

UNITED STATES INTERNATIONAL TRADE COMMISSION

SPRING TABLE GRAPES FROM CHILE AND MEXICO
Investigations Nos. 731-TA-926 and 927 (Preliminary)

DETERMINATIONS AND VIEWS OF THE COMMISSION
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DETERMINATIONS

On the basis of the record¹ developed in the subject investigations, the United States International Trade Commission (Commission) determines,² pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1673b(a)) (the Act), that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded, by reason of imports from Chile and Mexico of spring table grapes, provided for in subheading 0806.10.40 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (LTFV).

BACKGROUND

On March 30, 2001, a petition was filed with the Commission and the United States Department of Commerce (Commerce) by the Desert Grape Growers League, Thermal, CA, and its producer-members, alleging that an industry in the United States is materially injured or threatened with material injury by reason of LTFV imports of spring table grapes from Chile and Mexico. Accordingly, effective March 30, 2001, the Commission instituted antidumping duty investigations Nos. 731-TA-926 and 927 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of April 5, 2001 (66 FR 18109). The conference was held in Washington, DC, on April 20, 2001, 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 Dennis M. Devaney dissenting with respect to imports of spring table grapes from Chile and Mexico.

VIEWS OF THE COMMISSION

Investigations Nos. 731-TA-926 and 927 (Preliminary)

SPRING TABLE GRAPES FROM CHILE AND MEXICO

Based on the record in these investigations, we find that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of table grapes from Chile or Mexico that are allegedly sold in the United States at less than fair value (“LTFV”).³

I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS

The legal standard in a preliminary antidumping investigation requires the Commission to find, based upon the information available at the time of the preliminary determination, whether there is a reasonable indication that a domestic industry is materially injured or is threatened with material injury, or that the establishment of an industry is materially retarded, by reason of the allegedly unfairly traded imports.⁴ In applying this standard, the Commission weighs the evidence before it and determines whether “(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation.”⁵

II. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. In General

In determining whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the Commission first defines the “domestic like product” and the “industry.”⁶ 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.”⁷ 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”⁸

³ Commissioner Dennis M. Devaney dissenting. See Commissioner Devaney’s Dissenting Views.

⁴ 19 U.S.C. § 1673b(a). See also American Lamb Co. v. United States, 785 F.2d 994, 1001-1004 (Fed. Cir. 1986); Aristech Chemical Corp. v. United States, 20 CIT 353, 354 (1996).

⁵ American Lamb, 785 F.2d at 1001 (Fed. Cir. 1986). See also Texas Crushed Stone Co. v. United States, 35 F.3d 1535, 1543 (Fed. Cir. 1994).

⁶ 19 U.S.C. §1677(4)(A).

⁷ Id.

⁸ 19 U.S.C. § 1677(10).

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, generally through the application of a six-factor test.⁹ No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation.¹⁰ The Commission looks for clear dividing lines among possible like products and disregards minor variations.¹¹ Although 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 LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified.¹²

B. Product Description

Commerce has defined the scope of the subject merchandise in these investigations as follows: imports of any variety of vitis vinifera species table grapes from Chile or Mexico, entered during the period April 1 through June 30, inclusive, regardless of grade, size, maturity, horticulture method (i.e., organic or not) or the size of the container in which packed. The scope specifically covers all varieties of seedless or seeded grapes including, but not limited to, Thompson, Red Flame, Red Globe, Perlettes, Superior seedless, Sugrone, Ribier, Black seedless, Red seedless, Blanca Italia, Moscatel Rosada, Crimson seedless, Lavallee, Emperor, Queen Rose, Calmeria, Christmas Rose, Down seedless, Beauty seedless, Almeria, Supreme seedless, Superior Seedless M., Late Royal, Muscat seedless, Royal seedless, Early Ribier, Cardinal, Moscatel Dorada, Black Giant, Kaiji, Lady Rose, Black Diamond, Piruviano, Early Thompson, King Ruby seedless, White seedless, Queen seedless, Autumn seedless, Royal, Pink seedless, Green Globe, Autumn Black, Black Beauty, and Royal Giant. The scope specifically covers all table grapes entered within the

⁹ 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).

¹⁰ See, e.g., S. Rep. No. 96-249 at 90-91 (1979).

¹¹ 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.”).

¹² Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568 (Fed. Cir. 1996) (Commission may find single like product corresponding to several different classes or kinds defined by Commerce); Torrington, 747 F. Supp. at 748-752 (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

April 1 through June 30 window of each year, whether or not subject to the Federal Marketing Order set forth in 7 CFR, part 925.¹³

The subject merchandise consists of all grapes imported from Chile and Mexico during April, May, and June that are intended for consumption in raw form as grapes. The term “table grapes” is used to distinguish these grapes from grapes that are grown for processing into products such as raisins or wine.

C. Domestic Like Product

1. Spring Table Grapes Versus All Table Grapes

The petitioners, the Desert Grape Growers League and its members,¹⁴ argue that the Commission should define the domestic like product to be only table grapes produced during April, May, or June (“Spring” table grapes).¹⁵ According to petitioners, the “most important factors the Commission must consider are not among the six traditional factors, but are the seasonal nature of domestic Spring table grape production and the perishability of the product.”¹⁶ Petitioners claim that Spring table grapes and table grapes grown later in the year¹⁷ differ in that they do not overlap in the market and only Spring table grapes are marketed coincidentally with the subject imports.¹⁸ They state that the Commission’s consideration of its traditional six factors should be strongly influenced by the seasonal nature of the product and its perishability. Petitioners argue that such an analysis supports defining the like product to be Spring table grapes rather than all table grapes.¹⁹

The Chilean and Mexican Respondents²⁰ argue that defining the domestic like product to be table grapes produced in April, May, and June would be contrary to the statutory definition of the domestic like

¹³ The description of the scope of investigation also stated:

For further discussion, see the May 9, 2001, memorandum from the case team to Richard Moreland and Joseph Spetrini entitled “Temporal Limitations on the Class or Kind Described in the Antidumping Duty Petitions on Spring Table Grapes from Mexico and Chile.” The scope excludes by-product grapes and other grapes for use as other than table grapes, including those grapes used for raisins, crushing, juice, wine, canning, processed foods and other by-product and not direct consumption purposes. The spring table grapes subject to these investigations are classifiable under subheading 0806.10.40 of the Harmonized Tariff Schedule of the United States (HTS). Although the HTS subheading is provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

66 Fed. Reg. 26831, 26832 (May 15, 2001).

¹⁴ Petition of March 30, 2001 at 1.

¹⁵ Petitioners’ Postconference Brief, Exh. 1 at 29.

¹⁶ Petitioners’ Postconference Brief, Exh. 1 at 30.

¹⁷ Most domestic table grapes are produced later in the year, north of the Coachella Valley in the Central Valley of California, the Kern District and San Joaquin Valley. See Petitioners’ Postconference Brief, Exh.22.

¹⁸ 19 U.S.C. § 1673b(a). See also American Lamb Co. v. United States, 785 F.2d 994, 1001-1004 (Fed. Cir. 1986); Aristech Chemical Corp. v. United States, 20 CIT 353, 354 (1996).

¹⁹ Petitioners’ Postconference Brief, Exh. 1 at 46-62.

²⁰ The Chilean Respondents are the Asociacion de Exportadores de Chile, an association of exporters of Chilean grapes. The Mexican Respondents are the Asociacion Agricola Local de Productores de Uva de Mesa, A.C., an association of Mexican producers of table grapes.

product and Commission practice. They argue that the timing of production and sale is not a basis for distinguishing between products for purposes of defining the domestic like product. Furthermore, they maintain that there are no significant differences between Spring table grapes and table grapes grown later in the year, particularly with respect to the six factors traditionally considered by the Commission.²¹

We have considered whether the statute permits us to consider seasonality as the main factor in our determination of domestic like product. We find that it does not. The statute requires the Commission to identify the product which is “like” the article subject to investigation.²² While seasonality and perishability may be *among* the factors we consider, they do not override the other factors that the Commission must examine to establish whether the domestic product is “like” subject imports.

The record does not indicate any significant differences between the table grapes produced during April, May, and June and those produced later in the year. The only apparent difference between these grapes is the timing of the harvest. The table grape harvest in the Coachella Valley generally begins in May and ends in July, while the harvest in the San Joaquin Valley begins in June or July and ends early in the following year.²³ However, as discussed below, other significant similarities between the products far outweigh this temporal distinction.²⁴

The physical characteristics and end uses of table grapes produced during April, May, and June and of those produced later in the year are essentially identical.²⁵ The similarities in product characteristics make table grapes produced in the Spring interchangeable with those grown later in the year. Petitioners

²¹ Mexican Respondents’ Postconference Brief at 24-30; Chilean Respondents’ Postconference Brief at 7-35.

²² 19 U.S.C. § 1677(10).

²³ See Mexican Respondents’ Postconference Brief, App. 5 (collecting time of harvest data from the USDA and Chuck Allen’s Market Review).

²⁴ Moreover, there is some, albeit attenuated, overlap in production and availability of Spring table grapes and the table grapes harvested later in the year, which necessarily varies from harvest to harvest due to variability in growing and harvesting conditions. Table grapes produced in the Coachella Valley and Arizona at the end of June and early July compete to some degree with San Joaquin Valley and Kern District table grapes, which are harvested beginning at the end of June or early July. See Petitioners’ Postconference Brief, Exh. 22 and Mexican Respondents’ Postconference Brief, App. 5. Coachella Valley producers were shipping grapes in July two of the last three years. See Petitioners’ Postconference Brief, Exh. 22. Further, Arizona growers, who petitioners characterize as producing Spring table grapes, produced a significant quantity of their table grapes in July in two of the last three years. *Id.* Like all table grapes, Spring table grapes can remain in storage and be present in the market for up to four to six weeks after they are produced. Tr. at 34. Thus, Spring table grapes and table grapes grown later in the year overlap to some degree in time of production and in the marketplace.

²⁵ See Tr. at 17-19; Confidential Staff Report, June 1, 2001 (“CR”) at I-7 to I-8, Public Staff Report (“PR”) at I-5. Petitioners claim that Spring table grapes have a shorter shelf life because they are grown at hotter temperatures and are subject to a federal marketing order. The federal marketing order regulates the quality of table grapes through inspections, but it is a minimal standard. Tr. at 25, 177-78. It also does not apply to grapes grown in Arizona. Therefore, not all Spring table grapes, as petitioner defines them, are subject to the marketing order. CR at I-4, PR at I-3. The record also indicates that growing temperatures in the San Joaquin Valley, where later-harvested grapes are grown, are quite hot at harvest time, suggesting that harvest temperatures do not differ significantly. Tr. at 87-88; Mexican Respondents’ Postconference Brief at App. 7. Regardless of the merit of petitioners’ claims, table grapes produced at other times in California are the same species and are used by consumers in the same manner. Petitioners’ assertions only suggest some degree of quality differences, which would not establish that table grapes grown at other times are not part of the same domestic like product.

assert that there is no actual interchangeability because table grapes produced in later months are not present in the market at the same time with Spring table grapes. As discussed above, the statute implicitly permits seasonality to be *among* the factors considered. It does not permit seasonality to override the substantial similarities between “Spring” and all other table grapes. Moreover, as already discussed, there is some overlap in harvest times, although we acknowledge that actual interchangeability is limited to the extent that producers of Spring table grapes try to avoid competing with the later-season table grapes grown in larger quantities further north in California.²⁶

Channels of distribution, manufacturing processes, and price are similar, if not identical, for Spring table grapes and table grapes grown later in the year. All table grapes move through similar channels of distribution.²⁷ The production processes for Spring table grapes and table grapes grown later in the year are essentially the same and some employees work on grape harvests in both the Coachella and San Joaquin Valleys.²⁸ There is no evidence that purchasers or producers perceive Spring table grapes to be significantly different from table grapes grown later in the year.²⁹ Prices for table grapes grown later in the year may be a bit lower, but this may reflect the much greater supply of table grapes during the Summer months.³⁰

Each Commission investigation is *sui generis* and based on a unique interaction of economic variables. Nonetheless, petitioners assert that the Commission’s 1983 decision in Fall-Harvested Round White Potatoes from Canada provides precedent for a finding a seasonal like product.³¹ While the Commission in that investigation defined the like product as round white potatoes harvested in the Fall, the Fall-harvested potatoes differed significantly in physical characteristics from those harvested at other times and the Commission’s decision was based on those differences and not on seasonality alone.³² Moreover, the Fall-harvested potatoes were in the market most of the year because they could be stored for long periods.³³

In conclusion, the statute does not permit seasonality to override other factors used to determine the domestic like product. In these investigations, we find a high level of similarity between “Spring” and other table grapes and a lack of any significant differences besides time of harvest. We therefore find the domestic like product to be all table grapes.

²⁶ Tr. at 101-102.

²⁷ CR at I-10 to I-11, PR at I-7.

²⁸ CR at I-9, PR at I-6. Petitioners have identified cultivation techniques for Spring table grapes that they assert are not used for table grapes grown at other times. However, these additional steps (application of a chemical to bring the vines out of dormancy and sprinkling the vines with water) are outweighed by the significant similarities in the overall production process. See Tr. at 23-24. See also Tr. at 53 (production processes same for San Joaquin Valley and Coachella Valley table grapes).

²⁹ See CR at I-9, PR at I-6; Tr. at 17-18.

³⁰ See Petitioners’ Postconference Brief, Exh.1 at 1 and Exh. 22.

³¹ Inv. No. 731-TA-124 (Final) USITC Pub. 1463 (Dec. 1983).

³² USITC Pub. 1463 at 6.

³³ See USITC Pub. 1463 at Table 18.

2. Seeded Table Grapes

The Chilean Respondents ask the Commission to define seedless and seeded table grapes as distinct domestic like products.³⁴ They note that seeded and seedless table grapes differ in physical characteristics in that only seeded table grapes have seeds and they argue that seeded and seedless table grapes are not interchangeable because only seedless table grapes can be used in salads and other foods.³⁵

Petitioners maintain that seeded and seedless table grapes should not be separate like products because seeds are only a minor physical characteristic of the grape and seedless and seeded grapes are produced, marketed, and sold side by side.³⁶

The presence or absence of a seed does not alter the fundamental physical characteristics or uses of table grapes. Seeds may limit interchangeability for certain uses, such as in salads, but both varieties travel through the same channels of distribution.³⁷ Seeded and seedless varieties are grown in the same manner.³⁸ There is some evidence that purchasers and producers perceive them to be different products and that some consumers prefer one or the other type.³⁹ Prices for seeded and seedless table grapes are similar.⁴⁰ Based on similarities in physical characteristics, end uses, production, channels of distribution and pricing, we conclude that the similarities between seeded and seedless table grapes outweigh any differences between these two types of table grapes.

D. Domestic Industry and Related Parties

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.⁴¹ Based upon our domestic like product definition, we define the domestic industry as all domestic producers of table grapes.

We must further 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.⁴²

³⁴ Chilean Respondents' Postconference Brief, Attachment 1 at 1.

³⁵ Chilean Respondents' Postconference Brief, Attachment 1 at 1-2.

³⁶ See Petitioners' Postconference Brief, Exh. 1 at 74-76

³⁷ CR at I-10, PR at I-7.

³⁸ Tr. at 68 (Bianco).

³⁹ Tr. 147, 161.

⁴⁰ See CR & PR at Figs. V-3, V-4 and V-5.

⁴¹ See United States Steel Group v. United States, 873 F. Supp. 673, 681-84 (CIT 1994), aff'd, 96 F.3d 1352 (Fed. Cir.1996).

⁴² 19 U.S.C. § 1677(4)(B).

Exclusion of such a producer is within the Commission's discretion based upon the facts presented in each case.⁴³

***, a domestic producer of table grapes, imported the subject merchandise during the period of investigation.⁴⁴ Therefore, it is a related party and may be excluded from the definition of the domestic industry if appropriate circumstances exist.

*** imported *** million pounds of subject imports from Mexico in 1999, *** million pounds in 2000, and has arranged for the importation of *** million pounds in 2001.⁴⁵ However, its production of table grapes was far greater, *** million pounds in 2000.⁴⁶ Given that it is primarily a domestic producer of table grapes, we decline to exclude *** from the domestic industry and therefore define the domestic industry as all producers of table grapes.⁴⁷

III. CUMULATION

A. In General

For purposes of evaluating the volume and price effects for a determination of reasonable indication of material injury by reason of the subject imports, section 771(7)(G)(i) of the Act requires the Commission to assess cumulatively the volume and effect of imports of the subject merchandise from all countries as to which petitions were filed and/or investigations self-initiated by Commerce on the same day, if such imports compete with each other and with domestic like products in the U.S. market.⁴⁸ In assessing

⁴³ Sandvik AB v. United States, 721 F. Supp. 1322, 1331-32 (Ct. Int'l Trade 1989), aff'd without opinion, 904 F.2d 46 (Fed. Cir. 1990); Empire Plow Co. v. United States, 675 F. Supp. 1348, 1352 (Ct. Int'l Trade 1987). The primary factors the Commission has examined in deciding whether appropriate circumstances exist to exclude the related parties include: (1) the percentage of domestic production attributable to the importing producer; (2) the reason the U.S. producer has decided to import the product subject to investigation, *i.e.*, whether the firm benefits from the LTFV sales or subsidies or whether the firm must import in order to enable it to continue production and compete in the U.S. market; and (3) the position of the related producers vis-a-vis the rest of the industry, *i.e.*, whether inclusion or exclusion of the related party will skew the data for the rest of the industry. *See, e.g., Torrington Co. v. United States*, 790 F. Supp. 1161, 1168 (Ct. Int'l Trade 1992), aff'd without opinion, 991 F.2d 809 (Fed. Cir. 1993). The Commission has also considered the ratio of import shipments to U.S. production for related producers and whether the primary interests of the related producers lie in domestic production or in importation. *See, e.g., Melamine Institutional Dinnerware from China, Indonesia, and Taiwan*, Inv. Nos. 731-TA-741-743 (Final), USITC Pub. 3016 at 14, n.81 (Feb. 1997).

⁴⁴ *See* CR & PR at Table IV-5.

⁴⁵ CR & PR at Table IV-5.

⁴⁶ Letter from *** to Department of Commerce, April 26, 2001, *in* Mexican Respondents' Postconference Brief, Exh.17.

⁴⁷ Petitioners have asserted that some Central Valley producers of table grapes are also importers of the subject merchandise. Petitioners' Postconference Brief, Exh. 1 at 3-4. However, petitioners have not argued that we should exclude these producers under the related parties provision and no evidence on the record indicates that appropriate circumstances exist to do so.

⁴⁸ 19 U.S.C. § 1677(7)(G)(i).

whether subject imports compete with each other and with the domestic like product,⁴⁹ the Commission has generally considered four factors, including:

- (1) the degree of fungibility between the subject imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;
- (2) the presence of sales or offers to sell in the same geographic markets of subject imports from different countries and the domestic like product;
- (3) the existence of common or similar channels of distribution for subject imports from different countries and the domestic like product; and
- (4) whether the subject imports are simultaneously present in the market.⁵⁰

While no single factor is necessarily determinative, and the list of factors is not exclusive, these factors are intended to provide the Commission with a framework for determining whether the subject imports compete with each other and with the domestic like product.⁵¹ Only a “reasonable overlap” of competition is required.⁵²

B. Analysis

Fungibility among the subject imports and the domestic like product is high,⁵³ as the same varieties of grapes of comparable quality are generally grown in the United States and in Mexico and Chile.⁵⁴ Subject imports from both countries and domestically-produced table grapes are sold or offered for sale in the same geographic market, the entire United States,⁵⁵ and the channels of distribution are similar for the subject imports and domestic table grapes.⁵⁶

⁴⁹ The SAA expressly states that “the new section will not affect current Commission practice under which the statutory requirement is satisfied if there is a reasonable overlap of competition.” SAA at 848, citing Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898, 902 (Ct. Int’l Trade 1988), aff’d, 859 F.2d 915 (Fed. Cir. 1988).

⁵⁰ See Certain Cast-Iron Pipe Fittings from Brazil, the Republic of Korea, and Taiwan, Inv. Nos. 731-TA-278-280 (Final), USITC Pub. 1845 (May 1986), aff’d, Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898 (Ct. Int’l Trade), aff’d, 859 F.2d 915 (Fed. Cir. 1988).

⁵¹ See, e.g., Wieland Werke, AG v. United States, 718 F. Supp. 50 (Ct. Int’l Trade 1989).

⁵² See Goss Graphic System, Inc. v. United States, 33 F. Supp. 2d 1082, 1087 (Ct. Int’l Trade 1998) (“cumulation does not require two products to be highly fungible”); Mukand Ltd. v. United States, 937 F. Supp. 910, 916 (Ct. Int’l Trade 1996); Wieland Werke, 718 F. Supp. at 52 (“Completely overlapping markets are not required.”).

⁵³ See Tr. at 17-18.

⁵⁴ CR at I-9 to I-10, PR at I-6; Tr. at 105.

⁵⁵ See Petitioners’ Postconference Brief, Exh. 2 (compiling importers’ questionnaire responses that generally indicated that the market was the entire United States).

⁵⁶ CR at I-10, PR at I-7.

Subject imports from Chile, however, are not to any significant degree simultaneously present in the market with subject imports from Mexico or the domestic like product.⁵⁷ The great majority of the Chilean subject imports are “packed out” and shipped to the United States by the end of April.⁵⁸ Since table grapes are highly perishable, they are generally no longer saleable 4-6 weeks after harvest.⁵⁹ Therefore, Chilean subject imports are essentially no longer competing in the U.S. market by early June and have relatively little overlap with subject imports from Mexico and the domestic like product.⁶⁰ This is confirmed by shipment data from U.S. importers and domestic producers which show minimal overlap in shipments between the subject imports from Chile and domestic table grapes as well as the subject imports from Mexico.⁶¹ Moreover, examining the period of investigation as a whole (36 months), there are only 3 months with coincidence of significant shipments of subject imports from both Chile and Mexico and the domestic like product.⁶²

We therefore find that a reasonable overlap of competition does not exist between the subject imports from Chile and Mexico. Nor do we find a reasonable overlap of competition between subject imports from Chile and the domestic like product. Consequently, we do not cumulate subject imports for the purpose of analyzing whether there is a reasonable indication that the domestic industry is materially injured or threatened with material injury by reason of the subject imports.⁶³

IV. MATERIAL INJURY OR THREAT OF MATERIAL INJURY BY REASON OF SUBJECT IMPORTS

⁵⁷ We note that the SAA approves of a temporal analysis for purposes of cumulation but not for like product. See SAA at 848, citing *Fundicao Tupy, S.A. v. United States*, 678 F. Supp. 898, 902 (Ct. Int’l Trade 1988), *aff’d*, 859 F.2d 915 (Fed. Cir. 1988).

⁵⁸ CR & PR at Figs. IV-3, IV-4, IV-5. The subject imports from Chile generally arrive in the United States about two weeks later. Chilean Respondents’ Postconference Brief at 7.

⁵⁹ Table grapes can be stored in refrigeration for up to 4-6 weeks. Tr. at 34.

⁶⁰ Petitioners claim that Chilean grapes are kept in cold storage for up to 90 days so that they can compete in the U.S. market into May and June. Petitioners’ Postconference Brief at 12 (citing Tr. at 19); Tr. at 52. The Chileans maintain that they do not store grapes for the long periods asserted by petitioners. Tr. at 135 (Mr. Bown); Tr. at 143; Tr. at 143 (Mr. Eastes). The record does not support a finding that subject product from Chile is present in the U.S. market in significant quantities past early June.

Table grapes harvested late in the season have shorter shelf lives and tend to sell for a lower price. CR at V-4, PR at V-3. Hence, there is a strong incentive to sell grapes when they are fresh and command a price premium and also to avoid competition with fresher grapes that arrive on the market later. CR at I-10, PR at I-6. See also Tr. at 106; Petitioners’ Postconference Brief, Exh.1 at 38. The marketing order’s April 20 start date provides an additional incentive to import table grapes from Chile before that date. See Chileans’ Postconference Brief, Exh 15 (showing that over 90 percent of Chilean imports are before the April 20 start of the marketing order which provides for USDA inspection of the imports).

⁶¹ See CR & PR at Tables V-1 and V-2 (domestic and Mexican grapes not competing until May and small quantities of Chilean imports reported in May, except in 2000); CR & PR at Table V-3 (Chilean subject imports competing in May but limited subject imports from Mexico and limited domestic grapes).

⁶² INV-Y-117, June 8, 2001, at 1-4. Importers shipped only very small quantities of subject imports from Chile during May in 1998, 1999, and 2000.

⁶³ As the CIT has held, “[a] finding by the ITC of a like product does not control whether the ITC finds competition between the subject imports for the purpose of cumulation.” *Ranchers-Cattlemen Action Legal Foundation v. United States*, 23 CIT ___, 74 F. Supp.2d 1353, 1371 (1999).

A. Legal Standard - Material Injury

In the preliminary phase of antidumping or countervailing duty investigations, the Commission determines whether there is a reasonable indication that an industry in the United States is materially injured by reason of the imports under investigation.⁶⁴ In making this determination, the Commission must consider the volume of subject 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.⁶⁵ The statute defines “material injury” as “harm which is not inconsequential, immaterial, or unimportant.”⁶⁶ In assessing whether there is a reasonable indication that the domestic industry is materially injured by reason of subject imports, we consider all relevant economic factors that bear on the state of the industry in the United States.⁶⁷ 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.”⁶⁸

With respect to the volume of the subject imports, section 771(7)(C)(i) of the Act provides that the “Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.”⁶⁹

With respect to the 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.⁷⁰

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.⁷¹ These factors include

⁶⁴ 19 U.S.C. §§ 1671b(a) and 1673b(a).

⁶⁵ 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).

⁶⁶ 19 U.S.C. § 1677(7)(A).

⁶⁷ 19 U.S.C. § 1677(7)(C)(iii).

⁶⁸ 19 U.S.C. § 1677(7)(C)(iii).

⁶⁹ 19 U.S.C. § 1677(7)(C)(i).

⁷⁰ 19 U.S.C. § 1677(7)(C)(ii).

⁷¹ 19 U.S.C. § 1677(7)(C)(iii). See also SAA at 851, 885 (“In material injury determinations, the Commission considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they also may demonstrate that an industry is

(continued...)

output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”^{72 73 74}

Petitioners have brought this case on the basis of injury to a “Spring” table grapes industry. However, as discussed, the statute does not permit the Commission to define such an industry on the facts of this case, and we are therefore required by statute to consider whether the entire domestic table grapes industry has been materially injured or is threatened with material injury by reason of subject imports.

B. Legal Standard - Threat of Material Injury

In the preliminary phase of antidumping or countervailing duty investigations, the Commission determines whether there is a reasonable indication that an industry in the United States is threatened with material injury by reason of the imports under investigation.⁷⁵

Section 771(7)(F) of the Act directs the Commission to determine whether the U.S. industry 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.”⁷⁶ The Commission may not make such a determination “on the basis of mere conjecture or supposition,” and considers the threat factors “as a whole” in making its determination whether dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued.⁷⁷ In making our determination, we have considered all statutory factors that are relevant to these investigations,⁷⁸ including the rate of the

⁷¹ (...continued)

facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports.” *Id.* at 885.).

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

⁷³ 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 notice of initiation, Commerce identified estimated dumping margins of 23.00 to 99.39 percent for subject imports from Chile and dumping margins of 0.00 to 114.77 percent for subject imports from Mexico. 66 Fed. Reg. 26831 (May 15, 2001). There are no known dumping findings involving the subject merchandise in any other markets. CR & PR at VII-1 n.2

⁷⁴ Commissioner Bragg notes that she does not ordinarily consider the margin of dumping to be of particular significance in evaluating the effects of subject imports on domestic producers. *See Separate and Dissenting Views of Commissioner Lynn M. Bragg in Bicycles from China*, Inv. No. 731-TA-731 (Final), USITC Pub. 2968 (June 1996).

⁷⁵ 19 U.S.C. §§ 1671b(a) and 1673b(a).

⁷⁶ 19 U.S.C. § 1673d(b) and 1677(7)(F)(ii).

⁷⁷ 19 U.S.C. § 1677(7)(F)(ii).

⁷⁸ 19 U.S.C. § 1677(7)(F)(i). Factor VI regarding product-shifting is not an issue in these investigations. Factor VII also is inapplicable because these investigations do not involve imports of a processed agricultural product.

increase in the volume and market penetration of subject imports, unused production capacity, and inventories of subject merchandise.

C. Conditions of Competition

The following conditions of competition are pertinent to our analysis of material injury and threat of material injury by reason of subject imports from Chile and Mexico.

U.S. apparent consumption of table grapes increased over the period of investigation.⁷⁹ To meet this growing demand, acreage dedicated to production in the United States has increased as have U.S. producers' shipments.⁸⁰ The total value of domestic producers' shipments has also increased.⁸¹

The production or harvesting of table grapes in the United States occurs from April through December, depending on the area where they are grown.⁸² The vast majority of U.S. production of table grapes occurs in months other than April, May, and June.⁸³ There is a substantial volume of nonsubject imports, including imports from Chile and Mexico, during periods other than April-June.⁸⁴

Grapes harvested in the Coachella Valley and grapes imported between April 20 and August 15 are subject to a federal marketing order.⁸⁵ The order provides for USDA inspections of table grapes from the Coachella Valley and imports so that consistent quality is maintained.⁸⁶

Purchasers generally buy table grapes on the spot market.⁸⁷ Prices for table grapes are generally high early in May-June and July-August when grapes are fresh and supply is limited; as the season

⁷⁹ Apparent consumption was 1.99 billion pounds in 1998, 2.15 billion pounds in 1999, and 2.32 billion pounds in 2000. CR & PR at Table IV-9.

⁸⁰ CR & PR at Table IV-9; Mexican Respondents' Postconference Brief, App. 8 (data from USDA NASS Noncitrus Fruits and Nuts 2000 Preliminary Summary, CASS Agricultural Overview 1998-99); Chilean Respondents' Postconference Brief, Exh. 11 (data from ODEPA and USDA, National Agricultural Statistics Service).

⁸¹ Mexican Respondents' Postconference Brief, App. 8; California Table Grapes Commission Situation Analysis 2000 (contained in Chilean Respondents' Postconference Brief, Exh. 26). While the data in the Situation Analysis reflects only California table grapes, California is the source of 99 percent of U.S. production. See CR at III-9, PR at III-8; CR & PR at Table III-8.

⁸² Mexican Respondents' Postconference Brief, App. 5. In any growing season, the Coachella Valley growers, which account for less than 15 percent of U.S. production, generally harvest first. The Arizona growers typically harvest next, and the central and northern California growers are the last to harvest. See Id.

⁸³ See CR & PR at Table III-8. Production during the three months ranged from 11.4 percent to 13.6 percent of total domestic production from 1998 to 2000. Id.

⁸⁴ Compare CR & PR at Table IV-7 with CR & PR at Table IV-6. Nonsubject imports from Chile are over five times the amount of subject imports from Chile. See CR & PR at Table IV-7.

⁸⁵ The marketing order, 7 C.F.R. 925, regulates the quality of imports and domestic grapes from the Coachella Valley from April 20 to August 15. See CR at I-4, PR at I-5. Because there is an incentive to ship immature grapes when prices are high early in the season, the marketing order's purpose is to ensure consistent table grape quality through inspection, thus avoiding customer dissatisfaction. 52 Fed. Reg. 8865 (Mar. 10, 1987) (contained in Chilean Respondents' Postconference Brief, Exh. 14).

⁸⁶ See Tr. at 13.

⁸⁷ CR at V-4, PR at V-3; Tr. at 18-19.

progresses, prices and quality generally decline.⁸⁸ When volumes of table grapes in the market peak, promotions in supermarkets are important for selling the large quantities available.⁸⁹

Table grapes are perishable and can generally be stored for only 4-6 weeks.⁹⁰ Producers have an incentive to bring their grapes to market earlier rather than later in order to avoid competition with other sources⁹¹ and ship the table grapes before they deteriorate.⁹² Moreover, the federal marketing order's April 20 start date provides an additional incentive for importers to import table grapes from Chile earlier in the season.⁹³

D. Chile - Material Injury

1. Volume of Subject Imports

The volume of subject imports from Chile was 96.6 million pounds in 1998, 79.8 million pounds in 1999, and 131.8 million pounds in 2000.⁹⁴ These imports' U.S. market share was 4.9 percent in 1998, 3.7 percent in 1999, and 5.7 percent in 2000 in terms of quantity.⁹⁵ When viewed in isolation, these volumes could be considered significant. However, as discussed above, there is very limited competition between the subject imports from Chile and domestic table grapes because the vast majority of subject imports from Chile are generally shipped in the U.S. market during April,⁹⁶ while the great majority of U.S. production and shipments of table grapes occur considerably later in the year. The limited competition that does occur is further attenuated because the subject imports from Chile are generally lower quality end of season table grapes.⁹⁷ Given the limited and attenuated competition between the subject imports and the domestic like product, we do not find that the volume of subject imports from Chile is significant.⁹⁸ Moreover, as discussed later, due to this limited competition, the record does not provide a reasonable indication that subject imports from Chile are having a negative price effect or adverse impact on the domestic industry producing all table grapes.

⁸⁸ CR at V-4, PR at V-3.

⁸⁹ CR at V-4, PR at V-3.

⁹⁰ Tr. at 34. While petitioners assert that table grapes grown at lower temperatures can be stored for longer periods, the record indicates that table grapes stored for longer periods are less competitive and there appears to be no incentive for importers to store table grapes for long periods. Tr. at 135 (Mr. Bown); Tr. at 143; Tr. at 143 (Mr. Eastes). See also INV-Y-117, June 8, 2001, at 1-4 (indicating shipments of Chilean grapes are generally insignificant in May); CR at I-10, PR at I-6.

⁹¹ CR at I-10, PR at I-6; Tr. at 106.

⁹² See Tr. at 87-88.

⁹³ See Tr. at 51-52 (Chileans try to import table grapes before April 20). See also Chileans' Postconference Brief, Exh 15 (showing over 90 percent of imports before April 20 start of marketing order).

⁹⁴ CR & PR at Table IV-7. The value of the subject imports was \$47.6 million in 1998, \$53.3 million in 1999, and \$65.0 million in 2000. CR & PR at Table IV-7.

⁹⁵ CR & PR at Table IV-9.

⁹⁶ INV-Y-117, June 8, 2001, at 1-4. Importers imported only very small quantities of subject imports from Chile during May in 1998, 1999, and 2000.

⁹⁷ See Tr. at 102, 106.

⁹⁸ Commissioner Hillman does not join in this finding.

2. Price Effects of the Subject Imports

The record indicates very limited competition between the vast majority of subject imports from Chile and the vast majority of domestic production, due to the timing of the subject imports' presence in the market.⁹⁹ Pricing data from U.S. producers and importers indicate that there was underselling by the subject imports from Chile for the minimal period in which there is competition.¹⁰⁰ We note that there are no pricing comparisons possible for much of the season because of the absence of subject imports from Chile. However, pricing comparisons are of limited utility because they mainly involve late-season Chilean grapes and early-season domestic grapes; the quality of the grapes is not always comparable.¹⁰¹ Underselling that occurs at the end of the Chilean season thus likely reflects quality differences. Moreover, staff could only confirm one lost revenue allegation regarding Chile.¹⁰² Price trends for the domestic market indicate that prices for domestic table grapes generally increased during the period of investigation.¹⁰³

Based on the very limited competition between subject imports from Chile and the domestic like product, we find that subject imports have not depressed domestic prices to a significant degree or prevented price increases which otherwise would have occurred to a significant degree.

3. Impact of the Subject Imports

The Commission must evaluate the industry as a whole; that is, *all* domestic producers of table grapes.¹⁰⁴ Several indicators of the condition of the industry improved during the period of investigation.¹⁰⁵ The domestic industry's production and shipments generally rose¹⁰⁶ and the domestic

⁹⁹ INV-Y-117, June 8, 2001, at 1-4. Importers shipped only very small quantities of subject imports from Chile during May in 1998, 1999, and 2000. Competition is further attenuated during May because late-season Chilean grapes tend to be seeded, which compete to a lesser degree with seedless table grapes. See Chilean Respondents' Postconference Brief, Exh. 32; CR & PR at Table V-3; Tr. at 106 (Red Globe seeded table grapes harvested late in Chilean season).

¹⁰⁰ See CR & PR at Table V-4. Chilean subject imports undersold domestic table grapes in 22 of the 26 price comparisons. CR & PR at Table V-4.

¹⁰¹ See CR & PR at Tables V-1 and V-2. Purchasers indicated that "new" domestic grapes were competing with old Chilean grapes not of comparable quality. See CR at V-15 to V-18. Moreover, quantities of the domestic product and subject imports from Chile in the price comparisons were generally smaller for Chilean subject imports and the comparisons do not account for volume discounts offered by the domestic producers. CR at V-5, PR at V-4.

¹⁰² See CR & PR at Tables V-5 and V-6. Many of the allegations were disputed by purchasers. Id.

¹⁰³ See California Table Grapes Commission Situation Reports from 1998, 1999, and 2000 (indicating average box prices increased in 1999 and 2000) (contained in Chilean Respondents' Postconference Brief, Exhs. 26, 34 and 35).

¹⁰⁴ 19 U.S.C. § 1677(4)(A).

¹⁰⁵ The record contains information from the USDA, the California Table Grape Association and Chuck Allen's Market Review. While the record contains some data specific to the "Spring" table grape producers, we are required to examine data covering the entire industry and growing season.

¹⁰⁶ U.S. producers' shipments were 1.09 billion pounds in 1998, 1.30 billion pounds in 1999, and 1.29 billion pounds in 2000. CR & PR at Table IV-7. Production also increased. See California Table Grapes Commission

(continued...)

industry's capacity, as expressed in acreage, grew over the period of investigation.¹⁰⁷ The domestic producers' market share increased slightly from 1998 to 2000.¹⁰⁸ The average price per box rose from 1999 to 2000 to its highest price level since 1996.¹⁰⁹

Given the perishability of this product, subject imports from Chile do not compete with the majority of U.S. producers because there are no significant domestic shipments of subject imports from Chile after May and the vast majority of the table grape industry does not begin shipping until the end of June, at the earliest.¹¹⁰ Therefore, the vast majority of the U.S. industry – growers outside of the Coachella Valley – does not compete with the subject imports, a point petitioners concede.¹¹¹ Indeed, several domestic producers oppose the petition, suggesting that not only have they not been injured by reason of the subject imports, but rather that the subject imports are beneficial to the U.S. industry.¹¹²

Accordingly, we find that subject imports from Chile have not had a significant negative impact on the U.S. industry producing table grapes. We also find that the record as a whole contains clear and convincing evidence that there is no material injury by reason of subject imports from Chile and no likelihood exists that contrary evidence will arise in a final investigation.

E. Chile - Threat of Material Injury

In determining whether there is a reasonable indication of the threat of material injury in these investigations, we have considered the 2001 growing season.

The volume of subject imports from Chile increased from 1998 to 2000, as did the market penetration of subject imports.¹¹³ However, data for 2001 confirm the Chilean producers' forecast that

¹⁰⁶ (...continued)

Situation Reports from 1998, 1999, and 2000 (contained in Chilean Respondents' Postconference Brief, Exhs. 26, 34 and 35) (indicating tonnage increased in 1999 and 2000).

¹⁰⁷ Mexican Respondents' Postconference Brief, App. 8 (data from USDA NASS Noncitrus Fruits and Nuts 2000 Preliminary Summary, CASS Agricultural Overview 1998-99).

¹⁰⁸ The domestic industry's market share was 55.0 percent in 1998, 60.6 percent in 1999, and 55.4 percent in 2000. CR & PR at Table IV-9.

¹⁰⁹ See California Table Grapes Situation Report 2000 (contained in Chilean Respondents' Postconference Brief, Exh. 26).

¹¹⁰ Mexican Respondents' Postconference Brief, App.5.

¹¹¹ Petitioners have acknowledged that there is no competition between the great majority of domestic product and the subject imports from Chile. Petitioners' Postconference Brief, Exh 1 at 37-38 ("Chilean imports compete only with the spring table grape producers and do not compete with summer table grape producers after June.").

¹¹² See Mexican Respondents' Postconference Brief, Exh. 17 (collecting letters from Gerawan Farming, Ranch 124 Farming, Giumarra Companies, Magnum Farming, Jamat Partnership, J. Milicic and Son, Grapery, Pandol & Sons, Stevco, Nash De Camp, Bari Produce, Pacific Trellis Fruit, Borg Produce, Andrew Williamson Sales, Anton Caratan & Son, Caymus Vineyards, and Agricare). Some domestic producers, as well as respondents, have stated that the subject imports are necessary to maintain shelf space for table grapes in supermarkets when domestic production is low. See, e.g., Tr. at 103, 154, 167, and 188.

¹¹³ See CR & PR at Tables IV-7 and IV-9

exports to the United States will be lower in 2001 than in 2000.¹¹⁴ Capacity also is not expected to increase in Chile.¹¹⁵ All of these factors indicate no likelihood of substantially increased imports of the subject merchandise from Chile in the imminent future.¹¹⁶

As discussed earlier, there is very little overlap between subject imports from Chile and the domestic product because they are not present in the market at the same time. The limited competition that does exist is generally between lower-quality end of season Chilean table grapes and fresher, domestic table grapes. The record does not indicate any imminent change in this pattern.¹¹⁷ Packout data for April 2001 indicate the likelihood of reduced domestic shipments of Chilean subject imports in competition with domestic table grapes.¹¹⁸ Moreover, the earliest U.S. harvest, the Coachella Valley harvest, is anticipated to be later in 2001 than in 2000, further reducing the likelihood of competition in the marketplace between domestic table grapes and the subject imports from Chile.¹¹⁹ Prices for domestic table grapes were higher overall during 2000 despite the increase in shipments of subject imports.¹²⁰ We thus do not find it likely that subject imports will have significant price depressing or suppressing effects given the extremely limited competition with domestic table grapes generally as well as the likely reduced level of subject imports and reduced competition with domestic table grapes in 2001.

The positive trends for the industry as a whole during the period of investigation, including increased production, shipments, capacity, and domestic prices, provide no reasonable indication that material injury to the domestic industry as a whole is imminent. As we have described, competition from the subject imports from Chile is likely to be further attenuated in 2001 due to the later harvest in the Coachella Valley and the reduced Chilean packouts in April 2001. Furthermore, reports indicate a strong growing season in the Coachella Valley with increased production.¹²¹

¹¹⁴ See CR & PR at Table IV-3 (Chilean packout data lower for April 2001 relative to April 2000); CR & PR at Table VII-1 (forecasting reduced subject imports in 2001).

¹¹⁵ See CR & PR at Table VII-1.

¹¹⁶ Unused capacity and inventories are not relevant in this investigation because producers generally operate at peak capacity and inventories cannot be maintained for significant periods due to perishability. Tr. at 34. There is no incentive for importers to store grapes for long periods. Tr. at 135 (Mr. Bown); Tr. at 143; Tr. at 143 (Mr. Eastes). Capacity utilization has no real meaning in this industry as growers operate close to capacity and consider production to be capacity. See CR & PR at Table III-4.

¹¹⁷ See INV-Y-117, June 8, 2001, at 1-4. Given the limited scope of the investigation as well as the different growing season in the Southern Hemisphere, competition between subject imports from Chile and the vast majority of domestic production effectively *cannot* increase in the imminent future.

¹¹⁸ See CR & PR at Table IV-3 (Chilean packout data lower for April 2001 relative to April 2000). May data is incomplete for 2001. *Id.*

¹¹⁹ Reports indicate that the Coachella Valley harvest will be 10-12 days later in 2001 than in 2000. See Sun World expects 10 percent Jump in Coachella Grape Volume, Produce News, May 14, 2001 (attached as an exhibit to Chilean Respondents' Letter to the Commission of May 21, 2001). See also Weather May Tighten Memorial Day Supplies, The Packer, May 14, 2001 (indicating later and larger harvest in Coachella Valley).

¹²⁰ See California Table Grapes Situation Report 2000 (contained in Chilean Respondents' Postconference Brief, Exh. 26).

¹²¹ See Sun World expects 10 percent Jump in Coachella Grape Volume, Produce News, May 14, 2001 (attached as an exhibit to Chilean Respondents' Letter to the Commission of May 21, 2001). See also Weather May Tighten Memorial Day Supplies, The Packer, May 14, 2001 (indicating later and larger harvest in Coachella

Therefore, we find that the record as a whole indicates that there is no reasonable indication of a threat of material injury by reason of subject imports from Chile and no likelihood exists that contrary evidence will arise in a final investigation. For the foregoing reasons, we find that there is no reasonable indication of a threat of material injury by reason of the subject imports from Chile.

F. Mexico - Material Injury

1. Volume of Subject Imports

The volume of subject imports from Mexico was 142.6 million pounds in 1998, 179.7 million pounds in 1999, and 189.4 million pounds in 2000.¹²² These imports' U.S. market share rose from 7.2 percent in 1998 to 8.4 percent in 1999, and then fell slightly to 8.2 percent in 2000 in terms of quantity.¹²³ When viewed in isolation, these quantities could be considered significant. However, there is only limited competition between subject imports from Mexico and domestic table grapes because the vast majority of subject imports from Mexico are shipped in the U.S. market during May and June¹²⁴ while the great majority of U.S. production and shipments of table grapes occurs considerably later in the year, in August or later.¹²⁵

Given the limited competition between subject imports from Mexico and the domestic like product, we do not find that the volume of subject imports from Mexico, both in absolute terms and relative to U.S. apparent consumption, is significant.¹²⁶ Moreover, as discussed later, due to this limited competition, the record does not provide a reasonable indication that subject imports from Mexico are having a negative price effect or adverse impact on the domestic industry producing all table grapes.

2. Price Effects of the Subject Imports

The record indicates only limited competition between subject imports from Mexico and a substantial majority of domestic production, due to the timing of their presence in the market.¹²⁷ Pricing data from U.S. producers and importers indicate that there was a mixed pattern of underselling and overselling by the subject imports from Mexico for the minimal period in which there is competition between subject imports and domestic product.¹²⁸ We note that there are no pricing comparisons possible

¹²¹ (...continued)
Valley).

¹²² CR & PR at Table IV-7. The value of the subject imports was \$47.6 million in 1998, \$53.3 million in 1999, and \$65.0 million in 2000. CR & PR at Table IV-7.

¹²³ CR & PR at Table IV-9.

¹²⁴ INV-Y-117, June 8, 2001, at 1-4.

¹²⁵ INV-Y-117, June 8, 2001, at 1-4. See also CR & PR at Table III-8.

¹²⁶ Commissioner Hillman does not join in this finding.

¹²⁷ While subject imports from Mexico compete with domestic table grapes only during May and June, the domestic table grapes produced in this period constitute a small portion of total domestic table grapes production. Domestic shipments begin in May and last until December with the vast majority occurring after June. See INV-Y-117, June 8, 2001, at 1-4.

¹²⁸ See CR & PR at Table V-4. Mexican subject imports oversold domestic table grapes in 22 of the 48 price
(continued...)

for much of the season because of the absence of subject imports from Mexico. Staff could only confirm five lost revenue allegations and no lost sales allegations regarding Mexico, and many of the allegations were disputed by purchasers and the lost revenue allegations confirmed were for small amounts.¹²⁹ Price trends for the domestic market indicate that prices for domestic table grapes generally increased during the period of investigation.¹³⁰

Based on the very limited competition between the subject imports from Mexico and the domestic like product, we find that subject imports have not depressed domestic prices to a significant degree or prevented price increases which otherwise would have occurred to a significant degree.

3. Impact of the Subject Imports

The Commission must evaluate the industry as whole; that is, *all* domestic producers of table grapes.¹³¹ Several indicators of the condition of the domestic industry improved during the period of investigation.¹³² The domestic industry's production and shipments generally rose,¹³³ and the domestic industry's capacity, as expressed in acreage, grew over the period of investigation.¹³⁴ The domestic producers' market share increased slightly from 1998 to 2000.¹³⁵ The average price per box rose from 1999 to 2000 to its highest level since 1996.¹³⁶

Subject imports from Mexico have not had a significant impact on U.S. producers because there are no significant U.S. shipments of subject imports from Mexico that compete with the great majority of domestic production. The later season table grapes do not begin shipping until the end of June, at the earliest.¹³⁷ Therefore, the vast majority of the U.S. industry – growers outside the Coachella Valley – does

¹²⁸ (...continued)
comparisons. CR & PR at Table V-4.

¹²⁹ See CR & PR at Tables V-5 and V-6.

¹³⁰ See California Table Grapes Commission Situation Reports from 1998, 1999, and 2000 (indicating average box prices increased in 1999 and 2000).

¹³¹ 19 U.S.C. § 1677(4)(a).

¹³² The record contains information from the USDA, the California Table Grape Association, and Chuck Allen's Market Review. While the record contains some data specific to the "Spring" table grape producers, we are required to examine the data covering the *entire* industry and growing season.

¹³³ U.S. producers' shipments were 1.09 billion pounds in 1998, 1.30 billion pounds in 1999, and 1.29 billion pounds in 2000. CR & PR at Table IV-7. Production also increased. See California Table Grapes Commission Situation Reports from 1998, 1999, and 2000 (contained in Chilean Respondents' Postconference Brief, Exhs. 26, 34 and 35) (indicating tonnage increased in 1999 and 2000).

¹³⁴ Mexican Respondents' Postconference Brief, App. 8.

¹³⁵ The domestic industry's market share was 55.0 percent in 1998, 60.6 percent in 1999, and 55.4 percent in 2000. CR & PR at Table IV-9.

¹³⁶ See California Table Grapes Situation Report 2000 (contained in Chilean Respondents' Postconference Brief, Exh. 26).

¹³⁷ Mexican Respondents' Postconference Brief, App.5.

not compete with the subject imports, a fact the petitioners concede.¹³⁸ Indeed, several domestic producers oppose the petition, suggesting that not only have they not been injured by reason of the subject imports, but rather that the subject imports are beneficial to the U.S. industry.¹³⁹

Accordingly, we find that subject imports from Mexico have not had a significant negative impact on the U.S. industry producing table grapes. We also find that the record as a whole indicates that there is no reasonable indication of material injury by reason of subject imports from Mexico and no likelihood exists that contrary evidence will arise in a final investigation.

G. Mexico - Threat of Material Injury

In determining whether there is a reasonable indication of the threat of material injury, we have considered the 2001 growing season.

The volume of subject imports from Mexico increased from 1999 to 2000,¹⁴⁰ although the market share of the subject imports from Mexico fell.¹⁴¹ Capacity and production are not expected to grow significantly in Mexico.¹⁴² These factors indicate no likelihood of substantially increased injurious imports of the subject merchandise from Mexico in the imminent future.¹⁴³

As we have described in our material injury determination, there is a very limited overlap in competition between the subject imports and domestic table grapes because they are not present in the market at the same time as the great majority of domestic product. The limited competition that does occur is limited to May and June, a small portion of the season when only a small portion of domestic production

¹³⁸ Petitioners have acknowledged that there is no competition between the other California growers and the subject imports from Mexico. See Petitioners' Postconference Brief, Exh 1 at 37-38 (indicating that Mexican producers bring their grapes to market as quickly as possible to avoid competing with domestic table grapes from the San Joaquin Valley). See also Tr. at 106 (Mexican producers avoid competing with domestic table grapes from San Joaquin Valley).

¹³⁹ See Mexican Respondents' Postconference Brief, Exh. 17 (collecting letters from Gerawan Farming, Ranch 124 Farming, Giumarra Companies, Magnum Farming, Jamat Partnership, J. Milicic and Son, Grapery, Pandol & Sons, Stevco, Nash De Camp, Bari Produce, Pacific Trellis Fruit, Borg Produce, Andrew Williamson Sales, Anton Caratan & Son, Caymus Vineyards, and Agricare). Some domestic producers, as well as respondents, have stated that the subject imports are necessary to maintain shelf space for table grapes in supermarkets when domestic production is low. See, e.g., Tr. at 103, 154, 167, and 188.

¹⁴⁰ See CR & PR at Tables IV-7 and IV-9

¹⁴¹ See CR & PR at Table IV-9.

¹⁴² See CR & PR at Table VII-5 (capacity up slightly and production down in 2001).

¹⁴³ Unused capacity and inventories are not relevant in this investigation because producers generally operate at peak capacity and inventories cannot be maintained for significant periods due to the perishability of table grapes. Tr. at 34. There is no incentive for importers to store grapes because domestic table grapes grown later in the year will enter the market in large quantities. Tr. at 106. Capacity utilization has no real meaning in this industry as growers operate close to capacity and consider production to be capacity. See CR & PR at Table III-4.

of table grapes is present.¹⁴⁴ The record does not indicate any change in this pattern in 2001.¹⁴⁵ Prices for domestic table grapes were higher overall during 2000 despite the increase in shipments of subject imports.¹⁴⁶ We thus do not find it likely that subject imports will have significant price depressing or suppressing effects given the very limited competition between subject imports from Mexico and the domestic product.

The positive trends for the industry as a whole during the period of investigation, including increased production, shipments, capacity, and domestic prices, provide no reasonable indication that material injury to the industry as a whole is imminent. Reports also indicate a strong growing season in the Coachella Valley coupled with increased production.¹⁴⁷

Therefore, we find that the record as a whole contains clear and convincing evidence that there is no reasonable indication of material injury by reason of subject imports from Mexico and no likelihood exists that contrary evidence will arise in a final investigation. For the foregoing reasons, we do not find a reasonable indication of a threat of material injury by reason of the subject imports from Mexico.

CONCLUSION

For the foregoing reasons, we determine that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of table grapes from Chile or Mexico that are allegedly sold in the United States at LTFV.

¹⁴⁴ See INV-Y-117, June 8, 2001, at 1-4.

¹⁴⁵ Moreover, given the temporal limitation on the scope of the subject imports, competition between subject imports and the great majority of subject imports effectively *cannot* increase in the imminent future.

¹⁴⁶ See Chilean Respondents' Postconference Brief, Exh. 26.

¹⁴⁷ See Sun World expects 10 percent Jump in Coachella Grape Volume, Produce News, May 14, 2001 (attached as an exhibit to Chilean Respondents' Letter to the Commission of May 21, 2001). See also Weather May Tighten Memorial Day Supplies, The Packer, May 14, 2001 (indicating later and larger harvest in Coachella Valley).

DISSENTING VIEWS OF COMMISSIONER DENNIS M. DEVANEY

Investigations Nos. 731-TA-926 and 927 (Preliminary)

SPRING TABLE GRAPES FROM CHILE AND MEXICO

Based on the record in these investigations, I find that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of spring table grapes from Chile and Mexico.

I respectfully dissent from the majority's definition of the domestic like product, their definition of the domestic industry, and their determination that the domestic industry is neither materially injured nor threatened with material injury by reason of subject imports. Below, I set forth the reasoning for my conclusion that the domestic industry is threatened with material injury by reason of subject imports.

I. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. Domestic Like Product

In analyzing the domestic like product, my determination is based my determination on the factual circumstances of the case, applying the standard set forth in relevant precedent.¹⁴⁸ I have considered not only the six-factor test, but have also looked at other relevant factors based on the facts of the investigation and the transparent dividing lines between possible like products.^{149 150}

In this investigation, I find the domestic like product to be table grapes produced during April, May or June (spring table grapes). The Commission's six-factor test, along with factors unique to the spring table grape industry, supports defining the like product to be spring table grapes rather than all table grapes.

The critical distinguishing characteristic of spring table grapes is their perishability evidenced by the rapid cooling necessary to preserve the grapes.^{151 152} There is no interchangeability or competition between table grapes grown in the spring in the Coachella Valley and those grown in the summer in the Central

¹⁴⁸ 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).

¹⁴⁹ See, e.g., S. Rep. No. 96-249 at 90-91 (1979).

¹⁵⁰ 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 definition of 'like product' should not be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under consideration.").

¹⁵¹ Petitioners' Postconference Brief, Exh. 1 at 47.

¹⁵² Petitioners' Postconference Brief, Exh. 1 at 48.

Valley since the table grapes from Coachella and the Central Valley do not exist in the market at the same time.¹⁵³ ¹⁵⁴ Generally, the marketing and production processes of spring table grapes are different from those of summer table grapes.¹⁵⁵ Purchasers view spring table grapes as being distinct from those marketed in the summer.¹⁵⁶ The record indicates that production processes differ for spring and summer table grapes since table grapes grown in the Coachella Valley are treated with a chemical that induces dormancy in the vines, and are also sprinkled with water to create a cooler microclimate for the vines.¹⁵⁷

In addition, the seasonal nature of the production of table grapes, temporal limitations on the product, and the perishability of table grapes are important factors that support this definition of the domestic like product.¹⁵⁸ There are very few shipments of table grapes from the Coachella Valley growers, the Mexicans, or Chileans in July, when growers in the Central Valley are beginning to ship summer table grapes.¹⁵⁹ Therefore, I believe the appropriate domestic like product is spring table grapes produced between April 1 and June 30, inclusive.

Whether Seeded Grapes or Seedless Grapes Constitute a Separate Like Product

I believe that the domestic like product of spring table grapes should include two separate like products consisting of seeded spring table grapes and seedless spring table grapes. There is a continuum of physical characteristics among both seeded and seedless grapes, however, the clear dividing line between the two products is the presence or absence of seeds.

The record indicates that, generally, the only difference in physical characteristics between spring and summer table grapes is in terms of seeds. Seeded and seedless table grapes are not interchangeable because only seedless table grapes can be used in salads and other prepared foods.¹⁶⁰ Customers perceive seeded table grapes to be different from seedless table grapes and labeling of grapes as seeded or seedless in the markets indicate this difference. Evidence suggests general consumers of grapes prefer seedless table grapes and certain ethnic groups prefer seeded grapes.¹⁶¹ Although seeded grapes and seedless grapes are produced by the same production processes and move through the same channels of distribution, customer perceptions and the higher selling price for seedless grapes indicate that they are two separate products.¹⁶² ¹⁶³ Accordingly, I find two like products consisting of all seeded spring table grapes and all seedless spring table grapes.

¹⁵³ Petitioners' Postconference Brief, Exh. 1 at 52.

¹⁵⁴ Petitioners' Postconference Brief, Exh. 1 at 52.

¹⁵⁵ Petitioners' Postconference Brief, Exh. 1 at 53.

¹⁵⁶ Petitioners' Postconference Brief, Exh. 1 at 55-57.

¹⁵⁷ Petitioners' Postconference Brief, Exh. 1 at 58-59.

¹⁵⁸ Petitioners' Postconference Brief, Exh. 1 at 30.

¹⁵⁹ Petitioners' Postconference Brief, Exh. 1 at 36.

¹⁶⁰ Chilean Respondents' Postconference Brief, Attachment 1 at 2.

¹⁶¹ Tr. 147, 161.

¹⁶² Chilean Respondents' Postconference Brief, Attachment 1 at 3.

¹⁶³ Chilean Respondents' Postconference Brief, Attachment 1 at 4.

B. Domestic Industry and Related Parties

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.¹⁶⁴ Based on my definition of the domestic like product, I define the domestic industry as all producers of spring table grapes. I further would find that appropriate circumstances do not exist to exclude any producer from the domestic industry as a related party.

II. NEGLIGIBLE IMPORTS

I find that the record indicates that import quantities for each of the subject countries exceeded the 3 percent statutory negligibility threshold during the pertinent period. Subject imports constituted the overwhelming majority of imports during April, May, and June of 2000.

III. REASONABLE INDICATION OF THREAT OF MATERIAL INJURY

Based on the evidence in the record, I find that there is a reasonable indication that the domestic industry is threatened with material injury by reason of subject imports.

1. Foreign Production Capacity

Data indicates that Mexican capacity has grown over the period of investigation and that Mexican producers have the ability to increase capacity.¹⁶⁵ Chilean capacity has grown from 29 million pounds in 1997 to 56 million pounds in 2000 and there is no evidence that they will not further increase capacity.¹⁶⁶

2. Volume and Market Penetration of Subject Imports

Since Mexican capacity has increased and has the potential to continue to increase, it is likely that a large majority of the increased production in Mexico will be shipped to the United States.¹⁶⁷ Mexican producers' questionnaire responses alluded to a potential reduction in home market shipments in 2001.¹⁶⁸ This is demonstrated by the fact that the United States received 76 percent of the increased Mexican shipments between 1997 and 2000.¹⁶⁹

Another significant indication of a threat of material injury to the domestic industry comes from the Chileans attempt to expand their growing season by planting new late-season grapes, which compete directly with the domestic spring table grapes and cut into domestic producers' market share. This new practice

¹⁶⁴ See United States Steel Group v. United States, 873 F. Supp. 673, 681-84 (CIT 1994), aff'd, 96 F.3d 1352 (Fed. Cir.1996).

¹⁶⁵ CR & PR at Table VII-5. Petitioners assert that the Mexican producers will increase capacity from 227 million pounds in 2000 to 241 million pounds in 2001 and to 252 million pounds in 2002, CR & PR at Table VII-5.

¹⁶⁶ CR & PR at Table VII-1.

¹⁶⁷ Petitioners' Postconference Brief at 36.

¹⁶⁸ Petitioners' Postconference Brief at 37.

¹⁶⁹ Petitioners' Postconference Brief at 36, CR & PR at Table VII-5.

contradicts the Chilean respondents' argument that the late harvest in 2000 was an aberration.¹⁷⁰ Therefore it seems logical to expect that the growth in imports experienced over 1997-2000 will continue.¹⁷¹ Additionally, higher tariffs in the EU provide an incentive for the Mexican and Chilean producers to export to the United States, which imposes no tariffs.¹⁷²

3. Inventories of Subject Imports

Although the Chilean respondents' claim that the build-up of inventories in 2000 was an anomaly, as stated above, there is a potential threat that the Chilean producers can and will continue the practice of harvesting their crops later in the season and therefore building up inventories to ship to the U.S. in the future. Data indicates that Chilean grapes can be stored up to 90 days in Chile prior to shipment.¹⁷³

4. Dumping Findings in Other Markets

There are no known dumping findings involving the subject merchandise in any other markets.¹⁷⁴

IV. CONCLUSION

For the foregoing reasons, I determine that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of spring table grapes from Chile and Mexico.

¹⁷⁰ Petitioners' Postconference Brief at 39.

¹⁷¹ Petitioners' Postconference Brief at 41.

¹⁷² Petitioners' Postconference Brief at 37-38.

¹⁷³ Petitioners' Postconference Brief at 22.

¹⁷⁴ CR at VII-1 n.2, PR at VII-1 n.2.