

UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigation No. 731-TA-768 (Final)

FRESH ATLANTIC SALMON FROM CHILE

DETERMINATION

On the basis of the record¹ developed in the subject investigation, the United States International Trade Commission determines,² pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)) (the Act), that an industry in the United States is materially injured or threatened with material injury³ by reason of imports from Chile of fresh Atlantic salmon,⁴ provided for in subheadings 0302.12.00 and 0304.10.40 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

BACKGROUND

The Commission instituted this investigation effective June 12, 1997, following receipt of a petition filed with the Commission and the Department of Commerce by the Coalition for Fair Atlantic Salmon Trade.⁵ The final phase of the investigation was scheduled by the Commission

¹ The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

² Commissioner Carol T. Crawford dissenting.

³ Chairman Lynn M. Bragg determines that an industry in the United States is threatened with material injury by reason of the subject imports from Chile. Chairman Bragg further determines, pursuant to 19 U.S.C. § 1673d(b)(4)(B), that she would not have found material injury but for the suspension of liquidation of entries of the merchandise under investigation. Vice Chairman Marcia E. Miller determines that an industry in the United States is materially injured by reason of the subject imports from Chile.

⁴ For purposes of this investigation, Commerce has defined the subject merchandise as fresh, farmed Atlantic salmon, whether "dressed" or cut. Atlantic salmon is the species *Salmo salar*, in the genus *Salmo* of the family Salmoninae. "Dressed" Atlantic salmon refers to salmon that has been bled, gutted, and cleaned. It may be imported with the head on or off, with the tail on or off, and with the gills in or out. All cuts of fresh Atlantic salmon are included in the scope of the investigations. Examples of cuts include, but are not limited to: crosswise cuts (steaks), lengthwise cuts (fillets), lengthwise cuts attached by skin (butterfly cuts), combinations of crosswise and lengthwise cuts (combination packages), and Atlantic salmon that is minced, shredded, or ground. Cuts may be subjected to various degrees of trimming, and imported with the skin on or off and with the "pin bones" in or out.

Excluded from the scope are (1) fresh Atlantic salmon that is "not farmed" (*i.e.*, wild Atlantic salmon); (2) live Atlantic salmon; and (3) Atlantic salmon that has been subject to further processing, such as frozen, canned, dried, and smoked Atlantic salmon, or processed into forms such as sausages, hot dogs, and burgers.

⁵ The individual members of FAST on whose behalf the petition was filed are as follows: Atlantic Salmon of Maine (Fairfield, ME); Cooke Aquaculture US, Inc. (Calais, ME); DE Salmon, Inc. (Calais, ME); Global Aqua USA, LLC (Seattle, WA); Island Aquaculture Corp. (Swans' Island, ME); Maine Coast Nordic, Inc. (Calais, ME); Scan Am Fish Farms (Anacortes, WA); and Treats Island Fisheries (Lubec, ME). On Mar. 9, 1998, the petition was amended to include as an additional petitioner Trumpet Island Salmon Farm, Inc. (Mount Desert, ME).

following notification of a preliminary determination by the Department of Commerce that imports of fresh Atlantic salmon from Chile were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. § 1673b(b)). Notice of the scheduling of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of February 5, 1998 (63 *F.R.* 5965). The hearing was held in Washington, DC, on June 3, 1998, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on July 22, 1998. The views of the Commission are contained in USITC Publication 3116 (July 1998), entitled "Fresh Atlantic Salmon from Chile: Investigation No. 731-TA-768 (Final)."

By order of the Commission.

Donna R. Koehnke
Secretary

Issued:

VIEWS OF THE COMMISSION

Based on the record in this antidumping duty investigation, we find that an industry in the United States is materially injured or threatened with material injury by reason of imports of fresh Atlantic salmon from Chile that have been found by the Department of Commerce (“Commerce”) to be sold at less than fair value (“LTFV”).^{1 2}

I. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. Domestic Like Product

To determine whether an industry in the United States is materially injured or threatened with material injury by reason of the subject imports, the Commission first defines the “domestic like product” and the “industry.” Section 771(4)(A) of the Tariff Act of 1930, as amended (“the Act”), defines the relevant industry as the “producers as a {w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product.”³ In turn, the Act defines “domestic like product” as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation.”⁴

Our decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and we apply the statutory standard of “like” or “most similar in characteristics and uses” on a case-by-case basis.⁵ No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation.⁶ The Commission looks for clear dividing lines among possible like products, and

¹ Chairman Bragg determines that an industry in the United States is threatened with material injury by reason of the subject imports from Chile. *See* Views of Chairman Lynn M. Bragg. She joins in section I of the joint opinion. Vice Chairman Miller determines that an industry in the United States is materially injured by the subject imports from Chile. *See* Views of Vice Chairman Marcia E. Miller. She joins in sections I and II of the joint opinion. Commissioner Crawford determines that an industry in the United States is neither materially injured nor threatened with material injury by reason of the subject imports from Chile. *See* Dissenting Views of Commissioner Carol T. Crawford. Commissioner Crawford joins the sections of the joint opinion relating to the domestic like product, related parties, period of investigation and conditions of competition (sections IA-C & I.E and II of the joint opinion), except as noted below.

² Material retardation of the establishment of an industry is not an issue in this investigation.

³ 19 U.S.C. § 1677(4)(A).

⁴ 19 U.S.C. § 1677(10).

⁵ *See, e.g., Nippon Steel Corp. v. United States*, 19 CIT ___, Slip Op. 95-57 at 11 (Apr. 3, 1995). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) common manufacturing facilities, production processes and production employees; (5) customer and producer perceptions; and, where appropriate, (6) price. *See id.* at 11 n.4; *Timken Co. v. United States*, 913 F. Supp. 580, 584 (Ct. Int'l Trade 1996).

⁶ *See, e.g., S. Rep. No. 96-249*, at 90-91 (1979).

disregards minor variations.⁷ Although the Commission must accept the determination of Commerce as to the scope of the imported merchandise being sold at LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified.⁸

B. Product Description

Commerce has defined the imported merchandise within the scope of this investigation as being “fresh Atlantic salmon” (hereinafter “salmon”). The products covered by the scope are:

fresh, farmed Atlantic salmon, whether imported “dressed” or cut. Atlantic salmon is the species *Salmo salar*, in the genus *Salmo* of the family salmoninae. “Dressed” Atlantic salmon refers to salmon that has been bled, gutted, and cleaned. Dressed Atlantic salmon may be imported with the head on or off; with the tail on or off; and with the gills in or out. All cuts of fresh Atlantic salmon are included in the scope of the investigation. Examples of cuts include, but are not limited to: crosswise cuts (steaks), lengthwise cuts (fillets), lengthwise cuts attached by skin (butterfly cuts), combinations of crosswise and lengthwise cuts (combination packages), and Atlantic salmon that is minced, shredded, or ground. Cuts may be subjected to various degrees of trimming, and imported with the skin on or off and with the “pin bones” in or out.^{9 10}

Fresh Atlantic salmon, whether sold as whole, dressed fish or in cut form as fillets, steaks, or other forms, is intended for human consumption as a food product.¹¹ Fresh Atlantic salmon is produced in an aquaculture farming process and is generally sold by domestic salmon farmers and

⁷ Torrington Co. v. United States, 747 F. Supp. 744, 748-49 (Ct. Int’l Trade 1990), *aff’d*, 938 F.2d 1278 (Fed. Cir. 1991).

⁸ Hosiden Corp. v. Advanced Display Manufacturers, 85 F.3d 1561 (Fed. Cir. 1996) (Commission may find single like product corresponding to several different classes or kinds defined by Commerce); Torrington, 747 F. Supp. at 748-752 (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

⁹ Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon from Chile, 63 Fed. Reg. 31,411 (June 9, 1998) (“DOC Fin. Det.”); Final Negative Countervailing Duty Determination: Fresh Atlantic Salmon from Chile, U.S. Department of Commerce, 63 Fed. Reg. 31,437 (June 9, 1998).

¹⁰ Id. Commerce has specifically excluded from the scope of this investigation four categories of salmon, including fresh Atlantic salmon that is “not farmed” (i.e., wild Atlantic salmon); species of salmon other than Atlantic salmon (i.e., Pacific salmon); live Atlantic salmon and salmon that has been subjected to further processing, such as frozen, canned, dried, and smoked Atlantic salmon; and Atlantic salmon that has been further processed into forms such as sausages, hot dogs, and burgers. None of the parties have argued that any of these categories of salmon should be included within the domestic like product. For the reasons we discussed in our preliminary determination in these investigations, we do not believe that any of these categories of salmon should be included in the domestic like product. Fresh Atlantic Salmon from Chile, Inv. Nos. 701-TA-372 & 731-TA-768 (Preliminary), USITC Pub. No. 3052, at 5-9 (August 1997) (“Pre. Det.”).

¹¹ CR at I-3; PR at I-2.

importers to distributors who resell the salmon to grocery stores, seafood stores and restaurants.¹² A significant number of these distributors will further process whole salmon into salmon cuts for resale to these customers, as needed.¹³ The domestic salmon farmers and importers also sell smaller volumes directly to restaurants and grocery stores.¹⁴ Finally, a small percentage of fresh Atlantic salmon is sold to customers who smoke and salt the fish.¹⁵

C. Whether Whole Salmon and Salmon Cuts Are Part of the Same Domestic Like Product

In this final phase investigation, there is only one significant domestic like product issue: whether whole dressed Atlantic salmon and salmon cuts are part of the same domestic like product. In our preliminary determination, we found that whole dressed salmon and salmon cuts were part of the same domestic like product.¹⁶ Petitioners and respondents disagreed on this issue during the preliminary phase of this investigation¹⁷ but now both agree that whole dressed salmon and salmon cuts comprise a single domestic like product.¹⁸ On the whole, we believe that no new evidence has been placed on the record that would cause us to change our domestic like product finding. For the following reasons, therefore, we find that there is one domestic like product in this investigation, consisting of all fresh Atlantic salmon.

Physical Characteristics and End Uses. While salmon cuts are clearly distinguishable from whole dressed salmon by virtue of the fact that they have been cut into steaks or fillets and may have the head, skin, and bones of the fish removed, salmon cuts and whole salmon share the essential physical characteristic and end use of fresh Atlantic salmon: they are both composed of fresh salmon meat and are destined for human consumption.¹⁹ Moreover, the record shows that the meat contained in both whole salmon and salmon cuts is similar, if not identical, in terms of its texture, color, and taste.²⁰ Thus, although cutting of whole fish into fillets, steaks, and other portions may alter the appearance of the salmon somewhat and affect the use and/or sale of salmon by stores and restaurants, it does not appear that the essential quality of the salmon is altered by the cutting process.²¹

¹² CR at II-1; PR at II-1.

¹³ CR at III-7-9; PR at III-3-5.

¹⁴ CR at II-1; PR at II-1.

¹⁵ CR at II-1; PR at II-1.

¹⁶ Fresh Atlantic Salmon from Chile, Inv. Nos. 701-TA-372 & 731-TA-768 (Preliminary), USITC Pub. No. 3052, at 5-9 (August 1997) (“Pre. Det.”).

¹⁷ Pre Det. at 5-6.

¹⁸ Petitioners’ Prehearing Brief (“PB”) at 2-26; Respondents’ Posthearing Brief (“RPB”) at App. 1, p. 18.

¹⁹ CR at I-2; PR at I-2; PB at 3-19.

²⁰ CR at I-2; PR at I-2; PB at 3-19. In this regard, we note that all fresh Atlantic salmon, whether whole or cut, is a single species. Id.

²¹ In this regard, we note that the act of cutting does not, in all cases, alter significantly the appearance of the salmon. For example, like whole salmon, salmon steaks contain both the bones and skin of the salmon. Similarly, PBI fillets can contain both bones and skin as well.

Interchangeability and Customer or Producer Perceptions. The record indicates that there is at least a moderate level of interchangeability between whole salmon and salmon cuts.²² First, virtually all of the domestic producers and nearly half of responding importers indicated that whole salmon and salmon cuts are used in the same markets.²³ Moreover, a majority of purchasers stated that whole salmon and salmon cuts were sold to the same customers.²⁴ Second, although the majority of importers reported that they had customers who tended to prefer one of the two forms of salmon, a majority of the U.S. producers and five of sixteen importers stated that they had customers who purchased both whole salmon and salmon cuts. In addition, seven of 17 responding purchasers reported that they buy both whole salmon and salmon cuts.²⁵ Finally, respondents have placed on record a survey indicating that significant amounts of both whole salmon and salmon cuts are sold to and used by five major categories of customers.²⁶

While we find that there is at least a moderate level of interchangeability between whole salmon and salmon cuts, we also believe the record evidence suggests that the interchangeability may be somewhat limited by the physical differences between the two products. For example, some customers who appear to place a premium on the availability of a convenient ready-to-sell or prepared product apparently will not find a whole dressed salmon to be an acceptable substitute for salmon fillets or steaks.²⁷ As a result, a majority of importers and a significant number of purchasers have reported that whole salmon and salmon cuts are not necessarily sold to the same customers or markets and a majority of importers and purchasers reported that customers purchase primarily either whole salmon or salmon cuts.²⁸ In addition, several grocery chains, restaurants, and other purchasers either submitted letters or testified that they perceive fillets to be an entirely different product from whole dressed Atlantic salmon and would not find them to be interchangeable for their use.²⁹ Despite these facts, we do not believe this evidence offsets the record evidence suggesting that, for a significant number of customer categories, there is a moderate level of interchangeability between the two products.³⁰

²² CR at II-9; PR at II-6.

²³ Ten of 11 domestic producers and 7 of 16 importers stated that the two products were used in the same markets. CR at II-14; PR at II-6.

²⁴ *Id.*

²⁵ CR at II-14-15; PR at II-10.

²⁶ Respondents' Prehearing Brief ("RB") at 4 & App. 1. The survey showed that whole salmon represented 88 percent of salmon purchases made by specialty seafood retailers, 67 percent of salmon purchases made by white table cloth restaurants, 59 percent of salmon purchases made by supermarkets with full service seafood counters, 36 percent of salmon purchases made by supermarkets without full-service seafood counters and 21 percent of salmon purchases made by chain restaurants. *Id.* It also showed that PBO fillets represented 10 percent of salmon purchases made by specialty seafood retailers, 5 percent of salmon purchases made by white table cloth restaurants, 33 percent of salmon purchases made by supermarkets with full service seafood counters, 51 percent of salmon purchases made by supermarkets without full-service seafood counters and 71 percent of salmon purchases made by chain restaurants. *Id.* The remainder of these customers' purchases were of other salmon cuts.

²⁷ See CR at II-14-15; PR at II-10-11.

²⁸ CR at II-14-15; PR at II-10-11.

²⁹ See, e.g., RB at App. 8-10.

³⁰ Complete interchangeability is not a prerequisite for a finding of a single like product. For example, in Aramid Fiber from the Netherlands, supra, the Commission found a single like product although different forms of aramid fiber

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Channels of Distribution. To a great extent, domestically produced whole salmon and salmon cuts are sold in nearly identical channels of distribution. The overwhelming majority of both whole dressed salmon and salmon cuts produced by the domestic producers is sold to regional distributors who then resell the salmon to groceries, fish stores, restaurants, and other end users. The record data indicates that 82 percent of whole dressed salmon was shipped by domestic producers to regional distributors with 16.5 percent being sold to other purchasers and 1.5 percent being sold to retailers.³¹ Similarly, the record data indicate that approximately 97.4 percent of all domestically produced salmon cuts was shipped to regional distributors, with 1.4 percent being sold to other purchasers and 1.2 percent being sold to retailers.³²

Production Facilities, Processes, and Employees. Although salmon cuts are subject to an additional processing step, *i.e.*, the cutting process, the record evidence clearly shows that, to a great extent, both whole salmon and salmon cuts undergo the same production processes and are produced in the same facilities and by the same employees. In this regard, we note that all forms of fresh Atlantic salmon are the product of a single, relatively cost-intensive production process that begins with the fertilization of eggs and culminates in the harvesting of a farmed salmon from the ocean pens in which they are raised.³³ Both forms of salmon are then dressed, which consists of slitting the salmon lengthwise and removing their internal organs.³⁴ The record of this final investigation indicates that this production process accounts for the large majority of the overall cost of whole salmon and salmon cuts.³⁵

Price. The record data shows fairly consistent and significant price differences between whole dressed salmon and salmon fillets. Prices for whole dressed salmon were almost uniformly lower on a per pound basis than the prices of salmon fillets.³⁶ However, we note that most of the price differential between the two products appears to result from the fact that approximately 30 percent of the weight of a whole dressed salmon is lost as waste, *e.g.* head, tail, skin and bones, when the whole dressed fish is converted into fillets.³⁷ When the price levels of both products are converted to a dressed-weight basis, the record evidence indicates that the price levels of domestically produced whole salmon and domestic salmon cuts are nearly identical.³⁸ Moreover, as a general matter, the price trends of whole and cut salmon were relatively similar during the period of investigation.³⁹ Thus, although there are significant price differentials between the two

³⁰ (...continued)

were not interchangeable in specific end uses. *See also* Aramide Maatschappi V.O.F. v. United States, 19 CIT ____, Slip Op. 95-113 (June 1995).

³¹ CR and PR at Figure I-1.

³² CR and PR at Figure I-1.

³³ CR at I-2-5; PR at I-2-4.

³⁴ CR at I-2-5; PR at I-2-4.

³⁵ CR at III-10; PR at III-5.

³⁶ For example, during the period of investigation, the per pound prices of PBO fillets, the highest-value added salmon product, were between 32 and 60 percent higher than the comparable whole salmon product. *Compare* CR and PR at Tables V-1 and V-2 *with* Tables V-3 through V-5.

³⁷ CR and PR at Tables V-1 through V-5.

³⁸ *Compare* CR and PR at Table C-2 *with* Table C-3.

³⁹ CR and PR at Tables V-1 through V-8.

products, we do not believe that this fact by itself suggests that the two products should be considered separate domestic like products.

Conclusion. For the foregoing reasons, we find that there is one domestic like product in this investigation, consisting of all fresh Atlantic salmon, both whole and cut. Because all salmon is available in a variety of sizes and salmon cuts are available in a variety of forms, all salmon can be said to consist of a continuum of products and we find that there is no clear dividing line between the products that would warrant treating them as separate domestic like products.^{40 41}

⁴⁰ See, e.g., Stainless Steel Wire Rod from Germany, Italy, Japan, Korea, Spain, Sweden, and Taiwan, Inv. Nos. 701-TA-373 and 731-TA-769-775 (Preliminary), USITC Pub. 3060, at 5-8 (Sept. 1997).

⁴¹ We have relied primarily on our “traditional” domestic like product analysis for purposes of analyzing this issue. Our domestic like product finding would not change, however, if we were to use a semi-finished products analysis to perform our domestic like product analysis in this investigation. In a vertical like product analysis, the Commission examines: (1) whether the upstream article is dedicated to the production of the downstream article or has independent uses; (2) whether there are perceived to be separate markets for the upstream and downstream articles; (3) differences in the physical characteristics and functions of the upstream and downstream articles; (4) differences in the costs or value of the vertically differentiated articles; and (5) significance and extent of the processes used to transform the upstream into the downstream articles. Cut-to-Length Carbon Steel Plate from China, Russia, South Africa, and Ukraine, Inv. Nos. 731-TA-753-756 (Preliminary), USITC Pub. 3009 (Dec. 1996) at 6 n.25; Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany and Japan, Inv. No. 731-TA- 73 (Final), USITC Pub. 2916 (August 1995) at 6 and n. 23.

In this case, the record indicates that whole salmon is generally dedicated to the production of salmon cuts. Although the large bulk of whole salmon shipments at the producer level are made to distributors and are not used for production of salmon cuts by the U.S. producers, CR and PR at Table III-3, the record also indicates that at some point in the distribution chain, the majority of whole salmon production is used to produce salmon cuts for eventual sale to the end user, the consumer of the salmon. Thus, it can be said that whole dressed salmon is largely dedicated to use in producing salmon cuts. Second, there are not separate markets for whole and cut salmon. The record indicates that the domestic producers sell the vast majority of both their whole salmon and salmon cuts production to regional distributors for ultimate distribution to groceries, restaurants, and seafood stores. CR and PR at Figure I-1. In fact, the large majority of the U.S. producers and a substantial proportion of importers and purchasers believe that whole and cut salmon are sold in the same markets and to the same customers. CR at II-14; PR at II-10. Third, as we discussed above, salmon cuts and whole salmon share the same basic physical trait of being composed of fresh salmon meat intended for human consumption. Accordingly, whole salmon and salmon cuts share similar physical characteristics and functions. Fourth, although the record indicates that the cutting process adds relatively significant value to the whole salmon, the available record evidence in this investigation indicates that there is only a minimal difference in the cost of production of whole and cut salmon. For example, the record evidence suggests that the costs of converting whole salmon into cuts may only equal approximately *** percent of the overall sales value of the salmon cuts. CR at III-10; PR at III-5. In light of this, we believe that it can be said that there is not a significant difference in the cost of whole and cut salmon. Finally, the process for transforming the whole dressed salmon into either fillets or steaks, the principal form of salmon cuts, appears to be somewhat labor-intensive but does not appear to involve significant additional costs. CR at I-2-6; PR at I-3-4. Relatively little technical expertise is required and most processing appears to be performed manually without the use of expensive equipment. CR at I-2-6 & III-7-9; PR at I-3-4 & III-3-4. Accordingly, we believe that the production process necessary to transform whole salmon into salmon cuts is relatively insignificant.

D. Domestic Industry

The Commission is directed to consider the impact of the subject imports on the domestic industry, defined as “the producers as a [w]hole of a domestic like product.”⁴² In defining the domestic industry, the Commission’s general practice has been to include in the industry all of the domestic production of the like product, whether toll produced, captively consumed, or sold in the domestic merchant market.⁴³

When defining the domestic industry in this final investigation, we have considered two issues. First, we have considered whether the domestic industry should include firms whose only related domestic production activities consist of processing whole salmon into salmon cuts. Second, we have also considered whether appropriate circumstances exist to exclude from the domestic industry three domestic producers of fresh Atlantic salmon that are related parties in this investigation. For the reasons we discuss below, we have determined that the domestic industry does not include firms who merely process whole salmon into cuts.⁴⁴ We also find that appropriate circumstances do not exist to exclude any related party from the domestic industry.

⁴² 19 U.S.C. § 1677(4)(A).

⁴³ See United States Steel Group v. United States, 873 F. Supp. 673, 682-83 (Ct. Int’l Trade 1994) *aff’d* 96 F.3d 1352 (Fed. Cir. 1996).

⁴⁴ Commissioner Crawford included processors, toll and non-toll, in the domestic industry. See Dissenting Views of Commissioner Carol T. Crawford.

1. Whether Firms that Merely Process Salmon Engage in Sufficient Production-Related Activities To Be Included in The Domestic Industry

a. In General

In deciding whether a firm qualifies as a domestic producer, the Commission has analyzed the overall nature of a firm's production-related activities in the United States⁴⁵ to determine whether the firm's production-related activities are sufficient to constitute domestic production.⁴⁶ When determining whether a producer has sufficient production activities to qualify as a member of the industry, the Commission generally considers six factors:

- (1) the source and extent of the firm's capital investment;
- (2) the technical expertise involved in U.S. production activities;
- (3) the value added to the product in the United States;
- (4) employment levels;
- (5) the quantity and type of parts sourced in the United States; and
- (6) any other costs and activities in the United States directly leading to production of the like product.⁴⁷

No single factor is determinative and the Commission may consider any other factors it deems relevant in light of the specific facts of any investigation.⁴⁸

b. Arguments of the Parties and Analysis

In this investigation, the twelve firms who produce whole salmon clearly have sufficient production-related activities in the United States to qualify as domestic producers of fresh salmon.⁴⁹ These firms are salmon farmers whose primary production-related activity involves

⁴⁵ See, e.g., Cut-to-Length Carbon Steel Plate from China, Russia, South Africa, and Ukraine, Inv. Nos. 731-TA-753-756 (Preliminary), USITC Pub. 3009 (Dec. 1996) at 7-8; Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany and Japan, Inv. No. 731-TA- 73 (Final), USITC Pub. 2916 (August 1995).

⁴⁶ Ferrovandium and Nitrided Vanadium from Russia, Inv. No. 731-TA-702 (Final), USITC Pub. 2904 (June 1995) at I-8.

⁴⁷ See, e.g., Static Random Access Memory Semiconductors from the Republic of Korea and Taiwan, Inv. Nos. 731-TA-761-763 (Final), USITC Pub. 3098, at 9, n. 59 (Apr. 1998); Cut-to-Length Carbon Steel Plate from China, Russia, South Africa, and Ukraine, Inv. Nos. 731-TA-753-756 (Preliminary), USITC Pub. 3009 (Dec. 1996) at 6 n.25; Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany and Japan, Inv. No. 731-TA- 736-737 (Final), USITC Pub. 2916 (August 1995) at 6 and n. 23.

⁴⁸ Silicon Carbide from the People's Republic of China, Inv. No. 731-TA-651 (Final), USITC Pub. 2779 (June 1994) at I-11 n.49.

⁴⁹ CR at III-1-III-6; PR at III-1-3. No party has argued that these twelve producers do not engage in sufficient production-related activities to be considered domestic producers. The issue of whether certain of these firms that are
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raising whole salmon for slaughter, and then bleeding, gutting and cleaning the salmon to produce the “dressed, head-on” salmon.⁵⁰ A number of these salmon farmers also produce cuts of salmon, either through in-house facilities or through toll-production facilities, prior to selling the salmon meat.⁵¹

The record also indicates that a large number of processing firms purchase salmon in the dressed, head-on form, and in turn produce salmon cuts, consisting of steaks, fillets and other types of cuts.⁵² These processing firms then resell these salmon cuts to supermarkets and chain restaurants.⁵³ One salmon farmer has estimated that there are 100 such processors in Maine alone.⁵⁴ Only an extremely limited amount of data is available, however, with respect to the operations of these firms. Although Commission staff sent questionnaires to 44 firms that respondents indicated were the largest salmon processors in the United States, only nine firms responded, including several that did not produce salmon cuts.⁵⁵

In this final phase investigation, petitioners argue that the Commission should exclude processors from the domestic industry.⁵⁶ Respondents initially contended in their prehearing brief that the Commission should include all domestic salmon processors in the domestic industry.⁵⁷ Respondents dropped this argument in their posthearing brief, however,⁵⁸ asserting that salmon processors appear not to be dedicated processors but are distributors that may, on occasion, cut salmon to service their customers’ needs. Respondents also noted that processing firms handle many types of fish and that salmon is not the sole focus of their operations. Accordingly, respondents argued that the Commission should generally exclude these firms from the industry.⁵⁹

We agree that the domestic industry does not include any firms who process whole salmon into salmon cuts. Although there is only a limited amount of data available on the operations of these firms, the record shows that most processors generally make only a minimal investment in their cutting facilities, that the cutting process involves only a minimal level of expertise and that the processors’ cutting facilities are not dedicated solely to salmon processing.⁶⁰ While some firms have invested significant capital in automated cutting machinery and refrigeration equipment

⁴⁹ (...continued)

related parties should be excluded from the industry is discussed below.

⁵⁰ CR at III-1-III-6; PR at III-1-3.

⁵¹ CR at I-2-6 & III-1-6; PR at I-3-4 & III-1-3.

⁵² CR at III-7-10; PR at III-3-5.

⁵³ CR at III-7-10; PR at III-3-5.

⁵⁴ CR at III-7-10; PR at III-3-5.

⁵⁵ CR at III-7-8; PR at III-4.

⁵⁶ PB at 26-31.

⁵⁷ RB at 36-37.

⁵⁸ RPB at App. 1, p. 18-19.

⁵⁹ RPB at App. 1, pp. 18-19. Respondents added that the Commission should include within the industry a small number of large processors and toll processors. *Id.* They noted that this issue had little practical impact on the Commission’s analysis, however. *Id.*

⁶⁰ CR at III-9-10; PR at III-4-5.

for their processing operations,⁶¹ most processors are small, family-run businesses that use nothing more than knives and cutting tables to process salmon.⁶² Moreover, even for those firms that do make significant investments in specialized cutting machinery, the cost of that machinery appears to be relatively insignificant when compared with the capital investment made by salmon farmers in their overall salmon farming operations, which can be in the range of \$12 million to \$20 million.⁶³

Second, although the processing of whole salmon into salmon cuts appears to add somewhat significant value to the whole salmon,⁶⁴ there are relatively minimal costs involved in the cutting process. As indicated above, the available data suggest that, for most firms, the cutting process is simply a matter of cutting and filleting the salmon by hand with a knife and pliers.⁶⁵ Indeed, available data show that the costs of the cutting process may equal approximately 38 cents per pound, or only 9 percent of the price of salmon fillets.⁶⁶ Third, salmon-related employment levels for individual processors appear to be relatively low when compared with the employment levels of salmon farmers. The limited data available suggest that processors are generally small businesses that employ between one and twenty employees while salmon farmers operations employed, on average, approximately *** workers in 1997.⁶⁷ Moreover, because (unlike salmon farmers) most processors process many kinds of fish,⁶⁸ the employment levels directly attributable to salmon production alone would appear to be even lower as a general matter than those of salmon farmers. Fourth, the available evidence suggests that processors source significant volumes of whole salmon from both domestic and import sources, including the subject imports. Thus, most processors are simply distributors who also provide a cutting service to their customers as needed.⁶⁹ Finally, because most processors to whom questionnaires were sent did not provide responses to the Commission, we believe that this is a further indication that they should not be considered part of the industry.⁷⁰

⁶¹ The record indicates that cutting and filleting machinery can cost more than *** for a processor. CR at III-9; PR at III-5. Other information in the record indicates that the more sophisticated processors can invest up to \$500,000 in their cutting and refrigeration equipment for salmon and other fish products. See, e.g. Letter to the Commission from Bragi Henningson on behalf of North Landing Corp., dated June 27, 1997.

⁶² CR at III-9; PR at III-4.

⁶³ Transcript of Staff Conference at 9, 19.

⁶⁴ See, e.g., CR and PR at Tables V-1 through V-5.

⁶⁵ CR at I-5-6 & III-9-10; PR at I-4 & III-4-5.

⁶⁶ CR at III-10; PR at III-5.

⁶⁷ CR at III-9 & Table III-4; PR at III-5 & Table III-4.

⁶⁸ CR at III-9; PR at III-5.

⁶⁹ In this regard, we note that the services provided by these firms appear somewhat analogous to the cutting/processing services provided by steel service centers to their customers. In at least one recent case, the Commission has included steel service centers in the domestic industry. E.g., Certain Carbon Steel Plate from China, Russia, South Africa and the Ukraine, Inv. Nos. 731-TA-753-756, USITC Pub. 3076, at 11 (Dec. 1997). In that case, however, the Commission found that there was a substantial level of investment made in their cutting operations by the steel service centers (on the order of \$15 million to \$18 million) and a relative level of technical expertise involved in the cutting process. Id. In addition, the Commission found it important that the service centers were transforming the products from products outside the scope into products like those within the scope. Id.

⁷⁰ This is an indication that the processors may not be particularly interested in the outcome of this proceeding.

Accordingly, we determine that the domestic industry does not include any firms who simply process whole salmon into salmon cuts, whether performed on a toll or non-toll basis.^{71 72}

2. Related Parties

The statute allows the Commission to exclude certain domestic producers⁷³ from the domestic industry for the purposes of an injury determination, if appropriate circumstances exist.⁷⁴ Exclusion of such a producer is within the Commission's discretion based upon the facts presented in each case.⁷⁵

In this case, three domestic producers of salmon are related parties: Connors Aquaculture ("Connors"), Stolt Sea Farm Maine ("Stolt"), and Maine Aqua Foods ("Maine Aqua"). Connors is a related party by virtue of the fact that it is ***.⁷⁶ Stolt is a related party because it imported the subject merchandise during the period of investigation.⁷⁷ Maine Aqua is a related party because it is ***.⁷⁸ Accordingly, we must determine whether appropriate circumstances exist to exclude these producers from the domestic industry.

In our preliminary determination, we found that appropriate circumstances did not exist to exclude any of the three related parties from the domestic industry.⁷⁹ In this final phase investigation, petitioners state that they are not challenging the Commission's preliminary decision

⁷¹ In this regard, we note that the Commission generally includes toll-producers within the domestic industry producing the like product. *E.g.*, Aramid Fiber from the Netherlands, Inv. No. 731-TA-652 (Final), USITC Pub. 2783 at I-8-I-9 & n.34 (June 1994); Drams of One Megabit and Above from the Republic of Korea, Inv. No. 731-TA-556 (Final), USITC Pub. 2629 at 13-16, 41 (May 1993). However, where the issue has arisen, the Commission has excluded toll-producers where they did not engage in sufficient production related activities. *E.g.*, Cut-to-Length Plate, USITC Pub. 3009 at 8-9 n.8 (majority did not include toll producers in the industry); Ferrovanadium and Nitrided Vanadium from Russia, Inv. No. 731-TA-702 (Final), USITC Pub. 2904 (June, 1995) at I-10. In this case, the activities engaged in by toll processors appears to involve similar levels of production-related activity as non-toll producers. Accordingly, we have chosen to exclude both toll and non-toll processors from the industry.

⁷² We note that statute provides that, in cases involving processed agricultural products, the Commission may include growers of a raw agricultural input within the domestic industry producing an agricultural product processed from the raw product if certain conditions are met. 19 U.S.C. §1677(4)(E)(I). This provision does not apply where the Commission finds that the raw and processed agricultural products are not part of the same domestic like product.

⁷³ A domestic producer may be excluded from the domestic industry if it is either related to the exporters or importers of the subject merchandise, or is itself an importer of the subject merchandise. Parties are considered to be related if one party directly or indirectly controls another party, or if both are controlled by a third party. Direct or indirect control exists when "the party is legally or operationally in a position to exercise restraint or direction over the other party." 19 U.S.C. § 1677(4)(B).

⁷⁴ 19 U.S.C. § 1677(4)(B).

⁷⁵ See Torrington Co. v. United States, 790 F. Supp. at 1168; Sandvik AB v. United States, 721 F. Supp. 1322, 1331-32 (Ct. Int'l Trade 1989) *aff'd without opinion*, 904 F.2d 46 (Fed. Cir. 1990); Empire Plow Co. v. United States, 675 F. Supp. 1348, 1352 (Ct. Int'l Trade 1987).

⁷⁶ CR at III-3; PR at III-2.

⁷⁷ CR at III-6; PR at III-3.

⁷⁸ CR at III-5; PR at III-2-3.

⁷⁹ Pre. Det. at 11.

with respect to the inclusion of related parties in the domestic industry.⁸⁰ Respondents contend that the Commission should include these companies in the domestic industry because excluding them from the industry would be highly distortive.⁸¹

On the whole, we determine that appropriate circumstances do not exist to exclude any of the three related parties from the domestic industry. Although all of the related producers or their affiliates were involved in significant import activities during the period of investigation⁸² and were generally operating at higher profitability levels than the majority of other domestic producers,⁸³ we note that these firms are three of the largest individual producers in the industry and, in the aggregate, account for a substantial portion of domestic production.⁸⁴ Given the significance of their production levels and their status as three of the largest domestic producers, we believe that excluding these firms from the industry would not be appropriate in this investigation.

II. CONDITIONS OF COMPETITION AND PERIOD OF INVESTIGATION⁸⁵

In the final phase of an antidumping duty investigation, the Commission determines whether an industry in the United States is materially injured by reason of the dumped imports under investigation.⁸⁶ In making this determination, the Commission must consider the volume of subject imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations.⁸⁷ The statute defines “material injury” as “harm which is not inconsequential, immaterial, or unimportant.”⁸⁸

⁸⁰ Petitioners’ Posthearing Brief (“PPB”) at Ex. 1, p. 29-30.

⁸¹ RB at 34-36.

⁸² Connors did not itself import subject merchandise during the period of investigation but its related importer Heritage imported more than *** pounds of subject salmon from Chile in 1997, an amount *** the size of Connors’ domestic production during that same year. CR and PR at Table IV-1. Stolt acted as the importer of record for significant volumes of the subject merchandise from Chile, with its import volumes being nearly *** the size of its domestic production volumes in 1997. Stolt’s imports accounted for *** percent of all subject imports in 1997. *Id.* Like Connors, Maine Aqua did not itself import subject merchandise during the period of investigation, but its related companies imported *** pounds of subject merchandise in 1997, an amount *** times the size of Maine Aqua’s domestic production during that same year. *Id.*

⁸³ CR and PR at Table VI-4.

⁸⁴ Connors was the *** largest producer in terms of shipments and accounted for nearly *** percent of total domestic production of dressed Atlantic salmon in 1997. CR and PR at Tables IV-4 & VI-4. Stolt accounted for approximately *** percent of U.S. production of salmon in 1997 and shipped the *** largest volume of domestic shipments in 1997. *Id.* Maine Aqua accounted for *** percent of domestic industry production, making it a significant domestic producer. Moreover, Maine Aqua was responsible for the *** highest level of domestic shipments in 1997. *Id.*

⁸⁵ Commissioner Bragg joins the introductory discussion in this section but does not join subsections II.A and II.B of this section of the joint opinion. *See* Views of Chairman Lynn M. Bragg.

⁸⁶ 19 U.S.C. § 1673d(b).

⁸⁷ 19 U.S.C. § 1677(7)(B)(i). The Commission “may consider such other economic factors as are relevant to the determination,” but shall “identify each [such] factor . . . and explain in full its relevance to the determination.” 19 U.S.C. § 1677(7)(B).

⁸⁸ 19 U.S.C. §1677(7)(A).

In assessing whether there is a reasonable indication that the domestic industry is materially injured by reason of allegedly LTFV imports, we consider all relevant economic factors that bear on the state of the industry in the United States.⁸⁹ These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”^{90 91}

A. Period of Investigation

As an initial matter, we note that we have considered data for the period from 1994 through 1997 in this investigation. Although the Commission usually examines data for a three-year period in these investigations, we have the discretion to determine the appropriate period of investigation.⁹² The Commission has examined longer time periods in other investigations where it found that an examination of the longer time period would better allow it to understand the conditions in the market, the cyclical nature of an industry, or generally provide it with a broader perspective of the market.⁹³ In this final investigation, we believe that use of the four-year period of investigation has allowed us to obtain a more precise understanding of the growth in demand in the salmon market and the manner in which subject imports are competing within the market. We note, however, that we considered data for the latter part of the period of investigation to be the most probative of the condition of the industry and the impact of subject imports on that industry.

B. Conditions of Competition and the Business Cycle

Several conditions of competition are pertinent to our analysis of the domestic industry producing salmon.⁹⁴ First, overall demand in the U.S. market for salmon has increased rapidly and consistently throughout the period of investigation.⁹⁵ In 1997, the final year of the period of investigation, apparent consumption of all salmon was more than double apparent consumption in

⁸⁹ 19 U.S.C. § 1677(7)(C)(iii).

⁹⁰ *Id.*

⁹¹ 19 U.S.C. § 1673d(b). The statute defines “material injury” as “harm which is not inconsequential, immaterial, or unimportant.” 19 U.S.C. § 1677(7)(A).

⁹² *Wieland Werke, AG v. United States*, 718 F. Supp. 50, 55 (Ct. Int'l Trade 1989).

⁹³ *See, e.g., Large Newspaper Printing Presses from Germany and Japan*, Inv. Nos. 731-TA-736 & 737, USITC Pub. 2988, at 14 (Aug. 1988).

⁹⁴ Because the domestic industry captively produces salmon cuts from whole salmon, we have also considered whether to apply the statutory captive production provision for purposes of these determinations. 19 U.S.C. § 1677(7)(C)(iv). The SAA expressly states, however, that the captive production provision does not apply where the captively consumed product is used to produce a downstream product that is within the same domestic like product definition. H. Doc. No. 103-316 at 853 (1994). Accordingly, we find that the captive production provision is not applicable in this investigation.

⁹⁵ CR and PR at Table IV-3.

1994 and nearly two-thirds larger than apparent consumption in 1995.⁹⁶ The overall growth in demand for salmon has been reflected in significant growth in demand for both the whole and cut forms of salmon,⁹⁷ although growth in demand for salmon cuts has been significantly larger than the growth in demand for whole salmon.⁹⁸ The significant growth in demand has been the result of several factors, including consumers' increased desire to eat healthier foods, increased promotion of seafood in general and salmon in particular, and the increased availability of a steady supply of low-priced farm-raised salmon, especially salmon cuts.⁹⁹ The rapid growth in apparent consumption of salmon cuts and the slower growth in whole salmon consumption suggests as well that demand has been shifting on a relative level toward salmon cuts during the period of investigation.¹⁰⁰

Second, supply in the market is affected by the three-year growth/production cycle for salmon. It takes three years for farmed salmon to reach a size that may be sold in the market. Accordingly, production decisions must be made between four to five years in advance of the date of sale. Given the length of the production cycle, the ability of salmon producers to increase production levels rapidly to satisfy demand is constrained.¹⁰¹

Third, salmon is a perishable food product with a very short shelf-life¹⁰² and distributors and retailers therefore have a limited period of time within which to sell the product.¹⁰³ Accordingly, the perishability of the product creates an incentive to sell the product at reduced prices to avoid losses resulting from spoilage of the salmon.

Fourth, during the period of investigation, the large majority of domestic shipments have been made as whole salmon¹⁰⁴ while sales of the subject imports have been increasingly concentrated in cuts of salmon.¹⁰⁵ Although the bulk of domestic production and shipments have been of whole salmon, the domestic producers have been shipping higher volumes of cuts during each year of the period of investigation.¹⁰⁶ The domestic merchandise and the subject imports are sold in similar channels of distribution, however. The overwhelming majority of both whole dressed salmon and salmon cuts produced by the domestic producers are sold to regional

⁹⁶ CR and PR at Table IV-3. Apparent consumption of whole and cut salmon increased from *** pounds in 1994 to *** pounds in 1995 to *** pounds in 1996 to *** pounds in 1997.

⁹⁷ CR and PR at II-6 and Table IV-3.

⁹⁸ Apparent consumption of whole salmon increased by 50.7 percent from 1994 to 1997 while apparent consumption of salmon cuts increased by 356.1 percent during the same period. Apparent consumption of whole salmon increased by 22 percent from 1995 to 1997 while apparent consumption of salmon cuts increased by 219 percent during the same period. CR and PR at Table IV-3.

⁹⁹ CR at II-6-7; PR at II-4-5.

¹⁰⁰ CR at II-7; PR at II-4-5.

¹⁰¹ CR at II-2; PR at II-2.

¹⁰² CR at II-12; PR at II-8.

¹⁰³ CR at II-12; PR at II-8.

¹⁰⁴ Whole salmon accounted for between 91 and 92 percent of all domestic shipments in 1994, 1995 and 1996 and 87 percent of domestic shipments in 1997. CR and PR at Table III-3.

¹⁰⁵ Cuts of salmon accounted for 32 percent of total subject Chilean imports of salmon in 1994, 35 percent in 1995, 46 percent in 1996 and 71 percent in 1997. CR and PR at Table IV-3.

¹⁰⁶ Domestic shipments of salmon cuts have increased from *** pounds in 1994 to *** pounds in 1995 to *** pounds in 1996 to *** pounds in 1997. CR and PR at Table IV-3.

distributors who then resell the salmon to groceries, fish stores, restaurants, and other end users.¹⁰⁷

Fifth, the market is characterized by the presence of significant volumes of non-subject merchandise, both from Chile and non-subject countries.¹⁰⁸ The large majority of salmon imports from non-subject countries were imported from Canada during the period of investigation.¹⁰⁹

Finally, during the period of investigation, the domestic industry has been in the process of consolidation. During the period of investigation, four domestic producers of salmon left the salmon business entirely while nine companies were purchased by other salmon producers.¹¹⁰

¹⁰⁷ CR and PR at Figure I-1.

¹⁰⁸ The market share of non-subject imports from Chile ranged between *** and *** percent during the period of investigation while the market share of imports from non-subject countries ranged between *** and *** percent during the period. CR and PR at Table IV-4.

¹⁰⁹ Respondents' Hearing Exhibits at 4.

¹¹⁰ See PB at 65 & Ex. 5

VIEWS OF CHAIRMAN LYNN M. BRAGG

I join my colleagues in the sections of the joint opinion involving the domestic like product and the domestic industry. For the reasons discussed below, I find that the domestic industry producing fresh Atlantic salmon is threatened with material injury by reason of LTFV imports from Chile.

As a preliminary matter, I note that my determination is based upon the data set that runs from 1995 to 1997. Although the Commission has discretion to determine the appropriate period of investigation,¹¹¹ I see no compelling reason to depart from the standard three year period in this investigation.

I. CONDITIONS OF COMPETITION AND THE BUSINESS CYCLE

I have considered several conditions of competition in my analysis of the domestic industry producing salmon.¹¹² First, overall demand in the U.S. market for salmon has increased rapidly and consistently throughout the period of investigation.¹¹³ In 1997, the final year of the period of investigation, apparent consumption of all salmon was nearly two-thirds larger than apparent consumption in 1995.¹¹⁴ The overall growth in demand for salmon has been reflected in significant growth in demand for both the whole and cut forms of salmon,¹¹⁵ although growth in demand for salmon cuts has been significantly greater than growth in demand for whole salmon.¹¹⁶

Second, supply in the market is affected by the three-year growth/production cycle for salmon. It takes three years for farmed salmon to reach the optimum size for sale in the market. Accordingly, production decisions must be made between four to five years in advance of the date of sale. Given the length of the production cycle, the ability of salmon producers to increase production levels rapidly to satisfy demand is clearly constrained.¹¹⁷

Third, salmon is a perishable food product with a very short shelf-life.¹¹⁸ Because of its short shelf-life, distributors and retailers have a limited period of time within which to sell the product and an incentive to sell any remaining product at reduced prices to avoid losses resulting from spoilage.

¹¹¹ Wieland Werke, AG v. United States, 718 F.Supp. 50, 55 (Ct. Int'l Trade 1989).

¹¹² Because the domestic industry captively produces salmon cuts from whole salmon, I have also considered whether to apply the statutory captive production provision for purposes of these determinations. 19 U.S.C. § 1677(7)(C)(iv). The SAA expressly states, however, that the captive production provision does not apply where the captively consumed product is used to produce a downstream product that is within the same domestic like product definition. H. Doc. No. 103-316 at 853 (1994). Accordingly, I find that the captive production provision does not apply in this investigation.

¹¹³ CR and PR at Table IV-3.

¹¹⁴ CR and PR at Table IV-3. Apparent consumption of whole and cut salmon increased from *** pounds in 1995 to *** pounds in 1996 to *** pounds in 1997.

¹¹⁵ CR and PR at Table IV-3.

¹¹⁶ Apparent consumption of whole salmon increased by 22.1 percent from 1995 to 1997 while apparent consumption of salmon cuts increased by 219.1 percent during the same period. CR and PR at Table IV-3.

¹¹⁷ CR and PR at II-2.

¹¹⁸ CR at II-12; PR at II-8.

Fourth, during the period of investigation, domestic producers sold whole salmon¹¹⁹ almost exclusively while sales of the subject imports increasingly took the form of cuts of salmon.¹²⁰ Nevertheless, domestic producers shipped increasingly large volumes of cuts during each year of the period of investigation.¹²¹ Despite this difference, the domestic merchandise and the subject imports were sold in similar channels of distribution. The overwhelming majority of both whole dressed salmon and salmon cuts produced by the domestic producers were sold to regional distributors who then resold the salmon to groceries, fish stores, restaurants, and other end users.¹²²

Fifth, the market was characterized by the presence of significant volumes of non-subject merchandise, both from Chile and non-subject countries.¹²³ The large majority of salmon imports from non-subject countries were imported from Canada during the period of investigation.¹²⁴

Finally, the domestic industry has been in the process of consolidation in recent years.¹²⁵ During the period of investigation, four domestic producers of salmon exited the industry while nine companies were purchased by other domestic salmon producers, who were then able to capture and benefit from certain economies of scale available in this industry.¹²⁶

I have taken into account all of these marketplace characteristics in determining that the domestic industry is vulnerable to future adverse effects of dumped salmon from Chile.

II. NO MATERIAL INJURY BY REASON OF SUBJECT IMPORTS

A. Volume of Subject Imports¹²⁷

Section 771(7)(C)(I) provides that the “Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to

¹¹⁹ Whole salmon accounted for between 91 and 92 percent of domestic producers’ U.S. shipments in 1995 and 1996 and 87 percent of such shipments in 1997. CR and PR at Table IV-3.

¹²⁰ Cuts of salmon accounted for 35 percent of U.S. shipments of subject merchandise in 1995, 46 percent in 1996 and 71 percent in 1997. CR and PR at Table IV-3.

¹²¹ U.S. producers’ U.S. shipments of salmon cuts increased from *** pounds in 1995 to *** pounds in 1996 to *** pounds in 1997. CR and PR at Table IV-3.

¹²² CR and PR at Figure I-1.

¹²³ The market share of non-subject imports from Chile ranged between *** and *** percent during the period of investigation while the market share of imports from non-subject countries ranged between *** and *** percent during the period. CR and PR at Table VI-4.

¹²⁴ Respondents’ Hearing Exhibits, p.4.

¹²⁵ PB at 65 & Ex. 5.

¹²⁶ PB at 65 & Ex. 5.

¹²⁷ Respondents argued that the Commission should presume that the subject imports produced by firms that were not investigated by Commerce have been fairly traded at the same rates as the imports of the producers that were investigated by Commerce. I decline to do so, and have adhered to the Commission’s consistent practice of viewing all imports subject to Commerce’s “all others” rate as unfairly traded. The Commission has never departed from this practice in any Title VII proceeding and the approach advocated by respondents is inconsistent with the provisions of the statute, which requires the Commission to consider the volume effects of all imports subject to Commerce’s final affirmative dumping determinations. See 19 U.S.C. §1673d(b)(1).

production or consumption in the United States, is significant.”¹²⁸ The quantity and value of the subject imports of all salmon increased during the period of investigation. On a quantity basis, the volume of the subject imports increased consistently from *** pounds in 1995 to *** pounds in 1997,¹²⁹ or by 63.6 percent, while the value of the subject imports increased by 41.4 percent.¹³⁰

The subject imports also increased their market share slightly during the period.¹³¹ By quantity, the subject imports’ market share increased from 30.1 percent in 1995 to 30.8 percent in 1997.¹³² When measured on a value basis, the subject imports showed similar trends.¹³³ While the subject imports lost market share with respect to whole salmon during the last year of the period of investigation,¹³⁴ the subject imports gained substantial amounts of market share in the cut salmon portion of the market which more than offset the decline in the whole salmon portion of the market.¹³⁵

For reasons discussed below in the impact section, I find the volume of subject imports and the increase in the volume of imports not to be sufficient to have had a significant present adverse impact on the industry.

B. Price Effects of Subject Imports

Section 771(7)(C)(ii) provides that, in evaluating the price effects of the subject imports, the Commission shall consider (I) whether there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and (II) whether the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.¹³⁶

I find that there is at least a moderate degree of substitutability between the domestic merchandise and the subject merchandise.¹³⁷ ¹³⁸ This substitutability between all domestic salmon

¹²⁸ 19 U.S.C. § 1677(7)(C)(I).

¹²⁹ On a value basis, the subject imports rose from *** in 1995 to *** in 1997. CR & PR at Table IV-3.

¹³⁰ CR and PR at Table IV-3.

¹³¹ CR and PR at Table IV-4.

¹³² CR and PR at Table IV-4.

¹³³ CR and PR at Tables IV-4.

¹³⁴ By quantity, the market share of subject whole salmon imports increased from 24.4 percent in 1995 to 26.6 percent in 1996 but declined to 14.7 percent in 1997. By value, the market share of subject whole salmon imports increased from 21.3 percent in 1995 to 22.4 percent in 1996 but declined to 12.8 percent in 1997. CR and PR at Table IV-5.

¹³⁵ By quantity, the market share of subject cut salmon imports increased from 54.2 percent in 1995 to 57.8 percent in 1996 but declined slightly to 56.7 percent in 1997. By value, the market share of subject cut salmon imports increased from 45.5 percent in 1995 to 49.3 percent in 1996 but declined slightly to 48.0 percent in 1997. CR and PR at Table IV-6.

¹³⁶ 19 U.S.C. § 1677(7)(C)(ii).

¹³⁷ CR at II-9-II-18; PR at II-6-II-13.

¹³⁸ CR at II-9-II-22; PR at II-6-II-15. For example, although respondents contended that there is only a limited degree of substitutability between whole salmon and salmon cuts because of physical and handling differences, more than half of the domestic producers and a significant number of importers reported that they sell whole and cut salmon to
(continued...)

and all subject merchandise is diminished somewhat by differences in product offerings of the domestic and subject producers as well as by freshness, quality and other purchaser considerations. Despite these factors, the record also indicates that price is an important consideration in the purchasing decision.¹³⁹

¹³⁸ (...continued)

the same customers. CR at II-14. Similarly, the record evidence indicates that specialty and chain restaurants as well as specialty grocery stores and supermarkets all purchase, to some degree, both whole and cut salmon. RB at 4, and Exhibit 1.

¹³⁹ CR and PR at II-9-II-12.

During the period of investigation, U.S. producers' prices for both whole dressed Atlantic salmon and salmon cuts generally declined, as did prices for the subject imports. The weighted average unit prices reported by the domestic producers also showed declines during the period, and subject imports undersold the domestic product in over 90 percent of possible comparisons.¹⁴⁰ The margins of underselling were greatest for subject imports of fresh Atlantic salmon fillets.¹⁴¹ While margins of underselling for fillets averaged 21.5 percent,¹⁴² the average margin of underselling for Chilean whole salmon was 10.0 percent.¹⁴³

In sum, the record evidence in this investigation indicates that the domestic and subject merchandise are moderately substitutable, that price is important in purchasing decisions, that the supply of subject imports increased in the U.S. market, that underselling by the subject imports has been consistent over the period of investigation and that prices for both whole dressed salmon and salmon fillets have declined. Therefore, I find that the subject imports have depressed domestic prices or prevented price increases which otherwise would have occurred, to a significant degree.¹⁴⁴ Furthermore, I find that the downward price and unit value trends and level of underselling, particularly in the growing cuts segment, provide support for the finding that the domestic industry is threatened with material injury by subject imports from Chile. However, for reasons discussed in the impact section below, I do not find that these price declines have yet been sufficient to cause material injury to the domestic industry.

C. Impact of Subject Imports¹⁴⁵

In assessing the impact of the subject imports on the domestic industry, I note that the industry's condition appeared to improve during the period of investigation as evidenced by its production and

¹⁴⁰ CR at V-10-V-22; PR at V-6-V-22. For example, prices for subject Chilean fillets declined from 1995 to December 1997 between 8.1 and 17.2 percent. *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ 19 U.S.C. § 1677(7)(C)(ii).

¹⁴⁵ As part of its consideration of the impact of imports, the statute specifies that the Commission is to consider "the magnitude of the margin of dumping." 19 U.S.C. § 1677(7)(C)(iii)(V). Section 771(35)(C)(ii) defines the "magnitude of the margin of dumping" to be used by the Commission in a final determination as the margin or margins most recently published by Commerce prior to the closing of the administrative record. 19 U.S.C. § 1677(35)(C)(ii). Commerce has announced that it calculated dumping margins ranging from 2.22 percent to 10.69 percent for three of the investigated Chilean producers and an "all others" rate of 4.54 percent. DOC Fin. Det. at 31437. Commerce also found calculated "de minimis" margins for two Chilean producers, Camanchaca and Marine Harvest. In my analysis I do not ordinarily consider the margin of dumping to be of particular significance in evaluating the effects of subject imports on domestic producers. *See* Separate and Dissenting views of Commissioner Lynn M. Bragg in Bicycles from China, Inv. No. 731-TA-731(Final), USITC Pub. 2968 (June 1996).

shipment levels,¹⁴⁶ capacity levels and capacity use,¹⁴⁷ sales revenues,¹⁴⁸ and employment levels.¹⁴⁹ To some degree, these improvements were due to the dramatic increases in demand during the period, and to the fact that a number of the less profitable domestic producers had exited the industry or been purchased by larger domestic producers. In finding that the domestic industry is not yet materially injured, I have placed significant weight on the fact that reduced profitability as an indication of material injury is mitigated by other indicators such as those listed here. However, I also find that the continued presence of dumped imports at these volumes will lead to an imminent reversal in these trends.

Although the industry showed apparent improvement in a variety of trade-related areas, it did not enjoy the full benefit from the increase in demand in the market. For example, although apparent total consumption in the market increased by nearly 60 percent during the period from 1995 to 1997,¹⁵⁰ the domestic industry's shipments increased by only 22.9 percent.¹⁵¹

The domestic industry's failure to capture a larger portion of growing domestic consumption was reflected in the slight decline in its market share during the period of investigation.¹⁵² Moreover, in the rapidly-growing cuts portion of the market, the industry lost much larger relative amounts of market share than it did in the whole salmon portion of the market, suggesting the domestic industry's losses will continue to grow as cuts continue to grow in popularity. At the same time, the subject imports increased their share of the salmon cuts portion of the market, and the volume of subject imports of cuts continued to increase rapidly in the last year of the investigation period.¹⁵³ Because the three year production cycle prevents salmon producers from adjusting immediately to changes in demand, the impact of recent changes in production, marketing, sales, and purchasing patterns on the domestic industry is likely to be fully apparent only in the near future.¹⁵⁴ Thus, I find that once the shift in the market toward cuts and away from whole salmon develops more fully, the domestic industry will experience material injury as subject imports solidify their dominant position in the sale of cuts.

¹⁴⁶ The industry's production of whole salmon increased consistently during the period from 1995 to 1997, from 29.763 million pounds of whole salmon in 1995 to 38.091 million pounds in 1997. CR and PR at Table III-1. The industry's shipment levels of all salmon increased from *** pounds in 1995 to *** pounds in 1997, while the value of their shipments increased from *** in 1995 to *** in 1997. CR and PR at Table III-3.

¹⁴⁷ The industry's whole salmon capacity increased from 44.6 million pounds in 1995 to 53.0 million pounds in 1997. CR and PR at Table III-1. The industry's capacity use rate for whole salmon also increased from 66.7 percent in 1995 to 71.9 percent in 1997. CR and PR at Table III-1.

¹⁴⁸ The industry's net sales revenues increased from \$64.398 million in 1995 to \$76.866 million in 1997. CR and PR at Table VI-1.

¹⁴⁹ The average number of production-related workers employed by the industry increased from 391 in 1995 to 475 in 1997. Total hours worked increased from 663 thousand in 1995 to 792 thousand in 1997. Total wages paid to workers increased from \$8.0 million in 1995 to \$10.2 million in 1997. Total productivity increased from 44.2 pounds per hour in 1995 to 47.4 pounds per hour in 1997. Finally, average unit labor costs were stable during the period, being \$0.27 in 1995 and \$0.27 in 1997. CR at Table III-4.

¹⁵⁰ CR at Table IV-3. Id.

¹⁵¹ Id.

¹⁵² CR and PR at Table IV-4.

¹⁵³ CR and PR at Table IV-6.

¹⁵⁴ Of course, the statute directs the Commission to evaluate relevant economic factors within the context of any business cycle distinctive to the industry. 19 U.S.C. § 1677(7)(C).

In addition, the domestic industry experienced a decline in its average unit sales values during the period from 1995 to 1997, while simultaneously experiencing an increase in its average unit costs.¹⁵⁵ As a result, the industry experienced declines over the period of investigation in its gross profitability, net operating income and net income.¹⁵⁶ Moreover, as the industry experienced declines in profitability levels, a number of the domestic producers have been denied access to capital and have had to postpone capital investments. As a result, in the immediate future these producers will have difficulty both competing in the growing cuts portion of the market and achieving necessary economies of scale.¹⁵⁷

Given the decline in the industry's market share, the significant declines in its profitability levels, and the increasing volume of subject imports, I determine that the domestic industry producing fresh Atlantic salmon, although not yet materially injured by the subject imports, is vulnerable to material injury in the near future by reason of subject imports from Chile.

III. THREAT OF MATERIAL INJURY BY REASON OF SUBJECT IMPORTS FROM CHILE

To determine whether a U.S. industry is threatened with material injury by reason of the subject imports, section 771(7)(F) of the Act directs the Commission to assess whether "further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted."¹⁵⁸ The Commission may not make such a determination "on the basis of mere conjecture or supposition," and considers the threat factors "as a whole in making a determination whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued." In making my determination, I have considered all statutory factors that are relevant to this investigation.¹⁵⁹

For the reasons discussed below, I determine that the domestic industry producing fresh Atlantic salmon is threatened with material injury by reason of LTFV imports from Chile.

¹⁵⁵ The average unit value for the domestic industry's overall net sales declined from \$2.42 per pound in 1995 to \$2.17 per pound in 1997. The industry's average unit cost of goods sold increased from \$1.87 per pound in 1995 to \$1.95 per pound in 1997. CR and PR at Table VI-2.

¹⁵⁶ The industry's gross profits fell from \$14.534 million in 1995 to \$7.738 million in 1997. The ratio of the industry's gross profits to net sales fell from 22.6 percent in 1995 to 10.1 percent in 1997. Similarly, operating income fell from \$10.15 million in 1995 to \$2.225 million in 1997. The ratio of the industry's operating income to net sales fell from 15.8 percent in 1995 to 2.9 percent in 1997. The net income of the industry in 1995 of \$7.038 million became a loss of \$2.456 million in 1997. The ratio of net income to net sales fell from 10.9 percent in 1995 to a loss of 3.2 percent in 1997. CR and PR at Table VI-1.

¹⁵⁷ CR and PR at Appendix G.

¹⁵⁸ 19 U.S.C. § 1673d(b) and 1677(7)(F)(ii).

¹⁵⁹ 19 U.S.C. § 1677(7)(F)(I). Factor I is inapplicable because Commerce made a negative finding in its countervailing duty investigation of fresh Atlantic salmon from Chile. Factor VII regarding raw and processed agriculture products is inapplicable because the Commission included both whole and cut salmon within the same domestic like product. Factor V regarding inventories of the merchandise is inapplicable because producers and importers are unable to maintain substantial inventories of salmon because of salmon's perishability. Further, Chile has not been subject to any antidumping findings or remedies in any WTO member countries. CR and PR at VII-1. See 19 U.S.C. § 1677(7)(F)(iii)(I).

As an initial matter, I find it important to reiterate certain factors that point to the vulnerability of the domestic industry to the threat of material injury by reason of the subject imports. In the future, a growing proportion of domestic demand will likely be comprised of demand for salmon cuts, and more specifically, for PBO fillets. Thus, the future health of this industry will largely be determined by its ability to take advantage of the changing nature of demand and to compete with respect to sales of cuts. This adjustment will be made more difficult by the fact that the overwhelming proportion of future subject imports have been and are likely to continue to be in the form of cuts, the product for which underselling was most severe. Despite additional processing costs, it will continue to be cheaper for Chilean producers to ship cuts, rather than whole fish.¹⁶⁰

Also, the domestic industry's vulnerability to the threat of material injury is underscored by significant declines in its gross profitability, operating income and net income levels during the period from 1995 to 1997.¹⁶¹ Indeed, on a net income basis, the domestic industry has gone from being profitable at the beginning of the period to being unprofitable at the end of the period.¹⁶² Furthermore, the domestic industry's declining profitability has adversely affected its ability to make needed capital investments and other improvements.¹⁶³ While this inability to improve operations has not yet had its full impact on the domestic industry, it will certainly affect the domestic industry in the future as it struggles to compete in a changing marketplace that is increasingly dominated by dumped imports, in particular, subject cuts.

For these reasons, as well as those previously discussed, I find that the domestic industry is particularly vulnerable to the threat of material injury.

Subject Chilean producers of salmon added substantial amounts of capacity during the period from 1995 to 1997¹⁶⁴ and the record also indicates that several subject producers have plans to add even more capacity.¹⁶⁵ In addition, there is evidence that subject producers have potential to shift production from other seafood products to salmon and exports from other markets to the U.S.¹⁶⁶

Although the subject Chilean producers have operated at relatively high capacity utilization rates throughout the period of investigation, they nonetheless have significant unused

¹⁶⁰ CR and at VII-6.

¹⁶¹ CR and PR at Table VI-1.

¹⁶² Id.

¹⁶³ In this investigation twelve domestic producers reported that they had experienced actual negative effects on their existing development and production efforts, growth, investment, and ability to raise capital due to the subject imports. Eleven producers reported that subject imports resulted in the cancellation or rejection of expansion projects. Eight firms reported that they had bank loans rejected and five firms had their credit ratings lowered. CR and PR at Appendix G.

¹⁶⁴ The subject producers increased their capacity from *** pounds in 1995 to *** pounds in 1997, for an increase of nearly 75 percent. CR and PR at Table VII-1.

¹⁶⁵ Certain record evidence indicates that subject producers have plans to make significant capacity increases in the imminent future. PB at 80-82, CR at VII-3, PR at VII-2.

¹⁶⁶ A number of subject firms produce seafood products other than salmon, and *** has reported that it is converting its operations over to 100 percent salmon production. CR at VII-3, PR at VII-2.

capacity available.¹⁶⁷ Indeed, in 1997, their capacity utilization rate for whole salmon (most of which is eventually shipped to the U.S. in the form of cuts)¹⁶⁸ declined by five percentage points from the prior year.¹⁶⁹ In fact, subject producers' unused capacity in 1997 would be sufficient to produce an additional quantity of dumped salmon roughly equivalent to two-thirds of total domestic production in that same year.¹⁷⁰

¹⁶⁷ The subject producers operated at capacity utilization rates of 86.5, 87.8 and 82.6 percent during 1995, 1996, and 1997, respectively. CR and PR at Table VII-1.

¹⁶⁸ CR and PR at Tables VII-1 and VII-2.

¹⁶⁹ The subject producer's capacity utilization rate for whole salmon fell from 87.8 percent in 1996 to 82.6 percent in 1997. CR and PR at Table VII-1.

¹⁷⁰ CR and PR at Table VII-1 and Table III-1.

The Chilean salmon industry is almost entirely export-driven and the U.S. is by far the largest market for subject imports.¹⁷¹ Given the factors listed above, I am satisfied that subject producers will use expanded capacity and/or any increased capacity utilization to substantially increase their exports to the United States.

As noted previously, the volume of subject imports has increased dramatically over the period examined. While the subject imports have maintained a relatively stable market share during the period from 1995 to 1997,¹⁷² this has occurred during a period of rapid increases in consumption. In addition, although the market share of subject imports in the overall domestic salmon market has remained relatively stable, it has increased significantly in the cut salmon portion of the market,¹⁷³ which is the part of the market to which demand appears to be shifting.

Although it is reasonable to expect that increases in shipments of subject imports to the U.S. stemming from capacity that was added during the period of investigation in some part have yet to occur, significant increases in the quantity of subject imports are imminent as a result of this expanded capacity and the fact that subject producers are capable of operating at higher levels of capacity. Further, the volume of Chilean imports declined immediately after suspension of liquidation, but then proceeded to increase to a level higher than at any time during the period examined, demonstrating the ability of subject producers to increase import volumes to still higher levels even in the short term.^{174 175}

All of these factors indicate that subject producers will substantially increase their imports to the United States in the imminent future.

As discussed above, subject imports have depressed domestic prices during the period from 1995 to 1997. There is no indication that this trend is likely to abate; to the contrary, subject producers' unused capacity, capacity increases, and increased shipments to the U.S., as well as the dramatic nature of declining prices for subject imports in the most recent periods of examination indicate that domestic prices are likely to fall even further in the immediate future. Therefore, subject imports will have even more significant price depressing or suppressing effects on domestic prices in the immediate future. Furthermore, unfairly low prices will increase demand for the subject imports, in turn increasing the volume and market share of dumped imports in a manner injurious to the domestic industry.

¹⁷¹ Home market consumption accounts for only about 2 percent of subject Chilean production. The U.S. is by far the largest market for Chilean salmon, accounting for 96.4 percent of shipments of subject cuts and 21.4 percent of shipments of subject whole salmon in 1997. In addition, the majority of subject whole salmon shipments (62.4 percent in 1997) are processed into cuts or other finished products, most of which are shipped to the U.S. With respect to shipments of subject whole salmon, the percentage shipped to the U.S. has fallen, from 44.4 percent in 1995, to 33.2 percent in 1996, to 21.4 percent in 1997, and is projected to decrease to 17.6 percent in 1998. The trend for subject cuts has fluctuated somewhat, with 94.9 percent being shipped to the U.S. in 1995, 92.1 percent going to the U.S. in 1996, and 96.4 percent exported to the U.S. in 1997. Chilean producers project that 83.0 percent of subject cuts will be shipped to the U.S. in 1998. CR and PR at Tables VII-1 and VII-2.

¹⁷² CR and PR at Table IV-3.

¹⁷³ CR and PR at Table IV-6.

¹⁷⁴ Chart entitled "Fresh Atlantic Salmon: Total U.S. imports from Chile, by months, January 1995-April 1998."

¹⁷⁵ Throughout the period 1995 to 1997, subject imports have consistently comprised roughly three-fourths of total Chilean imports. Therefore, although data were not available specifically for subject imports, I find it reasonable to assume that subject imports were responsible for a significant portion of this increase.

As noted above in the material injury discussion, price effects of the subject imports had an adverse impact on the profitability of the domestic industry. These declines in profitability have caused several members of the domestic industry to delay or cancel capital investments in their production facilities, thus making it more difficult for the domestic industry to capture economies of scale or to finance a substantial entry into the market for cuts such as PBO fillets.¹⁷⁶ In fact, the unfair effects of subject imports could not come at a more critical time for the domestic industry. At a time of expanding U.S. consumption of salmon and dramatic increases in consumption of cuts, it is essential to the long-term viability of the domestic industry for U.S. producers to have the resources to compete in a changing marketplace. The weight of record evidence indicates that the domestic industry will be prevented from capitalizing on opportunities that it would otherwise be afforded were it not for the injurious effects of dumped imports in the domestic market. Therefore, it is likely that the subject imports will have adverse effects on the performance and development efforts of the industry.

In sum, the record evidence points to significant and increasing volumes of subject imports in the near future as a result of capacity increases, unused capacity, and the importance of the U.S. market to subject producers. These subject imports will almost certainly be shipped at prices that are well below prices for the domestic like product. These facts, combined with the shift in market demand toward cuts and the domestic industry's inability to make needed capital improvements, strongly indicate that subject imports are threatening the domestic industry with material injury in the imminent future.¹⁷⁷

Finally, I find that, but for the suspension of liquidation in January 1998, I would not have found that the domestic industry is materially injured by reason of the subject imports.

CONCLUSION

For the foregoing reasons, I determine that the domestic industry producing salmon is threatened with material injury by reason of LTFV imports of fresh Atlantic salmon from Chile.

¹⁷⁶ CR and PR at Appendix G.

¹⁷⁷ Aside from the factors discussed, Chairman Bragg finds no indication of any "other demonstrable adverse trends" that indicate that there is likely to be material injury by reason of the subject imports.

VIEWS OF VICE CHAIRMAN MARCIA E. MILLER

As indicated above, I join in the Commission's discussion of the domestic like product, industry, period of investigation and conditions of competition set forth above. Unlike the other members of the Commission, I determine that the domestic industry producing fresh Atlantic salmon is materially injured by reason of the subject imports from Chile. I discuss the reasons for my determination below.

I. MATERIAL INJURY BY REASON OF THE SUBJECT IMPORTS FROM CHILE

In the final phase of an antidumping duty investigation, I am required to determine whether an industry in the United States is materially injured by reason of the dumped imports under investigation.¹⁷⁸ In making this determination, I must consider the volume of subject imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations.¹⁷⁹

¹⁷⁸ 19 U.S.C. § 1673d(b).

¹⁷⁹ 19 U.S.C. § 1677(7)(B)(i). The Commission "may consider such other economic factors as are relevant to the determination," but shall "identify each [such] factor . . . and explain in full its relevance to the determination." 19 U.S.C. § 1677(7)(B).

A. Volume of Subject Imports¹⁸⁰

Section 771(7)(C)(i) provides that the “Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.”¹⁸¹ The quantity and value of the subject imports of all salmon increased during the period of investigation. On a quantity basis, the volume of the subject imports increased consistently from *** pounds in 1994 to *** pounds in 1997.¹⁸² On a value basis, the subject imports rose from *** in 1994 to *** in 1997.¹⁸³ The quantity of the subject imports increased by 131 percent from 1994 to 1997 while the value of the subject imports increased 91 percent during the same period.¹⁸⁴

Although the quantity and value of subject imports of whole salmon fluctuated during the period of investigation, the quantity and value of subject imports of salmon cuts increased substantially throughout the period of investigation.¹⁸⁵ On a quantity basis, the volume of the subject imports of whole salmon increased from *** pounds in 1994 to *** pounds in 1996 but

¹⁸⁰ In this final investigation, respondents contend that the Commission should not assume that all of the imports that have not been investigated by Commerce have been sold at less than fair value, given that Commerce has calculated “de minimis” margins for two companies in its final determination. Instead, respondents argue that the Commission should presume that the subject imports produced by firms that were not investigated by Commerce have been fairly traded at the same rates as the imports of the producers that were investigated by Commerce. Respondents argue that the Commission should consider this pro rata portion of the subject imports to be fairly traded imports. In assessing the significance of the volume of the subject imports, I have adhered to the Commission’s consistent practice of viewing all imports subject to Commerce’s “all others” rate as unfairly traded. In this regard, I note that the Commission has not departed from this practice in any Title VII proceeding. Moreover, I believe that the approach advocated by respondents is inconsistent with the provisions of the statute, which requires the Commission to consider the volume effects of all imports subject to Commerce’s final affirmative dumping determinations. *See* 19 U.S.C. §1673d(b)(1). The Court of International Trade and the Federal Circuit have both noted that the statute requires that the Commission perform its material injury analysis by analyzing the volume, price and impact of the “subject merchandise” on the domestic industry. *See, e.g., Algoma Steel Corp. v. United States*, 688 F.Supp. 639-642-643 (CIT 1988); *aff’d*, 865 F.2d 240, 243 (Fed Cir. 1989). Because imports that are subject to the “all others” rate are still considered “subject merchandise imports” and are subject to the imposition of antidumping duties, I believe that the Commission is required to include these imports in its analysis of the impact of the subject merchandise on the industry. In addition, the approach advocated by respondents is inconsistent with the statutory requirement that the Commission consider in its final injury determination the dumping margins “most recently published by [Commerce] prior to the closing of the . . . administrative record.” 19 U.S.C. §1677(35). In this case, the margins most recently published by Commerce are the margins announced in its amended final determination, which includes the “all others” rate applicable to the imports in question. If the Commission were to adopt the position advocated by respondents and assume that a portion of the imports subject to the “all others” rate were fairly traded, it would in effect be assigning a “de minimis” margin to these sales. It would, therefore, not be applying the rate published by Commerce to the sales, as required by the statute. Given this, it would appear that the approach advocated by respondents would be inconsistent with this requirement of the statute.

¹⁸¹ 19 U.S.C. § 1677(7)(C)(i).

¹⁸² CR & PR at Table IV-3.

¹⁸³ *Id.*

¹⁸⁴ The rate of increase in volume was 64 percent from 1995 to 1997 while the rate of increase in value was 41 percent from 1995 to 1997. CR and PR at Table IV-3.

¹⁸⁵ CR and PR at Table IV-3.

then declined to *** pounds in 1997.¹⁸⁶ On a value basis, subject imports of whole salmon rose from *** in 1994 to *** in 1996 but then declined to *** in 1997.¹⁸⁷ On the other hand, the volume of subject imports of salmon cuts by quantity increased consistently throughout the period of investigation, rising from *** pounds in 1994 to *** pounds in 1997.¹⁸⁸ On a value basis, subject imports of salmon cuts rose as well, from *** in 1994 to *** in 1997.¹⁸⁹ These increases in the volume of subject imports of salmon cuts more than offset the declines in volume exhibited by the subject imports of whole salmon.

Although the market share held by subject imports fluctuated somewhat during the period of investigation, the subject imports increased their overall market share.¹⁹⁰ When measured on a quantity basis, the share of the overall salmon market held by the subject imports increased from 27.1 percent in 1994 to 35.4 percent in 1996, then declined to 30.8 percent in 1997.¹⁹¹ When measured on a value basis, the subject imports showed similar market share trends in the overall salmon market.¹⁹² I note that the subject imports made their largest market share increase in the overall market between 1995 and 1996, the period during which the domestic producers registered the single largest drop in their market share.¹⁹³ Finally, although the subject imports have lost market share with respect to whole salmon during the last year of the period of investigation,¹⁹⁴ the subject imports have gained substantial amounts of market share for salmon cuts, more than offsetting their market share declines in the whole salmon portion of the market.¹⁹⁵

Based on the foregoing, I find that the volume of subject imports and the increase in that volume during the period of investigation was significant for purposes of this final determination. Although the volume increases occurred during a period of rising consumption, I note that the subject imports significantly increased their share of the overall market.

B. Price Effects of Subject Imports

Section 771(7)(C)(ii) provides that, in evaluating the price effects of the subject imports, the Commission shall consider whether there has been significant price underselling by the

¹⁸⁶ CR and PR at Table IV-3.

¹⁸⁷ CR and PR at Table IV-3.

¹⁸⁸ CR and PR at Table IV-3.

¹⁸⁹ CR and PR at Table IV-3.

¹⁹⁰ CR and PR at Table IV-4.

¹⁹¹ CR and PR at Table IV-4.

¹⁹² CR and PR at Table IV-4.

¹⁹³ CR and PR at Table IV-4.

¹⁹⁴ By quantity, the market share of subject whole salmon imports increased from 22.3 percent in 1994 to 24.4 percent in 1995 to 26.6 percent in 1996 but declined to 14.7 percent in 1997. By value, the market share of subject whole salmon imports increased from 19.8 percent in 1994 to 21.3 percent in 1995 to 22.4 percent in 1996 but declined to 12.8 percent in 1997. CR and PR at Table IV-5.

¹⁹⁵ By quantity, the market share of subject cut salmon imports increased from 50.2 percent in 1994 to 54.2 percent in 1995 to 57.8 percent in 1996 but declined slightly to 56.7 percent in 1997. By value, the market share of subject cut salmon imports increased from 39.8 percent in 1994 to 45.5 percent in 1995 to 49.3 percent in 1996 but declined slightly to 48.0 percent in 1997. CR and PR at Table IV-6.

imported merchandise as compared with the price of domestic like products of the United States, and whether the

effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.¹⁹⁶

I find that domestic and subject Chilean salmon are, at a minimum, moderately substitutable.¹⁹⁷ Although the level of substitutability between all domestic salmon and all subject merchandise is limited somewhat by the fact that the domestic producers do not offer the same amounts of salmon cuts as the subject importers¹⁹⁸ and by freshness, quality and other purchaser perceptions, available information indicates that there is a significant level of substitutability between whole and cut salmon.¹⁹⁹ Moreover, I also find that there is an even higher degree of substitutability between the domestic and subject merchandise when examined on the more specific whole and cut salmon product groupings.²⁰⁰ In this respect, I believe that the degree of substitutability is higher because the domestic and subject merchandise are physically similar and are considered to be comparable with respect to quality, reliability, availability and other circumstances of sale.²⁰¹

Although the available information indicates that a number of factors are important in a purchase decision, including freshness, shelf-life and quality of the product, the record also shows that price is an important consideration.²⁰² The record suggests that purchasers consider the domestic and subject merchandise to be comparable in most respects except price,²⁰³ making price one of the most significant distinguishing characteristics in the decision whether to purchase domestic or subject merchandise.

During the period of investigation, U.S. producers' prices for both whole dressed Atlantic salmon and salmon cuts have generally declined. For example, the domestic price of the four whole salmon products chosen for price comparisons decreased from 1995 to 1997, with price declines ranging from *** to 20.4 percent during the period.²⁰⁴ Similarly, the domestic price of three of the four salmon fillet products chosen for price comparisons decreased during this period as well, with price declines ranging from *** to *** percent.²⁰⁵ Moreover, price declines were reflected in the weighted average unit prices reported by the domestic producers, which declined

¹⁹⁶ 19 U.S.C. § 1677(7)(C)(ii).

¹⁹⁷ CR at II-9-II-18; PR at II-6-13.

¹⁹⁸ That is, by the fact that the bulk of domestic merchandise is sold in whole form and the majority of subject merchandise is sold in cut form.

¹⁹⁹ CR at II-9-II-22; PR at II-6-15. For example, although respondents contended that there is only a limited degree of substitutability between whole salmon and salmon cuts because of physical and handling differences, more than half of the domestic producers and a significant number of importers reported that they sell whole and cut salmon to the same customers. CR at II-14; PR at II-10. Similarly, the record evidence indicates that specialty and chain restaurants as well as specialty grocery stores and supermarkets all purchase, to a greater or lesser degree, both whole and cut salmon. RB, at 4 and Ex. 1.

²⁰⁰ CR at II-9-II-16; PR at II-6-11.

²⁰¹ CR at II-9-II-13; PR at II-6-11. In this regard, I note that the substitutability of the specific product groupings is the more relevant issue here because the Commission collected pricing comparison data on this basis. CR at V-7-V-28; PR at V-5-21.

²⁰² CR at II-9-II-12; PR at II-6-9.

²⁰³ CR and PR at Table II-3.

²⁰⁴ CR at V-10; PR at V-7.

²⁰⁵ CR at V-10; PR at V-7.

sharply and consistently during the period.²⁰⁶ These price declines occurred despite rapidly rising domestic consumption, that, all other things being equal, might have been expected to result in higher or at least steady prices.

²⁰⁶ The weighted average unit price of the domestic producers declined from *** per pound in 1994 to *** per pound in 1995 to *** per pound in 1996 to *** per pound in 1997. CR at C-3; PR at C-3.

The subject imports undersold the comparable domestic product in the vast majority of possible pricing comparisons. The subject merchandise undersold the domestic merchandise in 268 out of 276 instances, or a total of 97 percent of total comparisons, with margins of underselling ranging from 0.4 to 39.9 percent.²⁰⁷ The prevalence of this underselling was, moreover, reflected in both the whole and cut salmon pricing comparisons, although the margins of underselling were most pronounced with respect to subject imports of fresh Atlantic salmon fillets.²⁰⁸ The subject fillets undersold domestic fillets by margins ranging from 6.7 to 39.9 percent, with an average margin of underselling of 21.5 percent.²⁰⁹ The average margin of underselling for Chilean whole salmon was 10.0 percent.²¹⁰

Finally, when assessing the extent to which the subject imports have caused price declines in the U.S. market, I have also examined the record data with respect to the prices of non-subject imports from Chile and imports of salmon from non-subject countries. I note that the subject imports of salmon also undersold non-subject merchandise from Chile in 80 percent of the possible pricing comparisons, with margins ranging from 0.7 to 54.5 percent.²¹¹ Moreover, although the record does not contain pricing comparison data for all non-subject countries, the average unit prices of salmon imports from non-Chilean sources have been significantly higher than those of the subject merchandise and domestic merchandise during the period of investigation.²¹² Given the foregoing, I find that domestic price declines during the period are, to a significant degree, attributable to the prices of the subject imports rather than to those of non-subject imports.²¹³

Given the moderately high level of substitutability between the domestic and subject merchandise, the importance of price in purchasing decisions, the significant underselling by the subject imports and the rapidly declining prices for both whole dressed salmon and salmon fillets, I find that the subject imports depressed domestic producers' prices for fresh Atlantic salmon to a significant degree.²¹⁴

²⁰⁷ CR at V-23; PR at V-7.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ CR at V-28; PR at V-22.

²¹² CR at C-5 and C-6; PR at C-5 & C-6. The weighted average unit prices of whole salmon imports from non-Chilean sources ranged from \$2.67 per pound to \$2.82 during the period from 1994 to 1997, while the weighted average unit price of the subject imports ranged from *** to *** per pound during the same period. *Id.* The weighted average unit prices of cut salmon imports from non-Chilean sources ranged from \$2.29 per pound to \$2.83 per pound during the period from 1994 to 1997, while the weighted average unit price of the subject imports ranged from *** to *** per pound during the same period. *Id.*

²¹³ In this regard, I note that a study prepared for Canadian salmon and seafood producers and placed on record by respondents stated that Chile "has established itself as the price-setter for farmed salmon in the U.S. with its 50% share of total supply." RB at Ex. 6, p. iv.

²¹⁴ I find unpersuasive arguments made by respondents to the effect that price declines in the market are attributable to the price effects of fish products other than fresh Atlantic salmon. RB at 69-71. I believe that the record indicates that there is a significantly higher degree of price interaction between domestic and subject salmon than between the domestic merchandise and other types of fish products. CR at II-7-8; PR at II-5-6.

Similarly, although respondents contend that there is a single global price for salmon that has affected domestic prices,
(continued...)

C. Impact of Subject Imports²¹⁵

In assessing the impact that the subject imports have had on the domestic industry, I have taken into account the fact that aggregate apparent consumption was increasing rapidly during the period of investigation.²¹⁶ Although the industry's condition improved during the period of investigation when looking at its production and shipment levels,²¹⁷ capacity levels and capacity

²¹⁴ (...continued)

I note that the information placed on record to support this argument in fact indicates that there is not a global price for salmon but that there are significant price differentials among various markets with respect to the price of fresh Atlantic salmon. RB at 65.

Finally, respondents contend that the facts of this investigation are similar to those in Gerald Metals v. United States, 132 F.2d 716 (Fed. Cir. 1997). I disagree. I note as an initial matter that all Commission determinations are *sui generis*. See United States Steel Group v. United States, 873 F.Supp. 673 (CIT 1995), *aff'd*, 96 F.3d 1352 (Fed. Cir. 1996). Indeed, in Gerald Metals, the Federal Circuit specifically indicated that its holding was limited to the "unique circumstances" of the case. 132 F.3d at 722. Moreover, unlike the investigation at issue in Gerald Metals, apparent demand in this market is not remaining stable but has been increasing rapidly throughout the period of investigation. Thus, unlike the underlying investigation in Gerald Metals, prices could reasonably be expected to remain stable or increase in the face of increasing demand. Further, in finding that price suppression in the market was not the result of the subject imports, the Gerald Metals court explicitly relied on the fact that the depression of price expectations was caused by a temporary increase in global supply that was attributable to a one-time decision by Russia to sell off an overstock of magnesium. In this investigation, unlike Gerald Metals, any global oversupply is not attributable to a unique, one-time event but is attributable to capacity increases in the world market that will most likely be in existence for some period. In addition, a critical aspect of the Gerald Metals decision is the court's reliance on the fact that purchasers could readily switch their purchases from subject Russian imports to non-subject imports from Russia so that the effect of the temporary increase in global supply would be felt regardless of LTFV imports. In this case, purchasers could only switch from subject Chilean imports to non-subject imports in a minimal fashion because almost all of the non-subject Chilean production is now being shipped to the United States and their available capacity and non-U.S. shipment levels could not supply the demand now being supplied by the subject imports. CR and PR at Table VII-4 & VII-5. Further, unlike magnesium, salmon is not sold out of inventories because it is a perishable product and there is no fairly-traded inventory overhang, as there was in Gerald Metals. Finally, unlike Gerald Metals, the pricing data in this investigation clearly establishes that the subject merchandise are underselling both the non-subject and domestic merchandise.

²¹⁵ As part of its consideration of the impact of imports, the statute specifies that the Commission is to consider "the magnitude of the margin of dumping." 19 U.S.C. § 1677(7)(C)(iii)(V). Section 771(35)(C)(ii) defines the "magnitude of the margin of dumping" to be used by the Commission in a final determination as the margin or margins most recently published by Commerce prior to the closing of the administrative record. Commerce has announced that it calculated dumping margins ranging from 2.22 percent to 10.69 percent for three of the investigated Chilean producers and an "all others" rate of 4.54 percent. Commerce also found calculated "de minimis" margins for two Chilean producers, Camanchaca and Marine Harvest. These margins of dumping are relatively low, potentially weighing in favor of a negative determination. In this investigation, however, I find that an affirmative determination is appropriate based on persuasive evidence regarding the other factors discussed in this opinion.

²¹⁶ CR and PR at Table IV-3.

²¹⁷ The industry's production of whole salmon increased consistently during the period from 1994 to 1997, from 18.478 million pounds of whole salmon in 1994 to 38.091 million pounds in 1997. CR and PR at Table III-1. The industry's shipment levels of all salmon increased from *** pounds in 1994 and *** pounds in 1995 to *** million pounds in 1997, while the value of their shipments increased from *** in 1994 and *** in 1995 to *** in 1997. CR and PR at Table III-3.

use,²¹⁸ sales revenues,²¹⁹ and employment levels,²²⁰ I find that the improvement in these indicators was due primarily to the very significant increases in overall demand during the period. In this regard, although the industry showed improvement in a variety of areas, its improvement was in important respects not keeping pace with the significant increase in overall demand in the market. For example, although total consumption in the market increased by nearly 103 percent during the period from 1994 to 1997, the domestic industry's shipments increased by only 80 percent.²²¹

The domestic industry's failure to keep pace with the increase in overall demand in the market was reflected in a decline in its market share during the period of investigation, a decline that was accompanied by an increase in the market share of the subject imports during the same period.²²² In particular, the domestic industry's share of the overall market declined from *** percent in 1994 and *** percent in 1995 to *** percent in 1996 and *** percent in 1997, while the subject imports increased their share of the market from 27.1 percent in 1994 to 30.8 percent in 1997.²²³ Moreover, in the cuts portion of the market, the industry has lost larger amounts of market share, with its share declining from *** percent in 1994 to *** percent in 1997. At the same time, the subject imports have increased their share of the salmon cuts portion of the market, with their share of total cuts sales consistently increasing from *** percent in 1994 to *** percent in 1997.²²⁴

Most importantly, as the subject imports have had a significant price depressing effect on domestic prices during the period of investigation, the domestic industry has experienced a decline in its average unit sales values during the period from 1994 to 1997 that has been significantly larger than an accompanying decline in its average unit costs.²²⁵ As a result, the industry has experienced significant declines in its gross profitability, operating income and net income during the period from 1994 to 1997.²²⁶ In this regard, the number of firms reporting operating losses

²¹⁸ The industry's whole salmon capacity increased from 33.3 million pounds in 1994 to 53.0 million pounds in 1997. CR and PR at Table III-1. The industry's capacity use rate for whole salmon also increased from 55.6 percent in 1994 to 71.9 percent in 1997. CR and PR at Table III-1.

²¹⁹ The industry's net sales revenues increased from \$45.284 million in 1994 to \$76.866 million in 1997. CR and PR at Table VI-1.

²²⁰ The average number of production-related workers employed by the industry increased from 299 in 1994 to 475 in 1997. Total hours worked increased from 543 thousand in 1994 to 792 thousand in 1997. Total wages paid to workers increased from \$6.5 million in 1994 to \$10.2 million in 1997. Total productivity increased from 34.2 pounds per hour in 1994 to 47.4 pounds per hour in 1997. Finally, average unit labor costs declined or were stable during the period, being \$0.35 in 1994 and \$0.27 in 1997. CR at Table III-4.

²²¹ CR and PR at Table IV-3.

²²² CR and PR at tables IV-4.

²²³ CR and PR at tables IV-4.

²²⁴ CR and PR at Table IV-4.

²²⁵ The average unit value for the domestic industry's overall net sales declined from \$2.64 per pound in 1994 to \$2.17 per pound in 1997. The industry's average unit cost of goods sold decreased from \$2.08 per pound in 1994 to \$1.95 per pound in 1997. CR and PR at table C-1.

²²⁶ The industry's gross profits fell from \$9.575 million in 1994 and \$14.534 million in 1995 to \$7.738 million in 1997. The ratio of the industry's gross profits to net sales fell from 21.1 percent in 1994 and 22.6 percent in 1995 to 10.1 percent in 1997. Similarly, operating income fell from \$5.37 million in 1994 and \$10.15 million in 1995 to \$2.225 million in 1997. The ratio of the industry's operating income to net sales fell from 15.8 percent in 1995 to 2.9

(continued...)

increased from 0 in 1994 and 2 in 1995 to 4 in 1997.²²⁷ Moreover, as the industry has experienced declines in profitability levels, a number of the domestic producers have been denied access to capital and have had to postpone capital investments.²²⁸

Given the decline in the industry's market share and the significant declines in its profitability levels, I find that the subject imports are having an adverse impact on the domestic industry producing fresh Atlantic salmon.

II. CONCLUSION

Accordingly, I determine that the domestic industry producing fresh Atlantic salmon is materially injured by reason of allegedly LTFV imports from Chile.

²²⁶ (...continued)

percent in 1997. The net income of the industry in 1994 and 1995 of \$2.705 million and \$7.038 million became a loss of \$2.456 million in 1997. The ratio of net income to net sales in 1994 and 1995 fell from 6.0 percent and 10.9 percent, respectively, to a loss of 3.2 percent in 1997. CR and PR at table VI-1.

²²⁷ CR and PR at Table VI-1.

²²⁸ CR and PR at Appendix G.

DISSENTING VIEWS OF COMMISSIONER CAROL T. CRAWFORD

On the basis of information obtained in this final investigation, I determine that an industry in the United States is not materially injured or threatened with material injury by reason of imports of fresh Atlantic salmon from Chile found by the Department of Commerce to be sold at less-than-fair-value ("LTFV"). I concur in the conclusions of my colleagues in the finding of the like product, related parties, and in the discussion of the condition of the domestic industry and I therefore join their views in these areas. These dissenting views provide an explanation of my finding regarding the domestic industry and my determination of no material injury or threat of material injury to an industry in the United States by reason of LTFV imports of fresh Atlantic salmon from Chile.

I. ANALYTICAL FRAMEWORK

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

- (I) the volume of imports of the merchandise which is the subject of the investigation,
- (II) the effect of imports of that merchandise on prices in the United States for like products, and
- (III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States . . .¹

In making its determination, the Commission may consider "such other economic factors as are relevant to the determination."² In addition, the Commission "shall evaluate all relevant economic factors which have a bearing on the state of the industry . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry."³

The statute directs that we determine whether a domestic industry is materially injured "by reason of" the LTFV imports. Thus we are called upon to evaluate the effect of dumped imports on the domestic industry and determine if they are causing material injury. There may be, and often are, other "factors" that are causing injury. These factors may even be causing greater injury than the dumping. However, the statute does not require us to weigh or prioritize the factors that are independently causing material injury. Rather, the Commission is to determine whether any injury "by reason of" the dumped imports is material. That is, the Commission must determine if the subject imports are causing material injury to the domestic industry. "When determining the effects of imports on the domestic industry, the Commission must consider all relevant factors that can demonstrate if unfairly traded imports are materially injuring the domestic industry."⁴ It is important, therefore, to assess the effects of the dumped imports in a way that distinguishes those effects from the effects of other factors unrelated to the dumping. To do this, I compare the current condition of the industry to the industry conditions that would have existed without the dumping, that is, had subject imports all been fairly priced. I then determine whether the change in conditions constitutes material injury.⁵

¹ 19 U.S.C. § 1677(7)(B)(i).

² 19 U.S.C. § 1677(7)(B)(ii).

³ 19 U.S.C. § 1677(7)(C)(iii).

⁴ S. Rep. No. 100-71 at 116 (1987)(emphasis added); Gerald Metals, Inc. v. United States, 132 F.3d 716 (Fed. Cir. 1997) (rehearing denied).

⁵ Both the Court of International Trade and the United States Court of Appeals for the Federal Circuit have held that the "statutory language fits very well" with my mode of analysis, expressly holding that my mode of analysis comports with the statutory requirements for reaching a determination of material injury by reason of the subject imports. United

In my analysis of material injury, I evaluate the effects of the dumping⁶ on domestic prices, domestic sales, and domestic revenues. To evaluate the effects of the dumping on domestic prices, I compare domestic prices that existed when the imports were dumped with what domestic prices would have been if the imports had been priced fairly. Similarly, to evaluate the effects of dumping on the quantity of domestic sales,⁷ I compare the level of domestic sales that existed when imports were dumped with what domestic sales would have been if the imports had been priced fairly. The combined price and quantity effects translate into an overall domestic revenue impact. Understanding the impact on the domestic industry's prices, sales, and overall revenues is critical to determining the state of the industry, because the effects on the statutory impact factors⁸ (e.g., employment, wages, etc.) are derived from the impact on the domestic industry's prices, sales, and revenues.

I then determine whether the price, sales, and revenue effects of the dumping, either separately or together, demonstrate that the domestic industry would have been materially better off if the imports had been priced fairly. If so, the domestic industry is materially injured by reason of the dumped imports.

For the reasons discussed below, I determine that the domestic industry producing fresh Atlantic salmon is not materially injured by reason of LTFV imports of fresh Atlantic salmon from Chile.

II. DOMESTIC INDUSTRY⁹

I join my colleagues in finding that the domestic like product consists of all fresh Atlantic salmon, both whole dressed and cuts. For the reasons discussed below, I concur with my colleagues that the operations of the 12 producers of whole dressed fresh Atlantic salmon clearly should be included in the definition of the domestic industry. I further find that the relevant domestic industry includes processors of fresh Atlantic salmon. In coming to this conclusion, I have used as my starting point the Commission's finding of one like product consisting of both cuts and whole dressed fresh Atlantic salmon. In making my finding of one like product, I did not find any logical break in the spectrum of salmon products given the many variations of products, such as whole dressed, steaks, butterfly cuts, PBI fillets, and PBO fillets of fresh Atlantic salmon. These different variations of products have sufficient substitutability with each other, either directly or indirectly, to be considered one like product. Since the like product consists of both cuts of and whole dressed fresh Atlantic salmon, it is logical that the domestic industry consist of producers and processors of both cuts and whole dressed fresh Atlantic salmon. Therefore I do not see any compelling reason to exclude from the domestic industry those U.S. firms that primarily process fresh Atlantic salmon.¹⁰

The processing operations in question take whole round Atlantic salmon or whole dressed fresh Atlantic salmon and process it into whole dressed fresh Atlantic salmon or into steaks, PBI fillets, PBO fillets, and other types of cuts. Respondents argue for a pragmatic approach in which the Commission should

States Steel Group v. United States, 96 F.3d 1352, at 1361 (Fed. Cir. 1996), *aff'g* 873 F.Supp. 673, 694-695 (Ct. Int'l Trade 1994).

⁶ As part of its consideration of the impact of imports, the statute as amended by the URAA now specifies that the Commission is to consider in an antidumping proceeding, "the magnitude of the margin of dumping." 19 U.S.C. § 1677(7)(C)(iii)(V).

⁷ In examining the quantity sold, I take into account sales from both existing inventory and new production.

⁸ 19 U.S.C. § 1677(7)(C)(iii).

⁹ As discussed below, I include U.S. processors in the domestic industry. Five U.S. processors provided useful questionnaire responses. None reported imports of the subject merchandise. However, there is some evidence that they may have handled subject imports from Chile. Based on my review of processor questionnaire responses and evidence on the record, I do not find that appropriate circumstances exist to exclude any processors from the domestic industry.

¹⁰ For purposes of this investigation, I do not find the Commission "traditional" six-factor analysis of the domestic industry to be useful. Rather, I make my finding on the question of the domestic industry for the reasons given here.

include only the few major processors that have been identified. Petitioners do not agree with respondents' definition of the domestic industry. Petitioners wish to include only producers of whole dressed fresh Atlantic salmon and their internal processing operations, but exclude all independent and toll processors of fresh Atlantic salmon cuts.¹¹

It is clear that the operations of the 12 producers of whole dressed fresh Atlantic salmon should be included in the definition of the domestic industry. The two Washington state producers, Global Aqua and Scan Am/Cypress, who produce only whole round Atlantic salmon, have together produced *** percent of total U.S. production of all fresh Atlantic salmon in 1997.¹² Both producers rely on toll agreements for the processing of their fresh Atlantic salmon through the dressed and cut stages.¹³ Through these toll agreements, the processors ship all processed salmon back to the producers for resale. Of the Maine producers, Atlantic Salmon of Maine (ASM) and Connors Aquaculture are the two largest, accounting for *** and *** percent of total U.S. production of all fresh Atlantic salmon in 1997, respectively.¹⁴ ASM produces whole dressed fresh Atlantic salmon at its processing plant, and last year began processing fresh salmon fillets. In 1997, ASM also opened a new processing facility, which produces a full line of salmon products. Most of the Maine Atlantic salmon producers process their salmon through the dressed stage as ***. After domestic producers process the salmon to the dressed stage, much of it is sold to regional distributors/processors who either sell the product as is or further cut the product into steaks, fillets, or other cuts. Fresh Atlantic salmon is also sold to restaurants, supermarkets, and specialty seafood stores, who purchase whole dressed salmon and/or cuts, such as steaks or fillets. Whole dressed fresh Atlantic salmon constituted the majority of reported U.S. shipments by producers and processors, by contributing *** percent of the quantity of all reported U.S. shipments in 1997, while the cuts represented *** percent of the volume of reported U.S. producers' and processors' total U.S. shipments of fresh Atlantic salmon in 1997.¹⁵

Just as there is no logical break in the spectrum of fresh Atlantic salmon products for purposes of determining like product, there is no clear separation between the producers of whole dressed fresh Atlantic salmon and processors of fresh Atlantic salmon cuts. As noted above, some U.S. producers in fact have in-house processing operations while others utilize toll processing arrangements, while still other producers sell their product to independent processors.¹⁶ Therefore, I find no clear dividing line or compelling reason to exclude processors because doing so would exclude significant suppliers of a large and increasingly important portion of the like product.¹⁷ Moreover, these processing operations add at least *** percent value-added to

¹¹ Petitioners argue against including processors (both independent and toll cutters), based on the following reasons: (1) cutters have low capital investment compared to salmon growers and harvesters; (2) cutters have low technical expertise; (3) value-added is minor at less than 8 percent; (4) the low number of persons employed in cutting; (5) most regional distributors/processors handle many species of fish, not simply fresh Atlantic salmon; and (6) many regional distributors/processors handle subject imports from Chile, as well as the domestic product.

¹² CR at III-1, PR at III-1. These data do not reflect reported shipments by processors, as there is no corresponding break-out of the data for processors.

¹³ CR at III-3; PR at III-2.

¹⁴ CR at III-3; PR at III-2. These data do not reflect reported shipments by processors, as there is no corresponding break-out of the data for processors.

¹⁵ Tables C-1 and C-3, CR at C-3 & C-7; PR at C-3 and C-7.

¹⁶ Only 5 of 44 processors responding to the Commission's questionnaires provided usable information. CR at III-8; PR at III-4.

¹⁷ There are a significant number of small U.S. processors who cut fresh Atlantic salmon, as many as 100 in Maine alone. CR at III-7; PR at III-3. Many of these processors cut salmon along with many others types of fish, as most are small family-owned businesses, but there are at least five major processors. CR at III-8; PR at III-4. Also, restaurants, supermarkets, and even small fish stores can be considered processors, to the extent that they purchase whole dressed salmon and cut it into steaks or fillets. Although there is no clear cut-off point between a major processor of fresh

the fresh Atlantic salmon products.¹⁸ Having found one like product consisting of fresh Atlantic salmon cuts and whole dressed fresh Atlantic salmon, I likewise find there is one domestic industry consisting of producers and processors of fresh Atlantic salmon cuts and whole dressed fresh Atlantic salmon.¹⁹

III. CONDITIONS OF COMPETITION

To understand how an industry is affected by unfair imports, we must examine the conditions of competition in the domestic market. The conditions of competition constitute the commercial environment in which the domestic industry competes with unfair imports, and thus form the foundation for a realistic assessment of the effects of the dumping. This environment includes demand conditions, substitutability among and between products from different sources, and supply conditions in the market.

A. Demand Conditions

An analysis of demand conditions tells us what options are available to purchasers, and how they are likely to respond to changes in market conditions, for example an increase in the general level of prices in the market. Purchasers generally seek to avoid price increases, but their ability to do so varies with conditions in the market. The willingness of purchasers to pay a higher price will depend on the importance of the product to them (e.g., how large a cost factor), whether they have options that allow them to avoid the price increase, for example by switching to alternative products, or whether they can exercise buying power to negotiate a lower price. An analysis of these demand-side factors tells us whether demand for the product is elastic or inelastic, that is, to what extent purchasers will reduce the quantity of their purchases if the price of the product increases. For the reasons discussed below, I find that the overall elasticity of demand for fresh Atlantic salmon in the domestic market is moderately high. **Importance of the Product.** The first factor that measures the willingness of purchasers to pay higher prices is the importance of the product to purchasers. In the case of an intermediate product (“input”), the importance of the product to the purchaser will depend on the significance of the input’s cost relative to the total cost of the downstream product or service in which it is used, whether the input is critical to production of the downstream product or service, and ultimately the demand conditions for the downstream product. In the case of an end-use product, demand is determined by the importance of the product to the end-user.

Fresh Atlantic salmon is purchased from producers and importers by wholesale processors, distributors, and large retailers, such as grocery stores and restaurant chains. Demand for fresh Atlantic salmon in the United States is ultimately determined by importance of the product to the end-user, as

Atlantic salmon and the local fish store, I find that the evidence on the record supports inclusion in the domestic industry of all processors whose primary or significant purpose is to process whole dressed fresh Atlantic salmon into fresh Atlantic salmon cuts or who process relatively significant amounts of fresh Atlantic salmon, but that restaurants and supermarkets and other entities that perform only minimal processing of fresh Atlantic salmon or only process relatively small amounts should not be considered to be part of the domestic industry.

¹⁸Tables V-1 through V-3, CR V-11 through V-16; PR at V-8 through V-13. For those U.S. producers that rely on toll processors for the processing of whole round Atlantic salmon into whole dressed as well as cut fresh Atlantic salmon, the value-added is even higher.

¹⁹The difficulty of this issue is compounded by the severe lack of data on the operations of independent and toll processors of fresh Atlantic salmon, as only 9 of 44 processors responded to staff’s questionnaire, of which only five indicated that they were processors of fresh Atlantic salmon. CR at III-8; PR at III-4. Although the data on independent and toll processors is severely limited, I must make my determination regarding material injury and threat of material injury by reason of LTFV imports based on the available data for the domestic industry consisting of producers and processors of fresh Atlantic salmon.

measured by the price the end-user is willing to pay. This importance will depend on whether the product is considered a non-discretionary purchase (necessity) or a discretionary purchase by the end-user. When the product is considered a necessity by the end-user, changes in the price of the product are less likely to alter demand by the consumer. When the product is considered to be a discretionary purchase, changes in the price of the product are more likely to alter demand by the end-user. The purchase of fresh Atlantic salmon, a food item with many alternatives, is certainly discretionary. Moreover, as stated in the majority opinion and in the record, the apparent consumption of Atlantic salmon has risen during the past several years as steady, low-priced supplies of fresh Atlantic salmon products, particularly PBO fillets, have become increasingly available.²⁰ Other causes for the significant increase in demand for fresh Atlantic salmon include consumers' desire to eat a larger quantity of healthier foods and increased promotion of seafood in general, particularly salmon.²¹ These facts suggest a higher elasticity of demand for fresh Atlantic salmon.

Alternative Products. A second important factor in determining whether purchasers would be willing to pay higher prices is the availability of viable alternative products. Often purchasers can avoid a price increase by switching to alternative products. If such an option exists, it can impose discipline on producer efforts to increase prices.

In this investigation, the record indicates that several products, both fish and non-fish, can be considered substitutes for fresh Atlantic salmon, in both the cut and whole forms.²² The most viable fish product substitutes for fresh Atlantic salmon are the various species of fresh Pacific salmon. The record indicates that customers who purchase cuts of fresh Atlantic salmon switch to fresh Pacific salmon most often in the summer months when Pacific salmon is available in greater quantities and at lower prices.²³ Non-fish substitutes for salmon include other protein foods, such as beef or chicken.²⁴ When purchasers were asked whether changes in pricing affected their purchasing decisions, responses varied with 6 of 16 stating that their customers would shift purchases from fresh Atlantic salmon to other products under those circumstances.²⁵

Overall, I find that the elasticity of demand for fresh Atlantic salmon in the domestic market is moderately high. That is, the consumption of fresh Atlantic salmon will tend to fall in response to a general increase in the price of fresh Atlantic salmon.

B. Substitutability

Simply put, substitutability between fresh Atlantic salmon products from different sources measures the similarity or dissimilarity of the products from the purchaser's perspective. Substitutability depends upon: 1) the extent of product differentiation, measured by product attributes such as physical characteristics, suitability for intended use, purity, rate of defects, convenience or difficulty of usage in production process, quality, etc.; 2) differences in other non-price considerations such as reliability of delivery, technical support, and lead times; and 3) differences in terms and conditions of sale. Products are close substitutes and have high substitutability if product attributes, other non-price considerations, and terms and conditions of sale are similar.

While price is nearly always important in purchasing decisions, non-price factors that differentiate products determine the value that purchasers receive for the price they pay. If products are close substitutes, their value to purchasers is similar, and thus purchasers will respond more readily to relative price changes.

²⁰ Table IV-4, CR at IV-14 & CR at II-6; PR at IV-11, II-4 & II-5.

²¹ CR at II-6; PR at II-4 & II-5.

²² CR at II-7; PR at II-5.

²³ CR at II-8; PR at II-5 & II-6.

²⁴ CR at II-8; PR at II-6.

²⁵ See purchaser questionnaire responses and CR at II-8; PR at II-5 & II-6.

On the other hand, if products are not close substitutes, relative price changes are less important and are therefore less likely to induce purchasers to switch from one source to another. Thus, while overall demand for a product will only change moderately in response to the overall price change, the demand for products from different sources (e.g., subject imports) will decrease or increase depending on their relative prices and the substitutability of the products from different sources. In other words, purchasers can avoid price increases from one source by shifting their purchases to alternative sources. The magnitude of this shift in demand is determined by the degree of substitutability among the sources.

Purchasers have three potential sources of fresh Atlantic salmon: the domestic industry, subject imports, and nonsubject imports.²⁶ Purchasers are more or less likely to switch from one source to another depending on the similarity, or substitutability, between and among them. I find that there is moderately good substitutability between domestic fresh Atlantic salmon and fresh Atlantic salmon from Chile sold at LTFV; that nonsubject and subject imports are moderately good substitutes; and that nonsubject and domestic products are good substitutes. I have evaluated the substitutability among fresh Atlantic salmon from the different sources as follows.

Subject imports and the domestic like product are generally interchangeable. Domestic fresh Atlantic salmon and subject imports are sold through similar channels of distribution.²⁷ Domestic producers and subject importers sell a majority of their products to regional distributors/wholesalers and processors. There are some differences, however. U.S. importers indicated that a substantially larger number of their sales, especially in cuts of fresh Atlantic salmon, were made to retailers. The retailers included in this group were usually mass marketers, such as grocery stores, warehouse and club stores, and restaurant chains. Moreover, in the major channels of distribution where competition takes place, the domestic like product includes far more whole dressed fresh Atlantic salmon than cuts, including PBO fillets, of fresh Atlantic salmon.²⁸ In particular, 1997 data on domestic shipments by U.S. producers show that total cuts of fresh Atlantic salmon, including PBO fillets, PBI fillets, and steaks reached *** million pounds, accounting for *** percent of total domestic industry shipments, while whole dressed fresh Atlantic salmon reached *** million pounds, accounting for *** percent of shipments.²⁹ In contrast, 74 percent of 1997 subject Chilean imports were in the form of cuts.³⁰ Such differences in overall product mix diminish the substitutability between subject and domestic products. Evidence from questionnaires indicates that 9 of 16 purchasers primarily or exclusively buy one form of fresh Atlantic salmon, while 11 of 16 importers indicated the same.³¹ Although price appears to be important in overall purchasing decisions, it appears to be a less important factor when purchasers are deciding between whole salmon and PBO fillets. According to 10 of the 16 purchasers who reported their purchasing decisions, they said that price was “never” the sole factor considered in their decision to buy whole salmon or PBO fillets.³² Another difference that arose between the two products centers on the freshness of the product; the domestic like product is considered the fresher of the two sources because it does not have to be shipped long distances, and producers and importers have indicated that a

²⁶ As noted earlier, the domestic industry includes both U.S. producers and U.S. processors of fresh Atlantic salmon.

²⁷ The evidence on the record regarding shipments by processors is very limited.

²⁸ CR at III-18; PR at III-8.

²⁹ Tables C-3 & C-4, CR at C-6 & C-7; PR at C-6 & C-7.

³⁰ Table VII-1 and VII-2; CR at VII-5 through VII-8; PR at VII-3 through VII-5.

³¹ The majority of purchasers indicated that they do not compare prices between whole salmon and cuts of salmon and that they would not purchase the other if the price were similar. CR at II-14 and II-15; PR II-10.

³² CR at II-12; PR at II-8.

small number of customers are willing to pay a premium price for freshness of domestic salmon.³³ On balance, I find subject imports and the domestic like product to be moderately good substitutes.

I further find that, overall, nonsubject imports of fresh Atlantic salmon are good substitutes for the domestic like product. Nonsubject imports from Iceland, Ireland, Norway, and Scotland are less substitutable according to U.S. producers because of differences in freshness, shelf-life, and delivery time, while importers stated that there were no significant differences between the two. Nonsubject imports from Canada, the largest source of nonsubject imports, appear to be good substitutes for the U.S. product.³⁴ Nonsubject imports from Chile appear to be moderately good substitutes for the domestic like product. Overall, I find that nonsubject imports of fresh Atlantic salmon and the domestic like product are good substitutes based on a similarity in product mix and other factors.³⁵

The available information indicates that nonsubject imports appear to be moderately good substitutes for subject imports. Nonsubject imports from Chile, which represent over 25 percent of all imports of fresh Atlantic salmon from Chile, are very good substitutes for subject imports.³⁶ Less evidence exists regarding imports from other sources, but these imports appear to be better substitutes with domestic products than with subject imports, based on their mix of whole dressed versus cut salmon.³⁷

C. Supply Conditions

Supply conditions in the market are a third condition of competition. Supply conditions determine how producers would respond to an increase in demand for their product, and also affect whether producers are able to institute and maintain price increases. Supply conditions include producers' capacity utilization, their ability to increase their capacity readily, the availability of inventories and products for export markets, production alternatives, and the level of competition in the market. For the reasons discussed below, I find that the supply is inelastic for the domestic fresh Atlantic salmon industry.

Capacity Utilization and Inventories. Unused capacity can exercise discipline on prices, if there is a competitive market, as no individual producer could make a price increase stick. Any producer attempting a price increase would face a counterattack by other producers to prevent competitors who have the available capacity and are willing to sell more at a lower price.

The domestic industry's capacity to produce fresh Atlantic salmon increased during the POI because of the entry of three new participants, who led a 10.9 percent increase in capacity from 1995 to 1996 and a 7.1 percent increase from 1996 to 1997.³⁸ The domestic industry's capacity utilization rates for fresh Atlantic salmon increased from 55.6 percent in 1994 to 71.9 percent in 1997.³⁹ From these capacity figures, it is evident that the domestic industry is able to increase production over time.⁴⁰ Producers in Maine alone could increase their production by 19.9 million pounds of salmon on unused, already licensed sites.⁴¹ Although the domestic industry has available capacity that would allow U.S. producers to expand production

³³ Tables C-1 and C-3, CR at C-1 & C-7; PR at C-1 & C-7.

³⁴ CR at II-16 through II-18; PR at II-13 through II-15.

³⁵ CR at II-16 and II-17; PR at II-11 and II-12, and Tables C-1 and C-3, CR at C-3 and C-7; PR at C-3 and C-7.

³⁶ Table IV-3, CR at IV-11; PR at IV-7.

³⁷ CR at II-18 and II-19; PR at II-13, and Tables C-1 and C-3, CR at C-3 and C-7; PR at C-3 and C-7.

³⁸ Table C-1, CR at C-3; PR at C-3 and CR at III-4 and III-5; PR at III-2 and III-3. These figures do not reflect reported U.S. processors' data. Reported capacity of U.S. processors also increased. Table C-4, CR at C-7; PR at C-7.

³⁹ Table C-1, CR at C-3; PR at C-3 and CR at III-4 and III-5; PR at III-2 and III-3. U.S. processors' reported capacity utilization remained at 100 percent throughout the POI. Table C-4, CR at C-7; PR at C-7.

⁴⁰ Ibid.

⁴¹ CR at III-11; PR at III-5.

of fresh Atlantic salmon, they are limited in their ability to do so in the short-run. As discussed in the majority opinion, the domestic producers are prevented from expanding production quickly because they are constrained by the three year growth/life cycle of farmed fresh Atlantic salmon, the inability to keep inventories due to the perishability of the product, and a lack of capital to pay the expense of expanding.⁴²

Level of Competition. The level of competition in the domestic market has a critical effect on producer responses to demand increases. A competitive market is one with a number of suppliers in which no one producer has the power to influence price significantly.

The domestic fresh Atlantic salmon industry consists of twelve domestic producers from Maine and Washington state, and multiple processors of fresh Atlantic salmon cuts, five of which reported production in 1997.⁴³ During the period of investigation, the domestic industry has consolidated with 4 domestic producers leaving the business and 9 companies being purchased by other salmon producers.⁴⁴ Despite the consolidation, the industry remains competitive with its 12 producers, including three new entrants since 1995, and numerous processors. These domestic producers and processors appear to sell similar products and compete with one another, with some producers providing cuts along with the whole dressed fresh Atlantic salmon and others producing only the whole product. The domestic industry could increase or decrease its shipments to the U.S. market somewhat by diverting its exports to and from the domestic market. In 1997, the domestic industry exported *** percent of its total fresh Atlantic salmon shipments.⁴⁵ U.S. exports of cuts, however, were almost *** in 1997.⁴⁶

There is also competition in the U.S. market from nonsubject sources. Nonsubject import market share was *** percent in 1996 and was *** percent in 1997.⁴⁷ The record thus indicates that there is sufficient competition in the domestic market.

Despite the level of competition in the U.S. market, the domestic industry's physical inability to quickly respond to fluctuations in supply and the demand for fresh Atlantic salmon leads me to find that the elasticity of supply for the domestic fresh Atlantic salmon industry is inelastic.

IV. NO MATERIAL INJURY BY REASON OF LTFV IMPORTS OF FRESH ATLANTIC SALMON FROM CHILE

The statute requires us to consider the volume of subject imports, their effect on domestic prices, and their impact on the domestic industry. I consider each requirement in turn.

A. Volume of Subject Imports

The volume of subject imports of fresh Atlantic salmon increased from *** million pounds in 1994 to *** million pounds in 1997.⁴⁸ The value of subject imports increased from *** in 1994 to *** in 1997.⁴⁹ U.S. imports of LTFV fresh Atlantic salmon from Chile increased by 130.9 percent on the basis of quantity

⁴² CR at II-2 and III-10; PR at II-1 and III-5.

⁴³ CR at III-1; PR at III-1.

⁴⁴ PB at 65 & Ex. 5.

⁴⁵ Table III-3, CR at III-15; PR at III-9. Separate data on exports were not reported by U.S. processors.

⁴⁶ Ibid.

⁴⁷ Table C-1, CR at C-3; PR at C-3. These figures do not reflect reported U.S. processors' data.

⁴⁸ Table C-1, CR at C-3; PR at C-3.

⁴⁹ Ibid.

and by 90.9 percent on the basis of value during the period of investigation.⁵⁰ From 1994 to 1997, market share of subject U.S. imports from Chile increased from 27.1 percent to 30.8 percent on the basis of quantity and increased from 22.6 percent to 24.3 percent on basis of value.⁵¹

While it is clear that the larger the volume of subject imports, the larger the effect they will have on the domestic industry, whether the volume is significant cannot be determined in a vacuum, but must be evaluated in the context of their price effects and impact. Based on the market share of subject imports, the conditions of competition in the domestic market for fresh Atlantic salmon, and the lack of significant price effects or impact on the domestic industry as discussed below, I find that the volume of subject imports of fresh Atlantic salmon from Chile is not significant.

B. Price Effects

To determine the effect of subject imports on domestic prices I examine whether the domestic industry could have increased its prices if the subject imports had not been dumped. As discussed, both demand and supply conditions in the fresh Atlantic salmon market are relevant. Examining demand conditions helps us understand how purchasers would have reacted to higher prices for the domestic product, or buy different quantities of it, if subject imports had been sold at fairly traded prices. Examining supply conditions helps us understand whether available capacity and competition among suppliers to the market would have imposed discipline and prevented price increases for the domestic product, even if subject imports had been fairly priced.

In this investigation, the LTFV dumping margins for fresh Atlantic salmon imports from Chile are the following: 2.22 percent for Mares Australes; 5.33 percent for Aguas Claras; 10.69 percent for Eicosal; and 4.54 percent for “all others”.⁵² Thus, if subject imports had been fairly priced, their prices in the U.S. market would have increased only somewhat. Those with slightly higher margins would have become only somewhat more expensive, relatively speaking, to domestic and nonsubject fresh Atlantic salmon, while those with lower margins would have increased even less in price relative to the domestic like product and nonsubject imports. Moreover, most of the subject import sales are of PBO fillets, of which the domestic industry currently provides only a limited supply.⁵³ In fact, according to data from 1996, the last full year of reported data prior to the filing of the petition, 45.9 percent of subject imports were salmon cuts while cuts represented *** percent of domestic industry shipments.⁵⁴ In the same year, nonsubject imports of cuts were more than six times greater in quantity than domestic shipments of cuts, and their respective unit values were virtually identical.⁵⁵ Price data for PBO fillets suggest that even if subject imports had been fairly traded, their prices would have remained below that of the comparable domestic products in most cases during the period leading up to the filing of the petition, and prices of subject imports of whole dressed fresh Atlantic salmon would have been roughly similar to comparable domestic products.⁵⁶ In such a case, few if any

⁵⁰ Table C-1, CR at C-3; PR at C-3.

⁵¹ Table IV-4, CR at IV-14; PR at IV-11. These market share figures do not reflect reported shipments by U.S. processors.

⁵² Memorandum to Richard W. Moreland, Deputy Assistant Secretary, Import Administration, regarding clerical error allegations, July 1, 1998.

⁵³ CR at II-13-14; PR at II-10.

⁵⁴ Tables C-1 and C-3, CR at C-3 & C-7; PR at C-3 & C-7.

⁵⁵ In 1997, almost 71 percent of subject imports were salmon cuts, while cuts represented *** percent of nonsubject imports. In 1997, cuts represented *** percent of reported shipments by domestic producers and processors. Tables C-1, C-3, and C-4, CR at C-3 through C-7; PR at CR at C-3 through C-7.

⁵⁶ Tables V-1 through V-4, CR at V-11 through V-18; PR at V-8 through V-15.

purchases of subject imports would have shifted towards the domestic product. In other words, even if subject imports from Chile had been fairly priced, significant amounts of these subject imports would continue to have been sold.

On the supply side, competitive market conditions would have limited attempts by the domestic industry to increase prices. Although U.S. supply elasticity is inelastic due to the long production cycle, the domestic producers compete not only among themselves to sell perishable products, but with nonsubject imports from Chile, Canada, Norway, and elsewhere. In particular, nonsubject import market share was *** percent in 1997 compared to *** percent for the domestic industry's market share that same year.⁵⁷

On the demand side, the overall elasticity of demand for fresh Atlantic salmon indicates that any price increases by domestic suppliers in response to this shift in demand would have been resisted by purchasers in the form of reduced demand. In these circumstances, domestic producers could have raised their prices only minimally, and certainly not by significant amounts, had subject imports been fairly priced. Any effort by a domestic producer to raise prices significantly would have been undermined by competitors. Overall, any shift in demand from subject imports to domestic fresh Atlantic salmon would have been minimal, since domestic producers would have captured only a small fraction of the market share of subject imports from Chile, which would have continued to be sold in large quantities in the U.S. market. As discussed above, nonsubject imports are moderately good substitutes for subject imports and would have captured at least some of the small shift in demand away from subject imports, had they been fairly priced.

In general, while there may be some minimal effects on domestic prices that can be attributed to the unfair pricing of subject imports, I do not find that subject imports are having significant effects on prices for domestic fresh Atlantic salmon. Therefore, significant effects on domestic prices cannot be attributed to the unfair pricing of subject imports. Consequently, I find that subject imports of fresh Atlantic salmon from Chile are not having significant effects on prices of domestic fresh Atlantic salmon.

C. Impact

To assess the impact of subject imports on the domestic industry, I consider output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, research and development and other relevant factors.⁵⁸ These factors together either encompass or reflect the volume and price effects of the dumped imports, and so I gauge the impact of the dumping through those effects.

As discussed above, the domestic industry producing fresh Atlantic salmon would not have been able to increase its prices significantly if subject imports of fresh Atlantic salmon from Chile had been sold at fairly traded prices. Therefore, any impact of dumped imports on the domestic industry would have been on the domestic industry's output and sales. Had subject imports not been dumped, the demand for subject imports would have declined only slightly, and demand for the domestic product would have increased only minimally due to competition from non-LTFV imports from Chile and nonsubject imports from other countries, as well as from Chilean subject imports that would have continued to enter the U.S. market. In other words, had subject imports not been dumped, the domestic industry would not have been able to increase its output and sales, and therefore its revenues, significantly. Consequently the domestic industry would not have been materially better off if the subject imports had been fairly traded. Therefore, I find that the domestic industry producing fresh Atlantic salmon is not materially injured by reason of LTFV imports of fresh Atlantic salmon from Chile.

⁵⁷ Table IV-4, CR at IV-14; PR at IV-11. These figures do not reflect reported shipments by U.S. processors.

⁵⁸ 19 U.S.C. § 1677(7)(C)(iii).

V. NO THREAT OF MATERIAL INJURY BY REASON OF LTFV IMPORTS OF FRESH ATLANTIC SALMON FROM CHILE

On the basis of information obtained in this investigation, I determine that an industry in the United States is not threatened with material injury by reason of LTFV imports of subject imports of fresh Atlantic salmon from Chile. Section 771(7)(F) of the Act directs the Commission to determine whether a U.S. industry is threatened with material injury by reason of the subject merchandise by analyzing whether “further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted”.⁵⁹ The Commission considers the threat factors “as a whole”⁶⁰ and may not make such a determination “on the basis of mere conjecture or supposition”.⁶¹ In making my determination, I have considered all of the statutory factors⁶² that are relevant to this investigation⁶³ and have determined that the domestic industry producing fresh Atlantic salmon is not threatened with material injury by reason of the LTFV imports from Chile.

I do not find that there is an imminent substantial increase in production capacity or any existing unused capacity in the exporting country likely to result in a substantial increase in imports of subject fresh Atlantic salmon into the United States. Even though production capacity has increased and some capacity is available in the exporting country, there is no indication that subject imports will increase significantly in the immediate future. Capacity utilization of subject producers of whole dressed fresh Atlantic salmon remained at a relatively high level, ranging from a utilization rate of 83.5 percent in 1994 to a rate of 82.6 percent in 1997.⁶⁴ Production of subject cuts of fresh Atlantic salmon ranged from *** in 1994 to *** in 1997.⁶⁵ At these levels of capacity utilization, subject Chilean producers would have only a limited ability to increase their exports to the U.S. market. As a share of total shipments, subject Chilean whole dressed fresh Atlantic salmon exports to the U.S. decreased from 50.3 percent in 1994 to 21.4 percent in 1997.⁶⁶ Of the three

⁵⁹ 19 U.S.C. §1673d(b) and 1677(7)(F)(ii).

⁶⁰ While the language referring to imports being imminent (instead of “actual injury” being imminent and the threat being “real”) is a change from the prior provision, the SAA indicates the “new language is fully consistent with the Commission’s practice, the existing statutory language, and judicial precedent interpreting the statute.” SAA at 184.

⁶¹ 19 U.S.C. §1677(7)(F)(ii). An affirmative threat determination must be based upon “positive evidence tending to show an intention to increase the levels of importation.” Metallwerken Nederland B.V. v. U.S., 744 F.Supp. 281, 287 (CIT 1990). See also Calabrian Corp. v. United States, 794 F.Supp. 377,387 and 388 (Ct. Int’l Trade 1992), citing H.R. Rep. No. 1156, 98th Cong., 2d Sess. 174 (1984).

⁶² The statutory factors have been amended to track more closely the language concerning threat of material determinations in the Antidumping and Subsidies Agreements, although “[no] substantive change in Commission threat analysis is required.” SAA at 185.

⁶³ 19 U.S.C. Sec.1677(7)(F)(I). Factor I regarding consideration of the nature of the subsidies is inapplicable because the Department of Commerce made a negative final determination with respect to subsidies. Factor VII regarding raw and processed agricultural products is also inapplicable due to the definition of like product. See 19 U.S.C. Sec. 1677(7)(F)(iii)(I). Furthermore, I note that there are no antidumping remedies in effect in other WTO member markets against the subject imports from Chile.

⁶⁴ Table VII-1, CR at VII-5; PR at VII-3. There is no corresponding data available regarding capacity utilization of Chilean cut salmon production.

⁶⁵ Table VII-2, CR at VII-7; PR at VII-5.

⁶⁶ Table VII-1, CR at VII-6; PR at VII-4.

Chilean producers that project capacity increases in the near future, two are nonsubject producers.⁶⁷ Given the high capacity utilization rates and the conditions of competition discussed here and above, I do not find any existing unused capacity or imminent, substantial increase in production capacity in Chile indicating the likelihood of substantially increased imports of the subject merchandise into the United States.

The record in this investigation shows a large increase in the volume of imports of the subject merchandise, but this does not indicate a likelihood of substantially increased subject imports of fresh Atlantic salmon from Chile into the U.S. or show that there is a threat of material injury by reason of these subject imports. As noted above, the volume of subject imports of fresh Atlantic salmon from Chile increased by 130.9 percent from 1994 to 1997. The increase from 1994 to 1995 was 41.1 percent and from 1995 to 1996 was 43.3 percent. The increase in subject imports from 1996 to 1997 was 14.2 percent, while that of nonsubject imports was *** percent.⁶⁸ However, the rate of increase of consumption in the domestic fresh Atlantic salmon market increased between 1994 and 1997 by 102.7 percent.⁶⁹ It is also important to note that significant inventories for export to the United States do not exist for fresh Atlantic salmon due to the perishable nature of the product. Finally, as noted above, capacity utilization of subject producers in Chile remains relatively high. Based on the significant and increasing presence of nonsubject imports, the high levels of capacity utilization among subject producers in Chile, and the conditions of competition in the domestic fresh Atlantic salmon market, I do not find that the increase in volume and market penetration of imports of the subject merchandise indicates the likelihood of substantially increased imports of subject fresh Atlantic salmon from Chile into the U.S.

In my determination of no material injury by reason of LTFV imports of fresh Atlantic salmon from Chile, I demonstrated that subject imports have had no significant effect on domestic prices. In light of the competition in the fresh Atlantic salmon industry in the U.S. market and other conditions of competition, I find no evidence that this will change in the immediate future. Therefore, I conclude that subject imports will not enter the United States at prices that will have a depressing or suppressing effect on domestic prices or that are likely to increase demand for further subject imports.

Information in the record indicates that there are virtually no inventories due to the perishable nature of the product; therefore, there is a limited potential for product-shifting. I find no indication of any other demonstrable adverse trends, or convincing evidence of any recent or imminent changes in subject import levels or domestic market structure, that indicate the probability that there is likely to be material injury by reason of imports of the subject merchandise. I further find no actual and potential negative effects on the existing development and production efforts of the domestic industry that indicate that the domestic industry is threatened with material injury by reason of subject imports.

For the reasons stated above, I find that the domestic industry producing fresh Atlantic salmon is not threatened with material injury by reason of LTFV imports of fresh Atlantic salmon from Chile.

VI. CONCLUSION

⁶⁷ Most Chilean fresh Atlantic salmon production is exported to the United States, while there is only a limited home market for the Chilean product. Specifically, in 1997 *** million pounds of Chilean whole dressed fresh Atlantic salmon and *** million pounds of Chilean cuts of fresh Atlantic salmon were shipped to the home market, while *** million pounds of subject whole dressed fresh Atlantic salmon and *** million pounds of subject cuts of fresh Atlantic salmon were shipped to the U.S. market. See Tables VII-1 and VII-2, CR at VII-5-8; PR at VII-3-5.

⁶⁸ Table C-1, CR at C-3; PR at C-3.

⁶⁹ Table C-1, CR at C-3; PR at C-3. This figure does not reflect reported shipments by processors.

On the basis of the foregoing analysis, I determine that the domestic industry producing fresh Atlantic salmon is not materially injured or threatened with material injury by reason of LTFV imports of fresh Atlantic salmon from Chile.