

VIEWS OF THE COMMISSION

By a decision dated June 7, 2005, a Binational Panel constituted under Article 1904 of the North American Free Trade Agreement (“NAFTA”) remanded the Commission’s determination in Hard Red Spring Wheat from Canada, Inv. Nos. 701-TA-430B and 731-TA-1019B (Final), USITC Pub. 3639 (October 2003). The Panel ordered the Commission to issue a new determination consistent with a nine-part set of instructions.¹ Upon consideration of the record, the Panel’s decision, and its remand instructions, we determine that an industry in the United States is not materially injured, or threatened with material injury, by reason of imports of hard red spring wheat (“HRS wheat”) from Canada found to be subsidized and sold in the United States at less than fair value (“LTFV”).²

I. Background

In October 2003, the Commission determined that an industry in the United States was materially injured by reason of imports of HRS wheat from Canada found to be subsidized and sold in the United States at LTFV.³ Respondent parties subsequently challenged the Commission’s final determination before a NAFTA Article 1904 Binational Panel.⁴ After receiving the Panel decision, the Commission gave notice of its intention to re-open the record to gather data responsive to the Panel’s instructions.⁵ The Panel subsequently granted the Commission’s request to extend the period for completion of the remand views by 30 days to October 5, 2005.

II. Adoption and Summary of Portions of Prior Views

Each Commissioner participating in this remand investigation has reviewed the entire record, as supplemented, in light of the Panel decision and instructions on remand. Based on that consideration, the Commission determines to adopt and incorporate by reference the “Dissenting Views of Chairman Deanna Tanner Okun and Commissioner Stephen Koplan,”⁶ as well as sections I, II, III.A, and III.B of the Commission majority’s original views.⁷

We provide additional explanation of our determination here as well. For the most part, the

¹ Hard Red Spring Wheat from Canada, Secretariat File No. USA-CDA-2003-1904-06 (Panel Decision of June 7, 2005) (Panelist Maureen Irish dissenting in part).

² Commissioner Jennifer A. Hillman dissenting. See Dissenting Views of Commissioner Jennifer A. Hillman. Commissioner Shara L. Aranoff is recused from this remand determination.

³ Durum and Hard Red Spring Wheat from Canada, Inv. Nos. 701-TA-430A and 430B and 731-TA-1019A and 1019B (Final), USITC Pub. 3639 (October 2003) (“USITC Pub. 3639”). Commissioners Hillman and Miller voted in the affirmative. Chairman Koplan and Vice Chairman Okun dissented. Commissioner Lane did not participate.

⁴ Two parties filed complaints with the NAFTA Secretariat – the Canadian Wheat Board and the North American Millers’ Association.

⁵ 70 *Fed. Reg.* 38981 (July 6, 2005).

⁶ At the time of the original determination, Chairman Koplan was serving as a Commissioner, and Vice Chairman Okun was serving as Chairman. While Commissioners Lane and Pearson did not participate in the original determination, they participate in this remand determination.

⁷ The adoption of the dissenting views and portions of the majority views from the original investigations does not extend to any statements that are inconsistent with the additional explanation provided in these remand views.

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record as supplemented on remand is not materially different than the record before the Commission in the original investigations. Nevertheless, some of the newly gathered data merits discussion for the sake of completeness.

We also provide explanation pertaining to the remand instructions issued by the Panel. While these instructions were directed to the Commission's affirmative material injury determination in the original investigations, certain aspects of them could be understood to warrant additional explanation of the dissenting views as well. Generally, however, the Panel's instructions pertain to aspects of the majority's determination that are not in question here given our negative determination.

In order to establish the context in which the additional explanation is provided, we summarize briefly the findings adopted and incorporated by reference here. However, the omission of facts or analysis here does not signal an intent to narrow the basis of our determination.

The Department of Commerce defined the merchandise subject to these investigations 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."⁸ The Commission defined the domestic like product corresponding to the subject merchandise as hard red spring wheat.^{9 10} The Commission declined to define the like product to include hard red winter wheat, based on differences between the two classes of wheat in terms of physical characteristics, uses, the growers producing the wheat, and other factors.¹¹ The Commission defined the domestic industry as the growers of HRS wheat.¹²

The Commission addressed various conditions of competition characterizing the market for HRS wheat, including factors influencing supply and demand of HRS wheat.¹³ The Commission also found that HRS wheat grown in the United States and Canada is largely interchangeable, that HRS wheat is a widely traded commodity, and that the Minneapolis Grain Exchange is the primary source of information regarding prices of HRS wheat.¹⁴ The Commission also observed that drought conditions adversely affected U.S. production in marketing year 2002/03.¹⁵

With respect to the volume of subject imports, the dissenting views, which we adopt, observed that subject imports from Canada declined in volume from 41 million bushels in marketing year 2000/01 to 11 million bushels in marketing year 2002/03.¹⁶ The volume of HRS wheat from Canada likewise declined sharply relative to U.S. production and U.S. apparent consumption.¹⁷ Accordingly, the dissenting Commissioners found that the volume of subject imports from Canada was not significant in

⁸ 68 *Fed. Reg.* 52741, 52742 and 68 *Fed. Reg.* 52747, 52748 (September 5, 2003).

⁹ USITC Pub. 3639 at 12.

¹⁰ All Commissioners participating in the original investigations joined the discussion of the domestic like product, the domestic industry, and the conditions of competition. USITC Pub. 3639 at 3 n.1.

¹¹ USITC Pub. 3639 at 4-12.

¹² USITC Pub. 3639 at 12.

¹³ USITC Pub. 3639 at 51, 14-19.

¹⁴ USITC Pub. 3639 at 51, 21-23.

¹⁵ USITC Pub. 3639 at 51, 19-20.

¹⁶ USITC Pub. 3639 at 51.

¹⁷ USITC Pub. 3639 at 51-52.

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absolute terms or relative to production or consumption in the United States.¹⁸

With respect to the price effects of the subject imports, the dissenting views noted that monthly underselling comparisons were performed on several different bases in response to arguments presented by the parties.¹⁹ Specifically, the parties argued that unadjusted price comparisons would be skewed by certain factors – principally transportation costs and protein content. The various price comparisons were supplemented by a statistical analysis of prices for domestic and Canadian HRS wheat over the period examined. This statistical analysis addressed certain factors with the potential to affect prices that could not be addressed in the monthly comparisons.

The dissenting views found that adjusted price comparisons revealed mixed underselling. As those views noted, the data also showed that the estimated mean price for domestic grade number 1 HRS wheat was lower, but not statistically different than, the estimated mean price for subject number 1 HRS wheat.²⁰ The record showed that the estimated mean price for grade number 2 HRS wheat was statistically less than the mean estimated price of comparably graded HRS wheat from Canada.²¹ The views also observed that there was no underselling among the adjusted price comparisons after August 2002.²² On these bases, the dissenting Commissioners found that price underselling by the subject imports was not significant.²³

The dissenting views also noted that the record evidence did not show price depression or price suppression.²⁴ Prices for HRS wheat fluctuated early in the period examined, then increased and remained generally high during crop year 2002/03.²⁵ Farm prices for HRS wheat declined only slightly from \$2.94 per bushel in marketing year 2000/01 to \$2.89 per bushel in marketing year 2001/02, before rising sharply to \$3.84 per bushel in marketing year 2002/03.²⁶ Nor was there evidence that subject imports prevented price increases, which otherwise would have occurred, to a significant degree. Not only did prices rise, but the record did not suggest a pattern of rising costs leading to a “cost-price squeeze.”²⁷ Total direct and overhead expenses declined over the period examined for producers in the primary HRS wheat-growing states.²⁸

With respect to the impact of the subject imports on the domestic industry, the dissenting views noted the unique analytic challenges posed in many investigations of agricultural imports, including the present one.²⁹ They examined a wide variety of factors bearing on the state of the domestic HRS wheat

¹⁸ USITC Pub. 3639 at 52.

¹⁹ USITC Pub. 3639 at 53-54.

²⁰ USITC Pub. 3639 at 54.

²¹ USITC Pub. 3639 at 54.

²² USITC Pub. 3639 at 54-55.

²³ USITC Pub. 3639 at 55.

²⁴ USITC Pub. 3639 at 55.

²⁵ USITC Pub. 3639 at 55-56.

²⁶ USITC Pub. 3639 at 55.

²⁷ USITC Pub. 3639 at 56.

²⁸ USITC Pub. 3639 at 56.

²⁹ USITC Pub. 3639 at 57.

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industry.³⁰ With respect to the financial state of the domestic industry, the dissenting views noted that domestic wheat growers generally generated positive net returns (without government payments) in 2000, while net returns declined to a breakeven point or lower during 2001, as total product returns fell from peak levels, and total direct and overhead expenses increased.³¹ In 2002, net returns increased, as declining total product returns (as result of lower per acre yields due to drought conditions) were more than offset by declining expenses and increasing miscellaneous income.³² The dissenting Commissioners concluded that import trends precluded it from attributing even the temporary financial decline in 2001 to subject imports.³³

Based on its analysis of the significance of the volume, price effects, and impact of subject imports, the dissenting Commissioners determined that the HRS wheat industry in the United States was not materially injured by reason of subject imports from Canada.

With respect to the determination as to the threat of material injury, the dissenting views were based on an examination of each of the relevant statutory factors.³⁴ The dissenting views observed that the United States did not account for the majority of shipments of HRS wheat by the subject Canadian producers and that the Canadian home market accounted for an increasing share of Canadian HRS wheat shipments.³⁵ They found that there was not a likelihood of a substantially increased volume of subject imports in the imminent future.³⁶ The dissenting views observed that Canadian producers' shipments declined relative to U.S. apparent consumption.³⁷ They found that the record indicates that the volume of subject imports is likely to be greater than the low level experienced in marketing year 2002/03, but not likely to reach the level of marketing year 2000/01, given lower production, lower available stocks, export commitments to third-country markets, and limits on product-shifting by Canadian producers in the imminent future.³⁸

The dissenting views found no evidence that subject HRS wheat is likely to enter the United States at prices likely to have a significant depressing or suppressing effect on U.S. prices of HRS wheat.³⁹ The dissenting views observed that there has been no price underselling since August 2002 and that the estimated mean price of Canadian HRS wheat was higher than that for domestic HRS wheat in the U.S. market.⁴⁰ They noted that prices for domestic HRS wheat were near the highest levels observed at the end of the period examined, and that the U.S. Department of Agriculture projected a \$0.30 per bushel increase in overall wheat prices for the 2003/04 marketing year.⁴¹ The dissenting views also noted the lack of evidence on the record suggesting a likely and imminent decline in the price of subject

³⁰ USITC Pub. 3639 at 57-59.

³¹ USITC Pub. 3639 at 58-59.

³² USITC Pub. 3639 at 59.

³³ USITC Pub. 3639 at 59.

³⁴ USITC Pub. 3639 at 60.

³⁵ USITC Pub. 3639 at 61.

³⁶ USITC Pub. 3639 at 61.

³⁷ USITC Pub. 3639 at 61-62.

³⁸ USITC Pub. 3639 at 62.

³⁹ USITC Pub. 3639 at 63.

⁴⁰ USITC Pub. 3639 at 63.

⁴¹ USITC Pub. 3639 at 63.

imports, particularly given smaller stocks in both the United States and Canada.⁴²

On these bases and others, the dissenting views concluded that the HRS wheat industry in the United States is not threatened with material injury by reason of subject imports from Canada.⁴³

III. DISCUSSION OF INFORMATION GATHERED ON REMAND

It is in the context of the views we adopt, as briefly summarized above, that we address certain newly gathered evidence on the record. As noted, the supplemental information generally does not materially alter the body of facts before the Commission at the time of its original determination, including with respect to our findings as to the domestic like product, the domestic industry, the conditions of competition, as well as the volume, price effects, and impact of the subject imports. The newly gathered data did affect both the frequency of underselling observed and, to a lesser extent, the estimated mean prices for number 1 and number 2 HRS wheat from the United States and Canada.

Consistent with the Panel's remand instructions, the Commission re-opened the record to gather additional information with respect to the data used in the Commission's underselling analysis. During the original investigations, the Commission collected pricing data for HRS wheat on a number of different bases. In order to account for price differences arising as a result of differences in transportation costs, pricing data were collected on a plant/company-specific basis,⁴⁴ as well as on a Minneapolis basis.⁴⁵ The Commission also used a statistical analysis to estimate the effects of different factors on mean prices for number 1 and number 2 HRS wheat from the United States and Canada, during the entire period examined. Those estimated prices accounted for the effects of additional attributes, such as dockage, protein content, and test weight, on prices.⁴⁶

In its review decision, the Panel instructed the Commission to explain in greater detail the prices used in the price comparisons, particularly whether the prices used were for sales made at the same level of trade.⁴⁷ During the remand proceeding, the Commission sent questionnaires to each industry participant that had supplied prices used in the adjusted company-specific and Minneapolis comparisons. The questionnaire responses confirmed that the prices used were purchase prices reported by millers, which purchased from grain elevators as well as from large grain trading firms. The questionnaire responses also revealed that certain prices used in the original price comparisons were for sales between

⁴² USITC Pub. 3639 at 63.

⁴³ USITC Pub. 3639 at 63.

⁴⁴ USITC Pub. 3639 at 53, V-12.

⁴⁵ USITC Pub. 3639 at 53. In gathering prices on a Minneapolis basis, the Commission considered pricing data for purchases occurring in the Minneapolis area, and purchases where reported transportation costs between Minneapolis and another location enabled an adjustment to reflect the value at Minneapolis. See USITC Pub. 3639 at V-12 to V-13.

⁴⁶ USITC Pub. 3639 at 53-54.

⁴⁷ Panel decision at 66. As the panel noted, subject HRS wheat from Canada competes with the domestic product for sales to millers. Domestic producers of HRS wheat generally do not sell directly to millers, but rather to grain elevators. Grain elevators, in turn, mainly sell domestic HRS wheat to grain trading firms, millers, or integrated grain trading and milling concerns. Domestic HRS wheat sold to grain trading firms is sold to millers and to export markets. Memorandum INV-CC-126 (August 16, 2005) ("Remand Staff Report") at II-1. The Panel instructed the Commission to clarify whether the prices used in the price underselling comparisons occurred at the same level of trade.

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related parties.⁴⁸ These related-party data were removed from those used in the underselling analysis because they are not necessarily indicative of prices in arm's length transactions.⁴⁹ While the exclusion of these data results in a greater frequency of price underselling by subject imports than was observed in the original investigations, the record continues to support our finding that such underselling is not significant in this investigation.

As noted, the price comparisons examined here are based on prices reported by millers for their purchases of domestic HRS wheat and the subject HRS wheat imported from Canada. For domestic HRS wheat, the reported prices include those from transactions in which the product was purchased from grain elevators and transactions in which the product was purchased from grain trading companies. In making price comparisons with subject imports from Canada, we have considered, separately, prices for purchases from domestic grain elevators, purchases from domestic grain trading companies, and combined data for sales by both grain elevators and grain trading companies. As discussed below, the data show no significant distinctions in the comparisons as a result of the identity of the seller of the domestic HRS wheat.⁵⁰

In price comparisons specific to U.S. miller ***, the subject imports undersold the domestic product in 1 of 3 comparisons based on elevator prices, 1 of 2 comparisons based on grain trading firm prices, and 2 of 4 price comparisons involving combined data for number 1 HRS wheat.⁵¹ In comparisons specific to U.S. miller ***, the subject imports undersold the domestic product in 11 of 14 price comparisons involving Grade No. 2 HRS wheat.⁵²

For number 1 HRS wheat purchased on a Minneapolis basis, subject imports undersold the domestic product in 8 of 11 comparisons using grain elevator prices, 9 of 11 comparisons using grain trading companies prices, and 8 of 11 comparisons using the combined data.⁵³ For number 2 HRS wheat on a Minneapolis basis, subject imports undersold the domestic like product in 2 of 4 comparisons using grain elevator prices, 9 of 16 comparisons using prices from purchases from grain trading companies, and 8 of 16 comparisons using the combined data.⁵⁴

While the frequency of underselling based on the supplemented record is greater than that observed in the original investigations, the estimated mean prices for subject and domestic number 1 and 2 HRS wheat over the period investigated remain very similar. As noted, these estimated mean prices adjust for differences in dockage, protein content, and test weight – variables that are not accounted for in the transportation-adjusted comparisons discussed above.

In the original investigations, for both grade number 1 and grade number 2 HRS wheat, the estimated mean price for HRS wheat from Canada was higher than the estimated mean price for domestic HRS wheat, although the difference between the estimated mean prices for number 1 HRS wheat was too

⁴⁸ Remand Staff Report at III-9.

⁴⁹ Remand Staff Report at III-9.

⁵⁰ Given that the Commission placed little weight on conventional, unadjusted price comparisons in the original investigations, the industry participants that supplied the prices used in those comparisons to the Commission were not asked to clarify the identity of the seller during the remand investigation.

⁵¹ Remand Staff Report at Table III-5.

⁵² Remand Staff Report at Table III-7.

⁵³ Remand Staff Report at Table III-4.

⁵⁴ Remand Staff Report at Table III-6.

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small to be statistically significant.⁵⁵ In the remand investigation, the revised estimated mean prices are approximately \$142.98 per metric ton for number 1 HRS wheat from Canada and approximately \$144.18 per metric ton for domestically produced number 1 HRS wheat.⁵⁶ While the revised estimated mean price for number 1 HRS wheat from Canada is now lower than the revised estimate for domestic number 1 HRS wheat, the difference remains too small to be statistically significant.⁵⁷ For number 2 HRS wheat, the revised estimated mean price for HRS wheat from Canada remains higher, at \$146.01 per metric ton, than the revised estimated mean price of \$141.70 per metric ton for domestic HRS wheat, although that difference is now too small to be statistically significant.⁵⁸ In sum, while the frequency of underselling shown on the supplemented record is greater than that observed previously, the estimated mean prices remain relatively unchanged.

Also unchanged is that very few of the observed instances of underselling occurred in the last marketing year examined in this investigation (3 of 59 underselling observations).⁵⁹ No underselling was observed with respect to plant/company specific comparisons for *** after September 2001, and none for *** comparisons since April 2002.⁶⁰ There has been no underselling by subject imports of number 1 HRS wheat compared on a Minneapolis basis since August 2002, and none for number 2 HRS wheat compared on a Minneapolis basis since March 2002.⁶¹

While the observed underselling is high enough in frequency that it might have been significant under other circumstances, we find it is not significant here given that the estimated mean prices for domestic and subject HRS wheat are not statistically different, and (more importantly) that there was very little underselling during the last crop year examined in this remand investigation. Our finding that the volume of subject imports is not significant lends additional support to our conclusion that price underselling is not significant in this remand investigation.^{62 63}

In response to the Panel's instructions, the Commission sought additional information from market participants as to another issue – whether farm prices for HRS wheat were affected by the filing of the petition on HRS wheat from Canada.⁶⁴ A majority of both grain elevator associations and grain trading firms that responded to the questionnaires indicated that the filing of the petition did not affect

⁵⁵ USITC Pub. 3639 at 54.

⁵⁶ Remand Staff Report at III-18.

⁵⁷ Remand Staff Report at III-18 to III-19.

⁵⁸ Remand Staff Report at III-19.

⁵⁹ Remand Staff Report at Tables III-4 to III-7.

⁶⁰ Remand Staff Report at Tables III-5 and III-7.

⁶¹ Remand Staff Report at Tables III-4 and III-6.

⁶² The remand record includes reports from grain trading companies and grain elevator associations generally indicating that all or most price effects occurring at the mill level translate back to domestic producers (farmers). Remand Staff Report at II-5 to II-6. This evidence does not undermine our finding that underselling was not significant, given that the mean estimated prices for subject and domestic HRS wheat were not statistically different, there was very little underselling during the last crop year of the period examined, and the volume of subject imports was not significant.

⁶³ The new data similarly do not undermine our analysis with respect to the threat of material injury. See USITC Pub. 3639 at 60-63.

⁶⁴ Panel decision at 65.

HRS wheat prices.⁶⁵ Moreover, as noted in the dissenting views, our analysis of the data lead us to conclude that changes in the volume of subject imports from Canada are not clearly related to the filing of the petition.⁶⁶ Accordingly, the newly gathered data lends further support for our finding.^{67 68}

We have also considered the other newly gathered information, but find that none of it materially alters the analysis that we adopt. Accordingly, we decline to discuss the other evidence, consistent with our defined obligations to explain the reasons for our determination.

IV. Discussion Relating to Panel Decision and Remand Instructions

As noted, the Panel's decision and remand instructions were directed to the affirmative determination of the Commission majority in the original investigations. Nevertheless, we have considered whether any instruction could be construed to relate to the present negative determination.

The Panel remanded with instructions to further "[e]xamine exports of domestically-produced HRS wheat . . . [and] competition in third-country markets."⁶⁹ During the remand investigation, the Commission asked grain traders to identify how and when any changes in competition in export markets for HRS wheat affected HRS wheat prices in the United States.⁷⁰ The parties were also given opportunities to submit comments on the remand record. Nevertheless, no changes in competition in third-country markets were identified beyond the effects of drought, which were addressed in the original investigations. Accordingly, we have examined effects in third country markets that could affect our analysis.⁷¹

⁶⁵ Remand Staff Report at Table II-2.

⁶⁶ USITC Pub. 3639 at 52 n.408.

⁶⁷ We note with concern the Panel's discussion of what data may be accorded less weight under the post-petition data provision. The statute provides that if there is any petition-related change in the "volume, price effects, or impact of the [subject] imports," then the Commission may "reduce the weight accorded to the data for the period after the filing of the petition . . ." 19 U.S.C. § 1677(7)(I). Thus, the statute expressly defines the data that may be accorded less weight as the data for the post-petition period. The Panel, however, opines that a petition-related change in the volume of subject imports permits according less weight to post-petition data relating to volume only. Panel decision at 26. That factor-specific view ignores the fact that the volume, price effects, and impact of subject imports are often interrelated, so that a factor-specific approach to weighing post-petition data would frequently not be meaningful. Moreover, the Commission's interpretation of this provision is entitled to deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

⁶⁸ We briefly address the fact that almost all responding grain elevator associations indicated that increased volumes of HRS wheat imported from Canada affected domestic prices for HRS wheat. We note first that the same was reported by only 2 of 6 responding grain trading firms. Remand Staff Report at II-13 (responses of grain elevator associations) and at Table II-12 (responses of grain trading firms). Moreover, as discussed in the views we have adopted and incorporated by reference, the volume of subject imports declined sharply from 41 million bushels in crop year 2000/01 to 11 million bushels in crop year 2002/03, while the average farm price of HRS wheat increased from \$2.94 per bushel in crop year 2000/01 to \$3.84 per bushel in crop year 2002/03. Accordingly, any decreases in prices for HRS wheat observed by grain elevator associations that might have been the result of increased volumes of subject imports were short-lived and not significant in our view.

⁶⁹ Panel decision at 66.

⁷⁰ Remand Staff Report at II-16.

⁷¹ See USITC Pub. 3639 at 50-62 (incorporating drought into analysis).

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The Panel also instructed the Commission majority to explain “why yields per acre and farm prices are the most relevant factors in determining the financial state of the domestic industry.”⁷² By way of explanation, yields per acre and farm prices are among the elements incorporated in the calculation of “net returns,” which we examined in our analysis of the impact of subject imports. “Net returns” represents reported income minus reported expenses.⁷³ Income falls into the categories “total product return” and “miscellaneous income.”

With respect to the Panel’s instruction, “total product return,” which usually accounts for most of the producers’ income, is derived by multiplying per acre yields by farm prices, and adding a much smaller sum representing loan deficiency payments. Accordingly, yields per acre and farm prices account for most of the positive side of the net return calculation, making them important to our consideration of the financial state of the domestic industry. We do not, however, consider these factors in isolation from the other factors affecting net returns.

CONCLUSION

For the reasons contained in the views that we adopt, as further elaborated above, we determine that an industry in the United States is not materially injured, or threatened with material injury, by reason of imports of HRS wheat from Canada found to be subsidized and sold in the United States at LTFV.

⁷² Panel decision at 66. We do not consider the Panel’s instruction to reconsider yield fluctuations to implicate any aspect of our views. Based on the Panel’s decision, that instruction appears to pertain only to statements of the majority finding that fluctuations in per acre yields made the domestic industry highly sensitive to adverse price effects of subject imports.

⁷³ See USITC Pub. 3639 at, e.g., Table VI-3. Table VI-3 also exemplifies the other points expressed in the text above with relation to the calculation of net returns.