UNITED STATES INTERNATIONAL TRADE COMMISSION

DURUM AND HARD RED SPRING WHEAT FROM CANADA
Investigations Nos. 701-TA-430A and 430B and 731-TA-1019A and 1019B (Preliminary)

DETERMINATIONS AND VIEWS OF THE COMMISSION
(USITC Publication No. 3563, December 2002)

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Investigations Nos. 701-TA-430A and 430B and 731-TA-1019A and 1019B (Preliminary)[1]

DURUM AND HARD RED SPRING WHEAT FROM CANADA

DETERMINATIONS

On the basis of the record[2] developed in the subject investigations, the United States International Trade Commission (Commission) determines,[3] pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1671b(a) and 1673b(a)) (the Act), that there is a reasonable indication that industries in the United States are materially injured by reason of imports from Canada of durum and hard red spring wheat, provided for in subheadings 1001.10.00, 1001.90.10, and 1001.90.20 of the Harmonized Tariff Schedule of the United States, that are alleged to be subsidized by the Government of Canada and sold in the United States at less than fair value (LTFV).

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 its investigations. The Commission will issue a final phase notice of scheduling, which will be published in the *Federal Register* as provided in section 207.21 of the Commission's rules, upon notice from Commerce of affirmative preliminary determinations in the 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 those investigations under sections 705(a) and 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the 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 September 13, 2002, a petition was filed with the Commission and Commerce by the North Dakota Wheat Commission (hard red spring wheat), Bismarck, ND; the Durum Growers Trade Action Committee (durum wheat), Bismarck, ND;[4] and the U.S. Durum Growers Association (durum wheat),

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[1] Subsequent to the Commission's institution of these investigations, the Department of Commerce (Commerce) initiated separate countervailing duty investigations on durum wheat (C-122-846) and hard red spring wheat (C-122-848), and separate antidumping investigations on durum wheat (A-122-845) and hard red spring wheat (A-122-847). For consistency, the Commission is further delineating its investigation numbers for the duration of the investigations as follows: investigations Nos. 701-TA-430A and 731-TA-1019A will cover durum wheat and investigations Nos. 701-TA-430B and 731-TA-1019B will cover hard red spring wheat.

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

[3] Commissioner Stephen Koplan dissenting.

[4] In a petition supplement dated September 24, 2002, the petitioners informed Commerce that, with respect to the petition on durum wheat, the petitioners were replacing the North Dakota Wheat Commission with the Durum

(continued...)

Bismarck, ND, alleging that industries in the United States are materially injured and are threatened with material injury by reason of subsidized and LTFV imports of durum and hard red spring wheat from Canada. Accordingly, effective September 13, 2002, the Commission instituted countervailing duty and antidumping duty investigations Nos. 701-TA-430 and 731-TA-1019 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of September 25, 2002 (67 FR 60256). The conference was held in Washington, DC, on October 4, 2002, and all persons who requested the opportunity were permitted to appear in person or by counsel.

[4] (...continued)
Growers Trade Action Committee.

VIEWS OF THE COMMISSION

Based on the record in these investigations, we find that there is a reasonable indication that industries in the United States are materially injured by reason of imports of durum wheat and hard red spring wheat from Canada that are alleged to be subsidized and sold in the United States at less than fair value.[1]

The petition in these investigations was filed on September 13, 2002, by the North Dakota Wheat Commission, the Durum Growers Trade Action Committee, and the U.S. Durum Growers Association (collectively "Petitioners").[2] Other participants in these investigations include the Canadian Wheat Board (the "CWB"), a respondent interested party that opposes the petition; and the North American Millers' Association ("NAMA"), an association of purchasers of both the subject imported and domestically produced wheat, which also opposes the petition.

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 determinations, whether there is a reasonable indication that a domestic industry is materially injured, threatened with material injury, or whether the establishment of an industry is materially retarded, by reason of the allegedly unfairly traded imports.[3] In applying this standard, the Commission weighs the evidence before it and determines whether "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation."[4]

II. DOMESTIC LIKE PRODUCT

A. In General

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

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[1] Commissioner Koplan dissenting. See his Dissenting Views. He joins sections I-III, IV.A, and IV.B of these views.

[2] The Durum Growers Trade Action Committee became a petitioner by a supplement to the petition.

[3] 19 U.S.C. § 1673b(a); see also American Lamb Co. v. United States, 785 F.2d 994, 1001-04 (Fed. Cir. 1986); Aristech Chemical Corp. v. United States, 20 CIT 353, 354-55 (1996). No party argued that the establishment of an industry is materially retarded by reason of the allegedly unfairly traded imports.

[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] Id.

"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 consider other factors it deems relevant based on the facts of a particular investigation.[9] The Commission looks for clear dividing lines among possible like products, and disregards minor variations.[10] Although the Commission must accept the determination of the Department of Commerce ("Commerce") as to the scope of the imported merchandise allegedly sold at less than fair value, the Commission determines what domestic product is like the imported articles Commerce has identified.[11] The Commission must base its domestic like product determination on the record in these investigations. The Commission is not bound by prior determinations, pertaining even to the same imported products, but may draw upon previous determinations in addressing pertinent like product issues.[12]

B. Product Description

Commerce initiated investigations as to two kinds of imported merchandise. Commerce defined the subject durum wheat as:

> all varieties of durum wheat from Canada. This includes, but is not limited to, a variety commonly referred to as Canada Western Amber Durum. This merchandise is currently classifiable under the following [HTSUS]

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[7] 19 U.S.C. § 1677(10).

[8] See, e.g., NEC Corp. v. Department of Commerce, 36 F. Supp.2d 380, 383 (Ct. Int'l Trade 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Torrington Co. v. United States, 747 F. Supp. 744, 749 n.3 (Ct. Int'l Trade 1990), aff'd, 938 F.2d 1278 (Fed. Cir. 1991) ("every like product determination 'must be made on the particular record at issue' and the 'unique facts of each case' "). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes, and production employees; and, where appropriate, (6) price. See Nippon, 19 CIT at 455, n.4; Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int'l Trade 1996).

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

[10] Nippon Steel, 19 CIT at 455; Torrington, 747 F. Supp. at 748-49; see also S. Rep. No. 96-249, at 90-91 (1979) (Congress has indicated that the domestic 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 domestic like product corresponding to several different classes or kinds defined by Commerce); Torrington, 747 F. Supp. at 748-52 (affirming Commission's determination of six domestic like products in investigations where Commerce found five classes or kinds).

[12] See also Acciai Speciali Terni S.p.A. v. United States, 118 F. Supp.2d 1298, 1304-05 (Ct. Int'l Trade 2000); Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1169, n.5 (Ct. Int'l Trade 1988) (particularly addressing like product determination); Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1087-88 (Ct. Int'l Trade 1988).

> subheadings: 1001.10.00.10, 1001.10.00.91, 1001.10.00.92, 1001.10.00.95, 1001.10.00.96 and 1001.10.00.99.[13]

Commerce defined the subject hard red spring wheat as:

> all varieties of hard red spring wheat from Canada. This includes, but is not limited to, varieties commonly referred to as Canada Western Red Spring, Canada Western Extra Strong, and Canada Prairie Spring Red. The merchandise subject to this investigation is currently classifiable under . . . HTSUS subheadings: 1001.90.10.00, 1001.90.20.05, 1001.90.20.11, 1001.90.20.12, 1001.90.20.13, 1001.90.20.14, 1001.90.20.16, 1001.90.20.19, 1001.90.20.21, 1001.90.20.22, 1001.90.20.23, 1001.90.20.24, 1001.90.20.26, 1001.90.20.29, 1001.90.20.35, and 1001.90.20.96.[14]

C. Domestic Like Product

1. Product Description

Wheat is the seed of an annual cereal grass.[15] There are five primary classes of wheat grown in the United States. Hard red winter wheat ("HRW wheat") accounts for 39 percent of domestic wheat production, hard red spring wheat ("HRS wheat") for 24 percent, soft red winter wheat for 20 percent, white wheat (hard and soft) for 12 percent, and durum wheat for 4 percent. A "hard" wheat has a kernel that is high in protein and gluten content. Flour made from hard wheats generally is used to make bread and similar products. A "soft" wheat has a kernel with a relatively low protein content, and it generally is used for making cakes, crackers, biscuits, and pastries. Durum wheat is used to make semolina, which in turn is used to make pasta. White wheats are used to make breakfast cereals, crackers, donuts, layer cakes, and foam cakes.[16] In the preliminary phase of these investigations we must define the domestic like product or products that correspond to the subject durum wheat and the subject HRS wheat.

2. Like Product for Subject Durum Wheat

No party disputed the Petitioners' contention that the domestic like product for the subject durum wheat should include durum wheat only, and should exclude all non-durum wheats. We find that the record supports a like product consisting of only durum wheat. Based on their differing physical characteristics, including their vitreous kernel content,[17] durum and non-durum wheats have distinctly different uses. Durum wheat is milled into semolina, which is used to make pasta.[18] Non-durum wheats are milled into flour, which is milled more finely than semolina, and used to make baked goods such as

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[13] 67 Fed. Reg. 65947, 65948 (Oct. 29, 2002).

[14] 67 Fed. Reg. 65947, 65948 (Oct. 29, 2002).

[15] Preliminary phase staff report, confidential report ("CR") at I-4, and public report ("PR") at I-3. "Spring" wheats are planted in the spring, and harvested in the late summer or early fall. "Winter" wheats are planted in the fall, lie dormant during the winter, and are harvested in the mid- to late summer. CR at I-4, PR at I-3.

[16] CR at I-5 to I-7, PR at I-3 to I-5.

[17] Transcript of October 4, 2002 conference, revised and corrected copy ("Tr.") at 29, 43 (testimony of Neal Fisher, Administrator, North Dakota Wheat Commission).

[18] CR at I-5, PR at I-4.

bread, rolls, cake, and cookies.[19] Although it appears that durum and non-durum wheats are sold through the same or similar channels of distribution, purchasers reported that durum wheat is not interchangeable with non-durum wheats, and they are not blended together.[20]

Durum wheat is riskier to grow than non-durum wheats, and durum wheat traditionally has commanded a higher price, although the premium has diminished or disappeared in recent years.[21] Durum wheat production is concentrated in North Dakota, with smaller amounts in Montana and South Dakota, and still smaller amounts in Arizona and California.[22] Non-durum wheats are produced in much larger areas, including, in addition to areas of durum production, the Central Plains south to Texas, as well as Michigan, New York, and the Pacific Northwest.[23] In those areas of overlap, farmers can switch between the production of durum and some types of non-durum wheat, but switching to durum wheat is considered more difficult than switching to non-durum wheat.[24] Prices for durum wheat were higher than prices for non-durum wheat during most, but not all, of the period examined.[25] [26] On these bases we conclude that the domestic product "like" the subject durum wheat consists of durum wheat only, and excludes all non-durum wheats.

3. Like Product for Subject HRS Wheat

As discussed below, we define HRS wheat as a separate like product that does not include HRW wheat; we note, however, that this is a close issue which we intend to explore further in any final phase investigation. The parties disagree, and the record is more mixed, on the domestic like product corresponding to the subject HRS wheat. Petitioners argue that the domestic like product should include HRS wheat only,[27] whereas the CWB argues that it should include HRW wheat as well as all other non-durum wheats.[28] NAMA provided information relevant to the issue but did not expressly adopt a

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[19] CR at I-5, PR at I-4.

[20] NAMA's October 10, 2002 Postconference Submission at 3; CR at II-14, II-16, PR at II-8, II-10. Non-durum wheat has not been used since the early 1980's to make pasta due to poor results. Tr at 162-63 (Glen Zearfoss, Vice President-Logistics, New World Pasta Co.). Since then, consumers' quality expectations for pasta have risen, such that any current use of non-durum wheat flour in pasta is not acceptable to consumers; such use creates labeling problems as well. Id.

[21] Tr. at 18 (Fisher), 36 (Andrew Wechsler, economic consultant for Petitioners), and 48-49 (Fisher).

[22] Tr. at 91 (Fisher).

[23] Tr. at 91-92 (Fisher).

[24] Tr. at 49 (Fisher). The record in these preliminary investigations does not indicate the extent to which farmers have in fact switched between the production of durum and non-durum wheats. We will further explore this issue in any final phase investigation.

[25] CR and PR at Figure V-3.

[26] Commissioner Bragg notes that the period of investigation ("POI") for these preliminary phase investigations encompasses the 1999/00, 2000/01, and 2001/02 marketing years (also referred to as crop years). The U.S. marketing year for both durum wheat and HRS wheat begins June 1 and ends May 31. CR/PR at Table III-5. As noted below, however, Commissioner Bragg concurs with Petitioners that the Commission's traditional three-year period of data coverage may not offer sufficient perspective and that a longer POI may be necessary in any final phase investigation in order to establish an historical context against which the most recent data may best be compared. See infra n.85.

[27] Petitioners' Postconference Brief at 1-3.

[28] The CWB provided extensive argument in support of including HRW wheat in the domestic like product (CWB's Postconference Brief at 11-21, Tr. at 114-21 (Matthew Yeo, counsel for CWB) but made only passing statements in support of the inclusion of other non-durum wheats (CWB's Postconference Brief at 12 and Tr. at 120

position.[29] Because HRW wheat is more similar to HRS wheat than are other non-durum wheats, our analysis begins with a comparison of HRW wheat and HRS wheat.[30]

a. Physical Characteristics and Uses

Important physical characteristics of harvested wheat include its color, the consistency of the kernel size and quality, protein and gluten content, and the presence of disease-created toxins.[31] The parties addressed most of their argument to the protein and gluten content of the two wheat classes.[32] Commercial contracts frequently specify protein content for wheat and wheat flour, and millers and bakers typically require specific and constant protein levels.[33] Bakers can adjust their equipment and procedures to account for fluctuations, but because the process is time-consuming they prefer a consistent input, year after year.[34]

Although purchasers desire wheat with a protein content that is consistent, the protein content of wheat varies, both within a given crop year but more particularly from year to year.[35] Farmers can influence protein content to some extent, but the primary determinant is weather, because wheat grown in dry conditions has a significantly higher protein content than wheat grown in normal or wet conditions.[36]

Both Petitioners and the CWB agree that the protein content of HRS wheat ranges from 12 to 16 percent, whereas the protein content of HRW wheat ranges from 10 to 14 percent.[37] On average, protein content is 14 percent for HRS wheat and 11.5 percent for HRW wheat.[38] Although separated in protein

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(Yeo)).

[29] E.g., NAMA's Postconference Brief at 1-5.

[30] The record indicates that HRS wheat commonly is blended with HRW wheat. The record does not, however, indicate that HRS wheat commonly is blended with other non-durum wheats. The record indicates also that other non-durum wheats are lower in protein than either HRS wheat or HRW wheat, and that non-durum wheats are used to make different products than are HRS wheat and HRW wheat. CR at I-7, PR at I-5.

[31] Tr. at 150-51 (David Potter, Executive Vice President of American Italian Pasta Company, on behalf of NAMA).

[32] The parties did not clearly distinguish protein from gluten content perhaps because, as one witness testified, the term "gluten" as commonly used is not well-defined. Tr. at 181 (Randy Marten, Vice President, Miller Milling Co.).

[33] CR at I-6, PR at I-4. It was not clear from the record whether such contracts typically call for minimum protein content or a fixed protein content. In any final phase investigation we will seek additional information on this question.

[34] Tr. at 143 (Marten).

[35] CR at I-6, PR at I-4. Record evidence with regard to consistent protein levels is somewhat inconclusive. On the one hand there was evidence that the levels must be consistent. CR at I-6, PR at I-4. On the other hand, it was not clear whether it was acceptable to exceed specified protein levels. In any final phase investigation we will seek additional information on this question.

[36] Tr. at 57-58 (Fisher), 86 (Wechsler), 88 (Fisher), 100 (Wechsler).

[37] Petition at 28, CWB's Postconference Brief at 12.

[38] Petition at 28 and Petitioners' October 15, 2002 responses to supplemental questions at 3. The CWB does not dispute these figures. In addition, see the third and thirteenth pages of Tab 5 to Petitioners' September 24, 2002 responses to supplemental questions, showing a five-year average of 14.4 percent protein content for HRS wheat and 11.8 percent for HRW wheat. The figures from Tab 5 are based on samples taken from wheat for export. The Commission received testimony that the quality of HRS wheat that is exported is approximately the same as the quality of HRS wheat that is sold domestically. Tr. at 64-66 (Jim Peterson, Marketing Director of Petitioner the North Dakota Wheat Commission), 67 (Fisher). In any final phase investigation, the Commission will seek

content by only a few percentage points on average, the difference frequently, but not always, results in either distinct or complementary uses, as discussed below.

About one quarter of HRS wheat and HRW wheat are used in specific baked goods requiring a protein content that is higher or lower than average. Baked goods requiring a high protein content – including yeast breads, multigrain breads, croissants, bagels, frozen dough, and some pizza dough – typically are made with HRS wheat only.[39] Other goods require a relatively low protein content -- including pan breads and Asian noodles -- and typically are made with HRW wheat only.[40]

While about one quarter of HRS wheat and HRW wheat are directed to these distinct uses, the remainder of each is blended together to make flour for use by large bakeries.[41] Even when used in blends, however, it appears that HRW wheat cannot always be substituted one-for-one for HRS wheat due to protein content. Millers blend the higher-protein HRS wheat with the lower-protein HRW wheat to deliver the required consistent protein levels, and adjust the ratio of HRS wheat to HRW wheat from shipment to shipment and from year to year as needed to deliver a product that meets the protein level required under the contract. Therefore, the record suggests that the protein content of HRS wheat can be a distinctive physical characteristic, even where HRS wheat and HRW wheat are blended for the same use.[42] In crop year 2002/03, however, the protein content for HRW wheat may be much higher than the historical average, which would allow many millers to use HRW wheat almost exclusively to deliver a flour protein content that previously could not be attained without a significant HRS wheat content.[43]

There is also, however, evidence that HRW wheat can be substituted for HRS wheat in at least some applications. While HRS wheat is higher than HRW wheat in average protein content, the protein content for each varies within respective ranges that overlap. The record indicates that when HRS wheat and HRW wheat have the same protein content they generally are substitutable.[44] The record indicates that approximately 14 percent of HRW wheat and 20 percent of HRS wheat in the 2001/02 U.S. crop had a 13-percent protein level, but there was little HRW wheat with high protein (14 and 15 percent), and

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additional data on the average protein content of domestically produced HRS wheat and HRW wheat.

[39] Petition at 27; Tr. at 11 (Fisher), 141 (Marten); CR at I-9 n.27, PR at I-6 n.27. The record also contains a conflicting indication, however, that some HRW wheat is used in the production of bagels. NAMA's Postconference Brief at 2.

[40] Petitioners' October 15, 2002 responses to supplemental questions at 7.

[41] NAMA estimates that 75 percent of both HRS wheat and HRW wheat are sold for blending into pan breads, with the remainder devoted to specialty products. NAMA's Postconference Brief at 1.

[42] Additionally, as discussed below (see, infra, section II.C.3.f) HRS wheat tends to be higher priced than HRW wheat. We note, however, that while the parties agreed that HRS wheat generally is higher priced than HRW wheat (Petitioners' Sept. 24, 2002 responses to supplemental questions at 11, CWB's Postconference Brief at 12, 16), certain price series on the record indicated similar pricing. USDA, Economic Research Service, "Wheat: Situation and Outlook Yearbook," March 2002 at 91, 95. In any final phase investigation, we intend to gather additional data on the prices of HRS wheat and HRW wheat. The fact that millers use substantial quantities of HRS wheat, despite the fact that it generally is higher priced than HRW wheat, supports the conclusion that millers cannot fully substitute HRW wheat for HRS wheat. The difference in price suggests that millers do not substitute HRS wheat for HRW wheat, even if it is a technical possibility. Substitution of HRS wheat for HRW wheat generally would result in protein levels higher than specified. As mentioned previously, in any final phase investigation we intend to seek additional information regarding whether such substitution is technically and commercially feasible and, if so, whether it occurred during the period examined.

[43] Tr. at 142, 182 (Marten), NAMA's Postconference Brief at 2.

[44] CR at II-14, II-17; PR at II-8, II-10; Tr. at 116-17 (Yeo), 141-42, 156 (Marten); CWB's Postconference Brief at 18 n.35.

little HRS wheat with low protein (12 percent or less).[45] The record does not establish the extent to which millers seeking higher protein wheat are able to use HRW wheat that is at the high end of its protein range instead of HRS wheat.[46]

The CWB argued that protein content varies along a continuum with no clear dividing line between HRW wheat and HRS wheat. The record indicates an overlap in protein content, but it also indicates that HRW wheat in many instances cannot be substituted for HRS wheat in most years because millers must use HRS wheat in order to fulfill protein content specifications. In any final phase investigation, we will consider any new data on this contention.[47]

b. Interchangeability

It appears that interchangeability is significantly limited for the approximately one quarter of HRS wheat and HRW wheat respectively that are used to make the various high-protein or low-protein products described above. In their primary use in blended flours, however, there appears to be at least moderate technical one-way interchangeability, with HRW wheat substituting for HRS wheat in some instances.[48] As noted above, HRW wheat and HRS wheat with the same protein content generally are interchangeable. As a practical matter, however, there are significant limitations on a miller's ability to substitute HRS wheat for HRW wheat in blending. HRS wheat generally is higher in price, and millers seek the lowest cost grist. Moreover, in most years, except where they overlap in protein, HRW wheat cannot be substituted for the HRS wheat used in blends because the HRS wheat is needed to reach the minimum protein content required by customers for a particular flour.[49] Thus, the extent to which there is meaningful commercial overlap is not clearly established on this record.

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[45] Samples taken from wheat to be exported indicate that in crop year 2001 about 20 percent of HRS wheat had a protein content of 13.0 to 13.9 percent, as did about 14 percent of HRW wheat. Petitioners' September 24, 2002 responses to supplemental questions at the second and twelfth pages of Tab 5. We do not know whether figures for 2001 are representative for other years, particularly crop year 2002/03, when drought conditions were represented to have increased the protein content of both HRS wheat and HRW wheat significantly. It is also unclear whether samples taken from wheat sold for export are an accurate proxy for wheat sold domestically. See also CWB's Postconference Brief at Exhibit 2.

[46] In any final phase investigation, we intend to seek more information on this question.

[47] Petitioners asserted that in addition to differences in the quantity of protein in HRS wheat and HRW wheat, there are also qualitative differences in the protein and gluten of HRS wheat and HRW wheat. Petition at 29, Tr. at 45-46, 60, 104 (Peterson). These qualities impart strength, water absorption, and stability characteristics to the dough made from wheat flour. Id. The CWB asserted that these characteristics have no significance independent of protein content because they fluctuate in tandem with protein content. Petitioners submitted data for the closest available match (HRS wheat of 13.5 percent protein or less and HRW wheat of 12.5 percent protein or more) showing that differences in strength, absorption, and stability persist. Petitioners' October 15, 2002 responses to supplemental questions at 13-14. A miller testified that millers sometimes use HRS wheat in blends in order to obtain better results in these measures. Tr. at 141 (Marten). On the other hand, there appears to be little or no price differential in HRS wheat and HRW wheat with the same protein content. CWB's Postconference Brief at Exhibit 6. Additionally, a miller testified that it used very little HRS wheat in its blends in 2002, because the protein content of HRW wheat was sufficient to meet its needs. That suggests that, at least for this miller, the qualitative differences between HRS wheat and HRW wheat were not significant. Tr. at 141-42 (Marten).

[48] It is unclear whether HRS wheat technically could be substituted for HRW wheat in blends.

[49] Eight of eleven responding purchasers indicated that they blend HRS wheat with lower-protein HRW wheat in order to meet customer requirements. CR at II-17, PR at II-10.

This ambiguity is reflected in responses from producers and customers. A representative of producers stated that HRS wheat and HRW wheat are not substitutable but complementary.[50] Several purchasers indicated that HRW wheat can substitute for HRS wheat in some cases and a miller stated that, when the two classes have the same protein content, similar usage can occur.[51] One miller reported that the addition of HRS wheat improves dough handling, mixing characteristics, and water absorption.[52] When asked if HRS wheat and HRW wheat were comparable for producing flour to be used in baked goods, six of ten millers said yes, but four said no.[53] Although HRS wheat generally is priced higher than HRW wheat, eight of eleven millers said they blend HRS wheat with HRW wheat to increase gluten content.[54] That suggests that HRW wheat was not interchangeable with HRS wheat for the majority of these millers.

c. Channels of Distribution

Typically, wheat from the farm is trucked to a grain elevator, although some farmers truck their wheat directly to an export terminal.[55] From grain elevators, wheat typically is moved on rail cars or barges to domestic mills, feedlots, or export ports.[56] A significant portion of HRS wheat is traded at the Minneapolis Grain Exchange, and it appears that a large portion of HRW wheat is traded at the Kansas City Board of Trade.[57] These parallel channels of distribution are otherwise the same or very similar.[58]

d. Production Processes, Facilities, and Employees

HRS wheat is grown primarily in the Northern Plains: North Dakota (48 percent of production), South Dakota, Montana, Minnesota and Idaho.[59] HRW wheat is grown in the Central Plains in Nebraska, Kansas, Oklahoma, Texas, and Colorado. Several states produce both HRS wheat and HRW wheat, but the overlap is small because southern growers have poor results with spring wheat and northern growers have poor results with winter wheat.[60] HRS wheat is planted in April through May and is harvested in August through September.[61] HRW wheat is planted in September through November and harvested in

[50] Tr. at 195 (Fisher).

[51] CR at II-13 to II-14, II-17; PR at II-8, II-10.

[52] CR at II-17, PR at II-10.

[53] CR at II-17, PR at II-10.

[54] CR at II-17, PR at II-10.

[55] CR at I-10, II-1; PR at I-7, II-1.

[56] CR at I-10, II-1; PR at I-7, II-1. Between one eighth and one quarter of the annual wheat crop is sold for feed, although, due to lower prices, feed sales are a less important market segment. CR at II-2, PR at II-1. See CR at II-12, PR at II-7 to II-8.

[57] CR at II-1 to II-2, PR at II-1. See CR at I-8 and PR at I-6 and Petitioners' October 15, 2002 responses to supplemental questions at 11.

[58] CR at I-10, PR at I-7.

[59] CR at VI-7, PR at VI-3, Tr. at 91-92 (Fisher), Petitioners' October 15, 2002 response to supplemental questions at 3.

[60] Exhibit 11 to Petitioners' Postconference Brief (map of wheat production by class) CR at I-8, II-4; PR at I-6, II-2 (one type is usually dominant in a given area), Tr. at 91-92 (Fisher).

[61] CR at I-8, PR at I-6; Tr. at 93 (Fisher).

June through July.[62] Accordingly, the farms used to produce HRS wheat and HRW wheat do not overlap to a significant degree.[63] Equipment, labor, and other inputs are roughly similar for all classes of wheat, although fertilizer use varies depending on soil, moisture, and other factors.[64]

e. Producer and Customer Perceptions

A representative of producers testified that HRS wheat and HRW wheat are not substitutable.[65] Customer perceptions, however, are mixed. Some customers regard HRS wheat and HRW wheat to be substitutes if protein levels are the same. Six out of ten millers reported that HRS wheat and HRW wheat are comparable for use in baked goods, but four said they were not comparable. Although HRS wheat is usually higher in price, eight of eleven millers reported that they use HRS wheat to increase gluten content.

f. Price

Prices for HRS wheat and HRW wheat vary according to their protein content and other factors, making comparisons difficult. As a general indication of typical prices, the simple average price for marketing year 2001/02 of HRS wheat (Minneapolis 13 percent protein) and HRW wheat (Kansas City #1 ordinary) were $3.53 and $3.25 per bushel, respectively.[66] Both Petitioners and the CWB agreed (except when protein levels are the same) that prices for HRS wheat usually are higher than for HRW wheat.[67] The CWB contended that the difference disappears for HRS wheat and HRW wheat that have the same protein content, while Petitioners asserted that a small premium remains.[68]

g. Conclusion

On balance, based on the record in these investigations, we find that the domestic like product corresponding to the subject HRS wheat should include HRS wheat only.[69]

HRS wheat is on average higher in protein content than HRW wheat, although the ranges observed overlap. The differences in protein content generally result in distinct or complementary uses for HRS wheat and HRW wheat. One or the other is used exclusively in the production of various products requiring a high or low protein content. When blended together, they appear to be complementary because the higher priced HRS wheat is used to boost protein content to required levels. On the other hand, when HRS wheat and HRW wheat overlap in protein content, they appear largely

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[62] CR at I-8, PR at I-6; Tr. at 93 (Fisher).

[63] The record does not establish whether there is a significant overlap in production employees. In any final phase investigation we will seek information on this question.

[64] CR at II-4, PR at II-2.

[65] Tr. at 194-96 (Fisher).

[66] CR at I-10, PR at I-7.

[67] Petitioners' Sept. 24, 2002 responses to supplemental questions at 11, 18; CWB's Postconference Brief at 16-17 and Tr. at 116 (Yeo).

[68] CWB's Postconference Brief at 16-17 and Tr. at 116 (Yeo) and Petitioners' October 15, 2002 responses to supplemental questions at 9.

[69] The record in the preliminary phase of these investigations does not resolve several important questions relevant to our analysis, and in any final phase investigation we intend to seek additional information as indicated above.

substitutable. There is at least some interchangeability between HRS wheat and HRW wheat, but there are significant limits on interchangeability as well. Differences in price also indicate limits to interchangeability, and in fact, millers use the least amount of HRS wheat required in order to reduce the cost of their grist. Because they generally are produced in different regions, producers are less likely to regard HRS wheat and HRW wheat as substitutes, while customers' perceptions are mixed. Also, due to the generally differing areas in which they are produced, HRS wheat and HRW wheat are sold through different distributors, but other than their location the channels are the same or similar. Prices for HRS wheat are higher than for HRW wheat in most years. Accordingly, we find that the domestic like product corresponding to subject HRS wheat is limited to domestic HRS wheat and should not include HRW wheat.

Because HRW wheat is more similar to HRS wheat than are other non-durum wheats, we also conclude that the domestic like product should not include other non-durum wheats, which are more dissimilar to HRS wheat than HRW wheat.[70]

III. DOMESTIC INDUSTRIES

The domestic industry is defined 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."[71] In defining the domestic industry, the Commission's general practice has been to include in the industry all domestic production of the domestic like product, whether toll-produced, captively consumed, or sold in the domestic merchant market.[72] We find two domestic industries in these investigations, one consisting of all growers of durum wheat and another consisting of all growers of HRS wheat.

IV. REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF ALLEGEDLY SUBSIDIZED AND LESS THAN FAIR VALUE 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 or threatened with material injury by reason of the imports under investigation.[73] [74] In making

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[70] As noted, the record indicates that HRW wheat is commonly blended with HRS wheat, but it does not indicate that other non-durum wheats are commonly blended with HRS wheat. Moreover, other non-durum wheats are lower in protein than either HRS wheat or HRW wheat, and non-durum wheats have different end uses as well. CR at I-7, PR at I-5.

[71] 19 U.S.C. § 1677(4)(A).

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

[73] 19 U.S.C. § 1673b(a).

[74] By statute, imports from a subject country corresponding to a domestic like product that account for less than three percent of all such merchandise imported into the United States during the most recent twelve months for which data are available preceding the filing of the petition shall be deemed negligible. 19 U.S.C. § 1677(24)(A)(i)(I). The statute also provides that, even if imports are found to be negligible for purposes of present material injury, they shall not be treated as negligible for purposes of a threat analysis should the Commission determine that there is a potential that imports from the country concerned will imminently account for more than three percent of all such merchandise imported into the United States. 19 U.S.C. § 1677(24)(A)(iv). The Commission is authorized to make "reasonable estimates on the basis of available statistics" of pertinent import levels for purposes of deciding negligibility. 19 U.S.C. § 1677(24)(C); see also Uruguay Round Agreements Act

this determination, the Commission must consider the volume of imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations.[75] The statute defines "material injury" as "harm which is not inconsequential, immaterial, or unimportant."[76] 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.[77] 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."[78]

For the reasons discussed below, we determine that there is a reasonable indication that the domestic industry producing durum wheat is materially injured by reason of subject imports of durum wheat from Canada that are allegedly subsidized and sold at less than fair value. We determine also that there is a reasonable indication that the domestic industry producing HRS wheat is materially injured by reason of subject imports of HRS wheat from Canada that are allegedly subsidized and sold at less than fair value.

A. Information Available in the Preliminary Phase of These Investigations

The statute directs the Commission to make its preliminary determinations 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 . . ."[79] The domestic durum and HRS wheat industries are extremely large and collectively comprise tens of thousands of individual producers.[80] Accordingly, forwarding questionnaires to all producers of the domestic like products or developing a sampling methodology was impractical.[81]

In these investigations the Commission has reliable secondary sources for domestic producer data.[82] In addition, the Commission has obtained some information on the domestic industry from associations of producers of the domestic like products. The Commission also obtained data (including

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("URAA") Statement of Administrative Action ("SAA") at 856. By operation of law, a finding of negligibility terminates the Commission's investigations with respect to such imports. 19 U.S.C. § 1673b(a)(1).

Negligibility is not an issue in these investigations because the subject imports from Canada accounted for 95.5 percent of durum imports and 99.9 percent of HRS wheat imports into the United States in marketing year 2001/02, the most recent twelve month period preceding the filing of the petition for which data are available. CR and PR at Tables IV-1 and IV-2.

[75] 19 U.S.C. § 1677(7)(B)(i). The Commission "may consider such other economic factors as are relevant to the determination" but shall "identify each [such] factor . . . [a]nd explain in full its relevance to the determination." 19 U.S.C. § 1677(7)(B); see also Angus Chemical Co. v. United States, 140 F.3d 1478 (Fed. Cir. 1998).

[76] 19 U.S.C. § 1677(7)(A).

[77] 19 U.S.C. § 1677(7)(C)(iii).

[78] 19 U.S.C. § 1677(7)(C)(iii).

[79] 19 U.S.C. §§ 1671b(1) & 1673b(1).

[80] According to the 1997 Census of Agriculture, there were 6,887 farms growing durum wheat; and according to Petitioners, there are 40,407 U.S. producers of HRS wheat. CR and PR at III-1 & n.2.

[81] 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. United States, 805 F. Supp. 45, 49 (Ct. Int'l Trade 1992).

[82] The Commission staff report cites Commerce statistics, Statistics Canada, and publications by the Commission, USDA, academia, economists, and industry groups.

prices) from purchasers through questionnaires, though official statistics were used for import data. The parties have not suggested an alternative to these sources of data.

B. Conditions of Competition and the Business Cycle

Because many conditions of competition pertain both to the domestic durum wheat and HRS wheat industries, we discuss both in the following section, but indicate various distinctions as well.

1. Period Examined[83]

In the preliminary phase of these investigations we examine data from the three most current marketing years, 1999/00, 2000/01, and 2001/02.[84] In response to Petitioners' request for additional data to provide historical context, the Commission collected some data for the last five marketing years. However, the focus of our analysis is on the three most recent marketing years, for which our data set is most complete. In short, without undertaking a more thorough examination of the longer period we are unable to be confident that conclusions we might draw from information from prior years is accurate and representative. We conclude that reasonable findings can be made regarding the factors we must examine in our analysis based on data from the three most recent marketing years, the period we investigate in the vast majority of Title VII investigations. We do, however, exercise caution in comparing data from one marketing year to another. Conditions in the wheat markets may fluctuate significantly from year to year owing to weather conditions that affect production, supply, product characteristics (such as protein content), and price.[85]

2. Demand and Apparent U.S. Consumption

Approximately three quarters of wheat generally is used to produce food, while the balance is used for seed, feed, and other residual applications.[86] Demand trends for wheat are mixed, as per capita consumption has declined in recent years. Over the past three years, however, food use of durum wheat has increased by 12.7 percent and food use of HRS wheat has increased by 5.4 percent.[87] Durum wheat faces few substitute products in its primary application (pasta), either from other grains or other forms of

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[83] Commissioner Bragg refers to note 26, supra., and note 85, infra.

[84] The wheat marketing year runs from June 1 through May 31. Tr. at 39 (Fisher).

[85] Commissioner Bragg finds that with respect to HRS wheat, the probative value of comparisons of time series data on the preliminary record is, in general, limited because year-to-year fluctuations in weather conditions impact the relative protein content of HRS wheat vis-a-vis HRW wheat, which in turn may impact the demand in the U.S. market for HRS wheat. Thus, for example, the price per bushel of HRS wheat in year 1 may have little relation to the price per bushel in year 2 or year 3. Commissioner Bragg therefore concurs with Petitioners that the Commission's traditional three-year period of data coverage may not offer sufficient perspective and that a longer period of investigation may be necessary in order to establish an historical context against which the most recent data may best be compared. Another option for addressing concerns regarding such comparisons in any final phase investigation may be to construct a price per unit of protein for both subject imports of HRS wheat and the domestic like product in order to permit more complete "apples-to-apples" comparisons over time. In any event, for purposes of these preliminary investigations and with respect to both durum wheat and HRS wheat, Commissioner Bragg has focused primarily on the impact of subject imports during the 2000/01 and 2001/02 marketing years in finding a reasonable indication of present material injury to the domestic industries.

[86] CR at II-12, PR at II-7.

[87] Calculated from CR at II-13, PR at II-8.

wheat. HRS wheat is used in bread, where it faces substitute products in the form of HRW wheat and potentially other grains. Other grains are adequate substitute products for wheat in non-food applications such as animal feed.

Apparent U.S. consumption of both durum wheat and HRS wheat fluctuated but increased irregularly overall over the period examined. For durum wheat, apparent U.S. consumption was 91 million bushels in 1999/00, 81 million bushels in 2000/01, and 94 million bushels in 2001/02.[88] For HRS wheat, apparent U.S. consumption was 297 million bushels in 1999/00, 347 million bushels in 2000/01, and 329 million bushels in 2001/02.[89]

Variations in apparent U.S. consumption do not appear to be a function of changes in price. Farm prices for HRS wheat were relatively stable during the period examined, and thus would not appear to account for a fluctuation in apparent U.S. consumption. Similarly, an increase in the farm price of durum wheat in 2001/02 did not correspond to a decrease in apparent U.S. consumption.[90] Evidence on the record indicates that demand for both durum wheat and HRS wheat is relatively price inelastic.[91]

3. Supply

The domestic market is supplied by domestic production, existing inventories, and subject imports from Canada. The volume of imports from third countries is very small.[92] We discuss the actual volumes of subject durum wheat and HRS wheat imports from Canada in our analyses of volume later in these views.

a. Domestic Production

Production is in part a function of the number of acres of durum wheat and HRS wheat that are harvested. Harvested acreage is in turn influenced by a number of factors. Planted acreage sets a ceiling on harvested acreage. Acreage planted with durum wheat was essentially the same in 1999/00 and 2000/01, at 4.0 and 3.9 million acres respectively.[93] In marketing year 2001/02, however, acres planted with durum wheat fell to 2.9 million.[94] The difference between planted acreage and harvested acreage also varies. For durum wheat, acres planted but not harvested declined from approximately 0.4 million in 1999/2000, to 0.3 million in 2000/01 and to 0.1 million in 2001/02.[95] The decline in the number of planted acres not harvested was not enough to offset the decline in acres planted in 2001/02, however, with the result that acres of durum wheat harvested was the same at 3.6 million in marketing years 1999/00 and 2000/01, but was 2.8 million in 2001/02.[96]

For HRS wheat, acres planted increased from 14.3 million in 1999/00 to 14.4 million in 2000/01 and to 14.8 million in 2001/02.[97] There was also an increase in the number of acres planted but not

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[88] CR and PR at Table IV-5.

[89] CR and PR at Table IV-6.

[90] Compare CR and PR at Figure V-2 with Table IV-5.

[91] CR at II-21 to II-22, PR at II-13 to II-14.

[92] CR and PR at Tables IV-1 and IV-2.

[93] CR and PR at Table III-5.

[94] CR and PR at Table III-5.

[95] CR and PR at Table III-5.

[96] CR and PR at Table III-5.

[97] CR and PR at Table III-5.

harvested. In 1999/2000, there were approximately 0.5 million acres of HRS wheat planted but not harvested, compared to 0.8 million in 2000/01 and 1.0 million in 2001/02.[98] Acres harvested for HRS wheat were essentially stable during the period within a range of 13.6 to 13.8 million.[99] In any final phase investigation we will seek information on what factors account for the differences between planted acreage and harvested acreage for both durum wheat and HRS wheat.

Various factors influence the number of acres planted with durum wheat and HRS wheat. The areas of production of durum and HRS wheat overlap substantially. Some farmers therefore can switch from the production of one to the other, although changing from the production of HRS wheat to durum wheat is considered more difficult than changing from the production of durum to HRS wheat.[100] Switching from the production of durum to HRS wheat or vice versa does not account for all the observed changes, however, because the aggregate acres planted were lower in 2001/02 at 17.7 million acres than in 1999/00 or 2000/01, at 18.3 million acres each. Also competing for plantings are other crops, including soybeans, and oilseeds such as canola and flaxseed. The CWB asserts that acres planted with these crops have increased from 1996 to 2002, thereby displacing durum wheat.[101]

As farmers decide what crops to plant, they must consider various federal programs including production flexibility contract payments, marketing assistance, and crop insurance.[102] [103] Other government programs also have the potential to influence farmers' decisions.[104]

Apart from harvested acreage, production is driven by yield, which in turn is largely a function of weather and disease.[105] For durum wheat, average yields were 27.8 bushels per acre harvested in 1999/00, compared to yields of 30.7 and 30.0 for marketing years 2000/01 and 2001/02 respectively.[106] For HRS wheat, average yields in bushels per acre harvested were 32.5 in 1999/00, compared to 36.9 in 2000/01 and 34.5 in 2001/02.[107] The parties did not, however, argue that these differences were significant to our analyses.[108] [109]

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[98] CR and PR at Table III-5.

[99] CR and PR at Table III-5.

[100] Tr. at 48-49 (Fisher).

[101] CWB's Postconference Brief at 39 & n.73 (citing the NASS Statistical Database).

[102] Wheat Trading Practices: Competitive Conditions Between U.S. and Canadian Wheat, Inv. No. 332-429, USITC Pub. 3465 (Dec. 2001) ("Wheat Trading Practices") at 2-11 to 2-13.

[103] The CWB asserts that changes in the federal Crop Revenue Coverage program significantly affected U.S. acreages planted with durum wheat during the period examined, contending that the extension of CRC coverage to durum wheat in 1999 resulted in more acres planted with durum wheat than in previous years, and that the program's removal in 2001 resulted in fewer acres planted with durum wheat. CWB's Postconference Brief at 34-36. See Wheat Trading Practices at 2-13.

[104] The record does not contain sufficient information to permit us to draw conclusions as to the effects of these programs during the period examined. In any final phase investigation, we will seek further information on their effects on farmers' production decisions.

[105] Fusarium Head Blight or "scab" adversely impacted durum wheat and HRS wheat harvests during the period examined. Scab resulted both in lower production and lower prices due to lower quality. CWB's Postconference Brief at 36-38, 41-42.

[106] CR and PR at Table III-5.

[107] CR and PR at Table III-5.

[108] It was asserted that drought conditions in marketing year 2002/03 lowered the supply of durum and HRS wheat, and resulted in higher protein content for HRW wheat. See Tr. at 35 (Wechsler), 56-57 (Fisher), 142-43 (Marten). Because that marketing year has not yet ended, however, data on the record pertaining to it is limited, and thus our analyses center on the prior three marketing years. Even without additional data, however, we decline the

As a result of the factors discussed above, production of durum wheat was 99.3 million bushels in 1999/00, 109.8 million bushels in 2000/01, and 83.6 million bushels in 2001/02.[110] Because average yields for durum wheat were relatively constant, lower production in 2001/02 is a result of lower acres harvested, which is a result of lower acres planted. Production of HRS wheat was 447.9 million bushels in 1999/00, 502.3 million bushels in 2000/01, and 475.7 million bushels in 2001/02.[111] Because acres harvested varied little for HRS wheat, differences in production were largely a function of changes in average yields.

b. Inventories

In these industries, inventories are also a significant source of domestic supply. Inventories can be held for several years and may influence farmers' price expectations and decisions on which crops to plant and on how many acres.[112] The data available indicate that U.S. producers' ending inventories of durum wheat were 37 million bushels for 1999/00, 46 million bushels for 2000/01, but only 5 million bushels for 2001/02.[113] U.S. producers' ending inventories of HRS wheat also declined, but not to the same extent; such inventories were 187 million bushels for 1999/00, 179 million bushels for 2000/01, and 169 million bushels for 2001/02.[114]

c. Export Sales

In addition to production and inventories, a third major factor that affected the supply of domestically produced durum and HRS wheat in the U.S. market are the volumes of domestic durum or HRS wheat that are exported rather than sold or inventoried domestically. For durum wheat, export shipments accounted for 33 percent of total shipments by the domestic industry in 1999/00, 38 percent in 2000/01, and 35 percent in 2001/02.[115] For HRS wheat, export shipments accounted for an even higher proportion of total shipments for the domestic industry: 47 percent in 1999/00, 43 percent in 2000/01,

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suggestion of the CWB that we treat the drought as a "watershed" event similar to our treatment of section 201 relief in our analysis in Cold-Rolled Steel Products from Australia, India, Japan, Sweden, and Thailand, Inv. No. 731-TA-965, 971-72, 981 (Final), USITC Pub. 3536 (Sept. 2002). Droughts and other extremes in weather conditions commonly affect the production of agricultural products. See Petitioners' Postconference Brief at 36-38. Domestic agricultural producers presumably expect such conditions. Additionally, such occurrences rarely affect the market for an extended period of time, and we find no evidence that the drought conditions mentioned here would be different. See Petitioners' Postconference Brief at 36-38. In short, nothing similar to the fundamental change in market conditions we observed in Cold-Rolled Steel has occurred during the period examined in the present investigations.

[109] Commissioner Bragg notes that she did not treat the imposition of 201 relief as a "watershed" event in the recent cold-rolled steel investigations. See Dissenting Views of Commissioner Lynn M. Bragg in Cold-Rolled Steel Products from Australia, India, Japan, Sweden, and Thailand, Inv. Nos. 731-TA-965, 971-972, 979, and 981 (Final), USITC Pub. 3536 at 57, 72-73 (September 2002). Commissioner Bragg concurs that droughts and other extremes in weather conditions commonly affect the production of agricultural products such as durum wheat and HRS wheat.

[110] CR and PR at Table III-5.

[111] CR and PR at Table III-5.

[112] CR at II-7, PR at II-4 to II-5.

[113] CR and PR at Table C-1.

[114] CR and PR at Table C-2.

[115] CR and PR at Table III-6.

and 44 percent in 2001/02.[116] For both durum and HRS wheat, the quality of volumes exported is approximately the same as the quality of that shipped domestically.[117]

4. The Canadian Wheat Board

An additional condition of competition unique to these industries is the activity of the Canadian Wheat Board. The CWB is the sole exporter of wheat grown in the prairie provinces of Canada, which account for more than 90 percent of Canadian durum and western red spring wheat production.[118] The CWB is the largest seller of wheat in the world, and its sales account for 20 percent of the international market for wheat, and 60 percent of traded durum wheat worldwide.[119] Its status as a quasi-government entity allows it to enter into transactions at reduced risk.[120] For example, it has virtually no acquisition risk when entering into futures contracts because most Canadian producers have no option but to sell through the CWB (except in the less important case of sales of wheat for use as livestock feed).[121] The CWB returns all sales revenues except marketing costs to Canadian farmers in exchange for their wheat.[122] However, the CWB's system for price determination and remuneration is complex.[123] It is alleged on the one hand that the CWB strongly influences prices, and on the other that the CWB follows the prices set at grain exchanges in the United States.[124]

5. Substitutability

a. General

U.S. and Canadian durum wheat are interchangeable, as are U.S. and Canadian HRS wheat. Purchasers agree that U.S. and Canadian durum wheat are used in the same applications and that U.S. and Canadian HRS wheat are used in the same applications, with only 4 of 18 responding purchasers specifically ordering wheat from one country in particular over other possible sources of supply.[125] Most purchasers reported that U.S. and Canadian durum wheat were comparable in terms of primary purchasing factors, as they also did with regard to U.S. and Canadian HRS wheat, although 6 of 13

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[116] CR and PR at Table III-6.

[117] Tr. at 64-66 (Peterson) and 66-67 (Fisher).

[118] CR at II-11, PR at II-7. Farmers in the prairie provinces can market wheat for feed use. In other provinces, farmers or cooperatives can market wheat to any marketing channel. CR at II-11, PR at II-7.

[119] CR at II-12, PR at II-7.

[120] CR at II-12, PR at II-7.

[121] CR at II-11, PR at II-7 and Tr. at 62 (Wechsler).

[122] CR at II-12, PR at II-7.

[123] CR at II-9, PR at II-6.

[124] Tr. at 13 (Fisher), 152 (Potter). See CR at II-9 to II-11, PR at II-5 to II-7. In any final phase investigation, we will seek more information on how the CWB sets prices and the extent to which the CWB influences prices in the U.S. market.

[125] CR at II-19, PR at II-11. Most of the companies with specific preferences appeared to be durum wheat purchasers that favor Canadian quality and/or consistency.

reporting purchasers rated U.S. wheat inferior to Canadian wheat in terms of product consistency, and 4 of 12 in terms of product quality.[126] [127]

b. Price

Purchasers of durum wheat and HRS wheat report that price is one of three primary factors considered in purchasing decisions, along with quality and availability.[128] Durum and HRS wheat are commodity products, classified into five established grades distinguished by quality.[129] There are global markets for durum and HRS wheat and price information is rapidly disseminated throughout these markets.[130]

Information bearing on domestic prices is readily available. With regard to HRS wheat, the Minneapolis Grain Exchange (MGE) reports that acres planted and weather conditions while the crop is in the ground, and export demand and international supply during other times of the year are important determinants of price.[131] For both durum wheat and HRS wheat, daily market quotes from the MGE and the USDA's Agricultural Marketing Service are available online.[132] [133]

Transportation costs are an important factor in the price of wheat. As a percentage of total delivered price, transportation costs averaged 10.7 percent for domestic durum wheat and 7.9 percent for

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[126] CR and PR at Table II-3. All 14 reporting purchasers characterized product quality as a "very important" purchase factor; 13 of 14 reporting purchasers characterized product consistency, along with availability and reliability of supply, as "very important." CR and PR at Table II-2.

[127] The Commission received testimony that, even in comparisons of domestic and Canadian wheat of the same grade, there is both a perception and a reality that Canadian product is more consistent and contains less "dockage" or non-wheat content. Tr. at 152-53, 164-66 (Potter). Based on these differences, at least some purchasers appear willing to pay a premium for Canadian durum and HRS wheat compared to domestic durum and HRS wheat. Tr. at 164-66 (Potter). Despite these alleged differences, with regard to both durum and HRS wheat, Canadian subject imports and the domestic products are, within classes, highly, although not perfectly, interchangeable. CR at II-17 to II-18, PR at II-10. *See also* CR at II-11, PR at II-6 to II-7 ("it is commonly believed that the CWB with its control over marketing and planted varieties is more consistently able to guarantee quality and special characteristics.")

[128] CR and PR at Table II-2.

[129] CR at I-5, PR at I-4.

[130] Tr. at 131-35 (Daniel Sumner, economic witness for the CWB).

[131] CR and PR at V-1.

[132] CR and PR at V-1.

[133] Farmers typically sell to grain elevators. CR at V-4, PR at V-3. The Commission's purchaser information comes largely from wheat millers, rather than elevators. At least one miller, however, operates various grain elevators as part of its business. Tr. at 168 (James Meyer, Executive Vice President, Italgrani, USA, Inc. for NAMA). Purchasers reported that purchase prices frequently were determined by soliciting offers and the use of counteroffers. CR at V-3, PR at V-2. They variously reported making bids based on posted grain elevator prices, prices indicated on exchange futures or flat board prices, and prices indicated at the MGE or the Chicago Board of Trade, as adjusted for transportation costs. CR at V-3, PR at V-2. Purchasers reported making 11.6 percent of wheat purchases on the spot market and 88.4 percent by contract. CR at V-3, PR at V-2. Compared to contracts for the purchase of subject Canadian durum, a greater proportion of contracts for the purchase of domestic durum were for a term of less than 30 days, but there was also a substantial number of contracts for between 30 and 90 days, and over 90 days. CR and PR at Table V-2. Compared to contracts for the purchase of subject Canadian HRS wheat, contracts for the purchase of domestic HRS wheat were more concentrated in those for less than 30 days and in those for more than 90 days, but there was also a substantial number of contracts for between 30 and 90 days. CR and PR at Table V-2.

domestic HRS wheat.[134] For the subject imports, transportation costs account for an average of 7.7 percent of delivered cost in the case of subject imported durum, and 9.6 percent for subject imported HRS wheat.[135] [136]

There is record evidence that other factors affect prices, and that such factors are especially relevant to comparisons of prices for the domestic product and subject imports. The term "protein overdelivery" refers to the practice of supplying wheat with a protein content that is higher than that specified in the contract. Protein overdelivery is common in sales of both subject and domestic HRS wheat, but was more common for sales of wheat imported from Canada.[137] The record does not establish, however, the extent to which protein overdelivery resulted in lower prices for sales of subject imports than if the higher protein content had been included in those contracts.

c. Quality and Availability

Quality and availability are important purchasing factors in addition to price. Compared to HRS wheat, the quality of durum wheat is less a function of protein content, because once a minimum level is achieved, excess protein content has little or no value.[138] The most desireable characteristics for durum are a high vitreous kernel content, a golden color, consistent sizing, and a lack of damage and contamination.[139] There was also testimony that domestic and subject imported durum have complementary characteristics, and that the best pasta is made from a blend of the two.[140]

Pasta makers reported that their customers' quality expectations are very high, and they require high quality durum as an input.[141] They also reported that there is an insufficient supply of high quality domestic durum to meet their needs.[142] Petitioners disagreed, stating that the volume of high quality domestic durum was more than sufficient to meet U.S. millers' needs.[143] Petitioners also argued that only about half of subject durum imports were of high quality, a fact they maintain rebuts the millers' claims that imports of subject durum are driven by the need for a higher quality product.[144] [145]

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[134] CR and PR at Table V-1.

[135] CR and PR at Table V-1.

[136] There are allegations that the subject imports are transported to the United States at preferential rail rates (CR at V-2, PR at V-1), but whether those rates constitute a subsidy is a determination to be made by Commerce.

[137] Wheat Trading Practices at 5-15 to 5-17.

[138] Tr. at 153 (Potter), 197 (Fisher).

[139] Tr. at 29, 43 (Fisher), 150 (Potter).

[140] Tr. at 156 (Potter).

[141] Tr. at 161-63 (John Miller, President, Miller Milling Co.) & (Zearfoss).

[142] Tr. at 147-50 (Potter).

[143] Tr. at 28-29 (Fisher).

[144] Tr. at 28-29 (Fisher).

[145] None of the parties addressed how the substantial exports of durum wheat (addressed above in the discussion of the conditions of competition) were relevant to this question. In any final phase investigation, we will seek more information regarding the supply of high quality durum and how substantial exports by the U.S. industry may affect the supply of the product in the United States.

C. Reasonable Indication of Material Injury to the Domestic Durum Wheat Industry

1. Volume of Subject Imports of Durum Wheat

Section 771(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."[146]

From 1999/00 to 2000/01, apparent U.S. consumption of durum wheat fell 10.8 percent from 91 million bushels to 81 million bushels.[147] From 2000/01 to 2001/02 apparent U.S. consumption rose 16.5 percent from 81 million bushels to 94 million bushels.[148] Over the entire period, from 1999/00 to 2001/02, apparent U.S. consumption rose 3.9 percent.[149]

Compared to apparent U.S. consumption, the volume of subject imports grew at a faster rate from 2000/01 to 2001/02 and during the period overall. From 1999/00 to 2000/01, the volume of subject durum wheat imports fell 20 percent from 16 million to 13 million bushels.[150] From 2000/01 to 2001/02, however, the volume of subject durum wheat imports rose 54.1 percent from 13 million to 19 million bushels.[151] Over the entire period, the volume of subject imports rose 23.3 percent.[152] The higher rate of increase in subject durum imports compared to apparent U.S. consumption resulted in increased market share. Subject durum imports accounted for 17.3 percent of the domestic market in 1999/00, 15.5 percent in 2000/01, and 20.5 percent in 2001/02.[153]

As subject durum wheat imports increased both absolutely and relative to U.S. consumption, and as apparent U.S. consumption grew, U.S. producers lost U.S. market share, declining from 82.7 percent in 1999/2000 to 78.5 percent in 2001/02.[154]

Based on the record available in these preliminary determinations, we find that the substantial volume of subject imports that is increasing both in absolute terms and relative to consumption in the United States is significant.[155]

2. Price Effects of the Subject Durum Wheat Imports

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

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[146] 19 U.S.C. § 1677(7)(C)(i).

[147] CR and PR at Table C-1.

[148] CR and PR at Table C-1.

[149] Figure derived from staff working paper entitled "Table C-1(*)."

[150] CR and PR at Table C-1.

[151] CR and PR at Table C-1.

[152] Figure derived from CR and PR at Table IV-1.

[153] CR and PR at Table C-1. Import volume relative to domestic production is lower than import volume relative to apparent U.S. consumption, due to the considerable percentage of domestic durum production that is exported. The volume of domestic durum production that is exported increased over the period examined. CR and PR at Table C-1. We intend to examine in any final phase investigation the role of exports in the performance of the domestic industry.

[154] CR and PR at Table IV-9.

[155] CR and PR at Table C-1.

> (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
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> (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.[156]

As discussed above in regard to the conditions of competition, durum wheat is a commodity product for which price is an important factor in purchasing decisions. Most sales are by contracts of varying duration, but there are sales on the spot market as well. Information is available for prices in the international market and in the United States, although less information is available on durum prices than HRS wheat prices because of the lack of an organized futures market in durum.[157] Demand for durum wheat is relatively price inelastic, such that changes in price do not substantially change demand.

Out of twenty-two available price comparisons, there were no instances of underselling by the subject durum imports.[158] The subject imports oversold the domestic durum by margins ranging from 1.6 to 53.4 percent for No. 1 hard western amber durum and from 3.9 to 14.4 percent for No. 2 hard western amber durum.[159]

Petitioners argue that these price comparisons are invalid because they occur at different levels of trade, and are due to the subtle differences in quality discussed above.[160] Indeed, in a commodity market in which price is an important purchasing factor, we would not ordinarily expect subject imports to oversell the domestic like product consistently. In an effort to evaluate Petitioners' assertion, prices for domestic and imported subject merchandise were compared on a purchaser by purchaser basis, and there was an attempt to account for differences in vitreous kernel content, protein content, and other variables.[161] [162]

The results of that analysis show that prices paid by various purchasers for domestic and subject imported durum wheat were very close. [163] That analysis shows that the margins of overselling may be due at least in part to factors such as differences in levels of trade and quality.[164] That analysis does not, however, indicate that significant underselling occurred but rather that prices were very close.[165] In any final phase investigation, we will seek additional information on this issue, and also on the extent to which, in a commodity market in which prices are published on a daily basis, we should expect prices to be comparable.

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[156] 19 U.S.C. § 1677(7)(C)(ii).

[157] CR at II-2 n.3, PR at II-1 n.3.

[158] CR and PR at Tables V-5 and V-6.

[159] CR and PR at Tables V-5 and V-6.

[160] Petitioners' Postconference Brief at 41. Petitioners note that some firms reporting pricing data may purchase wheat directly from farmers while others may purchase wheat from elevators or the CWB. Id.

[161] CR at D-3 to D-4, D-8 to D-10, PR at D-3, D-5 to D-7.

[162] Commissioner Bragg notes that quarterly data on the record demonstrate predominant underselling of the domestic product by subject durum wheat imports, when differences in the level of protein are accounted for in part. See Petition at Exhibit I-35.

[163] CR at D-8 to D-10, PR at D-5 to D-7.

[164] CR at D-8 to D-10, PR at D-5 to D-7.

[165] CR at D-8 to D-10, PR at D-5 to D-7.

Prices for domestic durum wheat fluctuated during 1999/00 and 2000/01, before rising to higher levels in 2001/02.[166] We do not find that subject imports depressed prices for domestic durum wheat to a significant degree. Record evidence indicates, however, that subject imports may have reduced the amount of price increases in 2001/02 below what would have occurred otherwise.[167] Higher prices were expected considering that domestic production fell from 109.8 million bushels in 2000/01 to 83.6 million bushels in 2001/02, while apparent U.S. consumption rose from 81 million bushels in 2000/01 to 94 million bushels in 2001/02.[168] The volume of subject durum wheat imports increased more than 50 percent from 2000/01 to 2001/02, gaining in market share, while the domestic durum industry experienced higher direct and overhead expenses in 2001/02 than in 2000/01, leading to lower returns.[169] In any final phase investigation, we intend to examine further whether subject durum imports had significant price suppressing or depressing effects.

3. Impact of the Subject Durum Wheat Imports

In examining the impact of the subject imports on the domestic industry, we consider all relevant economic factors that bear on the state of the industry in the United States.[170] These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."[171] [172] [173]

We evaluate the condition of the industry based on available public data. Domestic production was sharply lower in 2001/02 at 83.6 million bushels than in 2000/01 at 109.8 million bushels, and lower also than in 1999/00 at 99.3 million bushels.[174] Declines in production were the result of sharply lower

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[166] CR and PR at Figure V-2.

[167] Tr. at 17-18 (Fisher). The closeness in price levels discussed supra is corroborative of price suppression by reason of subject imports.

[168] CR and PR at Table C-1.

[169] CR and PR at Table VI-3. Table VI-3 is based on farmers of durum wheat located in North Dakota only. The data appear to be a reasonable proxy for the entire industry, however, because North Dakota accounts for 73 percent of U.S. durum wheat production. CR at VI-5, PR at VI-3.

[170] 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).

[171] 19 U.S.C. § 1677(7)(C)(iii); see also SAA at 851 and 885 and Live Cattle from Canada and Mexico, Invs. Nos. 701-TA-386 and 731-TA-812 to 813 (Preliminary), USITC Pub. 3155 (Feb. 1999) at 25, n.148.

[172] The statute instructs the Commission to consider the "magnitude of the dumping margin" in an antidumping proceeding as part of its consideration of the impact of imports. 19 U.S.C. § 1677(7)(C)(iii)(V). In its notice of initiation, Commerce reported estimated antidumping margins ranging from 3.2 to 48.2 percent for subject durum wheat imports from Canada. 67 Fed. Reg. 65947, 65950 (Oct. 29, 2002).

[173] Commissioner Bragg notes that she does not ordinarily consider the magnitude of the margin of dumping to be of particular significance in evaluating the effects of subject imports on the domestic producers. See Separate and Dissenting Views of Commissioner Lynn M. Bragg in Bicycles from China, Inv. No. 731-TA-731 (Final), USITC Pub. 2968 (June 1996); Anhydrous Sodium Sulfate from Canada, Inv. No. 731-TA-884 (Preliminary), USITC Pub. 3345 (Sept. 2000) at 11, n.63.

[174] CR and PR at Table C-1.

acres harvested, which totaled 2.8 million in 2001/02, compared to 3.6 million in both 1999/00 and 2000/01.[175] As subject imports increased both in volume and U.S. market share over the period, U.S. producers lost market share from 82.7 percent in 1999/2000 to 78.5 percent in 2001/02.[176]

The domestic industry experienced slightly higher direct and overhead expenses per acre in 2001/02 than in 2000/01 for all three types of land tenures: owned, cash rented, and share rented.[177] However, the farmers' net returns (without government payments) dropped more sharply, resulting in losses at the end of the period for cash rented and share rented tenures, and in smaller returns for owned tenures.[178] Net returns with government payments were also lower in 2001/02 than in 2000/01 for all types of land ownership.[179] Despite higher prices in 2001/02 than in the earlier years of the period examined, the industry also experienced gross returns that were lower in 2001/02 than in the previous year for production on cash rented land, and only slightly higher than the previous year for production on land that was owned or share rented.[180] [181]

As required by the Act, we also consider any additional burden on government income or price support programs relating to this agricultural product.[182] On a per acre basis, government payments, including decoupled payments under the Agricultural Market Transition Act and market loss assistance payments, appear to have declined over the period examined.[183] Rising prices during the period

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[175] CR and PR at Table C-1. As indicated in our discussion of the conditions of competition, lower domestic production of durum wheat in 2001/02 is principally the result of lower acreages planted and harvested, not yield per acre. In any final phase investigation we will seek additional information on the extent to which other factors contributed to this decline, including changes in government programs.

[176] CR and PR and Table IV-9.

[177] From 2000/01 to 2001/02, producers on land they owned experienced a per acre increase in total direct and overhead expenses from $95.40 to $99.54; for producers on cash rented land, those per acre expenses increased from $106.07 to $107.29; and, for producers on share rented land, those per acre expenses increased from $74.61 to $78.58. CR and PR at Table VI-3.

[178] From 2000/01 to 2001/02, farmers' average per acre net returns without government payments decreased from $3.21 to $1.09 for owned land, and net losses increased from ($2.83) to ($8.09) for cash rented land, and from ($3.12) to ($5.20) for share rented land. CR and PR at Table VI-3.

[179] From 2000/01 to 2001/02, farmers' average per acre net returns with government payments decreased from $24.00 to $17.16 for owned land, from $18.03 to $8.07 for cash rented land, and from $11.53 to $6.10 for share rented land. CR and PR at Table VI-3.

[180] From 2000/01 to 2001/02, the domestic industry's per acre gross returns rose from $98.61 to $100.62 for owned land, from $71.49 to $73.38 for share rented land, and declined from $103.24 to $99.21 for cash rented land. CR and PR at Table VI-3.

[181] Commissioner Bragg notes that between 2000 and 2001, total and direct overhead expenses for the domestic industry (owned land) increased by $4.14 per acre, while U.S. producers' gross return (which includes both total product return as well as miscellaneous income in such form as crop insurance payments, for example) increased by only $2.01 per acre; similarly, total and direct overhead expenses
for the domestic industry (share rented land) increased by $3.97 per acre, while U.S. producers' gross return increased by only $1.89 per acre; finally, total and direct overhead expenses for the domestic industry (cash rented land) increased by $1.22 per acre, while U.S. producers' gross return actually declined by $4.03 per acre. See CR/PR at Table IV-3. Based upon the foregoing, Commissioner Bragg finds that the record is consistent in indicating that the domestic industry producing durum wheat is experiencing a cost/price squeeze.

[182] 19 U.S.C. § 1677(7)(D).

[183] CR and PR at Table VI-3. Crop revenue insurance payments are indicated not under the "Government payments" lines but rather under the "Miscellaneous income" lines. Loan deficiency payments were subsumed under "total product return." Thus, total government payments are not separately reported in Table VI-3.

examined may have reduced price-triggered government payments.[184] This apparent decline in burden is greater considering that planted acreage of durum wheat declined in the last year of the period examined.

Given the increased volume of and market share held by subject durum imports, evidence suggesting those imports may have had price suppressing effects during a time of rising industry costs, declines in the domestic industry's market share, acres planted and production during a time of increased apparent U.S. consumption, and lower returns, we conclude under the standard applicable to these preliminary investigations[185] that subject imports are having a significant adverse impact on the domestic durum wheat industry. In any final phase investigation, we will seek additional information on why domestic producers have reduced the acreage of durum planted, and other factors that bear on the state of the industry, including relevant shortages, quality concerns, and diseases.

CONCLUSION

For the reasons stated above, we determine that there is a reasonable indication that the domestic industry producing durum wheat is materially injured by reason of subject durum wheat imports from Canada that allegedly are subsidized and sold in the United States at less than fair value.

D. Reasonable Indication of Material Injury to the Domestic HRS Wheat Industry

1. Volume of Subject Imports of HRS Wheat

Section 771(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."[186]

From 1999/00 to 2000/01, apparent U.S. consumption of HRS wheat rose 16.7 percent from 297 million bushels to 347 million bushels.[187] From 2000/01 to 2001/02 apparent U.S. consumption fell 5.3 percent to 329 million bushels.[188] Over the entire period, from 1999/00 to 2001/02, apparent U.S. consumption rose 10.5 percent.[189]

While apparent U.S. consumption declined from 2000/01 to 2001/02, the volume of subject HRS wheat imports increased. From 1999/00 to 2000/01, the volume of subject HRS wheat imports fell slightly from 50 to 49 million bushels.[190] In 2001/02, however, the volume of subject HRS wheat rose 9.1 percent over the previous year to 54 million bushels.[191] Over the entire period, the volume of subject HRS wheat imports rose 6.4 percent.[192] The increase in the volume of subject HRS wheat imports in 2001/02, a year with lower apparent U.S. consumption than in 2000/01, resulted in increasing market penetration by the subject merchandise. Market share held by subject HRS wheat not only indicated a significant presence in the U.S. market but also increased from 14.1 percent in 2000/01 to 16.3 percent in

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[184] See CR at Figure V-3 and VI-10, PR at Figure V-3 and at VI-7.

[185] 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).

[186] 19 U.S.C. § 1677(7)(C)(i).

[187] CR and PR at Table C-2.

[188] CR and PR at Table C-2.

[189] Figure derived from staff working paper entitled "Table C-2(*)."

[190] CR and PR at Table C-2.

[191] CR and PR at Table C-2.

[192] Figure derived from CR and PR at Table IV-2.

2001/02.[193] U.S. producers' U.S. market share decreased during this same period, from 85.8 percent in 2000/01 to 83.7 percent in 2001/02.[194]

Based on the record available and the standard we apply in these preliminary determinations, we find a reasonable indication that the volume of subject HRS wheat imports, which have maintained a steady and significant presence in the U.S. market, and the increase in volume, both absolutely and relative to consumption in the United States in the most recent period, are significant.[195]

2. Price Effects of the Subject HRS Wheat Imports

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

> (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.[196]

As discussed above in regard to the conditions of competition, HRS wheat is a commodity product for which price is an important factor in purchasing decisions. Most sales are by contracts of varying duration, but there are sales on the spot market as well. Information is readily available for prices in the international market and in the United States. Demand for HRS wheat is relatively price inelastic, such that changes in price do not substantially change demand.

Out of thirty-eight available price comparisons, there was one instance of underselling by the subject HRS wheat imports, in the amount of 1.4 percent.[197] The other 37 comparisons showed price overselling, by margins ranging from 0.2 to 42.7 percent for No. 1 HRS wheat and from 0.7 to 38.6 percent for No. 2 HRS wheat.[198]

As noted previously in our discussion pertaining to durum wheat, Petitioners argue that such overselling is the result of price comparisons that are invalid because they occur at different levels of

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[193] CR and PR at Table C-2. Although subject HRS wheat held a higher market share in 1999/2000, at 16.9 percent, we consider the increase in market share from 14.1 percent in 2000/01 to 16.3 percent in 2001/02 to be important. Market share held by subject HRS wheat fell from 1999/2000 to 2000/01 not due to a significant drop in the volume of subject imports, but instead due to higher apparent U.S. consumption. The increase both in absolute volume and in market penetration from 2000/01 to 2001/02 occurred even as apparent U.S. consumption declined. CR and PR at Table C-2.

[194] CR and PR at Table IV-10.

[195] CR and PR at Table C-2. Import volume relative to domestic production is lower than import volume relative to apparent U.S. consumption, due to the considerable percentage of domestic HRS wheat production that is exported. The volume of domestic HRS wheat production remained relatively constant during the period examined. CR and PR at Table C-2. We intend to examine in any final phase investigation the role of exports in the performance of the domestic industry.

[196] 19 U.S.C. § 1677(7)(C)(ii).

[197] CR and PR at Tables V-3 and V-4. The Commission report incorrectly identifies the overselling to have occurred in a comparison of prices for the sale of durum wheat. CR at V-10, PR at V-7.

[198] CR and PR at Tables V-3 and V-4.

trade, and due to the subtle differences in quality.[199] As also discussed previously, we would not ordinarily expect subject imports to oversell the domestic like product consistently in a commodity market in which price is an important factor in purchasing decisions. As we did with regard to durum wheat, we have attempted to evaluate Petitioners' assertion by comparing prices paid for domestic and imported HRS wheat on a purchaser by purchaser basis, with attempts to account for differences in vitreous kernel content, protein content, and other variables.[200] [201]

The results of that analysis show that prices paid by various purchasers for domestic and subject imported HRS wheat were very close.[202] That analysis appears to show that the margins of overselling may be due at least in part to factors such as differences in levels of trade and other factors. That analysis does not, however, indicate that significant underselling occurred but rather that prices were very close. In any final phase investigation, we will seek additional information on this question, and also the extent to which, in a commodity market in which prices are published on a daily basis, we should expect prices to be comparable.

Prices for domestic HRS wheat fluctuated within a relatively narrow range during the period examined, but were somewhat lower at the end of the period examined than at the beginning.[203] These small price declines occurred even though apparent U.S. consumption increased 10.5 percent over the period examined.[204] Although prices were essentially flat or slightly lower, the domestic HRS wheat industry experienced higher direct and overhead expenses during each successive year of the period examined.[205] Moreover, prices for No. 2 HRS wheat were often higher than prices for No. 1 HRS wheat, contrary to expectations given that No. 1 HRS wheat is higher in quality.[206] The unexpected lower prices for No. 1 HRS wheat may be due to competition with subject imports. While there were substantial volumes of Canadian No. 1 western HRS wheat sold in competition with domestic No. 1 HRS wheat, the volumes of Canadian No. 2 western HRS wheat sold in competition with domestic No. 2 HRS wheat were very small.[207] We intend to examine further whether subject HRS wheat imports had significant price suppressing or depressing effects in any final phase investigation.[208]

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[199] Petitioners' Postconference Brief at 41. Petitioners note that some firms reporting pricing data may purchase wheat directly from farmers while others may purchase wheat from elevators or the CWB. Id.

[200] CR at D-3 to D-8, PR at D-3 to D-5.

[201] Commissioner Bragg notes that quarterly data on the record demonstrate predominant underselling of the domestic product by subject HRS wheat imports, when differences in the level of protein are accounted for in part. See Petition at Exhibit I-34.

[202] CR at D-3 to D-8 and PR at D-3 to D-5.

[203] CR and PR at Figure V-2 and Tables V-3 and V-4.

[204] CR and PR at Table IV-8.

[205] CR and PR at Table VI-4. Table VI-4 is based on farmers of HRS wheat located in North Dakota only. The data appear to be a reasonable proxy for the entire industry, however, because North Dakota accounts for 48 percent of U.S. HRS wheat production. CR at VI-7, PR at VI-3.

[206] CR and PR at Tables V-3 to V-4.

[207] CR and PR at Table V-3 and V-4.

[208] The closeness in price levels discussed supra is corroborative of price suppression by reason of subject imports.

3. Impact of the Subject HRS Wheat Imports

In examining the impact of the subject imports on the domestic industry, we consider all relevant economic factors that bear on the state of the industry in the United States.[209] These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."[210] [211] [212]

We evaluate the condition of the industry based on available public data. Domestic production rose from 447.9 million bushels in 1999/2000 to 502.3 million bushels in 2000/01 and then declined to 475.7 million bushels in 2001/02.[213] Because the number of acres harvested fluctuated little over the period examined, variations in production were the result of changes in average yields. As the volume and market share of subject imports increased from 2000/01 to 2001/02, U.S. producers lost market share.

The domestic HRS wheat industry experienced higher gross returns per acre in 2000/01 than in 1999/00, but gross returns fell in 2001/02, for all types of land tenure: owned, cash rented, and share rented.[214] In addition, net returns (without government payments) per acre dropped sharply, resulting in losses at the end of the period for cash rented and share rented tenures, and sharply reduced net returns for cash owned tenures.[215] Net returns per acre including government payments likewise showed losses

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[209] 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).

[210] 19 U.S.C. § 1677(7)(C)(iii); see also SAA at 851 and 885 and Live Cattle from Canada and Mexico, Invs. Nos. 701-TA-386 and 731-TA-812 to 813 (Preliminary), USITC Pub. 3155 (Feb. 1999) at 25, n.148.

[211] The statute instructs the Commission to consider the "magnitude of the dumping margin" in an antidumping proceeding as part of its consideration of the impact of imports. 19 U.S.C. § 1677(7)(C)(iii)(V). In its notice of initiation, Commerce noted that Petitioners estimated antidumping duties on subject HRS wheat ranging from zero to 86.6 percent using price-to-price comparisons based on home market prices and using price-to-price comparisons using third country prices. 67 Fed. Reg. 65947, 65950 (Oct. 29, 2002). Using price-to-constructed value comparisons, Commerce calculated a margin of 13.26 percent. 67 Fed. Reg. 65947, 65950 (Oct. 29, 2002).

[212] Commissioner Bragg notes that she does not ordinarily consider the magnitude of the margin of dumping to be of particular significance in evaluating the effects of subject imports on the domestic producers. See Separate and Dissenting Views of Commissioner Lynn M. Bragg in Bicycles from China, Inv. No. 731-TA-731 (Final), USITC Pub. 2968 (June 1996); Anhydrous Sodium Sulfate from Canada, Inv. No. 731-TA-884 (Preliminary), USITC Pub. 3345 (Sept. 2000) at 11, n.63.

[213] CR and PR at Table C-2.

[214] For each successive year of the period examined, per acre gross returns were $96.92, $123.89, and $104.43 for owned land; $98.29, $123.00, and $101.84 for cash rented land; and $66.42, $77.98, and $66.87 for share rented land. CR and PR at Table VI-4.

[215] From 2000/01 to 2001/02, per acre net returns without government payments fell from $26.23 to $0.08 for owned land, from a net return of $9.35 to a net loss of ($18.58) for cash rented land, and from a net return of $1.36 to a net loss of ($15.25) for share rented land. CR and PR at Table VI-4.

in 2001/02 for cash rented and share rented tenures, and reduced returns for owned tenures.[216] As previously noted, the domestic industry experienced slightly higher direct and overhead expenses per acre during each successive year of the period examined, and for all three types of land tenures.[217] However, net returns showed a sharper decline, resulting in the industry's losses.[218]

We also consider any additional burden on government income or price support programs relating to this agricultural product.[219] On a per acre basis, government payments, including decoupled payments under the Agricultural Market Transition Act and market loss assistance payments, apparently declined over the period examined.[220]

Given the significant volume and market share of subject HRS wheat imports, the increases in volume and market share in the most recent period, declines in domestic production and market share, rising industry costs, and declining returns, at least in 2001/02, we conclude that under the standard applicable[221] to these preliminary investigations, subject imports are having a significant adverse impact on the domestic HRS wheat industry. In any final phase investigation, we will seek additional information on other factors that may affect the condition of the industry, including government programs, product quality and availability issues.

CONCLUSION

For the reasons stated above, we determine that there is a reasonable indication that the domestic industry producing HRS wheat is materially injured by reason of subject HRS wheat imports from Canada that are allegedly subsidized and sold in the United States at less than fair value.

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[216] From 2000/01 to 2001/02, per acre net returns with government payments fell from $45.79 to $17.96 for owned land, from a net return of $29.72 to a net loss of ($1.43) for cash rented land, and from a net return of $15.99 to a net loss of ($2.99) for share rented land. CR and PR at Table VI-4.

[217] For the successive years examined, the domestic industry experienced increasing per acre total direct and overhead expenses, from $91.72 to $97.66 and to $104.35 for owned land, from $111.22 to $113.65 and to $120.42 for cash rented land, and from $71.51 to $76.62 and to $82.12 for share rented land. CR and PR at Table VI-4.

[218] Commissioner Bragg notes that between 2000 and 2001, total and direct overhead expenses for the domestic industry (owned land) increased by $6.69 per acre, while U.S. producers' gross return (which includes both total product return as well as miscellaneous income in such form as crop insurance payments, for example) actually declined by $19.46 per acre; similarly, total and direct overhead expenses for the domestic industry (share rented land) increased by $5.50 per acre, while U.S. producers' gross return actually declined by $11.11 per acre; finally, total and direct overhead expenses for the domestic industry (cash rented land) increased by $6.77 per acre, while U.S. producers' gross return actually declined by $21.16 per acre. See CR/PR at Table IV-4. Based upon the foregoing, Commissioner Bragg finds that the record is consistent in indicating that the domestic industry producing HRS wheat is experiencing a cost/price squeeze.

[219] 19 U.S.C. § 1677(7)(D).

[220] CR and PR at Table VI-4, CR at VI-10, PR at VI-7. In Table VI-4, crop revenue insurance payments are indicated not under the "Government payments" lines but rather under the "Miscellaneous income" lines. Loan deficiency payments were subsumed under "total product return." Thus, total government payments are not separately reported in Table VI-4.

[221] 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).

DISSENTING VIEWS OF COMMISSIONER STEPHEN KOPLAN

On the basis of the record developed in the subject investigations, I determine that the industries in the United States producing durum wheat and hard red spring wheat are not materially injured nor threatened with material injury by reason of imports of durum wheat and hard red spring wheat from Canada that are alleged to be subsidized by the Government of Canada and sold in the United States at less than fair value.

LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS

The legal standard in preliminary antidumping and countervailing duty investigations requires the Commission to find, based upon the information available at the time of the preliminary determination, whether there is a reasonable indication that a domestic industry is materially injured, threatened with material injury or that the establishment of an industry is materially retarded, by reason of the allegedly unfairly traded imports.[1] 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 material injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation."[2] For the reasons stated below, I find that the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury to the domestic industries, and no likelihood exists that contrary evidence will arise in any final investigations.

I concur with the Commission's findings with respect to the domestic like product, the domestic industry, and conditions of competition, unless otherwise noted. However, for the reasons discussed below, I dissent from the Commission's determinations that there is a reasonable indication that the durum wheat and the hard red spring wheat industries in the United States are materially injured by reason of the subject imports.

NO REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF ALLEGEDLY LESS THAN FAIR VALUE IMPORTS

As noted above, in the preliminary phase of antidumping and countervailing duty investigations, the Commission determines whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of the imports under investigation. In making this determination, the Commission must consider the volume of imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations.[3] The statute defines "material injury" as harm which is not inconsequential, immaterial, or unimportant.[4] In assessing whether there is a reasonable indication that the domestic industry is materially injured or threatened with material injury by reason of the subject imports, the Commission considers all relevant economic factors that bear on the state of the industry in

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[1] 19 U.S.C. Section 1671b(a), 1673b(a); see also American Lamb Co. v. United States, 785 F.2d 994, 1001-1004 (Fed Cir. 1986); Artistech Chemical Corp. v. United States, 20 CIT 353, 354 (1996).

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

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

[4] 19 U.S.C. Section 1677(7)(A).

the United States.[5] 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."[6]

For the following reasons, I determine that there is no reasonable indication that the domestic industries in these investigations are materially injured or threatened with material injury by reason of the subject imports that are allegedly subsidized by the Government of Canada and sold in the United States at less than fair value. For ease of analysis, whenever appropriate, I will combine my discussion of the durum wheat and hard red spring wheat industries generally followed by my specific material injury and threat of material injury analysis of the durum industry and that of the hard red spring wheat industry.

VOLUME OF SUBJECT IMPORTS

The Tariff Act of 1930 as amended (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."[7]

Durum

The volume of subject imports of durum wheat was 15.6 million bushels in 1999/00, 12.5 million bushels in 2000/01 and 19.3 million bushels in 2001/02.[8] Over the three-year period of investigation (POI), these subject imports increased by 23.3 percent.[9] Apparent consumption in the U.S. increased by 3.9 percent over the period, decreasing from 91 million bushels in 1999/00, to 81 million bushels in 2000/01, and then increasing to 94 million bushels in 2001/02. The subject imports' share of domestic consumption decreased from 17.3 percent in 1999/00 to 15.5 percent in 2000/01, and then increased to 20.5 percent in 2001/02, an increase of 3.2 percentage points over the POI.[10]

While the volume of subject imports of durum wheat increased between marketing years 2000/01 and 2001/02, I do not find this increase to be significant. Importantly, between 2000/01 and 2001/02, the number of acres of durum wheat planted by U.S. producers fell by 26.1 percent, from 3.9 million acres to 2.9 million acres, and the U.S. producers' production declined by 23.9 percent from 109.8 million bushels to 83.6 million bushels.[11] Although U.S. producers' U.S. shipments increased by 8.8 percent between these two years, they drew down their inventories by 89.1 percent.[12] I also note that U.S. producers' exports increased by 11.1 percent over the POI.[13]

I find the principal cause of the decline in the number of acres of durum wheat planted, as well as the decline in production and inventories, to be the result of the USDA's decision to drop Crop Revenue Coverage (CRC) for durum wheat in 2001. Under the Federal Crop Insurance Program, farmers can purchase yield insurance or crop revenue insurance through private companies at 40-50 percent of the total cost, and the remainder is paid by the U.S. government. One study estimates that in 1999, 3.3

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[5] 19 U.S.C. Section 1677(7)(C)(iii).

[6] Id.

[7] 19 U.S.C. Section 1677(7)(C)(i).

[8] CR and PR at Table IV-1.

[9] CR and PR at Table C-1.

[10] Id.

[11] Id.

[12] Id.

[13] Id.

million acres of durum wheat were covered by this program.[14] In 1999, U.S. durum wheat production increased as guaranteed higher durum wheat prices under CRC induced increased planting in North Dakota. However, in 2001, the USDA dropped CRC coverage for durum wheat because of the government's difficulty in determining an accurate durum wheat price for the program.[15] Thus, I find the domestic producers' loss in market share between 2000/01 and 2001/02 is principally the result of the producers' responses to a change in the CRC U.S. government support program and not as a result of the presence of subject imports.

Additionally, I find several other factors, such as the impact of disease and trends in favor of planting other crops, which had nothing to do with the subject imports, and contributed importantly to the shift away from durum wheat planting during the POI. Respondent, in examining the decline in durum wheat acreage in 2001, cited a USDA report that suggested/concluded that in addition to removal of incentives provided by the CRC program, concerns about Fusarium Head Blight (FHB) or scab problems, "which ravaged the durum crop across a wide area last year–further dampened incentives" {to plant durum}.[16]

I note that domestic durum and hard red spring wheat farmers, like all growers, must take several factors into consideration when deciding whether to maintain or reduce acreage of wheat in a given year based on expected future returns and subject to the limitations of climate and soil.[17] In addition to these traditional factors, exacerbated by the loss of insurance initiatives and the apparent increased risk from disease, during the POI, I find that durum wheat farmers shifted toward other crops such as soybeans, canola and flaxseed because these offered promising, renumerative alternatives to planting the same or additional acres of durum. The parties acknowledge that switching crops is fairly easy, and as the respondent noted, while durum plantings in North Dakota have declined, soybean plantings have increased from 850,000 acres in 1996 to a projected 2.45 million acres in 2002, whereas canola has increased from 800,000 acres in 1998 to a projected 1.35 million acres in 2002, and flaxseed has increased tenfold, from 80,000 acres in 1996 to a projected 800,000 acres in 2002.[18] I find this has occurred because these crops offer stronger financial incentives including better prices and lower risk. I do not find that the change in volume of the subject imports was large enough to have caused the large change in domestic production. This is particularly true because farmers reduced their acres planted before the increase in the volume of subject imports occurred in 2001 and 2002.

In the context of these conditions of competition, and importantly the absence of significant negative price effects discussed below, I find the volume of subject imports, and the increase in that volume (particularly the increase in 2001/02) is not significant.

Hard Red Spring

The volume of subject imports of hard red spring wheat from Canada was 50.4 million bushels in marketing year 1999/00, 49.1 million bushels in 2000/01, and 53.6 million bushels in 2001/02.[19] Thus,

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[14] Respondent's Post Conference Brief of October 10, 2002 at 35, citing Monte L. Vandeveer and C. Edwin Young, " The Effects of the Federal Crop Insurance Program on Wheat Coverage," USDA/ERS, *Wheat Yearbook* 2001(March 2001).

[15] CR at II-6, PR at II-4.

[16] Respondent's Post Conference Brief of October 10, 2002 at 36, citing USDA/ERS *Agricultural Outlook* (April 18, 2002) at 13.

[17] CR at II-3.

[18] Respondent's Post Conference Brief (October 10, 2002) at 39.

[19] CR and PR at Table IV-2.

over the POI, subject imports of hard red spring wheat increased by 6.4 percent.[20] Apparent consumption of hard red spring wheat in the U.S. increased by 10.5 percent over the POI, increasing from 297 million bushels in 1999/00 to 347 million bushels in 2000/01, before decreasing to 329 million bushels in 2001/02.[21] Although subject imports of hard red spring wheat increased over the POI, domestic apparent consumption increased by a larger amount, causing the share of the U.S. market accounted for by subject imports to decrease by 0.6 percentage points.[22] Subject imports of hard red spring wheat accounted for 16.9 percent of U.S. apparent consumption in 1999/00, 14.1 percent in 2000/01, and 16.3 percent in 2001/02.[23]

Coincident with the increase in subject imports over the period, U.S. producers increased the number of acres of hard red spring wheat planted by 3.5 percent, increased production by 6.2 percent, and increased U.S. shipments by 11.3 percent.[24]

In the context of the conditions of competition, including U.S. government farm support programs, the increasing U.S. production, shipments, and market share, and importantly, the absence of significant negative price effects discussed below, I find the volume of subject imports, and the increase in that volume, is not significant.

THE EFFECT OF SUBJECT IMPORTS ON DOMESTIC PRICES

> 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.[25]

The Commission requested U.S. purchasers and importers of durum and hard red spring wheat to provide monthly price data for certain products that were purchased between June 1999 and May 2002.[26] Eleven U.S. purchasers or importers provided usable pricing data for purchases of hard red spring wheat, and eight firms provided data for durum wheat.[27] The Commission supplemented its questionnaire price data with public price data collected by USDA. I find the price data collected by the Commission is the best data currently, and likely to be, available.

Durum

The price data collected by the Commission evidences no underselling by the imported merchandise as compared with the price of the domestic durum wheat. In fact, in each instance the

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[20] CR and PR at Table C-2.

[21] Id.

[22] Id.

[23] Id.

[24] Id.

[25] 19 U.S.C. Section 1677(7)(C)(ii).

[26] CR at V-8, PR at V-6.

[27] CR at V-9, PR at V-7.

subject import price exceeds the price of the domestic like product. Out of the 22 comparisons of monthly weighted average net contract prices of U.S. hard amber durum and Canadian western amber durum wheat, there was not a single instance of Canadian wheat underselling the U.S. product.[28] The margins of overselling by the subject imports ranged between 1.6 percent and 53.4 percent.[29]

The public data mirror the Commission data and show that the monthly prices of durum wheat generally increased over the POI, were at their lowest point in mid to late 1999 and then generally increased and reached their highest levels by the end of the POI.[30]

Given the lack of underselling by the subject imports, the increasing prices of durum wheat over the POI, and the global nature of competition for wheat, I find no evidence that the subject imports have depressed or suppressed prices of this domestic like product to a significant degree.

Hard Red Spring

The price data for hard red spring wheat collected by the Commission follows a similar pattern to that of durum wheat and evidences no significant underselling by the imported merchandise as compared with the price of the domestic like product.[31] In 38 comparisons of monthly weighted average net contract prices of U.S. hard red spring wheat and Canadian western red spring wheat, there was only one instance of Canadian wheat underselling the U.S. product.[32] The margin of underselling in that one instance was only 1.4 percent. The margins of overselling by the subject imports in the other 37 price comparisons ranged between 0.2 and 42.7 percent.[33]

The public data contained in the Staff Report can not be used to compare prices of U.S. and Canadian wheat in head to head competition. However, they supplement importantly the Commission's data by showing the trends in prices and confirm that the Commission's data are representative of the market prices. The public data mirror the Commission's data and show that the monthly prices of hard red spring wheat fluctuated over the POI, reaching their lowest point in August 2000, increasing in early 2001, and then softening into early 2002.[34] However, prices increased significantly in July 2002, reaching their highest level of the POI.[35]

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[28] CR and PR at Tables V-5 and V-6.

[29] Id.

[30] CR and PR at Figures V-2 and V-3, and Tables V-5 and V-6.

[31] Petitioners allege that the level of trade and lack of transportation data limit the usefulness of the pricing data and that the Canadian Wheat Board is a price leader in the U.S. market. Petitioners' Postconference Brief at 43-45. The Commission's price data in these investigations contain information on attributes, such as dockage, test weight, vitreous kernel count, protein level, and transportation costs. A statistical analysis of this data was completed by Staff and is reported in Appendix D of the Staff Report. Controlling for these various factors did not change the results observed in the raw price data. CR at D-8, PR at D-5. In other words, taking into account these various factors did not result in evidence of underselling by the imported Canadian hard red spring wheat.

[32] CR at Tables V-3 and V-4.

[33] Id.

[34] Compare CR at Figure V-2 at V-5 and Figure V-3 at V-6 with CR at Table V-3 at V-12 and Table V-4 at V-13.

[35] CR and PR at Figures V-2 and V-3. Figure V-2 reports farm prices of hard red spring wheat, by month, between June 1997 and July 2002. Figure V-3 reports monthly cash prices from the Minneapolis Grain Exchange for No. 1 hard red spring wheat with 13 percent protein, and No. 1 hard red spring wheat with 15 percent protein between June 1997 and February 2002. While Figure V-2 presents an average price of all hard red spring, and Figure V-3 presents price data for more specific products, the trends in the two figures are the same. Since only Figure V-2 presents data for March through July 2002, the recent increase in prices is only evidenced in that figure.

Wheat is traded worldwide, and the United States and Canada are both major exporters of wheat to third countries.[36] Figure V-4 of the Staff Report shows the prices of U.S. hard red spring wheat with 14 percent protein at Rotterdam and prices of Canadian western red spring wheat with 13.5 percent protein at St. Lawrence. The price trends of these two products mirror the prices of U.S. hard red spring wheat reported in Figures V-2 and V-3, evidencing that wheat prices are transmitted from country to country.[37] Many factors across the world impact the price of hard red spring wheat. The Minneapolis Grain Exchange reports that the number of acres planted, the weather, and other crop news drive the market from April to September while the crop is in the ground, and that export demand and international supply are important during other times of the year.[38] The USDA reports wheat production worldwide and the impact on prices.[39] Certainly, the supply and demand of wheat on the world market has a strong influence on the prices of wheat in the U.S. market.

At the end of the POI, given the lack of underselling by the subject imports, the fluctuating and increasing prices of hard red spring wheat, and the global nature of competition for wheat, I find no evidence that the subject imports have depressed or suppressed prices of this domestic like product to a significant degree.

THE IMPACT OF SUBJECT IMPORTS ON THE DOMESTIC INDUSTRY

In examining the impact of the subject imports on the domestic industry, the Commission considers all relevant economic factors that bear on the state of the industry in the United States.[40] These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."[41]

Durum

As discussed earlier, the Commission did not, and it appears that it will not, collect data from individual producers of durum wheat, and therefore it did not, and will not, collect the type of financial data it typically collects in Title VII investigations. I concurred with the majority of the Commission in recognizing that attempts to collect such data in any final investigations is not feasible. The public data reported in the Staff Report for durum wheat show that the net return to durum farmers was small or negative over the POI.[42] The record also shows that acres planted decreased by 27.9 percent, production

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[36] "Over the past 5 years, the United States was the leading world wheat exporter, with its share of world exports averaging about 27 percent annually. Canada was the second leading wheat exporter with an average 17-percent share during the period." *Wheat Trading Practices: Competitive Conditions Between U.S. and Canadian Wheat*, USITC Publication 3465 (December 2001).

[37] CR at V-7, PR at V-5.

[38] CR at V-1, PR at V-1.

[39] See, e.g., *Wheat Outlook: Droughts are Having Major Impacts on U.S. Wheat Sector*. USDA, WAS-0902, September 16, 2002.

[40] 19 U.S.C. Section 1677(7)(C)(iii). See also Statement of Administrative Action (SSA) at 851 and 855.

[41] Id., and Live Cattle from Canada Mexico, Inv. Nos. 701-TA-386 and 731-TA-812-813, (Preliminary), USITC Pub. 3155 (Feb. 1999) at 25, n.148.

[42] CR and PR at Table VI-3.

decreased by 15.9 percent, and U.S. shipments decreased by 1.3 percent.[43] However, as discussed above, I find that these declines in acres planted, production, and shipments were caused primarily by changes in the government support program for durum wheat producers.

While the domestic producers may be currently experiencing financial injury, because I find that the volume of subject imports was not significant and that the subject imports did not suppress or depress domestic prices during the POI to any significant degree, I determine that subject imports did not materially injure the domestic industry producing durum wheat.

Hard Red Spring

As with durum, the Commission did not collect financial data from the producers of hard red spring wheat. Again, I concurred with the Commission in finding that it is not feasible to collect such data in any final investigations. The Staff Report contains limited public data concerning the financial condition of the domestic producers, and this data shows that the domestic producers' net returns are small or are losses.[44]

However, while the financial condition of the domestic producers is not strong, other data collected by the Commission show that several impact factors improved over the period of investigation. U.S. producers' share of domestic apparent consumption remained at or above 83.1 percent over the POI, and was slightly higher in 2001/02 compared to 1999/00.[45] Over the period, the number of acres of hard red spring wheat planted increased by 3.5 percent, production increased by 6.2 percent, ending inventories decreased by 9.6 percent, and U.S. shipments increased by 11.3 percent.[46]

While the domestic producers may be currently experiencing financial injury, because I find that the volume of subject imports was not significant and that the subject imports did not suppress or depress domestic prices during the POI to any significant degree, I determine that subject imports did not materially injure the domestic industry producing hard red spring wheat.

Therefore, based on the record in these investigations, I find that there is no reasonable indication that an industry in the United States that is the subject of these investigations is materially injured by reason of the imports of durum wheat or hard red spring wheat from Canada that are alleged to be subsided by the Government of Canada and sold in the United States at less than fair value.

NO REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF THE IMPORTS THAT ARE ALLEGED TO BE SUBSIDIZED BY THE GOVERNMENT OF CANADA AND SOLD IN THE UNITED STATES AT LESS THAN FAIR VALUE

The Act directs the Commission to determine whether a domestic industry or industries are threatened with material injury by reason of the subject imports by analyzing whether "further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted."[47] The Commission may not make such a determination 'on the basis of mere conjecture or supposition' and considers the threat factors 'as a

[43] CR and PR at Table C-1.

[44] CR and PR at Table VI-4.

[45] CR and PR at Table C-2.

[46] Id.

[47] 19 U.S.C. Section 1673b(a) and 1677(7)(F)(ii).

whole'.[48] In making my decision I have considered all factors relevant to these investigations. Based on an evaluation of the statutory factors, I find that there is no reasonable indication that either of the industries in the United States that are the subject of these investigations are threatened with material injury by reason of imports of durum wheat and hard red spring wheat from Canada that are alleged to be subsidized by the Government of Canada and sold in the United States at less than fair value. While I find that the domestic industries are in a somewhat weakened condition, I do not find them to be vulnerable. Specifically, and for the following reasons, I do not find that further dumped and subsidized imports from Canada are imminent or that material injury by reason of the subject imports of durum wheat or hard red spring wheat from Canada will occur unless an order is issued or a suspension agreement is accepted.

First, I find no evidence that Canadian wheat crops are forecast to increase in the forthcoming crop year. Moreover, it is clear from the evidence in this case that the weather has had a major impact on reducing supplies of both subject products in Canada for 2002/2003 production. The National Agricultural Statistics Service has recently reported that projected wheat imports have been reduced substantially because of drought in Canada. USDA estimates that imports (2002/2003) of hard red spring wheat were reduced by between 27 million to 35 million bushels, the smallest level of hard red spring imports since the 1995/1996 market year.[49] They further note that wheat production in Canada has been slashed to the lowest level in over 25 years and that significant wheat areas have been harvested for hay instead of grain. "Recently, excessive rains have delayed harvest and reduced quality."[50] The Canadian projections for export shipments of durum wheat to the U.S. for 2002/2003 are substantially below shipments for 2001/2002, while internal consumption and shipments to other markets are expected to increase.[51] There are no projections for hard red spring wheat, but Canadian production had declined steadily over the POI, while exports to the U.S. have remained steady or declined slightly.[52]

As discussed above, I do not find that subject imports are entering the market at prices that are likely to depress or suppress domestic prices to any significant degree. Further, I find the subject imports were selling at prices higher than the domestic like products. It is equally clear that average prices being received by farmers in 2002/2003 for both durum wheat and hard red spring wheat are higher than at any period during the POI.[53] Therefore, subject imports are not entering the U.S. at prices that are likely to have a significant depressing or suppressing effect on domestic prices, or to increase demand for Canadian durum and hard red wheat.

Inventories for Canadian durum wheat are down substantially in the 2001/2002 crop year and are projected to decrease further in 2002/2003.[54]

As I discussed above, the volume of subject imports is not significant. While the quantity of hard red spring wheat increased over the POI, the share of the market accounted for by these subject

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[48] 19 U.S.C. Section 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, 690 F. Supp. 1273, 1280 (Ct. Int'l Trade 1984). See also Calabrian Corp. v. United States, 794 F. Supp. 377, 387-88 (Ct. Int'l Trade 1992) citing H.R. Rep. No. 98-1156 at 174 (1984).

[49] USDA, Economic Research Service, *Wheat Outlook* /WHS-0902, September 16, 2002 at 2.

[50] Id., at 4.

[51] CR Table VII-1, PR Table at VII-1.

[52] CR Table VII-2, PR Table at VII-2.

[53] CR at Figure V-2 at V-5.

[54] CR Table VII-1 and VII-2.

imports decreased by 0.6 percentage points.[55] Thus, there has not been an increase in the market penetration of subject imports of hard red spring wheat that would indicate the likelihood of substantially increased imports. Imports of durum wheat did increase at the end of the POI, but as discussed above, this increase occurred as U.S. producers dramatically decreased the number of acres planted. Given the projections of acreage planted and production in Canada for 2002/2003, I find it unlikely that there will be substantially increased imports of durum wheat, and given the demand for these agricultural products, I do not see evidence of likely product shifting.

I find no other evidence that competitive conditions will change in this market to such a degree that subject imports will increase significantly in the imminent future or that they will have an adverse effect on domestic prices.[56] Consequently, I conclude that the domestic industries producing durum wheat and hard red spring wheat are not threatened by the subject imports from Canada.

Finally, while I note that the Commission indicated in its opinion that it intends to collect some additional information, I note that the parties and the Commission rely almost entirely on publicly available data, primarily from the United States Department of Agriculture (USDA) and the U.S. Department of Commerce.[57] Also, the Commission has collected additional data from responses to purchasers' questionnaires, and from the Canadian Wheat Board regarding the purchases of durum and hard red spring wheat and the wheat industry in Canada. The coverage for purchasers is generally good for several products.[58] Additionally, the Canadian Wheat Board has been cooperative, and to the extent possible, has provided all the information requested by the Commission staff to date in these investigations.

The last time the USDA published its agricultural census, it reported that there were approximately 46,300 spring wheat farms in the United States. (*1997 Agricultural Census of Agriculture*, Vol. 5, part 51, table 26).[59] According to the Canadian Wheat Board, for the marketing year 2001/02 there were 58,788 permit holders who indicated they planned to grow hard red spring wheat and an additional 16,368 permit holders who stated they planned to grow durum wheat.[60] Therefore, I find that the methodology undertaken in these investigations was the only practical way to obtain data that are

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[55] CR at Table C-2.

[56] I have considered, pursuant to 19 U.S.C. Sections 1677(7)(F)(i)(VIII) and (IX), whether there are any actual and 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 domestic like product, and whether any other demonstrable adverse trends 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), and determined that these provisions are not applicable to my threat analysis.

[57] In an effort to determine whether there were any additional sources of employment data, petitioners' were asked at the Staff Conference for the source used to gather data regarding U.S. employment and labor. Mr. Neal Fisher, Administrator of the North Dakota Wheat Commission, indicated that the information came from USDA data that reflected income levels, cost of labor, capital and land. When asked if any other data were collected by the North Dakota Wheat Commission, the witness indicated that they typically do not. Staff Conference Tr. 40-41. In their Supplemental Submission of Answers to Questions following the Conference, petitioners indicated that they have not been able to locate any other data sources regarding wheat employment data other than the USDA data sources cited. "The North Dakota State University did conduct a producer survey in 1995, but that data is clearly dated. Calls to other agricultural statistical services indicates that such data is not being currently collected." Petitioners' Responses to Questions from Commission's Staff Conference, (October 10, 2002) at 2.

[58] CR at V-9, PR at V- 7.

[59] See, *Wheat Trading Practices: Competitive Conditions Between U.S. and Canadian Wheat*, USITC Publication 3465 (December 2001).

[60] CR at VII-1, PR at VII-1.

reliable and representative for these producers, importers, and purchasers of the like products in these investigations. No one has offered any alternative source of data. I concur with the Commission that it would be impractical to attempt to obtain a sampling of additional data from the many thousands of individual domestic producers.

CONCLUSION

Therefore, for the above stated reasons, I find that the record as a whole contains clear and convincing evidence that there is no reasonable indication of material injury or threat of material injury to the domestic industries in these subject investigations by reason of the imports of durum wheat and hard red spring wheat from Canada that are alleged to be subsidized by the Government of Canada and sold in the United States at less than fair value, and that there is no likelihood that contrary evidence will be available in any final investigations.