not due to any other factor, such as escapes, mortality or disease, the Commission concluded that these costs should not be included for the NV calculation". [118]

The reason this problem arose in the first place, has most probably relation to the confused status of the IP and the use of AA. It does not make-sense to make write-downs within the same year in which a product is sold. A write down in the IP must therefore relate to prospective sales and should not be included in COP of the IP using AA.

When assessing production costs retrospectively as is the case of CNV calculations, the existence or non-existence of inventory value write-downs should be irrelevant for the calculation of CNV, as long as all relevant costs are included, once. Whether costs are charged as expense in 2002, 2003 or at sale within the IP in 2004, will not affect the COP using PA. The notion that write-downs are not a true cost makes no particular sense, in this respect, as write-downs are only relevant for when costs are periodized as expenses, not the COP of salmon.

6.5.4 Biomass: Deformity

When the biomass is deformed the value of the biomass must be written down as a consequence of its lower anticipated market value. Norway claims that these write-downs shall not be included in the COP, while the Commission has the opposite view. (NOR1 and EUR1) It should be noted that deformity of salmon is not a normal occurrence, however downgrading to different qualities is normal.

The question can best be illustrated with a simplified example:

Assume Salmon Ltc has two full grown salmons on stock; A & B, and the expected selling price are NOK 20 for each. The cost based book value is NOK 15 for each. If salmon B dies there is no doubt that the actual COP of salmon A must be NOK 30.

However, assuming that salmon B does not die but rather gets sick, which makes its skin and meat of poor quality. If the expected selling price of salmon B is then reduced to NOK 10 a

[118] Council Regulation (EC) 85/2006 at recital 22.

write-down of NOK 5 is necessary. If the sick salmon B is eventually sold at NOK 10 and salmon A at ordinary price 20, the COP of Salmon A must now be NOK 15 + 5 = 20.

As most companies are price takers with no possibility to adjust sales prices to unusual events leading to higher costs, it would make more sense to only include the average sickness or mortality rate when calculating COP, in order to avoid cost these random fluctuations. Even though one could rightfully argue that salmon B's anomalous sickness should not affect salmon A's COP, using actual data this allocation is inevitable.

The existence of different qualities as e.g. superior and ordinary, yielding different market prices, bring about the question of how these write-downs should be taken into account. The alternatives are either to allocate some additional cost to superior or to apply identical CNV on the two categories, the last alternative would increase the probability to find dumping if ordinary is exported. This might explain why Norwegian firms do not export production quality fish[119].

6.5.5 Farming licenses writedowns

In Norway farming licenses are mandatory requirements in order for companies to farm salmon. Farming licenses are treated as having infinite life for accounting purposes and are therefore not subject to depreciation. Their value is either based on the net present value of future sales or the market value. The only recurring cost is the capital costs of the initial investment. In the salmon case several companies claimed that write-downs of salmon farming licences should not be included in the COP.

In the Commissions view these write-downs were related to expenses which had incurred and had to be borne by the companies concerned and consequently rejected the industry's claim. The write-downs were allocated using the three year average approach[120]. Even though the period of allocation can be argued, this allocation to companies using AA seems justifiable.

[119] FJORDSEAFOOD.com
[120] Council regulation (EC) 85/2006

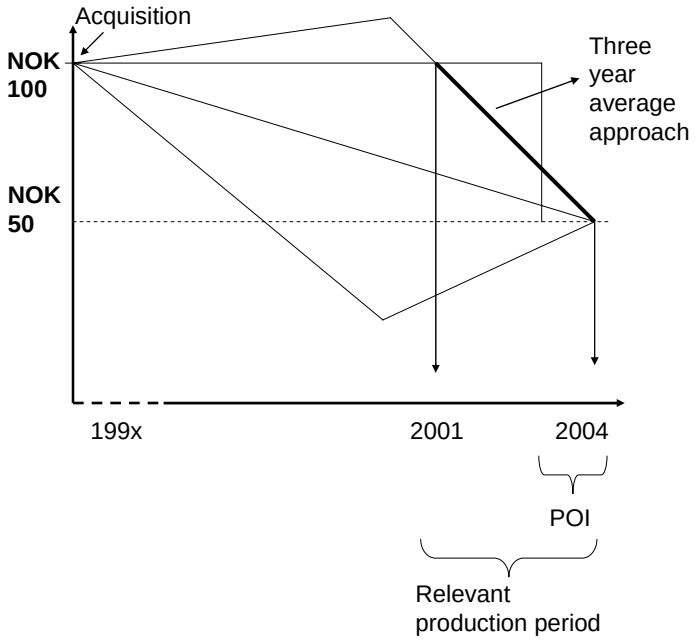

Figure 16: Licence depreciation

Using PA, the first prerequisite in order to include a write down is that the use of that license has contributed to the production of the salmon sold in the IP. As we can see from figure 18 the asset value development can take an infinite number of paths from acquisition to write-down if no previous value adjustment is done. The right amount to attribute to the current production depends on the licenses value fluctuations since the acquisition and the price fluctuation driver.

If the asset is valued at market value, ideally, the actual value loss of the asset, in the production period of the relevant salmon generation(s), is the amount to be allocated. Assuming a linear value loss is a not uncommon, however the re-amortization period of only three years as applied by the Commission seems random when the actual period from the last value assessment or adjustment would normally be found in historical accounts.

The illiquid market for these licenses makes value assessment before asset realization a challenging exercise and is certainly an aspect which makes accurate cost allocation to CNV difficult for the IA. Therefore the net present value valuation is common on these assets. As present value calculation depends on the firms costs, it would be somewhat awkward to add write-down costs to a firm because e.g. their feed cost has increased.

In this case one might arguably claim that no write-down should affect COP *when the asset is* not realized or terminated, as this would add an additional accounting cost to the COP in downturns.

6.5.6 Facility closures write-downs

The facility closure cost disagreements also centre on the problem of inaccuracies in the depreciation of assets. According to Norway's claim neither gains nor losses should be attributed to the COP. In one specific example, the write-downs were done before the IP and the EC consequently attributed one third of these costs to the COP of salmon in the IP (EUR1). As far as the salmon sold in the IP was produced or partly produced in the closed facilities the Commissions approach of including these write-downs can be supported.

However, analogously with the logic of farming licences the relevant period for re-amortization should be the time the asset has contributed to production in the company or the time from the last value adjustment. If the asset is depreciated linearly in the company's accounts it would make a whole lot of sense to use the same appreciation method and period.

If the salmon increased their value by 50 % in the now closed facility and the facility was ten years old, a more correct retrospective allocation for PA could then, assuming linear depreciation, be: 0.5 * 0.1 = 1/20, and not 1/3 as is utilized by the EC. [121] The Norwegian view would only be correct if the product sold in the IP did not benefit from the facility at all. In the AA case the Community's approach is an alternative but also here a similar approach of assessing the actual relationship between the salmon *sold* and the assets fall in value could be tried.

6.5.7 Severance payments

Severance payments are normally paid to employees made redundant due to rationalization or down-sizing. Severance payments can be paid in many ways but for simplicity we can assume that all employees who are fired get a one time disbursement. As long as the salmon sold in the IP has benefited from this labour it *could* be reasonable to include (a portion of) the severance costs, as suggested by the Commission (EUR1)

[121] Note that there are normally three generations in the sea (or more) at the same time. Three with identical yearly value increase is assumed.

If this non-recurring cost coincidently falls within the period when the relevant salmon is produced there is obviously a need to make some allocation. The nature of employees is different from assets and they might be regarded more as an input which companies must pay for on a semi-fixed basis.

The first and intriguing question might be if it is right to treat severance payments as a shut *down cost or an investment.*

Shut down cost: For oil installations the depreciations take into account that there is an abolition cost at the end of the assets life-cycle. If this approach was to be followed the severance payment would have to be re-amortized retrospectively and a portion would then be attributed the relevant production where the now fired employees contributed to production.

Investment: The efficiency improvement cost could also be regarded as an investment in future profitability. Future production will *benefit* from lover labour costs and will therefore be the relevant production to bear this investment cost. As there is little doubt that the decision to make some employees redundant is done with a prospective vision this might be the most reasonable alternative[122].

The second challenge is over which period this cost shall be allocated. In the first situation the average period the employees have been employed might be a reasonable period. In the second case there is no obvious period in which costs should be allocated, but the period should probably coincide with an appropriate horizon for an organizational restructuring.

6.5.8 Start up costs/restructuring costs

The rules on allocation of start-up costs were an innovation in the 1994 Code, as a compromise between several GATT members in the contentious problem of cost recovery[123]. A provision was included to account for differences in costs related to a

[122] This is not consistent at all with Norway's view: "A severance payment is, therefore, a special payment made to ensure that employees *cease* to provide services that benefit production. The payment does not, therefore, benefit either the current or future production of goods" and "Norway contends that the severance payments should not be included, at all, in the COP because, under Article 2.2.1.1, they are NRC that do not benefit current or future production of salmon". (NOR1 at Recital 882)
[123] Muller et al. 1998

products life cycle. This is typically valid for high-tech products with high early cost commitments, but sharply declining unit costs as volumes increase.

The rules for adjustments of costs which are affected by start up operations are given by Basic Regulation Art 2 (5) last subparagraph[124]. The basic idea is that relevant unit costs shall be adjusted to the level that prevails at the end of the IP, or after the IP, if the start up phase is lengthier and appropriate cost documentation is provided the investigation authority in time[125]. Start-up operation and life-cycle implications outside this extended IP are not taken into account.

The definition of start-up operations is quite strict and involves "*the use of new production facilities requiring substantial additional investment and low capacity utilization rates*".(Müller 1998, p.93) The Commission restrictive approach to allowances for start up's which can be verified by case-law. E.g. in *Hot Rolled Coils* (Van Bael & Bellis, 2004) adjustments to account for low capacity utilization were not accepted as the low capacity utilization was not due to start-up operations. In *Certain large electrolytic aluminium capacitors (ibid)*, one producer requested a start up adjustment related to new machinery. The claim was rejected on the grounds that it concerned the normal replacement of machinery which was depreciated according to standard accounting method. Furthermore, the producer could not demonstrate the existence of any de facto start up phase.

Thus, in order to be granted allowances for start up operations there must be significant investments beyond pure replacement of old machinery and high unit costs due to low utilization. The mere existence of low utilization or significant investments, are not themselves enough to allow for cost adjustments. Thus, eventual Norwegian claims under the start-up provision would seem to be far-fetched.

6.6 Seeling General & Administrative costs

SG&A costs include *all* costs which are incurred in connection with the sales of the like product in the exporter's domestic market, other than those attributed directly to the

[124] WTO 2.2.1.1.

[125] Note that this has implications for one of the ordinary course of trade tests.

production as COP, and except SG&A[126] costs particularly related to export sales (Van Bael and Bellis, 2005)[127].

Previously IA had almost unfettered discretion in this field. (Li, 2001) The rules on SG&A allocation still offer the Commission significant leeway even though they are now among the most elaborated of the Basic Regulation. Even though material improvements have been undergone the SG&A determinations still remain: "*One of the most complex - and arbitrary - aspects of CNV calculations*" (Vermulst, 2005, 37p).

As for the COP the accounting documentation of the companies under investigation are the point of departure for the Commission. This implies that the initial classification of a cost can decide whether it is included or not in the relevant portion of SG&A, as part of the CNV. E.g. if a cost category is defined as a general expense the company under investigation cannot necessarily pick and choose which cost are not related to the product concerned, at a later stage. [128]

If companies cannot prove a relationship or lack of relationship between costs and sales, the Commission will allocate on the basis of turnover[129]. The Commission does not stand back to reallocate SG&A on facts available when they have indications that the allocations and documentation from the companies under investigation are artificial, unrealistic or incomplete. However, the Commission is more flexible than the USDOC according to Stevenson (2005).

While there is always a COP there are not always domestic SG&A, as no domestic sales might exist at all. SG&A by nature cover the whole of the business' activities entailed by the company concerned. In many cases this includes a broad range of business activities in addition to those of the like product (salmon). These implications will be discussed in more detail as the rules for SG&A are presented.

According to ADA Art. 2.2.2 and Art. 2(6) of the Basic Regulation, four methods exist for

[126] Including general financial expenses
[127] Nb! Art. 20 (C)
[128] See WT/DS264/R (2004)
[129] Note that ad hoc cost allocation to adapt to the anti-dumping investigations will be disregarded. However, the companies can always support the Commission with additional documentation to facilitate allocations that are not normally done by the companies.

the allocation of SG&A and profits. There are some minor differences in the wordings of the two legal texts and in their structure. Alternative I) is preferred being the company's own cost data on the like product. When the company under investigation has no sufficient domestic sales of any PNC, the alternative methods must apply. There is no formal hierarchy established by the WTO for alternatives II - IV, however the EC has signalled some hierarchical preferences in their implementation as they have not reproduced the order of the alternative approaches. Thus, the main basic principles, in order as listed in the Basic Regulation are:

I) SG&A costs shall be based on "actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the company under investigation".

II) Use weighted average SG&A and profit data on the like product from other companies[130] under investigation.

III) The actual amount applicable to production and sales, in the ordinary course of trade, of the same general category[131] of products for the company in question.

IV) Any other reasonable method

The use of method one implies that the domestic sales of a like product (some model under investigation) must be in the ordinary course of trade in order to qualify as basis for these cost estimations. No low volume test is explicitly stated. Thus, the SG&A and profit margins from this particular model are allocated to the other models where there are no or no sales in the ordinary course of trade. The requirement for domestic sales to be suitable for the use under the alternative approaches appears to be diffuse[132].

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[130] The question whether method II) can be applied if only one other exporter exist has been raised before the Panel, where the AB overruled the Panels finding that the plural also included the singular, hence, if only one other exporter exist method II) cannot be utilized.

[131] In relation to the salmon case alt least trout should be accepted as the same general category of products whilst fishing rods would certainly not. The Panel has held that a narrow interpretation yielding the most comparable outcome is preferred. *Thailand-H-Beams*, in Vermulst (2005) p. 40

[132] There is no explicit requirement in law that the sales must pass a low volume test. Consequently it was held by the AB in the EC-Malleable cast iron tube or pipe fittings from Brazil (paragraph 101) case, that there is no low volume test under art. 2.2.2 chapeau. Thus, the Commission can base SG&A and profits on low volume sales from any PNC (no 5 % threshold) when using method I). In Van Bael & Bellis (EC law) it is stated implicitly in p. 74 that a 5 % threshold does apply under art 2 (6) of the Basic Regulation.
Article 2 A (6) of the Basic Regulation states that domestic sales must be in the ordinary course of trade in order to serve as basis for SG&A cost determination. Different from art. 2 (A) 2 there is no notion on low sales, hence domestic sale can be practically not-representative, but still serve as a basis for the determination of the SG&A costs and profits of other PNC's and even other companies PNC's. (page. 75, Bellis and p. 38 Vermulst).
Whereas this applies to just the first approach or the alternatives appears to be unsettled. The Basic Regulation explicitly includes the term ordinary course of trade under method III), whilst the ADA is silent on any condition applying to the

When CNV is calculated it is implicitly given that not all products concerned (PNC's) have representative domestic sales. It is obvious that the SG&A and profits of one product concerned is not necessarily representative for another product concerned under the same investigation. Using the alternatives magnifies the arbitrariness as the product *then* used as a benchmark is even more peripheral to the product under investigation and/or the company concerned. Furthermore, due to confidentiality companies cannot check the cost and profits data from competing companies. This makes it merely impossible to proactively avoid pricing behaviour which can lead to dumping charges. (Van Bael & Bellis, p 75).

6.6.1 General and Administrative cost

G&A[133] costs are usually born by the company as a whole. Thus, costs are normally allocated to all of the company's products on the basis of turnover. Where there is evidence that some product or category of product drive costs in another way than given by turnover the allocation might be adjusted accordingly. If there are G&A costs that relate solely to foreign activities these might be disregarded. (Van Bael and Bellis p. 71).

In *United States - Softwood lumber from Canada* the Panel first defines that "*although in varying degrees…by their nature, G&A costs are costs that will normally affect all products produced or sold by a company…"*[134]. In this interesting ruling the panel continues arguing that an unbiased and objective IA could treat legal settlement cost regarding hardboard (analogously: trout), which was *not* the product concerned, sold 1-18 years before the IP, as a general expense. The Panel then remarked that in respect to the nature of general and administrative costs, an inclusion of a portion of this cost to the general costs of softwood lumber (analogously: salmon) could be justified under ADA 2.2.2. Thus, the US approach of including this general cost item was found acceptable, as it could not be determined that there was no connection whatsoever between this significant cost and the production of softwood lumber. The Panel did not state that an opposite approach would have been incorrect.

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sales used under the alternatives. The AB overruled the Panel which stated that under method II) sales outside the ordinary course of trade could be excluded and held that under method II) exclusion of sales not in the course of trade is not allowed, since the provision explicitly asks for a weighted average. There is no doubt an inconsistency between the Basic Regulation and the ADA at this point. Furthermore, it seems odd that an ordinary course test shall be performed on the general category of goods as this data is normally not provided alongside with the investigations.

In *large electrolytic aluminium capacitors from Japan*, an exporter included in its SG&A a negative entry relating to income from financial investments which would have reduced SG&A if included. The Commission found that this deduction was *not* allowed since these revenues had no connection to the production of the product concerned (Müller, 1998, p 91). Similarly, in the *ferrosilicon from Brazil* case financial profits were not fully deductible as they did not solely relate to the production and sales of the product concerned.

In the *certain semi-finished products of alloy steel from Brazil and Turkey* case, financial costs related to an exporters holding in affiliated companies, and with no operational relation to the production of the product concerned where excluded when determining SG&A. Thus, according to Müller et al (1998), a non-recurring, (negative) cost can only be included if related to the production or sales of the product concerned. (Van Bael & Bellis 2004 and Muller 1998).

In *synthetic staple fibres*, Indonesian producers claimed that financial costs related to an organizational unit engaged in financial market activities should not be included in the SG&A. The Commission did not share this view, as the unit concerned performed activities which are normally carried out by a head-office. (Van Bael & Bellis, 2004, p.77).

6.6.2 Investment activities

Financial gains or losses due to investment activities would normally not fall into production costs. Still, it could be argued as seen by the Commission, that investment in *related* businesses e.g. other salmon producing companies as these investments can be seen as strategic with the potential of contributing to value adding for the core farming activities. Arguably, these costs should be attributed to general expenses. Totally unrelated investments should not be included in any COP at all and arguably either in the SG&A costs.

6.6.2.1 Bad debt

Losses on account receivables affect the company's profitability. Even though these losses by their nature cannot be reflected in the actual selling prices they are undoubtedly a selling

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[133] Including general financial expenses
[134] WT/DS 264 R Recital 7263. Recital 7246-7297

related cost which must be accounted for in the company's long-run price setting. As the actual amounts of bad debt can only be verified *a posteriori* for the account to be included it must be based on standard percentages which would then be best "facts available".

> 'Bad debt is purely related to sales and hence should not be considered as part of the COP' (EU1 at recital xx)[135].

Apparently, the matter was not further discussed in the WTO salmon case.

6.6.2.2 Cost of capital

An issue that has surprisingly not yet been raised is the question of opportunity cost of owner's equity. It should be a basic principle that the company's financing should not affect the CNV.

The point may well be illustrated with a brief example.
Assume two companies Salmon Debt Ltc and Salmon Equity Ltc for simplicity we assume that their respective financing is 90 % debt and 10 % debt of a total equity of 100 each. At 10 % interest rate and no other costs but interest costs, one salmon produced and sold in a single year would have a COP of NOK 9 at Salmon Debt Ltc and a COP of NOK 1 at Salmon Equity. Assuming a profit margin for the industry of a flat 10 % and no SG&A the CNV of the debt salmon would be NOK 9.9 and the CNV of salmon equity NOK 1.1. The return on owner's equity for debt would then be 9 % and the return on owner's equity for equity would be 0.1 %. This does obviously not make any sense for two reasons:

I) the profit margin should be differentiated to reflect the variations in capital structure or;
II) the opportunity cost of owner's equity should be taken into account at a reasonable rate.

A reasonable opportunity cost of capital could be adjusted in order to neutralize differences in capital structure between salmon farming companies.

[135] Quotation of reasoning from one sampled Norwegian company, in official letter to the Commission

6.6.3 Sales costs

The aspect of costs of the export product as *if* it was produced in the exporters home market is particularly relevant for sales costs, since e.g. advertising costs often differ substantially between national markets.

In *small-screen colour television receivers* from Korea[136] a producer argued that the advertising costs of the company were focused on the high-tech part of the product portfolio and not the product under investigation. The claim was thus that the advertising cost should not be allocated by turnover but allocated solely to the high tech products the advertisement was directed. The Commission disagreed on this view and stated that it was unrealistic to allocate advertisement costs to single models and not the product portfolio in its totality.

6.7 Reasonable profits

It might seem contradictory to calculate a profit margin under a dumping investigation. However, in practice, the higher the profit margins domestically, the higher the final dumping margin.

Mark-up's of 3-8 % are most common[137]. Profit margins are established according to the same hierarchical criteria which apply to the SG&A costs, section xx. The only distinction is that under "any reasonable method" (alternative VIII) profit margins must not *exceed* those found for the same general category or business sector (alternative III).

In the salmon case a flat profit margin of *8 per cent* was established and applied as the normal profit for the sampled companies when constructing NV. This profit margin was said to be a minimum return to capital in that business[138]. The use of a flat profit margin on all salmon companies does, as mentioned above not take into account the differences in capital structure and value adding business activities. This appears to be flawed.

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[136] Müller, 1998, p. 90

[137] The most extreme case was a Thai firm which got a 48 % mark-up in its provisional determination using "any reasonable method". This implicates that the company would have dumping margins in all cases where the comparable exports yielded less than 48 % profits.

[138] NOR1 at recital 379

Conclusions Part III

The cases where constructed normal value is utilized imply that either there are no domestic sales or that there is an international cyclical slump or price volatility. Using actual costs and normal profits could be viable when industry is performing at average, but not in downturns. Furthermore, the CNV method pays no respect to the inability of firms to adjust to short term cost fluctuations, due to e.g. mortality or input prices fluctuations.

The existence of a longer PP than IP, pose a problem, which solution depends upon the accuracy and method of accounting. The Commission cannot base its calculations on data which do not exist. The basic question is whether the COP shall be the one of the products *sold* or the cost of salmon *produced* in the IP. Even though there is no clear indication, the COP of the goods sold appears to be most in line with literature and intuition.

Ideally, to find an economically sound full cost allocation, it is the author's opinion that the CNV should be established using the *actual* production cost of the salmon *sold* in the IP, including *all* relevant costs for the entire production. The results should neither depend on legal structure nor capital structure.

Using PA and allocation of all-recurring costs to the right generation would be reasonable for production cost. Risk related costs of business, as mortality, should be included with a *standard* rate, while NRC should be allocated according to their contribution to the salmon sold in the IP. The remaining challenge is then related to prospective NRC which are clearly difficult to asses in advance.

When using AA and cost based valuation of inventory the accuracy of the inventory will affect the COP as seen in the example. The valuation of biomass is a hot topic in accounting circles and both opinions and practices differ. (Kredittilsynet, 2007)

When using AA, and calculating the COP of the periods *growth*, the preciseness of the salmon volume in BB and EB will be essential. Remember that all costs are put in the nominator and that growth is put on the denominator. This is crucial as it is easy to forget that the accuracy of then growth figure is as important as the costs in the nominator. There is little doubt that this method is easier than calculating the actual cost, but at the same time it

is also obvious that the COP of the growth is not necessarily representative for the cost of goods sold in the period.

The issue of NRC is challenging whatever method is utilized. The arbitrariness of using AA gets particularly pronounced when large NRC happens to fall within the AA, as was the case in the EC salmon case. The case of write-downs due to lower prospective salmon prices using AA is that it shall not be included. Using PA the COP shall not change due to NRC as this only relates to the charge of expenses in advance. The issue of severance payments and write-downs due to lower net present values of licences are intriguing questions with no clear cut answer.

Using a full cost approach including a “reasonable” profit does, apart from the ambiguous calculation, not make any sense from an economic point of view. Firms, and especially agricultural firms, have a great volatility in returns. Taking volatility into account firms will, on average, be selling at dumped price half of the time. This obviously does not make sense, especially as dumping investigations target specific periods of time, where markets are depressed and returns below normal.

PART IV

7 Final dumping determination

7.1 Comparison

The product under investigation sold in the domestic market and the product exported can be subject to a variety of factors affecting price comparability. Thus, the properly determined NV are not necessarily comparable to the relevant export prices without further adjustments.

Law-makers have stressed the need to avoid double-adjustments. The adjustments done in the process of establishing or constructing NV and the export prices must be taken into account when ensuring the ultimate comparability.

ADA art 2.4: "*A fair comparison shall be made between the export price and the NV*" the Basic Regulation further elaborates: "W*here the NV and the export price as established are not on such a comparable basis due allowance, in the form of adjustments, shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability*".

Accordingly the investigating authority is obliged to make any necessary adjustments to ensure the "full" comparability between the prices of the products sold in the two markets. The concept of full comparability does, however, not include many factors related to supply, demand and competition, as if included would probably explain the firms pricing behaviour.

The ADA does not list the factors for adjustment in the same way as the Basic Regulation. The Basic Regulation list of factors for adjustment was initially close-ended, but this changed when (k) was added by an amendment, Council Regulation 2331/96, and it is now open-ended. Thus, "every" demonstrable adjustment necessary to allow for a fair comparison must be taken into account.

The Basic Regulation's factors for adjustments are listed below from (a) to (k). The formulation is different from the ADA and the US anti-dumping act. One might legitimately wonder why an open-ended formulation needs an explicit list; the reason could be to help the investigating authority detect relevant areas where adjustments can rightfully be claimed.

Basic Regulation Art. 2 (10) selected extract:

(a) Physical characteristics

An adjustment shall be made for differences in the physical characteristics of the product concerned. The amount of the adjustment *shall correspond to a reasonable estimate of the market value of the difference (emphasis added).*[139]

(b) Import charges and indirect taxes

(c) Discounts, rebates and quantities

(d) Level of trade

(e) Transport, insurance, handling, loading and ancillary costs

(f) Packing

(g) Credit

(h) After-sales costs

(i) Commissions

(j) Currency conversions

(k) Other factors

At present the most relevant difference between the ADA and the Basic Regulation is the inclusion of the market value of differences under (a) in the latter. This allowance in the Basic Regulation is important as the physical difference between e.g. a superior and an ordinary salmon, both with a potentially identical constructed NV, is considerably larger in market value than in variable cost.

In the US municipal legislation, physical characteristics will be adjusted for according to the *difference in variable cost*, where appropriate, market value of price differences *may* also be considered. Thus, the US interpretation of the ADA could yield considerable differences in the adjustments in this particular case. There is no reason to believe that a pure variable cost adjustment approach would not be consistent with the ADA, hence, different implementations of the ADA can yield strikingly different results in particular cases without there necessarily being any erroneous implementation, but merely different implementation of the same general provision.

[139] One must assume that the allowances to adjust for market value of physical differences is based on the market value of the relevant market.

Price differences due to minor but price significant physical differences, batch sizes etc. are not necessarily accounted for in the process of establishing NV and EXP. However, they can be adjusted for in the comparability process as seen in the example under:

How this provision works in practice could be illustrated by a simple example:

The product under investigation is salmon. Salmon Ltd produced 11 kg salmon during the IP, of which 1 kg is superior quality and 10 kg ordinary quality. (Two sub-products).

Salmon Ltd sold one (1) kg superior HOG salmon to a domestic customer at NOK 25. The NV was then set to NOK/KG 25.

Salmon Ltd sold ten (10) kg ordinary HOG salmon to a Community customer at NOK/KG 21. The EXP was then set to NOK/KG 21

One could assume dumping practice by Salmon Ltd *before* making due allowances to ensure fair comparability. However, when assuming that Salmon Ltd could demonstrate that the market value of one kg superior is NOK 2 higher then the market value of ordinary salmon and assuming that the Community exporter got a NOK/KG 2 quantity rebate, the matter changes considerably.

As we can now see the CNV and EXP did not fairly reflect the actual prices charged by Salmon Ltd in the two markets. After due allowances are made no dumping margins can be established. Hence, Salmon Ltd's pricing behavior is legitimate.

To make a long shot, it would not be unreasonable to claim for adjustments due to other pricing relevant factors under (k) as many other factors in addition to those listed, affect price comparability between markets. If we could adjust for all pricing factors with non-predatory economic justification, true dumping would be revealed. However, this would be very difficult to estimate quantitatively in practice. The methodological challenge of dumping is thus yet to be solved.

7.2 Dumping margin

Dumping margins can only be established when the NVs or its substitutes and the export prices are made comparable. As we can see from the example under, for each exporter an individual dumping margin is calculated for each sub-product, whereupon a weighted average dumping margin can be established for the product under investigation and thus also the company.

The issue of dumping margins calculations will be examined in some detail as it gives important insight to the field of anti-dumping law. It is especially worth noting the discretion margins that are offered by these provisions. The historical development of the legal practice

through the panel's rulings and the panel's lack of discretion to pave the way for more economically rational interpretations show that the political aspects of anti-dumping law are predominant.

Within anti-dumping law there are three different methods to calculate dumping margins. This has historically given investigating authorities wide discretion to choose the one yielding the highest dumping findings.

The two preferred, symmetrical alternatives are:

I) **Weighted average to weighted average or "WW"**

Here the investigating authority compares the weighted average NV for each sub-product with the weighted average EXP.

II) **Transaction to transaction or "TT"**

Here the investigating authority use comparable transactions on a transaction to transaction basis.

In addition, under special circumstances an alternative unsymmetrical approach can be employed.

III) **Transaction to weighted average "W-T"**

Here the investigation authority use the weighted average NV and the EXP of each PNC on a transaction basis.

The mathematical formula is:

Dumping margin = [Normal Value - Export price (ex.works] / Export price (cif)

According to Stephenson (2005), although base on a simple formula the actual calculation is "extremely complicated". There is no reason to oppose his view.

The reason different export prices are used is to make the application for customs authorities more manageable. Goods are valued at the CIF level for customs purposes and it is at this level of trade anti-dumping duty is applied (ibid)

7.2.1 Inter model zeroing

The possibly most debated and criticized practice, which has been, and is to some degree still in use, is the practice commonly known as "zeroing". As previously explained business

normally involves multiple transactions within one or more sub-products, both domestically and in the export market. Assume, however, that within one product concerned let's say fillets (PNC) there are three export sales of 1 kg fillet at respectively 18, 24, 16 between Salmon Ltd. and an independent EC customer and four domestic sales of respectively NOK 17, 28, 15, 20. In the "WX" cases we must first find an average of the prices to establish NV which would be 20.

As we get confirmed the dumping findings can vary considerably depending on the method applied. "Zeroing" means setting negative dumping margins to zero, as we can see this usually yields to findings of higher dumping margins. A logical argument that has been put forward is the analogy to car speed limits that are normally not seen as applying to average speeds but rather to upper speed extremes. This relates to the concept of "targeted dumping"[140], which can, supposedly, be concealed by other above dumping level transactions if zeroing is not allowed.

The first important judgement on zeroing was the *bed linen*[141] case which condemned the use of zeroing when calculating dumping margins for the product under investigation. Later a new judgement established stricter conditions upon the usage of the alternative calculation method (WT) which the EC priory used without any justification.

The last years the most outspoken user of "zeroing" has been the US. In that connection a series of panel disputes has been launched among them the xx with the EC as complainant. Some of these cases are still to be concluded by the Panel and the Appellate Body. Notwithstanding, the tendency so far has been an incremental legal curbing of the investigating authorities possibility to exercise discretion.

At present the final status of the zeroing practice is not yet settled with particularly the US still showing great reluctance to let go of this practice. In respect to recent rulings from the Panel the use of "zeroing" is now limited to "WT" cases where there has still been no

[140] C- "258/84" at recital 25.
[141] Van Bael & Bellis (2004) p.123

definitive ruling.

WT (No zeroing)			WT (zeroing)		
NV	EXP	Dumping	NV	EXP	Dumping
20	20	0	20	20	0
20	24	4	20	24	0
20	16	-4	20	16	-4
Sum		0	Sum		-4

TT (No zeroing)			TT (zeroing)		
NV	EXP	Dumping	NV	EXP	Dumping
17	20	3	17	20	0
28	24	-4	28	24	-4
15	16	1	15	16	0
20	16	-4	20	16	-4
Sum		-4	Sum		-8

WW		
NV	EXP	Dumping
20	20	0
20	20	0
20	20	0
Sum		0

Table 8: Zeroing on PNC level

According to Van Baels and Bellis (2004) in the EC jurisprudence, dumping margins have traditionally been established either using the WW or the WT method. It might not be odd that the "TT" method is not in widespread use as there is normally no reason whatsoever to find a symmetrical pattern between export and domestic transactions.

Such maneuvers have, at least previously, been labeled "targeted dumping[142]" by the EC, and is one of the reasons why there are three dumping margin calculations to choose from. According to this reasoning different methods can reveal different kinds of dumping.

Apparently the moods have changed in this respect: "*The zeroing methodology artificially inflates the level of anti-dumping duties by ignoring non-dumped sales which if included in the anti-dumping calculation would decrease or eliminate anti-dumping duties*". EU to request WTO panel in zeroing dispute - Brussels 14 may 2007. However, in Stevenson (2005), "*some people believe that zeroing is totally prohibited - which is not true*". The legal standing of inter-model zeroing can still be seen as non-settled at least for some of its facets, including the asymmetrical approaches between the US and EU.

[142] This could be to sell with particularly low prices in the main regional markets of the domestic industry concerned. In the salmon case this could be UK. The economic explanation to such regional differences can be e.g. related to different competition levels.

7.2.2 Inter model zeroing

Salmon Ltd now produces 3 sub-products. The comparable prices for each model are as follows; after all necessary inter model adjustments are made[143]:

Sub-product	CNV/NV	EXP	Dumping margin	Weighted dumping margin	Share of Exports under POI
Whole	16	12	25,0 %	7,7 %	23 %
HOG	18	20	-11,1 %	-3,8 %	38,50 %
Filet	20	20	0 %	0,0 %	38,50 %
Weighted average dumping margin for Salmon Ltd and the product under investigation:				**3,8 %**	
With model zeroing the dumping margin would be:				**7,7 %**	

Table 9: Dumping margin calculation with model zeroing

The use of inter model zeroing is now explicitly outlawed by WTO jurisprudence (Stevenson, 2005). However, most likely it has been utilized in previous salmon disputes.

As in the example dumping margins are normally given in pro cent of the NV. Margins under the *de minimis*[144] level will not be subject to penalizations, as the *de minimis* level is 2 % a margin of 3,7 % would have been just above that threshold. The dumping margin also establishes the roof for the duties imposable to offset injury.

7.3 Dumping margin in EC salmon case

The provisional final dumping margins of the ten sampled Norwegian companies are publicly available and listed in the following table, they are higher than the definitive. This table is however included as it also shows the injury margin:

[143] CIF = ex factory, is assumed
[144] The *de minimis* principle.

Company	Dumping Margin	Injury Margin	Anti-Dumping duty
Marine Harvest Norway AS,	21,9 %	15,3 %	15,3 %
Fjord Seafood Norway AS	37,7 %	13,5 %	13,5 %
Pan Fish Norway AS	25,4 %	16,1 %	16,1 %
Stolt Sea Farm AS	13,9 %	14,2 %	13,9 %
Follalaks AS	24,5 %	27,7 %	24,5 %
Nordlaks Oppdrett AS	6,8 %	14,6 %	6,8 %
Hydrotech AS	21,9 %	15,3 %	15,3 %
Grieg Seafood AS	22,9 %	17,2 %	17,2 %
Weighted Average	22,5 %	16,0 %	16,0 %
Residual Margin	37,7 %	27,7 %	24,5 %

(Source: Commission Regulation EC 628/2005)

Table 10: Definitive dumping margins

How the dumping margins affected the Norwegian salmon industry:

a) Sampled companies who did fully cooperate with the investigating authorities did get an individual dumping margin based on the data supplied by the company. As we can see dumping margins were provisionally between 6.8 % for Nordlaks Oppdrett A/S and 24.5 % for Follolaks A/S.

b) Companies who were not sampled but did cooperate, got the weighted average of the sampled companies. As the ADA art 9 (i) explicitly states that "…*authorities shall disregard for the purpose of this paragraph any zero and de minimis margins and margins established under the circumstances referred to in paragraph 8 of Article 6*" (facts available). This calculation is one of the conditions disputed in the WTO Salmon case. (WTO salmon case)

c) The companies who not cooperate got the "residual" margin i.e. 20.9 %. Panel rulings have indicated that cooperation should pay-off, thus the dumping margin for non-cooperation should always be higher, or in this case the same, as for the exporter with the highest dumping margin (Stevenson, 2005).The reason for not setting the dumping margin higher in the salmon case is the relative high degree of cooperation by the Norwegian industry. On the other, if cooperation had been generally low individual dumping margins for non-cooperating companies could also be set by using the highest sub-product dumping margins or other methods based on "facts

available" with considerably higher dumping margins granted to punish for non-cooperation. [145]

As can be seen from the table both individual dumping margins and individual dumping margins are established. The duty imposed shall in no case exceed the level needed to offset the injury suffered by the CI. Consequently, anti-dumping duties are imposed are normally imposed with the same value as the injury margin. However, the dumping duty must neither exceed the dumping margin.[146]

7.4 Current status of the salmon trade

The definitive dumping margins were adjusted downwards in the definitive Regulation[147]. However, the Commission used its discretion to replace *ad valorem* duties by MIP (Minimum import prices) and a fixed duty shortly after. These were put in place for all Norwegian salmon companies, except for Norlaks Oppdrett AS being subject to the *de minimis* rule. [148]

There was also applied a tax on the sales under MIP to prevent circumvention of the MIP, this is expressed in the table under as a fixed duty to be paid in its totality when MIP are not respected. If salmon is dumped under the MIP when the fixed duty is applied an additional duty amounting to the difference shall also apply. The MIP are base on WFE standard. MIP do not affect the Norwegian industry unless the market price drops. MIP have been applied before by the EC and are not unfamiliar for Norwegian farmers. The measure is accurate but is easy to circumvent and earlier experiences have shown a great deal of inventiveness by Norwegian farmers (Asche et al. 2005). Asche further argues that the MIP should be dynamic in order to account for the downward trend of costs, this has not been the case so

[145] The US has, in some cases, taken the extreme approach as to use the margins expressed in the complainants dumping allegations. (Muller et al., 1998) This is justified under the facts available provision: annex II (1) The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the *facts available*, including those contained in the application for the initiation of the investigation by the domestic industry". (Emphasis added). The US wide use of facts available has been contested by the Panel (Stevenson, 2005)
[146] ADA Art. 9.1
[147] Council Regulation (EC) 85/2006
[148] Commission Regulation (EC) 1010/2005

far. The fixed duty shall apply when the MIP is not respected in order to avoid circumventions.[149]

Presentation of farmed salmon	Minimum import price EUR/kg net product	Fixed duty EUR/kg net product weight
Whole fish, fresh, chilled or frozen	EUR/KG 2,80	EUR/KG 0,40
Gutted, head-on, fresh, chilled or frozen	EUR/KG3,11	EUR/KG 0,45
Other (including gutted, head-off), fresh, chilled or frozen	EUR/KG 3,49	EUR/KG 0,50
Whole fish fillets and fillets cut in pieces, weighing more than 300 g per fillet, fresh, chilled or frozen, skin on.	EUR/KG5,01	EUR/KG 0,73
Whole fish fillets and fillets cut in pieces, weighing more than 300 g per fillet, fresh, chilled or frozen, skin off EUR/KG	EUR/KG 6,40	EUR/KG 0,93
Other whole fish fillets and fillets cut in pieces, weighing 300 g or less per fillet, fresh, chilled or frozen	EUR/KG 7,73	EUR/KG 1,12

Table 11: Minimum import prices

(Source: Council Regulation 85/2006)

Currently the salmon market price is approaching the MIP level, after a long period of high salmon prices. The measures can soon become a major concern for Norwegian exporters as the price ceiling might be above the price which prevails in the EC market. Asche has previously expressed his concern for unilateral trade regulations as they have a distortion effect shifting market shares from Norwegian salmon to other exporting countries which can capture market shares selling at under MIP. The threat of trade restrictions will however, to certain degree, be disciplining on these market operators.

[149] Council regulation (EC) 85/2006 at recital 129

7.5 The ADA, the salmon case and high politics

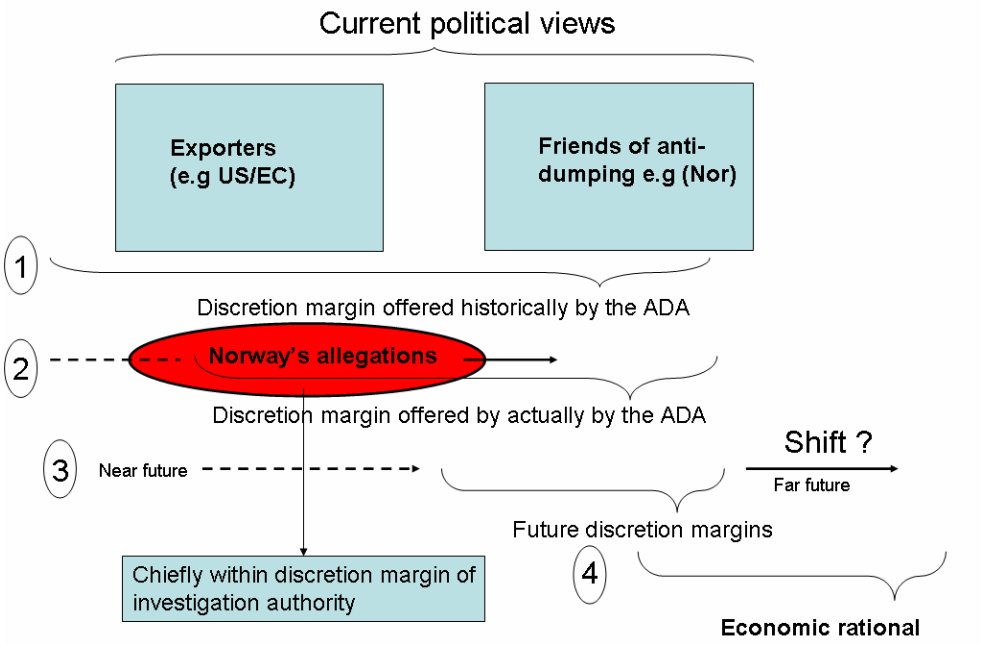

Figure 17: High politics implications for salmon case and ADA

As described in the previous section there are diverging political views on reforms of the ADA. Whilst there might be agreement on the need for adjustments neither the direction nor the strength of legal reforms is agreed upon. As the domestic tribunals and the Panel have no or at list very limited power to pave the way for legal evolution, the faith of the ADA lays on the shoulders of the politicians of the world's leading trading nations.

The two big rectangles shows the relative political stand between the major block WTO of subscribers, which have different political agendas depending on their traditional stand as either AD users or AD victims (importers/exporters). Norway is not an active user, whilst the US is.

Level one shows the discretion margin historically offered by the IA. As IA by nature are biased they will take full advantage of the discretion margins which are offered by the agreement. This discretion has somewhat been somewhat constrained by Panel and domestic tribunal rulings. This is shown as the dotted line.

Level two is the current status which offers IA lesser discretion than before. The Norwegian allegations brought for the panel would probably not have succeeded a decade ago, however as discretion margin is now smaller Norway might get support on some points where the IA

discretion margin is disputed. These points are given by the intersection between the allegation circle and the dotted line.

Level three is the expected gradual evolution of ADA following the Doha round. Even though no progress is certain, *if* there is progress it will certainly reduce IA discretion further.

Lever four is reserved the remote future as it depends on considerable political will of reform. In a world which is far from fully integrated and political blade rubbing in trade questions is common, it is unlikely that politicians will give up one of their principal protective measures. The last level will be more in line with economic rationale implying an anti-dumping agreement merged with or replaced by competition law following then a consideration of objective close to the one of domestic law.

What is then the main insight from this discussion?

I) Anti-dumping law is a juridical playing field where the rules are set by political compromise. Tribunals and Panels cannot take political side and make interpretations which limit the discretion offered by the ADA[150].

III) With respect to the WTO Salmon case one should not expect the Panel to deal with any injustice inherent in the ADA. The Panel will only and prudently assess whether the Commissions exercised discretion is within the one offered by the ADA. This is largely a *de jure* question and should be understood separately from any economic analysis of the measures "fairness".[151]

The Doha negotiations round has not yet been concluded. Generally there appears to be little progress and no results can be expected in the nearest future.

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[150] On the contrary, the EC recalls that the Members have expressly agreed that panels "cannot add to or diminish the rights and obligations provided in the covered agreements." (EU2, recital 51), making reference to the Vienna convention on treaties Art. 32.

[151] ADA Art. 17.6 (i) (ii): "..If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations".

[151] Journal of World Trade (2004)

The Norwegian salmon case is currently run by the Norwegian government in the WTO. A Panel report is expected to be circulated by September 2007, this is already a delay as the report was initially expected to be ready by May 2007. If the Panels report is appealed the process of appeal shall normally take no more than three months, meaning a final determination could be expected by start of 2008[152].

Final conclusion

I was once told that a fundamental juridical principle is that it is better to let 99 thieves go free than imprisoning one innocent person. In anti-dumping it appears that someone took this argument the wrong way[153]. Without saying that anti-dumping should put hurdles *that* high, recognizing that dumping *might* occur, there is something basically illogical about a measure which targets normal business practice as condemnable and unfair. Whereas competition law targets anti-competitive behaviour, anti dumping law has no mission statement and targets whatever behaviour falls within the legal definition of dumping.

The Norwegian salmon industry has been no exception to the allegations of unfair behaviour. Even though Norway aggregately has a considerable market share in the EU, individual firms are price takers in a highly competitive industry with constant pressure on rationalization and continuous shakeouts. Consequently, the industry assessment gives more support to protectionist motives than to predatory ones.

At a more technical level the Anti-dumping Agreement is pervaded by ambiguity which is perfectly suited for findings of fictitious dumping by biased investigating authorities. Especially the sales below cost test and the practice of zeroing are strikingly illogical for any other purpose than dumping margin inflation.

In the WTO salmon case many interesting questions have been raised. Even though the Anti-dumping Agreement itself is economically flawed, it does not preclude the use of economic thinking in its application. Even though the foundation wall is weak, sketches for the house can still be drawn. This is what has been done in the constructed normal value section. One

[152] WT/DS337/5
[153] Recalling Hyun (1998) the figure is one out of ten.

important and generally valid finding is that legal organization and capital structure ceteris paribus should not affect the estimation of a cost of production.

However, what finally happens in the courts is hampered by political constraints and the lack of mission statement, forcing judges to rule by the strict wording of ambiguous laws. Reviewing case law shows that these interpretations can turn in both parties favour and also reveal the inherent need for an economically rational benchmark, to test the merits of each case.

Notwithstanding, provisional flaws and biased investigation authorities, firms have a legal right to engage proactively in the anti-dumping process - this opportunity should not be ignored as it can impact final outcome.

Finally, there is no reason to believe that anti-dumping will undergo any fundamental change in the recent future. The anti-dumping measures applicability and thus the political indignation can only be changed by offering a better alternative to anti-dumping. Here the economic profession has certainly a considerable contribution to make. Meanwhile the field of anti-dumping will continue providing the world with protectionist measures justified by legal subtleties muffled up with quasi-economic rhetoric.

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NOR4: Norway's Responses to the Panel's Questions after the First Substantive Meeting, 15 January 2007
NOR5: Second Panel meeting opening statement by Norway, 6 February 2007
NOR6: Norway's replies to the Panel's questions after the second meeting with the parties, 23 February 2007

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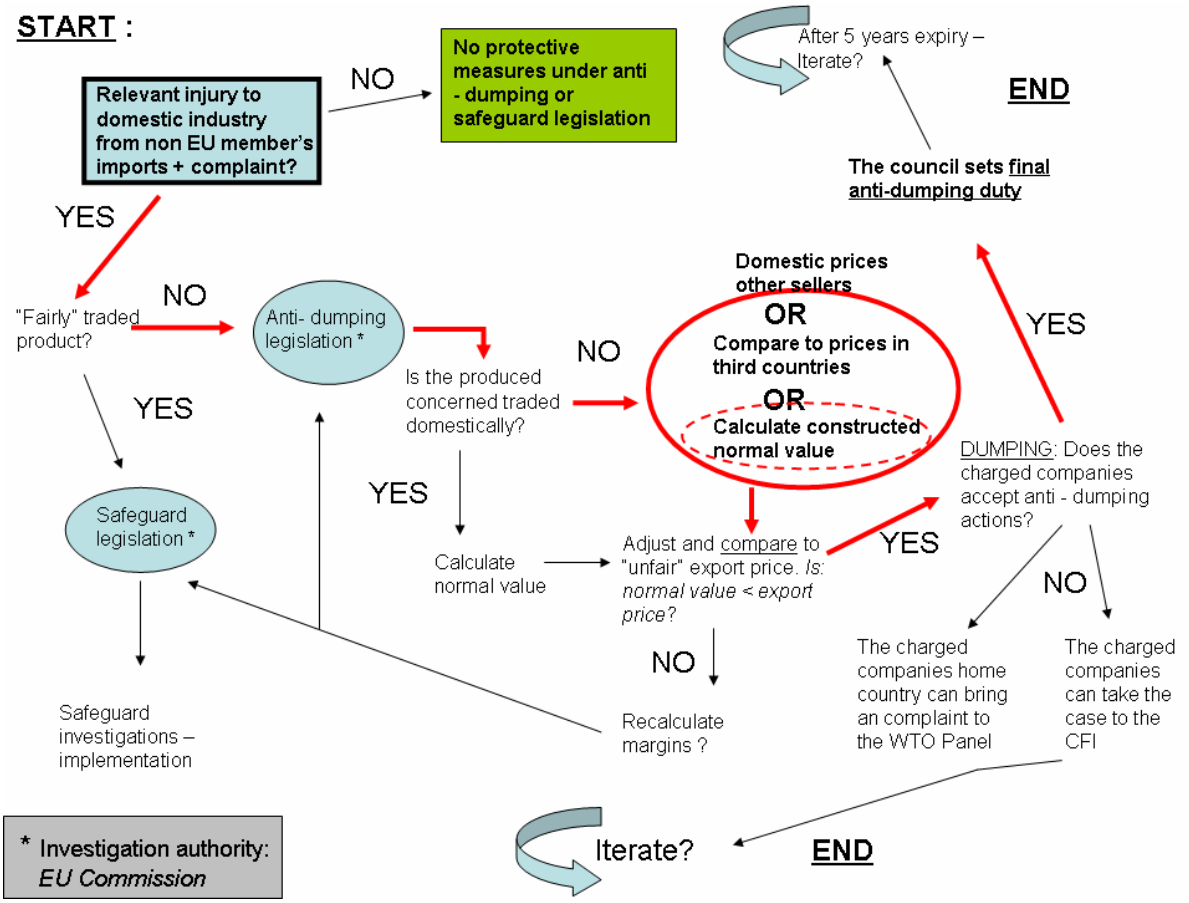
Appendix I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Relevant injury to domestic industry from non EU member's imports + complaint?
NO
No protective measures under anti - dumping or safeguard legislation
After 5 years expiry – Iterate?
END
The council sets final anti-dumping duty
YES
"Fairly" traded product?
NO
Anti- dumping legislation *
Is the produced concerned traded domestically?
NO
Domestic prices other sellers
OR
Compare to prices in third countries
OR
Calculate constructed normal value
YES
YES
Safeguard legislation *
YES
Calculate normal value
Adjust and compare to "unfair" export price. Is: normal value < export price?
YES
DUMPING: Does the charged companies accept anti - dumping actions?
NO
NO
The charged companies home country can bring an complaint to the WTO Panel
The charged companies can take the case to the CFI
Safeguard investigations – implementation
Recalculate margins ?
* Investigation authority: EU Commission
Iterate?
END

Appendix II

Overview of thesis scope and Basic Regulation Articles:

EC Basic Regulation articles	Relevance for this paper
Art 1. Principles	**Pri I**
Art 2. Determination of dumping	**Pri I**
A: NV	**Pri I**
B: Export price	Pri II
C: Comparison	**Pri I**
D: Dumping Margin	**Pri I**
Art 3. Determination of injury	Pri II
Art 4. Definition of community	PRI III
Art 5. Initiation of proceedings	PRI III
Art 6. The investigation	PRI III
Art 7. Provisional measures	NO
Art 8. Undertakings	NO
Art 9. Termination without measures;	PRI III
Art 10. Retroactivity	NO
Art 11. Duration, review and refunds	NO
Art 12. (No heading)	NO
Art 13. Circumvention	NO
Art 14. General provisions	Pri III
Art 15. Consultations	NO
Art 16. Verification visits	NO
Art 17. Sampling	Pri II
Art 18. Non-cooperation	Pri II
Art 19. Confidentiality	NO
Art 20. Disclosure	NO
Art 21. Community	Pri III
Art 22-24 Miscellaneous	NO

PRI I = Main focus of this paper
PRI II = Secondary focus of this paper
PRI III = Briefly touched upon to give context
NO = Not relevant for paper, implications not; or (just implicitly); mentioned in paper

Appendix III

Community consumption

	2001	2002	2003	IP
Tonnes	527 970	550 943	611 101	607 904
Index	*100*	*104*	*116*	*115*

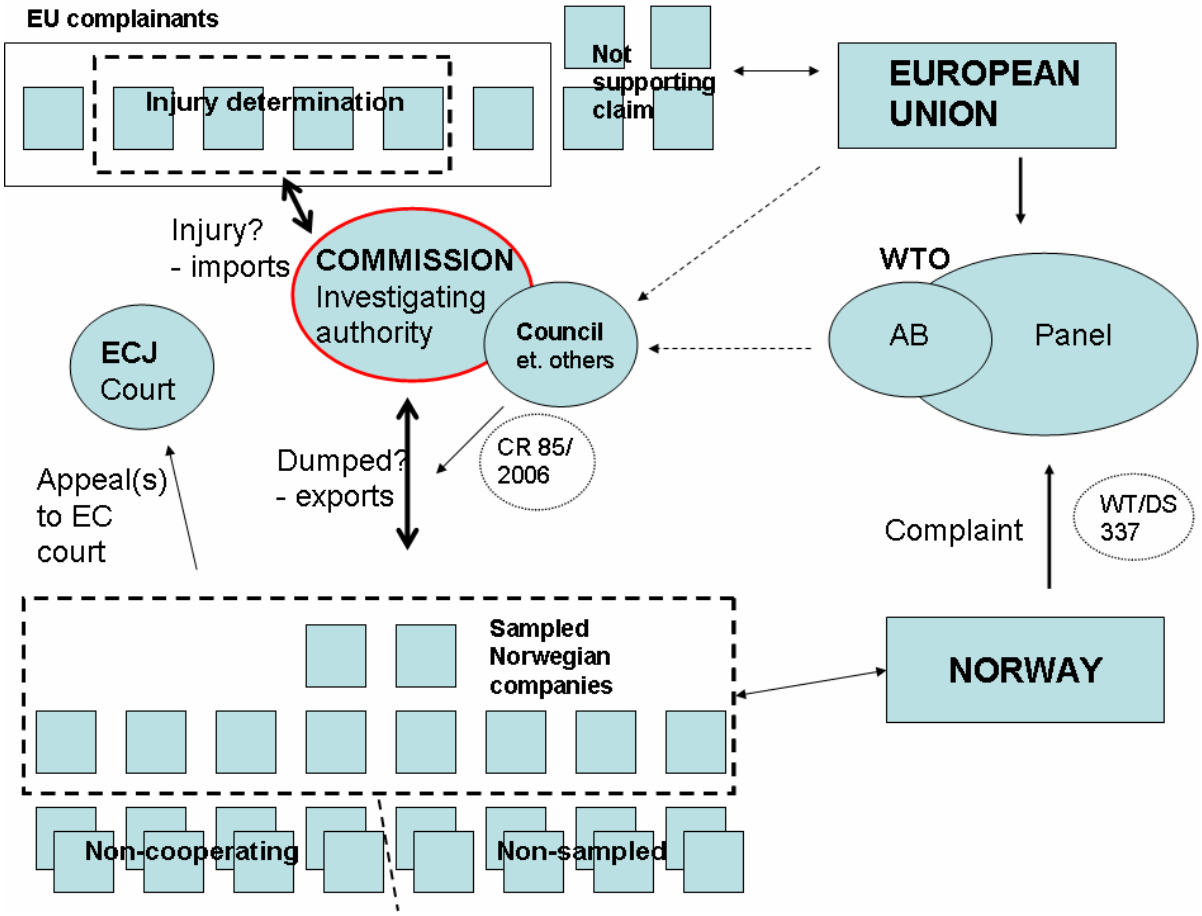
Source: Eurostat and data for Ireland, United Kingdom, France. All figures relate to EU 25.

Volume of imports concerned

	2001	2002	2003	IP
Tonnes	269 126	294 481	351 757	362 492
Index	*100*	*109*	*131*	*135*

Source: Eurostat.

Appendix IV



Appendix V

Estimated COP

		2005	2004	2003	2002	2001	2000
Smolt	NOK	1,85	1,94	1,85	1,96	2,13	2,33
Feed	NOK	7,46	8,47	8,81	8,83	7,70	7,61
Insurance	NOK	0,22	0,25	0,26	0,29	0,34	0,25
Labour	NOK	1,38	1,42	1,23	1,27	1,41	1,50
Depreciation	NOK	0,83	0,76	0,81	0,82	0,83	0,73
Other operating	NOK	1,52	1,68	1,94	2,39	2,03	2,19
Net financial	NOK	0,55	0,63	1,12	0,80	0,48	0,49
COP/kg	NOK	**13,80**	**15,15**	**16,02**	**16,37**	**14,91**	**15,10**
Slaughter cost kilo	NOK	2,39	2,43	2,43	2,46	2,43	2,33
COP/kg	NOK	**16,19**	**17,58**	**18,46**	**18,82**	**17,34**	**17,42**

(Source: Fiskerdirektoratet, 2006)