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3. Nature of material (<i>A concise account of the nature of the propaganda material filed</i>) Legal memorandum on the Government of Norway's position on certification under the Pelly Amendment and the possible imposition of trade sanctions.			
4. Title of material, if any Government of Norway response to certification under the Pelly Amendment.		5. Name of foreign principal on whose behalf this material was transmitted. Government of Norway	
6. Means of transmission Hand delivered	7. Dates of transmission 9/22/93 - 10/4/93	8. Total copies transmitted twenty (20)	
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MEMORANDUM

DATE: September 16, 1993

RE: Government of Norway Response to Certification Under the Pelly Amendment

I. Introduction

On August 5, 1993, the U.S. Department of Commerce certified under the Pelly Amendment that Norway's resumption of limited, traditional coastal whaling in 1993 "diminishes the effectiveness" of the International Whaling Commission (IWC) conservation program. As required by the Pelly Amendment, the President must report to Congress within sixty days of the certification date his decision on whether to impose trade sanctions against Norway. The application of trade sanctions against a nation certified under the Pelly Amendment would be an unprecedented step. This memorandum demonstrates why Norway's activities have not diminished the effectiveness of the IWC conservation program and discusses why the possible imposition of trade sanctions under the Pelly Amendment is inconsistent with U.S. GATT obligations, is unwarranted, and would constitute unsound trade policy.

In the past, the United States has refrained from imposing trade sanctions under the Pelly Amendment on the basis of mitigating circumstances, which have limited or eliminated the possible adverse environmental impacts of what it perceives as a technical departure from an international conservation program. Such circumstances are compellingly present with regard to Norway's resumption of limited, traditional coastal whaling because uncontroverted scientific evidence on the abundance of the minke whale population supports the limited harvest.

Norway is a longtime friend and ally of the United States, maintaining historically close ties with the American people. We are strongly committed to international cooperation and have supported U.S. efforts to strengthen and expand multilateral economic and social cooperation. In recent years, Norway has taken a leading role in international environmental matters. In light of our strong bilateral relationship and the compelling nature of our case, we assume that the United States will continue its prudent policy of considering all factors and circumstances in making its determination.

We urge the United States to avoid the temptation to follow, rather than lead, what it perceives to be American public opinion. We ask the United States to evaluate the question on the basis of wise environmental, trade, and foreign policies, rather than on the basis of the politics of the moment.

II. Background

Licensed Norwegian whalers have caught 157 minke whales from the Northeast Atlantic stock during the small-scale traditional coastal hunt this summer. The total quota authorized by Norway, including whales to be taken under the scientific program, is 296 minke whales, a figure below the amount which would have been permitted for the Northeast Atlantic minke whale stock under the most conservative application of the revised management procedure that was unanimously recommended by the IWC's Scientific Committee.

To ensure that the whaling program was conducted properly, Norway licensed all whaling boats which participated in the hunt. Norway also required proficiency tests for harpooners and a three-day course for all crew, and imposed strict standards on sea conditions and shooting ranges permitted for active harvesting. An on-board trained veterinarian accompanied every whaling boat to ensure humane killing methods and compliance with each boat's individual quota.

III. Discussion

- A. The Possible Imposition of Trade Sanctions Against Norway By the United States in the Current Situation Would Be Inconsistent With the General Agreement on Tariffs and Trade (GATT), and Thus Is Inconsistent With the Pelly Amendment Itself, Which Requires That Any Trade Restriction Imposed By the President Be Consistent With the GATT.

The GATT was drafted as a means to stem the politicalization of trade. It was in part the tragedy of protectionism in the 1930's and in part the needs of the post-war world that led the United States to make its bold proposal for a new international trade organization. The resulting General Agreement on Tariffs and Trade stands as a tribute to the efforts of nations which seek economic cooperation as a means to a better world. Thus, today it is essential that when GATT obligations apply, contracting parties comply with them. This is particularly true when one nation's politics impinges on the sovereign rights of another nation. In these situations, the nation considering trade measures must resist taking the political course, as politics have too often thwarted the disciplines of free trade.

An import ban on Norwegian products would violate the prohibition against quantitative restrictions contained in GATT Article XI,^{1/} and would discriminate against Norwegian products contrary to the most-favored nation principle of Articles I, II, and XIII.^{2/} In addition, the national treatment principle of Article III prohibits treating imported products less favorably than domestic products.^{3/} While sanctions under the Pelly Amendment would constitute GATT-inconsistent quantitative restrictions, any treatment of Norwegian products imported into the United States that is less favorable than the treatment of like domestic products would also violate Article III. Finally, as confirmed by a recent GATT Panel, there are no GATT exceptions, including those contained in Article XX, that would permit the contemplated restrictions of Norwegian products.

A GATT Panel has addressed several of the relevant issues in United States - Restrictions on Imports of Tuna [from Mexico] (the Tuna/Dolphin Panel).^{4/} There, the GATT Panel found import prohibitions on yellowfin tuna from Mexico, initiated to enforce a dolphin protection policy under the Marine Mammal Protection Act, inconsistent with GATT Article XI:1. The GATT Panel ruled that the sanctions were quantitative restrictions forbidden under

1/ Article XI contains an absolute prohibition on quotas, including the import ban contemplated under the Pelly Amendment.

2/ The most-favored-nation principle of Articles I and II prohibits treating the products of one GATT member less favorably than those of any other. By singling out Norwegian products from those of other nations, restrictions under the Pelly Amendment would violate this principle. Similarly, Article XIII requires that even when a quantitative restriction is permissible under the GATT that restriction must be applied on a nondiscriminatory basis to the products of all other countries. Thus, the United States would violate this obligation if it were to ban imports of a Norwegian product but fail to ban the like products of all its trading partners.

3/ Any treatment of imported Norwegian products under the Pelly Amendment that is less favorable than the treatment of like domestic products would violate Article III.

4/ General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991).

GATT Article XI and, as described below, no GATT exceptions applied.^{5/}

The proposed sanction of Norwegian products would not be justified by any exceptions in the GATT, including the exceptions in Article XX(b) for measures necessary to protect animal life or health, or the exception in Article XX(g) for measures relating to the conservation of exhaustible natural resources. As the GATT Tuna/Dolphin Panel ruled, Article XX(b) and (g) exceptions only allow a GATT member to impose trade restrictions to safeguard resources within its own territorial jurisdiction. Trade sanctions against Norway for its whaling practices in non-U.S. waters are therefore not covered by GATT exceptions. The Panel, cognizant of the dangers inherent in doing otherwise, forcefully stated that if the GATT were to permit extraterritoriality:

each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.

Tuna\Dolphin Panel, para. 5.27.

Moreover, a restriction on Norway's imports under the Pelly Amendment would fail the technical requirements of Article XX(b) that such measures be "necessary" to protect animal life, as well as Article XX(g) that such measures "relat[e] to" or be "primarily aimed at" the conservation of exhaustible natural

^{5/} The Panel implied that actions taken under the Pelly Amendment would also violate the GATT. In addition to its main argument against the Marine Mammal Protection Act, Mexico argued that the possible prohibition on all Mexican fish product imports under the Pelly Amendment was inconsistent with Article XI:1. The Panel ruled that because the Pelly Amendment only authorized but did not require trade sanctions, the Pelly Amendment was not inconsistent with the GATT: "... legislation merely giving those executive authorities the power to act inconsistently with the General Agreement is not, in itself, inconsistent with the General Agreement." It is clear, however, that, once taken, trade sanctions of the kind contemplated for Norway would be inconsistent with Article XI:1. The Panel report, of course, was never presented for formal adoption by the Contracting Parties.

resources. Under the GATT, a ban on imports with no relevance to the U.S. environment would be neither "necessary" nor "related to" the protection or conservation of U.S. animal life or natural resources. The GATT Tuna\Dolphin Panel confirmed that this is the law under the General Agreement and we submit that this law is necessary if nations are to continue to act in a manner respectful of the sovereignty of their trading partners.

Article XX(g) requires that the United States maintain restrictions on like domestic products if it seeks justification under that article. Unless the United States proposes restrictions on like domestic products, i.e., whale products, an embargo would fail this test as well. Given that other international fora are better suited to addressing U.S. concerns in this case and the fact that scientific evidence indicates that Norway's harvest of 296 minke whales will have no adverse impact on the Northeast Atlantic minke whale population, a trade ban would be neither "necessary" for, nor "relate[d] to," the protection of whales in this case, and would fail the preamble requirement, confirmed by several GATT Panels, that any Article XX sanctions must be the "least restrictive alternative available."

Any attempt to justify a ban on Norwegian products under GATT Articles XX or XI would represent the most egregious form of abuse of GATT exceptions and would set a poor precedent for international relations under the GATT. Norwegian imports do not threaten the U.S. environment or natural resources, and Norway does not propose to import into the United States any of the products subject to the current controversy. By prohibiting imports of Norwegian products in order to effect the extraterritorial goals of domestic political interests, the United States would be taking a political stance that would undermine the GATT so significantly that any nation would then be free to restrict trade in order to pressure another country to conform to its social, cultural or political standards of the day. Such a precedent would return to haunt the United States and all nations that have agreed to abide by international economic rules as the best means to ensure global economic stability. It is well-known that economic stability is fundamental to international cooperation on other matters, including environmental, security, and social issues.

Precisely in response to these concerns, many U.S. trading partners condemned the U.S. embargo on Mexican tuna and criticized the logic of the U.S. position in that case. Australia, Canada, the European Economic Community (EEC), Indonesia, Japan, Korea, Norway, the Philippines, Senegal, Thailand, and Venezuela all filed submissions as interested third parties opposing the United States. No submissions were made in support of the United States. Application of the Pelly Amendment

in our case presents many of the same issues raised in the GATT Tuna/Dolphin Decision.

Finally, because sanctions against Norway would violate the GATT, sanctions also are not permitted under the terms of the Pelly Amendment. The Pelly Amendment states that the President may prohibit the importation of products from the offending country only "to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade" (22 U.S.C. § 1978 (a)(4)). The language of this provision leaves little room for interpretation.

B. The Possible Imposition of Trade Sanctions Against Norway Is Not Warranted Because Norway's Resumption of Traditional Coastal Whaling Is Fully Supported by the Conclusions and Recommendations of the IWC Scientific Committee and by the Terms of the International Convention for the Regulation of Whaling Itself.

In considering whether to impose trade sanctions on countries for activities inconsistent with IWC programs, the United States has always evaluated the actual environmental impact of the country's behavior even after certifying that a technical departure from an IWC decision "diminished the effectiveness" of the Convention. The implicit issue, from an environmental perspective, has been the degree to which a country's actions threatened an adverse impact on the health of whale populations. With regard to Norwegian activities in 1993, the reasons to avoid imposing trade sanctions are compellingly clear; the resumption of limited traditional coastal whaling by Norway is supported by solid scientific evidence and has no adverse consequences on the vitality of the Northeast Atlantic minke whale population.

The International Convention for the Regulation of Whaling was established in 1946 to promote and develop whale stocks for sustainable harvest. Rules were set out under the Convention to achieve that goal and to govern the process by which the International Whaling Commission operates. Chief among those rules was the requirement that all decisions made by the IWC are to be based on scientific evidence. Given the differences among nations on political, cultural and social issues, this operating principle is the only one on which agreement can most reliably be reached.

In 1982, the IWC imposed a moratorium prohibiting commercial whaling in order to allow scientists time to assess whale stocks. The moratorium called upon the IWC Scientific Committee to undertake a comprehensive assessment of whale stocks and develop a Revised Management Procedure for the harvesting of whales by 1990 at the latest.

The stock assessments underway since 1986 have now been completed for some species, including the Northeast Atlantic minke whale. In 1992, the IWC Scientific Committee unanimously estimated the stock of minke whales in the Northeast Atlantic alone to be 86,700.

In addition, the methodology for calculation of catch limits has now been unanimously approved and recommended by the IWC Scientific Committee. Seven years of research and scientific analysis resulted in the 1992 unanimous recommendation by the Scientific Committee to the full IWC of the draft Revised Management Procedure (RMP) for assessing and managing whale stocks on a sustainable basis. Although it accepted the draft, the IWC identified other aspects which needed work before the Revised Management Scheme could be completed.

At this year's meeting in Kyoto, the Scientific Committee completed the additional work and unanimously recommended the RMP to the Commission for adoption and endorsement. This recommendation was based on the uncontroverted scientific validity of the proffered work product; it was entirely unrelated to any political or personal views held by some Scientific Committee members regarding the morals or ethics of harvesting whales. IWC Scientific Committee members are charged with the responsibility of providing the scientific underpinning for IWC decisions. They fulfilled that function and provided their unanimous scientific recommendation to the governing body.

Under the RMP and based on the Scientific Committee's unanimous finding that the Northeast Atlantic minke whale population is 86,700, the IWC had sufficient information and reliable methodology to set a limited harvest quota without any risk of adverse consequences. The two tasks upon which a continuation of the commercial whaling moratorium was predicated have now been completed.

However, at the May 1993 IWC meeting in Kyoto, the full IWC refused to adopt the RMP proffered by the Scientific Committee, thus deliberately avoiding the necessity of setting catch limits for whale populations which had been found able to sustain a limited harvest. The Chairman of the Scientific Committee, Dr. Philip Hammond of the United Kingdom, resigned in protest. His letter of resignation is instructive with regard to the basis on which decisions have been made recently by the IWC. Dr. Hammond explained his action in his May 26, 1993 letter as follows:

The matter of substance is, what is the point of having a Scientific Committee if its unanimous recommendations on a matter of primary importance are treated with such contempt? And in what position does it leave the Chairman? I have come to the conclusion that I can no

longer justify to myself being the organizer of and spokesperson for a Committee whose work is held in such disregard by the body to which it is responsible.

The IWC was presented with a management procedure unanimously recommended by its scientists that assured the achievement of conservation goals while permitting the possibility of a limited harvest of selected abundant stocks. Instead of following the recommendations of the Scientific Committee, the IWC was swayed by the political views of some of its members, which oppose any and all whaling regardless of sustainable development principles.

Thus, scientific principles are once again under attack in the IWC, but this time in the name of politics. The pendulum has swung from disregard of science for the purpose of over harvest to disregard of science for the purpose of no harvest. Neither extreme is justifiable either under the terms of the Convention or under sound principles of international environmental conservation efforts.

The United States, in its public statements before and during the 1993 IWC meeting in Kyoto, appeared prepared to abandon science as the guiding principle in international conservation activities. Such a policy has deeply disturbing implications, not only for the IWC, but for a multitude of international environmental efforts in which the United States is involved.

In its policy statement provided to the Norwegian Embassy before the Kyoto meeting, the United States stated:

The United States has been working in good faith in the IWC in recent years to develop reliable scientific data and a Revised Management Scheme which could serve as a basis for a decision on whether to lift the moratorium on commercial whaling.

Since that process is nearing completion and scientific analysis now shows that some populations of minke whales are likely to be able to sustain a limited harvest, it was time to review U.S. policy.

As evidenced by the unanimous vote in the House for a resolution to ban commercial whaling, there is presently no support in the U.S. Congress or among the American public for commercial whaling....

In making this decision (to oppose resumption of commercial whaling), the United States is not

challenging the IWC's scientific assessments upon which a resumption of commercial whaling might be based.

If every nation adopts the "perceived" public opinion of its populace as the basis for its international conservation decisions, mutual recrimination is the only likely result. The concept and implementation of international conservation programs is simply unworkable without adherence to scientific principles, since nations will always differ in the social and cultural perspectives which they bring to international environmental issues. Equally important is the necessity for a small coastal nation to be able to utilize its marine resources on a scientific and sustainable basis.

The United States has apparently recognized this in its treatment of other American cultures. For example, the United States has continued to support the hunting of the endangered bowhead whale by its Alaskan natives. At the same time, American public opinion has not been inflamed by these whaling activities. Though our situations are not identical, as the minke whale is abundant, at heart they both relate to the economic needs and cultural values of a traditional and isolated population dependent on the sustainable use of marine resources.

Maintenance of an objective standard of sustainable development, uncolored by cultural biases, is the only basis on which international agreement can be achieved. To abandon it in the context of whale conservation is to put every other international environmental effort at risk. Thus, it is not Norway's decision to resume scientifically supported limited whaling which diminishes the effectiveness of conservation programs, but rather the temptation for nations to make decisions based on domestic public opinion, rather than sound science.

C. Norway's Decision to Resume Limited Traditional Coastal Whaling is in Full Compliance with International Law.

Article V of the International Convention for the Regulation of Whaling expressly permits a member nation to file an official objection to a specific IWC decision. The filing of such an objection makes the IWC decision inapplicable to the objecting nation. Norway has presented two such formal objections to the IWC, one with regard to the commercial whaling moratorium and one with regard to the 1985 classification of the Northeast Atlantic minke whale as a protected stock. Thus, Norway has not violated any terms of the Convention and is in full compliance with its obligations under international law.

Furthermore, resuming limited harvest of minke whales is in full conformity with both the spirit and content of the UNCED declarations. In Rio de Janeiro, the 1992 UNCED endorsed the

principle of sustainable management and use of marine living resources, including marine mammals, on a scientific basis. The United States has recently created a Council on Sustainable Development to formulate a strategy for the implementation of this concept. Norway has supported and indeed led international efforts on these issues and continues to do so.

IV. Conclusion

In making its decision regarding possible imposition of trade sanctions against Norway, the United States should consider carefully the precedent it will set with regard to international environmental and trade issues. The achievement of environmental goals on a worldwide basis requires mutual respect for cultural differences and rational decision-making based on the best scientific evidence achievable. There is no other basis on which consensus and commitment can be obtained among nations with populations which hold diverse views on many social, cultural and political issues.

Consensus and cooperation cannot be achieved through coercion based on the politics of the moment. Rather, each nation must use objective and mutually agreed upon conservation standards to make the judgments and endure the sacrifices which are sometimes necessary to protect our global habitat. Similarly, in our increasingly interdependent world, the health of the global economy requires adherence to the mutually agreed upon rules governing trade among nations.

Norway urges the United States to consider the compelling reasons to avoid imposition of trade sanctions and to refrain from taking this egregious and unprecedented action.