Certain Orange Juice From Brazil

Investigation No. 731-TA-1089 (Final)(Second Remand)

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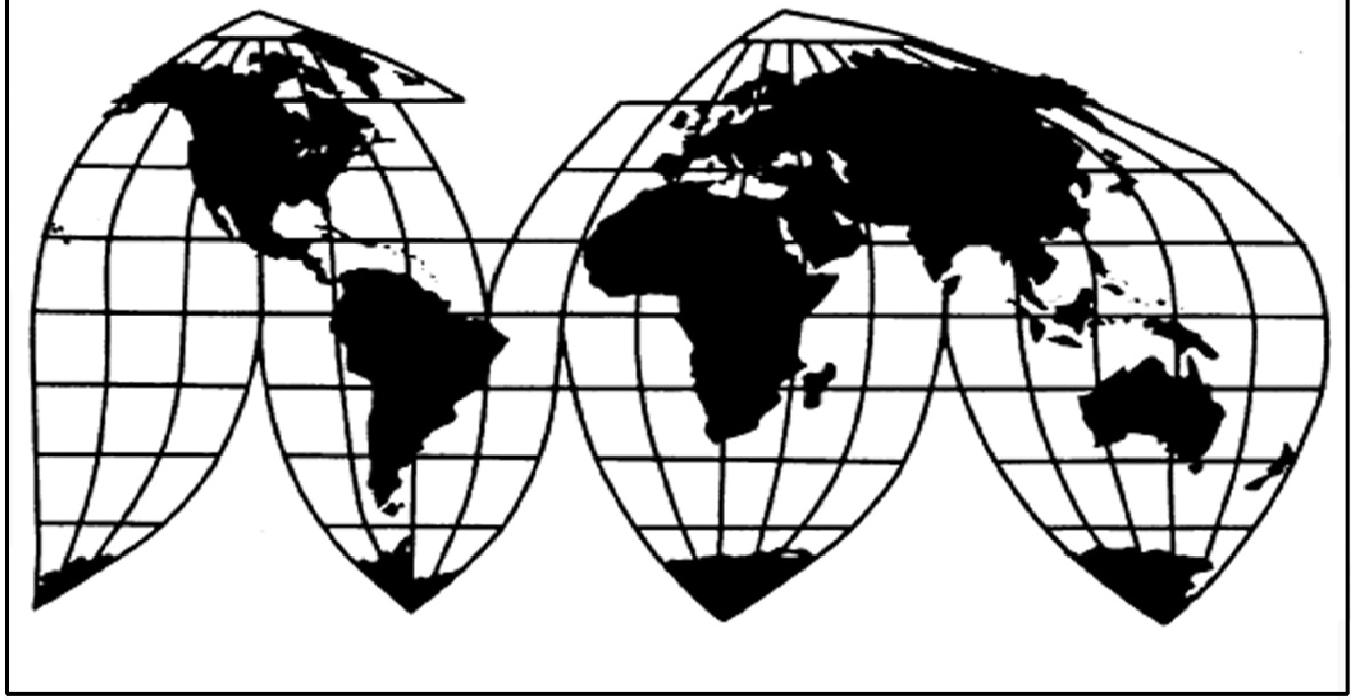
U.S. International Trade Commission



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U.S. International Trade Commission

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In February 2006, the United States International Trade Commission ("Commission") determined that an industry in the United States was materially injured by reason of imports of certain orange juice from Brazil that were found by the Department of Commerce to be sold at less than fair value ("LTFV").[1] Respondent Tropicana Products, Inc. appealed the Commission's determination to the U.S. Court of International Trade ("CIT"). On April 12, 2007 the CIT remanded the case to the Commission, and on June 26, 2007, the Commission again determined that an industry in the United States was materially injured or threatened with material injury by reason of imports of certain orange juice from Brazil sold at less than fair value.[2]

On September 19, 2007, the CIT remanded the case to the Commission for a second time, and on October 19, 2007, the Commission again determines that an industry in the United States is materially injured or threatened with material injury by reason of imports of certain orange juice from Brazil sold at less than fair value.[3]

[1] Chairman Stephen Koplan and Commissioners Charlotte R. Lane and Shara L. Aranoff made affirmative determinations; Vice Chairman Deanna Tanner Okun and Commissioners Jennifer A. Hillman and Daniel R. Pearson made negative determinations. *Certain Orange Juice from Brazil, Inv. No. 731-TA-1089 (Final),* USITC Publication 3838, March 2006, p. 1.

[2] Chairman Daniel R. Pearson and Commissioner Deanna Tanner Okun and Irving A. Williamson dissented.

[3] Chairman Daniel R. Pearson and Commissioner Deanna Tanner Okun and Irving A. Williamson dissenting.

VIEWS OF THE COMMISSION

On September 19, 2007, the U.S. Court of International Trade ("CIT" or "the Court") remanded two aspects of the Commission's first remand determination in Certain Orange Juice from Brazil, Inv. No. 731-TA-1089 (Final), USITC Pub. 3930 (June 2007).[1] Upon consideration of the Court's remand instructions and the information in the record, as obtained in both the original investigation and the first remand proceedings, we determine that an industry in the United States is materially injured by reason of imports of certain orange juice from Brazil ("certain orange juice") that the Department of Commerce has found are sold in the United States at less than fair value ("LTFV").[2] Subject to the Views expressed herein, we adopt and incorporate in their entirety the Commission's Views in both the original and first remand determinations.[3]

I. Issues on Remand

The Court's second remand opinion addresses two issues. First, the Court concluded that "the Commission did not properly examine the inverse correlation between domestic production and subject imports" and remanded the issue to the Commission for further explanation. See Slip Op. at 4. Second, the Court found that "the Commission did not conduct a proper analysis of the impact of non-subject imports" and instructed the Commission to apply the "replacement/benefit" test set forth in Bratsk Aluminium Smelter v. United States, 444 F.3d 1369 (Fed. Cir. 2006). See Slip Op. at 8-13.

II. Response to the Inquiries of the CIT

A. Inverse Correlation Between Domestic Production and Subject Imports

We address the first issue raised by the Court, i.e., the so-called "inverse correlation" between domestic production and subject imports.[4] The Court stated that it was "uncertain how the Commission obtained its data regarding domestic production" referenced in footnote 47 of the Commission's first remand determination and directed further explanation from the Commission on this subject. Slip Op. at 7.

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[1] Tropicana Products, Inc. v. United States, Slip Op. 07-141 (Ct. Int'l Trade, Sept. 19, 2007) ("Slip Op.").

[2] In these second remand proceedings, as in the first remand proceedings, three Commissioners have reached affirmative determinations (Vice Chairman Aranoff and Commissioners Lane and Pinkert), and three Commissioners have reached negative determinations (Chairman Pearson and Commissioners Okun and Williamson). If the voting Commissioners "are evenly divided as to whether the determination should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination." 19 U.S.C. § 1677(11).

[3] In the original determination, three Commissioners reached an affirmative determination, finding present material injury (then-Chairman Koplan and Commissioners Lane and Aranoff), and three reached a negative determination (then-Vice Chairman Okun and Commissioners Hillman and Pearson). See Certain Orange Juice from Brazil (Final), USITC Pub. 3838 (March 2006).

[4] Commissioner Lane notes that the terms "correlation" and "inverse correlation" have several meanings. As those terms are used in the immediate context of comparing domestic production to subject imports, she interprets them simply to mean that there was a simultaneous increase in the value of one and decrease in the value of the other. She notes that while a high degree of correlation may be one indication of a possible causal relationship, such correlation, by itself, does not establish a causal relationship.

In footnote 47 of its first remand determination, the Commission inadvertently referenced data concerning domestic *orange production* rather than the data it had otherwise relied upon elsewhere in its determination concerning domestic *orange juice production*. Throughout the first remand determination, as in the original determination, the Commission found that domestic production of certain orange juice fell from 1.43 billion gallons SSE in crop year 2001/02 to 1.25 billion gallons SSE in crop year 2002/03, increased to 1.47 billion gallons SSE in crop year 2003/04, and dropped to 1.01 billion gallons SSE in crop year 2004/05. See USITC Pub. 3930 at 11, 12 n.42. The Commission intended to reference this domestic orange juice production data in footnote 47 just as it did in all other instances in which it discussed production data. The following Table reflects the data from Table IV-6 in the Confidential Report.

Item	2001/02	2002/03	2003/04	2004/05
Domestic Production (*1,000 gallons SSE*)	1,430,000	1,250,000	1,470,000	1,001,000
Subject Imports (*1,000 gallons SSE*)	110,000	227,000	154,000	231,000

Using domestic orange juice production data, we again note the substantive point that was addressed in footnote 47, i.e., subject import volumes were virtually identical in two crop years when domestic orange juice production varied substantially, thereby attenuating the magnitude of any inverse correlation between domestic production and subject imports. Specifically, domestic production of orange juice fell by 19 percent between crop year 2002/03 and crop year 2004/05, dropping from 1.25 billion gallons SSE in crop year 2002/03 to 1.01 billion gallons SSE in crop year 2004/05. See USITC Pub. 3930 at 11 & 13 n.47 (citing CR at Table IV-6). Despite these substantial fluctuations in domestic production levels, subject import volumes remained virtually unchanged in these two crop years, barely increasing from 227.3 million gallons SSE in crop year 2002/03 to 231.7 million gallons SSE in crop year 2004/05, or by approximately 2 percent. CR/PR at Table IV-6.[5]

Similarly, domestic production levels were nearly the same during two crop years (i.e., 2001/02 and 2003/04) when subject import levels varied very substantially. In crop year 2001/02, domestic production of certain orange juice was 1.43 billion gallons SSE, whereas subject imports were 109.7 million gallons SSE.[6] In crop year 2003/04, domestic production of certain orange juice was 1.47 billion gallons SSE, whereas subject imports were 154.2 million gallons SSE.[7] In other words, although domestic production was virtually the same in crop years 2001/02 and 2003/04, subject import volumes were 40.6 percent higher in crop year 2003/04 than in 2001/02.

Nevertheless, as in the original and first remand determinations, we recognize the apparent correlation noted by the Court, *i.e.*, that during the period of investigation, subject imports generally

[5] Further, the same point is true even when domestic production is measured by the volume of oranges, a measure which makes some sense given that respondents' arguments focus on the alleged shortages in domestic orange juice production due to diminished orange crops. Despite substantial fluctuations in orange crop levels in crop years 2002/03 and 2004/05, subject imports were virtually identical in those two crop years. In crop year 2002/03, the Florida orange crop totaled 203.0 million boxes, while subject imports totaled 227.3 million gallons SSE. In crop year 2004/05, the Florida orange crop totaled 149.6 million boxes, while subject imports totaled 231.7 million gallons SSE. CR/PR Tables III-4 & IV-6. In other words, regardless of whether domestic orange juice production or domestic orange production is examined, the end result is the same: subject imports were at virtually constant levels in two crop years, while domestic production of oranges and orange juice varied substantially.

[6] CR/PR at Table IV-6.

[7] Id.

increased when domestic production of certain orange juice fell and vice-versa.[8] This fact by itself, however, does not necessarily indicate that one was the result of the other or that there was a link between the two. Rather, we find that the evidence in this record as a whole fails to demonstrate that increases in subject imports were solely or even primarily the result of declines in domestic production, because there were other factors in play. We emphasize to the Court that we have carefully considered the relationship between domestic production and subject imports as part of our comprehensive analysis and interpretation of the entire record.

In our view, notwithstanding any inverse relationship between subject imports and domestic production, the record reflects a more significant, and indeed a positive, correlation among subject imports, subject merchandise inventory, and Brazilian production of certain orange juice. As we explained in the first remand determination, this positive correlation strongly suggests that, contrary to the Respondents' claim that low-priced subject imports were merely "pulled" into the market to offset a domestic supply shortfall, increases in production levels in Brazil affected the increase in subject imports during the POI. See USITC Pub. 3930 at 13-14. Again, we find this positive correlation among subject imports, subject merchandise inventory, and Brazilian production of certain orange juice to be probative.

Most importantly, regardless of any inverse relationship between subject imports and domestic production, there is ample evidence in the record demonstrating that the volume of subject imports entering the U.S. market in the final crop year after the hurricanes (i.e., crop year 2004/05), as in every other year of the POI, was higher than necessary to meet residual demand and limited the ability of domestic producers to sell their total available supply, inclusive of inventories, in the domestic market. See USITC Pub. 3930 at 14. Simply put, even accepting as true the inverse relationship between domestic production and subject imports, the volume of subject imports was significant, and injurious to the domestic industry, throughout the POI for the reasons given in our original and first remand determinations.

II. Application of the Bratsk "Replacement/Benefit" Test

We now turn to the second issue raised by the Court, i.e., the application of the Bratsk "replacement/benefit" test. The Court stated that on remand "the Commission must examine whether non-subject imports would replace subject imports if prices of subject imports reflected fair value. How the Commission chooses to carry out this task under the facts of this case is for it to determine in the first instance." Slip Op. at 8. Relatedly, in a footnote, the Court directed the Commission on remand to "examine [non-subject Brazilian producer] Citrovita's projected production and whether Citrovita would have exported more to the United States if subject imports had been fairly traded. This does not require the Commission to look into the future, an inquiry to which the Commission objects, so much as to hypothesize as to what the present players, such as Citrovita, would have done in a situation of fair trade." Id. at 11 n.8.

As the Federal Circuit has explained, the Bratsk analysis "is triggered whenever the antidumping investigation is centered on a commodity product, and price competitive non-subject imports are a significant factor in the market."[9] Thus, the Bratsk test is not required in every investigation; it is required only in investigations involving a "commodity product" where "price competitive non-subject imports are a significant factor in the market." If either triggering factor is not satisfied, the Bratsk replacement/benefit test is not implicated. Because the Court found that both Bratsk triggering factors

[8] See, e.g., USITC Pub. 3930 at 9.

[9] Bratsk, 444 F.3d at 1375.

were satisfied in this case and directed the Commission to apply the Bratsk replacement/benefit test, we have done so.[10]

Under the Bratsk replacement/benefit test, the Commission is directed to address "whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic producers."[11] Accordingly, we have examined non-subject imports, both individually and collectively, from the only non-subject Brazilian producer (i.e., Citrovita) and the three primary non-subject country suppliers (i.e., Belize, Costa Rica, and Mexico).

Based on our review of the record evidence, we find that Brazilian non-subject imports would not have replaced Brazilian subject imports during the POI. Most telling, there were *** exports of non-subject Brazilian orange juice to the United States during the POI. The only non-subject Brazilian producer, Citrovita, *** orange juice to the United States *** during the POI while it was subject to an antidumping duty order;[12] its exports to the United States *** long before the POI when it became subject to an antidumping duty order in 1987 in another investigation. That order covering Citrovita remained in place throughout almost the entire POI in the original investigation at issue in this case.[13] The *** of *** non-subject imports from Brazil during the POI strongly suggests that Citrovita made a strategic decision to *** exporting orange juice to the United States while it was subject to an antidumping duty order in another investigation, a decision that was unrelated to whether imports subject to this investigation were fairly traded.[14]

In March 2005, in a five-year review that was completed before the original determination at issue in this case, the Commission found that revocation of the antidumping duty order on certain frozen concentrated orange juice from Brazil covering Citrovita would not be likely to lead to continuation or recurrence of material injury.[15] There is no reason to conclude, however, that Citrovita would have exported significant quantities to the United States even after revocation of that order. At several times during the POI, including the final crop year, Citrovita reported capacity utilization rates exceeding *** percent, indicating that it did not possess ***, even without exporting *** orange juice to the United States.[16] Likewise, Citrovita has projected *** percent capacity utilization rates in crop years 2005/06

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[10] Although we have complied with the Court's instructions to apply the Bratsk "replacement/benefit" test, we continue to believe that the second Bratsk triggering factor is not satisfied because non-subject imports, which accounted for 8.0 percent of U.S. apparent consumption at their peak during the POI, did not have a significant presence in the U.S. market during the POI for the reasons given in our first remand determination. See USITC Pub. 3930 at 27-29; compare with Bratsk, 444 F.3d at 1375 (non-subject imports accounted for 73.0 percent to 83.6 percent of U.S. apparent consumption during the POI).

[11] Bratsk, 444 F.3d at 1375.

[12] CR/PR at Table I-14.

[13] See Frozen Concentrated Orange Juice from Brazil, 731-TA-326, USITC Pub. 3760 (Second Review) (March 2005).

[14] We emphasize that Bratsk requires a backward-looking analysis, i.e., the Commission analyzes replacement/benefit during the period of investigation. See e.g., Certain Polyester Staple Fiber From China, 731-TA-1104, USITC Pub. 3930 at 28 (June 2007); accord Bratsk, 444 F.3d at 1375 ("the Commission is required to make a specific causation determination and in that connection to directly address whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic producers.").

[15] Frozen Concentrated Orange Juice from Brazil, 731-TA-326, USITC Pub. 3760 (Second Review) (March 2005).

[16] Citrovita's capacity utilization rate increased from *** percent in crop year 2001/2002 to *** percent in crop year 2002/03, dropped to *** percent in crop year 2003/04, and then increased again to *** percent in crop year 2004/05. CR/PR at Table I-14.

and 2006/07 while also projecting *** exports to the United States in those two crop years.[17] Instead, Citrovita's projected exports in crop years 2005/06 and 2006/07 will continue to be devoted *** for European and Asian markets.[18] Indeed, in their pre-hearing brief in this investigation, respondents cited to the Commission's determination in the review involving Citrovita to illustrate that the growth in consumption and prices for FCOJM in third country markets was higher than in the United States and that "Brazilian exports," including those from Citrovita, "will be dedicated to other [non-U.S.] markets."[19] For all of these reasons, we do not find that non-subject imports from Brazilian producer Citrovita would have replaced the subject imports in the U.S. market.

In response to the Court's first remand order in this case,[20] we also collected, through questionnaires and public sources, data pertaining to production of orange juice in the three countries that accounted for the next largest shares of exports to the United States, after Brazil, during the POI. We find that non-subject imports from those three countries – Belize, Costa Rica, and Mexico – either individually or collectively could not have, and therefore would not have, replaced subject imports had the subject imports been fairly traded.

In crop year 2004/05, total exports from Belize were 25,900 metric tons or 36.1 million gallons SSE.[21] Of this total, non-subject imports from Belize into the U.S. market were 30.4 million gallons SSE in crop year 2004/05.[22] Even assuming that producers in Belize could have shifted all of their non-U.S. exports to the United States in crop year 2004/05, that would represent only an additional 5.7 million gallons SSE of non-subject imports from Belize into the U.S. market for that year, compared with subject imports from Brazil that year of 231.7 million gallons SSE. In other words, in crop year 2004/05, any additional non-subject imports from Belize diverted to the U.S. market from other export markets could have replaced only 2.5 percent of Brazilian subject imports.

In 2004/05, total exports from Costa Rica were 51.6 million gallons SSE, which represented near-record export levels for Costa Rica during the POI.[23] Even assuming that producers in Costa Rica could have shifted all of their non-U.S. exports to the United States in 2004/05, this would represent only an additional 26.5 million gallons SSE in non-subject imports from Costa Rica into the U.S. market for that year, whereas subject imports into the U.S. market that year totaled 231.7 million gallons SSE. In other words, in crop year 2004/05, any additional non-subject imports from Costa Rica diverted from other markets to the United States could have replaced only 11.4 percent of Brazilian subject imports in the U.S. market.

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[17] ***. CR/PR at Table I-14.

[18] CR/PR at Table I-14.

[19] Louis Dreyfus' Prehearing Brief at 86-87 (citing Frozen Concentrated Orange Juice from Brazil, 731-TA-326, USITC Pub. 3760 at 14 (Second Review) (March 2005)).

[20] Tropicana Products, Inc. v. United States, Slip Op. 07-55 (Ct. Int'l Trade April 12, 2007).

[21] CR at I-37; PR at I-27. To convert Belize's total exports of 25,900 metric tons to a usable gallons SSE figure, we multiplied 25,900 by 2,204.6 because there are 2,204.6 pounds of orange juice in a metric ton (25,900 * 2,204.6 = 57,099,140). The metric tons (57,099,140) were then adjusted by the degree brix for orange juice of 65 percent (57,099,140 *.65 = 37,114,441 metric tons). Finally, this figure (37,114,441 metric tons) was divided by the quantity of pound solids in a gallon of orange juice SSE, 1.029 (57,099,140/1.029 = 36,068,455.8 gallons SSE).

[22] CR/PR at Table I-5.

[23] Total Costa Rican exports of orange juice were 54.8 million gallons SSE in 2002, 45.0 million gallons SSE in 2003, 43.2 million gallons SSE in 2004, and 51.6 million gallons SSE in 2005. In 2005, Costa Rican producers' total exports were almost evenly divided between the United States (25.9 million gallons SSE) and the Netherlands (21.9 million gallons SSE). CR/PR at Table I-17.

In 2004/05, total exports from Mexico were 95.9 million gallons SSE, which represented by far their highest level during the POI.[24] Meanwhile, non-subject imports from Mexico into the U.S. market totaled 54.8 million gallons SSE in crop year 2004/05, which also represented their peak during the POI.[25] Even assuming that producers in Mexico could have shifted all of their non-U.S. exports to the United States in crop year 2004/05, this would represent only an additional 41.1 million gallons SSE in non-subject imports from Mexico into the U.S. market for that year, whereas subject imports into the U.S. market totaled 231.7 million gallons SSE in crop year 2004/05. In other words, even at their peak in crop year 2004/05, any additional non-subject imports from Mexico diverted from other export markets to the U.S. market could have replaced only 17.7 percent of Brazilian subject imports in the U.S. market.[26]

There is additional evidence in the record indicating that Mexican producers have limited ability to increase exports to the United States. Mexican production of orange juice fluctuated between 11.2 million gallons SSE in crop year 2002/03 and 104.2 million gallons SSE in crop year 2004/05, indicating that Mexican production was not always sufficient to support significant exports over the POI.[27] Most Mexican oranges are consumed domestically for fresh-squeezed juice rather than processed into orange juice.[28] Adverse weather conditions during the POI caused the orange crop in Mexico to fall from 4.3 million tons in crop year 2003/04 to 3.9 million tons in crop year 2004/05, and the crop was projected to continue to decline because of continuing adverse weather conditions.[29] Moreover, domestic demand for orange juice in Mexico increased during the POI from 5.9 million gallons SSE in 2001/02 to 7.0 million gallons SSE in 2004/05.[30]

Taken collectively, non-subject imports from Belize, Costa Rica, and Mexico could not have replaced subject imports in the U.S. market. Even using the conservative but unlikely assumption that non-subject producers in Belize, Costa Rica, and Mexico could have shifted all of their non-U.S. exports to the United States in crop year 2004/05, this would represent only an additional 73.3 million gallons SSE, compared to subject imports into the U.S. market that totaled 231.7 million gallons SSE in crop year 2004/05.[31] In other words, in crop year 2004/05, any additional non-subject imports from Belize, Costa Rica, and Mexico diverted from other export markets to the U.S. market could have replaced only 31.5 percent of Brazilian subject imports in the U.S. market.

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[24] Mexican producers of orange juice exported most of their production during the POI. In 2001/02, Mexican production of orange juice was 47.8 million gallons SSE, while total Mexican exports of orange juice were 43.2 million gallons SSE. In 2002/03, Mexican production of orange juice was 11.2 million gallons SSE, while total Mexican exports of orange juice were 5.6 million gallons SSE. In crop year 2003/04, Mexican production of orange juice was 28.3 million gallons SSE, while total Mexican exports of orange juice were 22.5 million gallons SSE. In 2004/05, Mexican production of orange juice was 104.2 million gallons SSE, while total Mexican exports of orange juice were 95.9 million gallons SSE. CR/PR at Table I-11.

[25] CR/PR at Table I-5.

[26] Available information on the record indicates that home market consumption is minimal relative to exports for Mexico. With respect to Mexico, only 8.3 million gallons SSE of Mexican production was consumed in the home market in 2004/05. CR/PR at Table I-11.

[27] CR/PR at Table I-11.

[28] CR at I-44; PR at I-32.

[29] CR at I-43 to I-44; PR at I-32 to I-34.

[30] CR/PR at Table I-20.

[31] As noted above, Mexican exports peaked in crop year 2004/05, and Costa Rican exports reached near-record levels in crop year 2004/05. Accordingly, non-subject imports from those countries would have been even less able to replace subject imports throughout the rest of the POI.

In light of the aforementioned record evidence, we conclude that non-subject imports from Belize, Costa Rica, and Mexico could not, and therefore would not, have replaced subject imports during the POI, even if subject imports were fairly traded. Furthermore, given the available information concerning the attractiveness of third-country markets compared to the U.S. market, we do not find that nonsubject producers in Belize, Costa Rica or Mexico would have shifted much, if any, of their exports to the United States at the risk of abandoning customers in other markets where, as respondents have pointed out, prices are higher than in the U.S. market. Even when considered together with non-subject imports from Citrovita, non-subject imports from Belize, Costa Rica, and Mexico would not have replaced the volume of subject imports in the U.S. market.[32]

Given our finding that total non-subject sources (i.e., both Brazilian and third-country non-subject imports from Belize, Costa Rica, and Mexico) could not have replaced subject imports during the POI, it follows a fortiori that they would not have replaced subject imports fully, and therefore continuation of the order would benefit the domestic industry. Accordingly, we find that the Bratsk "replacement/benefit" test is not met in this case and does not preclude us from reaching an affirmative determination.

III. Conclusion

For the stated reasons above, we again determine that the domestic industry producing certain orange juice is materially injured by reason of subject imports of certain orange juice from Brazil that are sold in the United States at less than fair value.

[32] As shown above, even using the conservative but unlikely assumption that non-subject producers from Belize, Costa Rica, and Mexico could have shifted all of their non-U.S. exports to the United States in crop year 2004/05, this would represent only an additional 73.3 million gallons SSE into the U.S. market. Making a more conservative assumption that Citrovita would have exported to the United States in crop year 2004/05 an amount equivalent to the amount of ***, this would represent only an additional *** gallons SSE. In other words, in crop year 2004/05, any additional non-subject imports from Citrovita, Belize, Costa Rica, and Mexico diverted from other export markets to the U.S. market could have replaced only *** gallons SSE, or *** percent of Brazilian subject imports in the U.S. market.