

UNITED STATES INTERNATIONAL TRADE COMMISSION

MUSSELS FROM CANADA
Investigation No. 731-TA-924 (Preliminary)

DETERMINATION AND VIEWS OF THE COMMISSION
(USITC Publication No. 3416, May 2001)

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MUSSELS FROM CANADA

DETERMINATION

On the basis of the record¹ developed in the subject investigation, the United States International Trade Commission determines, pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1673b(a)), that there is a reasonable indication that an industry in the United States is threatened² with material injury by reason of imports from Canada of mussels, provided for in subheading 0307.31.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (LTFV).

COMMENCEMENT OF FINAL PHASE INVESTIGATION

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigation. 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 the Department of Commerce (Commerce) of an affirmative preliminary determination in the investigation under section 733(b) of the Act, or, if the preliminary determination is negative, upon notice of an affirmative final determination in that investigation under section 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigation need not enter a separate appearance for the final phase of the investigation. 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 investigation.

BACKGROUND

On March 12, 2001, a petition was filed with the Commission and Commerce by Great Eastern Mussel Farms, Tenants Harbor, ME, alleging that an industry in the United States is materially injured or threatened with material injury by reason of LTFV imports of mussels from Canada. Accordingly, effective March 12, 2001, the Commission instituted antidumping duty investigation No. 731-TA-924 (Preliminary).

Notice of the institution of the Commission's investigation 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 March 19, 2001 (66 FR 15503). The conference was held in Washington, DC, on April 2, 2001, and all persons who requested the opportunity were permitted to appear in person or by counsel.

¹ The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

² Chairman Koplan determines that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of mussels from Canada.

IEWS OF THE COMMISSION

Based on the record in this investigation, we find that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of mussels from Canada that are allegedly sold in the United States at less than fair value (“LTFV”).¹

I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS

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

II. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. In General

In determining whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the Commission first defines the “domestic like product” and the “industry.”⁴ 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.”⁵ In turn, the Act defines “domestic like product” as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation”⁶

The decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and the Commission has applied the statutory standard of “like” or “most similar in characteristics and uses” on a case-by-case basis, generally through the application of a six-factor test.⁷

¹ Chairman Koplán finds that there is a reasonable indication that an industry is materially injured by reason of subject imports from Canada. *See* Chairman Koplán’s Separate Views. He joins sections I, II, and III of the Commission’s Views.

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

³ 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).

⁴ 19 U.S.C. §1677(4)(A).

⁵ *Id.*

⁶ 19 U.S.C. § 1677(10).

⁷ *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

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No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation.⁸ The Commission looks for clear dividing lines among possible like products and disregards minor variations.⁹ Although the Commission must accept the determination of the Department of Commerce (“Commerce”) as to the scope of the imported merchandise allegedly subsidized or sold at LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified.¹⁰

B. Product Description

Commerce has defined the scope of the subject merchandise in this investigation as follows: Imports covered by this investigation are shipments of live processed blue mussels from Canada. Included in the scope are fresh, live processed blue mussels (*mytilus edulis*). Processing includes, but is not limited to, purging, grading, debearding, picking, inspecting and packing. The live processed blue mussels subject to this investigation are currently classifiable under subheadings 0307.31.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and Customs purposes, the Department's written description of the scope of this investigation remains dispositive.¹¹

Live mussels are processed for sale to consumers for consumption as seafood.¹² Processing appears to include purging (flushing the mussels with water to remove grit and other debris),¹³ grading (sorting of

⁷ (...continued)

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).

⁸ *See*, e.g., S. Rep. No. 96-249 at 90-91 (1979).

⁹ *Nippon Steel*, 19 CIT at 455; *Torrington*, 747 F. Supp. at 748-49. *See also* S. Rep. No. 96-249 at 90-91 (1979) (Congress has indicated that the like product standard should not be interpreted in “such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not ‘like’ each other, nor should the definition of ‘like product’ be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under consideration.”).

¹⁰ *Hosiden Corp. v. Advanced Display Mfrs.*, 85 F.3d 1561, 1568 (Fed. Cir. 1996) (Commission may find single like product corresponding to several different classes or kinds defined by Commerce); *Torrington*, 747 F. Supp. at 748-752 (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

¹¹ Notice of Initiation of Antidumping Investigation: Live Processed Blue Mussels from Canada, 66 Fed. Reg. 18227 (April 6, 2001).

¹² 66 Fed. Reg. 18227 (April 6, 2001); Confidential Report, INV-Y-078, April 19, 2001, (“CR”) at I-2; Public Report (“PR”) at I-2.

¹³ CR at I-2; PR at I-2.

mussels according to their size),¹⁴ debearding (removing the fibers that mussels use to attach themselves to objects),¹⁵ and picking (culling out the dead mussels or those with broken shells).¹⁶

C. Domestic Like Product

The statutory definition of “domestic like product” (a “product which is like, or in the absence of like, most similar in characteristics and uses with the article subject to an investigation”) makes clear that the definition of the subject merchandise is the starting point for defining the domestic like product. The Commission may, however, define the like product to include a broader range of domestically-produced products than the subject merchandise.

Petitioner Great Eastern Mussel Farms, Inc. (“Great Eastern”),¹⁷ appearing *pro se* before the Commission, contends that the domestic like product should be identical to the scope and only include live processed mussels of the species *Mytilus edulis*.¹⁸ Canadian producer and exporter Confederation Cove Mussel Co., Ltd (“Confederation Cove”) argues that unprocessed *Mytilus edulis* mussels as well as Baltic Mussels (*Mytilus trossulus*) should also be part of the domestic like product.¹⁹

1. Whether Unprocessed Mussels Should be Included in the Definition of the Domestic Like Product

In considering whether to expand the domestic like product to include an upstream product such as unprocessed mussels, the Commission generally utilizes the finished/semifinished product analysis.²⁰ When an upstream product is sold as a finished product in addition to being an input for production of the downstream product, the Commission has also analyzed the definition of the domestic like product under the traditional six-factor test as well as the finished/semifinished product analysis.²¹ We evaluate the

¹⁴ Petition of March 8, 2001, at 4.

¹⁵ CR at I-3; PR at I-2.

¹⁶ *Id.*

¹⁷ See section 339 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1339.

¹⁸ Great Eastern’s postconference brief at 2, 7, 8.

¹⁹ Confederation Cove’s postconference brief at 13-14, 18-19.

²⁰ In this analysis, the Commission examines: (1) whether the upstream article is dedicated to the production of the downstream article or has independent uses; (2) whether there are perceived to be separate markets for the upstream and downstream articles; (3) differences in the physical characteristics and functions of the upstream and downstream articles; (4) differences in the costs or value of the vertically differentiated articles; and (5) significance and extent of the processes used to transform the upstream into the downstream articles. See Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom, Invs. Nos. 701-TA-409-412, 731-TA-909-912 (Preliminary), USITC Pub. 3388 (January 2001) at 5; Live Cattle from Canada and Mexico, Invs. Nos. 701-TA-386, 731-TA-812-813 (Preliminary), USITC Pub. 3155, (February 1999) at 7; Certain Preserved Mushrooms from Chile, China, India, and Indonesia, Invs. Nos. 731-TA-776-779 (Final), USITC Pub. 3086 (February 1985) at 7.

²¹ See Fresh Atlantic Salmon from Chile, Inv. No. 731-TA-768 (Final), USITC Pub. 3116 (July 1998) at 7; Certain Preserved Mushrooms from Chile, Inv. No. 731-TA-776 (Final), USITC Pub. 3144 (November 1998) at 4. The record in this investigation is mixed as to the extent to which unprocessed mussels may be sold as a finished product. Great Eastern maintains that unprocessed mussels constitute 20 percent of the total mussel market. Transcript of Staff Conference of April 2, 2001, at 49 (“Tr.”) at 11. By contrast, Confederation Cove asserts that
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appropriateness of including unprocessed mussels in the definition of the domestic like product under both tests.

Application of only some of the factors we consider in the finished/semifinished analysis suggests that unprocessed mussels could be included. All mussels appear to undergo at least some processing, suggesting that all mussels are thus dedicated to the production of processed mussels.²² Further, the nature and extent of the processes used to transform unprocessed mussels into processed mussels do not appear to be significant or technically advanced, and the two products share many essential characteristics.²³ However, some differences in physical characteristics and purchasers are apparent as unprocessed mussels are not as clean as processed mussels, need to be debearded prior to use, and may contain dead or other unusable mussels.²⁴ There also appear to be separate markets for processed and unprocessed mussels,²⁵ and the two types of mussels are marketed differently, with only processed mussels sold in two and ten-pound bags.²⁶ Moreover, processing appears to enhance significantly the value of the mussels, in that processed mussels sell for twice the price of unprocessed mussels.²⁷ Accordingly, for purposes of the preliminary phase of this investigation, we determine that under the finished/semifinished analysis unprocessed mussels should not be included in the definition of the domestic like product.

Although the information on the record is mixed, application of the traditional six-factor test also does not indicate that unprocessed mussels should be included in the definition of the domestic like product. Both unprocessed and processed mussels can be consumed as seafood by end users but only processed mussels are sold in branded packaging in two and ten-pound bags.²⁸ Unprocessed mussels generally become processed mussels before going to end users, but there also appears to be a market for unprocessed mussels.²⁹ There is some interchangeability between unprocessed and processed mussels as unprocessed mussels can be consumed as live mussels by end users. However, unprocessed mussels are a declining segment of the market and a less desirable product.³⁰ Restaurants do not purchase unprocessed mussels, suggesting that processed and unprocessed mussels are not interchangeable for at least this group of

²¹ (...continued)

all mussels are processed before going to market, suggesting that there is no separate market for unprocessed mussels. Confederation Cove's Postconference Brief at 14. Mussels must ultimately be cleaned and debearded before consumption, and end users apparently perform this function with respect to unprocessed mussels. *See* Tr. at 10-11. We plan to seek more information concerning the nature and extent of any separate market for unprocessed mussels in any final phase of this investigation.

²² Mussels undergo some processing whether they are destined for the live market or other downstream uses, but the mussels may be processed differently. *See* CR at I-4, I-6; PR at I-3, I-4.

²³ Both types of mussels are live mussels and the primary difference is that unprocessed mussels are not purged of sand and grit. CR at I-3; PR at I-2.

²⁴ Tr. at 10-12.

²⁵ Great Eastern asserts that unprocessed mussels are twenty percent of the total mussel market and sell for half the price of processed mussels. Tr. at 11; Petition at 4. However, Confederation Cove claims that all mussels are processed prior to use in any application. Confederation Cove's postconference brief at 14.

²⁶ Tr. at 10, 11, 30. The ***. CR & PR at Tables V-1 and V-2.

²⁷ Tr. at 11; Petition at 4.

²⁸ Tr. at 10, 11, 30.

²⁹ Tr. at 11. These mussels are sold to end users without any processing.

³⁰ Tr. at 11-12.

purchasers which perceives them to be different products.³¹ Production processes may differ for unprocessed mussels, as wild mussels appear to be more likely to be unprocessed than those that are farm-raised.³² There is only limited information concerning channels of distribution for the two types of mussels. Finally, processed mussels command twice the price of unprocessed mussels.³³ Because there is limited interchangeability and the production processes and prices differ for processed and unprocessed mussels, the record in this preliminary phase does not clearly support expanding the domestic like product to include unprocessed mussels under the traditional six-factor test. However, we intend to revisit this issue in any final phase of the investigation and to explore the nature of processing and the value that it adds to the mussels.

Based on the record in the preliminary phase of this investigation, we find that neither the finished/semifinished product analysis nor the six-factor test clearly indicates that the Commission should include unprocessed mussels in the definition of the domestic like product. Consequently, we do not expand the definition of the domestic like product beyond the scope of Commerce's investigation and we do not include unprocessed mussels in the definition of the domestic like product for purposes of this preliminary determination.

2. Whether Other Mussels Should be Included in the Definition of the Domestic Like Product

Confederation Cove contends that the Commission should include the *Mytilus trossulus* or Baltic Mussel in the definition of the domestic like product.³⁴ While it is a close question, application of the Commission's six-factor test, based on the limited information in the record, does not demonstrate that *Mytilus trossulus* mussels should be included in the definition of the domestic like product at this time.

The evidence concerning the physical characteristics of *Mytilus trossulus* and *Mytilus edulis* mussels is mixed,³⁵ but does suggest that the two types of mussels are at least generally interchangeable.³⁶ While both types of mussels are consumed as seafood, it appears that *Mytilus trossulus* mussels are primarily used by restaurants on the West Coast, while *Mytilus edulis* mussels are sold to restaurants and in supermarkets across the United States.³⁷ The processing for both species appears to be similar.³⁸ It is

³¹ Tr. at 11.

³² Tr. at 49.

³³ Tr. at 11.

³⁴ Confederation Cove's postconference brief at 18. Confederation Cove also urges the Commission to consider including in the domestic like product a third species of mussel, *Mytilus galloprovincialis*, or Mediterranean Mussel, that is grown on the West Coast. We intend to seek more information concerning *Mytilus galloprovincialis* and *Mytilus trossulus*, in processed and unprocessed forms, in any final phase of this investigation.

³⁵ Confederation Cove claims that *Mytilus trossulus* and *Mytilus edulis* are virtually identical given that some Baltic Mussels may be grown, processed, and exported to the United States alongside Confederation Cove's *Mytilus edulis* mussels. Great Eastern, however, maintains that the meat differs. Confederation Cove's postconference brief at 19; Great Eastern's postconference brief at 9; Tr. at 13.

³⁶ Confederation Cove's postconference brief at 19.

³⁷ Tr. at 13. However, there is evidence that *Mytilus trossulus* mussels may be sold in supermarkets on the West Coast to a limited degree. See Tr. at 122.

³⁸ Confederation Cove's postconference brief at 20.

uncertain whether customers perceive the two types of mussels differently, but prices for *Mytilus trossulus* mussels are apparently three times those for *Mytilus edulis* mussels.³⁹

While the evidence suggests that these species may share similar product characteristics and are somewhat interchangeable in uses, the two types of mussels appear to have different end users and sell for different prices in different markets. Consequently, we do not include *Mytilus trossulus* mussels in the definition of the domestic like product.

Accordingly, we define the domestic like product coextensively with the scope of Commerce's investigation as fresh, live processed mussels of the species *Mytilus edulis*.

D. Domestic Industry

In defining the domestic industry, the Commission's general practice has been to include in the industry all of the domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market.⁴⁰ Based on our like product determination, we determine that the domestic industry consists of all processors of *Mytilus edulis* mussels.⁴¹

While no party has argued that the provision applies,⁴² we have considered whether, under the grower/processor provision of 19 U.S.C. § 1677(4)(E), the domestic industry should be defined to include growers and harvesters of mussels as well as processors.⁴³

³⁹ Tr. at 15-16.

⁴⁰ See United States Steel Group v. United States, 873 F. Supp. 673, 681-84 (CIT 1994), aff'd, 96 F.3d 1352 (Fed. Cir.1996).

⁴¹ Although Great Eastern asserted in its petition that it was the only domestic processor of *Mytilus edulis* mussels, during the course of this investigation it came to light that there may be other processors of mussels. See CR at III-1; PR at III-1. The Commission contacted and attempted to obtain information from these apparent processors but was unable to do so. CR at III-1 n.1; PR at III-1 n.1. We intend to seek information from other processors of mussels in any final phase of this investigation.

⁴² Confederation Cove asserts that the provision would apply but that processed mussels remain a "raw agricultural product" despite their processing. See Confederation Cove's postconference brief at 15. Great Eastern states that the provision does not apply. Great Eastern's postconference brief at 25.

⁴³ In cases involving processed agricultural products, the Act provides that the Commission can include growers or processors of a raw agricultural input as producers within the domestic industry producing the processed agricultural product if:

- (a) the processed agricultural product is produced from the raw product through a single continuous line of production, and
- (b) there is a substantial coincidence of economic interest between the growers and producers of the processed product based upon relevant economic factors.

19 U.S.C. § 1677(4)(E)(i). A "raw agricultural product" is defined as any farm or fishery product. 19 U.S.C. § 1677(4)(E)(iv).

Under the first prong, the processed product shall be considered to be processed from the raw product in a single continuous line of production if:

- (a) the raw agricultural product is substantially or completely devoted to the production of the processed agricultural product; and
- (b) the processed agricultural product is produced substantially or completely from the raw product.

19 U.S.C. § 1677(4)(E)(ii).

In addressing coincidence of economic interest under the second prong of the test, the Commission may, in its discretion, consider price, added market value, or other economic interrelationships. Further, the statute states that:

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The record indicates that live processed mussels are produced substantially from live unprocessed mussels. The limited data also suggest that unprocessed mussels are substantially devoted to the production of processed mussels. Moreover, live mussels are used to produce other products such as frozen and smoked mussels, but it is not clear if these products are produced from processed or unprocessed mussels.⁴⁴

We note that Great Eastern is the primary domestic cultivator and processor of *Mytilus edulis* mussels and this suggests a commonality of economic interest for a substantial portion of the industry processing mussels with the industry cultivating mussels,⁴⁵ though there are other harvesters of mussels and processors of mussels. Given the limited information on the record, however, we do not find the provision applicable for purposes of this preliminary determination, but intend to reconsider this issue in any final phase of the investigation.^{46 47}

III. CONDITIONS OF COMPETITION

The following conditions of competition are relevant to our determination.

The demand for mussels in the United States has been growing in recent years. Apparent consumption in the United States was *** million pounds in 1998 and *** million pounds in 2000.⁴⁸

⁴³ (...continued)

- (a) if price is taken into account, the Commission shall consider the degree of correlation between the price of the raw agricultural product and the price of the processed agricultural product; and
- (b) if added market value is taken into account, the Commission shall consider whether the value of the raw agricultural product constitutes a significant percentage of the value of the processed agricultural product.

19 U.S.C. § 1677(4)(E)(iii).

⁴⁴ It is uncertain what percentage of unprocessed mussels is diverted to uses other than the live mussel market. While virtually all of Great Eastern's mussels are destined for the live mussel market, testimony at the staff conference suggested that a substantial portion of other firms' unprocessed mussels are dedicated to other downstream products (e.g., smoked, frozen, or canned). See Tr. at 17-18; CR at III-1; PR at III-1. Whether processed mussels are inputs to these downstream products is not known. See CR at I-4, I-6; PR at I-3, I-4. In any final phase of this investigation, we intend to explore the nature of the processing used in producing these other downstream products.

⁴⁵ See Sugar from the European Union; Sugar from Belgium, France, and Germany; and Sugar and Syrups from Canada, Invs. Nos. 104-TAA-7 (Review); AA1921-198-200 (Review); and 731-TA-3 (Review), USITC Pub. 3238 (September 1999) at 13 (citing joint ownership of firms growing and processing).

⁴⁶ Specifically, we intend to seek further information in any final phase of this investigation to determine the extent to which all unprocessed mussels become processed mussels and whether there is a substantial coincidence of economic interest between the processors and harvesters or cultivators of mussels.

⁴⁷ A portion of Great Eastern's processed mussels was not cultivated or harvested by Great Eastern as it purchased unprocessed mussels from fishermen and then processed those mussels. Tr. at 49; Great Eastern's Questionnaire Response at 6. As noted previously, in any final phase of this investigation, we intend to explore the nature of the processing and the value added by the processing. See Certain Cut-To-Length Steel Plate from France, India, Indonesia, Italy, Japan, and Korea, Invs. Nos. 701-TA-387-392 and 731-TA-816-821 (Final), USITC Pub. 3273 (January 2000) at 10. But see Fresh Atlantic Salmon from Chile, Inv. No. 731-TA-768 (Final), USITC Pub. 3116 (July 1998) at 9-11 (processors of whole salmon who simply cut the salmon into steaks and fillets were excluded from the definition of the domestic industry).

⁴⁸ CR at II-2; PR at II-1.

Subject imports supply *** or more of the U.S. market.⁴⁹ Great Eastern supplies much of the remainder, but ***.⁵⁰ Nonsubject imports are minimal but growing.⁵¹

Both domestic mussels and the subject imports are sold through the same channels of distribution throughout the United States.⁵² Lead times for delivery of live mussels are very short⁵³ as they are a perishable product that cannot be held in inventory.⁵⁴ Domestic and imported processed mussels are marketed in ten-pound bags to restaurants and two-pound bags to supermarkets.⁵⁵ Notwithstanding these similarities, real or perceived quality differences may limit the substitutability of domestic and Canadian mussels. Thus, while the subject imports and the domestic like product appear to be moderately substitutable, some purchasers have indicated that quality differences exist due to the different cultivation technique used for Canadian mussels, which reportedly yields a mussel that is cleaner, with less sand and grit.⁵⁶

IV. REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF ALLEGEDLY LTFV IMPORTS⁵⁷

Section 771(7)(F) of the Act directs the Commission to determine whether the U.S. industry is threatened with material injury by reason of the subject imports by analyzing whether “further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted.”⁵⁸ The Commission may not make such a determination “on the basis of mere conjecture or supposition,” and considers the threat factors “as a whole” in making its determination whether dumped or subsidized imports are imminent and whether

⁴⁹ See CR & PR at Table IV-3.

⁵⁰ Compare CR & PR at Table IV-3 with CR & PR at Table III-1.

⁵¹ See CR & PR at Table IV-3.

⁵² CR at II-1; PR at II-1.

⁵³ *Id.*

⁵⁴ CR at VII-5; PR at VII-4; CR at II-2; PR at II-1.

⁵⁵ Tr. at 33. As noted earlier, the ***. In any final phase of this investigation, we intend to examine any price relationships between ten-pound bags and two-pound bags.

⁵⁶ Different cultivation techniques may affect the substitutability of the subject imports for the domestic product. Great Eastern cultivates mussels by bottom culturing. CR at III-1; PR at III-1. Great Eastern is beginning to implement raft cultivation of mussels, which appears to be somewhat similar to rope cultivation. See Tr. at 44. The Canadian producers rely on rope culturing techniques. CR at VII-1 to VII-2; PR at VII-1. Respondents have claimed that rope culturing results in a mussel that is cleaner and better-tasting than one raised on the bottom of the ocean. CR at II-4 to II-5; PR at II-3 to II-4; Confederation Cove’s postconference brief at 23-24; Prince Edward Island Aquaculture Alliance’s postconference brief at 5.

⁵⁷ Commissioner Bragg notes that there are several outcome determinative issues which, in her view, are not resolved at this stage of the proceedings, and are of particular relevance to her affirmative determination in this preliminary phase of the investigation. Based upon the outcome determinative nature of these unresolved issues and the apparent limited factual record at this stage of the proceedings, a final phase investigation will provide the Commission with the opportunity to: (1) clarify the nature of cultivation, harvesting, and processing; (2) further assess the economic relationship between cultivation, harvesting, and processing; (3) obtain purchasers’ perceptions on product substitutability; and (4) obtain additional information regarding the level and nature of competition between subject imports and the domestic like product within the various channels of the market, particularly with respect to price relationships between ten-pound bag sales and two-pound bag sales.

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

material injury by reason of imports would occur unless an order is issued.⁵⁹ In making our determination, we have considered all statutory factors that are relevant to this investigation,⁶⁰ including the rate of the increase in the volume and market penetration of subject imports, and unused production capacity.

For the reasons discussed below, we determine that there is a reasonable indication that the domestic industry is threatened with material injury by reason of subject imports.

The Canadian live processed mussel industry is centered on Prince Edward Island,⁶¹ although mussels are cultivated in Nova Scotia, Newfoundland, New Brunswick, and British Columbia.⁶² Prince Edward Island has excellent areas for the cultivation and processing of mussels and the industry there accounts for the vast majority of subject imports.⁶³

Canadian capacity grew rapidly between 1998 and 2000, as did Canadian production. Much of the increase in production, in turn, was exported to the United States.⁶⁴ Exports to the United States account for nearly one-half of all Canadian production. The United States is currently the only significant export market for the Canadian producers.⁶⁵

Excess capacity in Canada already ***.⁶⁶ Furthermore, the Canadian producers estimate that their capacity and production will increase significantly in 2001 and 2002,⁶⁷ and that growth in the Canadian industry will continue to be driven in large part by exports to the United States.⁶⁸

The Canadian industry's increased production and exports indicate that the volume of subject imports will continue to rise.⁶⁹ Subject imports held a large and growing share of the U.S. market from

⁵⁹ 19 U.S.C. § 1677(7)(F)(ii).

⁶⁰ 19 U.S.C. § 1677(7)(F)(i). Factor V is not pertinent in this investigation because mussels are perishable and inventories are not generally maintained. Factor VI regarding product-shifting also is not an issue in this investigation. Factor VII also is inapplicable because this investigation does not involve imports of both raw and processed agricultural products.

⁶¹ See CR & PR at Table VII-1.

⁶² CR at VII-1; PR at VII-1.

⁶³ In 2000, 98 percent of the subject imports were from Prince Edward Island. CR at VII-2; PR at VII-1. Approximately 31 million pounds of mussels are harvested on Prince Edward Island alone. CR at VII-1; PR at VII-1.

⁶⁴ See CR & PR at Table VII-1. The growth in Canadian production was not limited to Prince Edward Island. The record indicates that production expanded rapidly in other provinces as well. See, e.g., "Provincial Mussel: Newfoundland Invests in Two Programs to Boost Production" in Great Eastern's postconference brief at 22-23.

⁶⁵ See CR & PR at Table VII-1.

⁶⁶ Compare CR & PR at Table VII-1 with CR & PR at Table III-1. For both the Canadian and U.S. industries, it is uncertain whether reported capacity is for mussel cultivation or processing. We intend to clarify this issue in any final phase of this investigation.

⁶⁷ See CR & PR at Table VII-1. Capacity is projected to increase from 47.0 million pounds in 2000 to 52.1 million pounds in 2002. *Id.* Production is likewise forecast to increase from 38.2 million pounds in 2000 to 45.9 million pounds in 2002.

⁶⁸ Indeed, the Canadian producers forecast that exports to the United States will continue to increase as a percentage of their total shipments. See CR & PR at Table VII-1. We note that due to the perishable nature of the product, it appears that subject producers' ability to ship to third country markets is limited.

⁶⁹ Subject imports were 12.5 million pounds in 1998, 13.3 million pounds in 1999, and 17.2 million pounds in 2000, approximately a 37 percent increase in subject imports during the period of investigation. CR & PR at Table IV-1.

1998 through 2000,⁷⁰ and Canadian producers forecast *** to the United States.⁷¹ Therefore, based on the projected increases in capacity, production, and exports, as well as the rate of increase in subject imports between 1998 and 2000, we find it likely that subject imports will increase to significant levels in the imminent future.

In considering whether subject imports are likely to depress or suppress prices, we note that the subject imports are at least moderately substitutable for domestically produced mussels.⁷² Between 1998 and 2000, prices for the domestic like product generally ***.⁷³ Price comparisons overall indicate that the subject imports generally oversold the domestic product,⁷⁴ but the data also indicate that import prices vary greatly depending upon the source of the mussels.⁷⁵ These price disparities and the overselling may reflect quality and substitutability issues that we intend to examine further in any final phase of the investigation.

There is evidence in this preliminary phase that subject imports suppressed U.S. prices to some degree. The industry's ratio of cost of goods sold to net sales *** between 1998 and 2000.⁷⁶ However, the industry has not been able to raise its prices to any significant degree during this period of increased demand, ***.⁷⁷ We find the domestic industry's inability to increase its prices to cover increasing costs in an expanding market is due in part to the subject imports' large and growing share of the U.S. market.

Given the significant volume of subject imports that is likely, the apparent substitutability of subject imports for the domestic like product, and the *** during a period of strong demand, we find it likely that subject imports will enter the United States at prices that will significantly suppress price increases for the domestic like product.

Despite growing demand for mussels, the industry's production and shipments ***⁷⁸ *** of capacity utilization.⁷⁹ The domestic industry's share of the U.S. market in terms of quantity *** in 1998 to *** in 2000,⁸⁰ as subject imports captured a greater share of the growing U.S. market.

⁷⁰ Subject imports captured *** percent of the U.S. market in terms of quantity in 1998, *** percent in 1999, and *** percent in 2000. CR & PR at Table IV-3.

⁷¹ The Canadian producers forecast that subject imports will increase from 18.6 million pounds in 2000 to 22.7 million pounds in 2002. CR & PR at Table VII-1. Exports to the United States are forecast to increase by a greater percentage than home market shipments. See CR & PR at Table VII-1.

⁷² CR at II-3; PR at II-2.

⁷³ See CR & PR at Figs. V-2, V-3, V-4. The unit values of Great Eastern's net sales ***. See CR & PR at Table VI-2.

⁷⁴ CR at V-11; PR at V-4 to V-5; CR & PR at Table V-4. The importer *** in price comparisons for two-pound retail bags of mussels. See CR at V-11, PR at V-4 to V-5; Memorandum INV-Y-080, April 20, 2001 (indicating *** average selling prices).

⁷⁵ See Memorandum INV-Y-080, April 20, 2001 (indicating that ***).

⁷⁶ See CR & PR at Table VI-1.

⁷⁷ See CR & PR at Table VI-2.

⁷⁸ Its production and shipments was *** million pounds in 1998, *** million pounds in 1999 and *** million pounds in 2000. CR & PR at Tables III-1 and III-2. Its capacity was *** during the period at *** million pounds. CR & PR at Table III-1.

⁷⁹ Its utilization rate was *** percent in 1998, *** percent in 1999, and *** percent in 2000. CR & PR at Table III-1.

⁸⁰ CR & PR at Table IV-3.

Furthermore, Great Eastern, the only member of the industry for which we have data, is experiencing ***.⁸¹ The value of its net sales per pound ***⁸² over the period while its costs per pound ***.⁸³ As a result, the industry's financial performance worsened over the period of investigation. Its operating income as a percentage of net sales was *** percent in 1998, *** percent in 1999, and *** in 2000.⁸⁴ The industry's capital expenditures ***.^{85 86}

Related to the likely financial impact, we have also examined the statutory criterion concerning the actual and potential negative effects of the subject imports on the existing development and production efforts of the domestic industry. The industry *** and has begun developing new technology to enable it to implement and expand the raft culturing of mussels.⁸⁷ The industry's development and production efforts, including its ability to obtain a return on its investment will likely be diminished by increasing volumes of subject imports. As the industry attempts to expand the raft culturing of mussels, the likely significant increase in imports would likely threaten the implementation of the new method of cultivating unprocessed mussels which are used in the production of processed mussels.

Based upon the limited record before the Commission, we find it likely that these declines in the domestic industry's performance will continue and will result in material injury to the domestic industry in the imminent future due to the likely significant volumes of subject imports and their likely adverse price effects on the domestic product. Therefore, we conclude that there is a reasonable indication that further allegedly dumped imports are imminent and that material injury by reason of the subject imports would occur unless an order were issued.

CONCLUSION

For the foregoing reasons, we determine there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of mussels from Canada that are allegedly sold in the United States at less than fair value.

⁸¹ The industry's financial data include its operations on cultivating and processing mussels as this was the only information provided by the domestic industry. In any final investigation, we will assess the feasibility of gathering data that separate financial results on the cultivation of mussels from results based on the processing of mussels only, in light of the like product issue.

⁸² See CR & PR at Table VI-2 (increasing from *** in 1998 to *** in 2000).

⁸³ See CR & PR at Table VI-2 (increasing from *** in 1998 to *** in 2000).

⁸⁴ CR & PR at Table VI-1. The industry's productivity *** over the period and its workers and their hours worked were unchanged during the period. See CR & PR at Table III-3.

⁸⁵ See CR & PR at Table VI-4. Spending on research and development also was ***. See CR at Table VI-4. Productivity ***. See CR & PR at Table III-3.

⁸⁶ Commissioner Bragg notes that although the indicators of the domestic industry's performance generally declined at the end of the period of investigation, these indicators had not yet reached levels indicating material injury by reason of subject imports, particularly given the uncertainties regarding price effects of subject imports.

⁸⁷ CR at III-3; PR at III-2.

**SEPARATE VIEWS OF CHAIRMAN STEPHEN KOPLAN
IN MUSSELS FROM CANADA, INV. NO. 731-TA-924 (PRELIMINARY)**

My views on the domestic like product and the domestic industry and my description of the relevant conditions of competition are contained in the *Views of the Commission*. I do not find that there is a reasonable indication that the domestic industry processing mussels is threatened with material injury by reason of the subject imports from Canada. Rather, I find that the record in this case supports a determination that there is a reasonable indication that the domestic industry presently is suffering material injury by reason of imports from Canada sold in the United States at less than fair value (“LTFV”).

**REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF
SUBJECT IMPORTS FROM CANADA**

The demand for mussels in the United States has been growing during the period of investigation.¹ During this period, subject imports from Canada steadily and significantly increased,² and they captured a greater share of the U.S. market.³ Today, subject imports supply approximately *** of the U.S. market and nonsubject imports are a small presence in the market.⁴ As a result, the domestic industry’s share of the U.S. market in terms of quantity *** in 1998 to *** in 2000.⁵

There is some dispute about the extent to which the growth in the market has been attributable to the quality and nature of subject imports. Respondents contend that whole segments of the market have increased demand for subject imported mussels and that those purchasers would not consider buying domestic product.⁶ As stated in the *Views of the Commission*, I intend to examine this issue more fully in the final phase of this investigation. Nevertheless, based on the increase in subject imports and the current absolute level of subject imports in the market, I find the volume of subject imports to be significant for purposes of the preliminary phase of this investigation.

As to the price effects of the subject imports, I find that they are moderately substitutable for domestically produced mussels.⁷ During the period of investigation, pricing data indicate that prices for the

¹ Apparent consumption in the United States was *** million pounds in 1998 and *** million pounds in 2000. CR at II-2; PR at II-1.

² Subject imports were 12.5 million pounds in 1998, 13.3 million pounds in 1999 and 17.2 million pounds in 2000. CR & PR at Table IV-1. This is approximately a 37 percent increase in subject imports.

³ Subject imports captured *** percent of the U.S. market in terms of quantity in 1998, *** percent in 1999, and *** percent in 2000. CR & PR at Table IV-3.

⁴ See CR at Table IV-3; PR at Table IV-3.

⁵ CR & PR at Table IV-3.

⁶ See The Great Eastern Mussel Farms, Inc., *Growing Mussels on Rafts* (undated) at 2 (“Imports of live mussels have grown from 4.4 million to 13 million pounds in order to satisfy the growing U.S. demand for the once lowly mussel. According to import figures from Seafood Market Analyst, the food service segment of the market has driven the demand for imported frozen mussels from 8 million to 20 million pounds in just the last five years.”).

⁷ CR at II-3; PR at II-2. The difference stems from the manner in which Canadian mussels are cultivated, which is argued to be superior to the primary method used by Great Eastern. See The Great Eastern Mussel Farms, Inc., *Growing Mussels on Rafts* (undated) at 2 (“The rope cultured mussels are marketed as choice cultured mussels, meaning five-star quality, because of the very big meats inside each mussel.”). Great Eastern is reportedly increasing its use of such rope culturing equipment. *Id.* I reiterate that I intend to examine the extent to which there may be quality or other differences that diminish the substitutability of the subject imports with the domestic like product.

domestic like product ***.⁸ I recognize that price comparisons overall indicate that the subject imports generally oversold the domestic product.⁹ However, import prices vary greatly depending upon the source of the mussels.¹⁰ The importer which imports the majority of subject imports, *** in price comparisons for its sales of two-pound retail bags of mussels.¹¹ Moreover, the overall margins of underselling declined for two of the three pricing products (products 1 and 3) over the POI. The unit value of subject imports also declined slightly over the POI.¹² I generally do not give significant weight to unit value data where the Commission has extensive price comparisons. However, the pricing data gathered in this preliminary phase are incomplete and there is no evidence in the record indicating that the product mix or nature of the imported product has changed over the POI. Given the significant volume of subject imports, the preliminary record regarding the moderate substitutability of subject imports for the domestic like product, the mixed pricing data including the ***, and the decline in unit values, I find the record in this preliminary phase indicates that subject imports have entered the United States at prices that significantly suppressed necessary price increases for the domestic like product.

Great Eastern asserts that, as a result of the price suppression, it is experiencing a cost-price squeeze, rendering it ***.¹³ In particular, it cites to rising fuel and packaging costs.¹⁴ Great Eastern also claims that it had to ***.¹⁵ The record in this preliminary phase supports these claims. Indicators of the industry's performance generally declined at the end of the period of investigation. *** the industry's ratio of cost of goods sold to net sales has *** as the industry was not able to raise its prices sufficient to cover the ***.¹⁶ Specifically, the value of Great Eastern's net sales per pound ***¹⁷ over the period while its costs per pound ***.¹⁸

Despite growing demand for mussels, shipments measured by value declined slightly from 1999 to 2000 and unit values remained flat over the POI.¹⁹ This *** operating performance has caused a *** and has prevented the industry from obtaining a return on its ***.²⁰ Capacity utilization also declined from 1999 to 2000.²¹

⁸ See CR & PR at Figs. V-2, V-3, V-4.

⁹ CR at V-11 and Table V-4; PR at V-4 to V-5 and Table V-4.

¹⁰ See Memorandum INV-Y-080, April 20, 2001 (indicating that ***).

¹¹ See CR at V-11; PR at V-4 to V-5 and Memorandum INV-Y-080, April 20, 2001 (indicating *** average selling prices).

¹² CR at IV-1; PR at IV-1.

¹³ Great Eastern's Postconference Brief at 18.

¹⁴ Great Eastern's Postconference Brief at 17.

¹⁵ Great Eastern's Postconference Brief at 20.

¹⁶ See CR & PR at Table VI-2. I note that the industry's financial data includes its operations on cultivating and processing mussels as this was the only information provided by the domestic industry. In the final investigation, the Commission will attempt to gather data that separates financial results on the cultivation of mussels from results based on the processing of mussels only.

¹⁷ See CR & PR at Table VI-2 (increasing from *** in 1998 to *** in 2000).

¹⁸ See CR & PR at Table VI-2 (increasing from *** in 1998 to *** in 2000).

¹⁹ CR at III-4; PR at III-2.

²⁰ See CR & PR at Table VI-4. The industry's productivity *** over the period and the number of production related workers and their hours worked were unchanged during the period. See CR & PR at Table III-3.

²¹ Its utilization rate was *** percent in 1998, *** percent in 1999, and *** percent in 2000. CR & PR at Table III-1.

I find the industry's inability to increase its prices *** is due to a significant degree to the subject imports which occupy a growing share of the market and are often competitively priced. Accordingly, I find that there is a reasonable indication that the domestic industry processing mussels is injured by reason of the LTFV subject imports from Canada.