UNITED STATES INTERNATIONAL TRADE COMMISSION

FROZEN CONCENTRATED ORANGE JUICE FROM BRAZIL
Investigation No. 731-TA-326 (Review)

DETERMINATION AND VIEWS OF THE COMMISSION
(USITC Publication No. 3195, May 1999)

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DETERMINATION

On the basis of the record[1] developed in the subject five-year review, the United States International Trade Commission determines,[2] pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. § 1675(c)) (the Act), that revocation of the antidumping duty order on frozen concentrated orange juice from Brazil would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

BACKGROUND

The Commission instituted this review on December 2, 1998 (63 F.R. 66572) and determined on March 5, 1999 that it would conduct an expedited review (64 F.R. 12351, March 12, 1999).

[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] Chairman Bragg not participating. Commissioners Crawford and Askey dissenting.

VIEWS OF THE COMMISSION

Based on the record in this five-year review, we determine under section 751(c) of the Tariff Act of 1930, as amended ("the Act"), that revocation of the antidumping duty order covering frozen concentrated orange juice ("FCOJ") from Brazil would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[1]

I. BACKGROUND

In April 1987, the Commission determined that an industry in the United States was materially injured or threatened with material injury by reason of imports of FCOJ from Brazil that were being sold at less than fair value.[2] On May 5, 1987, Commerce issued an antidumping duty order on imports of FCOJ from Brazil.[3] The Commission instituted this five-year review on December 2, 1998.[4]

In five-year reviews, the Commission initially determines whether to conduct a full review (which would include a public hearing, the issuance of questionnaires, and other procedures) or an expedited review. First, the Commission determines whether individual responses to the notice of institution are adequate. Second, based on those responses deemed individually adequate, the Commission determines whether the collective responses submitted by two groups of interested parties -- domestic interested parties (producers, unions, trade associations, or worker groups) and respondent interested parties (importers, exporters, foreign producers, trade associations, or subject country governments) -- demonstrate a sufficient willingness among each group to participate and provide information requested in a full review.[5] If the Commission finds the responses from either group of interested parties to be inadequate, the Commission may determine, pursuant to section 751(c)(3)(B) of the Act, to conduct an expedited review unless it finds that other circumstances warrant a full review.

In this review, the Commission received a single joint response from Florida Citrus Mutual, a trade association of approximately 11,000 citrus growers, and from six processors of FCOJ.[6] The participating producers accounted for approximately 62 percent of the oranges delivered for processing into FCOJ during the October 1997 - September 1998 growing season and 24 percent of the domestic production of FCOJ during December 1997 to November 1998.[7] These processors and growers also filed joint comments on adequacy, arguing that the review should be expedited because no respondent interested party responded to the Commission's notice of institution.[8]

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[1] Chairman Bragg not participating. Commissioners Crawford and Askey dissenting. See their Dissenting Views. Commissioners Crawford and Askey join in Sections I, II, and III.A - III.B of these views, except as otherwise noted.

[2] Frozen Concentrated Orange Juice from Brazil, Inv. No. 731-TA-326 (Final), USITC Pub. 1970, April 1987 (hereinafter "Original Determination") at 1.

[3] 52 Fed. Reg. 16426 (May 5, 1987).

[4] 63 Fed. Reg. 66572 (Dec. 2, 1998).

[5] *See* 19 C.F.R. § 207.62(a); 63 Fed. Reg. 30599, 30602-05 (June 5, 1998).

[6] The responding FCOJ processors are Caulkins Indiantown Citrus Co.; Citrus Belle; Citrus World, Inc.; Orange Co. of Florida, Inc.; Peace River Citrus Products, Inc.; and Southern Gardens Citrus Processors Corp. Domestic interested parties' submission of Jan. 20, 1999, at 2-3.

[7] Confidential Report ("CR") at I-3 n.2; Public Report ("PR") at I-3 n.2.

[8] *See* 19 C.F.R. § 207.62(b) (authorizing, *inter alia*, all interested parties that have responded to the notice of institution to file comments with the Commission on whether the Commission should conduct an expedited review).

The Commission determined that the domestic interested party group response to the Commission's notice of institution was adequate.[9] The Commission also determined that the respondent interested party group response was inadequate because no foreign producers or U.S. importers of the subject merchandise responded to the Commission's notice of institution. Pursuant to section 751(c)(3)(B) of the Act, the Commission voted to conduct an expedited review.[10]

The domestic interested parties filed comments arguing that the revocation of the antidumping duty order on FCOJ from Brazil would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. [11]

II. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. Domestic Like Product

In making its determination under section 751(c), the Commission defines the "domestic like product" and the "industry."[12] The Act defines "domestic like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle."[13] In its final five-year review determination, Commerce defined the subject merchandise as "frozen concentrated orange juice from Brazil."[14] Commerce indicated that "pulpwash, a by-product of FCOJ which is composed of water-extracted soluble orange solids, [is] outside the scope of the order."[15] The subject merchandise is currently classifiable under Harmonized Tariff Schedule ("HTS") item number 2009.11.00.[16] As Commerce explained in its original investigation, FCOJ is "in a highly concentrated form for transport and further processing, sometimes referred to as frozen concentrated orange juice for manufacturing" ("FCOJM").[17] [18]

We find, based on the facts available, that the appropriate definition of the domestic like product in this expedited five-year review is the same as Commerce's scope and unchanged from the determination of the Commission majority in the original investigation, *i.e.*, FCOJM.[19]

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[9] Commissioner Crawford dissented as to the adequacy of the domestic interested party group response. Explanation of Commission Determinations on Adequacy in Frozen Concentrated Orange Juice from Brazil, CR and PR at Appendix B. *See also* 64 Fed. Reg. 12351 (March 12, 1999).

[10] 19 U.S.C. § 1675(c)(3)(B); *see* 64 Fed. Reg. 12351 (March 12, 1999).

[11] Domestic interested parties' submission of April 22, 1999, at 2. *See* 19 C.F.R. § 207.62(d).

[12] 19 U.S.C. § 1677(4)(A).

[13] 19 U.S.C. § 1677(10). *See* Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int'l Trade 1996); 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). *See also* S. Rep. No. 96-249 at 90-91 (1979).

[14] 64 Fed. Reg. 16901, 16902 (April 7, 1999).

[15] *Id*. at 16902 n.1.

[16] *Id*. at 16902.

[17] 52 Fed. Reg. 8324, 8326 (March 17, 1987).

[18] Although Commerce defined the scope as "frozen concentrated orange juice" in its final five-year review determination without specifying as it did in the antidumping duty order that such FCOJ is "in a highly concentrated form . . . referred to as frozen concentrated orange juice for manufacturing," we understand Commerce not to have expanded the scope beyond FCOJ for manufacturing to include the less concentrated FCOJ for retail. Our understanding is based on the lack of evidence in the record of a notice of a change in scope or an anti-circumvention action to broaden the scope, and the fact that FCOJ for manufacturing has accounted for virtually all imports of FCOJ both during the years examined in the original investigation and the recent years now examined in this review. Original Determination at 7; CR at I-13 & nn. 31-33, and PR at I-10 & nn. 31-33.

[19] Original Determination, at 7 and 84-87.

B. Domestic Industry

Section 771(4)(A) of the Act defines the relevant industry as the "domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."[20] As in the original investigation, we find in this review that the domestic industry includes all domestic producers of FCOJM.[21]

We also include growers of round oranges in the domestic industry, as we did in the original investigation.[22] [23] Section 771(4)(E) of the Act provides that, where the industry at issue produces a processed agricultural product from a raw agricultural product,

> the producers or growers of the raw agricultural product may be considered part of the industry producing the processed product if -- (I) the processed agricultural product is produced from the raw agricultural product through a single continuous line of production; and (II) there is a substantial coincidence of economic interest between the producers or growers of the raw agricultural product and the processors of the processed agricultural product.[24]

As in the original determination, we find that a high proportion of round oranges are processed into FCOJM.[25] We therefore find that FCOJM is produced from round oranges through a single continuous line of production. In the original investigation, the Commission also found a substantial coincidence of economic interest between the growers of round oranges and the processors of FCOJM, based on grower and processor membership in cooperatives and other arrangements effectively linking grower and processor proceeds, as well as the strong correlation between the prices of FCOJM and round oranges.[26] The limited additional evidence gathered in this review indicates that the same conditions exist today, and thus we find, from the evidence available on the record, a substantial coincidence of economic interest between the growers of round oranges and the processors of FCOJM.

III. REVOCATION OF THE ORDER ON FROZEN CONCENTRATED ORANGE JUICE IS LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF MATERIAL INJURY WITHIN A REASONABLY FORESEEABLE TIME[27]

A. Legal Standard

In a five-year review conducted under section 751(c) of the Act, Commerce will revoke an antidumping duty order unless: (1) it makes a determination that dumping is likely to continue or recur, and (2) the Commission makes a determination that revocation of an order "would be likely to lead to

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[20] 19 U.S.C. § 1677(4)(A).

[21] Original Determination at 10, 36, 49-51, and 87 & n.28.

[22] The vast majority of round oranges are processed into juice. Oranges consumed without processing are known as "specialty" or "eating" oranges. Original Determination at R-3 and R-4.

[23] *Id.* at 10-16, 36-40, 49-51, and 88-90.

[24] 19 U.S.C. § 1677(4)(E).

[25] Original Determination at 11, 37-38, 50, and 87 n.27; and CR at I-11 and PR at I-9.

[26] Original Determination at 11-15, 38-40, 50, 88-90.

[27] Commissioners Crawford and Askey determine that revocation of the order is not likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. However, they join in the majority's discussion of the relevant legal standard and the conditions of competition in sections III. A & B of these views.

continuation or recurrence of material injury within a reasonably foreseeable time."[28] The Uruguay Round Agreements Act ("URAA") Statement of Administrative Action ("SAA") states that "under the likelihood standard, the Commission will engage in a counter-factual analysis; it must decide the likely impact in the reasonably foreseeable future of an important change in the status quo -- the revocation [of the order] . . . and the elimination of its restraining effects on volumes and prices of imports."[29] Thus, the likelihood standard is prospective in nature.[30] The statute states that "the Commission shall consider that the effects of revocation . . . may not be imminent, but may manifest themselves only over a longer period of time."[31] According to the SAA, a "'reasonably foreseeable time' will vary from case-to-case, but normally will exceed the 'imminent' time frame applicable in a threat of injury analysis [in antidumping and countervailing duty investigations]."[32] [33]

Although the standard in five-year reviews is not the same as the standard applied in original antidumping or countervailing duty investigations, it contains some of the same elements. The statute provides that the Commission is to "consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked."[34] It directs the Commission to take into account its prior injury determination, whether any improvement in the state of the industry is related to the order under review, and whether the industry is vulnerable to material injury if the order is revoked.[35] [36]

Section 751(c)(3) of the Act and the Commission's regulations provide that in an expedited five-year review the Commission may issue a final determination "based on the facts available, in accordance

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[28] 19 U.S.C. § 1675a(a).

[29] URAA SAA, H.R. Rep. No. 103-316, vol. I, at 883-84 (1994).

[30] While the SAA states that "a separate determination regarding current material injury is not necessary," it indicates that "the Commission may consider relevant factors such as current and likely continued depressed shipment levels and current and likely continued prices for the domestic like product in the U.S. market in making its determination of the likelihood of continuation or recurrence of material injury if the order is revoked." SAA at 884.

[31] 19 U.S.C. § 1675a(a)(5).

[32] SAA at 887. Among the factors that the Commission should consider in this regard are "the fungibility or differentiation within the product in question, the level of substitutability between the imported and domestic products, the channels of distribution used, the methods of contracting (such as spot sales or long-term contracts), and lead times for delivery of goods, as well as other factors that may only manifest themselves in the longer term, such as planned investment and the shifting of production facilities." *Id*.

[33] In analyzing what constitutes a reasonably foreseeable time, Commissioners Crawford and Koplan examine all the current and likely conditions of competition in the relevant industry. They define "reasonably foreseeable time" as the length of time it is likely to take for the market to adjust to a revocation. In making this assessment, they consider all factors that may accelerate or delay the market adjustment process including any lags in response by foreign producers, importers, consumers, domestic producers, or others due to: lead times; methods of contracting; the need to establish channels of distribution; product differentiation; and any other factors that may only manifest themselves in the longer term. In other words, their analysis seeks to define "reasonably foreseeable time" by reference to current and likely conditions of competition, but also seeks to avoid unwarranted speculation that may occur in predicting events into the more distant future.

[34] 19 U.S.C. § 1675a(a)(1).

[35] 19 U.S.C. § 1675a(a)(1). The statute further provides that the presence or absence of any factor that the Commission is required to consider shall not necessarily give decisive guidance with respect to the Commission's determination. 19 U.S.C. § 1675a(a)(5). While the Commission must consider all factors, no one factor is necessarily dispositive. SAA at 886.

[36] Section 752(a)(1)(D) of the Act directs the Commission to take into account in five-year reviews involving antidumping proceedings "the findings of the administrative authority regarding duty absorption." 19 U.S.C. § 1675a(a)(1)(D). Commerce has not issued any duty absorption findings in this matter. 64 Fed. Reg. 16901, 16903 (April 7, 1999).

with section 776."[37] [38] As noted above, no respondent interested parties responded to the Commission's notice of institution. Accordingly, we have relied on the facts available in this review, which consist primarily of the record in the original investigation, limited information collected by Commission staff since the institution of this review, and information submitted by the domestic respondents.

For the reasons stated below, we determine that revocation of the antidumping duty order on FCOJM would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time.[39]

B. Conditions of Competition

In evaluating the likely impact of the subject imports on the domestic industry if the order is revoked, the statute directs the Commission to evaluate all relevant economic factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."[40] In performing our analysis under the statute, we have taken into account the following conditions of competition in the U.S. market for FCOJM.

In its original determination, the Commission found that subject FCOJM is a commodity-type product that is generally fungible or substitutable with domestic FCOJM, and that competition is often largely on the basis of price.[41] We find that this condition of competition is unchanged.

Domestic orange-bearing acreage fell from the crop years ended November 30 of 1983 to 1986, but by the crop years 1997 and 1998, orange-bearing acreage was at least ten percent higher than in crop year 1983.[42] During the crop years ended November 30 of 1983 to 1987, the number of processor firms[43]

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[37] 19 U.S.C. § 1675(c)(3)(B); 19 C.F.R. § 207.62(e). Section 776 of the Act, in turn, authorizes the Commission to "use the facts otherwise available" in reaching a determination when: (1) necessary information is not available on the record or (2) an interested party or any other person withholds information requested by the agency, fails to provide such information in the time or in the form or manner requested, significantly impedes a proceeding, or provides information that cannot be verified pursuant to section 782(i) of the Act. 19 U.S.C. § 1677e(a). The statute permits the Commission to use adverse inferences in selecting from among the facts otherwise available when an interested party has failed to cooperate by acting to the best of its ability to comply with a request for information. 19 U.S.C. § 1677e(b). Such adverse inferences may include selecting from information from the record of our original determination and any other information placed on the record. *Id*.

[38] Commissioners Koplan and Askey note that the statute authorizes the Commission to take adverse inferences in five-year reviews, but emphasize that such authorization does not relieve the Commission of its obligation to consider the record evidence as a whole in making its determination. "[T]he Commission balances all record evidence and draws reasonable inferences in reaching its determinations." URAA SAA at 869 (emphasis added). Practically speaking, when only one side has participated in a five-year review, much of the record evidence is supplied by that side, though that data is supplemented with publicly available information. We generally give credence to the facts supplied by the participating parties and certified by them as true, but base our decision on the evidence as a whole, and do not automatically accept the participating parties' suggested interpretation of the record evidence. Regardless of the level of participation and the interpretations urged by participating parties, the Commission is obligated to consider all evidence relating to each of the statutory factors and may not draw adverse inferences that render such analysis superfluous. "In general, the Commission makes determinations by weighing all of the available evidence regarding a multiplicity of factors relating to the domestic industry as a whole and by drawing reasonable inferences from the evidence it finds most persuasive." *Id.*

[39] Commissioners Crawford and Askey determine that revocation of the order is not likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. See their Dissenting Views.

[40] 19 U.S.C. § 1675a(a)(4).

[41] Original Determination at 6 & n.17, 45, 67-68, 101, and R-15 to R-16.

[42] Table I-1, CR at I-10 and PR at I-8.

[43] These are firms that extract juice from oranges and process it into FCOJM. Original Determination at R-17.

in Florida fell from 36 to 29, and there were at least four California processors.[44] There are currently 27 extractor-processors -- 26 in Florida and one in California.[45] Despite the smaller number of extractor-processors at present, the production of FCOJM from oranges grown in Florida was 42 percent higher in crop year 1997 than in crop year 1983, and it was 50 percent higher in crop year 1998 than in crop year 1983.[46]

The Commission did not derive apparent consumption figures in this review or in the original investigation because producers blend domestic and imported orange juice at various points in the production process.[47] The Commission instead determined the total available FCOJM by adding together FCOJM produced from the Florida crop, imports of FCOJM, and carryover stock.[48] These data show that total available FCOJM was relatively constant during crop years 1983-86, at 1.2 billion to 1.3 billion single strength equivalent ("SSE") gallons per year.[49] Total available FCOJM was slightly higher at 1.4 billion SSE gallons in crop year 1997, and higher still at 1.6 billion SSE gallons in 1998.[50] In crop year 1998, production from Florida crop accounted for 63.7 percent of total available FCOJM, while all Brazilian imports accounted for 12.0 percent, imports from all other sources accounted for 6.7 percent, and carryover stock accounted for the remaining 17.5 percent.[51] Moreover, although there are no data on subject imports on a crop year basis, information on the value of annual fiscal year imports that are subject to the antidumping duty order reviewed by the Customs Service reveals that less than five percent of all imports from Brazil during the 1993-97 period were subject imports.[52]

In contrast to the conditions existing during the original investigation, the domestic industry is not currently experiencing the effects of severe freezes that destroyed orange crops and trees.[53] Since the original investigation, new orange grove investments have shifted to the south out of traditional freeze zones, and investment in smaller groves has been encouraged by tax incentives.[54] Also in contrast to the original investigation, domestic orange growers now employ more advanced irrigation and planting techniques, permitting more efficient use of available acreage.[55]

A number of conditions of competition relate to imported FCOJM. Brazil remains the world's largest supplier of FCOJM, accounting now for over one-half of world production of round oranges and orange juice.[56] Although the overall volume of FCOJM imports fell after the institution of the original investigation in 1986, the volume of non-subject imports is significant and increasing.[57] Brazil accounts for the bulk of the non-subject imports, but other countries, including Mexico, have accounted for an increasing share of the imports.[58] A relatively high per-liter general duty rate applies to imports from

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[44] CR at I-9 and PR at I-7.

[45] CR at I-9 and PR at I-7.

[46] CR at I-11 and PR at I-9. By crop years 1997 and 1998, Florida accounted for 95 percent of all processed oranges and processed over 95 percent of its oranges. CR at I-11 and PR at I-9.

[47] CR at I-16 and PR at I-13.

[48] CR at I-16 and PR at I-13.

[49] CR at I-16 and at Table I-4 at I-17, and PR at I-13 and Table I-4 at I-14.

[50] Table I-4, CR at I-17 and PR at I-14.

[51] Table I-4, CR at I-17 and PR at I-14.

[52] CR at I-14, PR at I-11.

[53] *See* Original Determination at 17, 41-42, 72-73, and 94-95 regarding the effects of freezes.

[54] Domestic interested parties' submissions of Jan. 20, 1999, at 31 and April 22, 1999, at 6.

[55] Domestic interested parties' submission of Jan. 20, 1999, at 31.

[56] CR at I-16 to I-17 and PR at I-13.

[57] Table I-3, CR at I-15 and PR at I-12.

[58] Table I-3, CR at I-15 and PR at I-12.

Brazil and other countries. The rate is somewhat lower currently than in the years considered in the original investigation, but it remains equivalent to nearly 30 percent of the unit value.[59]

Based on the record evidence, we find that these conditions of competition in the FCOJM market are not likely to change significantly in the reasonably foreseeable future.[60] Accordingly, in this review, we find that current conditions in the FCOJM market provide us with a reasonable basis from which to assess the effects of revocation of the order within the reasonably foreseeable future.[61]

C. Likely Volume of Subject Imports

In evaluating the likely volume of imports of subject merchandise if the order under review is revoked, the Commission is directed to consider whether the likely volume of imports would be significant either in absolute terms or relative to production or consumption in the United States.[62] In doing so, the Commission must consider "all relevant economic factors," including four enumerated factors: (1) any likely increase in production capacity or existing unused production capacity in the exporting country; (2) existing inventories of the subject merchandise, or likely increases in inventories; (3) the existence of barriers to the importation of the subject merchandise into countries other than the United States; and (4) the potential for product shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.[63]

The record from the original investigation indicates that the Brazilian FCOJM industry had the ability and willingness to establish quickly a significant presence in the U.S. market. The market penetration of imports into the United States of subject FCOJM from Brazil increased from *** percent of the total available FCOJM[64] in crop year 1983 to *** percent of the total available FCOJM in crop year 1986.[65] Orange production and FCOJM production in Brazil increased from crop years 1983 to 1986.[66] Brazilian production was oriented almost entirely towards exports, which accounted for approximately 98 percent of all shipments.[67] Exports to the United States accounted for between 47 and 63 percent of total Brazilian exports during calendar years 1983 to 1986.[68]

Several factors support the conclusion that subject import volume is likely to be significant if the order is revoked. First, the volume of subject FCOJM imported from Brazil fell sharply after the entry of

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[59] The general rate of duty was 9.25 cents per liter during the years covered in the original investigation. Original Determination at R-16. The per-liter rates were lower in the years examined in this review: 8.32 cents in 1998, 8.08 cents in 1999, and 7.85 cents in 2000 and in subsequent years. CR at I-6 n.14 and PR and I-5 n.14 and 60 Fed. Reg. 1007, 1451 (Jan. 4, 1995).

[60] We are cognizant, of course, that future weather conditions are unpredictable. However, we note that orange groves are in the aggregate located somewhat more southerly at present than during the years examined in the original investigation. With regard to weather-related conditions, our findings are limited to the fact that the industry is not currently experiencing significant effects of adverse weather conditions.

[61] Commissioners Crawford and Askey make negative determinations and thus do not join the remainder of this opinion. *See* their dissenting views.

[62] 19 U.S.C. § 1675a(a)(2).

[63] 19 U.S.C. § 1675a(a)(2)(A)-(D). The record contains little information pertaining to existing inventories of the subject merchandise or the existence of barriers in other countries with respect to importation of FCOJM. Product shifting is not an issue due to a lack of alternative products.

[64] The Commission has not derived apparent consumption figures in this review or in the original investigation because producers blend domestic and imported orange juice at various points in the production process. CR at I-16; PR at I-13. As a proxy, the Commission has instead determined the total available FCOJM, by totaling FCOJM produced from the Florida crop, imports of FCOJM, and carryover stock. CR at I-16; PR at I-13.

[65] Table 48, Original Confidential Report of April 6, 1987, at R-100 and Original Determination at R-79.

[66] CR at I-17 to I-19 and PR at I-13 to I-15.

[67] Table I-5, CR at I-18 and PR at I-15.

[68] CR at I-19, PR at I-13.

the order. In crop years 1997 and 1998 the volume was approximately one-third as high compared with the peak in crop years 1984-86.[69] Because the current conditions of competition are similar to those in existence prior to issuance of the order, we find it likely in these circumstances that the exporters who ceased or reduced shipping FCOJM to the United States following issuance of the order would reenter the U.S. market and that the subject import volume would rise significantly if the discipline of the order were removed.[70] We recognize that the order was revoked as to several Brazilian producers in the course of Commerce's administrative reviews and that, as a consequence, their production of FCOJM is not subject merchandise.[71] Nevertheless, the order still applies to a number of Brazilian producers and, in the absence of contrary evidence, we infer that these producers account for a significant portion of Brazilian production.[72] [73] Thus, the order continues to impose a restraint on the export of subject merchandise to the United States, despite the order's partial revocation.

Second, the information available in the record indicates that Brazilian capacity to produce FCOJM is up sharply since the period of the original investigation. The number of orange bearing trees in the State of Sao Paulo, which accounts for the vast majority of Brazilian orange production, increased from 107 million in crop year 1986 to 178 million in crop year 1998.[74] The number of boxes of oranges produced rose similarly, from 239 million in crop year 1986 to 420 million in crop year 1998.[75] FCOJM production followed the same path, climbing from 1.2 billion SSE gallons in crop year 1986 to 1.9 billion SSE gallons in crop year 1998.[76] While these figures relate to the entire Brazilian industry, including those companies that are no longer subject to the order, they are indicative of the likely increases in capacity of the subject Brazilian producers.

Third, the Brazilian industry remains almost entirely export oriented. The home market consumes only about one percent of production.[77] Even after the entry of the order, Brazilian production shifted sales not to the home market but rather to other export markets, largely Europe and Japan.[78] We find that the increased production capacity and emphasis on export markets is evidence of the Brazilian producers' willingness and ability to export significant volumes of FCOJM to the U.S. market in the absence of the order.

Thus, based on the record in this review, and in the absence of contrary evidence or argument, we find that significant volumes of subject FCOJM from Brazil are likely to be exported to the United States within the reasonably foreseeable future if the antidumping duty order is revoked. Consequently, we conclude that subject imports would likely increase to a significant level, and would regain significant U.S. market share, absent the restraining effect of the order.

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[69] Table I-3, CR at I-15 and PR at I-12.

[70] *See* SAA at 890.

[71] CR at I-5 and PR at I-5.

[72] *Compare* domestic interested parties' submission of Jan. 20, 1999, at 23-25 (listing Brazilian manufacturers that have exported FCOJM since 1982) *with* 64 Fed. Reg. 16901, 16902 (April 7, 1999) (listing Brazilian manufacturers and exporters excluded from the order or as to which the order has been revoked).

[73] Commissioner Koplan did not base his finding on this inference.

[74] Table I-5, CR at I-18 and PR at I-15.

[75] Table I-5, CR at I-18 and PR at I-15.

[76] Table I-5, CR at I-18 and PR at I-15.

[77] Table I-5, CR at I-18 and PR at I-15.

[78] Domestic interested party respondents' submission of Jan. 20, 1999, at 30. The United States accounted for 47 to 63 percent of Brazilian exports in the calendar years 1983 to 1986, but only 18 percent in 1997. CR at I-19 and PR at I-13.

D. Likely Price Effects of Subject Imports

In evaluating the likely price effects of subject imports if the antidumping duty order is revoked, the Commission is directed to consider whether there is likely to be significant underselling by the subject imports as compared to domestic like products and whether the subject imports are likely to enter the United States at prices that would have a significant depressing or suppressing effect on the price of domestic like products.[79]

The record in this expedited review contains a limited amount of pricing data for the U.S. market. In the original determination, the Commission found that FCOJM imports from Brazil undersold the domestic like product during months in which the price of the domestic product fell.[80] The Commission also noted in the original determination that adverse price effects of subject imports coincided with those increased volumes.[81] Although the unit value of Brazilian FCOJM imports increased in the early period examined in the original investigation, it fell overall during those years, from $1.23 per SSE gallon in crop year 1983 to $1.15 per SSE gallon in crop year 1986.[82] In crop years 1997 and 1998 prices fell further, from $1.10 to $1.05 per SSE gallon.[83]

As discussed above, FCOJM is a commodity-type product that trades largely on the basis of price. Based on the limited record, we find it likely that the Brazilian producers would offer attractively low prices to U.S. purchasers in order to regain market share if the antidumping duty order is revoked. Thus, we conclude that prices for domestically produced FCOJM would likely decline to a significant degree in response to the likely significant volumes of substitutable subject imports offered at lower prices.

Accordingly, in the absence of contrary evidence or argument, we find that revocation of the antidumping duty order would be likely to lead to significant price effects, including significant underselling by the subject imports of the domestic like product, as well as significant price depression and suppression, in the reasonably foreseeable future.

E. Likely Impact of Subject Imports

In evaluating the likely impact of imports of subject merchandise if the order is revoked, the Commission is directed to consider all relevant economic factors that are likely to have a bearing on the state of the industry in the United States, including but not limited to: (1) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; (2) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; and (3) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the domestic like product.[84] All relevant economic factors are to be considered within the context of the business cycle and the conditions of competition that are distinctive to the industry.[85] As instructed by the statute, we have considered the

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[79] 19 U.S.C. § 1675a(a)(3). The SAA states that "[c]onsistent with its practice in investigations, in considering the likely price effects of imports in the event of revocation and termination, the Commission may rely on circumstantial, as well as direct, evidence of the adverse effects of unfairly traded imports on domestic prices." SAA at 886.

[80] Original Determination at 27 and 45.

[81] *Id*. at 27.

[82] Table I-3, CR at I-15 and PR at I-12.

[83] Table I-3, CR at I-15 and PR at I-12.

[84] 19 U.S.C. § 1675a(a)(4).

[85] 19 U.S.C. § 1675a(a)(4). Section 752(a)(6) of the Act states that "the Commission may consider the magnitude of the margin of dumping" in making its determination in a five-year review. 19 U.S.C. § 1675a(a)(6). The statute defines the "magnitude of the margin of dumping" to be used by the Commission in five-year reviews

(continued...)

extent to which any improvement in the state of the domestic industry is related to the antidumping duty order at issue and whether the industry is vulnerable to material injury if the order is revoked.[86]

In the original determination, one Commissioner found that the domestic industry was experiencing material injury by reason of increased volumes of low-priced LTFV imports of FCOJM that were gaining an increasing share of the FCOJM market.[87] He found that the subject merchandise placed a significant downward pressure on domestic prices, evidenced by a strong correlation between the price of the domestic product and the subject merchandise, the latter appearing to lead both upward and downward trends in domestic price.[88] He also found that purchasers reported that prices of Brazilian FCOJM were lower than prices of the domestic product in 1984 and 1986, which price difference took on additional importance in a price-sensitive market.[89]

Two Commissioners found in the original determination that the domestic industry was threatened with material injury by reason of increasing volumes of low-priced LTFV imports of FCOJM that were gaining an increasing share of the market in which the domestic product directly competed.[90] They noted increases in the capacity of the Brazilian processors and in the number of orange trees in Brazil, which they found indicated an ability to further increase production in the imminent future.[91] They also found that the subject merchandise had caused in part observed price declines; these declines coincided with increased volumes of subject imports.[92] They noted further the export orientation of the Brazilian industry.[93] These factors formed the basis for their determination that the domestic industry was threatened with material injury by reason of the subject merchandise.[94]

After imposition of the antidumping duty order, the domestic industry's share of total available FCOJM increased as subject imports exited the market.[95] The basic substitutability of the product has enabled the domestic industry to readily replace subject imports and regain domestic market share. Total available FCOJM (a proxy for apparent consumption) is relatively confined within a steady range, and demand is unlikely to be significantly increased by product development or new technology. Thus, it is likely that any future increase in the market share of subject imports would be largely at the expense of the domestic industry.[96]

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[85] (...continued)
as "the dumping margin or margins determined by the administering authority under section 1675a(c)(3) of this title." 19 U.S.C. § 1677(35)(C)(iv). *See also* SAA at 887. Commerce's expedited determination in its five-year review covered imports from all manufacturers and exporters of FCOJM from Brazil, other than imports produced by six companies that were either excluded from the order or as to which the order was revoked. 64 Fed. Reg. 16901, 16902 (April 7, 1999). Commerce found that revocation of the antidumping duty order would likely lead to a margin of dumping of 1.96 percent. 64 Fed. Reg. at 16904.

[86] The SAA states that in assessing whether the domestic industry is vulnerable to injury if the order is revoked, 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 may also demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports." SAA at 885.

[87] Original Determination at 44-46.

[88] *Id*. at 45.

[89] *Id.* at 45-46.

[90] *Id*. at 25.

[91] *Id*. at 26.

[92] *Id*. at 27.

[93] *Id*. at 30.

[94] *Id*. at 30.

[95] Table I-4, CR at I-17 and PR at I-14.

[96] We view the evidence as insufficient to find that the industry is in a "weakened state," as contemplated by the vulnerability criterion of the statute. Unlike in the original investigation, the domestic industry is not currently in
(continued...)

As discussed above, we conclude that if the order is revoked the likely volume of subject imports would be significant and that these imports would have significant adverse price effects. Given the substitutable nature of the product and subject imports' ability to compete directly with the domestic product for the same end uses, we find that a significant volume of low-priced subject imports would likely have a significant adverse impact on the production, shipment, sales, and revenue levels of the domestic industry. This reduction in the industry's production, sales and revenue levels would have a direct adverse impact on the industry's profitability and employment levels as well as its ability to raise capital and make and maintain necessary capital investments. Accordingly, and in the absence of contrary evidence or argument, we conclude that subject imports would be likely to have a significant adverse impact on the domestic industry within a reasonably foreseeable time if the antidumping duty order is revoked.

CONCLUSION

For the foregoing reasons, we determine that revocation of the antidumping duty order covering FCOJM from Brazil would be likely to lead to continuation or recurrence of material injury to the domestic FCOJM industry within a reasonably foreseeable time.

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[96] (...continued)
a weakened state as a result of damage inflicted by adverse weather conditions. In addition, although the domestic parties urge the Commission to find that the domestic industry is vulnerable to subject imports due to reportedly small profit margins, we find that the limited information on the record is inconclusive.

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

Section 751(d) requires that Commerce revoke an antidumping or countervailing duty order in a five-year ("sunset") review unless Commerce determines that, in the event of revocation, dumping or a countervailable subsidy would be likely to continue or recur and the Commission determines that material injury would be likely to continue or recur within a reasonably foreseeable time.[1] In this review of the antidumping duty order on FCOJM from Brazil, we find that material injury is not likely to continue or recur within a reasonably foreseeable time if the order is revoked.[2]

We join our colleagues' discussion regarding the domestic like product, domestic industry, conditions of competition, and in their explanation of the relevant legal standard. As a preliminary matter, and as previously noted in the majority opinion, the Commission received one jointly filed response to its notice of institution from a domestic trade association and certain processors of the domestic like product. No respondent interested parties chose to participate in this review. We therefore have a limited record to review in determining whether revocation of the order will likely lead to continuation or recurrence of material injury within a reasonably foreseeable time.[3]

A. General Considerations

The statute directs the Commission to take into account several general considerations.[4] In accordance with the statute, we have taken into account the Commission's prior injury determination, including the volume, price effects, and impact of the subject imports on the industry before the order was issued.

Based on the facts available in this review, the record indicates that the domestic industry has improved its position in the U.S. market since the issuance of the order. Both domestic production and domestic market share have increased since imposition of the order.[5] Although the domestic industry's market share has improved during the twelve years that the order has been in effect, it does not automatically or necessarily follow that revocation of the order will result in the continuation or recurrence of material injury within the reasonably foreseeable future.

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[1] 19 U.S.C. §§ 1675(d)(2), 1675a(a)(1).

[2] In analyzing whether revocation of an order would be likely to lead to a continuation or recurrence of material injury within a reasonably foreseeable time, Commissioner Crawford takes as her starting point the date on which the revocation would actually take place. In this review, the order would be revoked in January 2000. 19 U.S.C. § 1675(c)(6)(iv).

[3] Congress and the administration anticipated that the record in expedited sunset reviews would likely be more limited than that in full reviews and accordingly provided that the Commission's determination would be upheld unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(b)(ii). Nevertheless, even under a more relaxed standard of review, the Commission must ensure that its decision is based on some evidence in the record. *See* Genentech Inc. v. United States Int'l Trade Comm'n, 122 F.3d 1409, 1415 (Fed. Cir. 1997) (discussing the Commission's decision on sanctions).

[4] 19 U.S.C. § 1675a(a)(1). The Commission is to consider its prior injury determinations, whether any improvement in the state of the industry is related to the order, whether the industry is vulnerable to material injury in the event of revocation, and whether any duty absorption finding is made by the Department of Commerce. *Id*. Commerce made no duty absorption finding in this case. 64 Fed. Reg. 16901, 16903 (April 7, 1999). The statute also provides that the Commission may consider the margin of dumping when making its determination. 19 U.S.C. § 1675a(a)(6). Commerce has reported likely margins of 1.96 percent in the event of revocation for all Brazilian manufacturers and exporters other than those excluded from the order or for which the order has been revoked. *Id*. at 16904.

[5] CR and PR at Tables I-2 and I-4.

As previously stated in the conditions of competition section of the majority opinion, apparent domestic consumption figures for FCOJM are not available for this review. Instead, a substitute calculation approximating U.S. consumption, total available FCOJM, was used. In crop year 1984, total available FCOJM decreased slightly, but remained essentially unchanged between 1.2 billion and 1.3 billion SSE gallons during crop years 1983-86. The market share accounted for by domestic production decreased during crop years 1983-85 from 53.6 percent to 37.0 percent. In crop year 1986, that figure climbed to 41.9 percent. On the other hand, the market share accounted for by all imports from Brazil increased during crop years 1983-85 from 27.3 percent to 44.6 percent. In crop year 1986, that figure dropped to 39.2 percent.[6] However, in crop years 1997 and 1998, the market share accounted for by domestic production was five to six times greater than the share accounted for by all imports from Brazil. In crop year 1998, domestic production accounted for 63.7 percent of the domestic market, while all imports from Brazil accounted for 12.0 percent, other sources accounted for 6.7 percent, and carryover stock supplied 17.5 percent of the market.[7]

Additionally, the record demonstrates a general decline in the volume of Brazilian imports since imposition of the order. During the period covering the original investigation, U.S. imports of FCOJM from Brazil increased from 349 million SSE gallons in crop year 1983 to their highest volume of 578 million SSE gallons in crop year 1985. Since crop year 1986, imports of FCOJM from Brazil have decreased erratically through crop year 1998, when they were about one-third of the volume of the crop year 1985 imports.[8]

Domestic interested parties argue that they are vulnerable to material injury because the U.S. industry operates on very thin profit margins and Brazilian growers enjoy "tremendous potential" for increasing production by means of increasing investments in the cultivation of existing groves and additional acreage. The domestic interested parties also assert that the domestic industry lacks the capability to expand based on the amount of land suitable for planting, availability and costs of labor, costs of irrigation and cultivation, and difficulties in obtaining credit.[9] Thus, it would appear that the domestic interested parties argue that they are vulnerable to material injury based upon the fact that they are at full production capacity.

The record reveals that there have been certain improvements in production that suggest the domestic industry is not vulnerable to material injury in the event of a revocation. As noted in the conditions of competition, since the original order, the invention of microsprinkler irrigation and the introduction of innovative new production methods such as high density planting, have permitted higher utilization of available grove acreage. Moreover, certain tax incentives have created an environment that has enabled the industry to move orange groves south and away from traditional freeze areas, thus insulating the industry from adverse weather conditions.[10] Moreover, the mere fact that the domestic industry is operating at or near full capacity is not an indication that it is vulnerable to material injury. Based on the foregoing, we conclude that the domestic industry is not vulnerable to material injury if the order is revoked.[11]

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[6] CR and PR at Table I-4.

[7] CR and PR at Table I-4.

[8] *See* CR and PR at Figure I-1 and Table I-3.

[9] *See* Final Comments of Domestic Interested Parties, April 22, 1999, at 6-7.

[10] We note that the original affirmative injury determination found threat to the domestic industry due in large part to certain adverse weather conditions. "Our determination is based on the fact that the domestic industry is experiencing financial difficulties due, in part, to the series of recent freezes which have affected the Florida orange crop." Original Determination at 3.

[11] Commissioner Crawford finds that the magnitude of any adverse effects of revocation is likely to increase with the degree of vulnerability of the industry. She finds that the domestic industry in this review is not particularly vulnerable to injury if the order is revoked.

B. Volume

The Commission is to consider whether the likely volume of subject imports would be significant either in absolute terms or relative to production or consumption in the United States if the order under review is revoked.[12] In so doing, the Commission shall consider "all relevant economic factors," including four enumerated in the statute: (1) any likely increase in production capacity or existing unused production capacity in the exporting country; (2) existing inventories of the subject merchandise, or likely increases in inventories; (3) the existence of barriers to the importation of the subject merchandise in countries other than the United States; and (4) the potential for product shifting of production facilities in the foreign country, which can be used to produce the subject merchandise, and are currently being used to produce other products.[13]

The information available on the record regarding the Brazilian industry is insufficient to provide any reasonable basis for an assertion that a revocation of the existing order would likely result in a significant volume of the Brazilian imports subject to the existing order. All of the general information available in this review pertains to the Brazilian industry as a whole. The record indicates that total Brazilian production of FCOJM has increased nearly 60 percent since 1986, growing from 1.2 billion SSE gallons in crop year 1986 to 1.9 billion SSE gallons in crop year 1998. Similarly, total Brazilian inventories were about 24 percent higher over the same period, rising from 284 million SSE gallons in crop year 1986 to 351 million SSE gallons in crop year 1998.[14] However, exports to markets other than the United States are the most significant outlet for Brazilian merchandise, rising from 48.6 percent of Brazilian exports in calendar year 1986 to 81.6 percent of such exports in calendar year 1997. More important, several Brazilian firms have been excluded from the antidumping duty order, and the record reveals that less than 5 percent of all imports from Brazil during 1993-97 were subject imports.[15] Given the fact that the subject imports were only a very small portion of total Brazilian imports,[16] it is not reasonable to attribute significant portions of the increase in Brazilian production and inventories to the subject producers.

We have no reliable information regarding the likelihood or willingness of the subject Brazilian exporters to increase their U.S. market share. Given their extremely small market share, there is no reasonable justification to conclude that the absence of the order would likely lead to a significant volume of subject Brazilian imports. Therefore, we conclude that the likely volume of subject imports would be not significant either in absolute terms or relative to production or consumption in the United States in the reasonably foreseeable future if the order under review is revoked.

C. Price

In evaluating the likely price effects of the subject merchandise in the event of revocation, the Commission shall consider (1) whether imports are likely to be sold at a significantly lower price than the

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[12] 19 U.S.C. § 1675a(a)(2).

[13] 19 U.S.C. § 1675(a)(2)(A)-(D). The Statement of Administrative Action to the Uruguay Round Agreements Act ("SAA") indicates that the statutory factors specified for analysis of volume, price, and impact are a combination of those used to determine both material injury by reason of subject imports and threat of material injury in original antidumping and countervailing duty investigations. *See* SAA at 886.

[14] CR and PR at Table I-5.

[15] CR at I-14 and PR at I-11. Since the original duties were imposed, and as a result of several administrative reviews, the existing order has already been revoked as to five of the original 10 named firms that had been subject to the order. CR and PR at I-4 n.8.

[16] Subject imports comprised only 0.6 percent of the domestic market in 1997. *See* CR at I-14 and Table I-4 and PR at I-11 and Table I-4.

domestic like product, and (2) whether imports are likely to enter the United States at prices that otherwise would have a significant depressing or suppressing effect on the price of the domestic like product.[17]

The record in this review contains very limited pricing data. However, even if subject imports were to enter the United States at prices that undersold the domestic like product following revocation of the order, we conclude that the likely volume of those imports would be too minimal to have any discernible impact on prices in the U.S. market. Thus, we determine that imports of FCOJM from Brazil are not likely to have a price suppressing or depressing effect within a reasonably foreseeable time in the event of revocation.

D. Impact

When considering the likely impact of subject imports, the Commission is to consider all relevant economic factors that are likely to have a bearing on the state of the industry in the United States, including: (1) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; (2) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; and (3) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more enhanced version of the domestic like product.[18]

Subject imports are not likely to have a significant adverse impact on the domestic industry if the order is revoked. First, the U.S. industry is not vulnerable to injury if the order is revoked. Second, in light of the extremely small percentage of the domestic market currently accounted for by subject Brazilian imports, the volume of the subject imports in the absence of the existing order would not be significant, either in absolute terms or relative to domestic production or consumption. We have also determined that subject import volume is not likely to have price suppressing or depressing effects.

We therefore find that subject imports would not be likely to have a significant impact on domestic producers' cash flow, inventories, employment, wages, growth, ability to raise capital, or investment, within a reasonably foreseeable time in the event the order is revoked. In conjunction with our conclusions regarding likely volume and price effects, we find that revocation is not likely to lead to a significant reduction in U.S. producers' output, sales, market share, profits, or productivity. We therefore find that revocation is not likely to have a significant impact on the domestic industry within a reasonably foreseeable time.

CONCLUSION

We find that if the antidumping duty order is revoked, the volume of subject imports is not likely to be significant and the subject imports are not likely to have significant effects on domestic prices or a significant impact on the domestic industry. Therefore, we determine that revocation of the order in this review would not be likely to lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

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[17] 19 U.S.C. § 1675a(3). The SAA states that "[c]onsistent with its practice in investigations, in considering the likely price effects of imports in the event of revocation or termination, the Commission may rely on circumstantial, as well as direct, evidence of the adverse effects of unfairly traded imports on domestic prices." SAA at 886.

[18] 19 U.S.C. § 1675a(a)(4).