

Fresh Atlantic Salmon From Chile

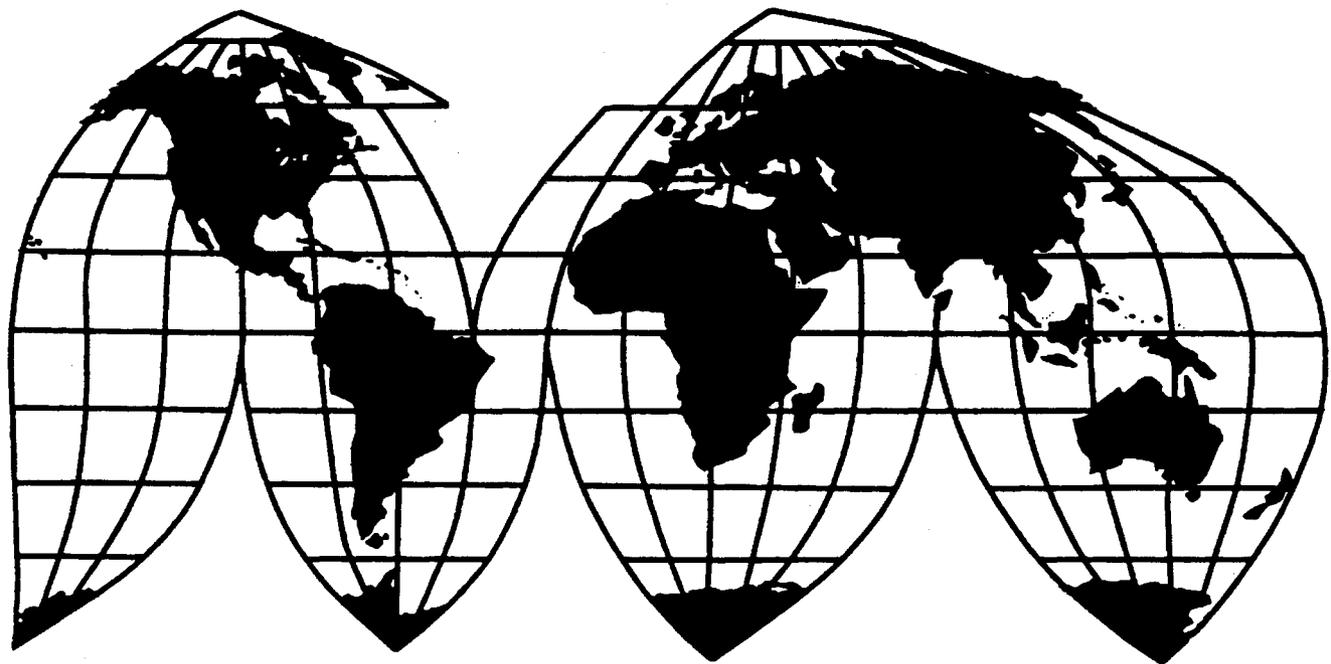
(Views on Third Remand)

Investigation No. 731-TA-768 (Third Remand)

Publication 3357

September 2000

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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THE COMMISSION'S DETERMINATION ON REMAND

In July 1998, the Commission determined that an industry in the United States was materially injured or threatened with material injury by reason of imports of fresh Atlantic salmon from Chile that had been found by the Department of Commerce ("Commerce") to be sold at less than fair value ("LTFV").¹ That determination was appealed to the U.S. Court of International Trade.

On July 2, 1999, at the request of the Commission, the Court remanded the determination to the Commission.² The Court directed the Commission to "reopen the administrative record to verify the accuracy of its foreign production, shipments and capacity data" and to "take any action necessary after reexamining the foreign production, shipments and capacity data." On remand, the Commission again determined that the industry in the United States producing fresh Atlantic salmon is materially injured or threatened with material injury by reason of imports of fresh Atlantic salmon from Chile that Commerce has determined are sold at LTFV.³

On July 27, 2000, the Court remanded this determination to the Commission.⁴ In its order, the Court directed the Commission to "either (1) adjust the 1998 production data for the consolidated subject producers or (2) justify the determination that the 1998 production data is, as is, the best information available." Once again, the Commission determined that the industry in the United States producing fresh Atlantic salmon is materially injured or threatened with material injury by reason of imports of fresh Atlantic salmon from Chile that Commerce has determined are sold at LTFV.⁵

¹ *Fresh Atlantic Salmon from Chile*, Inv. No. 731-TA-768 (Final), USITC Pub. 3116 (July 1998) ("Original Views").

² *Asociacion de Productores de Salmon y Trucha de Chile AG v. United States International Trade Commission et al.*, Court No. 98-09-02759, Slip Op. 99-58 (July 2, 1999) ("First Remand Order").

³ *Fresh Atlantic Salmon from Chile*, Inv. No. 731-TA-768 (Remand), USITC Pub. 3244 (Oct. 1999) ("First Remand Views").

⁴ *Asociacion de Productores de Salmon y Trucha de Chile AG v. United States International Trade Commission et al.*, Court No. 98-09-02759, Slip Op. 00-87 (July 27, 2000) ("Second Remand Order").

⁵ *Fresh Atlantic Salmon from Chile*, Inv. No. 731-TA-768 (Second Remand), USITC Pub. 3347 (August 2000) ("Second Remand Views").

On September 8, 2000, the Court remanded this second remand determination to the Commission.⁶ The Court instructed the Commission to explain “how the Commission’s decision to refuse to adjust the 1998 production data, and thus use facts otherwise available, complies with the specific statutory requirements.”⁷ In particular, the Court remanded for the Commission to address 19 U.S.C. §§ 1677e and 1677m. In accordance with the Court’s instructions on third remand, the Commission reaffirms its determination that the industry in the United States producing fresh Atlantic salmon is materially injured or threatened with material injury by reason of imports of fresh Atlantic salmon from Chile that Commerce has determined are sold at LTFV.

The views of Commissioner Bragg and Commissioner Miller⁸ comprised the Commission’s affirmative determination in the original investigation. At that time, Commissioner Crawford dissented, determining that domestic industry was not materially injured or threatened with material injury by reason of the subject imports.⁹ In this third remand, the Court has remitted the Commission’s determination for explanation of Commissioner Bragg’s use of facts available. Commissioner Bragg hereby explains her analysis in light of the Court’s instructions, and the Commission now submits Commissioner Bragg’s “Views on Third Remand” as the clarification requested by the Court’s order. Commissioners Miller and Crawford both reaffirmed their determinations during the first remand proceeding and nothing in the Court’s subsequent orders has affected those decisions.

⁶ *Asociacion de Productores de Salmon y Trucha de Chile AG v. United States International Trade Commission, et al.*, Court No. 98-09-02759, Slip Op. 00-117 (Sept. 8, 2000) (“Third Remand Order”).

⁷ *Id.* at 3.

⁸ During the original investigation and at the time of the first remand, Commissioner Bragg was Chairman and Commissioner Miller was Vice Chairman. The Chairmanship and the Vice Chairmanship have since changed. This opinion will refer to the Commissioners by their current titles.

⁹ Original Views at 35-47.

VIEWS ON THIRD REMAND OF COMMISSIONER BRAGG

In accordance with the order of the U.S. Court of International Trade (“CIT”) in *Asociacion de Productores de Salmon y Trucha de Chile AG v. United States International Trade Commission, et al.*, Court No. 98-09-02759, Slip Op. 00-117 (September 8, 2000) (“Third Remand Order”), I provide further explanation of the basis for my affirmative determination in *Fresh Atlantic Salmon from Chile*, Inv. No. 731-TA-768 (Second Remand).¹⁰ In the Third Remand Order, I have been specifically instructed to explain “how the Commission’s decision to refuse to adjust the 1998 production data, and thus use facts otherwise available, complies with the specific statutory requirements” of 19 U.S.C. §§ 1677e and 1677m.¹¹ Pursuant to these instructions, I now explain how my treatment of 1998 projections on remand comports with 19 U.S.C. §§ 1677e and 1677m.

Background

On July 2, 1999, at the request of the Commission, the Court remanded the original determination to the Commission to “reopen the administrative record to verify the accuracy of its foreign production, shipments and capacity data” and to “take any action necessary after reexamining the foreign production, shipments and capacity data.”¹² On July 30, 1999, the Commission sent questions to the Plaintiff in the CIT litigation (a respondent in the Commission proceedings), *Asociacion de Productores de Salmon y Trucha de Chile AG* (“Asociacion”), seeking to establish whether the production, shipments, and capacity data for *Fiordo Blanco, S.A.* (“*Fiordo Blanco*”), a Chilean producer of fresh Atlantic salmon, were double-counted by Commission staff during the original investigation.¹³ On August 17, 1999, the *Asociacion* provided its methodology for calculating its production, shipments and capacity data for the Chilean industry. On September 17, 1999, the *Asociacion* submitted briefs to

¹⁰ USITC Pub. 3347 (August 2000) (“Second Remand Views”).

¹¹ Third Remand Order at 3.

¹² Slip Op. 99-58 (July 2, 1999) (“First Remand Order”).

¹³ INV-W-201.

the Commission explaining its view of how this information should affect my threat analysis.¹⁴ I then reconsidered my original determination and again concluded in my First Remand Views that the industry in the United States producing fresh Atlantic salmon is threatened with material injury by reason of subject imports. The Court remanded that determination for an adjustment to the 1998 projections on which I relied or for an explanation of why those projections should not be adjusted.¹⁵ On August 28, 2000, I issued my second remand views explaining both why I prefer to use unadjusted 1998 projections and why I would reaffirm my previous determinations even if I were to make adjustments to those projections. The Court has remanded the Second Remand Views to me for a specific explanation of how my analysis comports with the statutory provision governing use of facts available.

Application of the facts available provision

In my Second Remand Views, I concluded that “the information necessary to my determination is not available on the record, and the unadjusted [1998 production, shipments, and capacity] data [for the subject producers] are the facts otherwise available for me to reach my determination.”¹⁶ I now explain, in detail, the basis for this conclusion.

Section 776(a) of the Tariff Act of 1930 (“the Act”), as amended, 19 U.S.C. § 1677e(a), requires me to use facts available in rendering my determination when “necessary information is not available on the record.” Section 771(7)(F) of the Act, 19 U.S.C. § 1677(7)(F), makes information about foreign producers’ production, shipments, and capacity “necessary” to my threat determination within the meaning of section 776(a). In determining whether an industry is threatened with material injury, I am required to consider any “existing unused production capacity or imminent, substantial increase in production capacity in the exporting country”¹⁷ and the “potential for product-shifting if production

¹⁴ USITC Pub. 3244 (Oct. 1999) (“First Remand Views”) at 8-9; 14-15.

¹⁵ Slip Op. 00-87 (July, 27, 2000) (“Second Remand Order”).

¹⁶ Second Remand Views at 9 n.27.

¹⁷ § 771(7)(F)(i)(II) of the Act, 19 U.S.C. § 1677(7)(F)(i)(II).

facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.”¹⁸

The information compiled by staff during the original investigation regarding the projected amount of the subject producers’ 1998 production, shipments, and capacity, included some representation for Fiordo Blanco’s projections twice. Staff added together the information contained in the Asociacion’s questionnaire response and the separate questionnaire response filed by Fiordo Blanco, in addition to other questionnaire responses filed by individual companies, to calculate the total 1998 projections for subject Chilean producers. The Asociacion claimed that its questionnaire response included information about Fiordo Blanco. Therefore, the 1998 projections “double-count” Fiordo Blanco, once from the Asociacion’s questionnaire response and once from Fiordo Blanco’s response.

To obtain the necessary information for my remand determinations (*i.e.* projected 1998 production, shipments, and capacity levels for the subject producers), I thus needed to eliminate the “double-counting” of Fiordo Blanco. To accomplish this objective, the amount that the Asociacion inputted for Fiordo Blanco into its reported projections should be removed from the totals for the subject producers.¹⁹ However, it is impossible to make this calculation because the Asociacion cannot indicate how much of its 1998 projections are attributable to Fiordo Blanco. The Asociacion stated that it could not provide me with a number, because “company-specific projections were not made.”²⁰ It is thus apparent that the necessary clarifying information does not exist. As a result, accurate information on the

¹⁸ § 771(7)(F)(i)(VII) of the Act, 19 U.S.C. § 1677(7)(F)(i)(VII). Production and shipments are particularly relevant to product shifting in an industry, such as this one, where the subject product can be further processed into nonsubject products. As I have found, “[w]hole salmon used for frozen and smoked salmon production can clearly be shifted into whole salmon or cuts salmon sales.” First Remand Views at 10 n.41.

¹⁹ In my Second Remand Views, I explain why removing the amount attributed to Fiordo Blanco by the Asociacion is required as opposed to removing the amount indicated by Fiordo Blanco, itself, in its questionnaire response. See Second Remand Views at 10.

²⁰ Asociacion Remand Questionnaire Response at Q1. This stands in stark contrast to its 1994-1997 data, where the Asociacion could provide a particular number for Fiordo Blanco that the Asociacion used in its total figures for that data.

total Chilean subject producers' projected 1998 production, shipments, and capacity levels is not available on the record. After considering all the evidence that is on the record, for reasons discussed at length in my second remand determination,²¹ I determined that the unadjusted 1998 projections are more likely to represent the actual situation of the aggregate producers in Chile.²²

The statute indicates that I may use facts otherwise available "subject to" § 782(d) of the Act, 19 U.S.C. § 1677m(d). The provisos of § 782(d) of the Act were not implicated in this investigation, however. Section 782(d) applies only "if . . . the Commission determines that a response to a request for information . . . does not comply with the request" In this investigation, I did not find that the Asociacion failed to comply with the Commission's request on remand for information about the 1998 projections. In response to the Commission's inquiries during the remand investigation, the Asociacion provided the Commission with all the information that it had about the 1998 projections. The Asociacion informed the Commission that it did not develop its 1998 projections by adding together company-by-company data, and it provided the Commission with a description of its methodology for developing that information.²³ This methodology, whereby adjustments were made to 1997 data based on projections of the Asociacion and expectations of the Chilean producers,²⁴ proved unhelpful to me in making the needed calculations for the purposes of the first remand, notwithstanding the fact that the Asociacion's responses complied with the Commission's information request. As a result, despite the fact that the Asociacion was forthcoming about its methodology for deriving 1998 projections, I remained in a position of needing to find useful information elsewhere in the record.

In addition, the effect of applying § 782(d) of the Act is that the Commission is permitted to "disregard all or part of the original and subsequent responses." I have not disregarded the Asociacion's

²¹ Second Remand Views at 8-10.

²² I note that my decision not to adjust the 1998 projections to remove double-counting is unrelated to any other problems that I have identified with the reported information.

²³ Remand Questionnaire Response at Q1.

²⁴ Remand Questionnaire Response at Q1.

responses to the questions posed by the Commission which were designed to shed light on the double-counting with respect to projected 1998 production, shipments, and capacity levels. To the contrary, in my Second Remand Views, I found that the Asociacion's response to the Commission's questions about the 1998 information was "particularly instructive."²⁵ Further, I used the Asociacion's responses as part of my calculation to derive the total projected production, shipments, and capacity levels for subject producers. As a result, the strictures of § 782(d), requiring that parties are to be informed when their responses do not comply with a request, is not implicated by my use of facts otherwise available to fill gaps in the record in this investigation.

Conclusion

For these reasons, as well as those given in my earlier decisions in this investigation, I have found that the industry in the United States producing fresh Atlantic salmon is threatened with material injury by reason of subject imports from Chile.

²⁵ Second Remand Views at 5.