

**CERTAIN FRESH CUT FLOWERS FROM  
CANADA, CHILE, COLOMBIA,  
COSTA RICA, ECUADOR,  
ISRAEL, KENYA, MEXICO,  
THE NETHERLANDS,  
AND PERU**

Views on Remand in Investigations  
Nos. 303-TA-18 (Final-Remand),  
701-TA-275 Through 278  
(Final-Remand), and  
731-TA-327 Through 333  
(Final-Remand)

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**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**COMMISSIONERS**

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UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, DC

Determinations in Investigations Nos. 303-TA-18 (Final-Remand), 701-TA-275 through 278 (Final-Remand), and 731-TA-327 through 333 (Final-Remand)

CERTAIN FRESH CUT FLOWERS FROM CANADA, CHILE, COLOMBIA, COSTA RICA, ECUADOR, ISRAEL, KENYA, MEXICO, THE NETHERLANDS, AND PERU

Pursuant to the decision of the Court of International Trade in Asociacion Colombiana de Exportadores de Flores v. United States, Slip Op. 88-91 (July 14, 1988), and on the basis of its reconsideration of the record <sup>1/</sup> developed in its countervailing duty investigations, the Commission <sup>2/</sup> has made the following determinations <sup>3/</sup> on remand:

<u>Country</u>	<u>Investigation No.</u>	<u>Product</u>	<u>Determination</u>
Canada.....	701-TA-275 (Final-Remand)	Standard carnations Miniature carnations	Affirmative <sup>4/</sup> Negative
Chile.....	701-TA-276 (Final-Remand)	Standard carnations	Affirmative <sup>4/</sup>
Israel.....	701-TA-277 (Final-Remand)	Miniature carnations Gerberas	Negative <sup>5/</sup> Negative
The Netherlands..	701-TA-278 (Final-Remand)	Miniature carnations Standard chrysanthemums Alstroemeria Gerberas	Negative Affirmative <sup>4/</sup> Negative Negative
Peru.....	303-TA-18 (Final-Remand)	Miniature carnations Pompom chrysanthemums Gypsophila	Negative <sup>5/</sup> Affirmative <sup>4/</sup> Negative

<sup>1/</sup> The record is defined in sec. 207.2(i) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(i)).

<sup>2/</sup> Commissioner Cass did not participate in these remand determinations.

<sup>3/</sup> A determination of "affirmative" indicates that the Commission determines that an industry in the United States is materially injured by reason of imports of the specified fresh cut flowers, provided for in items 192.17 (miniature carnations) and 192.21 (all other flowers subject to the investigations) of the Tariff Schedules of the United States, that have been found by the U.S. Department of Commerce to be subsidized by the governments of the cited countries. A determination of "negative" indicates that the Commission determines that an industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of subsidized imports of the specified fresh cut flowers.

<sup>4/</sup> Commissioner Liebeler and Acting Chairman Brunsdale dissent.

<sup>5/</sup> Commissioners Eckes and Rohr find threat of material injury. They would not have found material injury by reason of these imports but for the suspension of liquidation of entries of the merchandise.

Pursuant to the decision of the Court of International Trade in Asociacion Colombiana de Exportadores de Flores v. United States, Slip Op. 88-91 (July 14, 1988), and on the basis of its reconsideration of the record developed in its antidumping investigations, the Commission 1/ has made the following determinations 2/ on remand:

<u>Country</u>	<u>Investigation No.</u>	<u>Product</u>	<u>Determination</u>
Canada.....	731-TA-327 (Final-Remand)	Standard carnations Miniature carnations	Affirmative <u>3/</u> Negative
Chile.....	731-TA-328 (Final-Remand)	Standard carnations	Affirmative <u>3/</u>
Colombia.....	731-TA-329 (Final-Remand)	Standard carnations Miniature carnations Standard chrysanthemums Pompon chrysanthemums Alstroemeria Gerberas Gypsophila	Affirmative <u>3/</u> Affirmative <u>3/</u> Affirmative <u>3/</u> Affirmative <u>3/</u> Negative Negative Negative
Costa Rica.....	731-TA-330 (Final-Remand)	Standard carnations Miniature carnations Pompon chrysanthemums	Affirmative <u>3/</u> Negative <u>4/</u> Affirmative <u>3/</u>

1/ Commissioner Cass did not participate in these remand determinations.

2/ A determination of "affirmative" indicates that the Commission determines that an industry in the United States is materially injured by reason of imports of the specified fresh cut flowers that have been found by the U.S. Department of Commerce to be sold in the United States at less than fair value (LTFV), except for the affirmative determination regarding miniature carnations from Colombia, where the Commission's affirmative determination is based on a threat of material injury to the domestic industry by reason of imports of miniature carnations that have been found by the U.S. Department of Commerce to be sold in the United States at LTFV. Commissioners Eckes, Lodwick, and Rohr would not have found material injury by reason of these imports but for the suspension of liquidation of entries of miniature carnations from Colombia. A determination of "negative" indicates that the Commission determines that an industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of LTFV imports of the specified fresh cut flowers.

3/ Commissioner Liebler and Acting Chairman Brunsdale dissent.

4/ Commissioners Eckes and Rohr find threat of material injury. They would not have found material injury by reason of these imports but for the suspension of liquidation of entries of the merchandise.

<u>Country</u>	<u>Investigation No.</u>	<u>Product</u>	<u>Determination</u>
Costa Rica.....	731-TA-330 (Final-Remand)	Standard carnations Miniature carnations Pompom chrysanthemums	Affirmative <u>1</u> / Negative <u>2</u> / Affirmative <u>1</u> /
Ecuador.....	731-TA-331 (Final-Remand)	Standard carnations Miniature carnations Standard chrysanthemums Pompom chrysanthemums	Affirmative <u>1</u> / Negative <u>2</u> / Affirmative <u>1</u> / Affirmative <u>1</u> /
Kenya.....	731-TA-332 (Final-Remand)	Standard carnations Miniature carnations	Affirmative <u>1</u> / Negative
Mexico.....	731-TA-333 (Final-Remand)	Standard carnations Standard chrysanthemums Pompom chrysanthemums	Affirmative <u>1</u> / Affirmative <u>1</u> / Affirmative <u>1</u> /

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1/ Commissioner Liebeler and Acting Chairman Brunsdale dissent.

2/ Commissioners Eckes and Rohr find threat of material injury. They would not have have found material injury by reason of these imports but for the suspension of liquidation of entries of the merchandise.

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VIEWS OF COMMISSIONER ECKES, COMMISSIONER LODWICK, AND COMMISSIONER ROHR

Pursuant to the Court of International Trade's decision and Order in Asociacion Colombiana de Exportadores de Flores, et al. v. United States, et al., Slip op. 88-91 (July 14, 1988) (Restani, J.), and on the basis of our reconsideration of the information of record in these remanded investigations, we determine that:

(1) an industry in the United States is materially injured by reason of imports of standard carnations from Canada and Chile, which the Department of Commerce (Commerce) has determined are subsidized, and imports of standard carnations from Canada, Chile, Colombia, Costa Rica, Ecuador, Kenya, and Mexico, which Commerce has determined are sold at less than fair value (LTFV);

(2) an industry in the United States is materially injured by reason of imports of standard chrysanthemums from the Netherlands, which Commerce has determined are subsidized, and imports of standard chrysanthemums from Colombia, Ecuador, and Mexico, which Commerce has determined are sold at LTFV;

(3) an industry in the United States is materially injured by reason of imports of pompom chrysanthemums from Peru, which Commerce has determined are subsidized, and imports of pompom chrysanthemums from Colombia, Costa Rica, Ecuador, and Mexico, which Commerce has determined are sold at LTFV;

(4) an industry in the United States is threatened with material injury by reason of imports of miniature carnations from Colombia, which Commerce has determined are sold at LTFV;<sup>1/</sup>

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<sup>1/</sup> In addition, pursuant to 19 U.S.C. § 1673d(b)(4)(B), we determine that we would not have found material injury by reason of imports of miniature  
(Footnote continued on next page)

(5) an industry in the United States is not threatened with material injury by reason of imports of miniature carnations from Canada or the Netherlands, which Commerce has determined are subsidized, and an industry in the United States is not threatened with material injury by reason of imports of miniature carnations from Canada or Kenya, which Commerce has determined are sold at LTFV; <sup>2/</sup>

(5) Commissioner Lodwick determines that an industry in the United States is not threatened with material injury by reason of imports of miniature carnations from Israel or Peru, which Commerce has determined are subsidized, and an industry in the United States is not threatened with material injury by reason of imports of miniature carnations from Costa Rica or Ecuador, which Commerce has determined are sold at LTFV; <sup>3/</sup> and

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(Footnote continued from previous page)  
 carnations from Colombia, which Commerce has determined are sold at LTFV but for the suspension of liquidation of entries of that merchandise. Commissioners Eckes and Rohr make the same finding with respect to their affirmative threat determinations regarding subsidized miniature carnation imports from Israel and Peru, and LTFV miniature carnation imports from Costa Rica and Ecuador.

<sup>2/</sup> Material retardation is not an issue in these investigations, and is not discussed.

<sup>3/</sup> This determination, in conjunction with the determination of Acting Chairman Brunsdale and Commissioner Liebeler that an industry producing fresh cut flowers in the United States is not materially injured or threatened with material injury by reason of the imports subject to investigation, results in a negative determination with respect to imports of miniature carnations from Israel, Peru, Costa Rica, and Ecuador. See Separate Views of Acting Chairman Brunsdale and Commissioner Liebeler, *infra*. Commissioner Cass was not a member of the Commission at the time of the original determination, and did not participate in the remand proceedings.

(6) Commissioners Eckes and Rohr determine that an industry in the United States is threatened with material injury by reason of imports of miniature carnations from Israel and from Peru, which Commerce has determined are subsidized, and also by imports from Costa Rica and from Ecuador, which Commerce has determined are sold at LTFV.

#### BACKGROUND

On July 14, 1988, the Court of International Trade, per Judge Restani, issued its decision in Asociacion Colombiana de Exportadores de Flores, et al. v. United States, et al., Cons. Ct. No. 87-04-00623, Slip op. 88-91. In her decision, Judge Restani remanded our like product determination concerning standard carnations, miniature carnations, standard chrysanthemums, and pompon chrysanthemums. Judge Restani also remanded our determinations concerning threat of material injury by reason of imports of miniature carnations, stating that upon remand we should decide if we find cumulation appropriate for some aspects of our threat determinations.

We have carefully reviewed the information of record in these investigations <sup>4/</sup> and based our determinations on the record, taking into account the considerations set forth in the Court's decision.

#### LIKE PRODUCT

As a prerequisite to the Commission's material injury analysis, the Commission must define the relevant domestic industry or industries. Section

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<sup>4/</sup> The Court's opinion did not suggest, and no party had argued to the Court, that our original investigations were legally inadequate. Therefore, we have not deemed it necessary or appropriate to reopen the record in these investigations for receipt of further information or argument.

771(4)(A) of the Tariff Act of 1930 defines the domestic industry as the "domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."<sup>5/</sup> "Like product," in turn, is defined 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. . . ."<sup>6/</sup>

As the Court of International Trade recognized, the Commission's decision regarding the appropriate like product or like products in an investigation is essentially one based on the unique facts of each case.<sup>7/</sup> Factors the

Commission examines in deciding the appropriate like product include:

(1) physical characteristics and uses, (2) interchangeability, (3) channels of distribution, (4) common manufacturing facilities and production employees, and (5) customer or producer perceptions.<sup>8/</sup> In its decision reviewing our original like product determination in these investigations, the Court noted some of these factors, apparently approving of the general legal framework of the like product analysis applied in that determination. However, the Court pointed out that, on review of the record in these investigations, it found "little . . . to differentiate miniature from standard carnations or pompon

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<sup>5/</sup> 19 U.S.C. § 1677(4)(A).

<sup>6/</sup> 19 U.S.C. 1677(10).

<sup>7/</sup> Asociacion Colombiana de Exportadores de Flores, Slip op. 88-91 at 9.

<sup>8/</sup> See e.g., Nitrile Rubber from Japan, Inv. No. 731-TA-384 (Final), USITC Pub. 2090 (June 1988).

[sic] from standard chrysanthemums. . . .If there is specific information in the record which distinguishes these products from the standard flower, it should be cited and its significance explained. . . ."<sup>9/</sup>

We have canvassed the record, and on remand determine that each of the four flower types, standard carnations, miniature carnations, standard chrysanthemums, and pompom chrysanthemums, constitutes a separate like product. Our determination is based primarily on the different appearances of the four flower types, the differences in methods of sale (stems vs. bunches), the differences in pricing, differences in use, and differences in producer and customer perceptions.

The differences in appearance between miniature carnations and standard carnations, and between standard chrysanthemums and pompom chrysanthemums, are obvious.<sup>10/</sup> Standard carnations produce double fragrant flowers two to three inches across.<sup>11/</sup> The blooms are borne singly on wiry stems 18 to 24 inches long. In contrast, miniature carnations are bushier and more branching than standard carnations, with multiple flowers produced in sprays of up to 4 blooms on secondary stems. The individual miniature carnation blooms are

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<sup>9/</sup> Asociacion Colombiana de Exportadores de Flores, Slip op. 88-91 at 13-14.

<sup>10/</sup> In addition to the photographs in the record of various cut flowers, including the four types of cut flowers at issue, e.g. Public Document number 169 (hearing exhibits), exhibit 4 (Brochures), we note that the parties to the investigations brought arrangements of the flowers at issue in the investigation as exhibits to the hearing. Because of the restrictions of the Ethics in Government Act on gifts to government officials, and the perishable nature of the exhibits, these were returned to the parties at the conclusion of the hearing.

<sup>11/</sup> The term "double" refers to the volume of petals, not the number of blooms per stem.

smaller, up to 1 and 1/2 inches across. The stems are shorter, with the entire spray usually between 12 and 18 inches long. <sup>12/</sup> In addition, while it is true that miniature carnations and standard carnations belong to the same family, the Caryophyllaceae or "pink" family, we do not find this dispositive. Gypsophila, which we originally found to be a separate like product, a determination affirmed by the Court, are also a member of the same family. <sup>13/</sup>

Similarly, standard chrysanthemums produce a single bloom per stem on stems of between 18 and 36 inches. Standard chrysanthemum blooms range from three to eight inches across. In contrast, pompon chrysanthemums have smaller blooms, up to five inches across. Pompon chrysanthemums are also produced in sprays of up to 6 blooms per stem, and the stems are usually somewhat shorter, between 18 and 30 inches long. In addition, pompon chrysanthemums generally last somewhat longer as cut flowers than do standard chrysanthemums. <sup>14/</sup> Again, we do not find the fact that standard chrysanthemums and pompon chrysanthemums belong to the same family, the Compositae family, to be dispositive.

The record contains very little information on specific uses for standard carnations and miniature carnations. However, the different appearances of the flowers, particularly the distinctions in bloom size and number of blooms per stem, suggest to us that they are not interchangeable in use. The lack of

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<sup>12/</sup> Public Document number 136 (Report of the Commission) at A-11.

<sup>13/</sup> *Id.* at A-12.

<sup>14/</sup> Public Document number 136 (Report of the Commission) at A-11-A-12.

interchangeability at the wholesale level between the various categories, line, round and filler flowers, was discussed in our original determination, and in the Court's opinion.<sup>15/</sup> We believe that the different appearance of the flowers dictates their inclusion in one category or another. Thus, a standard carnation appears to us more similar in appearance to a gerbera or a daisy or other single-stemmed, single-bloom flower, which were identified at the hearing as "round flowers," and which we believe would be used as focal points in arrangements or bouquets, or as boutonnières.<sup>16/</sup> In contrast, the multiple blooms and stems of miniature carnations appear more similar to those flowers, such as gypsophila, which were identified as "filler flowers."<sup>17/</sup> Therefore, we are of the opinion that miniature carnations and standard carnations have distinct uses and are not interchangeable.

This same distinction holds true for standard chrysanthemums and pompom chrysanthemums. Standard chrysanthemums properly belong in the category of round flowers, while pompom chrysanthemums are more similar to filler flowers, based on their different appearances.<sup>18/</sup> Consequently, we believe it would be inappropriate to consider them interchangeable in use, and conclude that they are separate like products.

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<sup>15/</sup> Asociacion Colombiana de Exportadores de Flores, Slip op. 88-01 at 11.

<sup>16/</sup> See Public Document 170 (Transcript) at 196.

<sup>17/</sup> Id.

<sup>18/</sup> We note that the pompom chrysanthemums at issue in this investigation are not the familiar "football" mums often seen as ladies corsages, but the smaller-bloomed, multiple-stemmed variety.

In addition to the different appearances and probable uses of the four flowers, we note that while standard carnations are marketed and priced individually, by the stem, miniature carnations are marketed and priced in bunches. <sup>19/</sup> This difference in marketing and pricing further distinguishes standard carnations from miniature carnations. Moreover, those flowers identified specifically as filler flowers tend to be marketed and priced in bunches, while those flowers identified as round or line flowers tend to be marketed and priced as single stems, supporting our conclusion above as to the probable uses of miniature carnations and standard carnations by retail florists.

The same distinction in marketing and pricing holds true for standard chrysanthemums and pompom chrysanthemums. Standard chrysanthemums are marketed and priced by the stem, while pompom chrysanthemums are marketed and priced by the bunch. <sup>20/</sup> Moreover, we note that there was discussion during the investigations concerning the propriety, or lack thereof, of attempting to convert "bunches" to "stems" for purposes of counting volumes of production, shipments, and imports of the various flowers subject to the investigations, as well as the appropriate conversion factors to be applied. <sup>21/</sup> Although

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<sup>19/</sup> See, e.g., Confidential Document 14 (Report) at A-46, A-48, A-53, A-55-A-56 & n. 3, A-59-A-60 & n.3, A-63, A-64, A-124-A-127 & n.1, A-158-A-159, A-164, A-165, A-168-A-169

<sup>20/</sup> Id., A-160-A-161, A-170-A-171.

<sup>21/</sup> See Public Document 170 (Transcript) at 114 ("stems in [and] bunches are simply incompatible as volume measures, and it's not proper to convert bunches to stems to produce a common measure of volume, because one stem of a flower which is customarily bunched is not equivalent to the stem of a larger flower which is customarily sold by the stem.").

we did convert stems to bunches, using conversion factors based on information from the U.S. Department of Agriculture and the Customs Service, this does not detract from the importance of the distinction between flowers marketed as single stems and flowers marketed in bunches.

Finally, we believe that the information in the record supports the conclusion that producers, as well as customers, perceive the four flower types differently. While it is true that domestic flower growers often grow both standard carnations and miniature carnations, or standard chrysanthemums and pompom chrysanthemums, in the same establishment using the same labor force, we do not believe that this supports a conclusion that standard carnations and miniature carnations are a single like product, or that standard chrysanthemums and pompom chrysanthemums are a single like product. The questionnaire responses in the investigations indicate that most U.S. flower growers produce a variety of fresh cut flowers, and other greenhouse products such as flowering, green, or nursery plants, in those same establishments.<sup>22/</sup> There is nothing in the record which would lead us to

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<sup>22/</sup> For instance, production of the seven flowers subject to the investigations accounted for approximately one half of the total net sales of the 111 U.S. flower growers providing usable financial information to the Commission during the period of investigation. The majority of those growers produced all or most of the seven flowers subject to investigation. Confidential Document 14 (Report) at A-81-A-84, Table 21. Other fresh cut flowers and other greenhouse products accounted for the rest of their sales. Of those 111 growers, standard carnations accounted for more than 50 percent of total 1985 sales of 57, miniature carnations accounted for more than 50 percent of total 1985 sales of only 5, standard chrysanthemums accounted for more than 50 percent of total 1985 sales of only 12, and pompom chrysanthemums accounted for more than 50 percent of total 1985 sales of only 14. *Id.* at A-89, A-91, A-93, and A-95, Tables 24, 26, 28, and 30. This suggests to us that most U.S. growers produce a variety of flowers and other greenhouse products.

conclude that the choice of which varieties to grow is determined by the family of the flower, i.e. that a grower of standard carnations would generally also grow miniature carnations, or a grower of standard chrysanthemums would tend to also grow pompom chrysanthemums, simply because they are related flower types. Rather, the information of record suggests to us that the choice of which flowers to grow is driven by market considerations, that is, which flowers can be produced and sold most profitably, and the desire to achieve "a proper balance between production of miniatures, standards, and other competitive flowers." <sup>23/ 24/</sup> Thus, many U.S. growers indicated that they ceased production of one flower, and shifted to another, because of price declines or import competition, which indicates to us that the choice of the new flower to be produced was made based on <sup>25/</sup> market considerations, and not species or family.

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<sup>23/</sup> Public Document 170 (Transcript) at 23 (testimony of Mr. Haley, Pikes Peak Greenhouses, with respect to experience in miniature carnation market).

<sup>24/</sup> Commissioner Lodwick also notes that the testimony and data in the staff report indicate that the market dynamics for standard and miniature carnations over the period of investigation were different. Standard carnation consumption grew moderately, prices remained relatively stable, and financial returns were moderate, suggesting a mature and stable standard carnation industry. In contrast, miniature carnation consumption grew rapidly, prices dropped sharply, and financial returns were high, which suggests a growing and developing miniature carnation industry. These market differences between standard and miniature carnations affect producer decisions as to which type of flower to grow.

<sup>25/</sup> E.g. *id.* (Mr. Haley testified that "to survive in this market, we believe we must offer miniatures [miniature carnations] in proper proportions, along with standard carnations and pompom chrysanthemums."); *id.* at 25-26 (Mr. Nissen testified that after discontinuing standard carnation production due to the short Florida growing season, and noting that miniature carnation cultivation and production was not as widely advanced, "it was my judgement that the stage of market development of miniatures [miniature carnations] (Footnote continued on next page)

These factors, in addition to those addressed in our original determination, lead us to the conclusion that each of the four flowers here under consideration, standard carnations, miniature carnations, standard chrysanthemums, and pompom chrysanthemums, constitutes a separate like product. While we recognize that the distinctions between standard and miniature carnations, and standard chrysanthemums and pompom chrysanthemums, are less evident than the distinctions between gerberas, alstroemeria, and gypsophila, we nonetheless do not consider them to be minor.

Having determined that the four flower types constitute separate like products, we further determine that there are four domestic industries, one producing each of the four like products.<sup>26/</sup> As discussed in our original determination, we find it appropriate to apply the provisions of section 771(4)(B) in analyzing the information in the record where the disaggregated information is either not available, or not reliable.

#### CUMULATION

As discussed in our original determination, we considered the cumulative volume and price effects of the same type flowers from the various countries at issue in conducting our material injury analysis. We did not cumulate the volume and price effects of imports in making our threat determinations. In

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(Footnote continued from previous page)  
 offered affirmative opportunities." See Questionnaire responses, Confidential Documents 25.05 at 3, 25.77 at 35, 25.88 at 35, 25.204 at 35, 25.217 at 3, 25.248 at 35, 25.264 at 35, 25.274 at 35 (Domestic growers report shifting production among different types of flowers in response to market factors, prices, and import competition with particular flowers).

<sup>26/</sup> As the Court noted, the like product determination effectively is the industry determination. Asociacion Colombiana de Exportadores de Flores, Slip op. 88-91 at 9.

light of the Court's apparent concern that we may have assumed we were forbidden from using any form of cumulation analysis, even if we found it appropriate, <sup>27/</sup> it is necessary for us to clarify our determination that a cumulative analysis is not appropriate in these specific investigations for consideration of the question of threat of material injury.

As we noted in our original determination, <sup>28/</sup> and as the Court has now affirmed, <sup>29/</sup> the statute does not preclude the Commission from making a cumulative analysis of volume and price effects of imports in examining the question of a threat of material injury. In our original determination in these investigations, we concluded that a cumulative analysis in these particular cases would lead us into the "prohibited realm of speculation." <sup>30/</sup> We do not believe it is necessary in every case for us to

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<sup>27/</sup> Asociacion Colombiana de Exportadores de Flores, Slip op. 88-91 at 18.

<sup>28/</sup> Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, and the Netherlands, Invs. Nos. 701-TA-275-278 and 731-TA-327-331 (Final), USITC Pub. 1956 (March 1987) (hereinafter Flowers I) at 39-40 and nn. 92-93.

<sup>29/</sup> Asociacion Colombiana de Exportadores de Flores, Slip op. 88-91 (although the statute does not mandate cumulative analysis in threat determinations, "whether it is a useful tool to be used for some stages of the determination, at the ITC's discretion is a separate question." Id. at 16, 17.).

<sup>30/</sup> Flowers I at 40. In addition, we note that the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-\_\_\_\_, § 1330, \_\_ Stat. \_\_\_\_ (1988), while not applicable to these investigations, provides that the Commission may cumulatively analyze the volume and price effects of imports from two or more countries in considering threat of material injury "to the extent practicable, and subject to [the requirement that threat determination be made on the basis of evidence that the threat of material injury is real and that actual injury is imminent, and not on the basis of mere conjecture or supposition.]" H.R. Rep. 100-576, 100th Cong, 2d Sess., 106-07, 620. (1988). Thus, even under the new provision, cumulative analysis in cases of threat of material injury remains within the Commission's discretion, based on the facts of each case.

set forth the specific reasons for not engaging in a discretionary form of analysis. <sup>31/</sup> However, because the question was raised by the Court, <sup>32/</sup> and in light of our like product determination, we note that a cumulative analysis of the issue of threat of material injury to the domestic industry producing miniature carnations would have been speculative, and consequently would have resulted in a determination based on "mere conjecture or supposition," contrary to the requirements of the statute. <sup>33/</sup>

In this case, during the period of investigation, the trends in the volumes and market shares of imports of miniature carnations from the eight countries at issue varied significantly, as did the prices of those imports. No general trend in the imports from the countries under investigation emerges. For instance, imports of miniature carnations from Colombia <sup>34/</sup> increased significantly in each year of the period under investigation. By contrast, imports of miniature carnations from Kenya followed a roller

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<sup>31/</sup> Similarly, the Court of International Trade has recognized that it is not necessary in every case for us to set forth the specific reasons for not considering a possibly relevant, but not statutorily required, factor or argument in our injury and causation analyses. *Hyundai Pipe Co., Ltd. v. United States*, 670 F. Supp. 357, 360 (1987). See *British Steel Corp. v. United States*, 593 F. Supp. 405, 414 (1984); *Empire Plow Co., Inc. v. United States*, 675 F. Supp. 1354, 1387 (1987).

<sup>32/</sup> *Asociacion Colombiana de Exportadores de Flores*, Slip op. 88-91 at 18.

<sup>33/</sup> 19 U.S.C. § 1677(7)(F)(ii).

<sup>34/</sup> Imports of miniature carnations from Colombia increased from 21.5 million stems in 1983 to 41.6 million stems in 1985, and further increased by 122 percent between the interim periods January-September 1985 and 1986. Public Document 136 (Public version of Report) at A-102, Table 42.

coaster pattern; <sup>35/</sup> imports from Ecuador increased during the period of investigation, only to decline in interim 1986 as compared with interim 1985; <sup>36/</sup> imports of miniature carnations from Israel increased steadily during the period, but at a much slower rate than did imports of miniature carnations from Colombia; <sup>37/</sup> while imports from Peru decreased from 1983 to 1985, only to increase in interim 1986 as compared with interim 1985. <sup>38/</sup>

The market shares accounted for by the imports under investigation also differed significantly. Colombian imports of miniature carnations accounted for a significant share of apparent U.S. consumption throughout the period under investigation. <sup>39/</sup> Imports of miniature carnations from each of the other countries under investigation accounted for a significantly smaller

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<sup>35/</sup> Imports of miniature carnations from Kenya decreased from 2.4 million stems in 1983 to 430,000 stems in 1984, increased to 3.1 million stems in 1985, and declined to 370,000 stems in interim 1986, as compared with 1.3 million stems during interim 1985. Id.

<sup>36/</sup> Imports of miniature carnations from Ecuador increased from 1.7 million stems in 1983 to 9.9 million stems in 1985, but then declined to 4.6 million stems in interim 1986, as compared with 7.3 million stems during interim 1985. Id.

<sup>37/</sup> Imports of miniature carnations from Israel increased from 10.8 million stems in 1983 to 13.8 million stems in 1985, and increased again to 17.3 million stems in interim 1986, as compared with 10.9 million stems in interim 1985. Id.

<sup>38/</sup> Imports of miniature carnations from Peru were 12.0 million stems in 1983, decreased to 8.6 million stems in 1985, and increased in interim 1986 to 9.1 million stems as compared with 6.1 million stems in interim 1985. Id.

<sup>39/</sup> Colombian imports of miniature carnations accounted for 13.6 percent of apparent U.S. consumption 1983, 18.4 percent in 1984, 19.7 percent in 1985, and 29.7 percent in interim 1986, as compared with 18.6 percent in interim 1985. Id. at A-110, Table 44.

share of apparent U.S. consumption than did imports from Colombia, ranging from 8.3 percent of apparent U.S. consumption for Israel, to 0.1 percent of apparent U.S. consumption for Canada.<sup>40/</sup> The trends in market share accounted for by imports from each country also varied. Finally, prices of imports of miniature carnations from different countries did not follow consistent trends, and were both above and below reported U.S. grower prices for miniature carnations.<sup>41/</sup>

Moreover, the statute sets forth a number of other factors to be considered in analyzing the question of threat, which affect the probable future trends in imports. For instance, the statute requires the Commission to consider any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports to the United States.<sup>42/</sup> The industries in the countries under investigation range from a mature, stable industry in the Netherlands, with markets primarily in Europe, to a growing, export-oriented industry in Colombia, with significant incentives for export to the United States. These differences suggest that future trends in imports will continue to vary.

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<sup>40/</sup> Id.

<sup>41/</sup> Domestic producer prices for miniature carnations generally declined during the period under investigation. Prices of imports of miniature carnations from the Netherlands were consistently above domestic prices. Prices of imports of miniature carnations from other sources were both above and below the U.S. producer prices for comparable weeks. Confidential Document 14 (Report) at A-169, Table 53.

<sup>42/</sup> 19 U.S.C. § 1677(7)(F)((i)(II)).

While it might be mathematically possible to "guesstimate" the projected future volumes from each country individually, taking into account the factors specified in the statute, and then "cumulate" or simply add up those projected future volumes, in making a threat determination, we do not believe such an exercise would be sufficiently grounded in the evidence of record to be appropriate in this case. Moreover, projecting future price effects and then "cumulating" or adding them up, does not appear to us to be even mathematically possible without a large degree of supposition in this case. Consequently, while the facts of some other investigation might lend themselves to cumulative analysis of threat of material injury, we do not believe such analysis would be proper on the facts of record in these investigations.

#### CONDITION OF THE INDUSTRIES AND CAUSATION

Having reached the conclusion that there are four domestic industries at issue, on remand we reach the same conclusions concerning material injury, threat of material injury, and causation, which we reached in our original determinations, for the reasons stated therein. We therefore incorporate by reference our analysis and conclusions concerning material injury or threat of material injury to the domestic industries producing standard carnations, miniature carnations, standard chrysanthemums, and pompom chrysanthemums, by reason of the subject imports, set forth in Flowers I and Certain Fresh Cut Flowers from Peru, Kenya, and Mexico, Invs. Nos. 303-TA-18 and 731-TA-332-333 (Final), USITC Pub. 1968 (April 1987) (Flowers II).

SEPARATE VIEWS OF ACTING CHAIRMAN ANNE E. BRUNSDALE  
AND COMMISSIONER SUSAN LIEBELER

Inv. Nos. 303-TA-18 (Final) (Remand),  
701-TA-275 through 278 (Final) (Remand), and  
731-TA-327 through 333 (Final) (Remand)

August 29, 1988

On the basis of the record in these investigations, and in light of the decision of the Court of International Trade in this case,<sup>1/</sup> we conclude that an industry in the United States is neither materially injured nor threatened with material injury by reason of the subject imports of fresh cut flowers. We set forth these views to expand on our conclusion, with the benefit of the guidance from the Court, that the relevant like product in these investigations consists of all fresh cut flowers, and that the corresponding domestic industry consists of the domestic growers of such flowers. The reasons for our negative decisions regarding material injury and threat,<sup>2/</sup> as enunciated in our separate views in the Commission's previous final determinations, have not changed.<sup>3/</sup>

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<sup>1/</sup> Asociacion Colombiana de Exportadores de Flores v. United States, slip op. no. 88-91 (Ct. of Int'l Trade, July 14, 1988) ("Asocoflores").

<sup>2/</sup> We agree with our colleagues' conclusion that the antidumping and countervailing duty laws leave to the Commission's discretion whether to cumulate imports from different countries when analyzing the threat of material injury by reason of dumped or subsidized imports. Our particular treatment of the threat issue in these investigations is set forth in our separate views in the Commission's initial final determination.

<sup>3/</sup> As the Court noted in Asocoflores, *supra*, "No one has seriously challenged [the] conclusion that the cut flower industry as a whole is neither injured nor threatened with injury." Slip op. at 5.

### Background

This case concerns imports of seven varieties of dumped and subsidized flowers including standard carnations, miniature carnations, standard chrysanthemums, pompom chrysanthemums, alstroemeria, gerbera, and gypsophila. In the preliminary determination in these investigations, the Commission noted that all cut flowers, including the seven varieties in this case and the other varieties grown in the United States, share certain characteristics. Among other things, all fresh cut flowers possess a certain beauty and require careful maintenance to retain their appearance. Furthermore, all fresh cut flowers share a common purpose, that is, decoration and adornment.<sup>4/</sup> We thus faced the question whether cut flowers other than those subject to the investigation should be included in the definition of like product.

At the preliminary stage of these investigations, the Commission unanimously determined that all cut flowers constitute one like product. We reasoned that other cut flowers could not logically be excluded from the investigations without more information concerning the different types of flowers on the market:

In our view, petitioner's arguments in support of a determination that the seven flowers subject to investigation are like lead to the conclusion that all

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<sup>4/</sup> As the Court noted in Asocoflores, *supra*, slip op. at 10, "It is undisputed that all cut flowers serve the same general decorative function."

cut flowers are like. Thus, if the seven cut flowers subject to investigation are close substitutes for and compete with each other, and have an effect on each other's prices, it appears likely, on the basis of the information before us at this time, that the same is true with respect to all other fresh cut flowers. For instance, if gerbera are a close substitute or compete with standard carnations, it appears likely that daisies are in the same position vis a vis standard carnations.<sup>5/</sup>

The Commission further noted its intention during the final investigation to consider whether the seven cut flowers at issue should be separated into different like products, or whether some or all other cut flowers should be excluded from the like product category.<sup>6/</sup>

Following the preliminary determination, it was requested that the Commission expand the scope of the investigation to include cut flowers in addition to those subject to investigation. The request was premised on the notion that information on the markets for other popular fresh cut flowers, and for fresh cut flowers generally, would provide us with a basis for including or excluding other varieties of flowers from the like product category, as indicated in our preliminary views. The Commission, however, voted against this request by a 3-to-2 majority.

In its final determination, the Commission again noted that treating as the relevant like product the seven cut flowers at issue would logically require the inclusion of all cut flowers in

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<sup>5/</sup> Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, Kenya, Mexico, The Netherlands, and Peru, Inv. Nos. 303-TA-17 and 18, 701-TA-275-278 and 731-TA-327-334 (Preliminary), USITC Pub. 1877 at 9 (1986).

<sup>6/</sup> Id. at 8 n.15.

the like product definition.<sup>7/</sup> The like-product majority emphasized in its determination the differences between the flowers at issue, including general appearance, lifespan, and use. The majority did not, because it did not have the information to do so, consider the possibility that, even if the seven subject flowers are separate like products, other flowers not subject to investigation might fall within one of the like-product categories. Two Commissioners continued to conclude on the basis of the information in the record regarding only the seven subject flowers that all cut flowers constitute one like product, just as the Commission had unanimously concluded in its preliminary determination.

The Commissioners who determined that the seven flowers subject to investigation should be treated as seven separate like products disagreed in some of the investigations on the issue of material injury or threat of material injury. One Commissioner disagreed with two of his colleagues in the like-product majority by finding no material injury or threat of material injury by reason of imports of miniature carnations from countries other than Colombia. The Commission therefore had one majority reaching affirmative determinations with regard to some investigations, and a different majority reaching negative determinations in other investigations.

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<sup>7/</sup> Certain Fresh cut flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, and The Netherlands, Inv. Nos. 701-TA-275-278 and 731-TA-327-331 (Final), USITC Pub. 1956 at 12 (1987).

Groups representing domestic and foreign flower growers appealed the Commission's final determination to the Court of International Trade. The Court recognized that, to sustain the Commission's result in whole, it must find substantial evidence on the record to support both like product determinations.<sup>8/</sup> In fact, the Court rejected both views of the like product as represented in the decisions of the various Commissioners.

As to the view that the like product consists of one domestic cut flower industry, the Court recognized the like-product minority's efforts to obtain information on flowers other than those subject to investigation.<sup>9/</sup> The Court, however, disapproved the apparent reliance by the Commissioners supporting this view solely on the evidence in the record regarding the substitutability among varieties of flowers at the consumer level.<sup>10/</sup> That evidence, according to the Court, "does not rise to the level of substantial evidence." <sup>11/</sup>

As to the like-product majority's determination regarding seven separate like products, the Court was no less sparing in its criticism. The Court noted that the majority's decision ignored the possibility that flowers other than those subject to investigation might be part of one of the like products, but concluded that the exclusion of that possibility did not

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<sup>8/</sup> Asocoflores, supra, slip op. at 5.

<sup>9/</sup> Id., slip op. at 6-7.

<sup>10/</sup> Id. at 7.

<sup>11/</sup> Id.

constitute plain error.<sup>12/</sup> As to the differences between the two types of carnations and the two types of chrysanthemums subject to investigation, however, the Court concluded that there was insufficient evidence on the record as cited by the like-product majority to distinguish between the two varieties within a given species of flower.

The Court remanded the case to the Commission to reconsider, among other things, the like-product determinations. The Court noted that these determinations could dictate the outcome of the investigations: "If flower types are combined, some of the affirmative opinions may become negative. On the other hand, analysis on the basis of several like products may cause a negative determination to become positive on the threat issue." <sup>13/</sup>

On remand, after careful consideration of the Court's decision and the record developed during the investigations, a request was again made that the Commission reopen the record to collect information regarding other popular fresh cut flowers.<sup>14/</sup> The Commission, by a vote of 3 to 2, one Commissioner not participating, declined to reopen the record.

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<sup>12/</sup> Id. at 13. The Court noted that appellants had not cited as error the scope of the Commission's investigation. Id.

<sup>13/</sup> Id. at 14.

<sup>14/</sup> An expanded investigation taking into account other popular flowers would certainly be feasible in this case. In Fresh Cut Flowers, Inv. No. TA-201-22, USITC Pub. 827 (1977), an investigation under section 201 of the Trade Act of 1974, the Commission investigated a number of popular flowers, including roses, carnations, gladioli, chrysanthemums, orchids, daisies, statice, and a category of other inexpensive flowers, including tulips, irises, snapdragons, narcissuses, and general stock flowers.

Like Product on this Record

As noted above, in its preliminary determination in these investigations, the Commission expressed its intention to consider, among other things, "whether other fresh cut flowers can or should be excluded from the like product as defined above, on the basis of their particular characteristics or uses."<sup>15/</sup> Commissioner Stern, who left the Commission before the final investigations, noted possible distinctions among fresh cut flowers which might form the basis for a clear and meaningful like product determination, e.g., growing conditions, formal versus informal use, price.<sup>16/</sup> Indeed, the Court of International Trade, citing testimony before the Commission, noted another possible basis for differentiation, i.e., line flowers, round flowers, and filler flowers.<sup>17/</sup> One might even make a broader distinction between decorative flowers and filler flowers.

These product differentiations have the potential to be the most meaningful in terms of assessing the competitive impact of the subject imports on the domestic flower growers. We are, however, foreclosed from pursuing any such line of inquiry by the lack of meaningful data on types of flowers other than those subject to investigation which might form substantial parts of a given like-product category. In sum, since we do not have the

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<sup>15/</sup> USITC Pub. 1877 at 8 n.15.

<sup>16/</sup> *Id.* at 8 n.16.

<sup>17/</sup> *Asocoflores*, *supra*, slip op. at 11.

evidence to make the best decision, we must make the decision on the best evidence we have.

Given the lack of information regarding any flower other than the subject flowers, we have a limited number of like product options. We could either make separate like products from one or more of the subject flowers, or we could decline to differentiate at all and determine that all cut flowers constitute one like product, as the Commission did in its preliminary determination when faced with a similar lack of data. Given these options, we conclude for the following reasons that treating all fresh cut flowers as one like product is the only logical choice and the one with the most support in the record as it now stands.

Any combination of like products based solely on the seven flowers subject to investigation is highly problematic. If one assumes that each of the seven flowers constitutes a separate like product, then one must assume that each of the over 200 varieties of fresh cut flowers in the United States constitutes a separate like product.<sup>18/</sup> We believe that the result is unsatisfactory on this record because, if one concedes the possibility that any two of the flowers might be sufficiently similar to constitute one like product, then one cannot exclude the possibility that one or more of those varieties is sufficiently "like" a flower subject to investigation in this case. We have no evidence on which to

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<sup>18/</sup> As the Court noted, "This finding necessarily means the ITC also found that each flower is unlike the six other flowers under investigation or any other domestically produced flower." Asocoflores, supra, slip op. at 5 (emphasis added).

resolve this issue one way or the other; the Commission has, however, treated together as a group certain flowers deemed sufficiently similar for joint treatment in other investigations.<sup>19/</sup>

The Court's reluctance to accept the distinction between the two types of chrysanthemums and carnations in this case raises further questions about whether the mere classification of flowers as different varieties, without more evidence of concrete distinctions, are a sufficient basis for making a like-product determination. If we decide that distinctions among species are sufficient to support a separate like-product determination, but distinctions between varieties within a species are not, then we should articulate those differences and determine whether those distinctions are meaningful and can be applied uniformly with respect to the flowers at issue in this case. To do so, however, requires more information than we have on the record in this case.

These logical problems fall to the wayside if one views the relevant like product as consisting of all flowers. Furthermore, as indicated below, the evidence which the Commission did collect provides substantial support for the conclusion, adopted in the Commission's preliminary determination, that all cut flowers constitute one like product. As the Court noted in this case, "It is up to the ITC to determine what is a minor difference

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<sup>19/</sup> See note 10, *supra*. We recognize, of course, that an investigation under Section 201 of the Trade Act of 1974 is governed by standards somewhat different, but not altogether divorced, from the standards governing an antidumping or countervailing duty investigation.

[insufficient to differentiate like products]."20/ We conclude that fresh cut flowers possess only minor differences from variety to variety, none of which is sufficient on this record to distinguish among them for the purpose of a like product determination.

As the Commission and the Court have noted, fresh cut flowers generally have one purpose, decoration. Differences between flowers abound, and some flowers may be more appropriate in some circumstances than in others. Presumably, the Kentucky Derby will always be "The run for the roses." 21/ On the other hand, if one wishes to purchase or send an arrangement or a bouquet of flowers, various factors may limit the type of flower which is available or appropriate, but in most situations these considerations will not narrow the choice down to one particular type of bloom.22/

The Court criticized the view that the relevant like product consists of all fresh cut flowers because that view appeared to be based solely on substitutability at the consumer level. Substitutability was the most difficult issue facing the Commission during the investigations, and therefore warranted the lion's share of the analysis. Of course, the Commission traditionally analyzes additional factors to determine the scope of the like product, including physical characteristics and uses,

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20/ Id. at 9.

21/ However, because the Preakness, the second jewel in horse racing's triple crown, occurs during the time of year when its symbol, the black-eyed susan, is not in bloom, race officials substitute daisies with the center dyed black. Apparently, no flower is truly sacrosanct.

22/ See USITC Pub. 1956, supra, at 11.

channels of distribution, common manufacturing facilities and production employees, and consumer and producer perceptions.<sup>23/</sup> These factors substantiate our conclusion that the appropriate like product in these investigations consists of all fresh cut flowers.

As indicated above, all fresh cut flowers have essentially the same use -- decoration -- though minor differences in size, color, or scent may make one type of flower more appropriate than another on different occasions. Channels of distribution are varied, but the channel chosen appears to depend more on business expedience than on the type of flower; indeed, flowers of different types regularly share the same channels of distribution.<sup>24/</sup> Flower growers tend to grow a number of different types of flower.<sup>25/</sup> Flowers are not readily interchangeable at the wholesale level, but that is easily explained by the ready availability of all of the different varieties; retailers and consumers substitute based on factors such as taste, but wholesalers can usually provide whatever variety is in demand. In short, the flower industry is very fluid

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<sup>23/</sup> See, e.g., Fabric and Expanded Neoprene Laminate from Taiwan, Inv. No. 731-TA-371 (Final), USITC Pub. 2032 at 4 & n.5 (1987).

<sup>24/</sup> Report at A-29-32.

<sup>25/</sup> See, Fresh Cut Flowers, *supra*, USITC Pub. 827 at A-5 ("During 1950-1976 there was a marked shift in the composition of the fresh cut flower industry, from many small local growers of fresh cut flowers . . . to a few large and efficient growers. . . . Most growers produce more than one type of flower, and many also produce potted flower and foliage plants as well as bedding plants."); see also Asocoflores, *supra*, slip op. at 12 (noting evidence in this case indicating that the flowers subject to investigation were produced alongside other flowers not subject to investigation).

across the different varieties both at the grower level and at the consumer level. Given the state of the record before us, therefore, we cannot say that the distinctions between fresh cut flowers warrant their separation into different like products.

#### Material Injury and Threat

The conclusion we reach on the like-product issue, after the reconsideration mandated by the Court, is identical to the determination we made on this issue in the Commission's first final determination. Given that we reach the same conclusion on the critical like-product issue, and in light of the Court's explicit acknowledgment that the cut flower industry as a whole is not materially injured or threatened with material injury,<sup>26/</sup> we reach the same conclusions as we did in our earlier separate views. For the reasons expressed in those views, we determine that an industry in the United States has not been materially injured or threatened with material injury by reason of the imports which are the subject of these investigations.

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<sup>26/</sup> See note 2, supra.

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