

UNITED STATES INTERNATIONAL TRADE COMMISSION

GREENHOUSE TOMATOES FROM CANADA

Investigation No. 731-TA-925 (Final)

DETERMINATION AND VIEWS OF THE COMMISSION

(USITC Publication No. 3499, April 2002)

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GREENHOUSE TOMATOES FROM CANADA

DETERMINATION

On the basis of the record¹ developed in the subject investigation, the United States International Trade Commission (Commission) determines,² pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)) (the Act), that an industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of imports from Canada of greenhouse tomatoes, provided for in subheadings 0702.00.20, 0702.00.40, and 0702.00.60 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce (Commerce) to be sold in the United States at less than fair value (LTFV).

BACKGROUND

The Commission instituted this investigation effective March 28, 2001, following receipt of a petition filed with the Commission and Commerce by Carolina Hydroponic Growers Inc., Leland, NC; Eurofresh, Inc., Willcox, AZ; Hydro Age, Cocoa Beach, FL; Sun Blest Management, Fort Lupton, CO; Sun Blest Farms, Peyton, CO; and Village Farms, LP, Eatontown, NJ. The final phase of the investigation was scheduled by the Commission following notification of a preliminary determination by Commerce that imports of greenhouse tomatoes from Canada were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. § 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of November 14, 2001 (66 FR 57112). The hearing was held in Washington, DC, on February 21, 2002, and all persons who requested the opportunity were permitted to appear in person or by counsel.

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

² Commissioner Lynn M. Bragg dissenting.

VIEWS OF THE COMMISSION

Based on the record in this investigation, we determine that an industry in the United States is not materially injured or threatened with material injury by reason of imports of greenhouse tomatoes from Canada found to be sold in the United States at less than fair value (“LTFV”).^{1 2}

I. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. In General

In determining whether 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.”³ 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.”⁴ 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”⁵

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.⁶ No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation.⁷ The Commission looks for clear dividing lines among possible like products and disregards minor variations.⁸

¹ Commissioner Bragg dissenting. See Separate and Dissenting Views of Commissioner Lynn M. Bragg.

² Whether the establishment of an industry is being materially retarded is not at issue in this investigation.

³ 19 U.S.C. § 1677(4)(A).

⁴ 19 U.S.C. § 1677(4)(A).

⁵ 19 U.S.C. § 1677(10).

⁶ See, e.g., NEC Corp. v. Department of Commerce, 36 F. Supp.2d 380, 383 (Ct. Int’l Trade 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 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).

⁷ See, e.g., S. Rep. No. 96-249 at 90-91 (1979).

⁸ 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.”). The Commission has the authority to define the like product more broadly than the scope. Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1564 (Fed. Cir. 1996) (quoting Certain High-Information Content Flat Panel Displays and

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Although the Commission must accept the determination of the Department of Commerce (“Commerce”) as to the scope of the imported merchandise that has been found to be subsidized or sold at LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified.⁹

B. Product Description

Commerce’s final determination defines the imported merchandise within the scope of these investigations as follows:

all fresh or chilled tomatoes grown in greenhouses in Canada, e.g., common round tomatoes, cherry tomatoes, plum or pear tomatoes, and cluster or “on-the-vine” tomatoes. Specifically excluded from the scope of this investigation are all field-grown tomatoes.¹⁰

Tomatoes are edible fruits of the *Solanaceae* (or Nightshade) family, genus *Lycopersicon*, and species (*L.*) *esculentum*.¹¹ The imported product subject to this investigation, greenhouse tomatoes, includes a wide variety of fresh tomatoes, such as common round tomatoes, cherry tomatoes, plum or pear tomatoes, and cluster or “on-the-vine” tomatoes. The imported tomatoes are available in a wide range of sizes, shapes, and colors, but are limited to tomatoes grown in greenhouses and exclude field-grown tomatoes grown for the fresh tomato market (“field-grown tomatoes” or “field tomatoes”).¹²

⁸ (...continued)

Display Glass Therefor from Japan, Inv. No. 731-TA-469 (Final), USITC Pub. 2413 at 5 (August 1991).

⁹ Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568 (Fed. Cir. 1996) (Commission may find a 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).

¹⁰ Notice of Final Determination of Sales at Less Than Fair Value: Greenhouse Tomatoes from Canada, 67 Fed. Reg. 8781, 8782 (February 26, 2002). The notice also provides that:

“The merchandise subject to this investigation may enter the United States under statistical reporting numbers 0702.00.2000, 0702.00.2010, 0702.00.2030, 0702.00.2035, 0702.00.2060, 0702.00.2065, 0702.00.2090, 0702.00.2095, 0702.00.4000, 0702.00.4030, 0702.00.4060, 0702.00.4090, 0702.00.6000, 0702.00.6010, 0702.00.6030, 0702.00.6035, 0702.00.6060, 0702.00.6065, 0702.00.6090, and 0702.00.6095 of the Harmonized Tariff Schedule of the United States (HTSUS). These subheadings may also cover products that are outside the scope of this investigation, i.e., field-grown tomatoes.”

¹¹ Confidential Version of the March 18, 2002, Final Staff Report (“CR”) at I-2 (as revised by INV-Z-037), Public Version of the March 18, 2002, Final Staff Report (“PR”) at I-2. The CR was revised by memoranda numbered INV-Z-035, INV-Z-036, and INV-Z-037. Tables V-4 and V-5 were further revised by the Office of Economics to correct minor tabulation errors.

¹² Processing tomatoes also are excluded from the scope of this investigation. CR at I-2, n.6 (as revised by INV-Z-037), PR at I-2, n.6.

C. Domestic Like Product

General

In its preliminary determination in this investigation, the Commission found that the domestic like product consisted only of greenhouse tomatoes. The Commission determined not to include field tomatoes grown for the fresh market, but stated its intention to re-examine this question during the final phase of this investigation.¹³ In the final phase of this investigation, Petitioners¹⁴ continue to argue that the domestic like product should consist of tomatoes grown in greenhouses only. Respondents¹⁵ continue to argue that the domestic like product should consist of all tomatoes grown for the fresh market, whether grown in greenhouses or in the field.¹⁶

The Commission has conducted several prior import injury investigations of tomatoes. In April 1995, the Commission majority distinguished between fresh market and processing tomatoes, but found no factual or legal basis to conclude that cherry tomatoes or tomatoes grown in greenhouses were distinguishable from field-grown tomatoes, thus concluding that producers of such tomatoes were part of a single fresh tomato industry.¹⁷ In May 1996, the Commission found a single domestic like product consisting of all fresh market tomatoes, including both mature green field tomatoes and vine ripened field tomatoes, without distinguishing between greenhouse production and field production.¹⁸ In August 1996, the Commission majority found all forms and varieties of fresh tomatoes to be “like or directly competitive” with imported tomatoes.¹⁹ While two of the prior investigations were decided under a different statute (with different legislative histories and statutory purposes)²⁰ and all three were based on distinct factual records,²¹

¹³ Greenhouse Tomatoes from Canada, Inv. No. 731-TA-925 (Preliminary), USITC Pub. 3424 (May 2001) at 10 and note 59; see also CR at I-3, PR at I-2.

¹⁴ The Petitioners in this investigation are Carolina Hydroponic Growers Inc., Leland, NC; Eurofresh, Inc., Willcox, AZ; Hydro Age, Cocoa Beach, FL; Sun Blest Management, Fort Lupton, CO; Sun Blest Farms, Peyton, CO; and Village Farms, LP, Eatontown, NJ. CR and PR at I-1 (as revised by INV-Z-037).

¹⁵ Respondents BC Hot House Foods Inc. (“BC Hot House”) and the Ontario Greenhouse Vegetable Growers (referred to collectively herein as “Respondents”) filed briefs in this investigation.

¹⁶ CR at I-3, PR at I-2. All parties agree that tomatoes grown for processing into other products should not be included in the domestic like product. We do not include tomatoes grown for processing in the domestic like product. Compare Fresh Winter Tomatoes from Mexico, Inv. No. 731-TA-747 (Preliminary), USITC Pub. 2967 (May 1996) at 11-13.

¹⁷ Fresh Winter Tomatoes, Inv. No. TA-201-64 (Provisional Relief Phase), USITC Pub. 2881 (April 1995) at I-14 (Views of Chairman Watson and Commissioners Crawford and Bragg). Commissioners Rohr and Newquist focused exclusively on growers of fresh tomatoes who grow between January and April, exclusive of cherry, greenhouse, and processing tomatoes. Fresh Winter Tomatoes, Inv. No. TA-201-64 (Provisional Relief Phase), USITC Pub. 2881 (April 1995) at I-25 (Views of Commissioners Rohr and Newquist).

¹⁸ Fresh Tomatoes from Mexico, Inv. No. 731-TA-747 (Preliminary), USITC Pub. 2967 (May 1996) at 11.

¹⁹ Fresh Tomatoes and Bell Peppers, Inv. No. TA-201-66, Pub. 2985 (Aug. 1996) at I-8. The Commission majority concluded that, despite differences in growing techniques and superior freshness, taste, and appearance (reflected in price), greenhouse tomatoes are “no more than a higher priced version of field tomatoes.” Id. at I-9. But see Views of Commissioner Bragg (citing differences in producing firms, cultivation, prices, quality, and markets). Id. at I-21 to I-22.

²⁰ Both Fresh Winter Tomatoes and Fresh Tomatoes and Bell Peppers were safeguard investigations, decided
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our analysis of the record in this investigation does not lead us to a conclusion contrary to those of the prior investigations.

In our examination of the six traditional like product factors, we find that differences between greenhouse and field tomatoes generally represent variations in the quality of the tomato rather than distinctions that represent clear dividing lines. While greenhouse tomatoes typically occupy the higher end of a quality continuum, some field tomatoes are as high or higher in quality than greenhouse tomatoes, blurring any potential dividing lines. Based on our examination of the like product factors, we find the domestic like product to be all fresh tomatoes, whether grown in greenhouses or in fields.

Physical Characteristics and Uses

Both domestic greenhouse and field tomato growers supply the U.S. fresh tomato market with a variety of tomatoes, the vast majority of which belongs to the species *L. esculentum*.²² Although many genetic varieties exist within the species *L. esculentum*, the large common round tomato (“beefsteak tomato”) accounts for 50-60 percent of greenhouse tomatoes and about 70 percent of field tomatoes produced for the fresh market in the United States.²³ Most of the remainder of greenhouse tomatoes are the similar but smaller round tomatoes-on-the-vine (“TOV”), which are sold in small bunches attached to a common vine or “truss.”²⁴ Less than two percent of greenhouse tomatoes are specialty products such as cherry tomatoes.²⁵ Cherry tomatoes are also grown in the field, as well as Roma tomatoes and grape tomatoes.²⁶

The quality continuum mentioned above is observed among the beefsteak tomatoes that make up a majority of the fresh tomato market. The lower end of the continuum is represented by the large volume of beefsteak tomatoes grown in the field that are harvested while still entirely green (“mature greens”).²⁷ These tomatoes redden with the addition of ethylene gas, but do not ripen in terms of converting various starches into sugars, and thus are generally regarded as being inferior in flavor and appearance.²⁸ A mid-point is represented by the significant and growing portion of beefsteak field tomatoes known as “vine-

²⁰ (...continued)

under section 202 of the Trade Act of 1974 (19 U.S.C. § 2252).

²¹ The third investigation was Fresh Tomatoes from Mexico, Inv. No. 731-TA-747 (Preliminary), USITC Pub. 2967 (May 1996).

²² CR at I-3 to I-4, PR at I-2 to I-3.

²³ Transcript of February 21, 2002 hearing (“Hearing Tr.”) at 68-70 (David Fahrenbruch, General Manager of Operations for domestic greenhouse producer Sun Blest Management, and David Cimiano, Former Director of Produce for Safeway, Inc.); CR at I-4 and PR at I-3.

²⁴ Hearing Tr. at 68 (Fahrenbruch), transcript (revised and corrected copy) of April 18, 2001 conference (“Conf. Tr.”) at 89-90 (Fried De Schouwer, Director of Sales and Marketing Research for domestic greenhouse grower Eurofresh, Inc.).

²⁵ CR at I-4 and PR at I-3.

²⁶ CR at I-4 and PR at I-3.

²⁷ Conf. Tr. at 103 (Andy Smith, CEO of Canadian greenhouse tomato grower BC Hot House); Hearing Tr. at 106 (Dr. John Van Sickle, Dept. of Food and Resource Economics, Institute of Food and Agricultural Sciences at the University of Florida)(“strong majority of field tomatoes are mature green”).

²⁸ Conf. Tr. at 103-04 (A. Smith); CR at I-8 to I-9, II-1, PR at I-5 to I-6, II-1.

ripened,” which are harvested after a small amount of red color appears.²⁹ These tomatoes redden without the additional ethylene gas and generally taste better than mature green field tomatoes.³⁰ Greenhouse tomatoes generally represent a higher point on the quality continuum, and typically display more red color at harvest than do vine-ripened field tomatoes.³¹ Consistent with the position of greenhouse tomatoes in the quality continuum, more purchasers reported quality differences between greenhouse and mature green field tomatoes than between greenhouse tomatoes and vine-ripened field tomatoes. A majority of purchasers reported that greenhouse tomatoes have a better taste and quality than mature green field tomatoes, while less than one third specifically reported that greenhouse tomatoes have a better taste than vine-ripened field tomatoes, and only a slightly smaller number reported that greenhouse and vine-ripened field tomatoes are the same or similar.³²

The highest point on the quality continuum is represented by “locally-grown tomatoes.” Locally-grown tomatoes are distinct from other “vine-ripened” field tomatoes because the former are grown near the point of sale, and generally are available only during the peak local growing season, such as in late summer in many areas of the United States.³³ Growers generally indicated that locally-grown tomatoes ripen to the same or to a greater extent than vine-ripened field tomatoes prior to harvest.³⁴ The record indicates that customers prefer the taste of locally-grown tomatoes over that of all other tomatoes, including both vine-ripened field tomatoes and greenhouse tomatoes.³⁵

Mature green field tomatoes are firmer and thus are more easily harvested, shipped, and sliced than other field tomatoes or than greenhouse tomatoes.³⁶ There was mixed evidence regarding whether greenhouse or field tomatoes have a longer shelf life.³⁷

Consistent with the absence of a clear dividing line between greenhouse and field tomatoes in physical characteristics, these fresh tomatoes typically have the same end uses: consumption in salads, sandwiches, and as a fresh ingredient in various dishes. Neither greenhouse nor field tomatoes are processed into canned tomatoes, sauces, or other prepared foods. About 70 percent of all fresh tomatoes are sold at retail and used by individual consumers (such as shoppers at supermarkets), with the remainder

²⁹ Conf. Tr. at 93 (Fahrenbruch).

³⁰ CR at I-8 to I-9, PR at I-5 to I-6.

³¹ Conf. Tr. at 93 (Fahrenbruch); CR at II-1, PR at II-1. Nevertheless, the term “vine-ripened” generally refers to field tomatoes only. Conf. Tr. at 142 (A. Smith).

³² CR at I-9 and PR at I-6. Growers of greenhouse tomatoes generally reported that greenhouse tomatoes have better taste and appearance than field-grown tomatoes, but the responses of growers of field producers were mixed. CR at I-5 and PR at I-3 to I-4.

³³ See, e.g., Hearing Tr. at 65 (Ricky Carr, Produce Buyer, Ingles Market), 158 (Gianatti), Conf. Tr. at 103 (A. Smith), 119, 163 (Gianatti), 162 (Comito).

³⁴ In a telephone survey of 26 field tomato growers, two growers reported that locally-grown field tomatoes are allowed to ripen more if they are delivered locally, and two more said that locally-grown are picked later than vine-ripened field tomatoes. However, three growers reported that locally-grown and vine-ripened are the same, while another reported selling vine-ripened as locally-grown. See Telephone Survey of Field Growers Conducted by Commission Staff on March 25, 2002 (“Field Grower Survey”).

³⁵ Conf. Tr. at 119, 161-62 (Larry Gianatti, President & CEO of wholesaler/distributor Quality Sales, Inc., and Joe Comito, President of distributor/repacker Capital City Fruit); Hearing Tr. at 158, 204 (Gianatti).

³⁶ Conf. Tr. at 104, 108 (A. Smith).

³⁷ CR at I-5 and PR at I-3 to I-4.

used by food service providers, including restaurants, schools, and other institutions.³⁸ Fast food restaurants account for about 15.7 percent of all fresh tomato consumption.³⁹ Both greenhouse and field tomatoes are sold to retail users, but field tomatoes predominate in food service, reportedly because they are less expensive and easier to slice by hand or by mechanical slicers.⁴⁰

Interchangeability

U.S. growers, packers, and importers provided differing perspectives on the interchangeability and substitutability of greenhouse and field tomatoes. Approximately three quarters of U.S. importers reported that greenhouse and field tomatoes are substitutable for each other.⁴¹ Half of the responding packers and three of five responding field growers also considered field tomatoes to be substitutes for greenhouse tomatoes.⁴² Only three greenhouse growers reported interchangeability, however, and seven out of eleven reported no substitutability between greenhouse and field tomatoes.⁴³

An overwhelming majority of purchasers who responded to the Commission's questionnaires reported that they purchase both greenhouse and field tomatoes.⁴⁴ Moreover, nearly every responding purchaser also reported that greenhouse and field fresh tomatoes compete with each other for retail shelf space and that the shelf space allocated to these fresh tomatoes is adjusted on a weekly basis.⁴⁵ Although three quarters reported that they do not consider greenhouse tomatoes and field tomatoes to be substitutable,⁴⁶ 15 of 27 responding purchasers conceded that "local" tomatoes have an effect on their greenhouse tomato sales.⁴⁷

Finally, the Commission received testimony that supermarkets in more affluent areas carry more greenhouse tomatoes, while supermarkets in less affluent areas carry less expensive tomatoes (presumably

³⁸ CR at II-4, PR at II-2.

³⁹ *Id.*

⁴⁰ CR at II-4 to II-5, PR at II-4. Respondent BC Hot House reported that it sold *** of its greenhouse tomatoes directly to food service customers between 1998 and 2001, and that its biggest customer in Japan is Subway, a food-service customer. *** submitted affidavits stating that ***. CR at I-3, I-5, I-7 (as revised by INV-Z-037), II-4 to II-5, PR at I-3 to I-5, II-3. The volume of the foreign producers' sales to the food service industry is small and their activities within their own or other non-U.S. markets are not directly relevant to the Commission's domestic like product analysis.

⁴¹ CR and PR at Table II-1; CR at I-7 (as revised by INV-Z-037) and II-11, PR at I-5 and II-7.

⁴² CR and PR at Table II-1; CR at II-11, PR at II-7.

⁴³ CR and PR at Table II-1; CR at I-7 (as revised by INV-Z-037), II-11 to II-12, PR at I-5, II-7.

⁴⁴ CR at I-8, II-13, PR at I-5, II-8.

⁴⁵ *Id.* There also was testimony that mature green field tomatoes formerly dominated tomato sales, except when local production was available, but now both vine-ripened field tomatoes and greenhouse tomatoes are taking sales away from mature green field tomatoes. Conf. Tr. at 103-06 (A. Smith). However, mature green field tomatoes are still widely available in the U.S. market, indicating that many consumers are not willing to pay a higher price for the better taste and appearance of vine-ripened field and greenhouse tomatoes. Conf. Tr. at 106 (A. Smith).

⁴⁶ *Id.*

⁴⁷ CR at II-17, PR at II-10. Similarly, about half of responding purchasers reported that the availability and size of the tomato crops from Florida, California, and/or Mexico affected their pricing of greenhouse tomatoes. CR at II-17, PR at II-11.

including mature-green field tomatoes).⁴⁸ This suggests that retailers present a continuum of tomato types and sizes, based on availability, price, promotions, quality, and consumer preference.⁴⁹ This testimony also evidences that greenhouse and field tomatoes are interchangeable and that consumers tend to make their purchasing decisions on the basis of their tastes and disposable income. Consumer preferences, in turn, influence the purchasing decisions of supermarket retailers.

Channels of Distribution

The record in this investigation indicates some differences in channels of distribution for greenhouse and field tomatoes, but some overlap as well. Most U.S. greenhouse growers pack their own tomatoes and then sell them directly to retailers or to wholesalers or distributors who resell them to retailers.⁵⁰ While some field growers also pack their own tomatoes,⁵¹ others typically send their tomatoes to packers or repackers, who ship to retailers.⁵²

Slightly more than one half (54.9 percent) of domestically-produced greenhouse tomatoes were sold directly to retailers, while the remainder is sold to wholesalers or distributors.^{53 54} The record is less well-developed with respect to channels of distribution for field tomatoes, but there is evidence that the majority is sold through wholesalers after packing.⁵⁵ Accordingly, a substantial portion of both greenhouse and field tomatoes is sold to wholesalers. At least some distributors handle both greenhouse and field tomatoes.⁵⁶

Common Production Facilities, Processes, and Employees

“Greenhouse” tomatoes are defined in terms of their manner of production. Unsurprisingly, there is little overlap between the production facilities utilized by greenhouse growers and those utilized by field growers. Greenhouse tomatoes are grown in greenhouses that apply high-tech environmental controls, while field tomatoes are grown outdoors in fields.⁵⁷ Greenhouse tomatoes tend to be grown in soil-like media, such as rock wool suspended in nutrient solutions, whereas field tomatoes are grown in soil.⁵⁸ There is little or no overlap in employees utilized by U.S. greenhouse and field growers, as greenhouse employees

⁴⁸ Conf. Tr. at 154 (Gianatti); Hearing Tr. at 154 (Gianatti).

⁴⁹ CR at I-8, II-13 to II-14, PR at I-5, II-8.

⁵⁰ CR at I-10, II-3 (as revised by INV-Z-037), PR at I-6, II-2. Some of the larger greenhouse growers also have acted as distributors for smaller greenhouse growers. CR at II-3 (as revised by INV-Z-037), PR at II-2.

⁵¹ See, e.g., questionnaire responses of ***.

⁵² CR at I-10, II-3 (as revised by INV-Z-037) and PR at I-6 and II-2.

⁵³ CR at II-3 (as revised by INV-Z-037), PR at II-2.

⁵⁴ We use the term “retailers” here in contrast to distributors and wholesalers. Elsewhere, however, the term “retailers” refers to supermarkets and is used to contrast them with food service providers.

⁵⁵ CR at II-3 (as revised by INV-Z-037), PR at II-2. One responding field grower reported that he sold all of his tomatoes “at auction” and two others reported that they sold all of their tomatoes to wholesalers. Id.

⁵⁶ Conf. Tr. at 116-17 (Gianatti), 120-22 (Comito).

⁵⁷ CR at I-6, PR at I-4.

⁵⁸ Id.

are primarily full-time workers while field growers rely more heavily on seasonal migrant workers.⁵⁹ No tomato grower who responded to the Commission's questionnaires or who was contacted by Commission staff by telephone reported growing both greenhouse and field tomatoes.⁶⁰

With regard to production processes, greenhouse tomatoes and field tomatoes also differ with respect to the length of their growing seasons and the fruitfulness of individual plants, and growers consider these differences when deciding which type of tomato they want to produce. Greenhouse tomatoes tend to be "indeterminate" plants that have longer life spans, single stems over 20 feet in length, and more fruit production per plant.⁶¹ Field tomatoes tend to be "determinate" plants that grow and produce fruit for a relatively fixed period of time or "semideterminate" plants that grow taller than determinates and require staking.⁶²

Producer and Customer Perceptions

Consistent with continuum in the quality of fresh tomatoes, a large majority of purchasers reported that greenhouse tomatoes have a better taste and quality than mature green field tomatoes.⁶³ However, less than one third of these purchasers specifically reported that greenhouse tomatoes taste better than vine-ripened field tomatoes, and approximately one quarter of these purchasers reported that greenhouse tomatoes and vine-ripened field tomatoes are the same or similar.⁶⁴ Locally-grown field tomatoes are regarded as the highest in quality, and they displace demand for greenhouse tomatoes when the former are in season.⁶⁵ Also as noted above, a majority of tomato purchasers reported that these types of tomatoes compete with each other for shelf space in grocery stores and that the shelf space that they allot for greenhouse tomatoes and field tomatoes varies on a weekly basis, based on relative differences in availability, prices, promotions, quality, and consumer demand.⁶⁶

Domestic greenhouse tomato growers believe their tomatoes are qualitatively superior to field tomatoes.⁶⁷ Field growers were more varied in their responses, indicating that consumers perceive greenhouse tomatoes to be superior products but that such perceptions may vary based on a consumer's region, education and preferences.⁶⁸ The field growers' responses also indicate that greenhouse tomatoes are higher-priced, premium tomatoes that compete in the same market as field tomatoes.⁶⁹ In recent years,

⁵⁹ *Id.*

⁶⁰ CR at I-5, PR at I-4. None of the 26 field tomato growers contacted in the Commission's telephone survey reported growing any greenhouse tomatoes. *See* Field Grower Survey. Respondents indicate that they have identified a small number of growers in the United States who produce both greenhouse and field tomatoes. Respondents' Prehearing Brief at 51-52.

⁶¹ CR at I-4, PR at I-3.

⁶² *Id.*

⁶³ CR at I-9, PR at I-6.

⁶⁴ *Id.*

⁶⁵ Conf. Tr. at 161-62 (Gianatti, Comito); Hearing Tr. at 158 (Gianatti).

⁶⁶ CR at I-8, II-13 to II-14, PR at I-6, II-8.

⁶⁷ CR at I-8, PR at I-6.

⁶⁸ *Id.*

⁶⁹ *Id.* Of the 26 field growers contacted in the Commission's telephone survey, 19 reported that greenhouse tomatoes compete with field tomatoes, and another reported competition with greenhouse tomatoes only near the

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the California and Florida field growers have attempted to address consumers' perceptions of greenhouse tomatoes as premium products and enhance their own competitiveness by launching marketing programs that encourage consumers to choose field tomatoes over greenhouse tomatoes.⁷⁰

Price

The record with respect to pricing is mixed. U.S. tomato growers report that prices for greenhouse tomatoes usually are substantially higher than prices for field tomatoes.⁷¹ Moreover, thirteen of 24 tomato purchasers reported that greenhouse-grown beefsteak tomatoes typically are priced higher than field-grown beefsteak tomatoes.⁷² On the other hand, five commercial purchasers reported that greenhouse beefsteak tomatoes occupy the middle ground in a range of tomato prices, with field-grown beefsteak and Roma tomatoes selling for less and field-grown cherry and grape tomatoes selling for more.⁷³

These characterizations are consistent with data collected on an average unit value ("AUV") basis. Field tomato AUVs are less than half the level of greenhouse tomato AUVs.⁷⁴ Jumbo/extra large round greenhouse tomatoes, however, are sometimes priced lower than vine ripe jumbo/extra large round field tomatoes (11 of 47 retail comparisons in 2001; 10 of 47 distributor comparisons in 2001), and frequently are priced closer to vine-ripe field tomatoes than are mature green field tomatoes, suggesting a continuum of prices.⁷⁵ In addition, ***.⁷⁶ The record also indicates that some organically-grown tomatoes sell for more than greenhouse tomatoes.⁷⁷

Conclusion

Except with regard to manufacturing facilities, processes, and employees, there is substantial overlap between greenhouse and field tomatoes with respect to the like product factors. Greenhouse tomatoes make up part of a continuum of domestically produced fresh tomatoes. Greenhouse tomatoes are markedly better in taste and appearance than mature green field tomatoes, but only somewhat superior to vine-ripened field tomatoes, and they are generally inferior to locally-grown field tomatoes. We do not regard the gradations in quality found in this investigation to constitute clear dividing lines.

Uses of both greenhouse and field tomatoes are similar. Greenhouse and field tomatoes generally are interchangeable and are similar in customer perceptions at least to the extent that they compete with each other for shelf space, allocations of which are adjusted frequently. Locally-grown field tomatoes often

⁶⁹ (...continued)

Canadian border. See Field Grower Survey.

⁷⁰ Conf. Tr. at 106-07 (A. Smith); Respondents' Collective Conf. Exhibit 1; Hearing Tr. at 151-53 (A. Smith).

⁷¹ CR at I-10, PR at I-7.

⁷² CR at II-2, PR at II-1.

⁷³ CR at II-2, PR at II-1.

⁷⁴ Compare table C-1 with table C-2, CR and PR at C-3 to C-5.

⁷⁵ Compare CR and PR at Tables V-1 and V-2 with CR and PR at Tables D-3 and D-4 (as revised by INV-Z-035 and INV-Z-037). The price differential between vine ripe and mature green field tomatoes narrows markedly as vine ripe field tomatoes come into season.

⁷⁶ Petitioners' Posthearing Brief at Hillman-1 ***.

⁷⁷ Hearing Tr. at 166, 199 (John Reilly, Economist, Nathan Associates, and A. Smith); Hearing Exhibits of John G. Reilly, Nathan Associates Inc., on behalf of Respondents at 3.

displace greenhouse tomatoes when the former are in season, at least in certain markets. Greenhouse growers and field growers have different perceptions of these types of tomatoes, with most agreeing that greenhouse tomatoes are a superior-tasting product, but that some field-grown varieties are of comparable quality. With respect to channels of distribution, the two types can differ in regard to packing, but a substantial portion of each is sold to wholesalers and distributors and ultimately, most are sold to retailers rather than food service providers. They often differ significantly in price, but some field tomatoes such as grape tomatoes can sell for higher prices than greenhouse tomatoes, and mixed evidence suggests that fluctuations in the price and supply of field tomatoes affect the price of greenhouse tomatoes.

While we recognize the distinction between field and greenhouse tomatoes with respect to production facilities, processes, and employees, the other five factors traditionally considered by the Commission suggest a continuum of fresh tomato products. Thus, we find, on balance, that the evidence on the record supports a finding that the domestic like product consists of all fresh tomatoes, whether grown in a greenhouse or a field.

D. Domestic Industry

Section 771(4) of the Act defines the relevant industry as “the producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes the major proportion of that product.”⁷⁸ 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.⁷⁹ Based on our like product finding above, the domestic industry in this investigation includes growers of greenhouse and field tomatoes for the fresh market.

Greenhouse growers typically pack their own fresh tomatoes.⁸⁰ The Commission must consider, however, whether to include packers of field-grown tomatoes in the domestic industry. In doing so, the Commission must assess whether packers engage in sufficient production-related activities to merit inclusion in the domestic industry.⁸¹ The parties presented little or no argument relevant to this issue. Most growers of greenhouse tomatoes and some growers of field tomatoes pack their own production, and thus did not report separately their packing operations.⁸² Indeed, most responding growers viewed growing and packing operations as a single continuous line of production.⁸³ The record lacks evidence that packing operations involve any considerable technical expertise. However, packing operations do require large

⁷⁸ 19 U.S.C. § 1677(4)(A).

⁷⁹ See United States Steel Group v. United States, 873 F. Supp. 673, 681-84 (Ct. Int’l Trade 1994), aff’d, 96 F.3d 1352 (Fed. Cir. 1996).

⁸⁰ CR at I-10, PR at I-6.

⁸¹ In evaluating whether a producer engages in sufficient production-related activity, the Commission has considered six factors: (1) the source and extent of the firm’s capital investment, (2) the technical expertise involved in U.S. production activities, (3) the value added to the product in the United States, (4) employment levels, (5) the quantity and type of parts sourced in the United States, and (6) any other costs and activities in the United States directly leading to production of the like product. E.g., Static Random Access Memory Semiconductors from the Republic of Korea and Taiwan, Invs. Nos. 731-TA-761-762 (Final), USITC Pub. 3098 (April 1998) at 9, n.59.

⁸² CR at, e.g., I-6, n.17, PR at I-4.

⁸³ CR at I-6 n.17, PR at I-4 n.17. One Florida field grower reported that the market for field-grown tomatoes is characterized by producers who are growers, packers, and shippers. Id.

capital expenditures and most field tomato producers use packers.⁸⁴ Those packers that responded to the Commission's questionnaire employed approximately 9,000 production and related workers in 2001.⁸⁵ Tomatoes are shipped long distances to packers, at least in Florida, and a large volume of tomatoes is required to keep a packing shed operational.⁸⁶ These facts, combined with the labor and capital requirements for packing, suggest that the value added by packaging is not insubstantial. Based on the somewhat limited record in this investigation, we determine to include packers of field tomatoes in the domestic industry.⁸⁷

Thus, we determine that there is a single domestic industry encompassing U.S. producers of all fresh tomatoes, whether grown in greenhouses or in fields, including packers of field tomatoes.

E. Related Parties

We must determine whether any producer of the domestic like product should be excluded from the domestic industry pursuant to section 771(4)(B) of the Act. 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.⁸⁸ Exclusion of such a producer is within the Commission's discretion based upon the facts presented in each case.⁸⁹

*** was *** producer in 2001, accounting for *** percent of production, although it was very small in relation to total production of tomatoes for the fresh market in 2001.⁹⁰ In 2001, it imported ***

⁸⁴ Conf. Tr. at 95 (Terence P. Stewart, Stewart & Stewart, Petitioners' Counsel).

⁸⁵ This figure on production and related workers ("PRWs") is derived from the questionnaire responses provided by both packers and grower/packers, and thus likely include some PRWs related to growing rather than packing operations. Many of the same companies provided usable financial information (described in Appendix E, table E-1), but some packers and grower/packers that provided financial information did not provide PRW figures, and vice versa. We estimate that the packers and grower/packers that provided employment information accounted for approximately one fourth of the 2001 production of field-grown tomatoes for the fresh market, based on comparisons with USDA data.

⁸⁶ Id. at 95-96.

⁸⁷ This is consistent with our treatment of packers in prior investigations. Fresh Tomatoes from Mexico, Inv. No. 731-TA-747 (Preliminary) (May 1996) at 13-15.

⁸⁸ 19 U.S.C. § 1677(4)(B).

⁸⁹ 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, Invs. Nos. 731-TA-741-743 (Final), USITC Pub. 3016 (Feb. 1997) at 14 n.81.

⁹⁰ Compare CR and PR at Table III-1 (as revised by INV-Z-037), (percentage of greenhouse production) with
(continued...)

pounds of subject greenhouse tomatoes from Canada, while it produced *** pounds.⁹¹ It indicated that it imported subject (and nonsubject merchandise) ***.⁹² ***. ***.⁹³ Because *** imports are insignificant compared to the size of its domestic production, and because its interests appear to lie primarily in domestic production, not importation, we find that appropriate circumstances do not exist to exclude *** from the domestic industry.

***, which was ***.⁹⁴ *** also is ***.⁹⁵ In addition to these ***. ***.⁹⁶ Respondent *** during the winter months when Canadian greenhouses are out of production.⁹⁷ ***.⁹⁸

*** operating results were *** than the greenhouse industry average only ***.⁹⁹ Its results were *** in 2001.¹⁰⁰ *** was the *** domestic producer of greenhouse tomatoes in 2001, accounting for *** percent of domestic greenhouse tomato production.¹⁰¹ *** production is ***.¹⁰² The company ***. It indicated, however, that ***.¹⁰³

These data do not indicate that *** was shielded from the effects of subject greenhouse tomatoes. Furthermore, *** from the domestic industry. Accordingly, we find that appropriate circumstances do not exist to exclude *** from the domestic industry.

Accordingly, we define the domestic industry to include all producers of all fresh tomatoes, whether grown in greenhouses or in fields, in the United States.

II. NO MATERIAL INJURY BY REASON OF SALES AT LESS THAN FAIR VALUE

⁹⁰ (...continued)

CR and PR at Table C-2 (as revised by INV-Z-037), (showing much larger combined greenhouse and field production).

⁹¹ CR and PR at Table III-2 (as revised by INV-Z-037), and CR and PR at Table III-4.

⁹² CR and PR at Table III-4 n.1 (as revised by INV-Z-037).

⁹³ CR and PR at Table VI-3 (as revised by INV-Z-036). The Commission received almost no financial data from growers of field tomatoes, and thus a comparison of *** operating results to those of field producers is not possible. The Commission received limited data from packers of field tomatoes, showing that they had higher operating income as a percentage of net sales than greenhouse tomato growers. Compare CR and PR at Table VI-3 (as revised by INV-Z-036), (operating income of greenhouse tomato growers) with CR and PR at Table E-1, (operating income of field tomato packers).

⁹⁴ CR at III-1, n.3 (as revised by INV-Z-037), PR at III-1, n.3.

⁹⁵ CR at III-1 (as revised by INV-Z-037), PR at III-1.

⁹⁶ CR at III-1, V-5, n.3 (as revised by INV-Z-037) and PR at III-1, V-3, n.3.

⁹⁷ CR at III-3 (as revised by INV-Z-037), PR at III-1.

⁹⁸ CR at V-5 n.3 (as revised by INV-Z-037), PR at V-3, n.3. ***. Petitioners' Posthearing brief at In Camera-5; Respondents' Posthearing brief at A-34.

⁹⁹ CR and PR at Table VI-3 (as revised by INV-Z-036). As noted in connection with *** above, the staff report does not contain combined financial data for field tomato growers.

¹⁰⁰ Id. ***.

¹⁰¹ CR and PR at Table III-1 (as revised by INV-Z-037).

¹⁰² Compare CR and PR at Table III-1 (as revised by INV-Z-037), (percentage of greenhouse production) with CR and PR at Table C-2 (as revised by INV-Z-037), (showing much larger combined greenhouse and field production).

¹⁰³ CR and PR at F-3 (as revised by INV-Z-036).

In the final phase of antidumping duty investigations, the Commission determines whether an industry in the United States is materially injured by reason of the imports under investigation.¹⁰⁴ 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.¹⁰⁵ The statute defines “material injury” as “harm which is not inconsequential, immaterial, or unimportant.”¹⁰⁶ In assessing whether 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 the United States.¹⁰⁷ 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.”¹⁰⁸

In this investigation, the Commission gathered record data from a variety of sources, including data from the USDA and other public sources, as well as from responses to its questionnaires. The Commission received questionnaire responses from firms accounting for the great majority of domestic greenhouse tomato production, and from firms representing a much smaller portion of domestic field-grown fresh tomato growing and packing operations.¹⁰⁹ Specifically, the Commission mailed questionnaires to 303 firms believed to be domestic growers of field tomatoes and received only 8 responses.¹¹⁰ Additionally, those few responses were incomplete and essentially unuseable, despite requests by Commission staff for the provision of complete data.¹¹¹ Commission staff attempted to bolster the data for field growers by conducting a telephone survey of 26 field growers but were able to gather only a limited amount of additional data.¹¹² As a result, the record contains limited information regarding the employment and financial performance of domestic producers of field-grown tomatoes, who account for the vast majority of domestic fresh tomato production.¹¹³ However, the record contains some relevant public data collected by USDA, which cover factors such as capacity, production, and shipments of fresh tomatoes.

In our analysis in this investigation we rely on record data pertaining to all domestic producers of fresh tomatoes when such data are available, including public source data pertaining to the impact of subject imports on the domestic industry. While our analysis focuses on the market for all tomatoes, we also discuss competition between subject imports and domestic greenhouse tomatoes because the subject imports are more interchangeable with domestic greenhouse tomatoes than with domestic field tomatoes.

¹⁰⁴ 19 U.S.C. §§ 1671d(b) and 1673d(b).

¹⁰⁵ 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 . . . [a]nd 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).

¹⁰⁶ 19 U.S.C. § 1677(7)(A).

¹⁰⁷ 19 U.S.C. § 1677(7)(C)(iii).

¹⁰⁸ Id.

¹⁰⁹ CR at III-1 (as revised by INV-Z-037) and E-3, PR at III-1 and E-xx.

¹¹⁰ CR at I-2, n.5, PR at I-2, n.5.

¹¹¹ CR and PR at E-3 and n.1.

¹¹² See Field Grower Survey.

¹¹³ Compare CR and PR at Table VI-3 (as revised by INV-Z-036), (showing production by domestic growers of greenhouse tomatoes) with CR and PR Table C-2 (as revised by INV-Z-037), (showing production by domestic growers of greenhouse and field tomatoes for the fresh market).

For the reasons discussed below, we determine that the domestic fresh tomato industry is not materially injured by reason of subject imports from Canada found to be sold at LTFV.¹¹⁴

A. Conditions of Competition

The following conditions of competition in the fresh tomato industry inform our determination.

1. Competition Between Greenhouse and Field Tomatoes

As discussed above, greenhouse and field tomatoes are at least moderately interchangeable. Both greenhouse and field tomatoes are sold to retail users who supply a range of tomato types to their customers. The majority of retailers reported that these tomatoes compete with each other for retail shelf space and that the shelf space allocated to both is adjusted on a weekly basis. Moreover, the majority of tomato growers, importers, and packers indicated that both prices and supplies of field tomatoes affect the prices of greenhouse tomatoes and that supplies of greenhouse tomatoes affect the prices of field tomatoes.¹¹⁵

2. Demand

U.S. demand for all fresh tomatoes rose slightly between 1998 and 2001. The volume of apparent U.S. consumption of fresh tomatoes was 5.0 billion pounds in 1998, 5.2 billion pounds in 1999 and 2000, and 5.3 billion pounds in 2001.¹¹⁶

Field tomatoes accounted for about 90 percent of U.S. fresh tomato consumption during the period examined.¹¹⁷ Estimated per capita consumption of field tomatoes was 17.9 pounds in 1998, 18.2 pounds in 1999, 17.8 pounds in 2000, and 17.6 pounds (forecast) for 2001.¹¹⁸ In contrast, U.S. demand for greenhouse tomatoes was much smaller but experienced strong and steady growth throughout the period examined.¹¹⁹ Apparent U.S. consumption rose from 456 million pounds in 1998, to 507 million pounds in

¹¹⁴ Petitioners took no position on the issue of whether the fresh tomato industry was materially injured by subject imports. Petitioners' Posthearing Brief at Hillman-14.

¹¹⁵ CR at II-11 to II-13, PR at II-7 to II-8; see also United States Securities and Exchange Commission Form S-1 of Colorado Greenhouse Holdings, Inc. (June 19, 1998) (greenhouse tomato grower identifying direct competition between greenhouse and field tomatoes); Field Grower Survey (19 of 26 field growers reported that greenhouse tomatoes compete with field tomatoes, and another reported competition only near the Canadian border). Other evidence cited in this opinion also reflects competition between greenhouse and field tomatoes.

¹¹⁶ CR and PR at Table C-2 (as revised by INV-Z-037).

¹¹⁷ Field tomatoes accounted for 91 percent of U.S. consumption in 1998, 90 percent in 1999, 89 percent in 2000, and 88.5 percent in 2001. Percentages derived from CR and PR at Table C-1 (as revised by INV-Z-037), and CR and PR at Table C-2 (as revised by INV-Z-037).

¹¹⁸ CR at II-10, PR at II-6. The USDA does not collect per capita consumption data for greenhouse tomatoes. Id. These data show that per capita consumption of field tomatoes increased from 1998 to 1999, but declined in 2000 and 2001. Since U.S. demand for greenhouse tomatoes rose steadily throughout the period examined, these data indicate that greenhouse tomatoes displaced field tomatoes to some degree during the period examined.

¹¹⁹ CR at II-8 (as revised by INV-Z-037), PR at II-5. Questionnaire responses noted substantial increases in
(continued...)

1999, to 565 million pounds in 2000, and to 614 million pounds in 2001.¹²⁰ Petitioners and Respondents agreed that U.S. demand for greenhouse tomatoes will continue to experience slow but steady growth over the next few years.¹²¹ These facts suggest that growth in demand for greenhouse tomatoes is partly at the expense of field tomatoes, and partly as a result of new demand.¹²²

3. Supply

Tomato production from a given location is seasonal, but on an annual basis, the domestic market is supplied from various locations. The growing seasons of Florida and California, which account for the bulk of domestic field tomato production, are complementary.^{123 124} Florida's tomato production typically begins around mid-November and steadily builds through the winter and spring until it reaches its peak in late April and May. It then experiences a steep decline in June and disappears completely in the summer and early fall until the following November. As Florida's tomato production begins its June decline, California's production begins and rapidly builds in July and August to levels approximating the peak levels of Florida's winter and springtime production. Its production then remains at these levels through

¹¹⁹ (...continued)

demand for greenhouse tomatoes since 1998, with producers characterizing the demand variously as "rising steadily," "increased significantly," and "40% increase," purportedly due to an increased demand for high-quality, year-round tomatoes that "taste good" and have a long shelf life. *Id.* Responding importers identified factors including "food safety," increased availability, and price as helping to fuel demand. Responding retailers likewise noted an increase in demand for greenhouse tomatoes since 1998, which they attributed to these tomatoes' quality, flavor, and availability, as well as increasing consumer awareness of such tomatoes. CR at II-9, PR at II-5.

¹²⁰ CR and PR at Table IV-3 (as revised by INV-Z-037).

¹²¹ CR at II-8 to II-9 (as revised by INV-Z-037), PR at II-5.

¹²² CR at II-8 to II-10 (as revised by INV-Z-037), PR at II-5.

¹²³ For example, shipment volumes for California are zero (or near zero) during the first four months of the year, increasing thereafter to peak levels during summer months and then declining significantly in November and December. Florida, by contrast, shows little if any production during July, August, and September, generating its most significant production beginning in late fall, with apparent peaks in December, and then again in April and May. Florida and California represent the largest shares of U.S. fresh tomato production, with other states supplementing production, with a much smaller combined share, mostly during the summer and early fall. CR and PR at Table D-1, CR and PR at Figures D-1 to D-4.

¹²⁴ While data on imports are complete, USDA data on domestic shipments are understated. Table D-1 does not show any shipments from states other than Florida and California prior to June during any year of the period examined. Florida and California ship primarily field tomatoes, but states other than Florida and California account for the bulk of domestic greenhouse production, and it is clear that the USDA data either do not count greenhouse tomatoes at all or do not count them during their peak production. *See* notes from telephone conversation on March 14, 2002, between Staff member Timothy McCarty and ***, National Agricultural Statistics Service, USDA; CR and PR at Table D-1, and CR and PR at Table D-2. The data also undercount locally-grown tomatoes in particular, many of which do not pass through distribution points monitored in the collection of the data. Hearing Tr. at 168 (Reilly); Monitoring of U.S. Imports of Tomatoes ("Monitoring Report"), USITC Pub. 3473 (Nov. 2001) at Table 42 (describing USDA volume data as covering only "major shipping points"); USDA Market News Branch, Agricultural Marketing Service, Weekly Shipments 1998, 1999, 2000, 2001 (not reporting shipments from many states). Production of locally-grown tomatoes is highest in the third quarter of the year. Hearing Tr. 27-28 (Carr) (July and August), 158 (Gianatti) (July through September); Conf. Tr. at 162 (Comito) (mid-June to early July).

October before declining sharply in November.¹²⁵ In addition, many other states produce significant volumes of field tomatoes.¹²⁶ As with Florida and California, tomato production in these other states tends to shift from the southern states during the winter and early spring to the northern states during the summer.¹²⁷

Most domestic greenhouse tomato production is located in states in the southern half of the United States, although there is some production in the northern states as well.¹²⁸ The domestic greenhouses located in the northern states, particularly those that border Canada, have growing seasons similar to those of Canadian greenhouses, and the quality of their tomatoes is comparable to that of Canadian greenhouse tomatoes.¹²⁹ Northern U.S. producers seed in late fall to begin harvesting by late winter to early spring.¹³⁰ Production then continues through November.¹³¹ Producers in southern climates seed in July to begin harvesting in September and continue harvesting through the following spring.¹³² Domestic winter production volumes are lower than summer production volumes.¹³³

While the supply of subject imports is limited to greenhouse tomatoes from Canada, our assessment of U.S. consumption of the product grown by the U.S. industry, all fresh tomatoes, requires that imports of nonsubject field tomatoes be included in our assessment of supply. By far the largest source of U.S. tomato imports is Mexico.¹³⁴ Mexico supplies the U.S. market with fresh tomatoes year-round, with shipment volumes generally peaking from January to April, declining through the summer months, and remaining at a fairly stable level during the rest of the year.¹³⁵ It is estimated that Mexico ships approximately 1.4 billion pounds of fresh tomatoes to the United States each year,¹³⁶ including a relatively small but growing volume of greenhouse tomatoes.¹³⁷

The next largest source of U.S. tomato imports is Canada.¹³⁸ Like Mexico, Canadian fresh tomato producers ship tomatoes to the United States year-round, but their shipment volumes are minor during the winter months, increase markedly in March or early April, peak between June and August, and then decline

¹²⁵ CR and PR at Figures D-1 to D-4.

¹²⁶ CR and PR at Table D-1, and CR and PR at Figures D-1 to D-4.

¹²⁷ See, e.g., Conf. Tr. at 152-53 (Comito).

¹²⁸ Hearing Tr. at 231 (D. Smith, A. Smith).

¹²⁹ *Id.*

¹³⁰ CR at II-6 (as revised by INV-Z-037), PR at II-4.

¹³¹ CR at II-6 (as revised by INV-Z-037), PR at II-4.

¹³² *Id.*

¹³³ CR at II-6 (as revised by INV-Z-037), PR at II-4.

¹³⁴ CR at II-19 (as revised by INV-Z-037) to II-20 (as revised by INV-Z-037), IV-3 (as revised by INV-Z-037) to IV-5 (as revised by INV-Z-037), PR at II-12 to II-14, IV-1 to IV-3, CR and PR at Table D-1, and CR and PR at Table D-2.

¹³⁵ CR and PR at Table D-1.

¹³⁶ Monitoring Report at Table 5, at 12 (reporting figures in kilograms).

¹³⁷ Based on Harmonized Tariff Schedule breakouts for greenhouse tomatoes and estimates provided by respondents, imports of greenhouse tomatoes from Mexico were estimated as follows: 59.6 million pounds in 1998, 48.3 million pounds in 1999, 60.6 million pounds in 2000, and 73.6 million pounds in 2001. CR at IV-5 n.5 (as revised by INV-Z-037), PR at IV-3, n.5.

¹³⁸ CR and PR at Table D-1, and CR and PR at Figures D-1 to D-4.

steadily through November and December.¹³⁹ Canadian greenhouse tomato growers generally ship their tomatoes to the United States from March to December, with production peaking in May.¹⁴⁰

Much smaller volumes of tomatoes are imported from the Netherlands, Belgium, Spain, and Israel.¹⁴¹ These third countries likewise supply the U.S. market with fresh tomatoes year-round, with aggregate shipment volumes generally peaking from June to August.¹⁴² Petitioners and Respondents generally agreed that most imports from these other third countries are greenhouse tomatoes.¹⁴³ The quantity of nonsubject greenhouse tomato imports (including those from Canada) declined from *** million pounds in 1998 to *** million pounds in 1999, but then increased to *** million pounds in 2000 and *** million pounds in 2001.¹⁴⁴

As noted above, tomato production is sensitive to the availability of sunlight, extreme temperatures, weather, and climate. As a result, growers in the northern States plant and harvest their tomatoes later in the year than do growers in the southern States.¹⁴⁵ ¹⁴⁶ Although weather and pests pose fewer problems for greenhouse tomato producers than field tomato producers, the former remain at least somewhat susceptible to these problems.¹⁴⁷ Consequently, supply uncertainty resulting from freezes and other weather-related phenomena can cause temporary disruptions in seasonal price patterns.¹⁴⁸

¹³⁹ CR and PR at Table D-1. Within this overall pattern, Canadian field producers generally produce their tomatoes between July and October, with production peaking in August and September. Indeed, Agriculture and Agri-Food Canada estimates that field tomatoes comprise the majority of Canadian tomatoes shipped to the United States in August and September. CR at IV-3 n.4 (as revised by INV-Z-037), VI-4 (as revised by INV-Z-036) to VI-6 (as revised by INV-Z-036), PR at IV-1, n.4., VI-3. Otherwise, Petitioners and Respondents agreed that the majority of imports from Canada were greenhouse tomatoes. CR at IV-3 (as revised by INV-Z-037), PR at IV-1. However, not all greenhouse tomatoes imported from Canada are subject imports. CR and PR at Table IV-2 (as revised by INV-Z-037).

¹⁴⁰ CR at VII-4 (as revised by INV-Z-037), PR at VII-2.

¹⁴¹ CR at II-19 (as revised by INV-Z-037), PR at II-12.

¹⁴² CR and PR at Table D-1, and CR and PR at Figures D-1 to D-4.

¹⁴³ CR at IV-3 (as revised by INV-Z-037), PR at IV-1. However, two witnesses testified that these imports may not be exclusively greenhouse tomatoes. Conf. Tr. at 144 (Gianatti); Hearing Tr. at 140-42 (Mike DeGiglio, CEO of domestic greenhouse grower Village Farms). Thus, the record is unclear as to whether tomatoes imported from Spain and Israel include field tomatoes. CR and PR at Table II-3, n.4 (as revised by INV-Z-037).

¹⁴⁴ CR and PR at Table IV-2 (as revised by INV-Z-037).

¹⁴⁵ CR at II-6 (as revised by INV-Z-037), PR at II-4.

¹⁴⁶ Id.

¹⁴⁷ Conf. Tr. at 19, 52 (Fahrenbruch).

¹⁴⁸ Hearing Tr. at 169 (Reilly).

4. Tomato Producers as “Price Takers”

Factors that may constrain the ability of individual market participants to affect market-wide prices include the large number of greenhouse and field tomato suppliers relative to the smaller number of large U.S. retail customers,¹⁴⁹ the perishability of tomatoes, and the inability of producers to keep inventory on hand.¹⁵⁰ Most of a producer’s “inventory” is on the vine, to be picked just prior to the time of shipment.¹⁵¹ These facts are consistent with Petitioners’ contention that producers are “at the mercy” of the market when their product is available, and with Respondents’ characterization that tomato growers are “price takers.”¹⁵²

5. Business Costs

For the reasons given above, the record contains little evidence regarding business costs incurred by domestic growers of field tomatoes. The costs of growers of greenhouse tomatoes are not a proxy for the costs of all growers, due to differences in production facilities and processes. Nevertheless, we note that the costs associated with starting and maintaining a greenhouse growing operation are considerable, and that the greenhouse portion of the domestic industry is capital intensive.¹⁵³ Petitioners estimated the cost of constructing a new greenhouse to be \$500,000 per acre and noted that most new producers finance this cost, thereby accruing substantial interest expenses and depreciation expenses when they expand. They also reported that domestic greenhouse growers need a high level of cash flow in order to service debt and maintain production.¹⁵⁴ The record indicates that the greenhouse portion of the domestic tomato industry incurred a relatively large percentage of its debt to finance capacity expansions in response to growing U.S. demand,¹⁵⁵ and that many domestic greenhouse producers experienced higher average unit operating costs during the period examined due to this expansion.¹⁵⁶

¹⁴⁹ The Commission identified over 300 field growers operating in the United States alone. Meanwhile, massive consolidations among U.S. retailers have created huge retail chains that have increased leverage with respect to setting lower U.S. market prices for tomatoes. Hearing Tr. at 214-16 (Kevin Doran, Vice President of foreign greenhouse tomato grower BC Hot House, and Gianatti).

¹⁵⁰ Hearing Tr. at 120 (Robert F. Weidaw, CFO of domestic greenhouse tomato grower Eurofresh); CR at II-7 (as revised by INV-Z-037), PR at II-4. Because the product is perishable, it cannot be inventoried for very long. CR at II-7 (as revised by INV-Z-037), PR at II-4.

¹⁵¹ CR at II-7 (as revised by INV-Z-037), PR at II-4.

¹⁵² Petitioners’ Prehearing Brief at 16; Respondents’ Prehearing Brief at 76.

¹⁵³ We acknowledge that the field portion of the domestic fresh tomato industry probably is less capital intensive than the domestic greenhouse portion.

¹⁵⁴ Petitioners’ Prehearing Brief at 16-17. For detailed information on the operating costs of specific U.S. greenhouse growers, see CR and PR at Table VI-3 (as revised by INV-Z-036).

¹⁵⁵ CR at VI-17, n.24, PR at VI-5, n.24.

¹⁵⁶ CR at VI-15, PR at VI-3. U.S. greenhouse growers’ cost of goods sold (“COGS”) increased from \$98.7 million in 1998 to \$122 million in 1999, \$141.9 million in 2000, and \$151.8 million in 2001. CR and PR at Table VI-1. Specifically, Petitioner *** increased costs were attributable to the fact that the timing of the completion and start-up of its expanded facilities did not coincide with the optimal cropping cycle during these facilities’ first year of operations. CR at VI-15, n.15, PR at VI-4, n.15. ***. CR at VI-16, n.18, PR at VI-5, n.18. Petitioner ***. CR at VI-16, n.19, PR at VI-5, n.19. Domestic greenhouse growers’ interest expenses also increased from \$8.3

(continued...)

The record indicates that one reason that greenhouse expansion is so expensive is that it is technically challenging. The Commission received testimony that the horticultural strategies and techniques used to grow greenhouse tomatoes originally were developed in northern latitude countries such as the Netherlands and Canada.¹⁵⁷ Domestic greenhouse growers initially built their greenhouse facilities in northern latitude states, but when they tried to shift production to the southwestern states, they encountered significant technical difficulties, including problems with climate control, plant diseases, and insect pests.¹⁵⁸

B. Volume of Subject Imports

Section 771(7)(C)(i) of the Act provides that the “Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.”¹⁵⁹

The volume of subject imports from Canada rose from *** million pounds in 1998 to *** million pounds in 1999, *** million pounds in 2000, and *** million pounds in 2001.¹⁶⁰ Subject import volume increased by *** percent between 1998 and 1999, by *** percent between 1999 and 2000, and by *** percent between 2000 and 2001, with a total increase of *** percent for the period 1998-2001.¹⁶¹ However, relative to domestic production and consumption of fresh tomatoes, both the volume and the increase in volume of subject imports were small. Subject imports accounted for *** percent of the U.S. fresh tomato market in 1998, *** percent in 1999, and *** percent in both 2000 and 2001.¹⁶² In contrast, the domestic industry’s share of the U.S. fresh tomato market increased from 62.6 percent in 1998 to 68.8 percent in 2000, before declining to 66.0 percent in 2001.¹⁶³ Nonsubject imports’ market share declined from *** percent in 1998 to *** percent in 1999 and *** percent in 2000, but recovered to *** percent in 2001.¹⁶⁴ We further note that, in the context of greenhouse tomatoes alone, while subject import market

¹⁵⁶ (...continued)

million in 1998 to \$13.3 million in 1999 and \$19.7 million in 2000 before declining to \$9.5 million in 2001. Their depreciation/amortization costs likewise increased from \$8.5 million in 1998 to \$15.4 million in 1999 and \$18.6 million in 2000, then declined to \$14.4 million in 2001. CR and PR at Table VI-1 (as revised by INV-Z-036).

¹⁵⁷ Hearing Tr. at 161-64, esp. 163-64 (Burkhard Metzger, President & CEO of foreign greenhouse grower Suntastic Hot House, Inc.); see, generally, Respondents’ Posthearing Brief at A-1 to A-9.

¹⁵⁸ Hearing Tr. at 163-64 (Metzger); Respondents’ Posthearing Brief at A-5 to A-6.

¹⁵⁹ 19 U.S.C. § 1677(7)(C)(i).

¹⁶⁰ CR and PR at Table IV-2 (as revised by INV-Z-037). Agriculture and Agri-Food Canada reports that the majority of tomatoes imported from Canada into the United States during August and September is nonsubject field tomatoes. CR at IV-3, n.3 (as revised by INV-Z-037), PR at IV-1, n.3. Thus, our data overstate the volume of subject imports to some degree.

¹⁶¹ CR and PR at Table IV-2 (as revised by INV-Z-037). Subject imports were equivalent to only *** percent of U.S. production in 1998, *** percent of U.S. production in 1999, *** percent of U.S. production in 2000, and *** percent of U.S. production in 2001. Figures derived from CR and PR at Table C-2 (as revised by INV-Z-037).

¹⁶² Id.

¹⁶³ CR and PR at Table C-2 (as revised by INV-Z-037).

¹⁶⁴ CR and PR at Table C-2 (as revised by INV-Z-037).

share rose over the period examined (from *** percent in 1998 to *** percent in 2001), the market share of domestic greenhouse growers also increased (from 32.2 percent in 1998 to 36.2 percent in 2001).¹⁶⁵

Based on the above, we find that the volume and the increase in volume of subject imports are not significant in absolute terms or relative to total fresh tomato production or consumption in the United States.¹⁶⁶

C. Price Effects of the Subject Imports

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

(I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.¹⁶⁷

Purchasers listed price as one of the three most important factors they consider when choosing a supplier of greenhouse tomatoes.¹⁶⁸ During the period examined, greenhouse tomatoes generally were more expensive than field tomatoes.¹⁶⁹ The record indicates that prices for both greenhouse and field tomatoes declined from 1998 to 1999 but recovered in 2000 and 2001.¹⁷⁰ As discussed above, the record also

¹⁶⁵ CR and PR at Table C-1 (as revised by INV-Z-037).

¹⁶⁶ We have considered whether any change in the volume, price effects, or impact of subject imports since the filing of the petition is related to the pendency of the investigation. 19 U.S.C. § 1677(7)(I). The petition was filed on March 28, 2001 (CR and PR at I-1 (as revised by INV-Z-037)), by which time Canadian greenhouse tomato crops were already in production.

Despite the filing of the petition, the volume of subject imports was higher in 2001 than in 2000. CR and PR at Table C-1 (as revised by INV-Z-037). The rate of increase from 2000 to 2001 was lower than the rate of increase experienced from 1998 to 1999, and from 1999 to 2000. CR and PR at Table C-1 (as revised by INV-Z-037). Census Bureau statistics indicate that the volume of imports was lower in the fourth quarter of 2001 than during the fourth quarter of 2000, which could have been the result, at least in part, of Commerce's preliminary affirmative determination on October 5, 2001. Petitioners' Final Comments at 5. However, less than 20 percent of Canadian exports to the United States occur in the fourth quarter. Petitioners' Posthearing Brief at Miller-7; CR at VII-4 (as revised by INV-Z-037), PR at VII-2. We therefore decline to exercise our discretion to reduce the weight given to record evidence for the period after the filing of the petition. Nonetheless, even if the rate of increase from 2000 to 2001 had not declined relative to prior years, the change would not have altered our findings with respect to the significance of subject import volume, price, and impact, nor our determinations with respect to material injury or threat of material injury by reason of subject imports.

¹⁶⁷ 19 U.S.C. § 1677(7)(C)(ii).

¹⁶⁸ Table II-2, CR at II-15, PR at II-9, CR at II-14 to II-15, PR at II-9.

¹⁶⁹ CR at I-10, II-2 and PR at I-7, II-1; Conf. Tr. at 119 (Gianatti), 161-62 (Gianatti, Comito); Hearing Tr. at 158 (Gianatti).

¹⁷⁰ The Commission collected weekly pricing data on sales to both the retail and distributor markets on two greenhouse tomato products and two field tomato products for 1999, 2000, and 2001. Prices were generally lower

(continued...)

indicates that the fresh tomato supply is highly seasonal and that the prices of both greenhouse tomatoes and field tomatoes decline in the late spring and early summer as the supplies of both rise, and that prices rise late in the year when the volume of fresh tomatoes falls.¹⁷¹

Given our limited data on the field portion of the domestic tomato industry and the greater comparability of U.S. and Canadian greenhouse tomatoes, it is appropriate for us to examine instances of underselling by the subject imports with respect to domestically-produced greenhouse tomatoes as well as to domestically-produced field tomatoes. The record indicates that subject imports oversold domestic greenhouse tomatoes in the majority (73 percent) of comparisons in 1999, 2000, and 2001. In fact, there was a greater frequency of overselling in 1999 (81 percent) – the year in which prices were lowest – than in 2000 or 2001 (72 percent and 67 percent, respectively).¹⁷² Although direct price comparisons are not possible, the subject imports were generally priced higher than domestic field tomatoes as well.^{173 174} Accordingly, the record does not indicate significant underselling by the subject imports.¹⁷⁵

¹⁷⁰ (...continued)

in 1999 than during 2000 or 2001. CR and PR at Figures V-2, V-4, V-6, V-8, D-5, and D-7 (charting data from CR and PR at tables V-1 to V-4, D-3, and D-4) (as revised by INV-Z-035 and INV-Z-037) and generally showing deeper and longer-lasting price declines in 1999 than in 2000 or 2001). Monitoring Report at table 44, at 70 (table 44 showing that prices were lower in the last half of 1999 than during the last half of 2000). Pricing data from *** were excluded since it reported that ***. CR at V-5, n.3 (as revised by INV-Z-037), PR at V-3, n.3. Although pricing data for 1998 are not available, AUVs for domestically produced tomatoes fell sharply from 1998 to 1999, and were higher in both 2000 and 2001 than in 1999. CR and PR at Table C-2 (as revised in INV-Z-037). AUVs are not necessarily accurate proxies for prices because of potential shifts in product composition. However, the change in AUVs from 1998 to 1999 was sharp and there is no record evidence of significant shifts in product composition that would account for the decline in AUVs in 1999 and their subsequent rise in 2000 and 2001.

¹⁷¹ CR and PR at Table V-1 (as revised by INV-Z-037), CR and PR at Table V-2 (as revised by INV-Z-035), CR and PR at Table V-3 (as revised by INV-Z-037), CR and PR at Table V-4 (as revised by INV-Z-035), CR and PR at Figure V-2 (as revised by INV-Z-037), CR and PR at Figure V-4 (as revised by INV-Z-035), CR and PR at Figure V-6 (as revised by INV-Z-037), and CR and PR at Figure V-8 (as revised by INV-Z-035). For the seasonal variation in field tomato prices, see Monitoring Report at Table 44, at 70. As indicated in a footnote to our discussion of the conditions of competition and supply, USDA data understate total volumes, particularly in the third quarter of each year due to undercounting of locally-grown tomatoes.

¹⁷² CR and PR at Table V-1 (as revised by INV-Z-037), CR and PR at Table V-2 (as revised by INV-Z-035), CR and PR at Table V-3 (as revised by INV-Z-037), and CR and PR at Table V-4 (as revised by INV-Z-035 and later by the Office of Economics).

¹⁷³ Direct comparisons are not available because subject imports and domestic field tomatoes were not sold in the same weight boxes. CR at V-5 (as revised by INV-Z-037) and PR at V-3. As noted, AUVs are not necessarily an accurate reflection of prices. However, the substantial per-pound difference in the value of subject imports (***) and the U.S. shipments of domestic producers (\$0.27 to \$0.37) (reflecting mostly prices for field tomatoes) indicates that the subject imports were generally priced higher than domestic field tomatoes during the period examined. CR and PR at Table C-2 (as revised by INV-Z-037).

¹⁷⁴ With regard to greenhouse tomatoes, purchasers gave no clear indication of which sellers were price leaders, with more listing domestic producers than Canadian producers (some of them possibly producers of nonsubject imports) as price leaders, but a substantial number indicating tomatoes from Mexico as a price leader. CR at V-5 (as revised by INV-Z-037) and PR at V-3.

¹⁷⁵ We address Petitioners' contentions that the Commission's pricing data are unrepresentative of the reality in the market. First, Petitioners questioned the Commission's classification of certain sales made by *** that involved wholesaler/agents as sales to wholesalers (and not sales to retailers). The Commission closely examined

(continued...)

As noted, U.S. fresh tomato prices – both greenhouse and field – fell from 1998 to 1999, then rose in 2000 and 2001. Prices were higher in 2000 and 2001 than in 1999 despite the fact that the volume of subject imports increased during every year of the period examined. Accordingly, neither the data on subject import volume (increasing while domestic prices increased) nor the data on subject import prices (generally higher than domestic) indicate that the subject imports had a significant effect on domestic greenhouse or field tomato prices. Rather, it appears that prices were driven largely by changes in the volume of fresh tomatoes, which were many times larger than the volume of subject imports.^{176 177} The relatively small volume of subject imports, in the context of the fresh tomato market as a whole, indicates further that subject imports did not cause price depression to a significant degree.¹⁷⁸

The record also does not indicate price suppression due to any significant degree to subject imports. Since we lack data on the operating costs of the field portion of the domestic tomato industry, we must determine whether there is price suppression based on our cost data for greenhouse portion of this industry. The domestic greenhouse growers' unit COGS for greenhouse tomatoes was higher in 2000 than in the other years of the period examined, at \$0.64 in 1998, \$0.65 in 1999, \$0.72 in 2000, and \$0.65 in

¹⁷⁵ (...continued)

the nature of the transactions at issue and concluded that they represented a mix of sales to wholesalers and retailers. We considered *** transactions with *** to be wholesale transactions, because title passed to *** when *** shipped the tomatoes, leaving *** free to resell to other firms. See Limited Scope Review of March 20, 2002. Second, Petitioners also argued that Respondents failed to provide pricing and volume data for sales of lower-valued grade 2 tomatoes. The Commission confirmed, however, that very few “grade 2” tomatoes come into the United States from Canada. CR at V-6, n.9 (as revised by INV-Z-035), PR at V-4, n.9. Third, Petitioners suggested that Respondents were reporting some of their prices in Canadian dollars rather than U.S. dollars. The Commission confirmed, however, that Respondents reported prices in U.S. dollars. See “Confirmation of Importer Questionnaire Data” compiled by Craig Thomsen based on telephone interviews conducted between February 19, 2002, and February 26, 2002. Fourth, Petitioners requested that the Commission perform verifications of the Respondents' data. On March 20, 2002, the Commission conducted a limited review of the pricing data of the largest Respondent, BC Hot House, and concluded that it reported the data properly. See Limited Scope Review of March 20, 2002. Finally, Petitioners claimed that ***. We note that ***. See 67 Fed. Reg. 15528, 15529 (April 2, 2002).

¹⁷⁶ For example, in 1999, when greenhouse tomato prices were low, production of field tomatoes increased substantially and field tomato prices fell by a large margin. See Respondents Posthearing Brief at Exhibit 7.

¹⁷⁷ In their Prehearing Brief, Petitioners submitted an econometric analysis that purported to show no correlation between U.S. prices for greenhouse tomatoes and volumes of field tomatoes in the U.S. market. Petitioners' Prehearing Brief at 32, Exhibit 6. Commission staff reviewed this analysis and identified several technical and data deficiencies. Memorandum EC-Z-014 from Catherine B. DeFilippo through Robert B. Koopman to the Commission (March 15, 2002). Petitioners filed a response to Commission staff's analysis. See Stewart and Stewart's March 25, 2002, Submission of Economic Analysis Addressing Issues Raised by Staff. We find that Petitioners' analysis still fails to take into account adequately the quantity of the different types of tomatoes, and therefore is not persuasive.

¹⁷⁸ Petitioners argued that domestic prices were depressed during the period examined compared to the years prior to it. Because many factors may impact prices, the Commission does not base its analysis of price effects on periods prior to the period examined on which the Commission has no comprehensive data. We further note that, when commenting on the Commission's draft questionnaires, Petitioners did not request that the Commission seek data prior to 1998. See November 21, 2001, and November 30, 2001, comments of Petitioners on the Commission draft questionnaires.

2001.¹⁷⁹ However, prices of both greenhouse and field tomatoes were higher in 2000 than in 1999, indicating that domestic producers were able to raise prices in 2000, despite a volume of subject imports in 2000 that was higher than in 1999. Greenhouse growers' sales AUVs rose more than unit COGS in 2000. Moreover, the unit COGS of the domestic growers of greenhouse tomatoes does not necessarily reflect the experience of the industry overall, given the distinct methods of production used by growers of field tomatoes. Accordingly, the record does not demonstrate a cost-price squeeze indicating price suppression with regard to either greenhouse or field tomatoes. The small volume of subject imports, in the context of the overall fresh tomato market, further indicates that subject imports did not have a significant price-suppressing effect.

With regard to seasonal price fluctuations, the increase in volume of subject imports that begins in spring generally corresponds to declines in prices for the domestic like product.¹⁸⁰ However, this pattern of seasonal fluctuations in tomato prices pre-dated the entry of increasing volumes of subject imports.¹⁸¹ Moreover, subject imports oversold the domestic product in a considerable majority of price comparisons in March, April, and May, those months in which prices for domestic greenhouse tomatoes generally fall.¹⁸² This overselling refutes petitioners' assertion that respondents offer low prices in the spring to reestablish a presence in the U.S. market. Accordingly, while the volume of subject imports from Canada may have some seasonal impact, particularly on domestic greenhouse prices, we do not find any effect to be significant.

Finally, the lack of extensive underselling is not inconsistent with purchasers' experiences. With respect to greenhouse tomatoes, most (21 of 25) purchasers consider U.S. and Canadian product to be comparably priced.¹⁸³ There were few fully-documented lost sales or lost revenue allegations submitted and only a single confirmation.¹⁸⁴

Accordingly, we conclude that the subject imports did not have significant adverse price effects.

D. Impact of the Subject Imports

In examining the impact of the subject imports on the domestic industry, we consider all relevant economic factors that bear on the state of the industry in the United States.¹⁸⁵ These factors include output,

¹⁷⁹ CR and PR at Table VI-1 (as revised by INV-Z-036), and CR and PR at Table C-1 (as revised by INV-Z-037).

¹⁸⁰ Prices for domestic greenhouse tomatoes generally declined at the same time, as did prices for domestic field tomatoes to a lesser extent. CR and PR at Table V-1 (as revised by INV-Z-037), CR and PR at Table V-2 (as revised by INV-Z-035), CR and PR at Table V-3 (as revised by INV-Z-037), CR and PR at Table V-4 (as revised by INV-Z-035), CR and PR at Figures V-2 and V-3 (as revised by INV-Z-037), CR and PR at Figures V-4 and V-5 (as revised by INV-Z-035), CR and PR at Figures V-6 and V-7 (as revised by INV-Z-037), CR and PR at Figures V-8 and V-9, (as revised by INV-Z-035), Monitoring Report, at table 44, at 70.

¹⁸¹ Petitioners' Posthearing Brief at Okun-26, Miller 8-11; Respondents' Final Comments at Tables 4 and 5. The data in these charts and tables indicate that this seasonal pattern extends back to at least 1994.

¹⁸² CR and PR at Table V-1 (as revised by INV-Z-037), CR and PR at Table V-2 (as revised by INV-Z-035), CR and PR at Table V-3 (as revised by INV-Z-037), CR and PR at Table V-4 (as revised by INV-Z-035).

¹⁸³ CR and PR at Table II-3.

¹⁸⁴ CR at V-25 to V-26, PR at V-19.

¹⁸⁵ 19 U.S.C. § 1677(7)(C)(iii); see also SAA at 851 and 885 ("In material injury determinations, the Commission considers, in addition to imports, other factors that may be contributing to overall injury. While these
(continued...)

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.”^{186 187}

The average capacity, production, U.S. shipments, and market share of the domestic fresh tomato industry fluctuated during the period examined, but ended higher in 2001 compared to 1998. The domestic industry’s average capacity grew from 3.5 billion pounds in 1998, to 4.0 billion pounds in 1999, and to 4.1 billion pounds in 2000, and then fell to 4.0 billion pounds in 2001.¹⁸⁸ Production increased from 3.4 billion pounds in 1998 to 3.9 billion pounds in 1999, and was 4.0 billion pounds in 2000, and 3.9 billion pounds in 2001.¹⁸⁹ Shipments in the United States by the domestic industry totaled 3.1 billion pounds in 1998, rose to 3.5 billion pounds in 1999, and then fluctuated, to 3.6 billion pounds in 2000 and 3.5 billion pounds in 2001.¹⁹⁰ The market share in terms of quantity held by the domestic industry increased from 62.6 percent in 1998 to 68.4 percent in 1999, and to 68.8 percent in 2000, and then declined to 66.0 percent in 2001.¹⁹¹ Average unit values of U.S. shipments initially declined from \$0.37 per pound in 1998 to \$0.27 per pound in 1999, then partially recovered in 2000 and 2001 to \$0.32 and \$0.33 per pound, respectively.¹⁹²

This limited data with regard to the overall industry does not indicate a significant adverse impact by subject imports. By most measures, the industry was producing and shipping at higher volumes in 2001 than in 1998. It also held a marginally higher market share in 2001 than in 1998, despite consistent increases in the volume of subject imports.

It also is appropriate for us to examine the impact of subject imports on just the greenhouse portion of the domestic tomato industry. With regard to greenhouse tomatoes, domestic production increased from 153.7 million pounds in 1998, to 192.8 million pounds in 1999, 202.0 million pounds in 2000, and 229.4 million pounds in 2001.¹⁹³ Capacity, measured in acres under cover, increased from 416 acres in 1998 to

¹⁸⁵ (...continued)

factors, in some cases, may account for the injury to the domestic industry, they also may demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports.”

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

¹⁸⁷ The statute instructs the Commission to consider the “magnitude of the dumping margin” in an antidumping proceeding as part of its consideration of the impact of imports. 19 U.S.C. § 1677(7)(C)(iii) (V). In its amended final antidumping duty determinations, Commerce assigned the following antidumping duty margins in percent *ad valorem* to subject imports: BC Hothouse Foods, Inc., 18.04; Veg Gro Sales, Inc. (a.k.a K & M Produce Distributors, Inc.), 3.85; Red Zoo Marketing (a.k.a. Produce Distributors, Inc.), 1.85 (*de minimis*); J-D Marketing, Inc., 0.83 (*de minimis*); Mastronardi Produce Ltd., 0.52 (*de minimis*); and all others, 16.53. 67 Fed. Reg. 15528, 15529 (April 2, 2002).

¹⁸⁸ CR and PR at Table C-2 (as revised by INV-Z-037). As indicated in footnotes above, publicly available data undercounts the domestic industry’s shipments to a considerable degree.

¹⁸⁹ CR and PR at Table C-2 (as revised by INV-Z-037).

¹⁹⁰ CR and PR at Table C-2 (as revised by INV-Z-037).

¹⁹¹ CR and PR at Table C-2 (as revised by INV-Z-037).

¹⁹² CR and PR at Table C-2 (as revised by INV-Z-037).

¹⁹³ CR and PR at Table III-3 (as revised by INV-Z-037).

544 acres in 1999, 545 acres in 2000, and 548 acres in 2001.¹⁹⁴ By volume, capacity increased from 168.4 million pounds in 1998, to 228.3 million pounds in 1999, 231.8 million pounds in 2000, and 245.8 million pounds in 2001.¹⁹⁵ Capacity utilization initially declined from 91.3 percent in 1998 to 84.4 percent in 1999, but then increased to 87.1 percent in 2000 and to 93.3 percent in 2001.¹⁹⁶

Similarly, U.S. shipments by domestic greenhouse tomato producers increased from 146.7 million pounds in 1998 to 181.9 million pounds in 1999, 195.8 million pounds in 2000, and 222.1 million pounds in 2001.¹⁹⁷ Net sales likewise increased from \$124.3 million in 1998 to \$129.4 million in 1999, \$153.9 million in 2000, and \$185.3 million in 2001.¹⁹⁸ Unit values per pound fluctuated, falling from 81 cents per pound in 1998 to 69 cents per pound in 1999, before recovering to 78 cents per pound in 2000 and 80 cents per pound in 2001.¹⁹⁹

We do not assume that the employment and financial results of the domestic greenhouse tomato growers are an accurate proxy for financial results of the domestic fresh tomato industry as a whole, given the much smaller production of greenhouse tomatoes, the differing methods of production for greenhouse and field tomatoes, and differences in the average prices for greenhouse and field tomatoes.²⁰⁰ However, we would expect that any adverse impact by subject imports would be most apparent in the results for the greenhouse growers, given that subject imports are most interchangeable with domestic greenhouse tomatoes, and that the volume of subject imports is considerably larger in relation to domestic greenhouse production than to domestic field production.²⁰¹ We therefore consider in our analysis that, if subject imports were having an adverse impact on the domestic industry as a whole, that effect should be visible in the results of the greenhouse growers.

The number of production and related greenhouse tomato workers increased substantially from 1998 through 2000, then fell in 2001 to a level still above the 1998 and 1999 levels.²⁰² Hours worked by and wages paid to production and related workers also increased from 1998 to 2000 but decreased slightly in 2001.²⁰³ Productivity fluctuated but ended the period examined well above the level at the beginning of the period examined.

¹⁹⁴ Id.

¹⁹⁵ Id.

¹⁹⁶ Id.

¹⁹⁷ Id.

¹⁹⁸ CR and PR at Table VI-1 (as revised in INV-Z-036).

¹⁹⁹ CR and PR at Table VI-2 (as revised in INV-Z-036).

²⁰⁰ Our data on the packers of field tomatoes indicate that they generally are profitable. Although we have included packers in the domestic industry, we do not believe that they alone are representative of the overall domestic field grower sector. CR and PR at Table E-1; Consolidated Financial Table for U.S. Greenhouse Growers, Field-Grown Packers, and Field-Grown Grower/Packers in INV-Z-036.

²⁰¹ Subject imports also are substitutable with field tomatoes, albeit to a lesser extent. CR at II-10 to II-11, II-18 and PR at II-6 to II-7 and II-11.

²⁰² The number of production and related greenhouse tomato workers increased from 1,660 in 1998 to 1,790 in 1999 and 2,297 in 2000, but decreased to 1,935 in 2001. CR and PR at Table III-3 (as revised in INV-Z-037).

²⁰³ Hours worked increased from 2,558 in 1998 and 2,806 in 1999 to 3,767 in 2000 and 3,585 in 2001. The combined effects of increased hours worked and a marked increase in wage rates beginning in 2000 resulted in an increase in wages paid from \$18.7 million in 1998 and \$21.3 million in 1999 to \$31.6 million in 2000 and \$31.5 million in 2001. CR and PR at Table III-3 (as revised in INV-Z-037).

Domestic greenhouse growers generated operating income of 1.2 percent as a ratio to net sales in 1998 and experienced negative operating margins of 12.9 percent in 1999 and 7.6 percent in 2000. They returned to a positive margin in 2001,²⁰⁴ which at 5.3 percent was its best performance during the period examined, even though subject imports were at their highest level in that year. The number of firms reporting operating losses increased from 2 out of 10 in 1998, to 8 out of 11 in 1999, but declined to 8 out of 14 in 2000, and to 6 out of 13 in 2001.²⁰⁵

The domestic greenhouse growers' capital expenditures declined throughout the period examined, from \$44 million in 1998 to \$42 million in 1999, \$18 million in 2000, and \$2 million in 2001.²⁰⁶ *** domestic greenhouse growers accounted for the majority of the capital expenditures reported during the period examined, and these expenditures generally represented ***.²⁰⁷ Several domestic greenhouse growers reported that subject imports from Canada had a negative effect on their ability to obtain bank loans, thereby forcing them to reduce the size of their capital investments and cancel expansion projects.²⁰⁸ *** that reported research and development expenses during the period examined. *** research and development expenses ***.²⁰⁹

Thus, although greenhouse growers experienced solid performance with respect to many indicators over the period examined (such as capacity, production, shipments, and employment), their operating results suffered in 1999 and 2000. Reductions in capital expenditures and difficulty raising capital stem from the financial difficulties in 1999 and 2000. However, we do not find that subject imports were responsible for the negative financial results of greenhouse growers.

Operating losses in 1999 appear to be caused by declines in per-unit operating income; as noted in the section on Price Effects, subject imports were not responsible for falling prices in 1999. In 2000, the domestic greenhouse growers' per-unit revenues returned nearly to their 1998 level, but as a result of increased costs in 2000, they again experienced operating losses, although less than during 1999.^{210 211} We have found above that domestic greenhouse growers' prices were not suppressed by subject imports in 2000. In 2001, the domestic greenhouse growers experienced a small improvement in per unit revenues, but a significant decrease in average operating expenses, which resulted in a return to overall positive operating income in 2001 that was higher than the growers' operating income in 1998.²¹²

²⁰⁴ CR and PR at Table VI-1 (as revised in INV-Z-036); CR at VI-15, PR at VI-3.

²⁰⁵ CR and PR at Table VI-1 (as revised in INV-Z-036). In addition, Colorado Greenhouse declared bankruptcy in 2000, and its assets were ultimately liquidated. CR at VI-2, VI-12 (as revised in INV-Z-036), PR at VI-1 and VI-3. Suntastic reportedly declared bankruptcy in 2000, and is no longer in operation. CR at VI-2, n.8, PR at VI-1, n.8. Ecoscience, the parent company of a third producer, Village Farms, declared bankruptcy in 2001. CR at VI-2, PR at VI-1.

²⁰⁶ CR and PR at Table VI-5 (as revised in INV-Z-036).

²⁰⁷ CR at VI-18, n.27 (as revised in INV-Z-036), PR at VI-5, n.27 .

²⁰⁸ CR and PR at F-3 to F-4 (as revised in INV-Z-036). In contrast, about half of responding field tomato growers reported that they had experienced no negative effects from subject imports, while the other half reported that subject imports had forced them to reduce the size of their capital investments. CR and PR at F-4.

²⁰⁹ CR at VI-18 (as revised in INV-Z-036), n. 26, PR at VI-5, n.26.

²¹⁰ CR and PR at Table VI-1 (as revised by INV-Z-036), CR and PR at Table VI-2 (as revised by INV-Z-036).

²¹¹ Changes in average unit operating costs were attributable to such factors as capacity expansions and start-up problems, changes in product mix, and higher energy costs. CR at VI-15 to VI-16, PR at VI-3 to VI-5.

²¹² Id. Petitioners contended that the greenhouse growers' improved financial results in 2001 were a result of
(continued...)

Absent significant volume or price effects by subject imports, we do not regard the bankruptcies of various domestic greenhouse tomato producers to be evidence of a significant adverse impact of subject imports. The record reflects that Village Farms encountered financial difficulties at least in part due to merger costs, increased expenses experienced during the addition of four new facilities, *** to finance expansion, crop losses due to pests, and ***.²¹³ Similarly, the record suggests that Colorado Greenhouse encountered financial difficulties at least in part due to mismanagement, high employee turnover, partial crop losses due to viruses and insects, and damage from hail and wind.²¹⁴ Colorado Greenhouse also suffered from perceptions of poor quality after marketing under its name poorer quality tomatoes produced in Mexico, which adversely affected its sales.²¹⁵ Similarly, the former president of Suntastic USA testified that technical difficulties caused that company's bankruptcy, including horticultural challenges of growing greenhouse tomatoes in the southern United States, such as pests, fungus, and extreme swings in outside temperature.²¹⁶

Based on the above, we find that subject imports of greenhouse tomatoes from Canada are not having significant adverse impact on the domestic fresh tomato industry.

VI. NO THREAT OF MATERIAL INJURY BY REASON OF SUBJECT IMPORTS

Section 771(7)(F) of the Act directs the Commission to determine whether an industry in the United States is threatened with material injury by reason of the subject imports by analyzing whether "further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted."²¹⁷ The Commission may not make such a determination "on the basis of mere conjecture or supposition," and considers the threat factors "as a

²¹² (...continued)

"survivor bias." They note that certain greenhouse growers purchased the low-priced assets of bankrupt greenhouse growers, and thus experienced ***. Improved financial performance of the industry in 2001, as suggested by Petitioners, does reflect a healthier subset of operations. Colorado Greenhouse ceased operations entirely and only the most efficient parts of it were reconstituted in the form of Sun Blest Management. With the exception of ***, however, operating income increased in 2001 primarily because of improvements in average operating expenses and somewhat higher average unit sales revenue. See Staff notes, David Boyland, March 29, 2002.

²¹³ CR at VI-2 n.7, ***, VI-15 n.15 and VI-16 n.21 and PR at VI-1, n.7, VI-3 n.13, VI-4 n.15 and IV-5, n.21; see, generally, Respondents' Prehearing Brief at 98-104, Exhibit 31, Exhibit 32, Exhibit 33; Conf. Tr. at 113-14 (Cervini).

²¹⁴ CR at VI-15 n.15 and PR at VI-4, n.15; see, generally, Respondents' Prehearing Brief at 105-111, Exhibit 34, Exhibit 35; Conf. Tr. at 17-20, 51-53 (Fahrenbruch), 75-76 (Fahrenbruch and Bailey), 113-14 (Cervini).

²¹⁵ Conf. Tr. at 113 (Cervini), 119-20 (Gianatti). We find that the closure of Colorado Greenhouse's New Mexico facility in 1999 was caused by operational problems at the facility rather than by subject imports. Colorado Greenhouse's average unit costs ***, most likely due to the numerous problems recited above. See Respondents' Posthearing Brief at A-43 to A-45.

²¹⁶ Hearing Tr. at 163-64 (Metzger); Respondents' Posthearing Brief at A-6. See, generally, Hearing Tr. at 161-164 (Metzger); Respondents' Prehearing Brief at 97-98, Exhibit 30; Respondents' Posthearing Brief at A-1 to A-9.

²¹⁷ 19 U.S.C. §§ 1673d(b)(1), 1677(7)(F)(ii).

whole.”²¹⁸ In making our determination, we have considered all factors that are relevant to this investigation.²¹⁹

We conduct our analysis of the threat of material injury with respect to the domestic fresh tomato industry as a whole. As noted above, however, we have limited data about the field portion of the domestic industry. While we do not assume that domestic greenhouse tomato growers are an accurate proxy for the domestic fresh tomato industry as a whole, we would expect that any threat of material injury by reason of subject imports would be most apparent with respect to the greenhouse growers, given that subject imports are most interchangeable with domestic greenhouse tomatoes, and that the volume of subject imports is considerably larger in relation to domestic greenhouse production than to domestic field production. We therefore consider in our analysis that, if subject imports threaten to cause material injury to the domestic industry as a whole, this threat should be even more pronounced with respect to domestic greenhouse growers alone.

Based on an evaluation of the relevant statutory factors, we find that an industry in the United States is not threatened with material injury by reason of imports of greenhouse tomatoes from Canada that Commerce found to be sold in the U.S. market at less than fair value.

The United States accounted for a majority of shipments by the subject Canadian producers during the period examined. The share of the foreign producers’ shipments that was exported to the United States was *** percent in 1998, then fluctuated downward to *** percent in 2001.²²⁰ The home market accounted for nearly all the rest of shipments by the subject foreign producers.²²¹

Despite the general export orientation of the producers of the subject merchandise, the record does not indicate that substantially increased imports in the imminent future are likely. There is no evidence of significant unused production capacity. The capacity utilization of the Canadian producers was very high, exceeding *** percent in every year of the period examined, and it was projected to be in excess of that figure in 2002.²²² Nor is there evidence of an imminent, substantial increase in production capacity among the foreign producers. The capacity of the foreign producers did increase sharply from 1998 to 1999, and from 1999 to 2000.^{223 224} Capacity was essentially flat, however, in 2000 and 2001, and is projected to

²¹⁸ 19 U.S.C. § 1677(7)(F)(ii). An affirmative threat determination must be based upon “positive evidence tending to show an intention to increase the levels of importation.” Metallverken Nederland B.V. v. United States, 744 F. Supp. 281, 287 (Ct. Int’l Trade 1990), citing American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1280 (Ct. Int’l Trade 1984); see also Calabrian Corp. v. United States, 794 F. Supp. 377, 387-88 (Ct. Int’l Trade 1992), citing H.R. Rep. No. 98-1156 at 174 (1984).

²¹⁹ 19 U.S.C. § 1677(7)(F)(i). Factor VII regarding raw and processed agriculture products is inapplicable in this investigation because the subject merchandise includes a raw agriculture product only. See 19 U.S.C. § 1677(7)(F)(i)(VII).

²²⁰ CR and PR at Table VII-1 (as revised by INV-Z-037).

²²¹ CR and PR at Table VII-1 (as revised by INV-Z-037).

²²² CR and PR at Table VII-1 (as revised by INV-Z-037).

²²³ CR and PR at Table VII-1 (as revised by INV-Z-037).

²²⁴ Petitioners assert that table VII-1 undercounts the capacity of the foreign producers, because it does not account for ***. Petitioners’ Posthearing Brief at Okun-38. Subsequent to Petitioners’ assertion, however, the Commission received questionnaire responses accounting for nearly all of the disputed capacity, and those figures are reflected in the final Staff report. See Foreign Producer Questionnaire from *** (which reported ***). The following foreign producers also submitted questionnaires ***: *** (***), *** (***), and *** (***). Accordingly, the decline in capacity is not due to undercounting.

decline in 2002.²²⁵ Moreover, as noted in the foregoing discussion of the conditions of competition, expansions in capacity require significant capital expenditures. Even after expansion, there may be delays in production as tomato plants mature and begin to bear fruit, and due to the seasonal nature of greenhouse tomato production in Canada.²²⁶

There is some potential for product-shifting because fruits and vegetables other than tomatoes are currently grown in greenhouses in Canada.²²⁷ Tomatoes, however, already constitute the majority of greenhouse vegetables grown in Canada, suggesting that the greenhouse acreage available for shifting from other products to tomatoes is limited to some degree.²²⁸ More importantly, there is no evidence that a significant shift is expected in the imminent future. Furthermore, capacity for greenhouse production is projected to decline and any shift in production may be delayed by the time required for a tomato plant to bear fruit as well as by the seasonal growing cycle.²²⁹

There is not a significant rate of increase of the volume or market penetration of subject imports indicating the likelihood of substantially increased imports in the imminent future. As discussed above, volume increased in absolute terms from 1998 to 2001. Despite the absolute increases, market penetration of the subject imports was low, and thus the absolute increases were not significant. In 2002, both the foreign producers' production and shipments to the United States were projected to decline.²³⁰ Inventories are not an important consideration in our analysis, because the product is perishable and cannot be inventoried for any significant amount of time.²³¹ Taking these factors into account, we conclude that the record does not indicate a likelihood of substantially increased imports is imminent.

We also find no evidence in the record that subject greenhouse tomatoes are likely to enter the United States at prices likely to have a significant depressing or suppressing effect on domestic prices. The subject imports were priced higher than the vast majority of field tomatoes, and in price comparisons mostly oversold the domestic greenhouse tomatoes in 1999, 2000, and 2001.²³² Nor does the record indicate a likely and imminent decline in the price of the subject imports.

The record does not indicate actual or potential negative effects on the existing development and production efforts of the domestic industry. While the domestic greenhouse tomato growers experienced unfavorable financial results during certain years of the period examined, they improved by the end of the period examined.²³³ These unfavorable results reflect costs incurred by the expanding greenhouse tomato production, and in 1999 by price declines for domestic fresh tomatoes not related in significant part to

²²⁵ CR and PR at Table VII-1 (as revised in INV-Z-037).

²²⁶ See CR at VI-15 n.15 and PR at VI-4 n.15 (showing that production startup may not coincide with the optional cropping cycle). Petitioners submitted evidence that two firms have submitted building applications to build additional greenhouse acreage. Petitioners' Posthearing Brief at Okun-38 and Exhibit 13. The additional acreage is relatively small, however, and the evidence submitted by Petitioners does not establish when the additional greenhouses would be built or become operational, or what plants would be grown in those greenhouses. Several foreign producers reported reductions in acreage devoted to greenhouse tomato production. CR at VII-3 (as revised in INV-Z-037) and PR at VII-1).

²²⁷ CR at VII-4 (as revised in INV-Z-037) and PR at VII-2.

²²⁸ CR at VII-4 (as revised in INV-Z-037) and PR at VII-2.

²²⁹ CR and PR at Table VII-1 (as revised in INV-Z-037).

²³⁰ CR and PR at Table VII-1 (as revised at INV-Z-037).

²³¹ CR at II-7 (as revised at INV-Z-037) and PR at II-4.

²³² See the discussion of the price effects of subject imports above.

²³³ See the discussion of the impact of subject imports above.

subject imports.²³⁴ Moreover, greenhouse growers' capacity, production, shipments, and productivity all increased over the course of the period examined, and the financial condition of the domestic industry improved over the course of the period examined as well, all despite increased volumes of subject imports.²³⁵

We have considered whether there are any other demonstrable adverse trends that indicate the probability of likely material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time). In this regard, there are no known dumping findings or antidumping remedies in third-country markets against the subject imports.²³⁶ Moreover, third country markets account for less than *** percent of shipments by the foreign producers.

Given the lack of likely volume and price effects of subject imports and the present condition of the domestic industry, we find that material injury by reason of subject imports of greenhouse tomatoes from Canada is not imminent.

Based on an evaluation of all the relevant statutory factors, we do not find that further dumped subject imports from Canada are imminent or that material injury by reason of such imports would occur absent an antidumping duty order. Accordingly, we do not find that an industry in the United States is threatened with material injury by reason of subject imports from Canada that Commerce found to be sold in the United States at less than fair value.

CONCLUSION

For the foregoing reasons, we determine that an industry in the United States is not materially injured or threatened with material injury by reason of imports of greenhouse tomatoes from Canada that Commerce found to be sold in the United States at less than fair value.

²³⁴ Id.

²³⁵ Id.

²³⁶ CR at VII-4 (as revised at INV-Z-037) and PR at VII-2.

DISSENTING VIEWS OF COMMISSIONER LYNN M. BRAGG

Greenhouse Tomatoes from Canada, Inv. No. 731-TA-925 (Final)

Based on the record in this investigation, I determine that an industry in the United States is materially injured by reason of imports of greenhouse tomatoes from Canada that are sold in the United States at less than fair value. Accordingly, I respectfully dissent from the majority's negative determination.

I. DOMESTIC LIKE PRODUCT & DOMESTIC INDUSTRY

To determine whether an industry in the United States is materially injured or threatened with material injury by reason of the subject merchandise, the Commission must first define the "domestic like product" and the "industry."¹ Section 777(10) of the Tariff Act of 1930, as amended ("the Act"), defines the 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."² The Commission's decision regarding the appropriate domestic like product in an investigation is a factual determination made on a case-by-case basis.³ No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation. The Commission looks for clear dividing lines among possible like products and disregards minor variations.⁴ In addition, Congress has indicated that the definition of the like product should not be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under consideration.⁵ Although the Commission is not bound by prior determinations pertaining even to the same imported products,⁶ the Commission must accept the determination of the Department of Commerce ("Commerce") as to the scope of the imported merchandise allegedly subsidized or sold at less than fair value and determine what domestic product is like the imported articles Commerce identified.⁷

¹ 19 U.S.C. § 1677(4)(A).

² 19 U.S.C. § 1677(10).

³ See NEC Corp. v. United States, 36 F. Supp. 2d 380, 383 (Ct. Int'l Trade 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) ("every like product determination 'must be 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) common manufacturing facilities, production processes, and production employees; (5) customer or producer perceptions; and, when appropriate, (6) price. See Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int'l Trade 1996).

⁴ Nippon Steel, 19 CIT at 455; Torrington, 747 F. Supp. at 748-49.

⁵ See, S. Rep. No. 96-249 at 90-91 (1979). In my view, the inclusion of field-grown tomatoes in the definition of the domestic like product in this investigation frustrates the purpose of the statute by impeding the consideration of the domestic industry that is adversely affected by the subject imports under consideration.

⁶ Nippon, 19 CIT at 455; Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1169 n.5 (Ct. Int'l Trade 1988); Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1087-88 (Ct. Int'l Trade 1988); see also, subsequent discussion regarding previous investigations *infra* at n. 23.

⁷ Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568 (Fed. Cir. 1996); Torrington, 747 F. Supp. at 748-52.

Commerce's final determination defines the imported merchandise within the scope of this investigation as:

All fresh or chilled tomatoes grown in greenhouses in Canada, *e.g.*, common round tomatoes, cherry tomatoes, plum or pear tomatoes, and cluster or "on-the-vine" tomatoes. Specifically excluded from the scope of this investigation are all field-grown tomatoes.⁸

In the preliminary phase of this investigation, I joined a unanimous Commission in defining a single domestic like product consisting of only greenhouse tomatoes.⁹ The Commission found that the preliminary record evidenced differences between greenhouse and field-grown tomatoes in physical characteristics and uses, channels of distribution, production processes, producer and customer perceptions, and prices; however, the Commission stated that in any final phase of this investigation it would re-examine the domestic like product definition.

In the final phase of this investigation, the record presents evidence which again raises the question of whether to expand the domestic like product beyond the scope to include field-grown tomatoes. Petitioners¹⁰ contend a narrow domestic like product is appropriate in light of unique characteristics and uses;¹¹ distinct production facilities, processes, and employees;¹² different channels of distribution;¹³ producer and consumer perspectives¹⁴ indicating no interchangeability;¹⁵ and the price premium due to

⁸ Notice of Final Determination of Sales at Less than Fair Value: Greenhouse Tomatoes from Canada, 67 Fed. Reg. 8781, 8782 (Feb. 26, 2002).

⁹ Greenhouse Tomatoes from Canada, Inv. No. 731-TA-925 (Prelim.), USITC Pub. No. 3224 (May 2001) ("Preliminary Determination") at 5-10.

¹⁰ Petitioners are Carolina Hydroponic Growers Inc., Eurofresh, Inc., HydroAge, Sunblest Management LLC, Sunblest Farms LLC, and Village Farms, LP.

¹¹ CR at I-3, PR at I-2; Petitioners' Prehearing Brief at 4-7; Hearing Tr. at 17-18, 124; Petitioners' Posthearing Brief at 8, Okun-6-8, Written Questions-5-6, Ex. 4 (referencing greenhouse tomatoes and their superior flavor, redder color, thinner skin, higher water content, and overall better quality).

¹² CR at I-5-6, PR at I-4-5; Petitioners' Prehearing Brief at 8-9; Petitioners' Posthearing Brief at 8, Okun-8-10, Written Questions-8-9, Exs. 6-9 & 17 (emphasizing that no domestic firms produce both greenhouse and field-grown tomatoes, and that production processes and employees are distinct between the products).

¹³ CR at I-9-10, PR at I-6; Petitioners' Prehearing Brief at 14; Hearing Transcript ("Hearing Tr.") at 19-21, 62 & 70 (noting that the record indicates that greenhouse growers pack their tomatoes, while most field growers do not, and that between 30 and 40 percent of field-grown tomatoes are sold to food service establishments while only very few greenhouse tomatoes are sold to the food service industry).

¹⁴ CR at I-8-9, PR at I-5-6; Petitioners' Prehearing Brief at 15-16, Ex. 4; Petitioners' Posthearing Brief at 9, Written Questions-10 (recognizing that greenhouse tomatoes and field-grown tomatoes may not be perceived by home tomato buyers as qualitatively different). I find this to be less probative, if probative at all. The initial purchasing decisions by retail grocers, wholesalers and distributors, and food service buyers is the more compelling point at which these greenhouse and field-grown tomatoes compete. Decisions at this level determine which product will be available, in what quantity, pricing, and point-of-sale placement.

¹⁵ CR at I-6-8, PR at I-5-6; Petitioners' Prehearing Brief at 10-14, Ex. 4-5; Petitioners' Posthearing Brief at 8, Okun-1, Hillman-3, Ex. 5 (noting that *** reported that greenhouse tomatoes and field-grown tomatoes are not interchangeable or commercially substitutable).

greenhouse tomatoes' higher quality.¹⁶ In contrast, respondents¹⁷ request a broader domestic like product given past Commission investigations in which the majority of the Commission consistently defined the like product as all fresh tomatoes.¹⁸ Respondents also highlight that purchasers reported they bought both greenhouse and field tomatoes,¹⁹ that these tomatoes compete with each other for shelf space in grocery stores weekly, and that high-quality, locally-grown field tomatoes oversell greenhouse tomatoes in some markets.²⁰ While the respondents emphasize the evidence indicating that field tomatoes may compete with the greenhouse tomatoes during narrow segments of their respective marketing cycle,²¹ I find more persuasive the record evidence indicating that three quarters of purchasers confirmed that greenhouse and field tomatoes are not interchangeable.²² I also find that, on balance, there is a clear dividing line between greenhouse tomatoes and field tomatoes given the distinct production facilities, processes, and employees, unique channels of distribution, different characteristics and uses, producer and customer perceptions indicating no interchangeability, and premium prices for greenhouse tomatoes. Finally, I note that I am not bound by past decisions of the Commission involving domestic tomato production.²³

In my view, the information developed in this final phase investigation reinforces the definition of a single domestic like product comprised of greenhouse tomatoes only; therefore, I again define the domestic like product coextensively with the scope of the subject merchandise. Based on my definition of the

¹⁶ CR at I-10, PR at I-7; Petitioners' Prehearing Brief at 10-11; Hearing Tr. at 84, 295 & 297; Petitioners' Posthearing Brief at 9.

¹⁷ Respondents are BC Hot House Foods, Inc., Ontario Greenhouse Vegetable Growers, and BC Vegetable Greenhouse I.L.P.

¹⁸ Respondents' Prehearing Brief at 4, 11, 16-18; Hearing Tr. at 145-46; Respondents' Posthearing Brief at 17. Those decisions, in my view, reflect now dated perceptions. The most recent evidence regarding greenhouse tomatoes' distinct characteristics and uses, as well as separate production facilities and the other relevant criteria, I believe, substantiate the development of greenhouse tomatoes as a separate product and a domestic industry apart from field-grown tomato production.

¹⁹ Respondents' Prehearing Brief at 20-59, 60-62; Hearing Tr. at 146-53, 183, 227-28 & 298; Respondents' Posthearing Brief at 4, A-17-18, A-51-55, A-61-63, Exs. 14, 20, 23-26 & 31-32.

²⁰ CR at I-10, II-13-14, PR at I-7, II-8, Conference Transcript ("Conf. Tr.") at 161-62 (Gianatti, Comito); Respondents' Prehearing Brief at 63; Hearing Tr. at 147, 149, 151-52, 158 (Gianatti), 161, 165-66; Respondents' Posthearing Brief at 3, A-20-22, Ex.6.

²¹ Conf. Tr. at 161-62 (Gianatti, Comito); Hearing Tr. at 158 (Gianatti).

²² CR at I-6-8, II-10-14, PR at I-5-6, II-6-8.

²³ See Ranchers-Cattlemen Action Legal Foundation v. United States, 74 F. Supp. 2d 1353, 1379 (Ct. Int'l Trade 1999); Live Cattle from Canada and Mexico, Invs. Nos. 701-TA-386 (Prelim.) and 731-TA-812-813 (Prelim.), USITC Pub. 3155 (Feb. 1999) at 5-6 n.20. In the context of a Title VII investigation, the Commission examined the domestic tomatoes industry in Fresh Tomatoes from Mexico, Inv. No. 731-TA-747 (Final), USITC Pub. No. 2967 (May 1996) and defined the domestic like product as all fresh tomatoes, coextensive with the scope, but did not specifically address the issue of greenhouse tomatoes in its determination. Given that the Commission voted to conduct a full sunset review of that order in January 2002, the domestic like product issue is still outstanding in the review investigation. The Commission again examined the domestic fresh tomato industry in a global safeguard investigation, Fresh Tomatoes and Bell Peppers, Inv. No. TA-201-66, USITC Pub. No. 2985 (Aug. 1996), in which I defined two separate domestic like products, distinguishing between greenhouse tomatoes and field-grown tomatoes given the very different production processes, higher prices and quality differences, and different channels of distribution. The record in this investigation indicates that the foregoing distinctive factors still exist and have continued to develop, and that greenhouse tomatoes continue to constitute a separate U.S. market, apart from field tomatoes, since the previous investigations six years ago. Hearing Tr. at 48-52.

domestic like product, I define the corresponding domestic industry as all growers of greenhouse tomatoes in the United States.

Pursuant to provision 19 U.S.C. § 1677(4)(B) of the Act, I further consider whether any producer of the domestic like product should be excluded from the domestic industry for purposes of an injury determination; if “appropriate circumstances” exist, then the Commission has the discretion based on the facts presented in each case to exclude a related party that may be shielded from any injury that might be caused by the subject imports.²⁴

In the preliminary phase of this investigation, the Commission determined not to exclude any domestic producer as a related party. The current record indicates that domestic greenhouse tomato producer *** purchased subject imports during the period of investigation, and ***,²⁵ therefore each is a related party. However, *** imported a small volume of subject imports relative to their domestic production.²⁶ In addition, all producers account for a significant share of domestic production, and the financial performance of each does not suggest that any producer has been shielded from the effects of unfairly traded imports.²⁷ Consequently, I find that appropriate circumstances do not exist to exclude *** or *** as a related party.

II. MATERIAL INJURY BY REASON OF SUBJECT IMPORTS

A. Conditions of Competition

I consider several conditions of competition to be pertinent to my analysis in the final phase of this investigation.

Demand for greenhouse tomatoes in the United States dramatically expanded from a small niche base during the early 1990s and steadily rose throughout the period of investigation.²⁸ Apparent U.S. consumption increased 34.7 percent between 1998 and 2001, from 456 million pounds in 1998 to 614 million pounds in 2001.²⁹

Although the supply of domestic greenhouse tomatoes also increased during this period of growing demand,³⁰ several domestic producers struggled financially, ceased production, were partially liquidated, or reorganized in bankruptcy.³¹ In particular, domestic producers’ capacity rose from 168 million pounds (416 acres) in 1998 to 246 million pounds (548 acres) in 2001, and U.S. production increased from 154 million pounds in 1998 to 229 million pounds in 2001.³² However, firm closures and bankruptcies reduced domestic producers’ production capacity and capacity utilization, resulting in more than 10 percent (or over

²⁴ See Torrington Co., 790 F. Supp. at 1168; Sandvik AB v. United States, 721 F. Supp. 1322, 1331-32 (Ct. Int’l Trade 1989), *aff’d without opinion*, 904 F.2d 46 (Fed. Cir. 1990); Empire Plow Co. v. United States, 675 F. Supp. 1348, 1353-54 (Ct. Int’l Trade 1987).

²⁵ CR/PR at Tables III-4-5; CR/PR at IV-1.

²⁶ CR/PR at Tables III-4-5.

²⁷ CR/PR at Revised Table C-1.

²⁸ CR at II-8-10, PR at II-5-6.

²⁹ CR/PR Memorandum INV-Z-037 at Table C-1 (“Revised Table C-1”).

³⁰ *Id.*

³¹ Petitioners’ Prehearing Briefing at 33-34; Hearing Tr. at 54-55, 122-23.

³² CR/PR at Revised Table C-1.

100 out of 648 acres) of total domestic capacity idled and unused for greenhouse tomato production by 2001.³³

As noted in the preliminary determination,³⁴ I again find that the record evidence is mixed regarding the relationship between demand for greenhouse tomatoes and demand for field-grown tomatoes. I recognize that the record provides some indication that greenhouse tomatoes compete with field tomatoes to a limited degree during narrow segments of their respective marketing cycle,³⁵ and therefore field tomatoes appear to have some limited influence on the domestic greenhouse tomato market. Nevertheless, I note that the record also indicates that the U.S. demand for field tomatoes remained stable during the period of investigation, in contrast to the dramatic increase in U.S. consumption of greenhouse tomatoes, which underscores the fundamental existence of unique characteristics and uses, as well as the distinctive markets, for these two separate products.³⁶

Greenhouse tomato production, competition, and thus price, follow a seasonal pattern.³⁷ Northern U.S. growers plant in late fall, begin harvesting in winter or early spring, and produce until November; southern U.S. growers plant in summer, begin harvesting in early fall, and produce until late spring.³⁸ Given that domestic production occurs in both northern and southern climates, the industry as a whole essentially harvests greenhouse tomatoes year-round.³⁹ However, Canadian production begins in March, peaks in May, and declines progressively until December.⁴⁰ Accordingly, a substantial volume of Canadian greenhouse tomatoes enter the U.S. market in early spring and exit the market in late fall;⁴¹ thus, the timing of subject imports, as well as their volume, are important considerations in understanding production and marketing cycles for domestic and subject merchandise.

In addition, I note that the domestic industry for this agricultural product is characterized by high fixed costs due to the substantial expenses associated with building, financing, and operating greenhouses.⁴² Domestic producers rely on their ability to access both operating and investment capital and therefore require a high level of cash flow in order to justify further investment and pace capacity utilization and expansion with the market demand and growth.⁴³

The record indicates that domestically-produced and imported subject merchandise are broadly interchangeable given their similar quality.⁴⁴ Most domestically-produced and imported greenhouse

³³ Hearing Tr. at 9-10, 47 & 292.

³⁴ Preliminary Determination at 16.

³⁵ CR at I-8, II-13-14, PR at I-5, II-8; Conf. Tr. at 161-62 (Gianatti, Comito); Hearing Tr. at 158 (Gianatti).

³⁶ CR at II-9, PR at II-5-6.

³⁷ CR at V-23, PR at V-4.

³⁸ CR at II-6, PR at II-4.

³⁹ CR at II-6, PR at II-4.

⁴⁰ CR at II-16-17, PR at II-10.

⁴¹ Petitioners' Prehearing Briefing 16-18, 21-31, Ex. 7; Hearing Tr. at 10-11, 34, 36, 51 & 293-94.

⁴² Petitioners' Prehearing Brief at 16-17.

⁴³ Hearing Tr. at 39 (Mr. Fahrenbruch).

⁴⁴ CR at II-18-19, PR at II-11-12.

tomatoes are sold in the spot market;⁴⁵ producers are price takers, given the perishability of greenhouse tomatoes.⁴⁶

Nonsubject imports account for a significant portion of the U.S. market. However, the volume of nonsubject imports followed a declining trend over the period of investigation and were priced comparably to domestically-produced greenhouse tomatoes, depending on quality. In addition, nonsubject imports from the Netherlands enter the U.S. market year-round, and nonsubject imports from Mexico, Israel, and Spain enter primarily in the winter months.⁴⁷

B. Volume

The volume of subject imports significantly increased both absolutely and relative to consumption and production throughout the period of investigation.⁴⁸ In particular, the volume of subject imports increased *** percent between 1998 and 2001, from *** million pounds in 1998 to *** million pounds in 2001.⁴⁹ As the volume of subject imports steadily increased, they also captured a growing share of the U.S. market. The market share of subject imports grew from *** percent in 1998 to *** percent in 1999, and then to *** percent in 2000, but marginally declined to settle at *** percent in 2001.⁵⁰ Although domestic producers also increased their share of the growing U.S. market, subject imports captured a much larger share of the expanding U.S. market.⁵¹ The volume effect of subject imports was exacerbated by their seasonality because most subject imports entered spring to fall, which magnified the seasonal adverse price effect as discussed below.⁵² Accordingly, I find that the volume and increase in volume of subject imports are significant.

⁴⁵ CR at V-2-4, PR at V-1-3.

⁴⁶ Hearing Tr. at 113 (Mr. Fahrenbruch).

⁴⁷ CR/PR at Revised Table C-1.

⁴⁸ CR/PR at Revised Table C-1.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ CR/PR at Revised Table C-1. The volume of nonsubject (other than Canadian source) imports declined from 173 million pounds in 1998 to 150 million pounds in 1999, and to 146 million pounds in 2000. Although nonsubject imports increased to 159 million pounds in 2001, overall nonsubject imports declined 8.3 percent between 1998 and 2001. Similarly, nonsubject imports' share of the U.S. market declined from 38.0 percent in 1998 to 25.8 percent in 2000, but increased to 25.9 percent in 2001. Nonetheless, overall nonsubject imports lost 12.1 percent of the U.S. market over the period of investigation. *Id.* After Commerce amended the final *de minimis* margin of a foreign producer/U.S. importer, the volume of nonsubject Canadian imports changed. The revised volume of Canadian nonsubject imports increased *** percent between 1998 and 2001, from *** million pounds in 1998 to *** million pounds in 2001. Canadian nonsubject imports accounted for *** percent of the U.S. market share in 1998 and *** percent in 2001. *Id.*

⁵² CR/PR Memorandum INV-Z-037 at Figures V-2-9 (“Revised Figures V-2-9”) (citing the figures that compare the delivered weekly prices of domestic and Canadian products to the volume of domestic and Canadian products sold to retailers and distributors from 1999 through 2001, which provide a more visual line-graph comparison of significant volumes and significant price effects of subject imports over the period of investigation).

C. Price Effects of Subject Imports

Due to the importance of the seasonal patterns of greenhouse tomato production, competition, and thus price in this investigation, I begin my price effects analysis with a discussion of price trends.

The price trends for greenhouse tomatoes exhibited seasonal fluctuations during the years examined.⁵³ Prices were generally higher in the winter and typically declined beginning in the spring, with the lowest prices in May, only to slowly return to high winter prices by November. I note that the seasonal pricing patterns coincide with the seasonal production and volume of subject imports entering the U.S. market; that is, prices dropped to their lowest level in May, at the same time Canadian subject imports reached their highest volume level.⁵⁴

In addition to this seasonal pattern, I note the decline in average unit values. In particular, since domestic producers consider prices on a yearly average basis,⁵⁵ I find it noteworthy that average unit values (“AUVs”) for the domestic like product declined from 1998 to 1999, slightly recovered in 2000 and 2001, but were lower overall (1.1 percent) at the end of the investigation period.⁵⁶ Subject imports’ AUVs followed the same trend but with larger overall declines (*** percent) during the period of investigation.⁵⁷ Importantly, I consider the declining price trends in the context of dramatically expanding domestic consumption, during which time domestic producers would have anticipated increased prices sufficient to cover their increasing costs, but were unable to do so.⁵⁸

As noted previously, domestically produced and subject imported greenhouse tomatoes are broadly interchangeable, given the same quality, and therefore, competition is largely on the basis of price for this commodity-type product.⁵⁹ Greenhouse tomato producers are price takers, not price makers, that have very little leverage to influence prices given the product’s perishability. Notice of price changes is quickly and efficiently disseminated via the spot market, and contracts are negotiated weekly or monthly.⁶⁰ Commission staff collected weekly pricing data for four products, two greenhouse tomato products and two field-grown tomato products. As in the preliminary phase of this investigation, the pricing comparisons between domestic and subject greenhouse tomatoes evidence a mixed pattern of overselling and underselling.⁶¹ The absence of a strong pattern of underselling is not surprising given the commodity-type nature of the product and the efficient dissemination of price changes in the market. Nonetheless, price comparisons for sales to both retailers and distributors indicate that subject imports undersold the domestic product in 27 percent of pricing comparisons.⁶² Also, I note that the frequency of underselling increased

⁵³ CR at V-23, PR at V-4; CR/PR Memorandum INV-Z-037 at Table V-1 (“Revised Table V-1”).

⁵⁴ CR/PR at Revised Figures V-2-9.

⁵⁵ Hearing Tr. at 56-57.

⁵⁶ CR/PR at Revised Table C-1.

⁵⁷ *Id.*

⁵⁸ CR/PR at Revised Table C-1.

⁵⁹ CR at II-18-19, PR at II-11-12; see Cattle from Canada and Mexico, Invs. Nos. 701-TA-386, 731-TA-812-13 (Prelim.), USITC Pub. No. 3155 (Feb. 1999) at 55-56.

⁶⁰ CR at V-3, PR at V-1-2.

⁶¹ I note the Petitioners’ argument ***. See Hearing Tr. at 240-49 (Closed Session); Memorandum INV-Z-035. Notwithstanding such discrepancies, I find the pricing data indicate that when the volume of subject imports increased, the U.S. market prices trended down. CR/PR at Figure V-2-9.

⁶² CR/PR at Revised Table V-5.

over the period of investigation.⁶³ Additionally, given the importance of retailers discussed previously in the domestic like product section, I have also considered the sales at the retail level to have more probative value regarding the impact on price. Importantly, two-thirds of subject Canadian greenhouse tomatoes were sold to retailers, and the majority of instances of underselling occurred in sales to retailers during the peak production and import season of the Canadian subject imports.⁶⁴

Finally, in addition to the effect of subject imports, I also considered the effects of field tomatoes and nonsubject imports⁶⁵ on prices of greenhouse tomatoes. Respondents argue that the volumes and quality of field-grown tomatoes directly affect the price of greenhouse tomatoes, especially when considering prices of all fresh tomatoes.⁶⁶ I find that the long-acknowledged seasonality of field-grown tomatoes does not explain the recent period of declining greenhouse tomato prices, particularly in light of the relatively stable production and pricing of field-grown tomatoes. Indeed, I note that greenhouse tomato prices typically increase in the fall, even as domestic field tomato volumes evidence their seasonal increase, which does not support the contention that field-grown tomatoes directly affect the prices of greenhouse tomatoes.⁶⁷

Accordingly, for all the foregoing reasons, I find that apart from any other contributing factors, the significant volume of subject imports throughout the period of investigation caused significant price suppression and depression in the U.S. market even as apparent U.S. consumption of greenhouse tomatoes increased dramatically.

D. Impact of the Subject Imports on the Domestic Industry

Notwithstanding the increases in apparent U.S. consumption, as well as U.S. shipments and production by domestic producers over the period of investigation, the data demonstrate a drastic deterioration in the financial health of the domestic industry, resulting from significant declines in U.S. price levels and the inability to cover costs, which I found were by reason of subject imports.⁶⁸

⁶³ CR/PR at Revised Table V-5.

⁶⁴ CR/PR at Revised Figures V-2-3.

⁶⁵ As discussed previously in conditions of competition, the record indicates that although the market share of nonsubject imports is significant, the volume of nonsubject imports, however, followed a declining trend over the period of investigation and were priced comparably to domestically-produced greenhouse tomatoes, depending on quality. See Conditions of Competition *infra* at 7. In addition, the majority of nonsubject imports enter the U.S. market during different seasons of the year than subject imports. Accordingly, in my view, the record evidence does not support the contention that nonsubject imports negatively affect the price of domestic greenhouse tomatoes.

⁶⁶ Respondents' Prehearing Brief at 84-86, Ex. 25; Hearing Tr. at 151.

⁶⁷ CR at V-24-25, PR at V-4, V-18 CR/PR at Table D-1, Figures D-1-4.

⁶⁸ In an amended final antidumping determination, Commerce found the following weighted average margins: BC Hot House Foods 18.04; All Others 16.53; Mastronardi Produce Ltd. 0.52 or *de minimis*; J-D Marketing Inc. *de minimis*; and Red Zoo Marketing *de minimis*. Fed. Reg. at (67 FR 15528, April 2, 2002). I note that I do not ordinarily consider the magnitude of the margin of dumping to be of particular significance in evaluating the effects of subject imports on the domestic producers. See Separate and Dissenting Views of Commissioner Lynn M. Bragg in Bicycles from China, Inv. No. 731-TA-731 (Final), USITC Pub. 2968 (June 1996); Anhydrous Sodium Sulfate from Canada, Inv. No. 731-TA-884 (Prelim.), USITC Pub. 3345 (Sept. 2000) at 11, n.63.

The injury to the domestic industry is most evident in the widespread poor financial performances of the industry as a whole throughout the period of investigation.⁶⁹ For example, 2 of 10 domestic producers reported losses in 1998, but by 1999, 8 of 11 producers reported losses, and 8 of 14 reported losses in 2000.⁷⁰ In 2001, 6 of 13 reported losses.⁷¹ Overall, the domestic industry suffered cumulative net losses during the period of investigation.⁷² The significant volumes of increasing imports from Canada from spring to fall adversely affected the domestic industry's profitability. Despite increases in the volume of domestic production, U.S. shipments, and sales over the period of investigation during a time of growing demand, domestic producers were unable to increase prices to cover operating expenses, due to significant volumes of Canadian subject imports. As a result, the domestic industry's operating income collapsed from a nominal profit in 1998 to substantial losses in 1999 and 2000.⁷³ In 2001, the domestic industry's operating margins improved to a 5.3 percent profit due to restructuring efforts by some domestic producers.⁷⁴ Notwithstanding these restructuring efforts by some producers, the 2001 improvement in operating margins was not related to favorable market performance, and therefore, does not negate the drastic deterioration of the overall domestic industry's financial health over the period of investigation and the significant adverse impact of subject imports.

In particular, a number of domestic producers were either plagued with financial difficulties (***) ; ceased production (Suntastic (bankruptcy) and Carolina Hydroponic Growers); were liquidated and sold in part (Colorado Greenhouses); or went through bankruptcy reorganization (Village Farms).⁷⁵ Thus, although U.S. demand was experiencing high growth, a substantial amount of greenhouse acreage capacity nonetheless sat idle by 2001 as numerous domestic producers struggled financially.⁷⁶

An additional indicator of financial deterioration is the decline in the domestic industry's cash flow.⁷⁷ I consider the seasonal impact of subject imports as particularly significant for this agricultural industry, given the compressed seasonal harvest cycle for the producers of greenhouse tomatoes. A weak performance in seasonal returns has an immediate impact on cash flow for the next season's operations and the ability to compete in the next cycle. The weakened performance affects producers' access to credit as well.⁷⁸ With return on investment depressed in this agricultural industry, domestic producers cannot secure conventional agribusiness credit necessary for current operations, as well as for any expansion.⁷⁹ Not surprisingly, capital expenditures declined 95 percent over the investigation period; this further evidences that the domestic industry has been adversely impacted by the increasing supply of subject imports that depressed and suppressed U.S. prices and prevented the domestic industry from expanding production to

⁶⁹ CR/PR Memorandum INV-Z-036 at Table VI-3 ("Revised Table VI-3").

⁷⁰ CR/PR Memorandum INV-Z-036 at Table VI-1 ("Revised Table VI-1").

⁷¹ CR/PR at Revised Table VI-1.

⁷² Hearing Tr. at 9, 39 & 292.

⁷³ CR/PR at Revised Table C-1.

⁷⁴ *Id.* Specifically, ***.

⁷⁵ CR at VI-1-2, PR at VI-1; Petitioners' Prehearing Brief at 34 & 36; Hearing Tr. at 37 & 43.

⁷⁶ Petitioners' Prehearing Brief at 40-41; Hearing Tr. at 9-10, 47.

⁷⁷ CR/PR at Revised Table VI-1.

⁷⁸ Hearing Tr. at 39, 41-42.

⁷⁹ *See* Petition at 37 & Ex. 14; Petitioners' Prehearing Brief at 36-37, Ex. 14; Hearing Tr. at 10, 133; Petitioners' Posthearing Brief at 13.

keep pace with the expanding U.S. demand.⁸⁰ In sum, low market prices caused by the subject imports made creditors unwilling to extend the necessary credit to domestic producers; in turn, domestic producers with idle capacity were unable to generate sufficient income to service existing and proposed debt levels.⁸¹
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I also considered, in addition to subject imports, other factors that may be contributing to overall injury,⁸³ including over-expansion and mismanagement of company finances. While the record indicates that some domestic producers have experienced financial difficulties due to high overhead investments, new expansion costs, and unexpected plant diseases,⁸⁴ I found that, on balance, the record does not indicate that these factors account for the extensive injury to the domestic industry. Rather, the domestic industry as a whole experienced staggering losses and the inability to raise necessary capital attributable to significant price suppression and depression as a result of significant volumes of subject imports, a large portion of which undersold the domestic product.⁸⁵ Therefore, the record indicates that over the period of investigation, the only significant change in the U.S. market that accounts for the significant adverse impact experienced by the domestic industry is the significant volume, and increase in volume, of subject imports that caused significant negative price effects in the U.S. market and corresponding performance losses.

Based upon all of the foregoing, I determine that subject imports have had a significant adverse impact on the domestic industry producing greenhouse tomatoes.

III. CONCLUSION

For the foregoing reasons, I determine that the domestic industry producing greenhouse tomatoes is materially injured by reason of subject imports from Canada.

⁸⁰ CR/PR at Revised Table C-1.

⁸¹ Petitioners' Prehearing Brief at 36-37, Ex. 14; Hearing Tr. at 10, 133; Petitioners' Posthearing Brief at 13.

⁸² It is apparent that just as the developing domestic industry entered a period of dramatically increasing U.S. demand, a significant influx of unfairly traded subject imports disrupted the industry's market condition and prospects to the point where the continued viability of many U.S. producers is now in question; specifically, unfair imports from Canada entered the U.S. market at a critical point in the U.S. marketing cycle disrupting the domestic industry's ability to sustain needed operating cash flow for operations and access to credit for further development.

⁸³ 19 U.S.C. § 1677(7)(C)(iii); *see also*, SAA at 851, 885.

⁸⁴ CR at VI-16-18, PR at VI-5.

⁸⁵ CR/PR at Revised Table VI-1 & Revised Table C-1.

