UNITED STATES INTERNATIONAL TRADE COMMISSION

LIVE CATTLE FROM CANADA AND MEXICO
Investigations Nos. 701-TA-386 (Preliminary) and 731-TA-812-813 (Preliminary)

DETERMINATIONS AND VIEWS OF THE COMMISSION
(USITC Publication No. 3155, February 1999)

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LIVE CATTLE FROM CANADA AND MEXICO

DETERMINATIONS

On the basis of the record[1] developed in the subject investigations, the United States International Trade Commission determines, pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1671b(a) and 19 U.S.C. § 1673b(a)), that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of live cattle, provided for in subheading 0102.90.40 of the Harmonized Tariff Schedule of the United States, with the exception of statistical reporting numbers 0102.90.40.72 and 0102.90.40.74, that are alleged to be subsidized by the Government of Canada, and by imports of live cattle from Canada that are alleged to be sold in the United States at less than fair value (LTFV).[2] The Commission determines 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 of live cattle from Mexico that are alleged to be sold in the United States at LTFV.[3]

COMMENCEMENT OF FINAL PHASE INVESTIGATIONS

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of the investigations on Canada. The Commission will issue a final phase notice of scheduling that will be published in the *Federal Register* as provided in section 207.21 of the Commission's rules upon notice from the Department of Commerce (Commerce) of affirmative preliminary determinations in these investigations under sections 703(b) and 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in these investigations under sections 703(b) and 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of these investigations need not enter a separate appearance for the final phase of these investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

BACKGROUND

On November 12, 1998, a petition was filed with the Commission and the Department of Commerce by the Ranchers-Cattlemen Action Legal Foundation ("R-Calf"), Columbus, MT, alleging that an industry in the United States is materially injured by reason of imports from Canada of live cattle that are alleged to be subsidized by the Government of Canada, and imports from Canada and Mexico of live cattle that are alleged to be sold at LTFV. Accordingly, effective November 12, 1998, the Commission instituted countervailing and antidumping investigations Nos. 701-TA-386 and 731-TA-812-813 (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.

[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] Commissioners Carol T. Crawford and Thelma J. Askey dissenting.

[3] Chairman Lynn M. Bragg dissenting.

International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of November 19, 1998 (63 FR 64277). The conference was held in Washington, DC, on December 2, 1998, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on January 19, 1999. The views of the Commission are contained in USITC Publication 3155 (February 1999), entitled *Live Cattle from Canada and Mexico: Investigations Nos. 701-TA-386 and 731-TA-812-813 (Preliminary)*.

By order of the Commission.

Donna R. Koehnke
Secretary

Issued:

VIEWS OF THE COMMISSION

Based on the record in these investigations, we find that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of live cattle from Canada that allegedly are subsidized and sold in the United States at less than fair value ("LTFV").[1] We also 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 live cattle from Mexico that allegedly are sold in the United States at LTFV.[2]

I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS

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

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[1] Commissioner Crawford and Commissioner Askey 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 live cattle from Canada that allegedly are subsidized and sold in the United States at LTFV. See Dissenting Views of Commissioner Carol T. Crawford and Dissenting Views of Commissioner Thelma Askey, infra. They join in Sections I - IV.B., IV.D., and V of this opinion.

[2] Chairman Bragg determines that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of live cattle from Canada and Mexico that allegedly are subsidized and/or sold in the United States at LTFV. See Views of Chairman Lynn Bragg, infra. She does not join this opinion.

[3] 19 U.S.C. §§ 1671b(a) and 1673b(a); see also American Lamb Co. v. United States, 785 F.2d 994, 1001-1004 (Fed. Cir. 1986); Aristech Chemical Corp. v. United States, 20 CIT __, Slip Op. 96-51 at 4-6 (March 11, 1996).

investigation."[4]

II. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. In General

To determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the Commission first defines the "domestic like product" and the "industry."[5] Section 771(4)(A) of the Tariff Act of 1930, as amended ("the Act"), defines the relevant industry as the "producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."[6] In turn, the Act defines "domestic like product" as: "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation. . . ."[7]

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

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

[5] 19 U.S.C. § 1677(4)(A).

[6] 19 U.S.C. § 1677(4)(A).

[7] 19 U.S.C. § 1677(10).

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

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

B. Product Description

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

> all live cattle except imports of dairy cows for the production of milk for human consumption and purebred cattle specially imported for breeding purposes and other cattle specially imported for breeding purposes.[12]

The subject merchandise is all cattle and calves, regardless of breed or size, intended for slaughter as well as stocker and feeder cattle imported for feeding on rangelands or feedlots prior to slaughter and cull cattle imported for slaughter.[13] Excluded from the scope of the investigations are imports of dairy cattle for

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[9] See, e.g., S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979).

[10] Nippon Steel, 19 CIT at 455; Torrington, 747 F. Supp. at 748-49. See also S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979) (Congress has indicated that the like product standard should not be interpreted in "such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not 'like' each other, nor should the definition of 'like product' be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under consideration.")

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

[12] See Notice of Initiation of Antidumping Duty Investigations: Live Cattle from Canada and Mexico, 63 Fed. Reg. 71886 (December 30, 1998); see also Notice of Initiation of Countervailing Duty Investigation of Live Cattle from Canada, 63 Fed. Reg. 71889. Confidential Report ("CR") at A-5-11; Public Report ("PR") at A-5-11.

[13] Cull cattle for slaughter are milk cows and breed stock that are at the end of their useful life. CR at II-4; PR at II-3.

production of milk for human consumption and purebred and other cattle specifically imported for breeding purposes.[14]

There are three primary development stages for cattle prior to slaughter. The first stage consists of calves, which typically are raised with their mothers from birth to weaning at five to ten months and weigh between 400 to 650 pounds.[15] The second stage is the yearling or stocker stage, which typically are calves weaned from their mothers that are fed on available forage and high-value roughage feeds (such as sugar beet tops and corn stalks) or grazed on wheat pasture until they are 12 to 20 months of age and weigh 650 to 750 pounds, at which time they are ready to be placed in a feedlot.[16] The third stage is the feeder stage, which are cattle kept in confined areas for about 90 to 150 days and fed on finishing, high-energy rations, typically corn and protein supplements and some roughage, until they are about 15 to 24 months old, weigh between 1,100 and 1,300 pounds, and, thus, are fed cattle ready for slaughter.[17]

In this preliminary phase of these investigations, we have considered whether any of the stages of

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[14] 63 Fed. Reg. 71886 and 71889.

[15] CR at I-4, I-7 and I-8; PR at I-3, I-5; USITC Pub. 3048 at 2-1. A subset of the calf group are calves raised to be slaughtered for veal. These calves are included in the scope of the investigations. Veal calves usually have subsisted largely on milk, are less than three months of age, and are dairy calves that are not selected to be replacement animals, i.e., they primarily are male dairy calves. CR at I-6; PR at I-4.

[16] CR at I-4, I-7 and I-8; PR at I-3, I-5; USITC Pub. 3048 at 2-1. This stage of development also may be called backgrounding.

[17] CR at I-8; PR at I-5-6; USITC Pub. 3048 at 2-2. A small percentage, about 10 to 15 percent, of U.S. cattle are finished on pasture rather than on feedlots and are referred to as nonfed cattle rather than fed cattle when ready for slaughter. Id. at 2-2.

development should be defined as separate domestic like products.[18] [19]

For the reasons discussed below, for purposes of these preliminary determinations we find a single domestic like product , "live cattle," corresponding with the description of the subject merchandise.[20]

C. Analysis

We employ a semifinished product analysis rather than the "traditional" like product analysis when analyzing whether a product at an earlier stage of its production process is "like" a finished or further processed product.[21]

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[18] No party proposed that veal cattle be considered a separate domestic like product, and we see no reason to do so based on the record before us. CR at I-6, I-8, and I-9, n.32; PR at I-4, I-5, and I-6, n.32; 1997 Section 332 Study at 2-15 and Table D-19; Tr. at 52 and 53; Petitioner's Postconference Brief, Responses to Questions at 13 and 14. Accordingly, we include veal cattle in the single domestic like product of live cattle for purposes of these preliminary determinations.

[19] Petitioner R-Calf argues that the Commission should consider all live cattle intended for the production of beef, whether calves, yearlings, stockers, feeders, fat cattle or cull cows and bulls, as one like product, maintaining that cattle at different stages of production are a "'work in progress,' dedicated for use in the eventual production of beef. . . ." Petitioner's Postconference Brief at 3 and Answers to Questions at 9-13. Both Canadian and Mexican (CNG) Respondents have accepted the Petitioners' like product and industry definitions solely for purposes of the preliminary phase of these investigations. Respondent's (Canada) Postconference Brief at 3 and 4; Respondent's (Mexico-CNG) Postconference Brief at Appendix 1 at 1.

[20] Unless otherwise indicated, "cattle" refers to "live cattle" in these Views. The Commission must base its domestic like product determination on the record in these investigations and not on definitions made in other investigations. Nippon, at 11; Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1169, n.5 (Ct. Int'l Trade 1988) ("Asocoflores") (particularly addressing like product determination). Moreover, determinations in Commission investigations of live cattle conducted under section 201 of the Trade Act of 1974 in 1977 and Commission reports under section 332 of the Act offer limited guidance in decisions under the antidumping/countervailing duty laws. See e.g., Minivans from Japan, Inv. No. 731-TA-522 (Preliminary), USITC Pub. 2402 at 22 (July 1991) (Commission cannot apply Section 201 principles in antidumping duty investigations because of different statutory schemes, purposes and legislative histories); Tungsten Ore Concentrates from the People's Republic of China, Inv. No. 731-TA-497 (Preliminary), USITC Pub. 2367 (March 1991) (Sections 201 and 406 have different purposes and legislative histories and Commission cannot rely on them in antidumping duty investigations).

[21] Under the semi-finished product analysis, the Commission examines: (1) whether the upstream article is dedicated to the production of the downstream article, or has independent uses; (2) whether there are perceived to be separate markets for the upstream and downstream articles; (3) differences in the physical characteristics and functions of the upstream and downstream articles; (4) differences in the costs or value of the vertically differentiated articles; and (5) significance and extent of the processes used to transform the upstream into the downstream articles. See, e.g., DRAMs of One Megabit and Above from Taiwan, Inv. No.

In the present investigations, there are several upstream production stages in the development of fed or fat cattle for slaughter, specifically calves from birth to weaning; stocker/yearling cattle; and feeder cattle, as discussed above. The record indicates that cattle at each stage of development are dedicated to progression to the next stage and ultimately to development as fed cattle for slaughter.[22] Cattle have no independent use or function other than eventually to be slaughtered for beef. Cattle are embodied with their essential characteristics at birth, which vary depending primarily on breed and sex.[23] These essential characteristics are enhanced through the development process by the addition of body weight, their feeding and environmental conditions, and the age to which they are developed prior to slaughter. While cattle at different stages of production are not functionally or economically interchangeable because in each stage other than the final stage they have not reached their slaughter weight, it would not be expected that a semifinished product dedicated for use as a finished product would encompass all the functions of a finished product.[24]

Customers and producers perceive one ultimate end-use market for cattle -- the market for beef. While some integrated operations produce calves and raise them until they are ready for slaughter,[25] it appears more typical that cattle will be sold at different stages of development. However, the stage at which cattle are sold varies from operation to operation, and within each operation from year to year, depending on

731-TA-811 (Preliminary), USITC Pub. 3149 at n.15 (Dec. 1998) ("DRAMs from Taiwan"); Certain Preserved Mushrooms from Chile, Inv. Nos. 731-TA-776 (Final), USITC Pub. 3144 at 4 and 5 (Nov. 1998) ("Mushrooms Final"); Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany and Japan, Inv. No. 731-TA-736 and-737 (Final), USITC Pub. 2988 at 6, n.23 (Aug. 1996) (" Newspaper Presses"). See also Fresh and Chilled Atlantic Salmon from Norway, Inv. Nos. 701-TA-302 and 731-TA-454 (Final), USITC Pub. 2371 at 8 and 9 (April 1991) (salmon in earlier stage of production, smolt, included in the like product, full-grown salmon).

[22] CR at I-9; PR at I-6.

[23] CR at I-4; PR at I-3.

[24] See Atlantic Salmon, USITC Pub. 2371 at n.38; Newspaper Presses, USITC Pub. 2988.

[25] CR at III-1, and VI-9, n.21; PR at III-1 and VI-8, n.21 (regarding trend to consolidate cow-calf operations and feedlot operations). One estimate is that only five to ten percent of cattle are owned by a single operator from birth to slaughter. CR at I-7, n.26; PR at I-5, n.26.

weather, economic factors, prices for grain and/or cattle, and personal factors.[26] Finally, cattle at the feeder and fed stages of development are sold by U.S. producers either on the spot market in auction, by forward contracts, or by marketing agreements through dealers and buyer agents.[27]

The transformation from calf to fed cattle is significant, particularly given the fact that the animal doubles or triples in size from weaned calf to slaughter. The extent of additional "processing" is not particularly complex, and principally involves providing the appropriate feed for cattle at each stage of development. The primary expense for an operator at any one stage of production appears to be the cost of acquiring the cattle, followed by the cost of feed.[28]

Based on these facts, we find a single domestic like product encompassing all stages of development for "live cattle."

D. <u>Domestic Industry</u>

The domestic industry is defined as "the producers as a [w]hole of a domestic like product . . . ."[29] 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

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[26] CR at III-1 and 2; PR at III-1. There appears to be a significant degree of overlap between operations in all production stages, and particularly between cow-calf operators and stocker/yearling operators. For example, cow-calf operators, which frequently are family-owned and operated, also may do all or some of their own backgrounding; they also may only do part of the backgrounding before selling the cattle to another stocker/yearling operator. Stocker/yearling operators often will retain ownership in some or all of the cattle they send to feedlot. Conversely, some feedlots will acquire ownership in stocker cattle and set up toll arrangements with a stocker/yearling operation; a packer also may acquire feeder cattle and toll them out to a feedlot for finishing. The variables are many and often unique to each individual operation. A survey by Cattle-Fax of its membership found that 56 percent of cow-calf operators retained ownership of their calves through the stocker phase and 32 percent through the feedlot phase in 1996. Petitioner's Postconference Brief, Exhibit 1 at 4.

[27] CR at I-10 and II-3; PR at I-6-7 and II-2. There is some evidence on the record that stocker cattle are sold in similar ways, <u>i.e.</u>, by auction or contracts. ***.

[28] CR at VI-9; PR at VI-7-8. For example, the cost of acquiring feeder cattle is the primary expense of the feedlot operator, generally accounting for 50 to 75 percent of the total cost of the feedlot operation.

[29] 19 U.S.C. § 1677(4)(A).

merchant market.[30]

There are two issues in these investigations concerning the definition of the domestic industry: (1) whether the domestic industry should be defined to encompass operators that purchase either imported or domestically produced stocker and/or feeder cattle and further raise those cattle, such as stocker/yearling operators and/or feedlot operators;[31] and (2) whether appropriate circumstances exist to exclude related party producers from the domestic industry.

1. **Including Stocker/Yearling and Feedlot Operators in the Domestic Industry**

In defining the domestic industry in these investigations, we have considered whether operators that purchase stocker and/or feeder cattle, such as stocker/yearling operators, and/or feedlot operators, and raise them in the United States are part of the domestic industry producing live cattle. The question before us is whether the operators in question engage in sufficient production-related activity to be included in the domestic industry.[32]

For purposes of these preliminary determinations, we define the domestic industry to include all operators involved in the production of the domestic like product, including cow-calf operators,

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

[31] The statutory processed agricultural products provision is not applicable to these investigations since the domestic like product is the upstream raw agricultural product, "live cattle," and not a downstream processed agricultural product. See 19 U.S.C. § 1677(4)(E).

[32] To assess whether a firm qualifies as a domestic producer, we analyze the nature and extent of a firm's production-related activities in the United States. See, e.g., DRAMs from Taiwan, USITC Pub. 3149 at 8 and n.37 (Dec. 1998). The Commission generally considers six factors: (1) source and extent of the firm's capital investment; (2) technical expertise involved in U.S. production activities; (3) value added to the product in the United States; (4) employment levels; (5) quantity and type of parts sourced in the United States; and (6) any other costs and activities in the United States directly leading to production of the like product. Id. No single factor is determinative and the Commission may consider any other factors it deems relevant in light of the specific facts of any investigation. Id.

stocker/yearling operators, and feedlot operators.[33]

The operations involved in each of the stages of development play an integral, and roughly equivalent, role in the progression from calves to fed cattle. For example, stocker cattle gain approximately 100 to 350 pounds, or about 8 to 29 percent of their total weight in stocker/yearling operations.[34] Feeder cattle gain approximately 450 to 550 pounds, or about 37 to 46 percent of their total weight in feedlot operations.[35] The USDA defines domestic cattle to include all cattle fed in the United States, which includes imported cattle that are fed by stocker/yearling and/or feedlot operators prior to slaughter.[36] Therefore, in these preliminary investigations we find that the stocker/yearling operations and the feedlot operations engage in sufficient production-related activity to be included in the domestic industry, regardless of origin of the cattle.

2. Related Parties

We must further determine whether any producer of the domestic like product should be excluded from the domestic industry pursuant to 19 U.S.C. § 1677(4)(B). That provision of the statute allows the

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[33] While Petitioner maintains that all operations that produce live cattle for the production of beef are therefore producers of the like product, they also contend that stocker/feeder cattle imported from Mexico and/or Canada do not become a domestic product. Petitioner's Supplemental Brief at 4 and Petitioner's Postconference Brief, Response to Staff Questions at 14-16. Respondents also agree that operations involved in all stages of development are domestic producers, but they maintain that imported cattle destined for stocker/yearling or feedlot operations "become (by USDA's definition) domestic cattle." Respondent's (Mexico-CNG) Postconference Brief, Responses to Staff Questions at 4 and 5; Respondent's (Mexico-CNG) Supplemental Brief at 7; Tr. at 99-101(CNG representative stated that "the substantial part of the value of that animal is U.S."); Tr. at 133-134(Canadian representative stated that "any feeder animal that comes in and is fed up to a slaughter weight becomes a U.S. slaughter animal, not a Canadian slaughter animal.").

[34] Calculated from CR at I-4 and V-6; PR at I-3 and V-4. Stocker/yearling operations, which maintain pastures, pens, and fields, provide stocker cattle forage and high value roughage feeds, such as sugar beet tops and corn stalks, or wheat pasture.

[35] Calculated from CR at I-4 and V-6; PR at I-3 and V-4. Feedlot operations keep feeder cattle in confined areas for about 90 to 150 days and feed them high-energy rations, typically corn and protein supplements and some roughage until they are ready to be sold to packing houses for slaughter.

[36] CR at II-4, n.13; PR at II-3, n.13.

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.[37] Exclusion of such a producer is within the Commission's discretion based upon the facts presented in each case.[38]

While Petitioner contends that the Commission should exclude from the domestic industry "feedlot operators who raise imported cattle" as related parties, it acknowledges that "[p]ractically . . . it is difficult to identify the importers or the extent to which those operations rely upon imports versus domestic production."[39]

The record in these investigations indicates that a significant number of domestic producers in Texas import, handle, or feed subject cattle imported from Mexico.[40] However, there is no specific evidence on whether these domestic producers were importers of record or whether they are related to importers or

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[37] 19 U.S.C. § 1677(4)(B).

[38] 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).

[39] Petitioner's Postconference Brief, Response to Questions at 19-21; Petitioner's Supplemental Brief at 4-6.

[40] Commerce excluded the opposition of the Texas Cattle Feeders Association from its calculations regarding standing because allegedly 100 of its 200 members imported, handled, or fed Mexican cattle. Petitioner's Supplemental Brief at 5. See Memorandum to Richard W. Moreland, re "Petitioners on Live Cattle from Canada and Mexico: Determination of Industry Support," dated December 22, 1998. Mexican respondent, CNG, indicated that the members of this Texas association account for 2,717,000 head of cattle, which it alleged was "almost half of the cattle in Texas." Respondent's (Mexico-CNG) Supplemental Brief at 5-6 and n.7.

Mexican exporters that would allow us to determine whether any domestic producers should be excluded from the domestic industry.[41]

While the record contains more information regarding importers from Canada, there is less evidence regarding the domestic producers with whom these importers have some relationship.[42] [43] A large U.S. beef packer, *** ConAgra Cattle Feeding, the third largest U.S. feedlot operator. [44] In addition, the third largest U.S. beef packer, Excel, *** in 1997, is *** the fourth largest U.S. feedlot operator, Caprock Industries.[45] These two domestic producers, ConAgra Cattle Feeding and Caprock, appear to be related parties through corporate or contractual relationships with importers of subject merchandise.

Even if these or any other domestic producer could be deemed a related party, the record does not contain individual domestic producer data to determine whether appropriate circumstances exist to exclude them from the industry. Moreover, because the domestic cattle industry involves an enormous number of operations, any one domestic producer of live cattle accounts for only a very small share of domestic

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[41] Importers responding to the Commission's importers' questionnaire accounted for only 5 percent of subject imports from Mexico in 1997 and 57 percent of subject imports from Canada in 1997. CR at IV-1; PR at IV-1.

[42] The largest beef packer, IBP, which accounted for *** of cattle imports from Canada in 1997 and is ***, entered a risk-sharing arrangement with a cattle producer in the Northwest United States for the production of cattle in 1997. CR at IV-2; PR at IV-1. However, the record contains no evidence regarding the identity or size of the cattle producer or the arrangement. Thus, it is uncertain whether this risk-sharing arrangement is evidence of direct or indirect control. We intend to seek more information regarding this relationship in any final investigations.

[43] In addition, the 20th largest U.S. packer, Washington Beef, which accounted for *** of imports from Canada in 1997, noted at the Commission's conference that "Washington Beef is itself a cattle feeder, although we feed only a small percentage of the cattle which we slaughter, usually in a joint venture with another feeder." CR at IV-2; PR at IV-1 and Tr. at 126. Washington Beef also indicated that "[s]eventy percent of Washington Beef's fed cattle are purchased from domestic feedlots and 30 percent come from Canada." Tr. at 126.

[44] CR at IV-2 - IV-3; PR at IV-1 - IV-2 and CR/PR Tables III-2 and IV-1.

[45] CR at IV-3; PR at IV-1. While Caprock's one time feedlot capacity is 273,000 cattle, this is only about two percent of total U.S. feedlot inventory on January 1, 1997. CR/PR at Table III-2 and USDA data.

production, and the amount of domestic production attributable to a specific related domestic producer also would be very small[46] and, would probably not skew the data for the rest of the industry.[47] Thus, we do not exclude any domestic producers as related parties for purposes of these preliminary determinations. We will seek more information regarding the relationships between domestic industry feedlot operators and importers, as well as request comments on how to address related party issues in the unique circumstances of these investigations in any final phase investigations involving imports from Canada.

III. CUMULATION

A. <u>In General</u>

Section 771(7)(G)(i) of the Act requires the Commission to cumulate imports 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 United States market.[48] The petitions on subject imports from Canada and Mexico were filed on the same day. For purposes of these preliminary investigations, we find that the subject imports from Canada and Mexico each compete separately with the domestic like product. Therefore, the only cumulation issue is whether the subject imports compete with each other.[49] In assessing whether subject imports compete with each other (and with the domestic like product),[50]

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[46] For example, the number of cows and bred heifers held by the largest domestic cow-calf operation accounted for less than 0.1 percent of domestic inventory in 1997 and the capacity of the largest domestic feedlot operator was only about 0.7 percent of domestic capacity in 1997. ***. CR/PR at Tables III-1, III-2, III-3, and USDA data.

[47] Commissioner Crawford does not make her decision to exclude or not to exclude a related party based on whether inclusion or exclusion would skew the data.

[48] 19 U.S.C. § 1677(7)(G)(i). There are four statutory exceptions to the cumulation provision, none of which applies to these investigations. <u>See</u> 19 U.S.C. § 1677(7)(G)(ii).

[49] Petitioner contends that "Canadian, Mexican and U.S. cattle compete in a national market for sale to the same ultimate consumers . . . [and such] competition requires the Commission to assess the impact of imports on a cumulative basis." Petitioner's Postconference Brief, Responses to Questions at 21-23; Petitioner's Supplemental Brief at 9-14. Petitioner argues that "there is a 'reasonable overlap' in the geographic

the Commission has generally considered four factors, including:

(1) the degree of fungibility between the imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;[51]

(2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product;

(3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and

(4) whether the imports are simultaneously present in the market.[52]

While no single factor is 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

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shipments of Mexican and Canadian feeder cattle," and in the channels of distribution, and that imports are simultaneously present in the U.S. market. Id. and Tr. at 64-67. Respondents charge that it is inappropriate to cumulate cattle imports from Mexico and Canada because there is no overlap in competition between these imports. They argue that the two countries export different types of cattle, at different stages of production, to different areas of the United States, at different times of the year. Respondent's (Mexico-CNG) Postconference Brief at 2-10; Respondent's (Mexico-CNG) Supplemental Brief at 6; Respondent's (Mexico-AMEG) Supplemental Brief at 3-4; Respondent's (Canada) Postconference Brief at 6-8.

[50] The Statement of Administrative Action submitted to Congress in connection with the Uruguay Round Agreements Act 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." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. 316, Vol. 1, 103d Cong., 2d Sess. (1994)("SAA") at 848 citing Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898, 902 (Ct. Int'l Trade), aff'd, 859 F.2d 915 (Fed. Cir. 1988).

[51] Commissioner Crawford finds that substitutability, not fungibility, is a more accurate reflection of the statute. See Dissenting Views of Commissioner Carol T. Crawford in Stainless Steel Bar from Brazil, India, Japan and Spain, Inv. Nos. 731-TA-678, 679, 681, and 682 (Final), USITC Pub. 2856 (Feb. 1995), for a description of her views on cumulation.

[52] 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 1988), aff'd, 859 F.2d 915 (Fed. Cir. 1988).

other and with the domestic like product.[53] Only a "reasonable overlap" of competition is required.[54]

B. Analysis

1. Fungibility

For purposes of these preliminary determinations, we find there is not a sufficient degree of fungibility between the subject imports to support a finding of competition. The record reveals that live cattle that have not been fed to slaughter weight are not substitutes for cattle ready for slaughter, i.e., fed or fat cattle.[55] Cattle not at the slaughter stage will not produce the same type of marketable beef in terms of quality grades and sized pieces.[56] Typically, stocker cattle have not developed to the stage where they are suitable to be placed on feedlots.

Virtually all (95.4 percent by weight) of subject imports from Canada entered the United States in 1997 weighing over 320 kilograms (kg), or more than 704 pounds, primarily fed and cull cattle for immediate slaughter.[57] [58] The average weight of all cattle imported from Canada was: 1,322 pounds in 1995, 1,243

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[53] See e.g., Wieland Werke, AG v. United States, 718 F. Supp. 50 (Ct. Int'l Trade 1989).

[54] See Goss Graphics Systems, Inc. v. United States, 22 CIT __, Slip Op. 98-147 at 8 (Oct. 16, 1998); Mukand Ltd. v. United States, 937 F. Supp. 910, 916 (Ct. Int'l Trade 1996); Wieland Werke, AG, 718 F. Supp. at 52(Ct. Int'l Trade 1989); United States Steel Group v. United States, 873 F. Supp. 673, 685-86 (Ct. Int'l Trade 1994), aff'd, 96 F.3d 1352 (Fed. Cir. 1996).

[55] CR at V-1; PR at V-1.

[56] CR at II-10; PR at II-7. Most breeds of fed cattle receive their best quality grades if they are slaughtered when they reach the optimal weight of about 1,200 pounds. Thus, it is important that they be sold quickly when they get to this weight. CR at V-6; PR at V-5.

[57] We have used data by weight when available rather than by head as the better unit of measure when comparing cattle at the different stages of development. A comparison based on head of cattle would be less appropriate since cattle are not equivalent or substitutable at different stages of development. The use of weight provides a uniform measure of size and value at each stage of development. Indeed, cattle are sold on the basis of hundredweight not by the head.

[58] Imports of cattle from Canada weighing over 320 kg or 704 pounds by weight were: 99.1 percent by weight in 1995, 97.2 percent in 1996, 95.4 percent in 1997, 95.4 percent in interim period (Jan.-Oct.) 1997, and 97.8 percent in interim period (Jan.-Oct) 1998 of all Canadian cattle imports. Imports of cattle from Canada weighing 200-320 kg (440-704 pounds) by weight were: 0.6 percent by weight in 1995, 2.4 percent

pounds in 1996, 1,227 pounds in 1997, 1,226 pounds in interim period 1997, and 1,291 pounds in interim period 1998.[59] On the other hand, virtually all (96 percent by weight) subject imports of cattle from Mexico in 1997 were cattle weighing 90-320 kg, or 198-704 pounds, which primarily correspond with the calf or stocker stage of development in which cattle are grazed and subsequently fed in feedlots in the United States prior to slaughter, a process that may take up to a year.[60] The average weight of all cattle imported from Mexico was: 430 pounds in 1995, 435 pounds in 1996, 445 pounds in 1997, 420 pounds in interim period 1997, and 425 pounds in interim period 1998.[61]

In sum, about 95 percent of imports from Canada consists of cattle in the slaughter or feeder stage, while only about four percent of imports from Mexico consists of cattle in this stage. Conversely, some 96 percent of imports from Mexico consists of cattle in the calf or stocker stage, while only four percent of imports from Canada consists of cattle in these stages.[62] Moreover, even the small percentage (3.7 percent in

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in 1996, 3.7 percent in 1997, 3.8 percent in interim period (Jan.-Oct.) 1997, and 1.8 percent in interim period (Jan.-Oct) 1998 of all Canadian cattle imports. Imports of Canadian cattle weighing 90-200 kg (198-440 pounds) by weight were: 0.8 percent in 1997 and 0.3 percent in interim period 1998 of all Canadian cattle imports. Imports of cattle weighing less than 90 kg (198 pounds), presumably veal calves for immediate slaughter, were 0.1 percent in both 1997 and interim period 1998 of total Canadian subject imports. Calculated from CR/PR at Table E-1.

[59] CR/PR at Table IV-2.

[60] Imports of cattle from Mexico weighing 90-200 kg, or 198-440 pounds, by weight were: 58.5 percent by weight in 1995, 52.9 percent in 1996, 46.9 percent in 1997, 57 percent in interim period 1997, and 55.7 percent in interim period 1998 of all cattle imports from Mexico. Imports of cattle from Mexico weighing 200-320 kg, or 440-704 pounds, by weight were: 30.9 percent by weight in 1995, 42.1 percent in 1996, 49.1 percent in 1997, 40.9 percent in interim period 1997, and 40.8 percent in interim period 1998 of all cattle imports from Mexico. Imports of Mexican cattle weighing over 320 kg, or 704 pounds, were 4.0 percent in 1997 and 3.5 percent in interim period 1998. Calculated from CR/PR at Table E-1.

[61] CR/PR at Table IV-2.

[62] Subject imports of cattle weighing 90-320 kg, or 198-704 pounds, accounted for 4.5 percent by weight of subject imports from Canada in 1997 and 96.0 percent of subject imports from Mexico for the same year, whereas subject imports of cattle weighing over 320 kg, or over 704 pounds, accounted for 95.4 percent by weight of subject imports from Canada in 1997 and 4.0 percent of subject imports from Mexico for the same year.

1997) of imports from Canada that appear to be stocker/feeder cattle, where most of the overlap occurs, are significantly greater in size than the stocker/feeder cattle from Mexico. The average weight of feeder cattle imported from Canada was 666 pounds in 1997 whereas the average weight of stockers/feeders imported from Mexico was 446 pounds in 1997.[63] This suggests that such imports may be at different points in the stocker/feeder stage of development. Because cattle in different stages are poor substitutes for each other, imports from Canada and imports from Mexico are poor substitutes for each other.

In addition to the differences in stages of development between imports from Canada and Mexico, there are differences in the breeds, condition/health, and individual genetics that may affect the quality grade of the meat the animal produces.[64] Cattle imported from Canada tend to be "British" breeds (such as Angus and Hereford) that are more likely to produce higher-priced prime and choice quality grade meats.[65] Cattle imported from Mexico usually are Brahman or Brahman cross-breeds. While the Brahman breeds are more heat-resistant, they also are less likely to produce prime or choice grade meats.[66]

For the reasons discussed above, we find that the limited fungibility between subject imports of live cattle from Canada and subject imports from Mexico is not sufficient to support cumulation of subject imports from the two countries.

2. **Geographic Overlap**

Virtually all imports from Mexico entered the states of Texas, New Mexico, Arizona , and California,[67] whereas the majority of subject imports from Canada for the same period entered the states of

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[63] CR at I-12 and I-13; PR at I-7and I-8.

[64] CR at V-4; PR at V-3. Cattle are sold in a variety of grades and ages with different prices per hundredweight (cwt). CR at V-2; PR at V-3.

[65] CR at II-16; PR at II-10.

[66] CR at II-16; PR at II-10.

[67] CR/PR at Table D-1. Nearly all imports from Mexico (96.3 percent by head) entered the states of Texas (46.5 percent by head of all subject imports from Mexico), New Mexico (28.0 percent), Arizona (12.3

Washington, Utah, Nebraska, Colorado, and Minnesota.[68] Imports of Canadian and Mexican cattle overlap in only five states (Colorado, Indiana, Kansas, Nebraska, and Texas).[69] We find that there is only limited geographic overlap between the markets for the subject imports from Canada and Mexico. In the context of these investigations, however, we give relatively little weight to this limited geographical overlap because of the limited fungibility between subject imports of live cattle from Canada and Mexico.

3. Channels of Distribution

Cattle at all stages of development generally are sold in groups of similar-sized animals called lots. They are sold on the spot market at auction or by contract.[70] While the methods of selling cattle may overlap for cattle at different stages of development, the purchasers, and thus the channels of distribution, vary depending on the stage. Since virtually all subject imports from Mexico enter the U.S. market as calves and stockers, the channels of distribution for these imports are backgrounding or stocker/yearling operations.[71] Mexican cattle imported into the United States generally are sold by producers in Mexico through brokers, with the U.S. stockers/feeders typically the destination of the imports.[72] On the other hand, subject imports

percent), and California (9.5 percent) for the period of January 1995-October 1998.

[68] CR/PR at Table D-1. The majority (about 67 percent by head) of subject imports from Canada entered the states of: Washington (25.5 percent); Utah (12.1 percent); Nebraska (11.3 percent); Colorado (9.9 percent); and Minnesota (8.8 percent) for the period of January 1995-October 1998.

[69] CR/PR at Table D-1.

[70] CR at V-4; PR at V-3.

[71] CR at I-14; PR at I-8. In responses to Commission questionnaires, the reporting purchasers of Mexican cattle indicated that nearly all Mexican cattle entered the United States as stocker/feeder calves. CR at II-15; PR at II-9. Mexican Respondent, CNG, indicated "virtually all of the imports from Mexico consist of stocker cattle" which are not sold directly to feedlots, but rather are sold to stocker/yearling operators. Respondent's (Mexico-CNG) Postconference Brief, Responses to Staff Questions at 6.

[72] CR at II-15; PR at II-9. The cattle are sold in Mexico through a variety of systems including order buyers, video auctions, on ranches in Mexico or at the border. CR at I-13; PR at I-8.

from Canada enter the U.S. market primarily as fed and cull cattle ready for immediate slaughter.[73] Thus, the channels of distribution for imports from Canada are primarily slaughterhouses or packers. Virtually all Canadian cattle imported into the United States have been purchased in Canada, either at feedlots, where feedlot operators typically receive bids from buyers for U.S. and Canadian packers, or at public livestock auctions.[74]

We find that imports from Canada and from Mexico enter the U.S. market through different channels of distribution because they enter at different stages of development. Thus, we also find there is an insufficient degree of overlap in the channels of distribution among the imports from Canada and from Mexico to support a finding of competition under the cumulation provision of the statute.

4. Simultaneous Presence

Respondents allege that imports from Canada and Mexico enter the United States at different times of the year, imports from Canada during the spring and summer months, and imports from Mexico during the fall and winter months.[75] Import statistics and USDA data, however, indicate that imports of live cattle from Canada and Mexico were simultaneously present in the market throughout the period of investigation.[76]

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[73] CR at II-15; PR at II-10. Petitioner acknowledged that the "majority [of Canadian cattle] enter for slaughter, after being purchased by the packers or their order buyers" whereas the volume of Mexican cattle "purchased for immediate slaughter is minimal." Petitioner also contended that a "substantial quantity [of Canadian cattle], however, enter for feeding on feedlots prior to slaughter." Petitioner's Postconference Brief at 22 and 23.

[74] CR at I-12; PR at I-8.

[75] Respondent's (Mexico-CNG) Postconference Brief at 9-10; Respondent's (Mexico-AMEG) Supplemental Brief at 4; Respondent's (Canada) Postconference Brief at 8.

[76] CR/PR at Table IV-2. There is evidence in the record that imports from Canada for slaughter, which account for the majority of its imports, entered the United States in significant numbers in each month of the year from 1992 to 1996, with slightly less import volume in the months of November, December, and January. 1997 Section 332 Study at Table D-13. There also is evidence that imports of Mexican cattle entered the United States in every quarter from 1986 to 1998, generally with slightly less import volume in the third quarter (July-September) of each year. Respondent's (Mexico-CNG) Postconference Brief at Appendix 4.

However, simultaneous presence is not indicative of a reasonable overlap of competition when, as here, the imports from the two countries are at different stages of development and are poor substitutes for each other.

5. **Conclusion**

Based on the insufficient degree of fungibility between the imports from Canada and Mexico, and the differences in channels of distribution due to the fact that imports enter at different stages of development, we find there is not a reasonable overlap of competition between imports from Canada and Mexico. Therefore, we find that subject imports do not compete with each other in the U.S. market. Consequently, we do not cumulate subject imports from Canada with subject imports from Mexico for purposes of analyzing whether there is a reasonable indication that the domestic industry is materially injured by reason of subject imports.

IV. REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF SUBJECT IMPORTS

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.[77] [78] In making this determination, the Commission must

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[77] 19 U.S.C. §§ 1671b(a) and 1673b(a).

[78] Commissioner Crawford notes that the statute requires that the Commission determine whether a domestic industry is "materially injured by reason of" the allegedly subsidized and LTFV imports. She finds that the clear meaning of the statute is to require a determination of whether the domestic industry is materially injured by reason of unfairly traded imports, not by reason of the unfairly traded imports among other things. Many, if not most, domestic industries are subject to injury from more than one economic factor. Of these factors, there may be more than one that independently are causing material injury to the domestic industry. It is assumed in the legislative history that the "ITC will consider information which indicates that harm is caused by factors other than less-than-fair-value imports." S. Rep. No. 249, 96th Cong., 1st Sess. 75 (1979). However, the legislative history makes it clear that the Commission is not to weigh or prioritize the factors that are independently causing material injury. Id. at 74; H.R. Rep. No. 317, 96th Cong., 1st Sess. 46-47 (1979). The Commission is not to determine if the unfairly traded imports are "the principal, a substantial or a significant cause of material injury." S. Rep. No. 96-249 at 74 (1979). Rather, it is to determine whether any injury "by reason of" the unfairly traded imports is material. That is, the Commission must determine if the subject imports are causing material injury to the domestic industry. "When determining the effect of imports on the domestic industry, the Commission must consider all relevant factors that can demonstrate if unfairly traded imports are materially injuring the domestic industry." S. Rep. No. 71, 100th Cong., 1st Sess.

consider the volume of imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations.[79] The statute defines "material injury" as "harm which is not inconsequential, immaterial or unimportant."[80] 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.[81] 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."[82]

For the reasons discussed below, we determine that there is a reasonable indication that the domestic industry producing live cattle is materially injured by reason of subject imports from Canada and that there is no reasonable indication that the domestic industry producing live cattle is materially injured or threatened with material injury by reason of subject imports from Mexico.

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116 (1987) (emphasis added); Gerald Metals v. United States, 132 F.3d 716 (Fed. Cir. 1997) (rehearing denied).

For a detailed description and application of Commissioner Crawford's analytical framework, *see* Certain Steel Wire Rod from Canada, Germany, Trinidad & Tobago, and Venezuela, Inv. Nos. 731-TA-763-766 (Final), USITC Pub. 3087 at 29 (March 1998) and Steel Concrete Reinforcing Bars from Turkey, Inv. No. 731-TA-745 (Final), USITC Pub. 3034 at 35 (April 1997). Both the Court of International Trade and the United States Court of Appeals for the Federal Circuit have held that the "statutory language fits very well" with Commissioner Crawford's mode of analysis, expressly holding that her mode of analysis comports with the statutory requirements for reaching a determination of material injury by reason of the subject imports. United States Steel Group v. United States, 96 F.3d 1352, 1361 (Fed. Cir. 1996), *aff'g* 873 F. Supp. 673, 694-95 (Ct. Int'l Trade 1994).

[79] 19 U.S.C. § 1677(7)(B)(i). The Commission "may consider such other economic factors as are relevant to the determination" but shall "identify each [such] factor . . . and explain in full its relevance to the determination." 19 U.S.C. § 1677(7)(B). See also Angus Chemical Co. v. United States, 140 F.3d 1478 (Fed. Cir. 1998).

[80] 19 U.S.C. § 1677(7)(A).

[81] 19 U.S.C. § 1677(7)(C)(iii).

[82] 19 U.S.C. § 1677(7)(C)(iii).

A. Information Available in These Preliminary Investigations

The statute directs the Commission to make its preliminary determination of whether there is a reasonable indication that an industry in the United States is materially injured by reason of imports of subject merchandise "based on the information available to it at the time of the determination. . . ."[83] The domestic live cattle industry is extremely large and dispersed.[84] Thus, forwarding questionnaires to all domestic producers of the domestic like product -- live cattle -- or developing a sampling methodology was impractical in these preliminary investigations.[85]

Moreover, in these investigations, the Commission has reliable secondary sources for the necessary domestic producer data. These data generally involve periods through October 1998.[86] In addition, the Commission has obtained some information on the domestic industry from the questionnaires (with narrative questions) that were sent to U.S. associations representing U.S. cattle operations, 58 of which responded.[87]

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[83] 19 U.S.C. § 1673b(1).

[84] According to the petition, "[o]f the 882,600 [domestic live cattle] operations in 1997, 703,300 were reported to have 1-49 head of cattle; 104,820 were reported to have 50-99 head of cattle; 68,845 had 100-499 head; and 5,635 had 500+ head." Petition at 6. In 1997, there were 1,167,910 operations (including cow-calf operators, stocker/yearling operators, feedlot operators) of live cattle in the United States. CR/PR at III-1. The feedlot sector is more concentrated than the other production sectors, but still had 110,075 operations in 1997. CR at III-2; PR at III-1.

[85] The Court of International Trade (CIT) in Chung Ling acknowledged that it would be "impractical given the time constraints for completing its investigation" for the Commission to attempt to obtain absolute coverage utilizing questionnaires for "an industry comprised of more than 1,000 producers," even in a final investigation. Chung Ling Co. v. U.S., 805 F. Supp.45, 49 (Ct. Int'l Trade 1992).

[86] Petitioner supported the use of secondary source data in these investigations. Moreover, the CIT has supported use of secondary source data when the Commission determined that questionnaire responses did not provide an adequate basis for making its determination. Alberta Pork Producers' Mktg Bd. v. United States, 669 F. Supp. 445, 460 (Ct. Int'l Trade 1987)("statute permits the Commission to use the best information otherwise available, and nothing in the statute or regulations prevents the Commission from using information other than questionnaire responses when the Commission determines that the responses do not provide an adequate basis for making its determination."), aff'g, Live Swine and Pork from Canada, Inv. No. 701-TA-224 (Final).

[87] CR at III-1; PR at III-1.

The Commission also has obtained some information from responses to the importers'/purchasers' questionnaires regarding pricing data on both domestically-produced and imported live cattle.[88] Official statistics were used for import data. The parties have not offered an alternative to these sources of data.[89]

While the method undertaken in these investigations is the only practical way to obtain reliable and representative data for this industry in these preliminary investigations, we will continue to seek alternative methods to obtain information in any final phase investigations of the imports from Canada.

B. Conditions of Competition

One important condition of competition in these investigations is the existence of a business cycle, which is distinctive to the cattle industry. The "cattle cycle" is a "cyclical pattern of expansions and contractions" that historically lasts for approximately ten years from peak to peak and has four stages.[90] When slaughter cattle prices are relatively low and beginning to rise, cattle producers retain more cattle for breeding, rather than slaughtering them. This initially reduces the number of cattle slaughtered and tends to further increase cattle prices. This is the expansionary phase, which usually lasts about five years. In two to three years, the calves of the cows held for breeding are ready for slaughter. Thus, supplies of cattle begin to increase until a peak year, and prices begin to fall. The industry then enters the liquidation phase, which usually lasts about two to three years, in which cattle producers reduce their herds by sending some of their breeding stock to slaughter, thereby increasing the supply of slaughter cattle and further decreasing their price. In the fourth consolidation phase, which lasts about a year, cattle prices begin to rise, reflecting the reduced supply of cattle for slaughter due to the earlier liquidation of the breeding stock. There is general

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[88] The Commission sent importer questionnaires to approximately 127 firms that were believed to import cattle (i.e., packers and feedlots); 19 firms responded with import data, 12 firms responded that they did not import during the period of investigation, and 96 firms did not respond. CR at IV-1 and n.1; PR at IV-1 and n.1.

[89] See Tr. at 104 and 140.

[90] See CR at II-1 - II-3 and VI-2 - VI-3; PR at II-1 - II-2 and VI-2 - VI-3.

agreement among the parties and questionnaire responses that the domestic industry is in the liquidation phase of the cattle cycle.[91]

Another condition of competition is the dispersed nature of the cattle industry. There were 1,167,910 cattle operations in the United States in 1997.[92] The domestic cattle industry includes cow-calf operators, stocker/yearling operators, and feedlot operators. Each of these operations corresponds to a different stage of development of the cattle, as discussed above, and may be affected by different conditions of competition. Cow-calf operations are the least concentrated, with many operations family-owned and operated. They may do their own backgrounding, or sell or toll the weaned cattle to a stocker/yearling operator for grazing. For cow-calf operators and stockers, weather and other environmental conditions that enhance the cattle's growth are important factors in their operations. [93]

Feedlot operations are more concentrated, and purchase the cattle directly from cow-calf operators, from stocker/yearling operators, or from auction markets. The price of grain is an important factor for feedlot operators.[94] For example, the relatively low grain prices may encourage feedlot operators to retain cattle in the feedlots for longer periods of time because additional weight gain to the cattle is relatively inexpensive.[95]

Purchasers have somewhat different concerns depending on the stage of development. Purchasers of

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[91] CR at II-2 and VI-3; PR at II-2 and VI-3. The evidence in the record indicates that the cattle cycle in Canada is closely linked, or similar, to that in the United States. CR at II-2 and Tr. at 140. The evidence indicates that the Mexican cycle is more independent of the U.S. cycle and may already have moved into an expansionary phase. CR at II-2; PR at II-2.

[92] CR/PR at III-1. The evidence on the record also indicates that only a small percentage of operations had a large herd size, i.e., 500 or more heads of cattle. Petition at 6; CR at VI-2; PR at VI-1.

[93] For example, the drought in Texas and Southwest United States in 1998 forced ranchers to sell cattle that they might otherwise have kept, which increased the number of cattle on the market and reduced their price. Culled cows sold due to the drought will be for immediate slaughter, whereas young heifers sold would first affect the price of stocker and feeder cattle and later fed cattle. CR at II-3; PR at II-2.

[94] CR at VI-9; PR at VI-7.

[95] CR at I-8; PR at I-5-6. Evidence in the record indicates that current low grain prices may have resulted in feeding cattle to higher weights prior to slaughter.

calves, stockers, and feeder cattle are interested in health and ability to gain weight.[96] Purchasers of fed cattle, the concentrated downstream packer industry, are concerned with the quality of the meat that the fed cattle will produce.[97]

Within different stages of development, live cattle is a generally substitutable commodity product.[98] As discussed below, prices fluctuate daily for this commodity product.[99] The packer industry is heavily concentrated among a few firms, with the three largest packers accounting for a large majority of the cattle slaughter market in the United States.[100] Consequently, the dispersed domestic producers are price takers.[101] Primarily as a result of close geographic proximity and relatively open border policies, cattle and beef markets in the United States, Canada, and, to a lesser extent, Mexico, are highly interrelated.[102] [103]

The demand for live cattle is derived from the demand for beef and byproducts.[104] The demand for beef can shift within the beef market between different cuts of beef, between these cuts and manufactured meat such as hamburger, and between beef and other meats or other foods. Any of these changes may affect

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[96] CR at II-4; PR at II-3.

[97] CR at II-4; PR at II-3. Quality grades for beef from fed cattle are prime, choice, and select. Beef from cull cattle are graded on a different scale or not at all. Packers purchasing lots of fed cattle expect 80 percent of each lot will be grade choice or better (prime). Id.

[98] CR at II-13-15 and V-1; PR at II-8-9 and V-1.

[99] CR/PR at V-1.

[100] CR at II-3; PR at II-2.

[101] CR/PR at V-1.

[102] 1997 Section 332 Study at 1-1.

[103] The Canadian respondent argues that "[s]ince the North American beef market is integrated--prices are the same on both sides of the border--any interruption in the trade of cattle will be compensated for by trade in beef. Barriers to trade in live cattle will only affect the location of slaughter--prices will be unaffected." Respondent's (Canada) Postconference Brief at 14.

[104] CR at II-8; PR at II-5.

the demand and price for cattle. Studies of demand for beef demonstrate that beef is increasingly being replaced by pork and chicken in the United States.[105] Changes in beef exports also may have a significant effect on the demand for cattle in the United States.[106] Economic difficulties in the major importing countries of U.S. beef, including Japan and other Asian economies, have resulted in those countries purchasing lower-priced types of meat (chiefly frozen rather than fresh). Therefore the value of beef exports has fallen while the weight of these exports has risen.[107] In addition, recent difficulties in Russia have reduced Russian purchases of low-priced variety meats.[108]

U.S. apparent consumption for slaughter cattle, however, has changed relatively little over the period of investigation. U.S. apparent consumption for slaughter cattle by weight increased by 1.0 percent from 1995 to 1997, and was 0.5 percent lower in interim period 1998 compared with interim period 1997.[109] Finally, we note that there have been virtually no U.S. shipments of non-subject imports of live cattle during the period of investigation.[110]

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[105] CR at II-9; PR at II-6. Between 1997 and 1998, pork production increased by an estimated 9 percent and prices for hogs declined by an average of 30 percent. Respondent's (Canada) Postconference Brief at 29.

[106] CR at II-7; PR at II-5.

[107] CR at II-7; PR at II-5. Asian demand for high-quality leather also has declined.

[108] CR at II-7; PR at II-5.

[109] CR/PR at Table C-1. U.S. apparent consumption by head increased by 2.2 percent from 1995 to 1997, and was 3 percent lower in interim period 1998 compared with interim period 1997. U.S. apparent consumption by value increased by 2.5 percent from 1995 to 1997, and was 5.4 percent lower in interim period 1998 compared with interim period 1997. Id.

[110] CR/PR at Tables IV-2 and IV-3.

C. REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF SUBJECT IMPORTS FROM CANADA[111]

1. Volume of the Subject Imports from Canada

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."[112]

The volume and market share of subject imports from Canada increased from 1995 to 1997. The quantity of imports from Canada of live cattle by weight and by head increased from 1995 to 1997, declining slightly in interim period 1998 compared to interim period 1997.[113] U.S. market share held by imports from Canada increased from 3.4 percent by weight in 1995 to 3.8 percent by weight in 1997, and remained constant at 4.0 percent by weight for both interim periods 1997 and 1998.[114] This share of the U.S. market held by imports from Canada, while relatively modest compared to that held by the domestic producers,[115]

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[111] Commissioner Crawford and Commissioner Askey do not join this section of the opinion. See their dissenting views infra.

[112] 19 U.S.C. § 1677(7)(C)(i).

[113] CR/PR at Table C-1. U.S. imports of live cattle from Canada by weight were: 1,453.7 million pounds in 1995; 1,834.4 million pounds in 1996; 1,659.1 million pounds in 1997; 1,440.1 million pounds in interim period (Jan.-Oct.) 1997; and 1,429.1 million pounds in interim period (Jan.-Oct.) 1998. Imports from Canada by weight increased by 14.1 percent from 1995 to 1997. U.S. imports of live cattle from Canada by head were: 1,100,000 in 1995; 1,476,000 in 1996; 1,352,000 in 1997; 1,175,000 in interim period 1997; and 1,107,000 in interim period 1998. Imports from Canada by head increased by 22.9 percent from 1995 to 1997. Imports from Canada by weight and by head were 0.8 percent and 5.8 percent, respectively, lower in interim period 1998 compared to interim period 1997.

[114] CR/PR at Table C-1. See note 57 supra regarding the use of weight measurement as a better indicator than by head for comparison of data including cattle at different stages of production. The market share by head held by imports from Canada was similar in size and followed a similar trend.

[115] Domestic producers held 95 percent of the market by weight in each year and interim period of the period of investigation. CR/PR at Table C-1.

must be considered in light of the nature of this commodity agricultural product,[116] and the price-sensitivity of the live cattle market. As discussed below, the record suggests that even relatively small volumes can have significant price effects in this price-sensitive market.

Based on the foregoing, we find for purposes of these preliminary determinations that the volume and market share of the subject imports from Canada are significant for a commodity agricultural product despite the relatively low levels. We intend to further evaluate the significance of those volume and market shares in any final phase investigations.

2.. Price Effects of the Subject Imports from Canada

Section 771(C)(ii) of the Act provides that, in evaluating the price effects of the subject imports,

> the Commission shall consider whether -- (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.[117]

As stated above, live cattle is a commodity agricultural product which is highly price sensitive within each stage of development. Live cattle at the same stage of development are substitutable regardless of origin.[118] In responses to Commission questionnaires, 46 of the 47 responding cattle associations and 10 of

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[116] Indeed, in enacting the Trade Agreements Act of 1979, the Senate recognized the special nature of agricultural production and discussed it in connection with "material injury":

> Because of the special nature of agriculture, including the cyclical nature of much of agriculture production, special problems exist in determining whether an agricultural industry is materially injured. For example, in the livestock sector, certain factors relating to the state of a particular industry within that sector may appear to indicate a favorable situation for that industry when in fact the opposite is true. Thus, gross sales and employment in the industry producing beef could be increasing at a time when economic loss is occurring, *i.e.*, cattle herds are being liquidated because prices make the maintenance of the herds unprofitable.

S. Rep. 249, 96th Cong., 1st Sess. 88 (1979).

[117] 19 U.S.C. § 1677(7)(C)(ii).

[118] CR at II-10 and II-12; PR at II-7 and II-8.

the 11 responding purchasers reported that domestic and Canadian cattle were interchangeable.[119] In questionnaire responses, all purchasers reported price as one of the top three most important factors in their purchasing decisions and half of these responses reported price as the most important factor.[120] The record reveals that differences other than price are not significant for cattle at similar stages of development and sex.[121] As discussed above, the packing industry is concentrated. Moreover, cattle producers have little alternative but to take the market price at the time their product is ready for sale. For both of these reasons, cattle producers are price takers.[122] Market prices of cattle are widely disseminated and readily available. The USDA provides timely spot prices of feeder steers and heifers, fed steers, and culled cows in the United States on the Internet and by telephone.[123] Prices in the Canadian market are available from CanFax and are updated continually.[124]

In such an industry, a relatively small volume of imports can have a significant effect on domestic prices.[125] In light of the foregoing, we find, for purposes of these preliminary determinations, that the significant, albeit relatively small, volume of imports from Canada and their market share have depressed

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[119] CR at II-12; PR at II-8.

[120] CR at II-10; PR at II-7.

[121] CR at II-12; PR at II-8. In responses to Commission questionnaires, six of the eight responding purchasers *** reported that differences other than price between Canadian and U.S. cattle were not important. Id.

[122] CR/PR at V-1. It is important that cattle for slaughter be sold at their optimal weight in order to receive their best quality grades. CR at V-6; PR at V-5. This fact further limits the producer's ability to affect prices by withholding or accelerating the time of sale for its product.

[123] The USDA maintains a Web site that also provides the price of Mexican cattle, which is updated every Tuesday. CR at V-2; PR at V-3.

[124] CR at V-2; PR at V-3.

[125] See, e.g., USX Corp. v. United States, 655 F. Supp. 487, 490 ("it is the *significance* of a quantity of imports, and not absolute volume alone, that must guide ITC's analysis under section 1677(7)"and further stated about a "price sensitive and fungible product" that "'the impact of seemingly small import volumes . . . is magnified in the marketplace.'"

domestic prices or suppressed price increases to a significant degree.

We recognize that the declines in domestic prices over the period of investigation are in some measure due to the liquidation phase of the cattle cycle. However, for purposes of these preliminary investigations, we find that the imports of Canadian cattle have also had a depressing or suppressing effect on domestic prices.[126]

While there is evidence of consistent underselling by the imports from Canada during all reporting periods,[127] we have not given this evidence significant weight, in light of the pricing practices for this commodity agricultural product.[128] The integration of the U.S. and Canadian cattle markets, particularly the linkage in pricing methods, would suggest a single price for U.S. purchases of the U.S. product and imports from Canada at the same stage of development. Moreover, there is some evidence on the record in these preliminary phase investigations that the underselling could be the result of differences in factors such as quality and yield grade of the products.[129] We intend to further evaluate these issues in any final phase investigations.

Accordingly, we find for purposes of our preliminary determinations that the imports from Canada have depressed prices or suppressed price increases for the domestic like product to a significant degree.

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[126] CR/PR at Table V-1.

[127] In all 14 possible price comparisons of prices for domestic product and prices of imports from Canada, domestic product was undersold by these subject imports by margins ranging from 1.7 to 5.1 percent. CR/PR at Table V-1.

[128] In responses to Commission questionnaires, all 11 responding purchasers reported that U.S. and Canadian cattle were comparable in terms of lowest price. CR at II-13; PR at II-8.

[129] CR at V-13 and 14, n.17; PR at V-9 and 10, n.17.

3. Impact of the Subject Imports from Canada on the Domestic Industry[130]

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.[131] These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development.

We find that the data used by the Commission to evaluate the condition of the domestic industry are reliable and show an industry with declines in most of the key domestic industry factors.[132] [133] Moreover, the

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[130] As part of its consideration of the impact of imports, the statute specifies that the Commission is to consider "the magnitude of the margin of dumping" in an antidumping proceeding. 19 U.S.C. § 1677(7)(C)(iii)(V). In its notice of initiation, Commerce identified estimated dumping margins for Canada ranging from 6.42 to 10.72 percent; and estimated dumping margins for Mexico ranging from 15.48 to 64.49 percent. 63 Fed. Reg. at 71888 (Dec. 30, 1998).

[131] 19 U.S.C. § 1677(7)(C)(iii). See also SAA at 851 and 885 ("In material injury determinations, the Commission considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they also may demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports." Id. at 885.)

[132] CR/PR at Table III-3. U.S. production (the calf crop) steadily declined from 40.2 million head in 1995 to 38.7 million head in 1997, and from 28.5 million head in interim period (Jan.-Oct.) 1997 to 27.9 million head in interim period (Jan.-Oct.) 1998. Production capacity for the domestic industry steadily declined from 55.3 million head in 1995 to 53.7 million head in 1997, and from 52.9 million head as of July 1, 1997 to 51.9 million head as of July 1, 1998. U.S. domestic shipments (slaughter of animals of U.S. origin) increased from 34.5 million head in 1995 to 36.6 million head in 1996, and declined slightly to 36.1 million head in 1997. U.S. shipments also declined from 30.3 million head in interim period 1997 to 29.5 million head in interim period 1998. Mid-year and year-end inventories (total number of cattle and calves) declined from 1995 to 1997, and were lower in interim period 1998 compared with interim period 1997. The aggregate weight of U.S. cattle commercially slaughtered increased by 1.6 percent from 1995 to 1997, and decreased by 0.6 percent in interim period 1998 compared with interim period 1997. The unit value of commercially slaughtered U.S. cattle by pounds increased from $0.62 in 1995 to $0.64 in 1997, and declined from $0.64 in interim period 1997 to $0.60 in interim period 1998. Id.

[133] Petitioner proposes a methodology for the Commission to exclude imported cattle from domestic production and shipments: deduct imports of slaughter cattle and feeder cattle from the total slaughter figures. Petitioner's Supplemental Brief at 5; Petitioner's Postconference Brief at 5-6, 21-22. The Commission has prepared production and shipments data using this methodology to calculate the total slaughter of animals of U.S. origin because it is the most practical method of making the calculation. However, it assumes that animals are slaughtered in the same year that they are imported, which in fact is not always the case.

financial performance indicators for the industry were negative in each year of the period of investigation.[134] While weak performance is expected for the domestic industry during the liquidation phase of the cattle cycle, we find for purposes of these preliminary determinations that the subject imports from Canada of this commodity agricultural product have exacerbated the normal cyclical downturn in the industry's performance. We plan to further evaluate the relationship between the cattle cycle and impact of the imports from Canada on the condition of the domestic industry in any final phase investigations.

We conclude, on the record in these preliminary phase investigations, that the volume and market share of subject imports from Canada of this commodity agricultural product have depressed or suppressed domestic prices, and significantly weakened the financial performance of the domestic industry. Accordingly, we find that the subject imports from Canada have had a significant adverse impact on the domestic industry producing live cattle for purposes of these preliminary determinations.

4. Conclusion

For the reasons stated above, we find that there is a reasonable indication that the domestic industry is materially injured by reason of subject imports from Canada.

D. NO REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF SUBJECT IMPORTS FROM MEXICO

1. Volume of the Subject Imports from Mexico

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

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[134] CR/PR at Tables VI-1, VI-2, and VI-3. The gross value of U.S. cow-calf production (comparable to revenues on a per-unit basis) increased from $312.28 per bredcow in 1996 to $405.50 per bredcow in 1997. CR/PR at Table VI-1. However, total cash expenses also increased from $522.24 per bredcow in 1996 to $535.92 per bredcow in 1997. Id. Thus, the gross value of production less cash expenses was negative in all three years. Id. The record indicates that the negative gross value of production results over the past few years have been due to a combination of low prices for cattle and higher costs for feed, as well as variable and fixed expenses. CR at VI-4. The estimated returns or margins (difference between the selling price and expenses) for commercial feedlot operations were negative in each month from March to October 1998, but were positive in November 1998. CR at VI-9 and VI-10; PR at VI-7 and VI-8.

or consumption in the United States, is significant."[135]

The volume and market share of subject imports from Mexico have been small throughout the period of investigation. The quantity of imports from Mexico of live cattle by weight and by head declined over 50 percent from 1995 to 1997.[136] While there was a slight increase in the volume of imports from Mexico by weight and by head in interim period 1998 compared to interim period 1997,[137] these imports remain at historically low levels.[138] Imports from Mexico held a small and decreasing share of the U.S. market over the period of investigation, declining from 1.7 percent by weight in 1995 to 0.7 percent by weight in 1997, and remained constant at 0.5 percent by weight for both interim periods 1997 and 1998.[139] At the same time, domestic producers held 95 percent of the market by weight in each year and interim period over the period of investigation.[140]

Based on the foregoing, we conclude that the small volume of subject imports from Mexico and their

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[135] 19 U.S.C. § 1677(7)(C)(i).

[136] CR/PR at Table C-1. U.S. imports of live cattle from Mexico by weight were: 709.3 million pounds in 1995, 196.8 million pounds in 1996, 297.2 million pounds in 1997, 183.1 million pounds in interim period (Jan.-Oct.) 1997, and 193.8 million pounds in interim period (Jan.-Oct.) 1998. Imports from Mexico by weight declined by 58.1 percent from 1995 to 1997. U.S. imports of live cattle from Mexico by head were: 1,651,000 in 1995, 452,000 in 1996, 668,000 in 1997, 436,000 in interim period (Jan.-Oct.) 1997, and 456,000 in interim period (Jan.-Oct.) 1998. Imports from Mexico by head declined by 59.6 percent from 1995 to 1997.

[137] CR/PR at Table C-1. Imports from Mexico by weight and by head were 5.9 percent and 4.6 percent, respectively, higher in interim period 1998 compared to interim period 1997.

[138] Respondent's (Mexico-CNG) Postconference Brief at Appendix 4.

[139] CR/PR at Table C-1. See note 57 supra regarding the use of weight measurement as a better indicator than by head for comparison of data including cattle at different stages of production. While the market share by head held by imports from Mexico was slightly higher than that by weight, it still was small in each year throughout the period of investigation and followed a similar declining trend.

[140] CR/PR at Table C-1. The U.S. market share by weight held by the domestic industry was: 95 percent in 1995; 95.3 percent in 1996; and 95.5 percent in 1997, interim period 1997, and interim period 1998. The U.S. market share by head held by the domestic industry was: 92.6 percent in 1995; 95.0 percent in 1996; 94.7 percent in 1997; and 95.0 percent in both interim period 1997 and interim period 1998.

market share, even in the context of the conditions of competition for this industry, are not significant.

2. Price Effects of the Subject Imports from Mexico

Section 771(C)(ii) of the Act provides that, in evaluating the price effects of the subject imports,

> the Commission shall consider whether -- (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.[141]

While live cattle generally is a commodity agricultural product within stages of development, we find that the volume of imports from Mexico and market share are too small to affect domestic prices to a significant degree. Imports from Mexico accounted for 0.7 percent by weight of the U.S. market in 1997 and 0.5 percent by weight in interim period 1998.[142] The volume and market share of these imports are declining and are at historical low levels.[143] Further, while there are limited comparative pricing data in this investigation, there is no evidence of underselling.[144] Moreover, prices for cattle at the stocker and feeder stages of development, which account for virtually all imports from Mexico, have increased from 1996 to 1998.[145] Finally, there appears to be no direct relationship between the prices for stocker/feeder cattle, which

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[141] 19 U.S.C. § 1677(7)(C)(ii).

[142] CR/PR at Table C-1.

[143] Commissioner Crawford concurs that the subject imports are not having significant effects on domestic prices. She has given petitioner the benefit of the doubt and assumed that none of the subject imports would have been sold in the U.S. market at fairly traded prices, and that all of the demand for the subject imports would have shifted to domestic cattle. However, given the small volume of the subject imports, the increase in demand for domestic cattle would have been so small that the domestic industry would not have been able to increase its prices.

[144] CR/PR at Table V-2.

[145] Respondent's (Mexico-CNG) Postconference Brief at 16, Table 5. According to the Mexican Respondent, average U.S. market prices for 450 pound stockers based on CattleFax data were: $78.22 in 1995, $64.10 in 1996, $88.88 in 1997, $87.22 in interim period (Jan.-Aug.) 1997, and $91.37 in interim period (Jan.-Aug.) 1998; and average U.S. market prices for 650 pound stockers were: $68.21 in 1995, $59.22 in 1996, $78.22 in 1997, $76.96 in interim period (Jan.-Aug.) 1997, and $78.15 in interim period (Jan.-Aug.) 1998. USDA prices for 500 to 550 pound stockers shows fluctuations between quarters but a general increase in prices from 1996 to 1998. CR/PR at Table V-2.

tend to cost more per pound, and fed cattle ready for slaughter.[146] Thus, any effect that the imports of Canadian fed cattle have on the prices of domestic fed cattle are not affected by the small volume of imports from Mexico, since the imports from Mexico are at different stages of development.

Accordingly, we find that the insignificant volume of imports from Mexico has not adversely affected domestic prices to a significant degree.

3. Impact of the Subject Imports from Mexico on the Domestic Industry[147]

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.[148] These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development.

The small and decreasing volume and market share of the subject imports from Mexico have not had a significant adverse impact on the domestic industry during the period of investigation. As discussed earlier, domestic producers continually held 95 percent market share by weight throughout the period of investigation, while the small U.S. market share held by imports from Mexico declined from 1.7 percent in 1995 to 0.7 percent by weight in 1997, and was 0.5 percent in interim period 1998.[149]

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[146] CR at V-2; PR at V-2.

[147] See note 130 supra regarding consideration of "the magnitude of the margin of dumping" in an antidumping proceeding. 19 U.S.C. § 1677(7)(C)(iii)(V).

[148] 19 U.S.C. § 1677(7)(C)(iii). See also SAA at 851 and 885("In material injury determinations, the Commission considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they also may demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports." Id. at 885.)

[149] Commissioner Crawford concurs that the subject imports are not having a significant impact on the domestic industry. As noted previously, she has assumed that all of the demand for the subject imports would have shifted to domestic cattle had the subject imports been fairly traded. However, given the small volume of the subject imports, the increase in demand for domestic cattle would have been so small that the domestic industry would not have been able to increase its output, sales or revenues significantly. Therefore the domestic industry would not have been materially better off if the subject imports had not been dumped.

We find that the data used by the Commission to evaluate the condition of the domestic industry are reliable and show an industry with declines in most of the key domestic industry factors.[150] [151] Moreover, the financial performance indicators for the industry were negative in each year of the period of investigation.[152] Weak performance is expected for the domestic industry during the liquidation phase of the cattle cycle. The insignificant volume of imports from Mexico have not exacerbated the normal cyclical downturn in the industry's performance.

In sum, the small and decreasing volumes of subject imports from Mexico have not significantly affected domestic prices or significantly weakened the financial performance of the domestic industry.

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[150] CR/PR at Table III-3. U.S. production (the calf crop) steadily declined from 40.2 million head in 1995 to 38.7 million head in 1997, and from 28.5 million in interim period (Jan.-June) 1997 to 27.9 million head in interim period (Jan.-June) 1998. Production capacity for the domestic industry steadily declined from 55.3 million head in 1995 to 53.7 million head in 1997, and from 52.9 million head as of July 1, 1997 to 51.9 million head as of July 1, 1998. U.S. domestic shipments (slaughter of animals of U.S. origin) increased from 34.5 million head in 1995 to 36.6 million head in 1996, and declined slightly to 36.1 million head in 1997. U.S. shipments also declined from 30.3 million head in interim period 1997 to 29.5 million head in interim period 1998. Mid-year and year-end inventories (total number of cattle and calves) declined from 1995 to 1997, and were lower in interim period 1998 compared with interim period 1997. The aggregate weight of U.S. cattle commercially slaughtered increased by two percent from 1995 to 1997, and decreased by one percent in interim period 1998 compared with interim period 1997. The unit value of commercially slaughtered U.S. cattle by pounds increased from \$0.62 in 1995 to \$0.64 in 1997, and declined from \$0.64 in interim period 1997 to \$0.60 in interim period 1998. Id.

[151] Petitioner proposes a methodology for the Commission to exclude imported cattle from domestic production and shipments: deduct imports of slaughter cattle and feeder cattle from the total slaughter figures. Petitioner's Supplemental Brief at 5; Petitioner's Postconference Brief at 5-6, 21-22. The Commission has prepared production and shipments data using this methodology to calculate the total slaughter of animals of U.S. origin because it is the most practical method of making the calculation. However, it assumes that animals are slaughtered in the same year that they are imported, which in fact is not always the case.

[152] CR/PR at Tables VI-1, VI-2, and VI-3. The gross value of U.S. cow-calf production (comparable to revenues on a per-unit basis) increased from \$312.28 per bredcow in 1996 to \$405.50 per bredcow in 1997. CR/PR at Table VI-1. However, total cash expenses also increased from \$522.24 per bredcow in 1996 to \$535.92 per bredcow in 1997. Id. Thus, the gross value of production less cash expenses was negative in all three years. Id. The record indicates that the negative gross value of production results over the past few years have been due to a combination of low prices for cattle and higher costs. CR at VI-4. The estimated returns or margins (difference between the selling price and expenses) for commercial feedlot operations were negative in each month from March to October 1998, but was positive in November 1998. CR at VI-9 and VI-10; PR at VI-7 and VI-8.

Accordingly, we find that the subject imports from Mexico have not had a significant adverse impact on the domestic industry producing live cattle.

4. Conclusion

For the reasons stated above, we find that there is no reasonable indication that the domestic industry is materially injured by reason of subject imports from Mexico.

V. NO REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF ALLEGEDLY LTFV IMPORTS FROM MEXICO[153]

A. Cumulation for Purposes of Threat Analysis

In determining whether a domestic industry is threatened with material injury by reason of imports from two or more countries, the Commission has the discretion to cumulate the volume and price effects of such imports if they meet the requirements for cumulation for present material injury.[154] As discussed previously, we find that the requirements for cumulation are not satisfied in the context of present material injury. Accordingly, we do not cumulate for purposes of our threat analysis.

B. Statutory Factors

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 from Mexico 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."[155] The Commission may not make such a

[153] Petitioner has not set forth arguments regarding threat of material injury by reason of the subject imports. Nonetheless, the Commission is directed by statute to consider the issue. 19 U.S.C.§ 1673b(a).

[154] 19 U.S.C. § 1677(7)(H).

[155] 19 U.S.C. §§ 1673b(a) and 1677(7)(F)(ii).

determination "on the basis of mere conjecture or supposition,"[156] and considers the threat factors "as a whole." In making our determination, we have considered all factors that are relevant to this investigation,[157] and have determined that there is no reasonable indication that the domestic industry is threatened with material injury by reason of the subject imports from Mexico.

We find no likelihood of substantially increased imports. Import volumes declined significantly over the period of investigation, both by weight and by head.[158] The corresponding market share of subject imports also declined significantly over the period of investigation, both by weight and by head.[159] The market share of the imports is extremely small, only 0.7 percent by weight in 1997.[160] While there was a slight increase in the volume by weight between interim periods, market share by weight remained constant,

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[156] 19 U.S.C. § 1677(7)(F)(ii). An affirmative threat determination must be based upon "positive evidence tending to show an intention to increase the levels of importation." Metallverken Nederland B.V. v. United States, 744 F. Supp. 281, 287 (Ct. Int'l Trade 1990), citing American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1280 (Ct. Int'l Trade 1984). See also Calabrian Corp. v. United States, 794 F. Supp. 377, 387-88 (Ct. Int'l Trade 1992), citing H.R. Rep. No. 1156, 98th Cong., 2d Sess. 174 (1984).

[157] 19 U.S.C. § 1677(7)(F)(i). Factor (I) regarding subsidies is inapplicable to this antidumping investigation. Factor VII regarding raw and processed agricultural products is inapplicable, because this investigation does not apply to both a raw agricultural product and any product processed from it. Additionally, Factor VI regarding product shifting is not an issue in this investigation. Finally, there is no evidence in the record of dumping findings or antidumping remedies in markets of foreign countries relevant to this investigation. 19 U.S.C. § 1677 (7)(F)(iii).

[158] CR/PR at Table IV-3. U.S. imports of live cattle from Mexico by weight were: 709.3 million pounds in 1995, 196.8 million pounds in 1996, 297.2 million pounds in 1997, 183.1 million pounds in interim period (Jan.-Oct.) 1997, and 193.8 million pounds in interim period (Jan.-Oct.) 1998. U.S. imports of live cattle from Mexico by head were: 1,651,000 in 1995, 452,000 in 1996, 668,000 in 1997, 436,000 in interim period 1997 and 456,000 in interim period 1998.

[159] CR/PR at Table IV-3. Mexico's market share by weight was 1.7 percent in 1995, 0.5 percent in 1996, and 0.7 percent in 1997. Comparing interim period 1997 and 1998 figures, Mexico's market share remained constant at 0.5 percent. Mexico's market share by head of cattle was 4.4 percent in 1995, 1.2 percent in 1996, and 1.8 percent in 1997. Comparing interim period 1997 and 1998 figures, Mexico's market share increased slightly from 1.4 percent to 1.5 percent.

[160] CR/PR at Table IV-3.

and the imports continue to be at historically low levels.[161] We find that the overall declining volume and the low and declining market share of imports from Mexico during the period of investigation do not indicate the likelihood of substantially increased imports.

Furthermore, there is no indication of excess production capacity in Mexico that would increase the likelihood of substantially increased imports. To the contrary, the number of cattle in Mexico has declined over the period of investigation, and is expected to fall in 1999.[162] The record indicates that the severe drought experienced by Mexico in 1995 lowered cattle fertility rates, which may have been a factor in decreases in the number of Mexican cattle slaughtered over the period of investigation.[163] Although the U.S. market is Mexico's primary export market for cattle, the record indicates that exports to the U.S. market, both in absolute numbers and as a proportion of Mexican shipments, declined significantly during the period of investigation.[164] Although exports to the United States are expected to increase slightly in 1999, and preliminary 1998 data indicate that exports to the United States were slightly higher in 1998 compared with 1997, the 1998 figures were at significantly lower levels than at the beginning of the period examined.[165]

We do not find that the imports of live cattle from Mexico are likely to enter the market at prices that are likely to depress or suppress domestic prices to a significant degree. As discussed earlier, the imports from Mexico are entering the market in such small volumes that they are not currently having a price suppressing or depressing effect on the domestic prices of live cattle. The record does not indicate any likelihood that declining volume and market share of imports from Mexico will depress or suppress domestic

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[161] Respondent's (Mexico-CNG) Postconference Brief at Appendix 4.

[162] CR at VII-4-6 and Table VII-2; PR at VII-3-4 and Table VII-2. For purposes of applying the statutory threat factors to this investigation, we consider the overall number of cattle in Mexico as the "inventory" of cattle in Mexico, although different cattle would be marketable at different times.

[163] CR at I-14, VII-4-6, and Table VII-2; PR at I-9, VII-3-4, and Table VII-2.

[164] CR/PR at Table VII-2.

[165] CR at VII-6 and Table VII-2; PR at VII-4 and Table VII-2.

prices in the future to any significant degree. Due to the small market share of the imports from Mexico, we find that any actual or potential negative effect of the subject imports on existing development and production efforts of the domestic industry would not be material, and would not constitute a threat of material injury to the domestic cattle industry. We find no indication of "any other demonstrable adverse trends" that indicate that there is likely to be material injury by reason of the subject imports from Mexico.[166] Therefore, we do not find that material injury "would occur unless an order is issued or a suspension agreement is accepted."

For the foregoing reasons we determine that there is no reasonable indication that the domestic industry is threatened with material injury by reason of subject imports from Mexico.

CONCLUSION

For the foregoing reasons, we determine that there is a reasonable indication that the domestic industry producing live cattle is materially injured by reason of allegedly subsidized and LTFV imports from Canada. However, we determine there is no reasonable indication of material injury or threat of material injury by reason of allegedly LTFV imports from Mexico.

[166] We have considered the present condition of the domestic industry as among the "relevant economic factors" in our threat of material injury analysis.

SEPARATE AND DISSENTING VIEWS OF CHAIRMAN LYNN M. BRAGG

I find there is a reasonable indication that the domestic industry producing live cattle is materially injured by reason of imports of the subject merchandise from Canada which allegedly are subsidized, and by reason of imports of the subject merchandise from Canada and Mexico which allegedly are sold in the United States at less-than-fair-value.

At the outset, I note that I am satisfied that the preliminary record demonstrates a reasonable indication of material injury to the domestic live cattle industry by reason of the allegedly unfair imports from Canada and Mexico. This is not to say that the record is complete. It is not. To the contrary, this record and the issues it leaves unanswered, in my view, beg for a comprehensive final investigation. As the Commission notes in virtually every preliminary opinion[1]:

> The legal standard for preliminary antidumping duty determinations requires the Commission to determine, based upon the information available at the time of the preliminary determination, whether there is a reasonable indication that a domestic industry is materially injured, or threatened with material injury, by reason of the allegedly LTFV imports.[2] 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."[3]

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[1] See, e.g., Dynamic Random Access Memory Semiconductors of One Megabit and Above from Taiwan, Inv. No. 731-TA-811 (Preliminary), USITC Pub. 3149 (Dec. 1998); Persulfates from China, Inv. No. 731-TA-749 (Preliminary), USITC Pub. 2989 (Aug. 1996).

[2] 19 U.S.C. § 1673b(a); *see also* American Lamb Co. v. United States, 785 F.2d 994 (Fed. Cir. 1996); Calabrian Corp. v. United States, 794 F. Supp. 377, 381 (Ct. Int'l Trade 1992).

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

Thus, even absent my finding that there is a reasonable indication of material injury and causation evident at this phase of the investigations, I still would have made affirmative determinations pursuant to the afore cited formulation. Indeed, I would conclude that incomplete data concerning important issues, such as: reasonable overlap of competition among the various stages of cattle production; seemingly "abnormal" operation of the cattle cycle; and financial performance indicators for the various distinct production segments of the domestic industry, prevent a confident conclusion that "the record as a whole contains clear and convincing evidence that there is no material injury or threat of material injury."[4]

I. LIKE PRODUCT

For purposes of these preliminary investigations, I define the like product[5] consistent with the scope of the investigation as determined by the Department of Commerce, namely:

> all live cattle except imports of dairy cows for the production of milk for human consumption and purebred cattle specially imported for breeding purposes and other cattle specially imported for breeding purposes.[6]

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[4] American Lamb, 785 F.2d at 1001. As noted by the court there, this "guideline," in conjunction with no likelihood of later contrary evidence test, "weight the scales in favor of affirmative and against [preliminary] negative determinations." Id.

[5] 19 U.S.C. § 1677(10). In analyzing domestic like product issues, 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 Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int'l Trade 1996); Calabrian Corp. v. United States, 794 F. Supp. 377, 382 n.4 (Ct. Int'l Trade 1992).

[6] See Notice of Initiation of Antidumping Duty Investigations: Live Cattle from Canada and Mexico, 63 Fed. Reg. 71886 (December 30, 1998), and Notice of Initiation of Countervailing Duty Investigation of Live Cattle from Canada, 63 Fed. Reg. 71889 (both reprinted in Confidential Staff Report ("CR") at A-5-11; Public Staff Report ("PR") at A-5-11).

I note that for purposes of these preliminary investigations, no party contested the propriety of defining the like product consistent with the scope.[7]

II. DOMESTIC INDUSTRY/RELATED PARTIES

Based on the foregoing like product definition, and as proposed by the Petitioner,[8] I find for purposes of these preliminary investigations that the domestic industry consists of all "operations" engaged in the production of live cattle, including: cow-calf operators (covering the birth to weaning stage -- usually at five to ten months); backgrounders or stocker/yearling operators (which raise weaned calves until usually twelve to twenty months); and feedlot operators (which "finish" cattle during the last three to five months, until slaughter).[9] The domestic industry does not include slaughterhouses or packers. As with the like product definition, for purposes of these preliminary investigations, Respondents accept this definition of the domestic industry.[10]

As a result of the nature of the domestic industry definition, i.e., different operators engaged in different stages of production, in these investigations, an untold number of domestic operators -- primarily stockers and feedlot operators -- may be related to cattle producers in both

7 Petitioner R-Calf's Postconference Brief at 3; Respondents' (Canada) Postconference Brief at 3 and 4; Respondents' (Mexico-CNG) Postconference Brief at Appendix 1 at 1.

8 Petitioner R-Calf's Postconference Brief, Responses to Questions at 4-7 and 12-13.

9 CR at I-7-8; PR at I-5-6. Also included in the domestic industry are "seedstock" operators, which produce cattle for breeding. Ultimately, such cattle are slaughtered for beef. Id.

10 Respondents' (Canada) Postconference Brief at 3 and 4; Respondents' (Mexico-CNG) Postconference Brief at Appendix 1 at 1.

subject countries.[11] For example, a stocker operator which stocks both domestic and Mexican cattle, may be "related" by virtue of its imports.

In addition, some domestic packers are direct importers of subject cattle. Although such packers are not included in the domestic industry, some are owned by conglomerates which also own domestic feedlots; feedlots are part of the domestic industry.

Petitioner concedes, however, that it is "difficult to identify the [related] importers or the extent to which those operations rely upon imports versus domestic production."[12] Mexican Respondents argue that related feedlot operators, if any, should not be excluded from the domestic industry; the Mexican Respondents are silent with regard to related stocker/yearling operators.[13] No other respondents addressed this issue.

For purposes of these preliminary investigations, in light of the highly fragmented nature of the domestic industry and, therefore, the unlikelihood that any related party's inclusion will

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11 Domestic producers are "related parties" if they import subject merchandise, or if they directly or indirectly control or are controlled by a subject foreign producer or exporter. 19 U.S.C. § 1677(4)(B).

In "appropriate circumstances," such related parties may be excluded from the domestic industry. The primary factors the Commission examines 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.

19 U.S.C. § 1677(4)(B).

12 Petitioner’s Postconference Brief, Response to Questions at 19-21; Petitioner’s Supplemental Brief at 4-6.

13 Respondent’s (Mexico-CNG) Postconference Brief, Responses to Staff Questions at 6.

skew the domestic industry data, I find that appropriate circumstances do not exist to exclude any related party from the domestic industry.

III. CUMULATION

For purposes of these preliminary investigations, I have cumulated imports from the two subject countries. Indeed, I find that the statutory prerequisite to mandatory cumulation -- reasonable overlap of competition -- has been satisfied. Further, as discussed below, I believe sound and predictable administration of the statute requires that the Commission resolve seemingly dispositive cumulation issues, such as those presented in these investigations, only after the benefit of a full public hearing in connection with final and complete investigations.

The statute provides that in evaluating whether there is a reasonable indication that a domestic industry is materially injured by reason of subject imports, the Commission shall cumulatively assess imports from all subject countries if such imports compete with each other and with the domestic like product.[14] Indeed, only a reasonable overlap of competition is required.[15]

The Commission generally considers four factors in determining whether there is a reasonable overlap of competition, no one of which is necessarily dispositive; these include:

(1) the degree of fungibility between the imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;

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[14] 19 U.S.C. § 1677(7)(G).

[15] Goss Graphic Systems, Inc. v. United States, 22 CIT ___, Slip Op. 98-147 at 8 (Oct. 16, 1998); Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898, 902 (Ct. Int'l Trade), aff'd, 859 F.2d 915 (Fed. Cir. 1988).

(2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product;

(3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and

(4) whether the imports are simultaneously present in the market.[16]

Petitioner argues that there is a reasonable overlap of competition between the imports themselves and the domestic like product. In particular, Petitioner asserts: (i) that there is a national market for sale to ultimate consumers; (ii) that there is geographic overlap; (iii) that there is overlap in the channels of distribution; and (iv) that the subject imports and the domestic like product are simultaneously present in the market.[17]

Conversely, Respondents argue that there is no reasonable overlap of competition between the subject imports because they export different types of cattle, at different stages of production, to different areas of the United States, at different times of the year.[18]

Although Respondents' arguments could be satisfactorily demonstrated in final investigations, I find, based on the record in these preliminary investigations, that there is a reasonable overlap of competition between the subject imports themselves and among the subject

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16 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 1988), aff'd, 859 F.2d 915 (Fed. Cir. 1988); Mukand Ltd. v. United States, 937 F. Supp. 910, 915 (Ct. Int'l Trade 1996).

17 Petitioner's Postconference Brief, Responses to Questions at 21-23; Petitioner's Supplemental Brief at 9-14; Tr. at 64-67.

18 Respondent's (Mexico-CNG) Postconference Brief at 2-10; Respondent's (Mexico-CNG) Supplemental Brief at 6; Respondent's (Mexico-AMEG) Supplemental Brief at 3-4; Respondent's (Canada) Postconference Brief at 6-8. Respondents do not assert a lack of competition between imports from each country and the domestic like product.

In any final investigations, with regard to injury attributable to nonsubject imports, I will be particularly mindful that Canadian Respondents argue here that there is no competition between Canadian and Mexican cattle.

imports and the domestic like product.

With regard to Respondents' first two arguments, that cattle from Mexico and Canada are of different breeds and at different stages of production,[19] while the preliminary record bears this out to some degree, I have defined the like product as all live cattle, except for cattle for milking or breeding. As a consequence, I believe it would be premature at this preliminary stage of the investigations to find that products that are "like" based upon, among other things, characteristics and uses, nonetheless fail to compete.

The preliminary record does not permit a clear and convincing conclusion that the reasonable overlap of competition prerequisite has not been met. In my view, this issue goes to the heart of understanding the competitive conditions of this industry -- conditions which would be better assessed only after the Commission had an opportunity for full briefing by the parties, including a public hearing. Indeed, final investigations would have afforded the Commission a more complete opportunity to ascertain whether cattle at different stages of production are effectively a "work in progress." In other words, while it may be true that a Mexican calf entering the U.S. on a day certain does not compete with a head of Canadian cattle entering the same day,[20] it is not clear that the Mexican calf will not likely compete directly with a head of Canadian cattle entering six to eighteen months later. Without benefit of full briefing, I am not convinced that this is not competition.

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19 In general, Canadian cattle tend to be mature "common cattle," either ready for slaughter or to be fed on a feedlot prior to slaughter. Most Mexican cattle are calves that are crossbreeds between common cattle species and the "Brahman" species; these calves typically spend six months to one year in "stocker lots" before spending an additional three to five months on a feedlot. CR at I-3-9; PR at I-3-6.

20 Even in this regard, the record demonstrates a moderate level of competition between imports from the two countries. In 1997, for example, roughly 98% of cattle from Mexico weighed between 90 and 320 kilograms each; during the same period, 10% of cattle from Canada fell within this weight range. CR at Table E-1; PR at Table E-1.

Nor do the preliminary data paint a compelling picture of a lack of geographical overlap of competition. Indeed, in 1997 and during January through October 1998, 44% and 51% respectively, of imports from Mexico, and 23% and 22%, respectively, of imports from Canada, went to the states of Colorado, Indiana, Kansas, Nebraska, or Texas.[21]

In addition, at this stage in the investigations, it is not clear to what extent imports from the two countries may compete geographically once they reach the same stage of production. That is, for example, Mexican cattle which enter the U.S. through Texas destined for a stocker operation there, could well end up a few months later on a feedlot in Indiana together with cattle from Canada -- to say nothing of the likelihood that they may then be slaughtered and packed in Iowa. I believe that this issue of geographic competition requires further elucidation in final investigations.

Contrary to Respondents' final primary assertion in opposition to cumulation, i.e., that imports from the two countries are not present in the U.S. at the same time of year,[22] the preliminary record belies this argument. U.S. Department of Agriculture statistics indicate that in 1995 and 1996, the first two years of the period of the instant investigations, Canada exported cattle for slaughter in every month of both years.[23] Indeed, in 1996, 44% of Canadian imports entered the U.S. in the spring and winter months -- the period which Respondents assert is dominated by Mexican imports.

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21 CR at Table D-1; PR at Table D-1.

22 Respondents allege that most cattle from Canada enter in the spring and summer months; cattle from Mexico during the fall and winter. Respondent's (Mexico-CNG) Postconference Brief at 9-10; Respondent's (Mexico-AMEG) Supplemental Brief at 4; Respondent's (Canada) Postconference Brief at 8.

23 See Cattle and Beef: Impact of the NAFTA and Uruguay Round Agreements on U.S. Trade, Inv. No. 332-371, USITC Pub. 3048 (July 1997) at Table D-13.

Based on the foregoing, I find there is a reasonable overlap of competition between the subject imports and the domestic like product and that cumulation is therefore required. Further, although not necessary in my analysis, I note that to the extent the preliminary record casts doubt on certain elements of a reasonable overlap of competition, I believe these elements would have been further developed in final investigations. Finally, I note that while cumulation, or lack thereof, may be dispositive in some of my colleague's injury and causation analyses, such was not the case for me: I would have made affirmative determinations in these investigations even absent cumulation.

IV. REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF THE CUMULATED SUBJECT IMPORTS

For the reasons discussed below, I find that there is a reasonable indication that the domestic industry producing live cattle is materially injured by reason of imports of the subject merchandise from Canada which are allegedly subsidized, and by reason of subject merchandise from Canada and Mexico which are allegedly sold in the United States at less-than-fair-value.

In making these determinations, as directed by the statute, I have considered the volume of imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations.[24] I have also evaluated all relevant economic factors within the context of the business cycle and

[24] 19 U.S.C. § 1677(7)(B)(I). The Commission "may consider such other economic factors as are relevant to the determination" but shall "explain in full its relevance to the determination." 19 U.S.C. § 1677(7)(B).

conditions of competition distinctive to the live cattle industry.[25]

It is with this last point that I begin my analysis.

A. Conditions Of Competition

There are two important conditions of competition which characterize the domestic industry and, in particular, manifest the adverse effect of allegedly unfair imports on the industry.

First, the industry is, by all accounts, a true commodity industry. At the various stages of production, live cattle are fungible.[26] The industry is composed of approximately 900,000 cow-calf operators (i.e., the segment which raises cattle from birth to weaning).[27] Significantly, nearly 80% of these operators -- more than 700,000 -- have herds of 49 head of cattle or less.[28] Penultimate purchasers, i.e., packers, are highly concentrated[29] and have obvious access to a virtually inexhaustible number of supply sources, both domestic and foreign. In addition, as is the case in other true commodity industries, prices change from day to day. USDA, in fact, provides spot prices of live cattle at various stages of production on its Internet website and over the telephone.[30] Both Congress and the Commission's reviewing court have recognized that in

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25 19 U.S.C. § 1677(7)(C)(iii).

26 According to Commission staff, forty-six of the forty-seven responding cattle associations and ten of the eleven responding purchasers reported that domestic and Canadian cattle are interchangeable. CR at II-13; PR at II-8. As noted several times above, Canadian cattle are primarily those ready for slaughter. Similarly, Commission staff reported that thirty-nine of the forty-seven responding cattle associations and seven of the eight responding purchasers indicated that domestic and Mexican cattle are interchangeable. CR at II-14; PR at II-9. As also noted above, Mexican cattle are primarily calves destined for stocker lots.

27 CR at VI-2; PR at VI-1.

28 Id.

29 Indeed, in 1997, the three largest domestic packers reported a daily kill capacity of approximately 85,000 head of cattle. CR at Table IV-1; PR at Table IV-1.

30 CR at V-2; PR at V-2.

connection with a commodity industry, even a small volume of imports may have a significant adverse effect on domestic producers.[31]

Second, as is often true of commodity industries, the live cattle industry is characterized by a distinct business cycle. The "cattle cycle" typically lasts about ten years and has four distinct phases.[32]

> **The Expansionary Phase:** When cattle prices are relatively high, cattle producers retain more cattle for breeding, rather than slaughtering them. This initially reduces the number of cattle slaughtered and typically results in increased cattle prices. This phase lasts between three and eight years.
>
> **Peak Year:** As a result of the expansionary phase, cattle supplies begin to increase to the optimum point where supply and demand are roughly equivalent.
>
> **Liquidation Phase:** Begins as increased supply from the expansionary phase exceeds demand. Prices start to fall. Producers reduce their herds by sending some of their breeding stock to slaughter, thereby further increasing supply and reducing prices. This phase may last two to four years.

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31 H.R. Rep. 317, 96th Cong., 1st Sess. 46 (1979)("For one industry, an apparently small volume of imports may have a significant impact on the market; for another the same volume might not be significant."). See also USX Corp. v. United States, 655 F. Supp. 487, 490 (Ct. Int'l Trade 1987)("Congress, this court, and ITC itself have repeatedly recognized that it is the *significance* of a quantity of imports, and not absolute volume alone, that must guide the ITC's analysis . . . . ")(emphasis in original).

32 CR at II-1; PR at II-1.

Consolidation Phase: Supply reductions from the previous phase now cannot satisfy demand, thereby causing prices to rise. This phase may last about a year.

Then the cycle begins anew.

Significantly, Petitioner and Respondents agree that the cycle exists; they agree that the domestic industry should now be at the end of the "liquidation" phase, entering the "consolidation" phase; and they agree that the cycle is not operating as would otherwise be expected -- that prices have not increased during a period of reduced domestic supply. They do not agree, however, as to the cause of the cycle's failure to operate "normally."[33]

B. Volume

The volume of the cumulated subject imports declined irregularly from 2.75 million head of cattle in 1995 to 2.02 million in 1997.[34] During interim 1998 (January through October) cumulated imports were 1.56 million head of cattle compared with 1.61 for the same period in 1997.[35]

By weight, the cumulated volume declined from 2.16 billion pounds in 1995 to 1.95 billion in 1997, and was roughly constant in interim 1998 compared with interim 1997.[36]

By value, the cumulated subject import volume declined from $1.40 billion in 1995 to

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33 Petitioner asserts that the presence of the allegedly unfair imports has obstructed the normal operation of the cycle. Petitioner's Postconference Brief at 34. In contrast, the Canadian Respondents assert that factors other than imports, such as low feed costs, have distorted the traditional cycle. Canadian Respondent's Postconference Brief at 26-28.

34 CR at Table IV-2; PR at Table IV-2.

35 Id.

36 Id.

$1.11 billion in 1997; in interim 1998, import volume was valued at $921 million compared with $930 for the same period in 1997.[37]

As measured by head of cattle, the cumulated imports accounted for an irregularly declining share of total U.S. consumption: 7.4% in 1995; 5.0% in 1996; 5.3% in 1997; and 5.0% in both interim periods.[38] By weight, the cumulated imports' share of U.S. consumption declined from 5.0% in 1995 to 4.5% in 1997, and was 4.5% in both interim periods.[39] By value, the subject imports accounted for a declining share of consumption, from 5.3% in 1995 to 4.1% in 1997, though the share was higher in interim 1998 than in interim 1997.[40]

Although the volume of cumulated subject imports declined slightly during the period, the record indicates that these volumes are significant, both in absolute terms and relative to domestic production, particularly when viewed in light of the cattle cycle and the commodity nature of the marketplace. "Significantly," the over two million head of imported cattle is equivalent to the collective output of at least 40,000 of the smallest domestic cow-calf operations.[41]

C. Price

As would be expected in a true commodity market, prices tend to move in lock-step, whether up or down. Cattle producers are price takers, not price makers. Producers have no

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37 Id.

38 CR at Table IV-3; PR at Table IV-3.

39 Id.

40 Id.

41 As noted above, roughly 80% of cow-calf operators have 49 or less head of cattle; thus, 2 million (divided by) 49 (equals) slightly more than 40,000. Of course, this formulation assumes that each cow-calf operator has 49 head of cattle. Consequently, the cumulated import volume presumably is equivalent to substantially more than "just" 40,000 domestic cow-calf producers.

leverage to influence prices. Underselling or overselling will tend not to occur for more than a brief period. Notice of price changes is quickly and efficiently disseminated; purchasers respond rapidly with equivalent changes in purchase price.

Indeed, in these investigations, there is minimal evidence of underselling or overselling by the subject imports.[42] The nature of the cattle industry does not readily give rise to allegations of lost sales and corresponding revenue loss.[43] Here, there are only two sets of moderately illustrative pricing-related data: average unit values for the subject imports; and quarterly data derived from monthly USDA pricing data.[44]

Average unit values for the subject imports, both cumulatively and individually, were lower in 1997 than in 1995.[45] On a cumulated basis, the average unit value per pound in 1997 was $0.57 compared with $0.65 in 1995 -- a twelve percent decrease.[46] The average unit value for the cumulated subject imports was also $0.57 in both interim periods.[47]

The Commission sought pricing data for four products; as compiled by USDA, the four products are included in two sets of pricing data. These USDA data demonstrate that prices

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42 CR at Tables V-1 and V-2; PR at Tables V-1 and V-2. As expressed by Commission staff, "when large margins occur for cattle, they probably indicate either errors in the data or significant differences in the products involved." CR at V-13; PR at V-9.

43 CR at V-15; PR at V-10-11. See Gifford-Hill Cement Co. v. United States, 615 F. Supp. 577, 585 (Ct. Int'l Trade 1985)("Where fungible goods are concerned, volume [of imports] may be the best indicator of lost sales rather than the anecdotal evidence obtained in the typical lost sales study").

44 Although the Commission obtained some pricing data from questionnaire responses, Canadian Respondents assert that questionnaire responses are, for a number of reasons, generally not comparable. See CR at V-13 n.17; PR at V-9-10 n.17. In any final phase investigations, I encourage Canadian Respondents to propose how, if at all, questionnaire responses might be compared or reconciled.

45 CR at Table IV-2; PR at Table IV-2.

46 Id.

47 Id.

fluctuated significantly, but were lower in the later quarters of 1998 compared with the earlier quarters of 1995.[48] In fact, comparing the first two quarters of 1995 with the last two quarters of 1998, the average quarterly prices for USDA product 1 declined 11.9% and prices for USDA product two declined 7.3%.[49]

As noted above, the cattle cycle is in the stage where supplies should be falling and prices rising. Clearly, the first part of this equation is true. Between the interim periods, subject import volume and U.S. shipments declined.[50] Prices, however, continued to irregularly decline. For both USDA price sets, prices in last quarter of 1998 were lower than in the first and second quarters.[51]

In view of the normal and expected operation of the cattle cycle, shrinking domestic prices in the wake of declining imports and U.S. production reasonably indicate that even moderate volumes of allegedly unfair imports of live cattle have depressed U.S. prices to a significant degree. Considering in particular the composition of the domestic industry -- with its 700,000 or so small operators -- the degree of price depression is perhaps more than just "significant," it is potentially devastating for individual operators.

D. Impact

In assessing the impact of the allegedly dumped and subsidized imports on the domestic

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48 CR at Tables V-1 and V-2; PR at Tables V-1 and V-2.

49 Id. USDA product 1 is choice steers, between 1100 and 1300 pounds, in the Texas panhandle and Nebraska; this corresponds with ITC products 1 and 2, steers over 1200 pounds and heifers over 1100 pounds, respectively. USDA product 2 is steers medium #1, between 500 and 550 pounds, in Oklahoma City; this corresponds with ITC products 3 and 4, feeder steers 300 to 400 pounds and feeder steers 500 to 550 pounds, respectively.

50 CR at Table IV-3; PR at Table IV-3.

51 CR at Table V-1 and V-2; PR at Tables V-1 and V-2.

industry, I am particularly mindful of the role of the cattle cycle in assessing the industry's performance indicators. Indeed, in legislative history to the 1979 Trade Act, the Senate specifically alerted the Commission to the possibility that commodity industry cycles may otherwise mask the industry's "true" condition.

> Because of the special nature of agriculture, including the cyclical nature of much of agriculture production, special problems exist in determining whether an agricultural industry is materially injured. For example, in the livestock sector, certain factors relating to the state of a particular industry within that sector may appear to indicate a favorable situation for that industry when in fact the opposite is true. Thus, gross sales and employment in the industry producing beef could be increasing at a time when economic loss is occurring, *i.e.*, [when] cattle herds are being liquidated because prices make the maintenance of the herds unprofitable.[52]

Total U.S. consumption of cattle increased irregularly during the period, from 37.29 million head in 1995 to 38.11 in 1997; interim 1998 consumption was 31.01 million head compared with 31.98 for the same period 1997.[53] U.S. shipments also increased irregularly during the period, from 34.54 million head in 1995 to 36.09 in 1997; interim 1998 production was 29.45 million head compared with 30.37 in interim 1997.[54] Consequently, the domestic share of consumption increased irregularly during the period: 92.7% in 1995; 95.0% in 1996; 94.7% in 1997; and 95.0% in both interim periods.[55]

Notwithstanding the domestic industry's marginal increase in production and market share, aggregate "national" USDA data show that cow-calf operators' gross value of production less

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52 S. Rep. 249, 96th Cong., 1st Sess. 88 (1979).

53 CR at Table IV-3; PR at Table IV-3.

54 Id.

55 Id.

cash expenses (which is effectively the agricultural equivalent of operating income), per bredcow, was (negative) throughout the period.[56] In 1995, the (loss) was ($78.73) per bredcow; in 1996, ($209.96); and in 1997, ($130.42).[57] On a regional basis, in 1997, (losses) per animal were as follows: North Central ($356.79); West ($274.53); Southeast ($57.05); and Plains ($34.73).[58] These regional loss patterns confirm the adverse impact of the subject imports: most Canadian cattle entered the U.S. through North Central states; most Mexican cattle through states in the West.[59]

Except to the extent that some stocker operation financial data may inadvertently be included in USDA's cow-calf financial data, the Commission has absolutely no indication of the financial performance of the stocker operation segment of the industry. Similarly, the preliminary record contains virtually no financial data concerning the feedlot segment of the industry.[60]

Declines in domestic live cattle prices appear to be due, at least in part, to the volume of allegedly unfair subject imports. Declining prices have resulted in irregularly "increasing" operating income losses for cow-calf operations, particularly those operations located in states most likely to face competition from subject imports. Thus, for example, in 1997, the average cow-calf operator with 40 head of cattle, located in a North Central state, suffered an operating

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56 CR at Table VI-1; PR at Table VI-1. It is not clear, however, to what degree these data are limited solely to cow-calf operations. For example, if a cow-calf operator also owns a stocker operation, it may be that financial data related to the stocker operation are also included in these cow-calf data. In final investigations, there will be an opportunity for more precise definition of the composition of these data.

57 Id.

58 Id.

59 CR at Table D-1; PR at Table D-1.

60 In my view, these incomplete data sets, in addition to those discussed at the outset, prevent a confident conclusion that there is clear and convincing evidence of no material injury.

loss of more than $14,000.[61] On a national basis, the industry would seem to have experienced operating losses of $4.68 billion in 1997.[62]

These record data, including "operating income" data, clearly evidence a reasonable indication that the domestic industry has been adversely impacted by the subject imports.

V. CONCLUSION

Based on the foregoing, I find there is a reasonable indication that the domestic industry producing live cattle is materially injured by reason of allegedly subsidized live cattle from Canada, and allegedly dumped live cattle from Canada and Mexico.

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61 Derived from CR at VI-2 and Table VI-2; PR at VI-1 and Table VI-2.

62 Derived CR at Tables IV-3 and VI-2; PR at Tables IV-3 and VI-2.

VIEWS OF COMMISSIONER CAROL T. CRAWFORD

On the basis of information obtained in these preliminary investigations, I determine that there is no reasonable indication that the industry in the United States producing live cattle is materially injured or threatened with material injury by reason of imports of live cattle from Canada that are alleged to be subsidized and sold in the United States at less than fair value ("LTFV") and from Mexico that are alleged to be sold at LTFV. I join the majority of the Commission in the findings with respect to like product and domestic industry, in the decision not to cumulate the subject imports from Canada with the subject imports from Mexico, and in the discussion of the conditions of competition that are distinctive to the domestic industry. I concur in the determination that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of the subject imports from Mexico. However, I do not concur in the determination that there is a reasonable indication that an industry in the United States is materially injured by reason of the subject imports from Canada. Rather, I determine that there is no reasonable indication that the domestic industry is materially injured or threatened with material injury by reason of the allegedly subsidized and LTFV imports of cattle from Canada. Because my analysis and determination differ from the majority, my separate views follow.

I. ANALYTICAL FRAMEWORK

In determining whether there is a reasonable indication that a domestic industry is materially injured by reason of the allegedly subsidized and LTFV imports, the statute directs the Commission to consider:

(I) the volume of imports of the merchandise which is the subject of the investigation,
(II) the effect of imports of that merchandise on prices in the United States for like products, and
(III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States . . .[1]

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

The statute directs that we determine whether a domestic industry is materially injured "by reason of" the unfairly traded imports. Thus we are called upon to evaluate the effect of subsidized and dumped imports on the domestic industry and determine if they are causing material injury. There may be, and often are, other "factors" that are causing injury. These factors may even be causing greater injury than the subsidies and dumping. However, the statute does not require us to weigh or prioritize the factors that independently are causing material injury. Rather, the Commission is to determine whether any injury "by reason of" the unfairly traded imports is material. That is, the Commission must determine if the subject imports are causing material injury to the domestic industry. "When determining the effects of imports on the domestic industry, the Commission must consider all relevant factors that can demonstrate if unfairly traded imports are materially

[1] 19 U.S.C. § 1677(7)(B)(i).

[2] 19 U.S.C.§ 1677(7)(B)(ii).

[3] 19 U.S.C. § 1677(7)(C)(iii).

injuring the domestic industry."[4] It is important, therefore, to assess the effects of the unfairly traded imports in a way that distinguishes those effects from the effects of other factors unrelated to the subsidies and dumping. To do this, I compare the current condition of the industry to the industry conditions that would have existed without the subsidies and dumping, that is, had subject imports all been fairly priced. I then determine whether the change in conditions constitutes material injury.[5]

In my analysis of material injury, I evaluate the effects of the subsidies and dumping[6] on domestic prices, domestic sales, and domestic revenues. To evaluate the effects of the subsidies and dumping on domestic prices, I compare domestic prices that existed when the imports were subsidized and dumped with what domestic prices would have been if the imports had been priced fairly. Similarly, to evaluate the effects of the subsidies and dumping on the quantity of domestic sales,[7] I compare the level of domestic sales that existed when imports were subsidized and dumped with what domestic sales would have been if the imports had been priced fairly. The combined price and quantity effects translate into an overall domestic revenue impact. Understanding the impact on the domestic industry's prices, sales, and overall revenues is critical to determining the state of the industry, because the effects on the statutory impact factors[8] (e.g., employment, wages, etc.) are derived from the impact on the domestic industry's prices, sales, and revenues.

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

For the reasons discussed below, I determine that there is no reasonable indication that the domestic industry producing cattle is materially injured or threatened with material injury by reason of allegedly subsidized and allegedly dumped imports of live cattle from Canada.

II. CONDITIONS OF COMPETITION

To understand how an industry is affected by unfair imports, we must examine the conditions of competition in the domestic market. The conditions of competition constitute the commercial environment in which the domestic industry competes with unfair imports, and thus form the foundation for a realistic assessment of the effects of the subsidies and dumping. This environment includes demand conditions, substitutability among and between products from different sources, and supply conditions in the market.

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[4] S. Rep. No. 100-71 at 116 (1987)(emphasis added); Gerald Metals, Inc. v. United States, 132 F.3d 716 (Fed. Cir. 1997) (rehearing denied).

[5] Both the Court of International Trade and the United States Court of Appeals for the Federal Circuit have held that the "statutory language fits very well" with my mode of analysis, expressly holding that my mode of analysis comports with the statutory requirements for reaching a determination of material injury by reason of the subject imports. United States Steel Group v. United States, 96 F.3d 1352, at 1361 (Fed.Cir. 1996), *aff'g* 873 F.Supp. 673, 694-695 (Ct. Int'l Trade 1994).

[6] As part of its consideration of the impact of imports, the statute as amended by the URAA now specifies that the Commission is to consider in an antidumping proceeding, "the magnitude of the margin of dumping." 19 U.S.C. § 1677(7)(C)(iii)(V).

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

[8] 19 U.S.C. § 1677(7)(C)(iii).

A. Demand Conditions

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

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

The cost share of cattle as a percentage of the final products, *i.e.*, beef cuts and beef byproducts, is quite high, ranging from 66 percent to nearly 100 percent. It is somewhat less for feedlot operators, but still ranges up to 67 percent of their costs. For individual consumers, evidence indicates that meat accounts for 18.2 percent of food expenditures and that beef accounts for 43.7 percent of per-capita meat expenditures.[9] Therefore, the cost of cattle and the cost of the downstream products each accounts for significant shares of the costs of the intermediate and final products and expenditures for food and meat. These significant shares indicate that demand is likely to be fairly elastic.

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

Products that can substitute for cattle include other meats, particularly pork and poultry, as well as nonsubject downstream products, such as carcasses imported from Canada or Mexico. In fact, the record indicates that pork and poultry are increasingly being substituted for beef.[10] The availability of these alternative products indicates that demand is likely to be elastic.

Concentration of Buying Power. Although there is no concentration within the domestic cattle industry, there is considerable concentration in the packing industry, which is the purchaser of cattle. The three largest

[9] CR at II-10; PR at II-7 .

[10] CR at II-9; PR at II-6.

packers/purchasers account for the large majority of the cattle purchased and processed into beef products.[11] Therefore, the purchasing power of the buyers is concentrated in the packing industry, which can and does exert significant influence over prices for cattle. In fact, petitioner acknowledges that the domestic producers are "price takers"[12] that thus have a limited ability to affect prices.

The existence of buying power among the relatively small number of purchasers, *i.e.*, the packers, implies that purchasers do not strictly react to changes in prices for these products, but can influence them as well. However, demand for cattle is a ultimately a derived demand, that is, consumers purchase beef through market outlets supplied by the packers. As discussed above, since beef represents a fairly high percentage of consumers' meat expenditures, and there are readily available substitute products for beef, an increase in the price of beef is likely to result in lower consumer purchases of beef. Because cattle represents a high percentage of the end cost of beef, any increase in the price of cattle will translate into significant increases in the cost of beef. Since beef consumers will reduce their consumption significantly in response to higher beef prices, any increase in the price of cattle will ultimately result in lower purchases of cattle, despite the buying power of the packers. Therefore, I find that purchasers are likely to reduce significantly the amount of cattle they buy in response to a general increase in prices for these products.

B. Substitutability

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

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

Given the existing demand conditions for cattle, overall purchases are likely to be significantly smaller when overall prices of cattle increase. In addition to any changes in overall demand for cattle, the demand for cattle from different sources will decrease or increase depending on their relative prices and their substitutability. If cattle from different sources are substitutable, purchasers are more likely to shift their demand when the price from one source (i.e., subject imports) increases. The magnitude of this shift in demand is determined by the degree of substitutability among the sources.

There are virtually no nonsubject imports, and thus purchasers have only three potential sources of cattle:

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[11] CR at II-2, n.5 and II-3; PR at II-2 and II-2, n.5. See also confidential telephone notes of Elizabeth Haines (Oct. 1998).

[12] CR at V-1; PR at V-1; and Petitioner's Postconference Brief at 24 and 29.

the domestic product, the subject imports from Mexico and the subject imports from Canada. Purchasers are more or less likely to switch from one source to another depending on the similarity, or substitutability, between and among them. I have evaluated the substitutability among cattle from the different sources as follows.

For purposes of these preliminary investigations, I have joined the majority's finding that, within the same stage of development, the domestic product is quite a good substitute for both the subject imports from Mexico and the subject imports from Canada. However, the substitutability between cattle at different stages of development is limited, which reduces overall substitutability. As indicated in the Views of the Commission, the subject imports each are overwhelmingly concentrated in a specific stage of development, and thus are not good substitutes for the domestic product in the other stages of development. Therefore, I find that domestic cattle are only moderate substitutes for the subject imports from Canada and for the subject imports from Mexico. Finally, I joined the majority's finding that the subject imports from Canada and the subject imports from Mexico are poor substitutes for each other.

C. Supply Conditions

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

Capacity Utilization and Capacity. Unused capacity can disciplife prices. If there is a competitive market, no individual producer can make a price increase stick. Any attempt at a price increase by one producer would be beaten back by competitors who could produce more product to sell at the prevailing price.

A traditional concept of capacity utilization is not particularly applicable to the cattle industry as a measure of whether the domestic industry has the ability to respond to attempted price increases. Rather, I find that the most relevant consideration is the time it takes to "produce" fed cattle, that is, the length of time from when a calf is conceived until it has been raised to the point where it is ready for slaughter. The record indicates that the length of time from conception to slaughter is about two and one-half years.[13] Thus, in the short run, the domestic industry is not able to "produce" more cattle.

Inventories and Exports. As with capacity utilization, traditional concepts of inventories are not particularly applicable to the cattle industry. Specifically, live cattle are regularly traded at each stage of development, and thus the reported "inventories" do not represent product accumulating in storage. Rather, the reported inventories are, in fact, already in the market when counted as inventory. Furthermore, once cattle reach the optimal weight for slaughter, it is important that they be sold quickly because they are at their best quality at that size, and continued feeding requires more food for each additional pound, which results in increased fat content.[14] Therefore, the reported inventories do not represent an additional source of supply for the domestic industry. Finally, the domestic industry's exports are very small, and thus do not represent a significant source

[13] CR at II-5; PR at II-3 .

[14] CR at V-6 to V-7; PR at V-5 .

of supply.[15] Therefore the domestic industry has no actual inventories and very small exports available that could have added supply to the U.S. market in response to changes in demand.

Level of Competition. The level of competition in the domestic market has a critical effect on producer responses to demand increases. A competitive market is one with a number of suppliers in which no one producer has the power to influence price significantly. In the U.S. market, there are nearly 1.2 million domestic producers of cattle, which are widely dispersed. Thus, there is virtually no concentration within the domestic industry. Rather, there is significant competition within the domestic industry. There are virtually no nonsubject impgrts, and thus they are not a source of competition. Even though there is virtually no competition from nonsubject imports, the competition among domestic producers indicates that there is a significant level of competition in the U.S. market for cattle.

Notwithstanding the level of competition in the U.S. market, the domestic industry's ability to supply the demand for subject imports is extremely limited, and consequently I find that the elasticity of supply is quite low.

III. NO REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF ALLEGEDLY SUBSIDIZED AND LTFV IMPORTS OF CATTLE FROM CANADA

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

A. Volume of Subject Imports

By weight, subject imports from Canada increased from 1.454 billion pounds in 1995 to 1.834 billion pounds in 1996, and then decreased to 1.659 billion pounds in 1997. In the first 10 months of 1998, the subject imports were 1.429 billion pounds. The value of the subject imports was $847.5 million in 1995, $984.7 million in 1996, $933.1 million in 1997, and $796.0 million in the first 10 months of 1998.[16] By weight, the subject imports held a market share of 3.4 percent in 1995, 4.2 percent in 1996, 3.8 percent in 1997, and 4.0 percent in the first 10 months of 1998. Their market share by value was 3.2 percent in 1995, 3.8 percent in 1996, 3.4 percent in 1997, and 3.7 percent in the first 10 months of 1998.[17] While it is clear that the larger the volume of subject imports, the larger the effect they will have on the domestic industry, whether the volume is significant cannot be determined in a vacuum, but must be evaluated in the context of its price effects and impact. Based on the market share of the subject imports from Canada and the conditions of competition in the domestic market, I find that the volume of subject imports from Canada is not significant in light of the lack of price effects and impact, as discussed below.

B. Effect of Subject Imports on Domestic Prices

To determine the effect of the subject imports on domestic prices, I examine whether the domestic industry could have increased its prices if the subject imports had not been subsidized and dumped. As discussed,

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[15] Table III-3.

[16] Table IV-3.

[17] Table IV-3.

both demand and supply conditions in the domestic market are relevant. Examining demand conditions helps us understand whether purchasers would have been willing to pay higher prices for the domestic product, or buy less of it, if subject imports had been sold at fairly traded prices. Examining supply conditions helps us understand whether available capacity and competition among suppliers to the market would have imposed discipline and prevented price increases for the domestic product, even if subject imports had not been unfairly priced.

If the subject imports from Canada had not been subsidized and dumped, their prices in the U.S. market would have increased. Thus, if subject imports had been fairly priced, they would have become more expensive relative to domestic cattle. In such a case, if subject imports are good substitutes with other cattle, purchasers would have shifted towards the relatively less expensive products.

In these investigations, no subsidy margins have been calculated, but the alleged dumping margins for the subject imports are fairly small, ranging from 6.42 percent to 10.72 percent. Therefore, the subject imports likely would have been priced at least somewhat higher had they been fairly traded. Nonetheless, I have given petitioner the benefit of the doubt and assumed that none of the subject imports from Canada would have been sold in the U.S. market at fairly traded prices.

I have also given petitioner the benefit of the doubt and assumed that all of the demand for the subject imports would have shifted to the domestic product, regardless of the degree of substitutability between these two sources of supply. Because subject imports from Canada held a market share of only 3.8 percent by weight in 1997,[18] the shift in demand toward domestic cattle would not have been significant, and it would have been too small for the domestic industry to increase its prices significantly, regardless of the conditions of competition.

Notwithstanding the substantial limitations on domestic supply discussed above, even if the domestic industry had tried to increase its prices in response to the small shift in demand, its efforts would not have been successful. Demand conditions, as discussed above, are such that domestic suppliers would not have been able to increase prices in response to this shift in demand. In addition, while there is virtually no competition from nonsubject imports, there is significant competition among producers within the domestic industry. Thus, competitive conditions indicate that price discipline exists in the market. Furthermore, the concentration of purchasing power within the packing industry supports the conclusion that domestic cattle producers are price takers. The competition among domestic producers and the purchasing power of the packing industry would have enforced price discipline in the market. In these circumstances the domestic industry likely would not have been able to increase its prices had the subject imports been sold at fairly traded prices. Consequently, I find that subject imports are not having significant effects on prices for domestic cattle.

C. Impact of Subject Imports on the Domestic Industry

To assess the impact of subject imports on the domestic industry, I consider output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, research and development and other relevant factors.[19] These factors together either encompass or reflect the volume and price effects of the subsidized and dumped imports, and so I gauge the impact of the subsidies and dumping through those effects.

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[18] Table IV-3.

[19] 19 U.S.C. § 1677(7)(C)(iii).

As discussed above, I have given petitioner the benefit of the doubt and assumed that all of the demand for the subject imports from Canada would have shifted to the domestic product, had the subject imports been sold at fairly traded prices. Nonetheless, the domestic industry would not have been able to increase its prices in response to the shift in demand. Therefore, any impact on the domestic industry would have been on its output and sales.

Because it takes two and one-half years to raise cattle from conception to slaughter, the domestic industry could not have increased its output of cattle readily in response to the shift in demand. As discussed above, the domestic industry has no actual inventories and only very small levels of exports available with which it could have supplied the increase in demand. Therefore, the domestic industry could not have increased its output or sales significantly had the subject imports been fairly traded. Even giving petitioner the benefit of the doubt and assuming that the domestic industry *could have* increased its output and sales in response to a shift in demand, the shift in demand away from the subject imports would have been so small that any effect on the domestic industry's output and sales would not have been significant. Consequently, the impact on the domestic industry would not have been significant had the subject imports been fairly traded.

D. Conclusion

On the basis of the foregoing analysis, I find that the domestic industry would not have increased its prices or its output and sales, and therefore its revenues, significantly had the subject imports been fairly traded. Therefore, I find that the domestic industry would not have been materially better off if the subject imports had not been subsidized and dumped. Consequently, I determine that there is no reasonable indication that the domestic industry producing cattle is materially injured by reason of allegedly subsidized and LTFV imports of cattle from Canada.

IV. NO REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF ALLEGEDLY SUBSIDIZED AND LTFV IMPORTS OF CATTLE FROM CANADA[20]

The statute requires the Commission to determine whether the U.S. industry is threatened with material injury by reason of the subject imports by determining 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 . . ."[21] In reaching my determination, I have considered all the factors that are relevant to this investigation[22] and have determined that there is no reasonable indication that the domestic industry is threatened with material injury by reason of the subject imports from Canada.

[20] I have joined the majority in the determination that there is no reasonable indication that the domestic industry is threatened with material injury by reason of the subject imports from Mexico. As noted in that determination, petitioner has not advanced any arguments that the domestic industry is threatened with material injury by reason of the subject imports.

[21] 19 U.S.C. §§ 1671b(a), 1673b(a) and 1677(7)(F)(ii).

[22] 19 U.S.C. § 1677(7)(F)(I). The alleged subsidies relevant to Factor (I) are not export subsidies. Factor VII regarding raw and processed agricultural products is not applicable, because this investigation does not apply to both a raw agricultural product and any product processed from it. Additionally, Factor VI regarding product shifting is not an issue in this investigation. Finally, there is no evidence in the record of dumping findings or antidumping remedies in markets of foreign countries relevant to this investigation. 19 U.S.C. § 1677 (7)(F)(iii).

By weight, subject imports from Canada increased from 1995 to 1996, but decreased from 1996 to 1997. The corresponding market share of the subject imports was quite small and stable throughout the period of investigation, between 3.4 percent and 4.2 percent at all times.[23] Therefore, there has not been a significant rate of increase in the volume or market penetration of the subject imports that would indicate the likelihood of substantially increased imports. There is no indication in the record that any increase in production capacity in Canada or inventories[24] of Canadian cattle constitute evidence of the likelihood of substantially increased imports. Although the U.S. market is Canada's primary export market for cattle, the record indicates that Canadian exports have remained quite stable and are not projected to increase in the immediate future.[25] For these reasons, I find that further dumped and subsidized imports are not imminent.

Subject imports from Canada are not likely to enter the U.S. market at prices that are likely to have significant depressing or suppressing effects on domestic prices. As discussed above, the subject imports are entering the market in such small volumes that they are not currently having significant effects on domestic prices. There is no record evidence to suggest that the conditions of competition or the lack of significant price effects is likely to change in the immediate future. In addition, the volume of the subject imports is so small that any actual or potential negative effects on existing development and production efforts of the domestic industry would not be material. There is no evidence of any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of the subject imports from Canada. For these reasons, I do not find that material injury by reason of the subject imports would occur unless an order is issued or a suspension agreement is accepted.

For the reasons stated above, I do not find that further dumped and subsidized imports from Canada are imminent or that material injury by reason of the subject imports will occur unless an order is issued or a suspension agreement is accepted. Consequently, I find that there is no reasonable indication that the domestic industry is threatened with material injury by reason of the allegedly subsidized and LTFV imports of live cattle from Canada.

V. CONCLUSION

I determine that there is no reasonable indication that the domestic industry producing live cattle is materially injured or threatened with material injury by reason of imports of live cattle from Canada that are alleged to be subsidized and sold at LTFV.

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[23] Table IV-3.

[24] As discussed above, the traditional concept of inventories is not applicable in the cattle market.

[25] Table VII-1.

DISSENTING VIEWS OF COMMISSIONER THELMA J. ASKEY

Based on the record in these preliminary phase investigations, I 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 live cattle from Canada that are allegedly subsidized and/or sold at less than fair value ("LTFV").[1]

I have joined the Commission's decision that an industry in the United States is not materially injured or threatened with material injury by reasons of imports of live cattle from Mexico. I find the domestic like product and the domestic industry determinations, as well as the conditions of competition, described in the Commission's decision to be applicable to my analysis of live cattle imported from Canada. I have also joined in the decision not to cumulate subject imports from Canada and subject imports from Mexico. In these dissenting views, I explain the reasons for my determination that there is no reasonable indication that the domestic live cattle industry is materially injured or threatened with material injury by reason of imports of live cattle from Canada.

I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS

When making my determination in these preliminary phase investigations, I have carefully considered the legal standard for preliminary determinations under the statute. In a preliminary phase investigation, I am required to determine whether there is a "reasonable indication" of material injury or a threat of material injury by reason of the subject imports.[2] In American Lamb Co. v. United States,[3] the Federal Circuit held that the "reasonable indication" standard does not mean that the Commission is to determine only whether there is a "possibility" of material injury.[4] Instead, the Federal Circuit stated that the Commission may appropriately weigh the record evidence in a preliminary determination in order to determine whether "(1) the record as a whole contains clear and convincing evidence that there is no material

[1] I note that material retardation of an industry is not an issue in these investigations.
[2] 19 U.S.C. §§ 1671b(a)(1) & 1673b(a)(1).
[3] 785 F.2d 994 (Fed. Cir. 1986).
[4] 785 F.2d at 1004.

injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation."[5] Indeed, the Federal Circuit has stated that "[t]he statute calls for a reasonable indication of injury, not a reasonable indication of need for further inquiry."[6]

In this investigation, I believe that the record evidence is clear and convincing that the domestic industry is not materially injured or threatened with material injury by reason of the subject imports and that there is little or no likelihood that contrary evidence will arise in a final investigation. In this regard, I note that the Commission obtained questionnaire responses from 58 associations representing U.S. cattle producers and from importers accounting for approximately 57 percent of imports of the subject merchandise from Canada.[7] Moreover, the U.S. Department of Agriculture maintains comprehensive statistics representing 100 percent of the U.S. production and Commission staff had access to that data when preparing their report.[8] Further, in 1997 the Commission studied the beef and cattle industries in *Cattle and Beef: Impact of the NAFTA and Uruguay Round Agreements on U.S. Trade*.[9] The amount of the information now available on the record leads me to conclude that I have a full and accurate picture of this market as it now stands.

In these circumstances, I believe the record evidence shows that the industry is not currently being injured by the subject imports and is not imminently threatened with injury by the subject imports. In my opinion, therefore, these investigations should not continue.[10]

II. NO REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF ALLEGEDLY SUBSIDIZED AND LTFV IMPORTS FROM CANADA

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[5] 785 F.2d at 1001. The Court of International Trade has stated that, when the Commission considers the likelihood that contrary evidence will arise in a final investigation, it "must analyze the 'best information available' contained in the record at the time of its determination and judge the likelihood that evidence contrary to that already gathered will arise in a final determination that would support an affirmative determination." Calabrian Corp. v. U.S. Int'l Trade Comm'n, 794 F. Supp. 377, 386 (Ct. In'tl Trade 1992).

[6] Texas Crushed Stone Co. v. United States, 35 F.3d 1535, 1543 (Fed. Cir. 1994).

[7] CR at III-1, IV-1; PR at III-1, IV-1.

[8] CR at III-1; PR at III-1.

[9] USITC Pub. 3048, July 1997.

[10] In American Lamb, the Federal Circuit stated that Congress intended the Commission to use preliminary determinations to avoid the cost and disruption to trade caused by unnecessary investigations. 785 F.2d 994 (Fed. Cir. 1986).

In making a preliminary determination whether there is a reasonable indication that an industry in the United States is materially injured by reason of the allegedly subsidized and LTFV imports under investigation, I 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.[11] The statute defines "material injury" as "harm which is not inconsequential, immaterial, or unimportant."[12] I have considered all of the relevant economic factors that bear on the state of the industry in the United States.[13] No single factor is dispositive and I have considered all relevant factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."[14] For the reasons discussed below, I determine that there is no reasonable indication that the domestic live cattle industry is materially injured by reason of allegedly unfairly traded imports from Canada.

A. Conditions of Competition

The relevant conditions of competition are set forth in the determination of the majority of the Commission.

B. Volume of Subject Imports

Section 771(7)(C)(i) 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."[15]

Subject import volumes increased from 1995 to 1996, but decreased from 1996 to 1997. Imports from Canada reached a high of 1,834.4 million pounds in 1996 and decreased to 1,659.1 million pounds in

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[11] 19 U.S.C. § 1677(7)(B)(i). The Commission "may consider such other economic factors as are relevant to the determination," but shall "identify each [such] factor . . . and explain in full its relevance to the determination." 19 U.S.C. § 1677(7)(B).

[12] 19 U.S.C. §1677(7)(A).

[13] 19 U.S.C. § 1677(7)(C)(iii).

[14] Id.; 19 U.S.C. §§ 1671b(a) & 1673b(a).

[15] 19 U.S.C. § 1677(7)(C)(i).

1997.[16] Imports in interim 1998 (January - October) were 1,429.1 million pounds, down from 1,440.1 million pounds in interim 1997.[17] Canadian imports are expected to decrease further in the near future as the cattle cycle nears the end of the liquidation phase and cattle producers enter the consolidation phase, and as a result of increased slaughter capacity in Alberta.[18] Canadian imports peaked at 4.2 percent of the U.S. market in 1996; that share decreased to 3.8 percent in 1997 and increased slightly to 4 percent in interim 1998, which was the same share as in interim 1997.[19]

Given the foregoing, I find that the record clearly indicates that the volume of the subject imports is not significant.

C. <u>Price Effects of Subject Imports</u>

Section 771(7)(C)(ii) 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.[20]

Cattle for slaughter are sold either on the spot market or by contract, although even contract sales generally set price by referring to some price index, often the market price in a certain location, as of the time of delivery.[21] Market prices are generally determined in the larger markets and are available by telephone, website, and radio broadcast.[22] Slaughter cattle must be sold quickly once they

[16] CR/PR at Table E-1.

[17] <u>Id.</u>

[18] CR at VII-1-3; PR at VII-1-3.

[19] CR/PR at Table IV-3. These market share numbers are calculated by reference to weight; the same trends emerge when the market share is calculated by number of head. <u>Id.</u>

[20] 19 U.S.C. § 1677(7)(C)(ii).

[21] CR at V-4-5; PR at 3-4.

[22] CR at V-4-6; PR at 3-5.

reach their optimal weight of 1,200 pounds; cattle producers are price takers who take the market price when their cattle are ready for slaughter.[23]

Subject imports are generally good substitutes for U.S. cattle at the same stage of production, and purchasers claim price is an important determination in making decisions to buy cattle.[24] Cattle prices generally decreased over the period of investigation. Prices reached $72.09 per hundredweight in first quarter 1995, declined to a low of $59.41 in third quarter 1998, and rose to $61.17 in fourth quarter 1998.[25] The decline is consistent with what one would expect in this stage of the cattle cycle, although petitioner argues that the presence of a large number of imports has caused prices to stay low for longer than they would otherwise have done.

Though domestic and Canadian cattle are good substitutes for each other, I do not find that Canadian imports have affected prices to a significant degree. First, Canadian import volumes currently account for only 4 percent of the U.S. market; the highest volume was 4.2 percent in 1996.[26] Second, petitioner concedes that cattle producers are price takers who are not able to bargain with the highly concentrated and powerful packing industry.[27] Third, packers will only buy cattle that are at their optimal weight for slaughter, and producers, whether U.S. or Canadian, have a limited number of cattle that are ready for slaughter at any given time. Moreover, producers are unable to increase the number of cattle ready for sale in immediate response to packer demand because any increase in production lags approximately 3 years behind a decision to retain and breed more heifers.[28] Also, because the Canadian cattle cycle mirrors the U.S. cattle cycle, Canadian producers are unlikely to have production increases that are relatively larger than U.S. production increases. Therefore, limited numbers of Canadian slaughter-ready cattle are available at any one time to compete in the market with U.S. slaughter-ready cattle.

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[23] CR at V-1; PR at V-1.

[24] CR at II-10, II-12; PR at II-7, II-8.

[25] CR/PR at Table V-1.

[26] CR/PR at Table IV-3.

[27] Petitioner's Post-Conference Brief at 24-25, 29; CR at V-1; PR at V-1. The four largest-volume beef packing firms accounted for 68 percent of slaughter in 1994. USITC Pub. 3048 at 2-6.

[28] CR at VI-3; PR at VI-3.

Although the record evidence available at this time shows limited price underselling in 14 quarters at margins ranging from 1.7 to 5.1 percent, narrative questionnaire responses attribute some of the price variation to differences in yield and quality, exchange rate cover, and slight regional differences in price.[29] Also, the evidence that cattle prices emanate from cattle markets in the central United States means that Canadian producers have few, if any, opportunities to compete with U.S. producers by offering cattle at reduced prices.[30] As noted above, the fact that the Canadian cattle cycle mirrors the U.S. cattle cycle means that Canadians are unlikely to have relatively larger numbers of cattle ready to offer for slaughter at any given time -- in other words, if U.S. production is down, Canadian production also will be down.

In sum, the record indicates to me that the subject imports have not had a significant impact on domestic prices during the period.

D. Impact of the Subject Imports on the Domestic Industry

Section 771(7)(C)(iii) provides that the Commission, in examining the impact of the subject imports on the domestic industry, "shall evaluate all relevant economic factors which have a bearing on the state of the industry," including actual and potential declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, investment, and existing development and production efforts of the domestic industry; and the magnitude of the margin.[31] I have considered these factors within the context of the conditions of competition.[32]

As I previously indicated, the subject imports have had minimal, if any, volume or price effects during the period of investigation. Accordingly, I find that the record also establishes that there is no

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[29] CR at Table V-1, V-13-14 & n.17; PR at Table V-1, V-9-10 & n.17.

[30] In western Canada, cattle are sold through a sealed bid system, and Canadian slaughter cattle are exported to the United States only after they have been purchased by U.S. packing companies. USITC Pub. 3048 at K-4-5.

[31] As part of my consideration of the impact of imports, the statute specifies that the Commission is to consider in an antidumping proceeding, "the magnitude of the dumping margin." 19 U.S.C. § 1677(7)(C)(iii)(V). In making my determination, I have considered the margins of dumping announced by Commerce in its notice of initiation. 63 Fed. Reg. 71886, 71888 (Dec. 30, 1998).

[32] No party has alleged that the captive production provision, 19 U.S.C. § 1677(7)(C)(iv), should be applied.

reasonable indication that the subject imports have had an adverse impact on the condition of the domestic industry. The current state of the industry is readily explained by other factors, including the fact that the cattle cycle is in its liquidation phase, causing prices to fall in response to increased production available for slaughter. Beef also faces increasing competition from substitute products, such as pork and chicken.[33] Many of the statutory factors enumerated above have only limited application to this industry because of its dispersed nature. What limited information we have as to cash flow, inventories, employment, wages, growth, ability to raise capital, investment, and existing development and production efforts is unlikely to be augmented in a final determination or to show any unified trend given the dispersion of the industry and the effect decisions made by individual operators have on those factors.

Canadian imports of live cattle are too low in volume, and cattle producers yield too little power in the marketplace, to affect prices. The lack of any current volume or price effects indicates to me that the subject imports have not had a more than minimal or tangential causal nexus to any injury that may be suffered by the industry.[34]

III. NO REASONABLE INDICATION OF A THREAT OF MATERIAL INJURY BY REASON OF THE ALLEGEDLY SUBSIDIZED AND LTFV IMPORTS FROM CANADA

A. General

Because I have concluded that there is no reasonable indication that the domestic industry is materially injured by reason of the subject imports from Canada, I must also determine whether the industry is threatened with material injury by reason of those imports.[35] The statute directs me to consider nine enumerated factors when performing this threat analysis.[36] In making my determination, I have considered all statutory factors that are relevant to these investigations.[37]

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[33] CR at II-8-9; PR at II-5-6.

[34] Gerald Metals v. United States, 132 F.3rd 716 (Fed. Cir. 1997).

[35] 19 U.S.C. §§ 1671b(a), 1673b(a) & 1677(7)(F). I note that petitioner has not argued that the industry is threatened with material injury by reason of the subject imports.

[36] 19 U.S.C. §1677(7)(F).

[37] 19 U.S.C. § 1677(7)(F)(i). In this regard, I note that Factor VII of section 1677(7)(F)(i), is inapplicable because the investigation covers only raw agricultural products. In addition, the record evidence indicates that the subject

(continued...)

When performing my threat analysis in these preliminary phase investigations, I have closely considered the statutory requirement that I assess whether "further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued..." before making an affirmative threat finding.[38] Moreover, I have closely considered the requirement that my determination may not be made "on the basis of mere conjecture or supposition." Finally, I have considered the threat factors "as a whole" when making my threat determination.

C. My Consideration of the Statutory Threat Factors

I have considered all of the relevant statutory threat factors when assessing whether there is a reasonable indication that the subject imports from Canada threaten to materially injure the domestic industry. For the reasons set forth below, I find that there is no reasonable indication that the domestic industry is threatened with material injury by reason of the subject imports from Canada.

As an initial matter, I find that the domestic industry is not vulnerable to a threat of material injury from the subject imports. The domestic industry controls 95 percent of the market and the record indicates that this percentage is likely to remain constant or even to increase.[39] Virtually the only competition to the domestic industry comes from the subject imports. Though prices have decreased and have not recovered to the extent predicted in the expected time, prices are still expected to rise as the cattle cycle enters the consolidation phase.[40] I therefore do not find the domestic industry to be vulnerable.

As required by the statute, I considered the nature of the subsidies alleged to be provided to the subject imports[41] and whether those imports are likely to increase as a result of those subsidies. In these proceedings, the Department of Commerce is examining 30 separate programs allegedly applicable to the

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[37] (...continued)
merchandise from Canada is not subject to antidumping findings or remedies in any WTO member countries. CR at VII-7; PR at. *See* 19 U.S.C. § 1677(7)(F)(iii)(I).

[38] 19 U.S.C. §§ 1671b(a), 1673b(a), & 1677(7)(F)(ii).

[39] CR/PR at Table IV-3.

[40] CR at VI-3; PR at VI-3.

[41] 19 U.S.C. §1677(7)(F)(i)(I). The statute directs me particularly to consider whether Commerce found any export subsidies. *Cf.* SAA at 855 (noting that factor I involves "consideration of export subsidies").

subject merchandise, none of which is an export subsidy.[42] The lack of an export subsidy program suggests that the subsidies in themselves will not lead Canadian producers to increase shipments of live cattle to the United States, and the record reflects that Canadians have not significantly increased exports through the period of investigation.

I have also considered whether there is "any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports."[43] In this case, the record indicates that Canadian production is in fact projected to decrease again in 1999.[44] Moreover, increased slaughter capacity in Alberta is expected to absorb more Canadian production in the future.[45] The record does not reflect any likelihood that an increase in imports of subject merchandise is imminent or that there is a likelihood of material injury to the industry "unless an order is issued."[46]

I have also examined whether there has been "a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports."[47] As indicated above, imports of subject merchandise have not significantly increased, either by volume or by market share, during the past two years.[48]

Similarly, I have examined "whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices and are likely to increase demand for further imports."[49] As I explained in my injury views above, the record shows that the subject imports have not had significant price effects on the price of domestic merchandise. I do not believe that

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[42] 63 Fed. Reg. 71889, 71891 (Dec. 30, 1998).
[43] 19 U.S.C. §1677(7)(F)(i)(II).
[44] CR at VII-3; PR at VII-3.
[45] Id.
[46] 19 U.S.C. §1677(7)(F)(ii).
[47] 19 U.S.C. §1677(7)(F)(i)(III).
[48] CR/PR at Tables IV-3 and E-1.
[49] 19 U.S.C. §1677(7)(F)(i)(III).

there is any record evidence to suggest that there will be any significant change in the manner in which the subject imports compete with the domestic merchandise in the imminent future. Accordingly, I find it unlikely that the subject imports will have significant price-depressing or price-suppressing effects on domestic prices in the imminent future.

I have also considered the levels of "inventories of the subject merchandise."[50] Canadian production and capacity to produce were lower in 1997 than in 1995, and production is expected to decrease further in 1999.[51] I do not find that inventory levels of the subject merchandise support a finding of a threat of material injury.

I am also directed to consider whether there is a "potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products."[52] Here, the record evidence suggests that there is a minimal potential for product shifting. I also do not find that imports have had actual or potential "negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product."[53]

Finally, I am required by the statute to consider "any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time)."[54] I do not find that the record in these investigations indicates that there are any demonstrable adverse trends suggesting that the subject imports will imminently materially injure the industry.

Accordingly, I find that the domestic industry is not threatened with material injury by reason of the subject imports from Canada.

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[50] 19 U.S.C. §1677(7)(F)(i)(V).
[51] CR at VII-1-3; PR at VII-1-3.
[52] 19 U.S.C. §1677(7)(F)(i)(VI).
[53] 19 U.S.C. §1677(7)(F)(i)(VIII).
[54] 19 U.S.C. §1677(7)(F)(i)(IX)

CONCLUSION

For the foregoing reasons, I find that there is no reasonable indication that the domestic live cattle industry is materially injured or threatened with material injury by reason of the subject imports from Canada.