

UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigations Nos. 731-TA-777-779 (Final)

CERTAIN PRESERVED MUSHROOMS FROM CHINA, INDIA, AND INDONESIA

DETERMINATIONS

On the basis of the record¹ developed in the subject investigations, the United States International Trade Commission determines, 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 by reason of imports from China, India, and Indonesia of certain preserved mushrooms, provided for in subheadings 0711.90.40 and 2003.10.00 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).² Vice Chairman Miller and Commissioners Hillman and Koplan find that critical circumstances exist with respect to subject imports from China. Chairman Bragg and Commissioners Crawford and Askey find that critical circumstances do not exist with respect to subject imports from China.

BACKGROUND

The Commission instituted these investigations effective January 6, 1998, following receipt of a petition filed with the Commission and the Department of Commerce by the Coalition for Fair Preserved Mushroom Trade and its members: L.K. Bowman, Inc., Nottingham, PA; Modern Mushroom Farms, Inc., Toughkenamon, PA; Monterey Mushrooms, Inc., Watsonville, CA; Mount Laurel Canning Corp., Temple, PA; Mushroom Canning Co., Kennett Square, PA; Sunny Dell Foods, Inc., Oxford, PA; and United Canning Corp., North Lima, OH.³ The final phase of these investigations was scheduled by the Commission following notification of preliminary determinations by the Department of Commerce that imports of certain preserved

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 Commissioners Crawford and Askey dissenting with regard to Indonesia.

³ On Mar. 9, 1998, the Commission received notice that Southwood Farms, Hockessin, DE, had joined the petitioning coalition.

mushrooms from China, India, and Indonesia 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 investigations 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 August 19, 1998 (63 FR 44470). The hearing was held in Washington, DC, on October 15, 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 February 11, 1999. The views of the Commission are contained in USITC Publication 3159 (February 1999), entitled *Certain Preserved Mushrooms from Chile, India, and Indonesia: Investigations Nos. 777-779 (Final)*.

By order of the Commission.

Donna R. Koehnke
Secretary

VIEWS OF THE COMMISSION

Based on the record in these investigations, we find that an industry in the United States is materially injured by reason of imports of certain preserved mushrooms from China, India, and Indonesia that have been found by the Department of Commerce (“Commerce”) to be sold at less than fair value (“LTFV”).¹ Vice Chairman Miller, Commissioner Hillman, and Commissioner Koplan find that critical circumstances exist with respect to subject imports from China and address this issue in separate views. Chairman Bragg, Commissioner Crawford, and Commissioner Askey find that critical circumstances do not exist with respect to subject imports from China and address this issue in separate views.²

The instant investigations arose out of the same petition as an investigation concerning certain preserved mushrooms from Chile. We were required to issue our determination in the Chile investigation in November 1998 because Commerce issued its final determination in that investigation earlier than it did in the other three.³ Under section 771(7)(G)(iii) of the Tariff Act of 1930, as amended (“the Act”), we are required to make our determinations in the instant investigations on the same record as that of the Chile determination, except that the record in these investigations also includes Commerce’s final determinations and the parties’ final comments concerning the significance of those determinations.⁴

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 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.”⁵ In turn, the Act defines “domestic like

¹ Commissioner Crawford and Commissioner Askey determine that an industry in the United States is not materially injured or threatened with material injury by reason of imports of certain preserved mushrooms from Indonesia that Commerce has found to be sold at LTFV. *See* Views of Commissioners Carol T. Crawford and Thelma J. Askey. They join sections I, II, III.A, and III.B of this opinion.

² *See* Views of Vice Chairman Marcia E. Miller and Commissioners Jennifer A. Hillman and Stephen Koplan Regarding the Legal Effect of Critical Circumstances Tie Votes, finding that the “tie vote rule” of 19 U.S.C. § 1677(11) applies to determinations on critical circumstances (while Chairman Bragg does not join in these views, she believes that the “tie vote rule” is applicable to critical circumstances), and the Views of Commissioner Thelma J. Askey on Critical Circumstances, finding that the “tie vote rule” does not apply to critical circumstances determinations (while Commissioner Crawford does not join in these views, she concludes that the “tie vote rule” is not applicable to critical circumstances).

³ Certain Preserved Mushrooms from Chile, Inv. No. 731-TA-776 (Final), USITC Pub. 3144 at 4-6 (Nov. 1998) (“Chile Determination”).

⁴ *See* 19 U.S.C. § 1677(7)(G)(iii). Accordingly, the record for these determinations is the same as that in the Chile determination, with the following exceptions: (1) the record includes Commerce’s final margins for China, India, and Indonesia and Commerce’s final critical circumstances determination for China; (2) the record includes the final comments of the parties; and (3) because Commerce’s final margins with respect to Indonesia changed the volume and composition of the subject imports from Indonesia, these determinations use slightly different U.S. apparent consumption data than did the Chile determination.

⁵ 19 U.S.C. § 1677(4)(A).

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.”⁶

The decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and the Commission applies the statutory standard of “like” or “most similar in characteristics and uses” on a case-by-case basis.⁷ No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation.⁸ The Commission looks for clear dividing lines among possible like products, and disregards minor variations.⁹ 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.¹⁰

Commerce has defined the imported articles within the scope of these investigations as: [C]ertain preserved mushrooms whether imported whole, sliced, diced, or as stems and pieces. The preserved mushrooms covered by the scope of this investigation are the species *Agaricus bisporus* and *Agaricus bitorquis*. “Preserved mushrooms” refer to mushrooms that have been prepared or preserved by cleaning, blanching, and sometimes slicing or cutting. These mushrooms are then packed and heated in containers including but not limited to cans or glass jars, in a suitable liquid medium, including but not limited to water, brine, butter or butter sauce. Preserved mushrooms may be imported whole, sliced, diced, or as stems and pieces. Included within the scope of the investigation are “brined” mushrooms, which are presalted and packed in a heavy salt solution to provisionally preserve them for further processing.¹¹

⁶ 19 U.S.C. § 1677(10).

⁷ See, e.g., Nippon Steel Corp. v. United States, 19 CIT 450, 455 (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 455 n.4; Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int’l Trade 1996).

The Commission employs a “semifinished products” analysis when analyzing whether a product at an earlier stage of its production process is “like” a finished or further processed product. Under this 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. Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany and Japan, Inv. Nos. 731-TA 736-737 (Final), USITC Pub. 2988 at 6 n.23 (Aug. 1996).

⁸ See, e.g., Nippon Steel, 19 CIT at 454-55.

⁹ 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).

¹⁰ 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).

¹¹ 63 Fed. Reg. 72255, 72256 (Dec. 31, 1998) (China); 63 Fed. Reg. 72246 (Dec. 31, 1998) (India); 63 Fed. Reg. 72268, 72269 (Dec. 31, 1998) (Indonesia).

Commerce expressly excluded other species of mushrooms, fresh and chilled mushrooms, dried mushrooms, frozen mushrooms, and marinated, acidified or pickled mushrooms from the scope.¹²

For purposes of our like product determination, the record in these final phase investigations is identical to the record in our determination concerning Chile. In the Chile determination, we determined that neither fresh mushrooms nor marinated, acidified, or pickled mushrooms should be included in the domestic like product. We consequently defined the domestic like product to encompass only the types of preserved mushrooms within Commerce's scope definition.¹³ For the reasons stated in the Chile determination, we reach the same conclusion here.

B. Domestic Industry

The domestic industry is defined as "the producers as a [w]hole of a domestic like product."¹⁴ In defining the domestic industry, the Commission's general practice has been to include in the industry producers of all of the domestic production of the like product, whether toll produced, captively consumed, or sold in the domestic merchant market.¹⁵

The record in these investigations concerning the definition of the domestic industry is identical to the record in our determination concerning Chile. In the Chile determination, we determined that: (1) the domestic industry should be limited to domestic producers of certain preserved mushrooms and that growers of fresh mushrooms should not be included in the domestic industry; (2) Giorgio Foods and *** were related parties pursuant to section 771(4)(B) of the Act; and (3) appropriate circumstances did not exist to exclude Giorgio and *** from the domestic industry.¹⁶ Accordingly, we defined the domestic industry to consist of all domestic producers of preserved mushrooms.¹⁷ For the reasons stated in the Chile determination, we adopt the same definition of the domestic industry in the instant investigations.¹⁸

II. CUMULATION

A. In General

Section 771(7)(G)(i) of the Act requires the Commission to cumulate imports from all countries as to which petitions were filed and/or investigations self-initiated by Commerce on the same day, if such imports compete with each other and with domestic like products in the United States market.¹⁹

In assessing whether imports compete with each other and with the domestic like product, the Commission has generally considered four factors:

¹² See, e.g., 63 Fed. Reg at 72256.

¹³ Chile Determination, USITC Pub. 3144 at 4-6.

¹⁴ 19 U.S.C. § 1677(4)(A).

¹⁵ 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).

¹⁶ Chile Determination, USITC Pub. 3144 at 6-9. Commissioner Crawford and Commissioner Askey found that appropriate circumstances existed to exclude related party producers Giorgio and *** from the domestic industry. *Id.*, at 8 n.35, 9 n.45.

¹⁷ Chile Determination, USITC Pub. 3144 at 9. Commissioner Crawford and Commissioner Askey defined the domestic industry to consist of all domestic producers of preserved mushrooms except Giorgio and ***. *Id.* at 9 n.48.

¹⁸ Commissioner Crawford and Commissioner Askey also adopt the same definition of the domestic industry in the instant investigations that they did in the Chile determination.

¹⁹ 19 U.S.C. § 1677(7)(G)(i). There are four exceptions to the cumulation provision, none of which is applicable in the instant investigations.

- (1) the degree of fungibility between the imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;
- (2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product;
- (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and
- (4) whether the imports are simultaneously present in the market.²⁰

While no single factor is necessarily determinative, and the list of factors is not exclusive, these factors are intended to provide the Commission with a framework for determining whether the imports compete with each other and with the domestic like product.²¹ Only a “reasonable overlap” of competition is required.²²

B. Discussion

The petition in the instant antidumping investigations concerning China, India, and Indonesia was filed on the same day as the petition in the companion antidumping investigation involving preserved mushrooms from Chile. Accordingly, the first part of the statutory standard for cumulation is satisfied, and we are required to determine, for the imports from each subject country, whether there is a reasonable overlap of competition between those subject imports and the domestic like product and between imports from each subject country, on the one hand, and imports from each other subject country, on the other.²³

²⁰ See Certain Cast-Iron Pipe Fittings from Brazil, the Republic of Korea, and Taiwan, Inv. Nos. 731-TA-278-280 (Final), USITC Pub. 1845 (May 1986), *aff'd*, Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898 (Ct. Int'l Trade), *aff'd*, 859 F.2d 915 (Fed. Cir. 1988).

²¹ See, e.g., Wieland Werke, AG v. United States, 718 F. Supp. 50 (Ct. Int'l Trade 1989).

²² See Goss Graphic System, Inc. v. United States, 22 CIT ___, slip op. 98-147 at 8 (Oct. 16, 1998) (“cumulation does not require two products to be highly fungible”); Wieland Werke, 718 F. Supp. at 52 (“Completely overlapping markets are not required.”); United States Steel Group v. United States, 873 F. Supp. 673, 685-86 (Ct. Int'l Trade 1994), *aff'd*, 96 F.3d 1352 (Fed. Cir. 1996).

²³ Petitioners contend that subject imports from all countries should be cumulated. NFP, Chinese Respondents, and Indonesian Producers respectively argue that subject imports from Chile, China, and Indonesia should not be cumulated with imports from any other subject country. Pillsbury argues that subject imports from Chile and Indonesia should not be cumulated. There was no party to the investigations representing producers or exporters of subject merchandise from India that submitted argument.

1. Fungibility

With Domestic Like Product. All responding U.S. producers reported that preserved mushrooms from all sources are used interchangeably.²⁴ Importers showed more divergence in views. Eleven of 15 importers reported that subject merchandise from China was interchangeable with domestically-produced mushrooms, and four reported that it was not. Ten of 20 importers reported that subject merchandise from India was interchangeable with domestically-produced mushrooms, and ten reported it was not. Ten of 22 importers reported that subject merchandise from Indonesia was interchangeable with domestically-produced mushrooms, and 12 reported that it was not.²⁵

A majority of purchasers reported that imports from each of the subject countries were at least moderate substitutes for the domestically-produced product. Thirteen of 19 purchasers reported that subject imports from China were at least moderate substitutes with the domestic like product, and 13 of 21 purchasers found products from these two sources comparable in quality.²⁶ Three of four purchasers reported that subject imports from India were at least moderate substitutes with domestically-produced preserved mushrooms, and two of three purchasers found that U.S. and Indian preserved mushrooms were comparable in quality.²⁷ Seven of 10 purchasers found that subject imports from Indonesia were at least moderate substitutes with the domestic like product and six of eight purchasers found product from these two sources comparable in quality.²⁸

Fifteen of the 22 purchasers of subject imports from China, one of the three purchasers of subject imports from India, and seven of the 10 purchasers of subject imports from Indonesia also reported purchases of domestically-produced preserved mushrooms.²⁹

With Other Subject Imports. All U.S. producers reported that imported preserved mushrooms from all subject sources were used interchangeably. Sixteen of 23 responding importers agreed.³⁰ A limited number of purchasers compared the substitutability of imports from the pertinent subject countries. Three of four purchasers reported that Chilean and Chinese imports were at least moderate substitutes. The sole purchaser to compare Chilean and Indian imports reported that they were moderate substitutes, and one of two purchasers reported that Chilean and Indonesian imports were moderate substitutes, with the other purchaser responding that the two imports were not substitutable. Each of the two responding purchasers reported that the substitutability between the Chinese and Indian products was good. Four of six responding purchasers reported that the substitutability between the Chinese and Indonesian products was at least moderate. There were no purchaser comparisons of the substitutability of Indian and Indonesian products.³¹

Of the 22 purchasers of subject imports from China, five reported purchasing subject imports from Chile, three reported purchasing subject imports from India, and ten reported purchasing subject imports from Indonesia. One purchaser reported purchasing subject imports from both Chile and India. No individual purchaser reported purchasing subject imports from both India and Indonesia or from both Chile and Indonesia.³²

²⁴ Confidential Report (CR) at II-8, Public Report (PR) at II-5.

²⁵ CR at II-8, PR at II-5-6.

²⁶ CR at II-9, II-12, PR at II-6, II-8.

²⁷ CR at II-9, II-12, PR at II-6, II-8.

²⁸ CR at II-9, II-12, PR at II-6, II-8.

²⁹ Table F-1, CR at F-3-4, PR at F-3-4.

³⁰ CR at II-13, PR at II-8.

³¹ CR at II-13-14, PR at II-9.

³² Table F-1, CR at F-3-4, PR at F-3-4.

2. Common Geographic Markets

Six of the 11 responding domestic producers and 17 of the 28 responding importers reported selling their preserved mushrooms nationwide.³³ Imports from each subject country were entered in numerous ports across the country.³⁴

3. Common Channels of Distribution

Preserved mushrooms are sold to industrial users, food service customers, and retailers. Industrial users typically purchase product in 68-ounce cans for use in producing packaged foods. Food service customers, which consist of restaurants and institutional customers as well as distributors to such firms, also typically purchase product in 68-ounce cans. Retail customers, which are principally grocery stores, most often purchase product in four or eight-ounce cans or jars.³⁵

A predominant *** percent of subject imports from Chile were distributed to food service users. Most of the remaining Chilean product was distributed to industrial users (*** percent), with only a small share, *** percent, being distributed to retail users.³⁶

The majority of subject imports from China, 68.3 percent, also were distributed to food service users. Most of the remaining Chinese imports (30.1 percent) were distributed to retail users, with 1.5 percent being shipped to industrial users.³⁷

Subject imports from India predominantly were distributed to retail users. Specifically, a large share, *** percent, of Indian imports entered this channel of distribution, with most of the remaining share, *** percent, distributed to food service users, and a small share, *** percent, distributed to industrial users.³⁸

Subject imports from Indonesia were overwhelmingly shipped to retail users, with 94.3 percent entering this channel. The small remaining share, 5.7 percent, entered the food service channel, and none entered the industrial user channel.³⁹

Domestically-produced preserved mushrooms are distributed in all three channels of distribution. In 1997, 26.9 percent of U.S. producers' shipments were distributed to industrial users, 28.7 percent were distributed to food service users, and 44.4 percent were distributed to retail users.^{40 41}

³³ CR at V-1, PR at V-1. *** all stated that they market their imported preserved mushrooms nationwide. *See* Importers Questionnaire Responses.

³⁴ CR at I-10-11, PR at I-7-8.

³⁵ CR at II-1, PR at II-1.

³⁶ Table I-2, CR at I-13, PR at I-10.

³⁷ Table I-2, CR at I-13, PR at I-10.

³⁸ Table I-2, CR at I-13, PR at I-10.

³⁹ Table I-2, CR at I-13, PR at I-10. We reject petitioners' contention that the data in the staff report showing a concentration of Indonesian subject imports in retail shipments are irreconcilable with official import statistics reflecting that approximately 25 percent of total imports from Indonesia were sold in containers larger than the sizes most often sold at retail. Information in the record indicates that the Indonesian product was sold at the retail level in 68 oz. cans as well as in four- and eight-ounce containers. At the hearing, a witness for Pillsbury, the *** importer of subject merchandise from Indonesia, *see* CR at IV-2, PR at IV-1, stated that "[a]ll of our large cans are only sold at retail, primarily through warehouse or club stores, such as Cos[t]co or B.J.s or Sam[']s." Tr. at 178 (La Penotiere). Pillsbury's testimony is ***. *See* *** Questionnaire.

⁴⁰ Table I-2, CR at I-13, PR at I-10.

⁴¹ Commissioner Crawford and Commissioner Askey excluded the related party producers from the domestic industry, and thus analyze the channels of distribution as follows. The preserved mushrooms sold by non-related party domestic producers are still distributed in all three channels of distribution, but there is a marked concentration in the industrial

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4. Simultaneous Presence in Marketplace

Both the domestic like product and imports from each subject source were present in the U.S. market in each month of 1997 and the first half of 1998.⁴²

C. **Conclusion**

The record with respect to Chile-China and Chile-India competition has not changed since issuance of the determination concerning Chile. Consequently, for the reasons stated in Chile investigation, we conclude that subject imports from Chile compete with subject imports from both China and India.⁴³

In the Chile determination, the Commission declined to cumulate subject imports from Chile with subject imports from Indonesia on the basis that “the record shows only a minimum overlap between the subject imports from Chile and Indonesia in the various channels of distribution, which we find to be insufficient to satisfy the ‘reasonable overlap’ standard.”⁴⁴ Consistent with our previous finding, we again conclude that subject imports from Chile do not compete with subject imports from Indonesia.⁴⁵

The record indicates that subject imports from China compete with subject imports from India and Indonesia. Imports from each of these three countries have been present in the United States throughout the period of investigation and are distributed nationwide. Questionnaire responses indicate that subject imports from China are considered at least moderate substitutes with subject imports from India and Indonesia. Several purchasers purchase subject imports from both China and India or from both China and Indonesia.⁴⁶ Significant proportions of subject imports from China and India are distributed in both the food service and retail channels, although the distribution pattern for subject imports from China differs somewhat from that for subject imports from India. Similarly, a significant proportion of subject imports from China are distributed into the retail channel into which nearly all subject imports from Indonesia are distributed. We thus conclude that the data show a reasonable overlap in channels of distribution between subject imports from China, on the one hand, and subject imports from India and Indonesia, on the other.

⁴¹(...continued)

and food service segments. In 1997, *** percent of non-related U.S. producers’ shipments was sold to industrial users, *** percent was sold to food service users, and only *** percent was sold to retail users. See Table I-3, CR at I-14, PR at I-11.

⁴² CR at I-11, PR at I-8.

⁴³ See Chile Determination, USITC Pub. 3144 at 11-12, 14-15.

⁴⁴ Chile Determination, USITC Pub. 3144 at 15.

⁴⁵ Because Commerce’s final determination on Indonesia, unlike its preliminary determination, was affirmative with respect to all exporters, the volume of subject imports from Indonesia is larger and their composition is slightly different for purposes of the final Indonesia determination than they were for the Chile determination. Nevertheless, the record continues to show only a minimal overlap in channels of distribution, and no common purchasers of subject imports from both Chile and Indonesia.

⁴⁶ Consequently, we are unpersuaded by arguments raised by Chinese Respondents and Indonesian Producers that subject imports from their respective countries are higher in quality than those of the other subject countries and thus should not be cumulated. The questionnaire responses, together with the incidence of common purchasers, rebuts the arguments that there are sufficiently large quality differences between subject imports from China or Indonesia and imports from any other subject source such that there would not be a reasonable overlap in fungibility.

As discussed below, respondents’ arguments about lack of reasonable overlap of channels of distribution for country combinations other than Indonesia-Chile are also not supported by the record.

The record indicates that a majority of subject imports from both India and Indonesia are distributed into the retail channel of distribution.⁴⁷ The record data do not suggest that subject imports from India and Indonesia have any particularly distinct qualities or characteristics that would limit their fungibility with each other. We consequently conclude that the record indicates that subject imports from India and subject imports from Indonesia compete with each other.

The record indicates that purchasers generally consider the subject imports from China, India, and Indonesia to be at least moderate substitutes with the domestic like product, that there are common purchasers of the domestic product, on the one hand, and product from each of the subject countries, on the other hand, and there is a reasonable overlap in channels of distribution, inasmuch as significant proportions of the domestic like product are distributed in each of the three channels of distribution. On the basis of this information, we conclude that the domestic like product competes with the subject imports from China, India, and Indonesia.⁴⁸

Based on our analysis of competition, for purposes of our determinations on China and India, we cumulate subject imports from Chile, China, India, and Indonesia. For purposes of our determination on Indonesia, we cumulate subject imports from China and India with subject imports from Indonesia, but we do not cumulate subject imports from Chile.⁴⁹

III. MATERIAL INJURY BY REASON OF DUMPED IMPORTS

In the final phase of antidumping duty investigations, the Commission determines whether an industry in the United States is materially injured by reason of the dumped imports under investigation.^{50 51} In

⁴⁷ The record does not indicate common purchasers of imports from India and Indonesia, although one importer imported preserved mushrooms from both countries in 1997. This firm, ***. See CR at IV-2, PR at IV-1.

⁴⁸ Commissioner Crawford and Commissioner Askey do not concur in this conclusion with respect to subject imports from Indonesia. They find that subject imports from Indonesia do not compete with the domestic like product because they are sold primarily in different market segments. See footnote 41 above.

⁴⁹ Because Commissioner Crawford and Commissioner Askey conclude that subject imports from Indonesia do not compete with preserved mushrooms produced by the domestic industry, they do not cumulate subject imports from Indonesia with subject imports from any other subject country. For purposes of their determinations on China and India, they cumulate subject imports from Chile, China, and India.

⁵⁰ 19 U.S.C. § 1673d(b).

⁵¹ Commissioner Crawford notes that the statute requires that the Commission determine whether a domestic industry is materially injured “by reason of” LTFV imports. She finds that the clear meaning of the statute is to require a determination of whether the domestic industry is materially injured by reason of unfairly traded imports, not by reason of the unfairly traded imports among other things. Many, if not most, domestic industries are subject to injury from more than one economic factor. Of these factors, there may be more than one that independently are causing material injury to the domestic industry. It is assumed in the legislative history that the “ITC will consider information which indicates that harm is caused by factors other than the less-than-fair-value imports.” S. Rep. No. 96-249 at 75 (1979). However, the legislative history makes it clear that the Commission is not to weigh or prioritize the factors that are independently causing material injury. *Id.* at 74; H.R. Rep. No. 96-317 at 46-47 (1979). The Commission is not to determine if the unfairly traded imports are “the principal, a substantial or a significant cause of material injury.” S. Rep. No. 96-249 at 74. Rather, it is to determine whether any injury “by reason of” the unfairly traded imports is material. That is, the Commission must determine if the subject imports are causing material injury to the domestic industry. “When determining the effect 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.” S. Rep. No. 100-71 at 116 (1987) (emphasis added); *Gerald Metals v. United States*, 132 F.3d 716 (Fed. Cir. 1997) (rehearing denied).

For a detailed description and application of Commissioner Crawford’s analytical framework, see *Certain Steel* (continued...)

making these determinations, the Commission must consider the volume of the dumped 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.⁵² The statute defines “material injury” as “harm which is not inconsequential, immaterial, or unimportant.”⁵³ In assessing whether the domestic industry is materially injured by reason of dumped imports, we consider all relevant economic factors that bear on the state of the industry in the United States.⁵⁴ 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.”⁵⁵

A. Conditions of Competition

The applicable conditions of competition in the instant investigations are the same as those discussed in our determination concerning Chile. There we identified two principal conditions of competition: (1) apparent U.S. consumption of fresh mushrooms has increased in recent years while apparent U.S. consumption of preserved mushrooms has declined; and (2) there are three major types of purchasers in the marketplace, each of which is associated with a different channel of distribution -- retail, food service, and industrial. For purposes of the instant determinations, we adopt by reference the discussion of conditions of competition in the Chile determination and do not repeat that discussion here.⁵⁶

B. Determinations concerning China and India

For the reasons stated below, we determine that the domestic preserved mushroom industry is materially injured by reason of subject imports from China and India.^{57 58} As previously discussed, for

⁵¹(...continued)

Wire Rod from Canada, Germany, Trinidad & Tobago, and Venezuela, Inv. Nos. 731-TA-763-766 (Final), USITC Pub. 3087 at 29 (March 1998) and Steel Concrete Reinforcing Bars from Turkey, Inv. No. 731-TA-745 (Final), USITC Pub. 3034 at 35 (April 1997). 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 Commissioner Crawford’s mode of analysis, expressly holding that her mode of analysis comports with the statutory requirements for reaching a determination of material injury by reason of the subject imports. United States Steel Group v. United States, 96 F.3d 1352, 1361 (Fed. Cir. 1996), *aff’d* 873 F. Supp. 673, 694-95 (Ct. Int’l Trade 1994).

⁵² 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).

⁵³ 19 U.S.C. § 1677(7)(A).

⁵⁴ 19 U.S.C. § 1677(7)(C)(iii).

⁵⁵ 19 U.S.C. § 1677(7)(C)(iii).

⁵⁶ See Chile Determination, USITC Pub. 3144 at 16-17. We note that apparent consumption data in the instant determinations are slightly different from those used in the Chile determination. In the instant determinations, where all imports from Indonesia are subject imports, official statistics were used to calculate Indonesian import volume. See CR at IV-2, PR at IV-1. By contrast, not all Indonesian imports were subject imports at the time of the Chile determination. Consequently, there the Commission used a combination of official statistics and questionnaire data to calculate Indonesian import volume. See Chile Determination, USITC Pub. 3144 at IV-1 & n.20.

⁵⁷ For purposes of their determinations on China and India, Commissioner Crawford and Commissioner Askey cumulate subject imports from Chile, China, and India. Their determinations in the Chile Determination were based on the same cumulated subject imports. Because the record and cumulated subject imports are, for all practical purposes, the same in the instant determinations as in the Chile Determination, Commissioner Crawford and Commissioner Askey

(continued...)

purposes of making our determinations on China and India, we have cumulated subject imports from Chile, China, India, and Indonesia.

1. Volume of Subject Imports

Section 771(7)(C)(i) of the Act 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.”⁵⁹

The quantity of cumulated subject imports from Chile, China, India, and Indonesia declined from 123.0 million pounds in 1995 to 111.1 million pounds in 1996, and then increased to 118.3 million pounds in 1997. Cumulated subject import quantity in interim (January-June) 1998, 68.3 million pounds, was higher than the 64.1 million pounds imported in interim 1997. The value of cumulated subject imports declined from \$155.0 million in 1995 to \$116.2 million in 1996 and then to \$111.9 million in 1997. Interim 1998 cumulated subject import value of \$58.5 million was less than interim 1997 cumulated subject import value of \$60.5 million.⁶⁰

Cumulated subject import quantity declined at a lower rate over the period of investigation than did U.S. apparent consumption. Consequently, cumulated subject import market penetration rose over the period of investigation. Market penetration for cumulated subject imports from Chile, China, India, and Indonesia, measured by quantity, declined slightly from 51.2 percent in 1995 to 51.0 percent in 1996, and then rose to 57.8 percent in 1997. Interim 1998 cumulated subject import market penetration, 61.5 percent, was greater than the interim 1997 figure of 59.8 percent.⁶¹

In light of their market penetration levels, we find the volumes of cumulated subject imports to be significant. We also find the increase in cumulated subject import market penetration over the period of investigation to be significant.

2. Price Effects of Subject Imports

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

⁵⁷(...continued)

adopt the analysis and reasoning of that determination here. They have considered Commerce’s final margins for China and India and the modifications in apparent consumption data from the Chile Determination. The differences in the apparent consumption data are slight and the dumping margins for China and India remain large and thus do not change their analysis or reasoning. Consequently, Commissioner Crawford and Commissioner Askey conclude that the domestic preserved mushroom industry is materially injured by reason of subject imports from China and India.

⁵⁸ Commissioner Askey notes that in the Chile Determination she found that the volumes of cumulated subject imports (Chile, China, and India) to be significant. She also found the increase in cumulated subject import market penetration over the period of investigation to be significant. She found that the cumulated subject imports are moderate substitutes with the domestic like product and that for all three products, cumulated subject imports undersold the domestic like product in 63 of 94 quarterly comparisons with the non-related party producers. Accordingly, she concluded that the subject imports had significant price-depressing effects. Consequently, she concluded that the cumulated subject imports had a significant adverse impact on the domestic preserved mushroom industry’s sales, employment, revenue, and operating performance. See Chile Determination, USITC Pub. 3144 at 17-24.

⁵⁹ 19 U.S.C. § 1677(7)(C)(i).

⁶⁰ Table IV-1, CR at IV-4, PR at IV-3.

⁶¹ Table IV-3, CR at IV-6, PR at IV-5. The market penetration of nonsubject imports was 9.1 percent in 1995, 6.8 percent in 1996, 5.7 percent in 1997, 5.5 percent in interim 1997 and 7.0 percent in interim 1998. *Id.*

underselling by the imported merchandise as compared with the price of domestic like products of the United States, and (II) 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.⁶²

The record indicates that price is an important factor in purchasing decisions for preserved mushrooms. Twenty-six of 30 purchasers named price as one of the three most important factors in their purchasing decisions.⁶³ Although purchasers named quality as the most important factor in their purchasing decisions more often than they mentioned price,⁶⁴ they did not tend to perceive significant quality distinctions between the domestic like product and subject imports from Chile, China, India, and Indonesia. Three of five purchasers found the Chilean and U.S. products to be comparable in quality, 13 of 21 purchasers found the Chinese and U.S. products to be comparable in quality, two of three purchasers found the Indian and U.S. products to be comparable in quality, and six of eight purchasers found the Indonesian and U.S. products to be comparable in quality.⁶⁵ Additionally, majorities of purchasers found the subject imports from Chile, China, India, and Indonesia to be at least moderate substitutes with domestically-produced preserved mushrooms.⁶⁶ Accordingly, we find that the cumulated subject imports are moderate substitutes with the domestic like product.

The Commission collected pricing data on three products: stems and pieces (other than those packed in butter or butter sauce) sold in four-ounce cans, stems and pieces (other than those packed in butter or butter sauce) sold in 68-ounce cans, and sliced mushrooms (other than those packed in butter or butter sauce) sold in four-ounce cans. Although we have considered all three of these products in our analysis, we have given particular focus to the second product. This is because preserved mushrooms are sold in the U.S. market predominantly as stems and pieces not packed in butter or butter sauce and the second product reflects sales in both the food service and industrial channels of distribution, where the most significant competition between the domestic like product and the cumulated subject imports occurred. Additionally, this product provided the greatest number of pricing comparisons between the domestically-produced product and the cumulated subject imports.

The cumulated subject imports from Chile, China, India, and Indonesia undersold the domestic like product in 67 quarterly comparisons, oversold the domestic like product in 67 quarterly comparisons, and in two comparisons the products were priced the same.⁶⁷ With respect to the 68-ounce stems and pieces product, the cumulated subject imports undersold the domestic like product in 27 of 50 quarterly pricing comparisons, with there being multiple instances of underselling by each of the subject countries.⁶⁸ Given that the cumulated subject imports are moderate substitutes with each other and with the domestic like

⁶² 19 U.S.C. § 1677(7)(C)(ii).

⁶³ CR at II-8, PR at II-5. Liberty Gold, an importer of subject merchandise from China, submitted an affidavit stating that one of the most popular preserved mushroom products is “generally very sensitive to price trends in the market because customers tend to make their purchasing decisions almost exclusively on the basis of price.” Liberty Gold Prehearing Brief, Exhibit A, ¶ 2. NFP, *** importer of subject merchandise from China in 1997, stated that “the preserved mushroom market from China is a commodity market that is price-driven.” NFP Posthearing Brief at 3.

⁶⁴ CR at II-7-8, PR at II-5.

⁶⁵ CR at II-11-12, PR at II-7-8.

⁶⁶ Table II-1, CR at II-9, PR at II-6.

⁶⁷ See Tables V-1-3, CR at V-7-12, PR at V-5-10.

⁶⁸ See Table V-2, CR at V-9-10, PR at V-7-8.

product and that price is an important factor in purchasing decisions, we find that the underselling has been significant.⁶⁹

Moreover, prices for each of the products generally declined over the period of investigation.⁷⁰ The price declines were particularly noteworthy for the 68-ounce stems and pieces product. For the domestically-produced product, prices declined by 27.4 percent between the first quarter of 1995 and the second quarter of 1998.⁷¹ During this same period, prices for this product declined by *** percent for imports from Chile, by 34.1 percent for imports from China, and by *** percent for imports from Indonesia. Between the second quarter of 1996 (the earliest period for which such data were reported) and the second quarter of 1998, prices for this product declined by *** percent for imports from India.⁷²

These price declines occurred when domestic producers' costs also declined. Nevertheless, prices declined at a greater rate than cost of goods sold (COGS). The decline in net unit sales values was greater than the decline in unit COGS over the period of investigation.⁷³ In light of the substitutability of the domestic like product and the cumulated subject imports and the substantial volumes of the subject imports, we find that there is a link between the declines in prices for the cumulated subject imports and the declines in prices for the domestic like product. We accordingly conclude that the cumulated subject imports had significant price-depressing effects.

3. Impact of Subject Imports^{74 75}

⁶⁹ We also observe that there were several instances of confirmed lost revenues to the domestic industry attributable to the cumulated subject imports. These involved competition with subject imports from China. *See* CR at V-18, V-25, PR at V-14-15.

⁷⁰ Tables V-1-3, CR at V-7-12, PR at V-5-10. Prices did not decline for product 1 from Chile, product 3 from India, or product 3 from Indonesia, and there was only one quarter's pricing observation for product 3 from Chile.

⁷¹ CR at V-6, PR at V-12.

⁷² CR at V-15-16, PR at V-12.

⁷³ Average unit sales values declined by 32 cents from 1995 to 1997 and were two cents lower in interim 1998 than in interim 1997. By contrast, unit COGS declined by 26 cents from 1995 to 1997 and were three cents higher in interim 1998 than interim 1997. *See* Tables VI-2, VI-3, CR at VI-6-7, PR at VI-3.

We also acknowledge that the price declines were coincident with a period of reduced U.S. demand for preserved mushrooms, as respondents assert. Nevertheless, reduced demand is not necessarily a satisfactory explanation for significant price declines for a product for which demand is relatively price inelastic. *See* CR at II-5-7, II-16, PR at II-4, II-10. Moreover, as discussed above, there was significant underselling by the cumulated subject imports. Cost declines and reduced demand do not explain the significant underselling.

⁷⁴ As part of its consideration of the impact of imports, the statute as amended by the Uruguay Round Agreements Act (URAA) specifies that the Commission is to consider "the magnitude of the margin of dumping." 19 U.S.C. § 1677(7)(C)(iii)(V). With respect to Chile, Commerce assigned a 148.51 percent weighted-average dumping margins to all exporters. 63 Fed. Reg. 56613, 56623 (Oct. 22, 1998). Commerce's final dumping margins range from 126.16 percent to 198.63 percent for China. 63 Fed. Reg. 72255, 72268 (Dec. 31, 1998). For India, Commerce's final dumping margins range from 6.28 percent to 243.87 percent. 63 Fed. Reg. 72246, 72255 (Dec. 31, 1998). Commerce's final dumping margins range from 7.94 percent to 22.84 percent for Indonesia. 63 Fed. Reg. 72268, 72283 (Dec. 31, 1998).

⁷⁵ Chairman Bragg notes that she does 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).

In examining the impact of the subject imports on the domestic industry, we consider all relevant economic factors that bear on the state of the industry in the United States.⁷⁶ 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.

As stated previously, the cumulated subject imports maintained a significant market share during the period of investigation and depressed domestic prices to a significant degree. As a result, the domestic industry's performance showed declines in many key indicators during the period of investigation, although some indicators were better for interim 1998 than for interim 1997.

The cumulated subject imports increased their market share at the expense of the domestic industry. Measured by quantity, the domestic industry's market share increased from 39.7 percent in 1995 to 42.2 percent in 1996, but declined to 36.5 percent in 1997. Interim 1998 market share of 31.6 percent was lower than interim 1997 market share of 34.7 percent.⁷⁷

Coincident with the loss of market share to the cumulated subject imports, domestic producers' production and U.S. shipments fell. Production declined from 107.7 million pounds in 1995 to 84.9 million pounds in 1996 and then to 74.7 million pounds in 1997. Production was lower in interim 1998 (42.4 million pounds) than in interim 1997 (46.8 million pounds).⁷⁸ The quantity of U.S. shipments declined from 95.3 million pounds in 1995 to 91.9 million pounds in 1996 and then to 74.6 million pounds in 1997. The 35.0 million pounds of U.S. shipments in interim 1998 was lower than the 37.2 million pounds in interim 1997. The value of U.S. shipments declined from \$142.0 million in 1995 to \$121.1 million in 1996 and then to \$90.3 million in 1997. Interim 1998 U.S. shipment value of \$42.0 million was lower than interim 1997 U.S. shipment value of \$45.6 million.⁷⁹

Capacity utilization declined from 50.1 percent in 1995 to 38.0 percent in 1996 and to 36.7 percent in 1997. Interim 1998 capacity utilization of 52.6 percent was higher than interim 1997 capacity utilization of 42.8 percent.⁸⁰

The size of the domestic workforce shrank by approximately one-fifth between 1995 and 1997 and by approximately another one-fifth in interim 1998 as compared to interim 1997.⁸¹ The number of production and related workers declined from 518 in 1995 to 476 in 1996 and then to 421 in 1997. Interim 1998 employment of 357 was lower than interim 1997 employment of 450. Hours worked declined from 1.1 million in 1995 to 978,000 in 1996 and then to 804,000 in 1997. The 417,000 hours worked in interim 1998 was less than the 470,000 hours worked in interim 1997.⁸² Three domestic producers ceased operations entirely in 1997.⁸³

The combination of declining output and falling prices had negative consequences for the domestic industry's operating performance. Sales revenues declined on both an aggregate and a per-unit basis. To a

⁷⁶ 19 U.S.C. § 1677(7)(C)(iii). *See also* URAA Statement of Administrative Action (SAA), H.R. Rep. 316, 103d Cong., 2d Sess., vol. I at 885 ("In material injury determinations, the Commission considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they also may demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports."). *See also id.* at 851.

⁷⁷ Table IV-3, CR at IV-6, PR at IV-5.

⁷⁸ Table III-1, CR at III-6, PR at III-4.

⁷⁹ Table III-2, CR at III-6, PR at III-4.

⁸⁰ Table III-1, CR at III-6, PR at III-4. Capacity was lower in interim 1997 than interim 1998, partially as a result of ***. CR at III-3, PR at III-2.

⁸¹ The large workforce reduction was spread across the industry, as several producers reduced employment. *Compare* Table III-4, PR at III-7, CR at III-5 *with* Table C-3, CR at C-8, PR at C-8.

⁸² Table III-4, PR at III-7, CR at III-5.

⁸³ CR at III-1 n.1, PR at III-1 n.1.

lesser extent, COGS also declined on both an aggregate and per unit basis, due to declines in raw materials costs. Selling, general, and administrative expenses (SG&A) remained essentially constant on a unit basis.⁸⁴

Because unit sales values declined at a greater rate than unit COGS,⁸⁵ operating income declined on a per-unit basis. Operating margins declined from 5.3 percent in 1995 to 3.7 percent in 1996 and to 1.3 percent in 1997. The 2.6 percent operating margin in interim 1998 was lower than the 5.7 percent operating margin in interim 1997. Operating income declined from \$7.5 million in 1995 to \$4.5 million in 1996 and to \$1.2 million in 1997. Interim 1998 operating income of \$1.1 million was lower than interim 1997 operating income of \$2.6 million.⁸⁶ During 1997 and both interim periods, at least half of the domestic producers sustained operating losses.⁸⁷

We have examined whether the domestic industry's operating difficulties might be attributable to causes other than the cumulated subject imports. We cannot conclude that any of the alternative causes advanced by respondents, such as declines in demand or imports other than the cumulated subject imports, provide a satisfactory explanation, either individually or in the aggregate, for the declines in the domestic industry's performance.⁸⁸ Instead, because of their significant volumes and price-depressing effects, we find a causal nexus between the subject imports and the domestic industry's sales, employment, and revenue declines and consequent poor operating performance. We therefore conclude that the cumulated subject imports had a significant impact on the domestic preserved mushroom industry. Accordingly, we have reached affirmative determinations in the investigations concerning China and India.

C. **Determination concerning Indonesia**⁸⁹

For the reasons stated below, we determine that the domestic preserved mushroom industry is materially injured by reason of subject imports from Indonesia. As previously discussed, for purposes of making our determinations on Indonesia, we have cumulated subject imports from China, India, and Indonesia.

1. Volume of Subject Imports

⁸⁴ Table VI-1, CR at VI-3, PR at VI-2.

⁸⁵ We have considered respondents' arguments that the unit COGS figures for the latter portion of the period of investigation were inflated by increases in the unit costs of other factory overhead. The reason that unit factory overhead costs increased, however, is because producers were forced to spread fixed overhead costs over a smaller quantity of production. In turn, these production declines were a function of the subject imports. Consequently, the increase in unit factory overhead costs is not a cause of the domestic producers' difficulties independent from the cumulated subject imports.

⁸⁶ Table VI-1, CR at VI-3, PR at VI-2.

⁸⁷ Six producers reported operating losses in 1997, seven in interim 1997, and five in interim 1998. Table VI-2, CR at VI-5, PR at VI-3.

⁸⁸ As previously stated, the cumulated subject imports were able to increase their U.S. market penetration over the period of investigation at the expense of the domestic industry, notwithstanding declines in apparent U.S. consumption.

Nonsubject imports had considerably lower market penetration than did the cumulated subject imports. Table IV-1, CR at IV-4, PR at IV-3. Moreover, the declines in average unit sales value over the period of investigation were considerably higher for the cumulated subject imports than for nonsubject imports. *See id.*

⁸⁹ Commissioner Crawford and Commissioner Askey have reached negative determinations concerning Indonesia and do not join this section of the opinion. *See Views of Commissioners Carol T. Crawford and Thelma J. Askey.*

Section 771(7)(C)(i) of the Act 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.”⁹⁰

The quantity of cumulated subject imports from China, India, and Indonesia declined from 112.3 million pounds in 1995 to 104.0 million pounds in 1996, and then increased to 112.8 million pounds in 1997. Cumulated subject import quantity in interim (January-June) 1998, 64.0 million pounds, was higher than the 60.8 million pounds imported in interim 1997. The value of cumulated subject imports declined from \$143.3 million in 1995 to \$108.2 million in 1996 and then to \$105.7 million in 1997. Interim 1998 cumulated subject import value of \$53.7 million was less than interim 1997 cumulated subject import value of \$56.6 million.⁹¹

Cumulated subject import quantity increased over the period of investigation while U.S. apparent consumption declined. Consequently, cumulated subject import market penetration rose over the period of investigation. Cumulated subject import market penetration, measured by quantity, increased from 46.8 percent in 1995 to 47.8 percent in 1996, and then to 55.2 percent in 1997. Interim 1998 cumulated subject import market penetration, 57.7 percent, was greater than the interim 1997 figure of 56.8 percent.⁹²

In light of their market penetration levels, we find the volumes of cumulated subject imports from China, India, and Indonesia to be significant. We also find the increase in cumulated subject import market penetration over the period of investigation to be significant.

2. Price Effects of Subject Imports

Section 771(7)(C)(ii) of the Act provides that, in evaluating the price effects of the subject imports, the Commission shall consider whether -- (I) 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) 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.⁹³

The record indicates that price is an important factor in purchasing decisions for preserved mushrooms. Twenty-six of 30 purchasers named price as one of the three most important factors in their purchasing decisions.⁹⁴ Although purchasers named quality as the most important factor in their purchasing decisions more often than they mentioned price,⁹⁵ they did not tend to perceive significant quality distinctions between the domestic like product and subject imports from China, India, and Indonesia. Thirteen of 21 purchasers found the Chinese and U.S. products to be comparable in quality, two of three purchasers found the Indian and U.S. products to be comparable in quality, and six of eight purchasers found the Indonesian

⁹⁰ 19 U.S.C. § 1677(7)(C)(i).

⁹¹ Table IV-1, CR at IV-4, PR at IV-3.

⁹² Table IV-3, CR at IV-6, PR at IV-5. The market penetration of fairly traded imports was 9.1 percent in 1995, 6.8 percent in 1996, 5.7 percent in 1997, 5.5 percent in interim 1997 and 7.0 percent in interim 1998. *Id.*

⁹³ 19 U.S.C. § 1677(7)(C)(ii).

⁹⁴ CR at II-8, PR at II-5. Liberty Gold, an importer of subject merchandise from China, submitted an affidavit stating that one of the most popular preserved mushroom products is “generally very sensitive to price trends in the market because customers tend to make their purchasing decisions almost exclusively on the basis of price.” Liberty Gold Prehearing Brief, Exhibit A, ¶ 2. NFP, *** importer of subject merchandise from China in 1997, stated that “the preserved mushroom market from China is a commodity market that is price-driven.” NFP Posthearing Brief at 3.

⁹⁵ CR at II-7-8, PR at II-5.

and U.S. products to be comparable in quality.⁹⁶ Additionally, majorities of purchasers found the subject imports from China, India, and Indonesia to be at least moderate substitutes with domestically-produced preserved mushrooms.⁹⁷ Accordingly, we find that the cumulated subject imports are moderate substitutes with the domestic like product.

The Commission collected pricing data on three products: stems and pieces (other than those packed in butter or butter sauce) sold in four-ounce cans, stems and pieces (other than those packed in butter or butter sauce) sold in 68-ounce cans, and sliced mushrooms (other than those packed in butter or butter sauce) sold in four-ounce cans. Although we have considered all three of these products in our analysis, we have given particular focus to the second product. This is because preserved mushrooms are sold in the U.S. market predominantly as stems and pieces not packed in butter or butter sauce and the second product reflects sales in both the food service and industrial channels of distribution, where the most significant competition between the domestic like product and the cumulated subject imports occurred. Additionally, this product provided the greatest number of pricing comparisons between the domestically-produced product and subject imports from China, India, and Indonesia.

The cumulated subject imports from China, India, and Indonesia undersold the domestic like product in 61 of 118 quarterly comparisons.⁹⁸ With respect to the 68-ounce stems and pieces product, the cumulated subject imports from China, India, and Indonesia undersold the domestic like product in 23 of 36 quarterly pricing comparisons, with there being multiple instances of underselling by each of the subject countries.⁹⁹ Given that the cumulated subject imports are moderate substitutes with each other and with the domestic like product and that price is an important factor in purchasing decisions, we find that the underselling has been significant.¹⁰⁰

Moreover, prices for each of the products generally declined over the period of investigation.¹⁰¹ The price declines were particularly noteworthy for the 68-ounce stems and pieces product. For the domestically-produced product, prices declined by 27.4 percent between the first quarter of 1995 and the second quarter of 1998.¹⁰² During this same period, prices for this product declined by 34.1 percent for imports from China and by *** percent for imports from Indonesia. Between the third quarter of 1996 (the earliest period for which such data were reported) and the second quarter of 1998, prices for this product declined by *** percent for imports from India.¹⁰³

These price declines occurred when domestic producers' costs also declined. Nevertheless, prices declined at a greater rate than cost of goods sold (COGS). The decline in net unit sales values was greater than the decline in unit COGS over the period of investigation.¹⁰⁴ In light of the substitutability of the

⁹⁶ CR at II-11-12, PR at II-7-8.

⁹⁷ Table II-1, CR at II-9, PR at II-6.

⁹⁸ See Tables V-1-3, CR at V-7-12, PR at V-5-10.

⁹⁹ See Table V-2, CR at V-9-10, PR at V-7-8.

¹⁰⁰ We also observe that there were several instances of confirmed lost revenues to the domestic industry attributable to the cumulated subject imports. These involved competition with subject imports from China. See CR at V-18, V-25, PR at V-14-15.

¹⁰¹ Tables V-1-3, CR at V-7-12, PR at V-5-10. Prices did not decline for product 3 from India or product 3 from Indonesia.

¹⁰² CR at V-6, PR at V-12.

¹⁰³ CR at V-15-16, PR at V-12.

¹⁰⁴ Average unit sales values declined by 32 cents from 1995 to 1997 and were two cents lower in interim 1998 than in interim 1997. By contrast, unit COGS declined by 26 cents from 1995 to 1997 and were three cents higher in interim 1998 than interim 1997. See Tables VI-2, VI-3, CR at VI-6-7, PR at VI-3.

We also acknowledge that the price declines were coincident with a period of reduced U.S. demand for

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domestic like product and the cumulated subject imports and the substantial volumes of the subject imports, we find that there is a link between the declines in prices for the cumulated subject imports and the declines in prices for the domestic like product. We accordingly conclude that the subject imports had significant price-depressing effects.

3. Impact of Subject Imports^{105 106}

In examining the impact of the subject imports on the domestic industry, we consider all relevant economic factors that bear on the state of the industry in the United States.¹⁰⁷ 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.

As stated previously, the cumulated subject imports from China, India, and Indonesia maintained a significant market share during the period of investigation and depressed domestic prices to a significant degree. As a result, the domestic industry's performance showed declines in many key indicators during the period of investigation, although some indicators were better for interim 1998 than for interim 1997.

The cumulated subject imports increased their market share at the expense of the domestic industry. Measured by quantity, the domestic industry's market share increased from 39.7 percent in 1995 to 42.2 percent in 1996, but declined to 36.5 percent in 1997. Interim 1998 market share of 31.6 percent was lower than interim 1997 market share of 34.7 percent.¹⁰⁸

Coincident with the loss of market share to the cumulated subject imports, domestic producers' production and U.S. shipments fell. Production declined from 107.7 million pounds in 1995 to 84.9 million pounds in 1996 and then to 74.7 million pounds in 1997. Production was lower in interim 1998 (42.4 million pounds) than in interim 1997 (46.8 million pounds).¹⁰⁹ The quantity of U.S. shipments declined from 95.3 million pounds in 1995 to 91.9 million pounds in 1996 and then to 74.6 million pounds in 1997. The 35.0 million pounds of U.S. shipments in interim 1998 was lower than the 37.2 million pounds in interim 1997. The value of U.S. shipments declined from \$142.0 million in 1995 to \$121.1 million in 1996 and then to

¹⁰⁴(...continued)

preserved mushrooms, as respondents assert. Nevertheless, reduced demand is not necessarily a satisfactory explanation for significant price declines for a product for which demand is relatively price inelastic. See CR at II-5-7, II-16, PR at II-4, II-10. Moreover, as discussed above, there was significant underselling by the cumulated subject imports. Cost declines and reduced demand do not explain the significant underselling.

¹⁰⁵ As part of its consideration of the impact of imports, the statute as amended by the URAA specifies that the Commission is to consider "the magnitude of the margin of dumping." 19 U.S.C. § 1677(7)(C)(iii)(V). Commerce's final dumping margins range from 126.16 percent to 198.63 percent for China. 63 Fed. Reg. 72255, 72268 (Dec. 31, 1998). For India, Commerce's final dumping margins range from 6.28 percent to 243.87 percent. 63 Fed. Reg. 72246, 72255 (Dec. 31, 1998). Commerce's final dumping margins range from 7.94 percent to 22.84 percent for Indonesia. 63 Fed. Reg. 72268, 72283 (Dec. 31, 1998).

¹⁰⁶ Chairman Bragg notes that she does 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).

¹⁰⁷ 19 U.S.C. § 1677(7)(C)(iii). See also SAA at 885 ("In material injury determinations, the Commission considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they also may demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports."). See also *id.* at 851.

¹⁰⁸ Table IV-3, CR at IV-6, PR at IV-5.

¹⁰⁹ Table III-1, CR at III-6, PR at III-4.

\$90.3 million in 1997. Interim 1998 U.S. shipment value of \$42.0 million was lower than interim 1997 U.S. shipment value of \$45.6 million.¹¹⁰

Capacity utilization declined from 50.1 percent in 1995 to 38.0 percent in 1996 and to 36.7 percent in 1997. Interim 1998 capacity utilization of 52.6 percent was higher than interim 1997 capacity utilization of 42.8 percent.¹¹¹

The size of the domestic workforce shrank by approximately one-fifth between 1995 and 1997 and by approximately another one-fifth in interim 1998 as compared to interim 1997.¹¹² The number of production and related workers declined from 518 in 1995 to 476 in 1996 and then to 421 in 1997. Interim 1998 employment of 357 was lower than interim 1997 employment of 450. Hours worked declined from 1.1 million in 1995 to 978,000 in 1996 and then to 804,000 in 1997. The 417,000 hours worked in interim 1998 was less than the 470,000 hours worked in interim 1997.¹¹³ Three domestic producers ceased operations entirely in 1997.¹¹⁴

The combination of declining output and falling prices had negative consequences for the domestic industry's operating performance. Sales revenues declined on both an aggregate and a per-unit basis. To a lesser extent, COGS also declined on both an aggregate and per unit basis, due to declines in raw materials costs. Selling, general, and administrative expenses (SG&A) remained essentially constant on a unit basis.¹¹⁵

Because unit sales values declined at a greater rate than unit COGS,¹¹⁶ operating income declined on a per-unit basis. Operating margins declined from 5.3 percent in 1995 to 3.7 percent in 1996 and to 1.3 percent in 1997. The 2.6 percent operating margin in interim 1998 was lower than the 5.7 percent operating margin in interim 1997. Operating income declined from \$7.5 million in 1995 to \$4.5 million in 1996 and to \$1.2 million in 1997. Interim 1998 operating income of \$1.1 million was lower than interim 1997 operating income of \$2.6 million.¹¹⁷ During 1997 and both interim periods, at least half of the domestic producers sustained operating losses.¹¹⁸

We have examined whether the domestic industry's operating difficulties might be attributable to causes other than the cumulated subject imports. We cannot conclude that any of the alternative causes advanced by respondents, such as declines in demand or imports other than the cumulated subject imports, provide a satisfactory explanation, either individually or in the aggregate, for the declines in the domestic industry's performance.¹¹⁹ Instead, because of their significant volumes and price-depressing effects, we find

¹¹⁰ Table III-2, CR at III-6, PR at III-4.

¹¹¹ Table III-1, CR at III-6, PR at III-4. Capacity was lower in interim 1997 than interim 1998, partially as a result of ***, CR at III-3, PR at III-2.

¹¹² The large workforce reduction was spread across the industry, as several producers reduced employment. *Compare* Table III-4, PR at III-7, CR at III-5 with Table C-3, CR at C-8, PR at C-8.

¹¹³ Table III-4, PR at III-7, CR at III-5.

¹¹⁴ CR at III-1 n.1, PR at III-1 n.1.

¹¹⁵ Table V1-1, CR at VI-3, PR at VI-2.

¹¹⁶ We have considered respondents' arguments that the unit COGS figures for the latter portion of the period of investigation were inflated by increases in the unit costs of other factory overhead. The reason that unit factory overhead costs increased, however, is because producers were forced to spread fixed overhead costs over a smaller quantity of production. In turn, these production declines were a function of the subject imports. Consequently, the increase in unit factory overhead costs is not a cause of the domestic producers' difficulties independent from the cumulated subject imports.

¹¹⁷ Table VI-1, CR at VI-3, PR at VI-2.

¹¹⁸ Six producers reported operating losses in 1997, seven in interim 1997, and five in interim 1998. Table VI-2, CR at VI-5, PR at VI-3.

¹¹⁹ As previously stated, the cumulated subject imports were able to increase their U.S. market penetration over the period of investigation at the expense of the domestic industry, notwithstanding declines in apparent U.S. consumption.

(continued...)

a causal nexus between the subject imports and the domestic industry's sales, employment, and revenue declines and consequent poor operating performance. We therefore conclude that the cumulated subject imports from China, India, and Indonesia had a significant impact on the domestic preserved mushroom industry. Accordingly, we have reached an affirmative determination in the investigation concerning Indonesia.

CONCLUSION

For the foregoing reasons, we determine that the domestic industry producing preserved mushrooms is materially injured by reason of dumped imports from China, India, and Indonesia.

¹¹⁹(...continued)

Imports other than the cumulated subject imports from China, India, and Indonesia had considerably lower market penetration than did the cumulated subject imports. Table IV-1, CR at IV-4, PR at IV-3. Moreover, the declines in average unit sales value over the period of investigation were considerably higher for the cumulated subject imports than for fairly traded imports. *See id.*

**VIEWS OF VICE CHAIRMAN MILLER, COMMISSIONER HILLMAN, AND
COMMISSIONER KOPLAN ON CRITICAL CIRCUMSTANCES**

Because Commerce made an affirmative critical circumstances determination with respect to subject imports from China and we have determined that the domestic preserved mushroom industry is materially injured by reason of subject imports from China, we must further determine “whether the imports subject to the affirmative [Commerce critical circumstances] determination . . . are likely to undermine seriously the remedial effect of the antidumping order to be issued.”¹²⁰ The URAA SAA indicates that the Commission is to determine “whether, by massively increasing imports prior to the effective date of the relief, the importers have seriously undermined the remedial effect of the order.”¹²¹

In its final determination, Commerce made affirmative critical circumstances determinations with respect to one named exporter (Tak Fat Trading Corporation Co.) and several unspecified exporters.¹²² It made negative critical circumstances determinations with respect to several named exporter/producer combinations.¹²³

Commerce issued its final determination concerning China after the Commission issued its determination in the companion investigation concerning preserved mushrooms from Chile. Under section 771(7)(G)(iii) of the Act, the Commission was required to make its determination in the China investigation based on the record it had compiled in the investigation concerning Chile. In a staggered investigation, the statute authorizes the Commission to include in the record for purposes of the later-decided investigations the final Commerce determination and final party comments on that determination.¹²⁴ It does not permit the Commission otherwise to supplement the record in the later-decided investigations. Consequently, in the instant investigation section 771(7)(G)(iii) of the Act precluded the Commission from generating any new information concerning the firms for which Commerce had made final affirmative critical circumstances

¹²⁰ 19 U.S.C. § 1673d(b)(4)(A)(i). The statute further provides that in making this determination:

the Commission shall consider, among other factors it considers relevant--

- (I) the timing and volume of the imports,
- (II) a rapid increase in inventories of the imports, and
- (III) any other circumstances indicating that the remedial effect of the antidumping order will be seriously undermined.

19 U.S.C. § 1673d(b)(4)(A)(ii).

¹²¹ SAA at 877.

¹²² See 72 Fed. Reg. at 72268. These unspecified exporters did not respond to Commerce’s questionnaires and are subject to the China-wide antidumping margin. *Id.* at 72263.

¹²³ See 73 Fed. Reg. at 72268.

¹²⁴ 19 U.S.C. § 1677(7)(G)(iii). Final party comments may not contain new factual information. See 19 U.S.C. § 1677m(g); 19 C.F.R. § 207.30(b). Portions of the Chinese Respondents’ final comments contain new factual information. Pursuant to 19 U.S.C. § 1677m(g) and 19 C.F.R. § 207.30(b), we have disregarded this material.

determinations after Commerce issued its determination.¹²⁵ Consequently, pursuant to our statutory directive, we were required to reach our critical circumstances decision based on the facts available.¹²⁶

Consistent with Commission practice, in considering the timing and volume of imports, we have compared import quantities prior to filing of the petition with those subsequent to the filing of the petition.¹²⁷ The record contains information concerning Tak Fat, the one named exporter for which Commerce made an affirmative critical circumstances determination. These data indicate that Tak Fat's exports to the United States increased from *** million pounds during July-December 1997 to *** million pounds during January-June 1998. In other words, Tak Fat's export volume for the six months after filing of the petition was *** percent higher than its volume for the six months prior to the filing of the petition.¹²⁸ Tak Fat was responsible for a substantial proportion of total subject imports from China during that period.^{129 130}

We have also examined information available in the record that sheds light on the timing of the increase. The record does not contain monthly export data from any exporters that received affirmative critical circumstances determinations from Commerce. It does, however, contain monthly data for all certain preserved mushroom imports from China.¹³¹ These data indicate that monthly import volumes fluctuated irregularly prior to January 1998, but were relatively evenly spaced throughout the year.¹³² By contrast, in the months immediately following January 1998, the month the petition in the instant investigation was filed, import volumes surged dramatically, far exceeding previous monthly levels. Monthly import volume more than doubled between January and February. The March import volume was over 50 percent above that for February and almost four times the level of January. Import volumes fell significantly following the March surge, and thereafter remained steadily below historic levels for the remainder of the period of investigation.¹³³

¹²⁵ Normally, when an investigation is not staggered the Commission will not be foreclosed from attempting to supplement the record, including seeking company-specific import and inventory data, after issuance of a final Commerce critical circumstances determination.

¹²⁶ See 19 U.S.C. § 1677e(a)(1). See also SAA at 869 ("Section 776(a) makes it possible for Commerce and the Commission to make their determinations within the applicable deadlines if relevant information is missing from the record."). We emphasize that we have not relied on any adverse inferences in making our decision.

¹²⁷ See Certain Brake Drums and Rotors from China, Inv. No. 731-TA-744 (Final), USITC Pub. 3035 at 19 (April 1997).

¹²⁸ CR at IV-3, PR at IV-2. We have relied principally on Tak Fat data because the record does not contain reliable information concerning export volumes for the other firms for which Commerce made an affirmative critical circumstances determination, and, as explained above, the Commission could not gather additional data concerning these firms after issuance of Commerce's final critical circumstances determination.

¹²⁹ Compare CR at IV-3, PR at IV-2 with Table IV-1, CR at IV-4, PR at IV-3.

¹³⁰ Vice Chairman Miller and Commissioner Hillman note that not only do other data, as discussed below, support their finding, but also that the Tak Fat data alone can support a finding that there was an exceptionally large increase in imports from those companies subject to the Commerce affirmative critical circumstances determination after the filing of the petition.

¹³¹ See Table E-1, CR at E-3, PR at E-3; Petitioners' Posthearing Brief, Appendix 8.

¹³² Although some respondents argued that there is a cyclical growing season for certain preserved mushrooms in China, they did not agree on the timing of the season. Compare Liberty Gold Prehearing Brief at 4 with Chinese Respondents' Prehearing Brief at 26. In any event, these respondents do not claim that the canning process follows a seasonal pattern. The information available in the record does not support the position that preserved mushroom imports from China are seasonal in nature. See Table E-1, CR at E-3, PR at E-3; Petitioners' Posthearing Brief, Appendix 8. Consequently, use of a seasonal analysis is not appropriate. Compare Steel Concrete Reinforcing Bars from Turkey, Inv. No. 731-TA-745 (Final), USITC Pub. 3034 (April 1997).

¹³³ Table E-1, CR at E-3, PR at E-3.

Commerce's negative critical circumstances determinations were premised on findings that certain Chinese exporters did not "massively" increase imports between the period prior to filing of the petition and the period subsequent to filing of the petition.¹³⁴ Consequently, we believe it is reasonable to conclude that a significant proportion of the surge of subject imports from China immediately following filing of the petition is attributable to Tak Fat and the other exporters subject to Commerce's affirmative critical circumstances determination. The timing and magnitude of the import surge leads us to conclude that these exporters were responsible for a massive increase in imports timed in such a manner that they would undermine seriously the remedial effect of any subsequent antidumping order.

Our conclusion is also corroborated by the available data in the record concerning inventories.¹³⁵ The available data concern all U.S. inventories of subject imports from China. These inventories increased from *** million pounds at the end of 1997 to *** million pounds at the end of June 1998. The ratio of inventories to U.S. shipments of imports from China also increased from *** percent at the end of 1997 to *** percent at the end of June 1998.¹³⁶ For the same reasons we found it reasonable to conclude that a significant proportion of the import surge is attributable to the exporters that received affirmative critical circumstances determinations from Commerce, we also find it reasonable to conclude that a significant proportion of the inventory buildup is attributable to merchandise from these exporters. That the inventory increase was substantial in both relative and absolute terms demonstrates a rapid increase in inventories of imports subject to Commerce's critical circumstances determination.¹³⁷ Moreover, the magnitude of the inventory increase was sufficient to significantly delay the remedial effect of the antidumping order.

The timing and volume of the imports, the rapid increase of inventories, and the substitutability of the subject imports from China with the domestic like product described above in the analysis on price effects all support a conclusion that there was an import surge by those firms subject to Commerce's affirmative critical circumstances determination that is likely to seriously undermine the effect of the antidumping order. Accordingly, we make an affirmative critical circumstances finding.

¹³⁴ See 63 Fed. Reg. at 72263.

¹³⁵ See 19 U.S.C. § 1677e(c).

¹³⁶ Table VII-5, CR at VII-8, PR at VII-4.

¹³⁷ Preserved mushrooms are capable of being stockpiled. The Commission found in the preliminary determination that this product has a shelf life of up to three years. See Certain Preserved Mushrooms from Chile, China, India, and Indonesia, Inv. Nos. 731-TA-776-779 (Preliminary), USITC Pub. 3086 at 6 (Feb. 1998), citing Conf. Tr. at 17-18. See also Tr. at 27 (Ciarrocchi).

VIEWS OF CHAIRMAN BRAGG, COMMISSIONER CRAWFORD, AND COMMISSIONER ASKEY ON CRITICAL CIRCUMSTANCES

Because Commerce made an affirmative critical circumstances determination with respect to subject imports from China and we have determined that the domestic preserved mushroom industry is materially injured by reason of subject imports from China, we must further determine “whether the imports subject to the affirmative [Commerce critical circumstances] determination . . . are likely to undermine seriously the remedial effect of the antidumping order to be issued.”¹³⁸ The URAA SAA indicates that the Commission is to determine “whether, by massively increasing imports prior to the effective date of the relief, the importers have seriously undermined the remedial effect of the order.”^{139 140 141 142}

The statute requires the Commission to find that imports subject to Commerce’s critical circumstance determinations “are likely to undermine seriously” the remedial effect of the order. In making this finding, the Commission is instructed to examine certain factors, including the timing and the volume of the imports and whether there has been a rapid increase in inventories of the imports.¹⁴³ These factors provide guidance for whether the surge in imports and any increase in inventories are “likely to” undermine seriously the effect of an order. However, these factors do not provide any guidance for evaluating the effects of the surge and increase in inventories, that is, whether an order is undermined seriously.

Neither the statute nor the legislative history defines the term “undermines seriously.” Nonetheless, the choice of this term clearly indicates that something more than merely affecting the order is required. *Black’s Law Dictionary* defines “serious” as grave or great, and Webster’s Third New International Dictionary defines “undermine” as to subvert or weaken insidiously.¹⁴⁴ Therefore, the plain meaning of the

¹³⁸ 19 U.S.C. § 1673d(b)(4)(A)(i). The statute further provides that in making this determination:

the Commission shall consider, among other factors it considers relevant--

- (I) the timing and volume of the imports,
- (II) a rapid increase in inventories of the imports, and
- (III) any other circumstances indicating that the remedial effect of the antidumping order will be seriously undermined.

19 U.S.C. § 1673d(b)(4)(A)(ii).

¹³⁹ SAA at 877.

¹⁴⁰ Chairman Bragg notes that although she reached a negative critical circumstances determination in this investigation, she believes that the “tie vote rule” (19 U.S.C. § 1677(11)) is applicable to critical circumstances. See “Additional Views of Commissioner Bragg and Vice Chairman Nuzum Regarding Effect of Critical Circumstances Tie Vote,” Coumarin from the People’s Republic of China, Inv. No. 731-TA-677 (Final), USITC Pub. 2852 at I-25 (Feb. 1995).

¹⁴¹ Commissioner Crawford has concluded that the “tie vote rule” (19 U.S.C. § 1677(11)) is not applicable to critical circumstances. See Coumarin from the People’s Republic of China, Inv. No. 731-TA-677 (Final), USITC Pub. 2852 at I-21-23 (Feb. 1995) (Additional Views of Chairman Watson and Commissioner Crawford on Critical Circumstances).

¹⁴² Commissioner Askey has concluded that the “tie vote rule” (19 U.S.C. § 1677(11)) is not applicable to critical circumstances. See Views of Commissioner Thelma J. Askey on Critical Circumstances.

¹⁴³ 19 U.S.C. § 1673d(b)(4)(A)(ii)(I)-(II).

¹⁴⁴ Black’s Law Dictionary 1367 (6th ed. 1990); Webster’s Third New International Dictionary 2489 (1981).

term “undermine seriously” establishes a very high standard: that the surge in imports greatly and insidiously weakens or subverts the effect of the order.¹⁴⁵

An antidumping duty order provides a remedy for market disruption caused by dumped imports. Therefore, evaluating the market disruption caused by the surge in imports and increase in inventories serves to measure the effect they have on the order. If the magnitude of the surge in imports and increase in inventories is sufficiently large that they greatly and insidiously weaken or subvert the effect of the order, then the order is undermined seriously.

In finding “massive imports” in connection with its affirmative critical circumstances determination, Commerce compared import quantities for the seven-month period after the filing of the petition, January to July 1998, with the seven-month period before the filing of the petition, June to December 1997. The Commission record permits a comparison of import volumes for the six post-petition months, January to June 1998, with those for the six pre-petition months, July to December 1997.¹⁴⁶ The record indicates that the surge in those imports subject to the Commerce affirmative critical circumstances determination (i.e., Tak Fat and all nonresponding firms from China¹⁴⁷) that occurred over this period only accounts for approximately *** percent of total apparent consumption during January-June 1998.¹⁴⁸ Further, the importation pattern for certain preserved mushrooms reveals that there tend to be larger volumes of imports in the first half of the year than in the second half of the year.¹⁴⁹ Comparing the volume of imports in the first half of 1997 for those firms that were believed to be subject to Commerce’s affirmative critical circumstances determination with the volume of their imports in the first half of 1998 shows only a *** percent increase in imports. On this record, these increases are not likely to seriously undermine the remedial effect of the order.

¹⁴⁵ Chairman Bragg does not join this paragraph or the following paragraph regarding the definition of the term “undermine seriously.”

¹⁴⁶ The information in the record most closely corresponding to the pre-petition and post-petition period examined by the Commerce Department falls within these six month time frames.

¹⁴⁷ The Commission report provides data on imports attributable to four firms other than Tak Fat that were believed by staff to be subject to Commerce's affirmative critical circumstances determination; data for the four firms were labeled in the staff report as data for “all nonresponding firms” from China. In fact, information in the Chinese Respondents’ Final Comments at 2-3 indicates that exports of the firms were covered by Commerce’s negative critical circumstances determination. (We note that portions of those comments contain new factual information and that pursuant to 19 U.S.C. § 1677m(g) and 19 C.F.R. § 207.30(b), we have disregarded this material.) The data presented for “all nonresponding firms” from China are unreliable and virtually all, if not all, of the exports of the four firms were likely not covered by Commerce’s affirmative critical circumstances determination. Indeed, the only exporter in China covered by Commerce’s affirmative critical circumstances determination for which the Commission has data is Tak Fat. *See* Office of Investigations data sheet entitled “U.S. Imports of Certain Preserved Mushrooms from China.” There are no data on any other such exporters in China, and the Commission was not able to obtain data directly from any such firms. Moreover, in the instant investigation, section 771(7)(G)(iii) of the Act precluded the Commission from obtaining any new information concerning the other firms for which Commerce had made affirmative critical circumstances determinations after Commerce issued its determination. *See* 19 U.S.C. § 1677(7)(G)(iii).

Although the Chinese Respondents have contested the reliability of the data in the Commission’s report attributable to the firms other than Tak Fat, we have used this information in making a negative finding. Any proposed error in the data would serve only to reduce the controverted numbers and further support the case for a negative finding. We therefore have used the data in the manner most favorable to petitioners, but still find that the data do not warrant an affirmative critical circumstances finding.

¹⁴⁸ *Compare* CR at IV-3, PR at IV-2 with Table IV-3, CR at IV-6, PR at IV-5.

¹⁴⁹ CR at IV-3, PR at IV-2.

This conclusion is corroborated by the available data on inventories. The data in the record¹⁵⁰ demonstrate that the increase in inventories between the end of 1997 and June 1998 accounted for merely *** percent of apparent consumption during January-June 1998.¹⁵¹ Additionally, comparing inventories in June 1997 with those in June 1998 shows that inventories increased a mere *** percent over this period. Thus, the record does not support the conclusion that there has been a rapid increase in inventories that is likely to seriously undermine the remedial effect of the order.

Thus, notwithstanding its timing, we find that the surge in imports and the increase in inventories are too small to constitute a degree of market disruption that is “likely to undermine seriously the remedial effect” of any antidumping order. We accordingly make a negative critical circumstances finding.

¹⁵⁰ The information available in the record concerning inventory levels pertains to all LTFV preserved mushroom imports, not merely those subject to the affirmative Commerce critical circumstances determination.

¹⁵¹ Compare Table VII-5, CR at VII-8 with Table IV-3, CR at IV-6.

VIEWS OF VICE CHAIRMAN MARCIA E. MILLER AND COMMISSIONERS JENNIFER A. HILLMAN AND STEPHEN KOPLAN REGARDING THE LEGAL EFFECT OF CRITICAL CIRCUMSTANCES TIE VOTES¹⁵²

In this investigation three Commissioners have voted in the affirmative regarding critical circumstances and three in the negative. Given the terms of the Act's tie vote provision and the legislative history and clear Congressional intent behind that provision and the critical circumstances provisions, such a tie vote should be deemed an affirmative determination of critical circumstances by the Commission.¹⁵³

The tie vote rule, section 771(11) of the Act, provides that:

If the Commissioners voting on a determination by the Commission, including a determination under section 751, are evenly divided as to whether the determination should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination.¹⁵⁴

The issue here is whether a Commission conclusion regarding critical circumstances under section 735(b)(4) of the Act is a "determination" for purposes of section 771(11).

Section 735(b)(4) of the Act states that when, as in this case, Commerce has made an affirmative finding of critical circumstances, "the final determination of the Commission shall include a finding as to whether the imports subject to the affirmative determination [of critical circumstances] are likely to undermine seriously the remedial effect of the antidumping duty order"¹⁵⁵ Thus, this section refers to a critical circumstances ruling as a "finding." However, in setting forth the effect of a negative conclusion by the Commission on critical circumstances, section 735(c)(3) of the Act refers to the Commission's decision as a "determination." The Commission's critical circumstances decisions are therefore referred to in the statute as both "determinations" and as "findings." The recognition in the statute that such decisions are "determinations," as well as the fact that they are final, conclusive determinations by the Commission that directly affect the availability and extent of antidumping duties, support the view that the tie vote provision applies to such determinations.

This interpretation of the statute is supported by the legislative history. Critical circumstances decisions are referred to as "determinations" in much of the legislative history.¹⁵⁶ They are also referred to, at times, as "findings."¹⁵⁷ In fact, Congress has used the terms interchangeably in the same discussion within

¹⁵²Chairman Bragg notes that although she reached a negative critical circumstances determination in this investigation, she believes that the "tie vote rule" (19 U.S.C. § 1677(11)) is applicable to critical circumstances. *See* "Additional Views of Commissioner Bragg and Vice Chairman Nuzum Regarding Effect of Critical Circumstances Tie Vote," Coumarin from the People's Republic of China, Inv. No. 731-TA-677 (Final), USITC Pub. 2852 at I-25 (Feb. 1995).

¹⁵³The Department of Commerce has reached the same conclusion, *see* Coumarin from the People's Republic of China, 60 Fed. Reg. 7751 (Feb. 9, 1995) (Notice of Antidumping Order).

¹⁵⁴19 U.S.C. § 1677(11).

¹⁵⁵19 U.S.C. § 1673d(b)(4)(A)(i).

¹⁵⁶*See, e.g.*, S. Rep. No. 96-249, at 74 (1979); S. Rep. No. 100-71, at 17, 92-93 (1987); H.R. Rep. No. 100-576, at 611 (1988); H.R. Rep. No. 103-826, at 50 (1994); S. Rep. No. 103-412, at 38-39 (1994).

¹⁵⁷*See, e.g.*, H.R. Rep. No. 96-317, at 69, 73 (1979); S. Rep. No. 100-71, at 91 (1987).

the legislative history, both with respect to the Commission and the Department of Commerce.¹⁵⁸ The most reasonable conclusion is that, with respect to critical circumstances, Congress has used “determinations” and “findings” not as terms of art but rather as interchangeable synonyms. Therefore, it is not appropriate to limit application of the tie vote rule to critical circumstances decisions on the grounds that they are referred to at times as “determinations” and at other times as “findings.”

In addition to the statutory language, Congressional intent behind the tie vote rule and critical circumstances provisions further demonstrate that the tie vote rule applies to critical circumstances determinations.

The original tie vote provision, enacted in 1958, was part of a bill intended “to provide for greater certainty, speed, and efficiency in the enforcement”¹⁵⁹ of the antidumping law. Congress described the tie vote provision itself as providing “additional strength to the law.”¹⁶⁰ The Federal Circuit’s precursor recognized this clear legislative intent.¹⁶¹ Congress enacted the tie vote rule for a clear purpose: to resolve, in favor of the petitioning domestic industry, tie votes on decisions affecting availability and extent of relief in an antidumping action. A critical circumstances determination, which affects the starting date of antidumping duties, is such a decision.¹⁶²

Congress has shown its strong intent to make retroactive application of duties fully available to petitioners in appropriate circumstances. Congress enacted the critical circumstances provisions for this purpose and has amended them to improve their availability and application. When these provisions were first enacted in 1979, Congress described its goal as providing prompt and meaningful relief to domestic industries suffering from surges of dumped or subsidized imports, and deterring exporters of merchandise under investigation from circumventing the intent of the antidumping law.¹⁶³ The 1988 amendments were an effort toward “an improved critical circumstances procedure [that] will significantly strengthen antidumping and countervailing duty procedures by revitalizing a provision that has up to now been ineffective.”¹⁶⁴ Given the clear legislative intent for strong, effective retroactive relief where warranted, the tie vote provision, which itself is intended to strengthen the dumping law, applies to critical circumstances determinations. Moreover, given its intent, it is reasonable to conclude that Congress did not intend the availability of retroactive relief to be limited by an effective requirement of a two-thirds vote (in investigations in which the full Commission votes on the issue).

¹⁵⁸ See H.R. Rep. No. 96-317, at 73 (1979); S. Rep. No. 100-71, at 92-94 (1987); S. Rep. No. 103-412, at 38-39 (1994).

¹⁵⁹S. Rep. No. 85-1619, at 1 (1958).

¹⁶⁰*Id.* at 2.

¹⁶¹See Border Brokerage Co. v. United States, 646 F.2d 539, 546 (C.C.P.A. 1981) (noting that “[i]n the case of the Antidumping Act, enacted for the benefit of United States manufacturers, the stated purpose of the tie vote provision was to provide additional deterrent strength to the law and greater certainty, speed, and efficiency in its enforcement.”). The court in Border Brokerage also noted that, in the absence of the tie vote rule, an effective two-thirds rule would apply to determinations voted on by all six Commissioners, and that “such a two-thirds majority requirement could hardly be said to add deterrent strength, certainty, speed, and efficiency in enforcement of the antidumping law.” *Id.* at 546, n.18.

¹⁶²Coumarin from the People’s Republic of China, Inv. No. 731-TA-677 (Final), USITC Pub. 2852 at I-25 (Feb. 1995) (Additional Views of Commissioner Bragg and Vice Chairman Nuzum).

¹⁶³See H.R. Rep. No. 96-317, at 63 (1979); S. Rep. No. 96-249, at 67 (1979).

¹⁶⁴H.R. Rep. No. 100-576, at 611 (1988) (conference report).

For the foregoing reasons, in the present investigation the Commission should be deemed to have reached an affirmative determination of critical circumstances.

VIEWS OF COMMISSIONER THELMA J. ASKEY ON CRITICAL CIRCUMSTANCES

In this case, the Commission is equally divided as to whether critical circumstances exist that warrant the extraordinary relief of retroactive duties on imports of certain mushrooms from China.¹⁶⁵ The Commission must therefore decide whether the “tie vote” provision applies to critical circumstances findings.¹⁶⁶ I believe the plain language of the statute indicates that the tie vote provision, which by its terms applies to Commission “determinations,” does not apply to critical circumstances “findings,” and that the Commission should therefore be deemed to have voted in the negative on critical circumstances.

If Commerce decides that critical circumstances exist, the statute directs that “the final determination of the Commission shall include a finding as to whether the imports subject to the affirmative determination under subsection (a)(3) of this section are likely to undermine seriously the remedial effect of the antidumping duty order to be issued under section 1673e of this title.”¹⁶⁷

“Findings” are therefore distinct from, and subsidiary to, the Commission “determination.”

The first rule of statutory construction is that if the language of the statute is plain, the interpreter should look no further for clarification.¹⁶⁸ The tie vote provision states:

(11) Affirmative determinations by divided Commission

If the Commissioners voting on a determination by the Commission, including a determination under section 1675 of this title, are evenly divided as to whether the determination should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination. For the purpose of applying this paragraph when the issue before the Commission is to determine whether there is -

(A) material injury to an industry in the United States,
(B) threat of material injury to such industry, or
(C) material retardation of the establishment of an industry in the United States,
by reason of imports of the merchandise, an affirmative vote on any of the issues shall be treated as a vote that the determination should be affirmative.¹⁶⁹

By its terms, therefore, the tie-vote provision applies only to Commission “determinations.” The provision already provides rather extraordinary relief to domestic petitioners by requiring respondents to obtain a 4-2

¹⁶⁵The Department of Commerce determined that critical circumstances existed with respect to subject imports from China produced by Tak Fat and by non-responding exporters. 72 Fed. Reg. 72255, 72259 (Dec. 31, 1998).

¹⁶⁶19 U.S.C. § 1677(11) (1994). The tie vote provision is applicable only to Title VII determinations and is an exception to the general rule requiring a majority of the Commission to make a definitive determination. The tie vote provision does not apply to other types of Commission investigations, such as those under §§ 337, 22, 406, and 201. This issue has been addressed once by the Commission in Coumarin from the People’s Republic of China, Inv. No. 731-TA-677 (Final) (Feb. 1995) (“Coumarin”). In that case, the Commission was equally divided on the existence of critical circumstances as well as on the application of the “tie vote” provision to critical circumstances findings and Commerce concluded that it would treat the Commission’s decision as an affirmative critical circumstances finding. 60 Fed. Reg. 7751, 7752 (Feb. 9, 1995).

¹⁶⁷19 U.S.C. § 1673c(b)(4). 19 U.S.C. § 1673e, which is cited in the critical circumstances provision, refers to the Commission’s overall affirmative determination under 19 U.S.C. § 1673d(b) but does not refer to critical circumstances findings and therefore does not compel a different conclusion.

¹⁶⁸Hoechst Aktiengesellschaft v. Quigg, 917 F.2d 522, 526 (Fed. Cri. 1990); 2A Sutherland on Statutory Construction § 46.01 (5th ed. 1992).

¹⁶⁹19 U.S.C. § 1677(11).

majority in order to avoid the imposition of a dumping or countervailing duty order and should be construed narrowly to apply only to definitive Commission “determinations.” A divided Commission’s critical circumstances “finding” is not a determination and therefore does not invoke the tie-vote provision.¹⁷⁰

I am mindful of the apparent ambiguity introduced by the ministerial directive appearing later in the statute: “[i]f the determination of the administering authority or the Commission under subject (a)(3) or (b)(4)(A) of this section, respectively, is negative . . .”¹⁷¹ This language, however, should not be construed to alter the plain language of the prior provision, which is substantive rather than procedural. The change in term may well be inadvertent given that the ministerial provision is directed at the Department of Commerce. Commerce’s critical circumstances decision is referred to in the statute as a “determination” and Commerce is charged with implementing any final critical circumstances decision.¹⁷² The provision therefore has no substantive effect on the Commission’s decisionmaking or on any Commission action.

The development of the law also supports the conclusion that any contradiction in the latter passage was unintentional. The statutory directive as to critical circumstances was first passed in 1979, while the ministerial provision was only added to the statute in 1984.¹⁷³ The tie vote provision, initially added to the law in 1958, preceded all provisions on critical circumstances. Thus, had Congress intended the tie vote provision to apply to the Commission’s critical circumstances finding, it likely would have made that clear at the time it passed the critical circumstances portion of the statute. The legislative history does not indicate Congress intended the provision to apply.¹⁷⁴ Similarly, when Congress revised the critical circumstances provision in 1988 and by so doing made relief easier to obtain for domestic producers, it did so by changing the criteria the Commission considers in making a critical circumstances determination, but conspicuously did not change the statutory language to ensure that the tie vote provision would apply.¹⁷⁵

Even more definitive is Congress’s latest revision of the tie vote provision in the Uruguay Round Agreements Act (“URAA”). The URAA requires that Commerce and the Commission conduct reviews of antidumping and countervailing duty orders that have been in place for five or more years (“sunset” reviews). The Commission is required to “determine whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.”¹⁷⁶ An affirmative determination is a vote to keep the order, while a negative determination is a vote to revoke the order.¹⁷⁷ Congress amended the tie vote provision so that it would apply to “determinations under section 1675 of this title,”¹⁷⁸ which includes sunset reviews. The clear implication of this change is that absent revision, the tie vote provision would not have applied to determinations made by the Commission in sunset reviews. If Congress had to revise the tie vote provision to make it apply to a

¹⁷⁰See Coumarin, Additional Views of Chairman Watson and Commissioner Crawford on Critical Circumstances, at I-21-24.

¹⁷¹Id. at § 1673d(c)(3).

¹⁷²Id.; 19 U.S.C. § 1673d(a)(3). Section 1673d(a)(3) is entitled “Critical Circumstances Determinations.”

¹⁷³The ministerial provision was added to clarify that a final critical circumstances decision could be affirmative even though the preliminary decision was negative. H.R. Rep. No. 98-1156, at 183 (1984).

¹⁷⁴H.R. Rep. No. 96-317, at 63 (1979); S. Rep. No. 96-249, at 91 (1979) (The Senate described the existing law, which was carried forward into the new law with conforming changes, as follows: “if the ITC commissioners voting on a determination are evenly divided as to whether the determination of the Commission should be in the affirmative or in the negative, the Commission is deemed to have made an affirmative determination.”) (emphasis added).

¹⁷⁵H.R. Conf. Rep. No. 100-576, at 611 (1988).

¹⁷⁶19 U.S.C. §§ 1675a(a)(1). In fact, 19 U.S.C. § 1675a(a) is entitled “Determination of likelihood of continuation or recurrence of material injury.”

¹⁷⁷19 U.S.C. § 1677(11).

¹⁷⁸H.R. 5110, 103d Cong., § 221(b) (1994) (enacted).

sunset review determination, which is very similar in effect to an overall determination in a Title VII case, then logically the provision does not apply to such subsidiary issues as critical circumstances findings. Thus, this latest amendment supports the conclusion that the tie vote provision applies only to overall Commission determinations as enumerated therein.

The statutory language is clear that the tie vote provision does not apply to subsidiary “findings.” A Commission equally divided as to the existence of critical circumstances should thus be deemed to have made a negative finding.

VIEWS OF COMMISSIONERS CAROL T. CRAWFORD AND THELMA J. ASKEY

We concur in our colleagues' determination that a domestic industry is materially injured by reason of the subject imports from China and India. However, on the basis of information obtained in these investigations, we determine that an industry in the United States is not materially injured or threatened with material injury by reason of the subject imports from Indonesia. We join the majority of the Commission in the finding with respect to like product and in the discussion of the conditions of competition that are distinctive to the domestic industry. However, we define the domestic industry differently from our colleagues, and we do not cumulate the subject imports from Indonesia with any other subject imports. Based on our definition of the domestic industry and our evaluation of the subject imports from Indonesia, we determine that the domestic industry is not materially injured or threatened with material injury by reason of the LTFV imports of certain preserved mushrooms from Indonesia. Because our analysis and determination differ from the majority, our separate views follow.

I. DOMESTIC INDUSTRY

In the Chile Determination¹⁷⁹ we found that appropriate circumstances exist to exclude Giorgio and **** from the domestic industry. The record in that determination is the same as the record here, and we adopt herein by reference the same analysis and reasons for excluding these two firms in our determinations here. Although these firms are excluded from the domestic industry, they are not excluded from the market. Rather, they are an alternative source of supply in the U.S. market.¹⁸⁰

II. CUMULATION

The statute requires that we cumulate subject imports from different countries only "if such imports compete with each other and with the domestic like products in the United States market."¹⁸¹ We find the subject imports from Indonesia do not compete with the domestic like product produced by the domestic industry excluding Giorgio and ****. When these two firms are excluded, only a small amount, **** percent, of the domestic like product is sold in the retail market segment,¹⁸² whereas the overwhelming majority, 94.3 percent, of the subject imports from Indonesia is sold in the retail market segment. Subject imports from Indonesia are virtually absent from the two market segments where the domestic like product is concentrated. Thus, there is very little overlap in sales of the domestic like product and sales of the subject imports from Indonesia in the same market segments, an overlap that is too small to constitute a reasonable overlap of competition. Therefore, we find that subject imports from Indonesia do not compete with the domestic like product.¹⁸³ Consequently, we do not cumulate the subject imports with any of the other subject imports.

III. NO MATERIAL INJURY BY REASON OF LTFV IMPORTS FROM INDONESIA

¹⁷⁹ Chile Determination, USITC Pub. 3144 at 9.

¹⁸⁰ See Extruded Rubber Thread from Indonesia, Inv. Nos. 701-TA-375, 731-TA-787, USITC Pub. 3106 at 10 (May 1998).

¹⁸¹ 19 U.S.C. § 1677(7)(G)(i).

¹⁸² Calculated from Table I-3.

¹⁸³ Because the domestic like product and the subject imports are sold in different market segments, we do not find that existence of sales in the same geographic region or a simultaneous presence in the market is probative evidence of competition between the domestic like product and the subject imports from Indonesia.

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

A. Volume of Subject Imports

Subject imports from Indonesia decreased from 30.8 million pounds in 1995 to 26.9 million pounds in 1996, and then increased to 31.8 million pounds in 1997. In the first 6 months of 1998, the subject imports were 12.0 million pounds. The value of the subject imports was \$47.6 million in 1995, \$35.2 million in 1996, \$37.3 million in 1997, and \$12.7 million in the first 10 months of 1998.¹⁸⁴ The subject imports from Indonesia held a market share (by quantity) of 12.8 percent in 1995, 12.4 percent in 1996, 15.5 percent in 1997, and 10.8 percent in the first 6 months of 1998. Their market share (by value) was 14.6 percent in 1995, 13.7 percent in 1996, 17.1 percent in 1997, and 11.5 percent in the first 6 months of 1998.¹⁸⁵ Because the subject imports do not compete with the domestic like product, we find that the volume of subject imports from Indonesia is not significant.

B. Effect of Subject Imports on Domestic Prices

As discussed, the subject imports from Indonesia do not compete with the mushrooms produced by the domestic industry. Therefore, any effect of the subject imports on domestic prices would be, at most, minimal. Consequently, we find that the subject imports from Indonesia are not having significant effects on prices for the domestic like product.

C. Impact of Subject Imports on the Domestic Industry

As discussed, the subject imports from Indonesia do not compete with the mushrooms produced by the domestic industry. Therefore, any impact of the subject imports on the domestic industry would be, at most, minimal. Consequently, we find that the subject imports from Indonesia are not having a significant impact on the domestic industry.

D. Conclusion

On the basis of the foregoing analysis, we find that subject imports from Indonesia are not having significant effects on domestic prices nor a significant impact on the domestic industry. Consequently, we determine that the domestic industry producing certain preserved mushrooms is not materially injured by reason of LTFV imports of certain mushrooms from Indonesia.

¹⁸⁴ Table IV-1.

¹⁸⁵ Table IV-3.

IV. NO THREAT OF MATERIAL INJURY BY REASON OF LTFV IMPORTS FROM INDONESIA

We first address the issue of whether to cumulate the subject imports from Indonesia with the other subject imports. The statute grants the Commission discretion to cumulate or not to cumulate subject imports in a threat determination. However, the Commission is allowed to cumulate only “if such imports compete with each other and with domestic like product in the United States market.”¹⁸⁶ Thus, competition between and among the subject imports and with the domestic like product is a precondition to the Commission’s exercise of its discretion. As discussed, we find that the subject imports from Indonesia do not compete with the domestic like product. Therefore, the statute’s precondition to cumulation is not met. Consequently, we do not cumulate the subject imports from Indonesia with any of the other subject imports.

The statute requires the Commission to determine whether the U.S. industry is threatened with material injury by reason of the subject imports by determining 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 . . .”¹⁸⁷ In reaching our determination, we have considered all the factors that are relevant to this investigation¹⁸⁸ and have determined that the domestic industry is not threatened with material injury by reason of the subject imports from Indonesia.

Under the plain reading of the statute, an affirmative determination must satisfy a two-pronged test. The Commission must find that further subject imports are imminent and that material injury will occur unless an order is issued. If the Commission finds either that further subject imports are not imminent or that material injury will not occur unless an order is issued, a negative determination is required by the statute. We consider each of the required findings in turn.

Production capacity in Indonesia increased from 1995 to 1997, but is projected to remain constant in 1998 and 1999. At the same time, production is projected to increase, and thus capacity utilization is also projected to increase. While Indonesian exports to the United States are a large portion of total exports, Indonesian exports to other markets are projected to account for a greater portion of total exports in the immediate future.¹⁸⁹ While unused capacity exists, the shift in exports towards other markets mitigates the likelihood of substantially increased subject imports. By quantity, subject imports from Indonesia decreased from 30.8 million pounds in 1995 to 26.9 million pounds in 1996, and then increased to 31.8 million pounds in 1997. In the first 6 months of 1998, the subject imports were 12.0 million pounds compared to 16.9 million pounds in the first 6 months of 1997.¹⁹⁰ The subject imports increased by only 3.4 percent from 1995 to 1997, and were 29 percent lower in the first 6 months of 1998 compared to the first 6 months of 1997. Therefore, there has not been a significant rate of increase in the volume of the subject imports that would indicate the likelihood of substantially increased imports. Although inventories increased from 1995 to 1997, they were lower in the first 6 months of 1998 compared to the first 6 months of 1997, and are projected to

¹⁸⁶ 19 U.S.C. § 1677(7)(H).

¹⁸⁷ 19 U.S.C. § 1677(7)(F)(ii).

¹⁸⁸ 19 U.S.C. § 1677(7)(F)(i). Factor I is not applicable because these investigations do not involve subsidies. Factor VII is not applicable because these investigations do not involve imports of a raw agricultural product.

¹⁸⁹ Table VII-4.

¹⁹⁰ Table IV-1.

decrease in the immediate future,¹⁹¹ which does not indicate a likelihood of increased subject imports. In addition, the record indicates that there is no potential for product-shifting in the immediate future.¹⁹² For these reasons, we find that further dumped and subsidized imports are not imminent.

Even if further subject imports from Indonesia were imminent, we do not find that material injury would occur unless an order is issued. As discussed, the subject imports from Indonesia and the domestic like product do not compete with each other and thus are not having significant effects on domestic prices. There is no evidence in the record to suggest that this lack of competition will change in the immediate future. Therefore, subject imports are not likely to enter the U.S. market at prices that are likely to have significant depressing or suppressing effects on domestic prices. Furthermore, because of the lack of competition, any actual or potential negative effects of the subject imports on existing development and production efforts of the domestic industry would not be material. Finally, we find no evidence of any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of the subject imports from Indonesia. Consequently, we do not find that material injury by reason of the subject imports would occur unless an order is issued or a suspension agreement is accepted.

For the reasons stated above, we do not find that further dumped and subsidized imports from Indonesia are imminent. Further, we do not find that material injury by reason of the subject imports would occur unless an order is issued or a suspension agreement is accepted. Consequently, we find that the domestic industry is not threatened with material injury by reason of LTFV imports of certain preserved mushrooms from Indonesia.

V. CONCLUSION

We determine that the domestic industry is not materially injured or threatened with material injury by reason of imports of LTFV imports of certain preserved mushrooms from Indonesia.

¹⁹¹ Table VII-4.

¹⁹² Indonesian Producers Posthearing Brief at 22.