

UNITED STATES INTERNATIONAL TRADE COMMISSION
CERTAIN NON-FROZEN CONCENTRATED APPLE JUICE FROM CHINA
Investigation No. 731-TA-841 (Preliminary)
DETERMINATION AND VIEWS OF THE COMMISSION
(USITC Publication No. 3216, July 1999)

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DETERMINATION

On the basis of the record¹ developed in the subject investigation, the United States International Trade Commission determines,² pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1673b(a)), that there is a reasonable indication that an industry in the United States is materially injured³ by reason of imports from China of concentrated apple juice, other than frozen,⁴ provided for in subheading 2009.70.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (LTFV).

COMMENCEMENT OF FINAL PHASE INVESTIGATION

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigation. The Commission will issue a final phase notice of scheduling which will be published in the *Federal Register* as provided in section 207.21 of the Commission's rules upon notice from the Department of Commerce (Commerce) of an affirmative preliminary determination in the investigation under section 733(b) of the Act, or, if the preliminary determination is negative, upon notice of an affirmative final determination in that investigation under section 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigation need not enter a separate appearance for the final phase of the investigation. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigation.

BACKGROUND

On June 7, 1999, a petition was filed with the Commission and Commerce by counsel on behalf of Coloma Frozen Foods, Inc., Coloma, MI; Green Valley Packers, Arvin, CA; Knouse Foods Cooperative, Inc., Peach Glen, PA; Mason County Fruit Packers, Ludington, MI; and Tree Top, Inc., Selah, WA., alleging that an industry in the United States is materially injured by reason of LTFV imports of non-frozen concentrated apple juice from China. Accordingly, effective June 7, 1999, the Commission instituted

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.

³ Commissioner Crawford determines that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of the subject merchandise from China that are allegedly sold at LTFV.

⁴ For purposes of this investigation, non-frozen concentrated apple juice is defined as having a Brix value of 40 or greater, whether or not containing added sugar or other sweetening matter, not fortified with vitamins or minerals, unfermented and not containing added spirits.

antidumping investigation No. 731-TA-841 (Preliminary).

Notice of the institution of the Commission's investigation and of a public conference 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 June 16, 1999 (64 F.R. 32256). The conference was held in Washington, DC, on June 28, 1999, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on July 22, 1999. The views of the Commission are contained in USITC Publication 3216 (July 1999), entitled *Certain Non-frozen Concentrated Apple Juice from China: Investigation No. 731-TA-841 (Preliminary)*.

By order of the Commission.

Donna R. Koehnke
Secretary

Issued:

VIEWS OF THE COMMISSION

Based on the record in this investigation, we find a reasonable indication that an industry in the United States is materially injured by reason of imports of non-frozen concentrated apple juice (“NFC AJ”) from China that are allegedly sold in the United States at less than fair value (“LTFV”).^{1 2}

I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS

The legal standard for preliminary antidumping determinations requires the Commission to determine, based upon the information available at the time of the preliminary determination, whether there is a reasonable indication that a domestic industry is materially injured, threatened with material injury, or the establishment of an industry is materially retarded, by reason of the allegedly LTFV imports.³ In applying this standard, the Commission weighs the evidence before it and determines whether “(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation.”⁴

II. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. In General

To determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the Commission first defines the “domestic like product” and the “industry.”⁵ Section 771(4)(A) of the Tariff Act of 1930, as amended (“the Act”), defines the relevant domestic 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.”⁶ In turn, the Act defines “domestic like product” as: “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation”⁷

The decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and the Commission has applied the statutory standard of “like” or “most similar in characteristics and uses” on a case-by-case basis.⁸ No single factor is dispositive, and the Commission

¹ Chairman Bragg did not participate in this investigation.

² Commissioner Crawford finds a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of NFC AJ from China. She joins sections I, II, and III.A. of these views. *See Separate Views of Commissioner Carol T. Crawford.*

³ 19 U.S.C. § 1673b(a); *see also American Lamb Co. v. United States*, 785 F.2d 994, 1001-1004 (Fed. Cir. 1986); *Aristech Chemical Corp. v. United States*, 20 CIT ___, Slip Op. 96-51 at 4-6 (March 11, 1996).

⁴ *American Lamb*, 785 F.2d at 1001 (Fed. Cir. 1986); *see also Texas Crushed Stone Co. v. United States*, 35 F.3d 1535, 1543 (Fed. Cir. 1994).

⁵ 19 U.S.C. § 1677(4)(A).

⁶ 19 U.S.C. § 1677(4)(A).

⁷ 19 U.S.C. § 1677(10).

⁸ *See, e.g., NEC Corp. v. Department of Commerce*, Slip Op. 98-164 at 8 (Ct. Int’l Trade, Dec. 15, 1998); *Nippon Steel Corp. v. United States*, 19 CIT 450, 455 (1995); *Torrington Co. v. United States*, 747 F. Supp. 744, 749, n.3 (Ct. Int’l Trade 1990), *aff’d*, 938 F.2d 1278 (Fed. Cir. 1991) (“every like product determination ‘must be

(continued...)

may consider other factors it deems relevant based on the facts of a particular investigation.⁹ The Commission looks for clear dividing lines among possible like products, and disregards minor variations.¹⁰ Although the Commission must accept the determination of the Department of Commerce (“Commerce”) as to the scope of the imported merchandise allegedly sold at LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified.¹¹

B. Product Description

In its notice of initiation, Commerce defined the imported merchandise within the scope of these investigations as:

non-frozen concentrated apple juice having a Brix value of 40 or greater, whether or not containing added sugar or other sweetening matter. Excluded from the scope of this investigation are frozen concentrated apple juice, non-frozen concentrated apple juice fortified with vitamins or minerals, non-frozen concentrated apple juice that has been fermented, and non-frozen concentrated apple juice to which spirits have been added.¹²

NFCAJ is a highly concentrated form of apple juice from which the apple “essence” and most of the water have been removed. NFCAJ production begins with juice apples,¹³ which are milled and mash-finished to remove the stems, seeds, peels, and other extraneous matter. The pulpy apple residue is then separated from the juice and removed. The juice then is heated in a “stripper” until the apple essence¹⁴ separates and can be removed, and is then further heated to the point of pasteurization. The juice is then

⁸ (...continued)

made on the particular record at issue’ and the ‘unique facts of each case’”). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes and production employees; and, where appropriate, (6) price. See Nippon, 19 CIT at 455 n.4; Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int’l Trade 1996).

⁹ See, e.g., S. Rep. No. 96-249, at 90-91 (1979).

¹⁰ Nippon Steel, 19 CIT at 455; Torrington, 747 F. Supp. at 748-49. See also S. Rep. No. 96-249, at 90-91 (1979) (Congress has indicated that the like product standard should not be interpreted in “such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not ‘like’ each other, nor should the definition of ‘like product’ be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under consideration.”).

¹¹ Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568 (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).

¹² 64 Fed. Reg. 36,330, 36,331 (July 6, 1999).

¹³ After harvesting, apples are generally sorted into three categories: fresh market, peelers, and juice apples. Fresh market apples are sold for fresh consumption. Peelers are used to produce apple slices, apple sauce, and other processed products. Juice apples are used to produce apple juice. Juice apples are the inevitable by-product of production of apples for the fresh market and generally consist of apples that, due to size or condition, are not suitable for either fresh consumption or processing. Confidential Report (“CR”) at I-3, Public Report (“PR”) at I-2-I-3.

¹⁴ The “essence” of a fruit is what provides its characteristic taste and aroma. CR at I-4 n.22, PR at I-3 n.22.

filtered or “clarified,” resulting in a non-cloudy juice. Finally, the clarified juice is passed through evaporators, which use heat to remove water from the juice until it takes a highly concentrated form. After processing, NFCAJ is poured into bulk tanks or 55-gallon drums, where it can be stored for an extended period of time.¹⁵ NFCAJ can be used to produce apple juice, blended fruit juice beverages, as a flavoring ingredient in carbonated and other beverages, and as a sweetener in bakery products, cereal, and health foods.¹⁶

C. Domestic Like Product Issues

The only like product issue in the preliminary phase of this investigation is whether the domestic like product should be expanded beyond the scope to include single strength apple juice (“1XAJ”) and frozen concentrated (triple strength) apple juice (“3XCAJ”). Petitioners advocate a single domestic like product coextensive with the scope, *i.e.*, NFCAJ.¹⁷ Respondents take no position on whether the like product should be limited to NFCAJ or should be defined more broadly to include other forms of apple juice.¹⁸

Single strength apple juice is apple juice in drinkable form and is generally sold to grocery stores and food service establishments for ultimate sale to consumers in bottles, cans, or paper cartons. It can be made directly from apples, or by reconstituting (*i.e.*, adding water to) apple juice concentrate.¹⁹ Frozen concentrated apple juice is apple juice from which some of the water has been evaporated and that is maintained in frozen form to lengthen shelf life. Frozen concentrated apple juice is a consumer product that is sold in the freezer section of supermarkets. The consumer must add three parts water to the concentrate in order to reconstitute it into drinkable juice.²⁰

For purposes of these views, we refer to single strength apple juice and frozen concentrated apple juice collectively as “retail apple juice.”²¹ Also for purposes of these views, we do not include in our definition of “retail apple juice” juice that has been excluded from the scope definition because it contains added vitamins or alcohol.

a. Physical Characteristics and Uses

All forms of apple juice are made from apples and therefore bear significant similarities in terms of physical characteristics. Petitioners argue, however, that two physical characteristics distinguish NFCAJ from retail apple juice: degree of concentration and taste.²²

Single strength apple juice, frozen concentrated apple juice, and NFCAJ represent differing degrees of concentration that are reflected in the amount of sugar they contain by weight. Sugar content is measured on the Brix scale, which indicates a solution’s percentage by weight of sugar at a particular

¹⁵ Petition at 4-5.

¹⁶ Petition at 6-7.

¹⁷ Petitioners’ Postconference Brief at 2.

¹⁸ Respondents’ Postconference Brief at 3.

¹⁹ CR at I-2-I-3, PR at I-2-I-3; Petition at 3.

²⁰ CR at I-4-I-5 and nn. 22 and 24, PR at I-3-I-4 and nn. 22 and 24; Petition at 3.

²¹ For purposes of this preliminary determination, we also include shelf stable non-frozen concentrate sold at retail as a form of “retail apple juice.” In any final phase of the investigation, we will seek additional information concerning the characteristics (such as the Brix value) and uses of this product.

²² Petitioners’ Postconference Brief at 5.

temperature. The scope of this investigation covers NFCAJ with a Brix value of 40 or greater. NFCAJ typically has a Brix value of about 70, meaning that at a temperature of 20°C it contains seventy percent sugar by weight. By contrast, frozen concentrate generally has a Brix value of about 44 to 46,²³ and single strength apple juice has a Brix value of between 9 and 14.²⁴

Apple essence is what gives apple juice its distinctive flavor. As discussed further below, apple essence is separated from NFCAJ during the production process. Once the apple essence is removed, NFCAJ tastes like very sweet water. By contrast, single strength apple juice and frozen concentrated apple juice both contain apple essence.²⁵

NFCAJ has several end uses. The majority of domestically-produced NFCAJ, about 65 percent, is reconstituted into retail apple juice.²⁶ For this end use, both water and apple essence must be combined with the NFCAJ to produce a drinkable product that tastes like apple juice.²⁷ About 25 percent of domestic NFCAJ production is used to produce juice blend products.²⁸ In many cases, NFCAJ is used as a juice “filler” so that the product can be labeled “100 percent fruit juice” but will not have a distinctive apple taste. For this end use, no apple essence is required, unless the blended juice beverage is intended to have an apple flavor.²⁹ A small amount of domestic production of NFCAJ is used as a flavoring in other beverages. No information is available on whether apple essence must be added in such applications.³⁰ A small portion of domestic NFCAJ production is also used as a sweetener in cereal, bakery products, and other prepared foods, where presumably a strong apple flavor is not desired.³¹

b. Interchangeability

Petitioners concede that, technically, retail apple juice could be used as a substitute for NFCAJ in the production of juice blends and bakery products. There are several reasons, however, why such substitution is not commercially feasible. First, retail apple juice is a more perishable form of apple juice than NFCAJ and may not meet purchasers’ shelf life needs. Second, single strength apple juice may not be sweet enough for use in the purchaser’s end product. For example, a baker might water down 70 Brix NFCAJ to 20 Brix for use as a sweetener, but would not have the means to concentrate single strength apple juice that is only 11 ½ to 12 Brix or to remove the essence from the juice.³²

c. Channels of Distribution

NFCAJ is an industrial product that is sold for further manufacturing into retail apple juice, juice blends, or other products, while single strength apple juice and frozen apple juice concentrate are sold to grocery stores or food service establishments for human consumption. Despite these initially separate

²³ *Apple Juice*, Inv. No. TA-201-59, USITC Pub. 1861 at A-5 (June 1986).

²⁴ Transcript of Commission Staff Conference (“Conf. Tr.”) (June 28, 1999) at 34; CR at I-2 n.8, PR at I-2 n.8.

²⁵ Conf. Tr. at 21, 41-43.

²⁶ CR at I-3, PR at I-2. This is lower than petitioners’ initial estimate of 70-75 percent. Conf. Tr. at 30.

²⁷ Conf. Tr. at 21, 41-43. Petitioner Tree Top indicated that it has at least one customer that requests that it blend the essence back into the NFCAJ before delivery, but that Tree Top never stores NFCAJ with the essence in it. Conf. Tr. at 40-41.

²⁸ CR at I-3, PR at I-2.

²⁹ Petitioners’ Postconference Brief at 7; Conf. Tr. at 21-22, 41-43.

³⁰ Petitioners’ Postconference Brief at 8; CR at I-3, PR at I-2.

³¹ Petitioners’ Postconference Brief at 8; CR at I-3, PR at I-2.

³² Conf. Tr. at 32-33.

channels of distribution, however, the majority of NFCAJ is ultimately reconstituted into retail apple juice and sold through the same channels of distribution as retail apple juice made directly from apples.³³

d. Common Manufacturing Facilities, Employees and Methods

There are two production technologies that can be used to extract juice from apples. The traditional method is to use a press. Using this method, the juice is pressed out of the juice apples, then filtered and pasteurized. At this point the product can either be sold directly as single strength apple juice or it can be sent through a “concentrator” that uses heat to remove most of the water. Because apple essence separates from apple juice at a lower temperature than does water, the separation of the apple essence from the juice is an unavoidable step in the production of concentrate. The separated essence can be recaptured by an additional device or allowed to drain out of the concentrator as waste. Heating continues until the NFCAJ reaches a concentration of 70 Brix. Thus, using the traditional process, NFCAJ shares the first several production steps in common with retail apple juice. At the conference, several petitioning companies testified that they use the same production line to produce single strength apple juice intended for immediate retail sale and single strength apple juice intended for further processing into NFCAJ.³⁴

An alternate and newer technology is the liquification process. This process removes the liquid from the apple without the use of a press. Liquification results in a higher juice yield than the traditional press method, and is therefore preferred by some large producers of NFCAJ. The traditional method is preferred for the production of single strength apple juice, however, because it is believed to produce a better flavored juice. At present, both technologies are in general use, with some facilities that use only one or the other and some that use both technologies.³⁵ Petitioner Tree Top, which accounted for *** of domestic production of NFCAJ in 1998, ***.³⁶

e. Producer and Customer Perceptions

Petitioners argue that consumers and producers perceive NFCAJ and retail apple juice to be different products because one is an intermediate industrial product with several end uses while the other is a downstream retail product.³⁷ With respect to retail apple juice production, however, (which accounts for about 65 percent of domestic production of NFCAJ) NFCAJ could be considered as more of a convenient storage format than it is a separate product.³⁸

³³ CR at I-3, PR at I-2 (65 percent of domestically produced NFCAJ is used in the production of retail apple juice). In any final phase of the investigation, we will seek information on whether there are arms length sales of single strength apple juice in bulk to bottlers. If bottlers purchase both single strength juice in bulk and NFCAJ for use separately or together in the production of retail juice, then the channels of distribution for at least some 1XAJ would be the same as for the approximately 65 percent of domestic NFCAJ that is used to produce retail apple juice.

³⁴ Conf. Tr. at 36 (Coloma), 37 (Knouse).

³⁵ Conf. Tr. at 35-36.

³⁶ CR at I-3 n.17, PR at I-3; CR at III-1, PR at III-1.

³⁷ Conf. Tr. at 22.

³⁸ Cf. Conf. Tr. at 18 (development of NFCAJ allowed year round apple juice production for the first time).

f. Price

Petitioners contend that the additional value added through the processing and packaging of single strength apple juice for retail sale results in a much higher price than for a comparable amount of NFCAJ.³⁹ It is not clear, however, that comparing the retail price of single strength apple juice to the price of NFCAJ sold in bulk to industrial users is the appropriate comparison since, as petitioners admit, the process of reconstituting and bottling NFCAJ for retail sale adds considerable value to the product.⁴⁰

g. Conclusion

For purposes of our preliminary determination, we find a single domestic like product limited to NFCAJ. We base this finding on the physical differences between NFCAJ and retail apple juice (in particular, the removal of the apple essence from NFCAJ); the fact that about 35 percent of domestic NFCAJ is not used to produce retail apple juice; the limited commercial interchangeability between NFCAJ and retail apple juice in producing downstream products such as non-apple flavored juice blends and baked goods; the additional processing steps needed to produce NFCAJ from single strength apple juice; the use of a different manufacturing technology for removing juice from apples for NFCAJ versus 1XAJ by *** domestic producer ***; and the different channels of distribution in which NFCAJ and retail apple juice are sold. Nevertheless, we intend to reconsider this issue in any final phase of the investigation. In particular, we will seek further information concerning the relative significance of common and separate production processes for NFCAJ and retail apple juice, and, to the extent possible, comparisons concerning channels of distribution, consumer perceptions, and price at the same level of trade.⁴¹

D. Domestic Industry

The domestic industry is defined as “the producers as a [w]hole of a domestic like product”⁴² In defining the domestic industry, the Commission’s general practice has been to include in the industry all of the domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market.⁴³ For the reasons discussed below, we define the domestic industry in this investigation as all domestic producers of NFCAJ, and do not include apple growers in the domestic industry.

³⁹ Petition at 9.

⁴⁰ Petitioners’ Postconference Brief at 8 n.20. In any final phase of the investigation, we will seek information permitting a price comparison between 1XAJ and NFCAJ at the same level of trade, such as a comparison between the price to a bottler of 1XAJ in bulk and NFCAJ (converted to single strength equivalent).

⁴¹ We will also consider whether a semifinished product analysis would be more appropriate to this issue than the traditional six factor like product analysis.

⁴² 19 U.S.C. § 1677(4)(A).

⁴³ See United States Steel Group v. United States, 873 F. Supp. 673, 681-684 (Ct. Int’l Trade 1994), *aff’d*, 96 F. 3d 1352 (Fed. Cir. 1996).

1. Whether the Industry Includes Apple Growers

In cases involving processed agricultural products, section 771(4)(E) of the Act authorizes the Commission to include growers of a raw agricultural input within the domestic industry producing the processed agricultural product if:

- (a) the processed agricultural product [here, NFCAJ] is produced from the raw product [apples]⁴⁴ through a single continuous line of production,⁴⁵ and
- (b) there is a substantial coincidence of economic interest between the growers and producers of the processed product based upon relevant economic factors.⁴⁶

Based on the record in the preliminary phase of this investigation, we find that the domestic industry producing NFCAJ does not include apple growers, because although the processed agricultural product (NFCAJ) is produced substantially from the raw agricultural product (apples), the raw agricultural product is not substantially or completely devoted to the production of the processed agricultural product. In previous investigations, the Commission has found that a raw agricultural product is not substantially or completely devoted to the production of the processed agricultural product when the majority of domestic production of the raw agricultural product is either not processed at all, processed into products other than the one subject to investigation, or a combination of both.⁴⁷ In this investigation, the record indicates that only about 20 percent of domestic apple production (by weight) is processed into apple juice,⁴⁸ and

⁴⁴ "Raw agricultural product" is defined as any farm or fishery product. 19 U.S.C. §1677(4)(E)(iv).

⁴⁵ The statute provides that the processed product shall be considered to be processed from the raw product in a single continuous line of production if:

- (a) the raw agricultural product is substantially or completely devoted to the production of the processed agricultural product; and
- (b) the processed agricultural product is produced substantially or completely from the raw product.

19 U.S.C. § 1677(4)(E)(ii).

⁴⁶ In addressing coincidence of economic interest under the second prong of the test, the Commission may, in its discretion, consider price, added market value, or other economic interrelationships. Further:

- (a) if price is taken into account, the Commission shall consider the degree of correlation between the price of the raw agricultural product and the price of the processed agricultural product; and
- (b) if added market value is taken into account, the Commission shall consider whether the value of the raw agricultural product constitutes a significant percentage of the value of the processed agricultural product.

19 U.S.C. § 1677(4)(E)(iii).

⁴⁷ See, e.g., Certain Preserved Mushrooms from Chile, Inv. No. 731-TA-776 (Final), USITC Pub. 3144 (Nov. 1998); Crawfish Tail Meat from China, Inv. No. 731-TA-752 (Final), USITC Pub. 3057 (Aug. 1997); Canned Pineapple Fruit from Thailand, Inv. No. 731-TA-706 (Final), USITC Pub. 2907 (July 1995).

⁴⁸ Conf. Tr. at 87.

virtually no domestic apples are grown specifically for use as juice apples.⁴⁹ The remaining 80 percent of domestic apples are either sold in the fresh market or processed into slices, apple sauce, baby food, or other non-juice products.⁵⁰ Moreover, of the 20 percent of domestic apples that are used as juice apples, only a little more than half are used to produce NFCAJ.⁵¹

2. Related Parties

We must further determine whether any producer of the domestic like product should be excluded from the domestic industry pursuant to 19 U.S.C. § 1677(4)(B). That provision of the statute allows the Commission, if appropriate circumstances exist, to exclude from the domestic industry producers that are related to an exporter or importer of subject merchandise, or which are themselves importers.⁵² Exclusion of such a producer is within the Commission's discretion based upon the facts presented in each case.⁵³

Respondents argue that *** is a related party and that appropriate circumstances exist to exclude it from the domestic industry because its ***. They also argue that *** may be a related party by virtue of its ***.⁵⁴ Petitioners did not address this issue.

*** is a *** producer that accounted for only *** percent of domestic production of NFCAJ in 1998.⁵⁵ In 1998, *** purchased subject imports amounting to *** and ***.⁵⁶ There is no evidence to suggest that *** was the importer of the subject imports it purchased, nor is there any evidence that it is related to any importer or foreign producer of the subject merchandise. In previous investigations, however, the Commission has concluded that a domestic producer that does not itself import subject merchandise, or does not share a corporate affiliation with an importer, may nonetheless be deemed a related party if it controls large volumes of imports. The Commission has found such control to exist where the domestic producer was responsible for a predominant portion of an importer's purchases and the importer's purchases were substantial.⁵⁷

⁴⁹ Conf. Tr. at 45-46.

⁵⁰ Conf. Tr. at 21-22.

⁵¹ Conf. Tr. at 45.

⁵² 19 U.S.C. § 1677(4)(B).

⁵³ Sandvik AB v. United States, 721 F. Supp. 1322, 1331-32 (Ct. Int'l Trade 1989), *aff'd without opinion*, 904 F.2d 46 (Fed. Cir. 1990); Empire Plow Co. v. United States, 675 F. Supp. 1348, 1352 (Ct. Int'l Trade 1987). The primary factors the Commission has examined in deciding whether appropriate circumstances exist to exclude the related parties include: (1) the percentage of domestic production attributable to the importing producer; (2) the reason the U.S. producer has decided to import the product subject to investigation, *i.e.*, whether the firm benefits from the LTFV sales or subsidies or whether the firm must import in order to enable it to continue production and compete in the U.S. market, and (3) the position of the related producers vis-a-vis the rest of the industry, *i.e.*, whether inclusion or exclusion of the related party will skew the data for the rest of the industry. *See, e.g.*, Torrington Co. v. United States, 790 F. Supp. 1161, 1168 (Ct. Int'l Trade 1992), *aff'd without opinion*, 991 F.2d 809 (Fed. Cir. 1993). The Commission has also considered the ratio of import shipments to U.S. production for related producers and whether the primary interests of the related producers lie in domestic production or in importation. *See, e.g.*, Melamine Institutional Dinnerware from China, Indonesia, and Taiwan, Inv. Nos. 731-TA-741-743 (Final), USITC Pub. 3016 at 14 n.81 (Feb. 1997).

⁵⁴ Respondents' Postconference Brief at 24-25.

⁵⁵ CR at III-3, PR at III-2.

⁵⁶ CR at III-4, PR at III-2.

⁵⁷ *See, e.g.*, Certain Cut-to-Length Steel Plate from the Czech Republic, France, India, Indonesia, Italy, Japan,

(continued...)

In this case, the only importer of the subject merchandise that reported *** among its ten largest customers was ***, which reported that *** accounted for *** percent of its sales of subject merchandise in 1998 (about *** short tons). In 1998, *** accounted for about *** percent of subject imports, meaning that *** purchases from *** accounted for about *** percent of subject imports in that year. Total purchases of subject imports reported by *** were about *** short tons, indicating that it must also purchase subject merchandise from other domestic sources.⁵⁸ In our view, these data indicate that *** was not responsible for a predominant portion of any importer's purchases of the subject merchandise and therefore should not be considered a related party.

Similarly, there is no evidence to suggest that *** or any other domestic producer of NFCAJ might be a related party as that term is defined in the statute.⁵⁹ ⁶⁰ Accordingly, we find that no domestic producer should be considered a related party for purposes of our preliminary determination in this investigation, and define the domestic industry as all domestic producers of NFCAJ.

III. REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF THE SUBJECT IMPORTS ⁶¹

In the preliminary phase of antidumping or countervailing duty investigations, the Commission determines whether there is a reasonable indication that an industry in the United States is materially injured by reason of the imports under investigation.⁶² In making this determination, the Commission must consider the volume of 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.⁶³ The statute defines "material injury" as "harm which is not inconsequential, immaterial or unimportant."⁶⁴ In assessing whether there is a reasonable indication that the domestic industry is materially injured by reason of subject imports, we consider all relevant economic factors that bear on the state of the industry in

⁵⁷ (...continued)

Korea, and Macedonia, Inv. Nos. 701-TA-387-392 and 731-TA-815-822 (Preliminary), USITC Pub. 3181 at 12 (Apr. 1999); Certain Brake Drums and Rotors from China, Inv. No. 731-TA-744 (Final), USITC Pub. 3035 at 10 n.50 (Apr. 1997).

⁵⁸ Questionnaire Responses of *** and ***; Table IV-1, CR at IV-2, PR at IV-2.

⁵⁹ CR at III-2 n.7, PR at III-1 n.7 (*** reported no purchases of subject merchandise).

⁶⁰ Commissioner Crawford determines that there is no evidence that any of the *** domestic producers that reported purchases of subject imports is a related party. She further determines that neither of the *** importers that are related to Chinese producers is selling a significant volume of subject merchandise to any domestic producer of NFCAJ.

⁶¹ Commissioner Crawford finds a reasonable indication that the domestic industry is threatened with material injury by reason of subject imports. *See Separate Views of Commissioner Carol T. Crawford.* She therefore joins only subsection A of section III of the majority views.

⁶² 19 U.S.C. § 1673b(a).

⁶³ 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). *See also Angus Chemical Co. v. United States*, 140 F.3d 1478 (Fed. Cir. 1998).

⁶⁴ 19 U.S.C. § 1677(7)(A).

the United States.⁶⁵ 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.”⁶⁶

For the reasons discussed below, we determine that there is a reasonable indication that the domestic industry producing NFCAJ is materially injured by reason of allegedly LTFV imports of NFCAJ from China.

A. Conditions of Competition

1. Captive Production

Because the domestic industry captively consumes the majority of its production of the domestic like product in the manufacture of downstream articles, we first consider whether the statutory captive production provision requires us to focus our analysis primarily on the merchant market when assessing market share and the factors affecting the financial performance of the domestic industry.^{67 68}

We find that domestic producers both internally transfer significant production of NFCAJ and sell significant production in the merchant market,⁶⁹ and, accordingly, that the statutory threshold is satisfied. For the following reasons, however, we find that the third criterion of the captive production provision is not satisfied in this investigation.

⁶⁵ 19 U.S.C. § 1677(7)(C)(iii).

⁶⁶ 19 U.S.C. § 1677(7)(C)(iii).

⁶⁷ The captive production provision, 19 U.S.C. § 1677(7)(C)(iv), provides:

(iv) CAPTIVE PRODUCTION -- If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that --

(I) the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product,

(II) the domestic like product is the predominant material input in the production of that downstream article, and

(III) the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article,

then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii), shall focus primarily on the merchant market for the domestic like product.

⁶⁸ Commissioner Askey notes that the statute requires the Commission to analyze the impact of the subject imports on all domestic production operations, including both captive and merchant market shipments. *See* 19 U.S.C. §§ 1677(4)(A) and 1677(7)(B). Moreover, she notes that, even if the statutory provisions are met and the captive production provision applies, it merely permits the Commission to “focus primarily” on the merchant market operations of the industry; the provision does not allow the Commission to disregard the industry’s captive consumption completely. 19 U.S.C. § 1677(7)(C)(iv).

⁶⁹ In 1998, internal shipments accounted for approximately 57.7 percent of domestic producers’ total shipments of NFCAJ (by volume) and merchant market shipments accounted for 42.1 percent, with the remainder being export shipments. Table III-2, CR at III-6, PR at III-3.

The third statutory criterion requires us to determine whether the merchant market purchaser is generally using the domestic like product in the production of the same downstream article or articles as the integrated domestic producer.⁷⁰ The Commission has previously determined that, in investigations involving captive production of multiple downstream products, the Commission should make its determination of whether the third criterion (and hence the captive production provision) is satisfied with respect to production of all such products, rather than making a separate determination with respect to each captively produced downstream product.⁷¹ In this investigation, therefore, we consider whether merchant market purchasers are generally using NFCAJ in the production of the same two principal downstream products that are captively produced, *i.e.*, retail apple juice and juice blends. The record indicates that approximately 45 percent of NFCAJ sold on the merchant market is used in the production of retail apple juice; 35 percent of NFCAJ sold on the merchant market is used in the production of juice blends; and the remaining 20 percent sold on the merchant market is sold to bakers and others for the manufacture of other products. The record further indicates that 80 and 18 percent of captively consumed NFCAJ is used in the production of retail apple juice and juice blends, respectively.⁷² Because we find that a substantial share of NFCAJ sold on the merchant market is used to produce the same two downstream products as is the NFCAJ that is internally consumed by integrated producers, we find that the third criterion is not satisfied, and, therefore, that the captive production provision does not apply in this investigation.^{73 74}

2. Other Conditions of Competition

An important condition of competition in the market for NFCAJ is that domestic consumption of apple juice generally exceeds domestic supply. As a consequence, the United States has historically been a net importer of NFCAJ and imports of NFCAJ currently hold more than 75 percent of the U.S. market.⁷⁵ In this preliminary phase of the investigation, the record evidence is somewhat mixed on the extent to which domestic product, subject imports, and non-subject imports complement each other and the extent to which they compete with each other in the U.S. market for NFCAJ. Petitioners contend that non-subject imports from southern hemisphere countries such as Argentina and Chile may complement domestic production to some extent, because of their different growing seasons. Similarly, they assert that non-subject imports from European countries, such as Germany, may complement domestic production because they tend to be higher in acidity and can be blended with domestic NFCAJ as part of the reconstituting process to reduce

⁷⁰ See Certain Hot-Rolled Steel Products from Japan, Inv. No. 731-TA-807 (Final), USITC Pub. 3202 at 27-29, 33-35 (June 1999) (“Hot-Rolled Steel”).

⁷¹ *Id.*

⁷² CR at I-3 n.14, PR at I-2.

⁷³ Under the third criterion of the captive production provision Vice Chairman Miller and Commissioners Hillman and Koplan assess the overall degree of overlap between the downstream products produced captively and those produced from the domestic like product in the merchant market. See Hot-Rolled Steel, USITC Pub. 3202 at 33.

⁷⁴ Commissioner Crawford notes that, even in circumstances in which the captive production provision does not apply, the Commission has the discretion to consider the significant volume of captive production as a condition of competition. See, *e.g.*, Hot-Rolled Steel, USITC Pub. 3202 at 29; Certain Emulsion Styrene-Butadiene Rubber from Brazil, Korea, and Mexico, Inv. Nos. 731-TA-794-796 (Final), USITC Pub. 3190 at 13-14 (May 1999). In any final phase of the investigation, she will seek further information on the extent to which captive production of NFCAJ is insulated from competition with subject imports and whether certain domestic capacity for the production of downstream products is dedicated to consumption of domestically-produced NFCAJ.

⁷⁵ Conf. Tr. at 9-10; CR at IV-4, PR at IV-4; Table IV-2, CR at IV-6, PR at IV-5.

its sweetness. By contrast, they claim that Chinese imports are a very good substitute for the domestic product, since they share the same growing season and are generally low in acidity.⁷⁶ On the other hand, as discussed further below, the extent to which subject imports have displaced nonsubject imports in the U.S. market during the period examined suggests that subject and nonsubject imports are substitutable to a significant extent.⁷⁷ Moreover, questionnaire responses support this inference: the majority of responding producers and importers indicated that the domestic like product, subject imports, and nonsubject imports are interchangeable.⁷⁸ Accordingly, for purposes of this preliminary determination, we conclude that both subject and nonsubject imports are relatively good substitutes for the domestic like product and for each other.⁷⁹

Because NFCAJ is an agricultural product, weather conditions and other factors affecting the apple harvest can result in swings in the domestic supply and prices of juice apples. The parties disagree, however, about the existence or significance of bumper apple crops in 1998 and 1999. Respondents argue that current U.S. apple harvests are at near-record levels, resulting in very low prices for juice apples.⁸⁰ Petitioners, by contrast, claim that they have seen no difference recently in the amount of fruit available for processing into NFCAJ.⁸¹ In any final phase of the investigation, we will seek further information on the manner in which the fresh apple harvest affects prices in the market for NFCAJ.

Finally, because juice apples are a perishable commodity, they must be processed into NFCAJ relatively soon after harvest. This means that NFCAJ production is a somewhat seasonal activity. As a consequence, NFCAJ producers have somewhat limited ability to affect their volume of production in response to current demand conditions.⁸²

B. Volume of the 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.”⁸³

Imports of NFCAJ from China (by quantity) rose throughout the period examined, from 6,297 short tons in 1996 to 25,978 short tons in 1997 and 46,032 short tons in 1998, for an overall increase of over 600 percent. Imports by quantity were 19,020 short tons in interim (January-March) 1999, compared with 6,308 short tons in interim 1998, a 200 percent increase. By value, imports followed the same pattern, rising from \$8.7 million in 1996 to \$27.0 million in 1997 and \$33.4 million in 1998, for an overall

⁷⁶ Conf. Tr. at 11-12, 19, 27-29, 52-53.

⁷⁷ Table IV-2, CR at IV-6, PR at IV-5.

⁷⁸ CR at II-3-II-5, PR at II-3.

⁷⁹ Commissioner Crawford finds that U.S.-produced and Chinese NFCAJ are moderate substitutes. She bases this on differing product characteristics, terms of sales, and the substantial volume of captive production. *See her Separate Views.*

⁸⁰ Conf. Tr. at 64, 69.

⁸¹ Conf. Tr. at 61.

⁸² CR at II-1, PR at II-1; Conf. Tr. at 9-10, 64, 69. While NFCAJ can be made with apples that have been held in climate controlled storage for up to 8 to 10 months following harvest, most NFCAJ is made from recently harvested apples. CR at I-3, PR at I-2.

⁸³ 19 U.S.C. § 1677(7)(C)(i).

increase of 284 percent. Subject imports by value were \$14.5 million in interim 1999 compared to \$5.2 million in interim 1998, a difference of 179 percent.⁸⁴

Subject imports' share of the U.S. market (by quantity) also rose over the period examined, climbing from 2.2 percent in 1996 to 8.2 percent in 1997 and 14.8 percent in 1998. Subject imports' market share by quantity was 26.1 percent in interim 1999, compared with 10.6 percent in interim 1998. By value, the market share of subject imports followed the same pattern, rising from 1.9 percent in 1996 to 6.9 percent in 1997 and to 12.5 percent in 1998. Subject imports' market share by value was 24.5 percent in interim 1999, compared with 8.9 percent in interim 1998.⁸⁵

Although subject imports rose dramatically over the period examined by every measure, they did not take market share from the domestic like product. Domestic producers' share of the U.S. market for NFCAJ (by quantity) fell from 20.5 percent in 1996 to 18.6 percent in 1997, then rose to 23.9 percent in 1998. Domestic producers' market share by quantity was 24.5 percent in interim 1999, compared with 17.5 percent in interim 1998.⁸⁶

Despite the fact that subject imports did not displace domestic product over the period examined, we find both the volume and the increase in the volume of subject imports to be significant in absolute terms. We base this conclusion principally on subject imports' extremely rapid rise by all measures to hold a prominent share of the domestic market for NFCAJ.

C. Price Effects of the Subject Imports

Section 771(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.⁸⁷

Prices for domestic NFCAJ trended sharply and steadily downward between early 1996 and late 1998, increasing very slightly in the first quarter of 1999. Thus the price of a gallon of domestic NFCAJ, which began the period at over ***, declined to just over *** in late 1998 and the first quarter of 1999.⁸⁸ Prices for the Chinese product also declined steadily over the period examined. The price of a gallon of subject NFCAJ began the period well below that for domestic NFCAJ, at about ***, and ended the period *** at about ***.⁸⁹ Although margins of underselling decreased as domestic prices descended rapidly to meet subject import prices, subject imports undersold the domestic like product in all 11 quarters in which comparisons were possible.⁹⁰

The observed price declines correlate with the surge in Chinese imports. At the beginning of 1996, Chinese imports were selling for just over *** the price of the domestic like product, and their prices continued to fall throughout 1997 and 1998. Between 1996 and 1997, the volume of subject imports increased by over 200 percent, while domestic prices fell by more than *** percent. As the rate of increase in the volume of subject imports slowed between 1997 and 1998 (although the increase continued in

⁸⁴ Table IV-1, CR at IV-2, PR at IV-2; Table C-1, CR at C-3, PR at C-3.

⁸⁵ Table IV-2, CR at IV-6, PR at IV-5.

⁸⁶ Table IV-2, CR at IV-6, PR at IV-5. Market share by value followed the same general pattern.

⁸⁷ 19 U.S.C. § 1677(7)(C)(ii).

⁸⁸ Table V-1, CR at V-4, PR at V-4.

⁸⁹ Table V-1, CR at V-4, PR at V-4.

⁹⁰ Table V-1, CR at V-4, PR at V-4.

absolute terms), both domestic and subject import prices fell more slowly and margins of underselling by the subject imports declined somewhat.⁹¹ We note that domestic and subject import prices rose slightly in the first quarter of 1999, although the volume of imports continued to rise relative to the first quarter of 1998.⁹² Nevertheless, we do not view this very slight increase in prices from their very low current levels as indicating an ongoing recovery or as negating our general observations concerning the correlation between volume and price trends in this market.

Based on the observed correlations between rising subject import volumes, declining prices, and underselling, and in light of the relatively high degree of substitutability between the subject imports and the domestic like product, we find both that underselling by the subject imports is significant and that the subject imports have depressed the prices for the domestic like product to a significant degree.

D. Impact of the Subject Imports on the Domestic Industry

Section 771(7)(C)(iii) provides that the Commission, in examining the impact of the subject imports on the domestic industry, “shall evaluate all relevant economic factors which have a bearing on the state of the industry.” These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”⁹³ ⁹⁴ For the reasons discussed below, we conclude that the rising volume and low and declining prices of the subject imports have adversely affected the domestic industry producing NFCAJ in several respects.

Between 1996 and 1997, U.S. apparent consumption of NFCAJ increased by more than nine percent.⁹⁵ Faced with growing demand, domestic producers increased their production, capacity utilization, and employment between those two years, despite the growing volume of lower-priced subject imports.⁹⁶

⁹¹ Table IV-1, CR at IV-2, PR at IV-2; Table V-1, CR at V-4, PR at V-4. By contrast, there does not appear to be any correlation between domestic price declines and the volumes or prices of nonsubject imports. Nonsubject import volumes rose modestly between 1996 and 1997, then fell in 1998 and interim 1999, resulting in a net loss both in absolute terms and in market share. The average unit values for nonsubject imports also fell over the period, reflecting general price declines in the market, but were at all times higher than the average unit values for subject imports. Although nonsubject import average unit values were below those for the domestic like product in 1996 and 1997, they were higher than those for the domestic like product in 1998 and interim 1999, when prices for both the domestic product and the subject imports reached their lowest levels of the period. Table C-1, CR at C-3, PR at C-3.

⁹² *Id.*

⁹³ 19 U.S.C. § 1677(7)(C)(iii). *See also* SAA at 851 and 885 and Live Cattle from Canada and Mexico, Inv. Nos. 701-TA-386 and 731-TA-812-813 (Preliminary), USITC Pub. 3155 at 25 n.148 (Feb. 1999).

⁹⁴ As part of its consideration of the impact of imports, the statute specifies that the Commission is to consider “the magnitude of the margin of dumping” in an antidumping proceeding. 19 U.S.C. § 1677(7)(C)(iii)(V). In its notice of initiation, Commerce identified estimated dumping margins for China ranging from 51.69 to 65.64 percent. 64 Fed. Reg. 36,330, 36,332 (July 6, 1999).

⁹⁵ Apparent consumption rose from 290,556 short tons in 1996 to 318,006 short tons in 1997 and 310,496 short tons in 1998. Apparent consumption was 72,359 short tons in interim 1999, compared with 59,359 short tons in interim 1998. Table IV-2, CR at IV-5, PR at IV-5; Table C-1, CR at C-3, PR at C-3.

⁹⁶ Domestic production of NFCAJ rose from 56,116 short tons in 1996 to 70,268 short tons in 1997, then fell to 63,715 short tons in 1998. Domestic production was 20,612 short tons in interim 1999, compared with 12,684

(continued...)

Domestic producers' U.S. shipments by quantity remained constant, however, resulting in rising inventories as a percentage of shipments, and U.S. shipments by value declined.⁹⁷ Between 1997 and 1998, as demand fell somewhat, subject import volumes continued to rise, and domestic prices continued to fall in the face of underselling by the subject imports, domestic producers cut back on production (albeit not below 1996 levels) and capacity utilization declined. Although shipments rose in terms of quantity, the value of shipments continued to decline.⁹⁸

Reported domestic capacity to produce NFCAJ rose by nearly five percent between 1996 and 1998, from 106,114 short tons to 111,341 short tons.⁹⁹ Coloma, one of the *** firms that accounted for virtually all of the increase,¹⁰⁰ made its investment decision prior to or early in the period examined, before the recent surge in Chinese imports, and reported that the concentrator that it purchased in 1996 is now largely idle.¹⁰¹ ***.¹⁰² Such capacity expansion as occurred, therefore, cannot be viewed as a sign of industry health, as respondents contend. Moreover, although one capacity expansion planned before the surge in Chinese imports came on line in 1996, new capital expenditures declined over the period.¹⁰³ Thus,

⁹⁶ (...continued)

short tons in interim 1998. The domestic industry's capacity utilization rose from 52.9 percent in 1996 to 64.4 percent in 1997, fell to 57.2 percent in 1998, and was 67.5 percent in interim 1999 compared with 54.2 percent in interim 1998. Table III-1, CR at III-5, PR at III-2. The average number of production and related workers employed by the domestic industry rose from 241 in 1996 to 256 in 1997 and 266 in 1998, and was 149 in interim 1999 compared with 131 in interim 1998. Domestic employment related trends were generally favorable throughout the period examined. Table III-4, CR at III-7, PR at III-4.

⁹⁷ U.S. producers' end-of-period inventories as a ratio of U.S. shipments rose from 26.9 percent in 1996 to 47.4 percent in 1997, fell to 27.6 percent in 1998, and were 25.2 percent in interim 1999 compared with 45.7 percent in interim 1998. Table III-3, CR at III-7, PR at III-4. Domestic producers' U.S. shipments by quantity were 59,488 short tons in 1996, 59,093 short tons in 1997, and 74,078 short tons in 1998. U.S. shipments by quantity were 17,882 short tons in interim 1999, compared with 10,406 short tons in interim 1998. By value, domestic producers' U.S. shipments fell from \$96,201 in 1996 to \$77,643 in 1997 and \$63,144 in 1998, and were \$13,626 in interim 1999, compared with \$9,732 in interim 1998. Table III-2, CR at III-6, PR at III-3.

⁹⁸ Tables III-1-III-4, CR at III-5-III-7, PR at III-2-III-4. We note that most indicators examined showed improvement when comparing interim 1999 to interim 1998. We give little weight to these apparent improvements, however, for several reasons. First, because *** did not report data for ***, while *** did report ***, the data for the two interim periods may not be comparable. Moreover, as we have observed in the past, a single quarter of interim data, particularly for a seasonal product such as NFCAJ, is not as informative as a longer interim period. Finally, even if the data were comparable and reliable, we do not find that a single quarter of improving trends negates the generally negative effects that the subject imports have had on the domestic industry throughout the period examined or the existence of a reasonable indication of present material injury by reason of such imports at the time of our vote.

⁹⁹ Table III-1, CR at III-5, PR at III-2.

¹⁰⁰ CR at III-5, PR at III-2. Although Tree Top acquired an NFCAJ facility from Seneca in 1999, there was no net increase in industry capacity due to this transaction. The interim data in Table III-1, CR at III-5, PR at III-2, indicate an increase because ***.

¹⁰¹ Conf. Tr. at 14-16.

¹⁰² Questionnaire Response of ***.

¹⁰³ Reported capital expenditures fell from *** in 1996 to *** in 1997 and *** in 1998 and were *** in interim 1999 compared with *** in interim 1998. Table VI-9, CR at VI-12, PR at VI-3. The *** in capital expenditures in interim 1999 relative to interim 1998 reflects ***. Tree Top claims that it purchased the Seneca facility principally to obtain additional apple sauce production capacity. Conf. Tr. at 39. In any final phase of the

(continued...)

rising volumes of low-priced subject imports prevented domestic producers from fully utilizing new and existing capacity despite healthy and growing demand that significantly exceeded domestic supply.¹⁰⁴

The most telling indicator of the effects of surging, low-priced Chinese imports in this investigation is the financial experience of the domestic industry, which was generally unfavorable throughout the period examined. Because the financial results of cooperative and noncooperative producers cannot be combined, we discuss them separately.

Although their net sales by quantity increased between 1996 and 1998, declining prices caused noncooperative producers' net sales values to decline over the same period. Both the quantity and value of noncooperative domestic producers' net sales was lower in interim 1999 than in interim 1998.¹⁰⁵ Noncooperative producers' operating income margin fell from *** percent in 1996 to *** percent in 1997. A significant reduction in cost of goods sold in 1998 could not overcome the effect of falling prices, resulting in an operating income margin of *** percent for that year. Noncooperative producers' operating income margin was *** percent in interim 1999, compared with *** percent in interim 1998.¹⁰⁶ Also driven by declining domestic prices for NFAJ, cooperative producers' results followed a similar trend, with net sales by quantity rising over the entire period, and net sales value rising between 1996 and 1997 before falling to below their 1996 level in 1998.¹⁰⁷ For cooperative producers, the ratio of net proceeds paid to grower members to net sales fell from *** percent in 1996 to *** percent in 1997 and *** percent in 1998.¹⁰⁸

¹⁰³ (...continued)

investigation, we will seek further information concerning the relative magnitude and value of the apple sauce, retail apple juice, and NFAJ capacity Tree Top acquired from Seneca.

¹⁰⁴ Petitioner Knouse argued that it closed its Newfane, New York, NFAJ facility in 1998 due to low-priced competition from subject imports. Conf. Tr. at 23-24. The record evidence on this point is mixed. Knouse reports that it moved the concentrator from the closed facility to another of its NFAJ facilities, but that the relocated concentrator is largely idle at present. *Id.* Press reports indicate, however, that the decision to close the facility was made no later than early 1997, and that management cited reasons other than import competition for the closure. Respondents' Postconference Brief at Exhibit 6.

¹⁰⁵ Noncooperative producers' net sales quantity fell from *** short tons in 1996 to *** short tons in 1997, then rose to *** short tons in 1998. Net sales by quantity were *** short tons in interim 1999 compared with *** short tons in interim 1998. Noncooperative producers' net sales value fell from *** in 1996 to *** in 1997 and remained at *** million in 1998. Net sales value was *** in interim 1999, compared with *** in interim 1998. Table VI-1, CR at VI-2, PR at VI-1.

¹⁰⁶ Table VI-1, CR at VI-2, PR at VI-1. Respondents dispute the accuracy of the juice apple costs reported by some noncooperative producers and urge the Commission to recalculate the financial data using a "market" price for juice apples of \$10-\$20 per ton. Respondents' Postconference Brief at 12-14. Our report includes the financial data as reported by these producers and without the requested adjustment. We note that domestic producers are required to certify the accuracy of their questionnaire responses and that such responses may be subject to verification in any final phase of the investigation.

¹⁰⁷ Cooperative producers' net sales quantity rose from *** short tons in 1996 to *** short tons in 1997 and *** short tons in 1998 and was *** short tons in interim 1999 compared with *** short tons in interim 1998. Cooperative producers' net sales value rose from *** in 1996 to *** in 1997, then fell to *** in 1998, and was *** in interim 1999 compared with *** in interim 1998. Table VI-5, CR at VI-8, PR at VI-2. Because ***, we find that the data for interim 1998 and interim 1999 for cooperative producers are not comparable and give them little weight.

¹⁰⁸ Table IV-5, CR at VI-8, PR at VI-2. Respondents argue that cooperative domestic producers of NFAJ reported juice apple costs far above the current market value of juice apples, thereby shifting profits from their

(continued...)

Because the rising volumes and low and declining prices of the subject imports have prevented the domestic industry from expanding its production and sales in a growing market characterized by a shortage of domestic supply and have in fact caused the domestic industry to reduce production, idle capacity, and suffer financial declines, we find that the subject imports are having an adverse impact on the domestic industry.

CONCLUSION

For the reasons stated above, we find a reasonable indication that the domestic industry producing non-frozen concentrated apple juice is materially injured by reason of subject imports from China.

¹⁰⁸ (...continued)

NFCAJ operations to their grower-owners. Respondents' Postconference Brief at 10-12. The data presented in our report reflect the total net proceeds paid by cooperative producers to their grower members and reflect no assumptions concerning juice apple costs to the cooperatives.

SEPARATE VIEWS OF COMMISSIONER CAROL T. CRAWFORD

On the basis of the information obtained in this investigation, I determine that there is no reasonable indication that the industry in the United States producing non-frozen concentrated apple juice (“NFC AJ”) is materially injured by reason of imports of NFC AJ from China that are allegedly sold in the United States at less-than-fair-value (“LTFV”), but that there is a reasonable indication that it is threatened with material injury by reason of the subject imports. I join my colleagues in the findings with respect to the domestic like product and the domestic industry, as well as in the discussion of the conditions of competition in the U.S. market (other than the characterization of the substitutability between the domestic like product and the subject imports). Because my analysis and determination differ from those of the majority, my separate views follow.

I. ANALYTICAL FRAMEWORK

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

- (I) the volume of imports of the merchandise which is the subject of the investigation,
- (II) the effect of imports of that merchandise on prices in the United States for like products, and
- (III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States¹

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

The statute directs that we determine whether there is “material injury by reason of the dumped imports.” Thus we are called upon to evaluate the effect of dumped imports on the domestic industry and determine if they are causing material injury. There may be, and often are, other “factors” that are causing injury. These factors may even be causing greater injury than the dumping. However, the statute does not require us to weigh or prioritize the factors that are independently causing material injury. Rather, the Commission is to determine whether there is any injury “by reason of” the dumped imports is material. That is, the Commission must determine if the subject imports are causing material injury to the domestic industry. “When determining the effects of imports on the domestic industry, the Commission must consider all relevant factors that can demonstrate if unfairly traded imports are materially injuring the domestic industry.”⁴ It is important, therefore, to assess the effects of the dumped imports in a way that distinguishes those effects from the effects of other factors unrelated to the dumping. To do this, I compare the current condition of the industry to the industry conditions that would have existed without the dumping, that is, had subject imports all been fairly priced. I then determine whether the change in conditions constitutes material injury. Both the Court of International Trade and the United States Court of Appeals for the Federal Circuit have held that the “statutory language fits very well” with my mode of

¹ 19 U.S.C. § 1677(7)(B)(i).

² 19 U.S.C. § 1677(7)(B)(ii).

³ 19 U.S.C. § 1677(7)(C)(iii).

⁴ S. Rep. No. 71, 100th Cong., 1st Sess. 116 (1987) (emphasis added). Gerald Metals, Inc. v. United States, 132 F.3d 716 (Fed. Cir. 1997) (rehearing denied).

analysis, expressly holding that my mode of analysis comports with the statutory requirements for reaching a determination of material injury by reason of the subject imports.⁵

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

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

For the reasons discussed below, I determine that there is no reasonable indication that the domestic industry producing NFCAJ is materially injured by reason of allegedly LTFV imports of NFCAJ from China.

II. LIKE PRODUCT AND DOMESTIC INDUSTRY

As discussed previously, I concur in the finding that, for purposes of the preliminary phase of this investigation, single-strength apple juice and frozen concentrated apple juice should not be included in the same like product with NFCAJ. I also concur with the intention to reconsider this issue in any final phase of the investigation. Finally, I concur in the conclusion that the domestic industry consists of all domestic producers of NFCAJ.

III. CONDITIONS OF COMPETITION

To understand how an industry is affected by unfair imports, we must examine the conditions of competition in the domestic market. The conditions of competition constitute the commercial environment in which the domestic industry competes with unfair imports, and thus form the foundation for a realistic assessment of the effects of the dumping. I concur with the discussion of certain important conditions of competition presented in the views of the Commission majority, other than the characterization of the substitutability between the domestic like product and the subject imports. However, my analysis requires additional evaluation of the commercial environment in which competition takes place. This environment includes demand conditions, substitutability among and between products from different sources, and supply conditions in the market.

⁵ *United States Steel Group v. United States*, 96 F.3rd 1352, at 1361 (Fed.Cir. 1996), *aff'g* 873 F.Supp. 673, 694-695 (Ct. Int'l Trade 1994).

⁶ As part of its consideration of the impact of imports, the statute as amended by the URAA now specifies that the Commission is to consider in an antidumping proceeding "the magnitude of the margin of dumping." 19 U.S.C. § 1677(7)(C)(iii)(V). In this investigation, the alleged dumping margins for subject imports are 51.69 and 65.64 percent. (64 F.R. 36332, July 6, 1999).

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

A. Demand Conditions

An analysis of demand conditions tells us what options are available to purchasers, and how they are likely to respond to changes in market conditions, such as an increase in the general level of prices in the market. Purchasers generally seek to avoid price increases, but their ability to do so varies with conditions in the market. The willingness of purchasers to pay a higher price will depend on the importance of the product to them (*e.g.*, how large a cost factor), whether they have options that allow them to avoid the price increase, for example by switching to alternative products, or whether they can exercise buying power to negotiate a lower price. An analysis of these demand-side factors tells us whether demand for the product is elastic or inelastic, that is, whether purchasers will reduce the quantity of their purchases if the price of the product increases. For the reasons discussed below, I find that the overall demand for NFCAJ is moderately inelastic.

Importance of the Product and Cost Factor. Key factors that measure the willingness of purchasers to pay higher prices are the importance of the product to purchasers and the significance of its cost. In the case of an intermediate product (*e.g.*, an input), the importance will depend on its cost relative to the total cost of the downstream product in which it is used. When the price of the input is a small portion of the total cost of the downstream product in which it is used, changes in the price of the input are less likely to alter demand for the downstream product, and, by extension, demand for the input.

Demand for NFCAJ is driven by the demand for apple juice, which accounts for up to 65 percent of NFCAJ's downstream use. The remainder is primarily used in blended juices. Although producers have mixed views on demand, importers generally conclude that demand has grown steadily since 1996.⁸ This is consistent with the 6.9-percent increase in U.S. consumption from 1996 to 1998.⁹ Record evidence indicates that NFCAJ is most often used to produce single-strength apple juice, frozen concentrated apple juice, and juice blends. The cost share of NFCAJ in single-strength apple juice ranges from 33 to 60 percent; in frozen concentrated apple juice from 10 to 55 percent; and in blended juices from 1 to 55 percent, depending on the formula used for the blend.¹⁰ These moderate cost shares indicate that demand would likely be moderately inelastic.

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

Information on the record indicates that other juice concentrates (such as white grape, pear, and grapefruit) can be substituted for NFCAJ in juice blends, thereby affecting demand for NFCAJ; however, such substitution is limited by taste considerations, labeling requirements, and the lower cost of NFCAJ.¹¹ Purchasers can substitute single-strength apple juice or frozen concentrate for NFCAJ in various downstream products (*e.g.*, juice blends or bakery products), but such substitution is limited by the (often undesired) presence of apple aroma/flavor.¹² Likewise, purchasers can use frozen concentrate or single-strength apple juice directly, without the intermediate step of concentration. However, single-strength apple

⁸ Confidential Report ("CR") at II-2, Public Report ("PR") at II-2.

⁹ Table C-1, CR at C-3, PR at C-3.

¹⁰ CR at II-3, PR at II-2.

¹¹ CR at II-3, PR at II-3.

¹² Frozen concentrated apple juice and single-strength apple juice have no use other than for consumption as apple juice, and both contain the essence of the apple, which imparts a characteristic apple aroma and flavor. NFCAJ, by comparison, contains no apple essence in virtually all instances and, therefore, does not become single-strength apple juice simply by adding back water. CR at I-4 n.22, PR at I-3 n.22.

juice or frozen concentrate would require substantial additional storage facilities (including freezer capacity if the purchaser were using frozen concentrate) and would incur greater shipping costs.¹³ Thus, limits on the availability and/or substitutability of alternative products indicate moderately inelastic demand for NFCAJ. However, I intend to explore further in any final phase investigation the degree of substitutability between NFCAJ and frozen concentrate or single-strength apple juice.

The moderate cost share of NFCAJ in downstream products, combined with the limits on the availability and substitutability of alternative products, reduces the elasticity of demand. For this reason, I find that the demand for NFCAJ is moderately inelastic. That is, purchasers will not reduce significantly the amount of NFCAJ they buy in response to a general increase in the price of NFCAJ.

B. Substitutability

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

While price is nearly always important in purchasing decisions, non-price factors that differentiate products determine the value that purchasers receive for the price they pay. If products are close substitutes, their value to purchasers is similar, and thus purchasers will respond more readily to relative price changes. On the other hand, if products are not close substitutes, relative price changes are less important and are therefore less likely to induce purchasers to switch from one source to another.

Because demand for NFCAJ is moderately inelastic, overall purchases will not decline significantly if the overall prices of NFCAJ increase. However, purchasers can avoid price increases from one source by seeking other sources of NFCAJ. In addition to any changes in overall demand for NFCAJ, the demand for NFCAJ from different sources will decrease or increase depending on their relative prices and their substitutability. If NFCAJ from different sources is substitutable, purchasers are more likely to shift their demand from one source when the products from that source (*i.e.*, subject imports) experience a price increase. The magnitude of this shift in demand is determined by the degree of substitutability among the sources.

Purchasers have a number of available sources of NFCAJ: NFCAJ produced by domestic producers, nonsubject imports, and subject imports. Purchasers are more or less likely to switch from one source to another depending on the similarity, or substitutability, between and among them. I have evaluated the substitutability among NFCAJ from different sources as follows.

Based on the evidence in the record, I find that subject imports and domestic NFCAJ are moderate substitutes for each other. The great majority of producers and importers consider NFCAJ from China and the domestic like product to be interchangeable. Most producers and importers also stated that nonsubject imports and the domestic like product, as well as nonsubject and subject imports, were interchangeable.¹⁴

Nonetheless, there appear to be differences in product characteristics and sales conditions. Producers and importers indicate that Chinese NFCAJ (1) is lower in acid content than the domestically produced product, thereby requiring blending with higher acid NFCAJ; (2) takes 15 days longer on average

¹³ One gallon of NFCAJ is equivalent to 7.5 gallons of single-strength apple juice. CR at I-2, PR at I-2.

¹⁴ CR at II-4, PR at II-3.

for delivery; and (3) cannot be used in USDA or other government purchase programs.¹⁵ On the other hand, one producer noted that Chinese NFCAJ is preferable to the domestic product because shipments to the east coast eliminate the higher U.S. inland transportation costs.¹⁶

Furthermore, a substantial portion of all NFCAJ produced in the United States is consumed internally by U.S. producers and, thus, is less substitutable for NFCAJ imported from China or from other sources.¹⁷ In 1998, internal consumption accounted for 57.7 percent of the domestic industry's total shipments of its U.S.-produced NFCAJ.¹⁸

While subject imports and the domestic like product appear to be only moderate substitutes, subject imports and nonsubject imports appear to be very good substitutes. While the record does not contain extensive details regarding the marketing of nonsubject NFCAJ, the evidence suggests that imports of Chinese NFCAJ have tended to displace nonsubject imports, rather than U.S.-produced product, over the period examined. Between 1996 and 1998, imports of NFCAJ from China increased by 39,736 short tons, while nonsubject imports decreased by 34,396. The domestic industry's U.S. shipments increased by 14,591 short tons over the same period.¹⁹

For these reasons, I find that subject imports and domestic NFCAJ are only moderate substitutes for each other, while subject imports and nonsubject imports are good substitutes for each other. Therefore, I find that purchasers would have switched from purchases of subject imports to purchases of nonsubject imports had subject imports been fairly priced.

C. Supply Conditions

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

Capacity Utilization and Capacity. Unused capacity can exert price discipline in a competitive market, because no individual producer could make a price increase stick. Any attempt at a price increase by any one producer would be beaten back by its competitors who have the available capacity and are willing to sell more at a lower price. In 1998, the domestic industry's capacity utilization stood at 57.2

¹⁵ CR at II-4, PR at II-3.

¹⁶ CR at II-4, PR at II-3.

¹⁷ Captive production and consumption do not render products completely non-substitutable with merchandise available in the merchant market in all cases. I note in this investigation that ***'s internal consumption is of *** (CR at III-3 and n.13, PR at III-2 and n.13), while ***'s internal consumption is of *** (CR at III-4 and n.16, PR at III-2 and n.16). *** indicated that ***.

¹⁸ Table III-2, CR at III-6, PR at III-3. However, I note that recently the domestic industry has substantially increased its exposure to competition in the merchant market for NFCAJ. Although the 57.7-percent share of total shipments represented by captively-produced and -consumed NFCAJ represents a large share, that share is down noticeably from the levels in 1996 (69.4 percent) and 1997 (72.2 percent), suggesting that direct competition between domestically produced and imported NFCAJ is increasing. I note that the share of total shipments represented by captively-produced and -consumed NFCAJ in the first quarter of 1999 was 60.3 percent, down significantly from the level in the first quarter of 1998 (83.5 percent). *Id.*

¹⁹ Table IV-1, CR at IV-2, PR at IV-2; Table III-2, CR at III-6, PR at III-3. A similar trend is evident when comparing interim period data. *Id.*

percent.²⁰ Therefore, a substantial share of capacity was unused and thus apparently available to increase production.²¹ Based on these rates, it would appear that U.S. producers have considerable unused capacity that could have been used to supply the demand for subject imports. However, capacity can only be translated into production if the requisite raw material -- juice apples (those that cannot be sold as fresh market produce or for processing) -- are available. The longstanding and extensive need of U.S. producers to supplement their production with purchases or direct imports of NFCAJ suggests that the availability of raw materials can be a serious restraint, although the record suggests that, at present, the supply of juice apples is not a significant constraint.

Inventories and Exports. The domestic industry had 20,451 short tons of NFCAJ in inventory as of December 31, 1998. This volume appears to be substantial, with ending inventories equivalent to 27.5 percent of total shipments in 1998. However, December inventory data can be misleading, since apples are harvested from August through October, while NFCAJ is produced from August through June.²² The domestic industry's export shipments were quite small, and thus do not represent a significant source of supply. Despite minor participation in export markets, the domestic industry's extensive inventories appear to indicate a high elasticity of supply.

Level of Competition. The level of competition in the domestic market has a critical effect on producer responses to demand increases. A competitive market is one with a number of suppliers in which no one producer has the power to influence price significantly. In the U.S. market, there are now at least eleven companies that produce NFCAJ,²³ and thus there is competition within the domestic industry. Nonsubject imports are a substantial source of competition in this market, as evidenced by their dominate position in the market during the period examined. Consequently, I find that there is a high level of competition in the U.S. market for NFCAJ.

I find that the elasticity of supply is high, based on the domestic industry's extensive ability to increase the supply of domestic NFCAJ from existing unused capacity and inventories.

IV. NO MATERIAL INJURY BY REASON OF ALLEGEDLY LTFV IMPORTS OF NFCAJ FROM CHINA

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

A. Volume of Subject Imports

The quantity of imports of NFCAJ from China increased from 6,297 short tons in 1996 to 25,978 short tons in 1997 and 46,032 short tons in 1998, for an overall increase of 631 percent. Imports by quantity were 19,020 short tons in interim (January-March) 1999, compared with 6,308 short tons in interim 1998, a difference of 202 percent. By value, imports followed the same pattern, rising from \$8.7 million in 1996 to \$27.0 million in 1997 and \$33.4 million in 1998, for an overall increase of 284 percent.

²⁰ Table III-1, CR at III-5, PR at III-2.

²¹ Under appropriate circumstances, producers can alter their product mix by changing the proportion of equipment time and labor devoted to producing NFCAJ. However, while the concentrators used to make NFCAJ can be used to make other juices (*e.g.*, cherry or pear concentrate), such concentrates are niche products relative to NFCAJ, so the potential for product switching is restricted.

²² CR at II-1-2, PR at II-1-2. In addition, the concentrate may be stored up to one year.

²³ CR at III-1, PR at III-1.

Subject imports by value were \$14.5 million in interim 1999 compared to \$5.2 million in interim 1998, an increase of 179 percent.²⁴

Subject imports' share of the U.S. market (by quantity) also rose over the period examined, increasing from 2.2 percent in 1996 to 8.2 percent in 1997 and 14.8 percent in 1998. Subject imports' market share by quantity was 26.1 percent in interim 1999, compared with 10.6 percent in interim 1998. By value, the market share of subject imports followed the same pattern, rising from 1.9 percent in 1996 to 6.9 percent in 1997 and 12.5 percent in 1998. Subject imports' market share by value was 24.5 percent in interim 1999, compared with 8.9 percent in interim 1998.²⁵

As noted earlier, although subject imports increased noticeably over the period examined, they did not gain market share from the domestic like product. Domestic producers' share of the U.S. market for NFCAJ (by quantity) fell from 20.5 percent in 1996 to 18.6 percent in 1997, but then increased to 23.9 percent in 1998. Domestic producers' market share by quantity was 24.5 percent in interim 1999, compared with 17.5 percent in interim 1998.²⁶

While it is clear that the larger the volume of subject imports, the larger the effect it will have on the domestic industry, whether the volume is significant cannot be determined in a vacuum, but must be evaluated in the context of its price and volume effects. Based on the market share of subject imports relative to that of nonsubject imports and the conditions of competition in the domestic market, I find that the volume of subject imports is not significant in light of its price and volume effects.

B. Effect of Subject Imports on Domestic Prices

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

In this investigation, the dumping margins for subject imports are quite large, ranging from 51.69 to 65.64 percent.²⁷ Therefore, subject imports would have been priced significantly higher had they been fairly traded. Thus, demand would have shifted away from the subject imports. Regardless of the shift in demand away from the subject imports, however, the domestic industry would not have been able to increase its prices. The elasticity of supply, competition within the industry, and most particularly, competition from nonsubject imports, would have prevented any price increases.

Consequently, I find that subject imports are not having significant effects on the price of NFCAJ produced and sold by the industry in the United States.

C. Impact of Subject Imports on the Domestic Industry

To assess the impact of subject imports on the domestic industry, I consider output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return

²⁴ Table IV-1, CR at IV-2, PR at IV-2; Table C-1, CR at C-3, PR at C-3.

²⁵ Table IV-2, CR at IV-6, PR at IV-5.

²⁶ Table IV-2, CR at IV-6, PR at IV-5. Market share by value followed the same general pattern.

²⁷ 64 Fed. Reg. 36332 (July 6, 1999).

on investment, ability to raise capital, research and development and other relevant factors.²⁸ These factors together either encompass or reflect the volume and price effects of the dumped imports, and so I gauge the impact of the dumping through those effects.

As I have discussed above, demand for NFCAJ likely would have shifted away from the subject imports had they not been sold LTFV. It is not likely, however, that this shift would have had a significant effect on domestic prices, in light of the domestic industry's substantial amount of unused capacity and available inventory, the large number of competitive U.S. producers, and intense competition from nonsubject imports. Also, it is likely that little, if any, of the shift in demand away from subject imports would have been gained by the domestic industry. Rather, as discussed above, the facts demonstrate that most, if not all, of the displacement that occurred over the period examined has resulted from subject imports supplanting nonsubject imports. Thus, if subject imports had been fairly traded, it is likely that nonsubject imports would have captured all or nearly all of the shift in demand away from the subject imports. Accordingly, the domestic industry likely would not have been able to increase significantly its output and sales, and therefore its revenues, had subject imports not been dumped. Consequently, the domestic industry would not have been materially better off if the subject imports had been fairly traded.

V. REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF ALLEGEDLY LTFV IMPORTS

For the purposes of determining whether there is a reasonable indication that a U.S. industry is threatened with material injury by reason of the subject merchandise, Section 771(7)(F) of the Tariff Act of 1930, as amended, lists a number of factors for the Commission to consider.²⁹ While an analysis of the statutory threat factors necessarily involves projection of future events, “[s]uch a determination may not be made on the basis of mere conjecture or supposition.”³⁰

Further direction is provided by the amendment to Section 771(7)(F)(ii), which adds that the Commission consider the threat factors “as a whole” in making its determination “whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur” unless an order issues.³¹ In addition, the Commission must consider whether dumping findings or antidumping remedies in markets of foreign countries against the same class of merchandise suggest a threat of material injury to the domestic industry.³² I have considered all of the statutory factors and determined that there is a reasonable indication that the domestic industry is threatened with material injury by reason of the allegedly LTFV imports of NFCAJ from China.

As I noted earlier in my discussion of the price effects of the subject imports in the context of present material injury, I find that there has not been significant price underselling by the imported merchandise as compared with the price of the domestic like product, and that the subject imports have not depressed or suppressed prices to a significant degree. Rather, there have been no price effects due to the high elasticity of supply, competition within the industry, and competition from nonsubject imports. There is no evidence that these conditions are likely to change. Therefore, I find that subject imports are not likely to have a significant effect on the domestic industry's prices in the imminent future.

²⁸ 19 U.S.C. § 1677(7)(C)(iii).

²⁹ 19 U.S.C. § 1677(7)(F)(ii); *see* 19 U.S.C. §§ 1671b(a), 1673b(a).

³⁰ 19 U.S.C. § 1677(7)(F)(ii); *see, e.g.*, S. Rep. No. 249 at 88-89; *see also* Metallverken Nederland B.V. v. United States, 744 F. Supp. 281, 287 (Ct. Int'l Trade 1990).

³¹ 19 U.S.C. § 1677(7)(F)(ii).

³² 19 U.S.C. § 1677(7)(F)(iii)(I). There are no such findings relevant to this investigation.

Overall concentrating capacity in China more than tripled between 1996 and 1998, according to the eight Chinese manufacturers/exporters that responded to the Commission's request for information.³³ Production, though increasing rapidly over the same period, did not keep pace with capacity growth.³⁴ Accordingly, in 1998, unused capacity in China was 9,529 short tons, out of 68,970 short tons of total capacity. Capacity utilization in 1998 was 86.2 percent, nearly 14.7 percentage points lower than in 1996.

Capacity is projected to expand in 1999, increasing by 12.9 percent over the levels reported in 1998, before stabilizing in 2000. The Chinese home market has not been, and is not projected to be, a significant outlet for shipments of Chinese NFCAJ. Other export markets are available to absorb additional exports, but the United States became China's largest export market in 1998 and is projected to remain a very significant market in 1999 and 2000.³⁵

Even with only a partial response by the Chinese industry to the Commission's questionnaires, eight Chinese manufacturers/exporters reported 26,900 short tons of inventory in 1998, a volume equivalent to 8.7 percent of the U.S. market in 1998.³⁶ In addition, importer inventory levels in the United States were sizeable in 1998, reaching 1,230 short tons. Moreover, U.S. importers' inventories of Chinese NFCAJ increased by 81.4 percent from interim 1998 to interim 1999.³⁷

As I noted earlier in my discussion of the volume of the subject imports in the context of present material injury, the quantity of subject imports increased from 6,297 short tons in 1996 to 46,032 short tons in 1998, a 631-percent increase. Over the same period, the market share increased by 12.7 percentage points. Imports by quantity were 19,020 short tons in interim 1999, compared with 6,308 short tons in interim 1998, a 202-percent increase.³⁸ Reported exports of NFCAJ to the United States exhibited similar rapid growth, although reporting manufacturers/exporters indicate that all such growth will essentially cease in 1999 and 2000.³⁹

I find that the rate of increase in the volume and market share of the subject imports, together with the existence of unused foreign production capacity and the importance of the U.S. export market to Chinese manufacturers/exporters, indicate the likelihood of substantially increased imports. Over the period examined, the growth in imports of NFCAJ from China has come almost exclusively at the expense of nonsubject imports. However, in 1998 Chinese imports reached 19.5 percent of total imports.⁴⁰ By the first quarter of 1999, Chinese imports reached 34.5 percent of total imports. NFCAJ from China has already displaced a substantial share of nonsubject imports, and by 1998 held 14.8 percent of the U.S. market. It is therefore likely that any significant volume of imports shipped in 1999 will begin to capture sales from U.S. producers. As noted earlier, direct competition between Chinese and U.S.-produced NFCAJ is likely to increase as U.S. producers sell larger portions of their total production into the merchant market. Therefore, it is likely that substantially increased imports will have a material effect on the domestic industry's output and sales, and therefore its revenues, in the imminent future.

³³ Table VII-1, CR at VII-2, PR at VII-2.

³⁴ Because nearly all of the reporting Chinese manufacturers/exporters generate the preponderance of their sales revenues through the production of NFCAJ, the potential for product shifting appears is restricted. *See* CR at VII-1 and VII-3, PR at VII-1.

³⁵ Table VII-1, CR at VII-2, PR at 2.

³⁶ Table VII-1, CR at VII-2, PR at VII-2.

³⁷ Table VII-2, CR at VII-3, PR at VII-3.

³⁸ Table C-1, CR at C-3, PR at C-3.

³⁹ Table VII-1, CR at VII-2, PR at VII-2.

⁴⁰ Table IV-1, CR at IV-2, PR at IV-3.

CONCLUSION

For the foregoing reasons, I determine that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of NFCAJ from China that allegedly are sold in the United States at less than fair value.