

UNITED STATES INTERNATIONAL TRADE COMMISSION

ALLURA RED COLORING FROM INDIA

Investigations Nos. 701-TA-433 (Preliminary) and 731-TA-1029 (Preliminary)

DETERMINATION AND VIEWS OF THE COMMISSION

(USITC Publication No. 3595, April 2003)

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Investigations Nos. 701-TA-433 (Preliminary) and 731-TA-1029 (Preliminary)**

**ALLURA RED COLORING FROM INDIA**

**DETERMINATIONS**

On the basis of the record<sup>1</sup> developed in the subject investigations, the United States International Trade Commission (Commission) determines, pursuant to section 703(a) of the Tariff Act of 1930 (19 U.S.C. § 1671b(a)) (the Act), that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded, by reason of imports from India of allura red coloring, provided for in subheading 3204.12.50 of the Harmonized Tariff Schedule of the United States, that are alleged to be subsidized by the Government of India. The Commission also determines, pursuant to section 733(a) of the Act (19 U.S.C. § 1673b(a)), that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded, by reason of the subject imports from India that are also alleged to be sold in the United States at less than fair value (LTFV).

**BACKGROUND**

On March 4, 2003, a petition was filed with the Commission and Commerce by Sensient Technologies Corporation, Milwaukee, WI, alleging that an industry in the United States is materially injured or threatened with material injury by reason of subsidized and LTFV imports of allura red coloring from India. Accordingly, effective March 4, 2003, the Commission instituted countervailing duty investigation No. 701-TA-433 (Preliminary) and antidumping duty investigation No. 731-TA-1029 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of March 11, 2003 (68 FR 11579). The conference was held in Washington, DC, on March 25, 2003, and all persons who requested the opportunity were permitted to appear in person or by counsel.

By order of the Commission.

Marilyn R. Abbott  
Secretary

Issued:

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

**VIEWS OF THE COMMISSION**  
**Investigations Nos. 701-TA-433 and 731-TA-1029 (Preliminary)**

**ALLURA RED COLORING FROM INDIA**

Based on the record in these investigations, we determine that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of allura red coloring from India that are alleged to be subsidized by the Government of India and by reason of imports of allura red coloring from India that are allegedly sold in the United States at less than fair value (LTFV).<sup>1</sup>

**I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS**

The legal standard for preliminary antidumping and countervailing duty determinations requires the Commission to determine, based upon the information available at the time, whether there is a reasonable indication that a domestic industry is materially injured, threatened with material injury, or that the establishment of an industry is materially retarded, by reason of the subject imports.<sup>2</sup> 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.”<sup>3</sup>

The Court of Appeals for the Federal Circuit has stated that the purpose of preliminary determinations is to avoid the cost and disruption to trade caused by unnecessary investigations and that the “reasonable indication” standard requires more than a finding that there is a “possibility” of material injury.<sup>4</sup> It also has noted that, in a preliminary investigation, the “[t]he statute calls for a reasonable indication of injury, not a reasonable indication of need for further inquiry.”<sup>5</sup> Moreover, the CIT recently has reaffirmed that in applying the reasonable indication “standard for making a preliminary determination regarding material injury or threat of material injury, the Commission may weigh all evidence before it and resolve conflicts in the evidence.”<sup>6</sup>

As we discuss below, we find that the record of these preliminary investigations contains clear and convincing evidence that the domestic industry producing allura red coloring is neither materially injured nor threatened with material injury by reason of the subject imports. We note that staff has collected complete information for domestic production, Indian production, imports of subject product, and pricing data. The record also contains information collected from purchasers that represent a significant portion of the market. Although we recognize that we might obtain additional evidence in any final phase investigations relating to the domestic industry’s condition or other factors, given the generally robust condition of the industry and the limited presence of subject imports, we see no likelihood that any evidence we obtain in any final investigations would change our findings that the domestic industry has been impacted in a minimal manner, at most, by the subject imports during the period.

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<sup>1</sup> Whether the establishment of an industry is materially retarded is not an issue in these investigations.

<sup>2</sup> 19 U.S.C. § 1673b(a); see also American Lamb Co. v. United States, 785 F.2d 994, 1001-1004 (Fed. Cir. 1986); Ranchers-Cattlemen Action Legal Foundation v. United States, 74 F. Supp.2d 1353, 1368-69 (Ct. Int’l Trade 1999).

<sup>3</sup> 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).

<sup>4</sup> American Lamb, 785 F.2d at 1004.

<sup>5</sup> Texas Crushed Stone Co. v. United States, 35 F.3d 1535, 1543 (Fed. Cir. 1994).

<sup>6</sup> R-CALF, 74 F. Supp.2d at 1368 (Ct. Int’l Trade 1999).

## 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.”<sup>7</sup> 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.”<sup>8</sup> 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 . . . .”<sup>9</sup>

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.<sup>10</sup> No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation.<sup>11</sup> The Commission looks for clear dividing lines among possible like products and disregards minor variations.<sup>12</sup> 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.<sup>13</sup>

### B. Product Description

In its notice of institution, Commerce defined the scope of these investigations as follows: Allura red coloring, also known as Food, Drug, and Cosmetic (FD&C) Red No. 40, defined as synthetic red coloring containing not less than 85 percent of the disodium salt of 6-hydroxy-5-[(2-methoxy-5-methyl-4-sulfonyl)azo]-2-naphthalenesulfonic acid, whether or not certified for human consumption at the time of entry into the United States. The product definition covers all forms and variations of allura

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<sup>7</sup> 19 U.S.C. § 1677(4)(A).

<sup>8</sup> 19 U.S.C. § 1677(4)(A).

<sup>9</sup> 19 U.S.C. § 1677(10).

<sup>10</sup> See, e.g., NEC Corp. v. Department of Commerce, Slip Op. 98-164 at 8 (CIT, Dec. 15, 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Torrington Co. v. United States, 747 F. Supp. 744, 749, n.3 (CIT 1990), aff’d, 938 F.2d 1278 (Fed. Cir. 1991) (“every like product determination ‘must be made on the particular record at issue’ and the ‘unique facts of each case’”). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes and production employees; and, where appropriate, (6) price. See Nippon, 19 CIT at 455, n.4; Timken Co. v. United States, 913 F. Supp. 580, 584 (CIT 1996).

<sup>11</sup> See, e.g., S. Rep. No. 96-249, at 90-91 (1979).

<sup>12</sup> 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.”).

<sup>13</sup> 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).

red, such as powders, press cakes, extrudates, liquid or granules, but excludes lake pigments formed from allura red. This investigation does not cover colors of animal, vegetable or mineral origin, also known as “natural colors.”<sup>14</sup>

Allura red is the common name for a synthetic red food coloring. When certified by the Food and Drug Administration (FDA) as meeting certain purity standards, allura red also can be referred to as FD&C Red No. 40. A synthetic color refers to a color that is made from petroleum or coal products; by virtue of being a synthetic coloring, each production batch requires FDA certification before it can be legally used in a food. FDA certification takes approximately two to four weeks.

In addition to approving certain synthetic coloring for food use, the FDA has approved certain synthetic coloring for use in the manufacture of drugs and/or cosmetics. Such colorings are referred to as Drug and Cosmetic (D&C) colorings and given specific D&C names. While FD&C Red No. 40 is approved for use in all three applications,<sup>15</sup> petitioner notes that approximately 90 percent of allura red is used to color food products including soft drinks dry mixes, baked foods, confections, dairy products, and pet foods.<sup>16</sup> Many of the largest food companies, such as Heinz, Kraft, and Coca-Cola, purchase allura red coloring for use in their various food products.

### **C. Domestic Like Product Issues**

Petitioner asserts that there is only one like product that is coextensive with the scope of the investigations, specifically “allura red coloring in all forms, whether or not previously certified by the FDA.”<sup>17</sup> Respondent is not disputing that the definition of the domestic like product should be coextensive with the definition of the subject merchandise for these preliminary investigations.<sup>18</sup>

There are no substitutes for allura red coloring and there are no similar red dyes for use in food and cosmetics.<sup>19</sup> Moreover, the record indicates that domestically produced allura red coloring is virtually identical to the subject merchandise.<sup>20</sup> Accordingly, we find a single domestic like product consisting of allura red coloring in all forms, whether or not previously certified by the FDA.

### **D. Domestic Industry<sup>21</sup>**

The domestic industry is defined as “the producers as a [w]hole of a domestic like product . . .”<sup>22</sup> In defining the domestic industry, the Commission generally includes in the industry all of the domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic

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<sup>14</sup> 68 Fed. Reg. 11579, March 11, 2003.

<sup>15</sup> The approval selection is hierarchical: colors approved for use in foods can be used in cosmetics and drugs, but approval for use in drugs and cosmetics is not sufficient to permit use in food.

<sup>16</sup> Conference Tr. at 12. In addition to FD&C Red No. 40, other red colorings are FD&C Red No. 3 and a few natural red food colors (derived from plants or animals) that do not require FDA certification before use in food. While domestic and imported FD&C Red No. 3 are interchangeable, they are not substitutable with FD&C No. 40. Tr. at 42 and Petitioner’s Postconference brief at 7, fn. 2.

<sup>17</sup> Petition at 6.

<sup>18</sup> Conference Tr. at 61.

<sup>19</sup> CR at II-6; PR at I-5.

<sup>20</sup> CR at I-4; PR at I-3.

<sup>21</sup> No party has argued for the exclusion of either domestic producer under the related party provision of the statute, 19 U.S.C. §1677(4)(B), and nothing in the record indicates that either producer was a related party.

<sup>22</sup> 19 U.S.C. § 1677(4)(A).

merchant market.<sup>23</sup> Based on our definition of the domestic like product, we conclude that the domestic industry consists of both domestic producers of allura red coloring, *i.e.*, Noveon Hilton Davis, Inc. (“Noveon”) and petitioner Sensient Technologies Corp. (“Sensient”).

#### **IV. NO REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF ALLEGEDLY SUBSIDIZED AND LTFV IMPORTS<sup>24</sup>**

In the preliminary phase of antidumping and countervailing duty investigations, the Commission determines whether there is a reasonable indication that an industry in the United States is materially injured by reason of the imports under investigation.<sup>25</sup> In making this determination, the Commission must consider the volume of subject imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations.<sup>26</sup> The statute defines “material injury” as “harm which is not inconsequential, immaterial, or unimportant.”<sup>27</sup> In assessing whether there is a reasonable indication that the domestic industry is materially injured by reason of subject imports, we consider all relevant economic factors that bear on the state of the industry in the United States.<sup>28</sup> No single factor is dispositive, and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>29</sup>

For the reasons discussed below, we determine that there is no reasonable indication that the domestic industry is materially injured by reason of subject imports of allura red coloring from India that are allegedly subsidized and/or sold in the United States at less than fair value.

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<sup>23</sup> 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).

<sup>24</sup> Subject imports from India made up 100 percent of all imports of allura red coloring to the U.S. market during the period of investigation. Therefore, the negligibility provision does not apply. See 19 U.S.C. § 1677(24).

<sup>25</sup> 19 U.S.C. §§ 1671b(a) and 1673b(a).

<sup>26</sup> 19 U.S.C. § 1677(7)(B)(i). The Commission “may consider such other economic factors as are relevant to the determination” but shall “identify each [such] factor . . . [a]nd explain in full its relevance to the determination.” 19 U.S.C. § 1677(7)(B). See also Angus Chemical Co. v. United States, 140 F.3d 1478 (Fed. Cir. 1998).

<sup>27</sup> 19 U.S.C. § 1677(7)(A).

<sup>28</sup> 19 U.S.C. § 1677(7)(C)(iii).

<sup>29</sup> 19 U.S.C. § 1677(7)(C)(iii).

## A. Captive Production<sup>30</sup>

The record indicates that both domestic producers internally consume allura red for use in the production of downstream products, including liquid color, dye blends, dispersions, and lakes. However, neither petitioner nor respondent have advanced any arguments regarding the applicability of the captive production provision and we find that the requirements for applying the captive production provision are not satisfied.

With respect to the threshold criterion that domestic producers internally transfer significant production and sell significant production in the merchant market, both domestic producers reported internal consumption to be between \*\*\* percent and \*\*\* percent of total shipments.<sup>31</sup> Internal consumption and inter-company transfer shipments represented between \*\*\* percent and \*\*\* percent of the quantity of U.S. producers' total shipments over the period for which data were collected.<sup>32</sup> The question arises, however, as to whether the inter-company transfers should be treated as internal transfers under the statute. There is insufficient information in the record about the nature of the inter-company transfers to determine this issue. On the basis of the percentages for internal consumption alone, we find that the threshold criterion is met.

With respect to the second statutory criterion, record evidence indicates that allura red coloring accounts for approximately \*\*\* percent of the raw material cost of the downstream product (*i.e.*, liquid color, dye blends, dispersions, and lakes).<sup>33</sup> The second statutory criterion requires that the domestic like product be “the predominant material input” into the downstream product, and we do not find that a raw material that accounts for \*\*\* percent of raw material costs can be described as “the predominant material input.” The second statutory criterion is not met, and therefore we find that the captive production provision is not applicable.<sup>34</sup> Because none of the parties to these investigations argued that the captive production was a significant condition of competition in this industry we do not consider it to be a significant condition of competition.

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<sup>30</sup> The captive production provision, 19 U.S.C. § 1677(7)(C)(iv), which was added to the statute by the Uruguay Round Agreements Act (URAA), provides:

(iv) CAPTIVE PRODUCTION -- If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that –

- (I) the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product,
- (II) the domestic like product is the predominant material input in the production of that downstream article, and
- (III) the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article,

then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii), shall focus primarily on the merchant market for the domestic like product.

The Statement of Administrative Action (SAA) issued in conjunction with the URAA indicates that where a domestic like product is transferred internally for the production of another article coming within the definition of the domestic like product, such transfers do not constitute internal transfers for the production of a “downstream article” for purposes of the captive production provision. SAA, H.R. Rep. 103-316, vol. I at 853.

<sup>31</sup> CR and PR Tables III-2 and VI-1.

<sup>32</sup> CR and PR Tables III-2 and VI-1.

<sup>33</sup> CR at II-6, PR at II-3; Response of \*\*\* to supplemental questions of Commission Staff, April 16, 2003.

<sup>34</sup> There is insufficient evidence on the record to determine whether the third criterion is met, but that issue is mooted by our finding with respect to the second criterion.

## A. Conditions of Competition

When performing our analysis in these investigations, we took into account the following conditions of competition:

Demand for allura red coloring is highly dependent on the demand for certain food products. The food industry accounts for 90 percent of domestic consumption with the rest consumed by the pharmaceutical and cosmetics industries.<sup>35</sup> Demand for allura red, as measured by apparent domestic consumption, increased over the period of investigation by \*\*\* percent. Domestic consumption was \*\*\* pounds in 2000, \*\*\* pounds in 2001 and \*\*\* pounds in 2002.<sup>36</sup>

There are two domestic producers of allura red coloring in the United States: Sensient and Noveon.<sup>37</sup> As recently as January 2000, there had been a third producer of subject merchandise, Monarch Food Colors, Inc. Monarch sold its manufacturing assets to Universal Foods Corporation, the predecessor company to Sensient, in January 2000 and ceased operations.<sup>38</sup> The two domestic producers supply nearly all of the merchant market and, as a share of total apparent domestic consumption by volume, domestic market share slightly declined from \*\*\* percent in 2000 to \*\*\* percent in 2002.<sup>39</sup> By value, domestic market share declined from \*\*\* percent of apparent domestic consumption in 2000 to \*\*\* percent in 2002.<sup>40</sup> Indian producers account for the remainder of the market. There were no imports of allura red coloring from countries other than India during the period of investigation.<sup>41</sup>

Capacity utilization for domestic and Indian producers was relatively low throughout the entire period of investigation, but maintaining high capacity utilization rates does not appear to be a prerequisite to operating profitably in this industry.<sup>42</sup> Allura red coloring has an indefinite shelf life and can be inventoried for years without degrading.<sup>43</sup>

Sensient's history dates back to 1905 with the establishment of a firm known as Warner Jenkinson in St. Louis, MO. In 1984, Warner Jenkinson was acquired by Universal Foods Corporation, the predecessor company to Sensient Technologies. The Sensient Color Group is a division of Sensient Technologies, one of the world's largest producers of natural and synthetic colors and certified food colors, supplying colorants to domestic and international producers of beverages, bakery products, processed foods, confections, pet foods, cosmetics, and pharmaceuticals. The Sensient Color Group is the largest commercial producer of allura red coloring in the United States.<sup>44</sup>

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<sup>35</sup> CR at II-6; PR at II-3.

<sup>36</sup> CR at II-5; PR at II-2.

<sup>37</sup> CR at III-1; PR at III-1.

<sup>38</sup> Petition, exhibits 12 and 20. See also, Conference Tr. at 7. Sensient argues that it was motivated to acquire Monarch because Monarch held patented technology for producing an extruded form of allura red, which was a superior product to anything that Sensient produces. The extruded form of allura red may command a premium price in the marketplace. It was Sensient's plan to use the Monarch capacity to grow the extruded allura red business. Sensient produced allura red at the Monarch facility from January 2000 through October 2000, after which the facility was shut down. Production during this period totaled roughly \*\*\* pounds. Sensient now produces the extruded form by producing allura red at its own facility in St. Louis, MO and then transporting that production to the extruder at the Monarch facility. (See Conference Tr. at 54-55; Petitioner's Postconference brief at p. 11; e-mail to Woodley Timberlake, USITC, from Baker & McKenzie, Apr. 2, 2003).

<sup>39</sup> CR and PR Table IV-3.

<sup>40</sup> CR and PR Table IV-2.

<sup>41</sup> CR and PR Table IV-1.

<sup>42</sup> CR and PR Tables III-1 and VII-1.

<sup>43</sup> Conference Tr. at 26.

<sup>44</sup> Petition at 8; CR and PR Table III-1.

Since 1991, Sensient/Warner Jenkinson has acquired a total of \*\*\* firms worldwide, \*\*\* in the United States and \*\*\* abroad.<sup>45</sup> Only \*\*\* of the \*\*\* had any production of allura red. In the \*\*\* instances where Sensient acquired firms that were themselves producers of allura red, Sensient shut down the acquired facility entirely and supplied the customer base previously served by that facility out of its own production at its St. Louis, MO, facility.<sup>46</sup>

Noveon first began producing allura red in 1980 under the name of Hilton Davis, which at that time operated as a division of Sterling Drug. In 1999, Hilton Davis became known as Noveon Hilton Davis. Noveon Hilton Davis' parent company, Noveon, Inc., is the successor company to the Performance Materials Segment of the B.F. Goodrich Corporation, which Noveon, Inc. acquired on February 28, 2001. Allura red is produced at the company's facility located in Cleveland, OH. Noveon \*\*\* over the period of investigation.

Allura red coloring is sold either directly to end users or through distributors and typically is sold as part of a basket of dyes. Annual contract sales make up \*\*\* percent of Sensient's sales and \*\*\* percent of Noveon's sales. Both petitioner and respondent reported that allura red coloring is sold in three market tiers, with tier one consisting of large multinational customers such as Heinz, Kraft, and Coca-Cola that buy large quantities of product under long-term contracts and purchase directly from the producer or importer.<sup>47</sup> \*\*\* reported that its tier one customers \*\*\* together accounted for \*\*\* percent of the firm's 2002 allura red sales, and Noveon's tier one customers \*\*\* accounted for \*\*\* percent of that firm's sales in 2002. Most tier one purchasers purchase allura red on a world-wide basis except for their U.S. operations because of the stringent FDA qualification process. The two domestic producers and Indian producers also supply tier one purchasers in foreign markets.<sup>48</sup>

Some tier one purchasers recently have sought to capitalize on their buying power by requiring suppliers to compete with each other through the use of "reverse auctions" conducted via the internet.<sup>49</sup> <sup>50</sup> Using this system of reverse auctions, purchasers announce an auction and place an open order for a 12-month contract that includes the volume and the starting bid price. Allura red suppliers then have 30 minutes to place an unlimited number of competing bids on the system. Bids are anonymous, but all participants can watch the bid prices entered in real time.<sup>51</sup> These large customers are able to secure volume discounts.

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<sup>45</sup> Acquired foreign firms include those in Canada, Germany, Italy, Peru, and the United Kingdom.

<sup>46</sup> Based on information contained in an e-mail to Woodley Timberlake, USITC, from Baker & McKenzie, Apr. 2, 2003.

<sup>47</sup> Customers in this tier generally require that suppliers be qualified and normally interface directly with the U.S. operations of allura red producers. Petition at 10.

<sup>48</sup> Conference Tr. at 48 (O'Brien), 63, 67-68 (Tiberwala).

<sup>49</sup> The record contains information on three reverse auctions conducted by two purchasers in 2001 and 2002. CR at II-3 - II-4; PR at II-1 - II-2.

<sup>50</sup> Chairman Okun also notes that evidence of tier one purchasers' significant buying power is further supported by the 1999 review of the acquisition by Universal Foods Corporation, the predecessor company to Sensient Technologies, of Pointing Holdings Limited in the United Kingdom, in which the British Competition Commission found that large customers, many of which are the same multinational corporations that are significant tier one purchasers in the United States, have "substantial buying power." Petition Exhibit 43 at 92.

<sup>51</sup> CR at II-2 - II-4; PR at II-1 - II-2; Conference Tr. at 90-111. During some auctions, firms that are not qualified (*i.e.*, Indian firms) to provide allura red coloring to the customer have to submit lower bids to offset the cost of qualification. Tr. at 111.

The second tier consists of other food, drug, or cosmetic color manufacturers who purchase products to fill out their color product line.<sup>52</sup> The third tier consists of numerous smaller customers that typically buy smaller quantities of products. Both domestic producers and importers use regional

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<sup>52</sup> CR at I-5; PR at I-4.

distributors to supply these smaller customers in the third tier, and, to a lesser extent, customers in the second tier as well.<sup>53</sup>

The domestic like product and subject merchandise are largely substitutable. All purchasers require that the product must meet FDA specifications for food and/or cosmetic use, but once these specifications are met, domestically produced and imported merchandise are largely interchangeable.<sup>54</sup> Respondent argues that there is, in addition, a lengthy initial qualification process imposed by tier one purchasers.<sup>55</sup> In addition, respondent argues that certain purchasers prefer allura red coloring that emits less dust than standard forms, which is why it has developed a dust-free, “soon-to-be-patented,” form of allura red under the trademark Spheroclean.<sup>56</sup> Domestic producers also market their own dust-free forms of allura red coloring.<sup>57</sup>

## **B. Volume of the Subject Imports**

Section 771(7)(C)(i) of the Act provides that the “Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.”<sup>58</sup>

Petitioner argues that U.S. imports of allura red are classified under HTS subheading 3204.12.50; however, subject imports actually entered the U.S. market under HTS 3204.12.45.<sup>59</sup> In any event, both of these HTS subheadings are basket categories of colorings that are not specific to allura red. Therefore, official import statistics for HTS subheadings 3204.12.45 or 3204.12.50 do not necessarily correlate specifically to the subject merchandise and are therefore not meaningful.<sup>60</sup> For this reason, we rely on importer questionnaires, which covered 100 percent of subject imports during the period of investigation.<sup>61</sup>

The absolute volume and value of U.S. imports of allura red from India fluctuated during the period of investigation from \*\*\* pounds, valued at \$\*\*\*, in 2000 to \*\*\* pounds, valued at \$\*\*\*, in 2001 and were \*\*\* pounds, valued at \$\*\*\*, in 2002.<sup>62</sup> The U.S. market share held by shipments of subject

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<sup>53</sup> CR at I-5; PR at I-4.

<sup>54</sup> CR at II-7; PR at II-6.

<sup>55</sup> Conference Tr. at 98-101. While petitioner asserted that it is not aware of any qualification process for tier one purchasers, it acknowledged that this may be due to the fact that it has been the major supplier to tier one purchasers for many years and that a qualification process is thus not necessary for its product. Conference Tr. at 41.

<sup>56</sup> Respondent Postconference Br. at 6.

<sup>57</sup> Respondent Postconference Br. at 7.

<sup>58</sup> 19 U.S.C. § 1677(7)(C)(i).

<sup>59</sup> CR at IV-1; PR at IV-1.

<sup>60</sup> On March 11, 2003, Commission staff had a telephone conversation with Mr. Harvey Kuperstein, national import specialist with U.S. Customs and Border Protection Department of Homeland Security, in which Mr. Kuperstein expressed the opinion that U.S. imports of allura red from India were improperly being recorded under HTS subheading 3204.12.45. (See Investigator’s Telephone and Other Sundry Notes, Mar. 11, 2003.) At the Commission’s conference, Roha USA was specifically questioned as to what HTS classification it enters its U.S. imports of allura red. Respondent postconference brief states that Roha USA’s U.S. imports of allura red enter the United States under HTS subheading 3204.12.45, a classification that also represents a basket category of goods. (See respondent postconference brief, p. 14.)

<sup>61</sup> Data on U.S. imports from India as reported in Commission questionnaires can be found in tabular form at CR and PR Table IV-1.

<sup>62</sup> CR and PR Table IV-1.

imports increased on the basis of apparent domestic consumption from \*\*\* percent in 2000 to \*\*\* percent in 2001, to \*\*\* percent in 2002. On the basis of value, subject imports' market share followed

similar trends increasing from \*\*\* percent in 2000 to \*\*\* percent in 2001, to \*\*\* percent in 2002.<sup>63</sup> The domestic industry held more than \*\*\* percent of the U.S. market for allura red coloring during the entire period of investigation. As a share of domestic production, subject imports were \*\*\* percent in 2000, \*\*\* percent in 2001, and \*\*\* percent in 2002.<sup>64</sup>

We find that the small volume of subject imports, and the modest increase in that volume, both in absolute terms and relative to domestic consumption or production, is not significant.

### **C. Price Effects of the Subject Imports**

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

- (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
- (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.<sup>65</sup>

The Commission requested U.S. producers and importers of allura red to provide quarterly data for the total quantity and value of allura red that was shipped to unrelated purchasers in the U.S. market. Data were requested for sales in four volume categories.<sup>66</sup> Pricing data accounted for virtually all of U.S. producers' shipments of allura red and U.S. shipments of subject imports from India in 2002.<sup>67</sup>

Subject imports consistently undersold the domestic like product during the period of investigation.<sup>68</sup> In isolation, this underselling could be viewed as significant, though over the period of investigation, the margins of underselling have become smaller partly because prices of subject imports generally have increased.<sup>69</sup> Subject import prices reached their highest point at the end of the period of investigation when subject import volume was at its highest.<sup>70</sup> Underselling margins were also smallest at the end of the period of investigation, suggesting that the significance of the underselling was diminishing over the period.

In general, prices of domestically produced allura red trended downward somewhat over the period of investigation, although for most of the producer groups prices fluctuated without clear patterns. For sales to purchasers in group 1, the data for domestic producers shows a downward trend from the first quarter of 2000 through the first quarter of 2001. Prices for producers generally increased until the

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<sup>63</sup> CR and PR Table IV-2.

<sup>64</sup> CR and PR Table IV-1.

<sup>65</sup> 19 U.S.C. § 1677(7)(C)(ii).

<sup>66</sup> These include: (1) Sales of allura red coloring that are less than 500 pounds; (2) sales of allura red coloring that are between 500 pounds and 4,999 pounds; (3) sales of allura red coloring that are between 5,000 pounds and 24,999 pounds; and (4) sales of allura red coloring that are 25,000 pounds or greater. CR at V-4; PR at V-3.

<sup>67</sup> CR at V-4; PR at V-3.

<sup>68</sup> CR and PR Tables V-1 - V-4 and E-1 -E-2.

<sup>69</sup> CR at V-7. For instance, for purchaser group 2 the first observable margin of underselling in 2000 was \*\*\* percent while the last observable margin of underselling in 2002 was \*\*\* percent. This trend of declining margins of underselling was true also for purchaser group 1. CR and PR Tables V-1 - V-4.

<sup>70</sup> For instance, for purchaser group 2, subject import prices increased from \$\*\*\* per pound to \$\*\*\* per pound from the first to the last observable instance. CR and PR Tables V-1 - V-4.

second quarter of 2002, and fell in the third and fourth quarters.<sup>71</sup> For sales to purchasers in group 2, prices for domestically produced allura red declined in the third quarter of 2000, and continued a slow

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<sup>71</sup> Excluding the first quarter of 2000, when there were no comparable sales of allura red from India, prices to group 1 purchasers rose and fell with no apparent overall pattern. CR and PR Table V-1.

decline through fourth quarter of 2002.<sup>72</sup> For sales to purchasers in group 3, where only two sales were noted by importers, prices fluctuated within a narrow range from quarter to quarter but declined overall from first quarter 2000 to the fourth quarter 2002.<sup>73</sup> Prices for allura red sold to purchasers in the largest purchaser group (group 4) were at their highest point at the beginning of the period of investigation, fell in the second quarter of 2000 and gradually increased through the first quarter of 2001. From the first quarter of 2001 to the last quarter of 2002, prices were relatively steady at \*\*\* per pound.<sup>74</sup>

Any declining prices for the domestic like product cannot be attributed, to a significant degree, to the subject imports. First, as noted above, subject import volume was very small throughout the period of investigation. The extremely limited presence of subject imports would restrict their ability to be a moving force with respect to the overall pricing environment for allura red. Second, domestic prices began declining during 2000, a year in which subject imports were at only \*\*\* percent of consumption. Most of the modest growth in import market share occurred in 2001; however, domestic prices for two of the product groups actually rose in the first half of 2001 until the second quarter of 2002, before falling in the third and fourth quarters of 2002.<sup>75</sup> Third, prices for the subject imports generally rose over the period of investigation such that underselling margins were significantly reduced. Thus, in addition to the very low volume of subject imports, there is a lack of correlation between trends in the volume and prices of the subject imports and the volume and prices of the domestic like product.<sup>76</sup>

We also find no significant price suppressing effects by the subject merchandise. The domestic industry's cost of goods sold relative to net sales fluctuated, but at the end of the period of investigation, when subject imports were at their highest, cost of goods sold was at a level below the level in 2000 when the subject imports were barely present in the market.<sup>77</sup> Unit costs of goods sold declined slightly more than unit sales values over the period.<sup>78</sup> This suggests that prices were not being suppressed relative to costs and the industry was not experiencing a cost-price squeeze. Also, while several lost revenue allegations were confirmed, the overall evidence of alleged lost revenues by domestic producers to subject imports is mixed and is not dispositive of whether subject imports had any significant price effects in the market as a whole.<sup>79</sup>

The record appears to support respondent's contention that domestic prices were declining before the entry of subject imports, as early as 1999. This may well be due to intra-industry price competition between Noveon, Sensient, and Monarch.<sup>80</sup> \*\*\* during the period of investigation.<sup>81</sup> \*\*\* of the period of investigation and it \*\*\*.<sup>82</sup> The shipments of \*\*\* alone, which is the \*\*\* of the two domestic producers, were approximately \*\*\* than subject imports in 2002 (when subject imports peaked). The industry's declining costs would have enabled domestic producers to lower prices while still maintaining

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<sup>72</sup> Excluding the high domestic prices for the first two quarters of 2000, which were for smaller quantities and occurred in the absence of comparable sales of subject imported allura red, domestic prices for group 2 fell approximately \*\*\* percent over the period of investigation. CR and PR Table V-2.

<sup>73</sup> CR and PR Table V-3.

<sup>74</sup> CR and PR Table V-4.

<sup>75</sup> CR and PR Tables IV-2 and V-1 - V-4

<sup>76</sup> We note that domestic shipments of the pricing products generally increased over the period of investigation. CR and PR at Tables V-1 - V-4.

<sup>77</sup> CR and PR table VI-1.

<sup>78</sup> CR and PR Table VI-1.

<sup>79</sup> CR and PR Table V-6.

<sup>80</sup> CR and PR Table E-1.

<sup>81</sup> CR and PR Figure E-1.

<sup>82</sup> CR and PR Table III-3. \*\*\* lowest prices, which occurred in 2002, coincided with the largest one- year increase in \*\*\* commercial shipments in seven years. CR and PR Table E-1.

profitability. These facts strongly suggest that it was domestic competition that was a driving force behind allura red prices rather than subject imports.

Petitioner submitted pricing information showing that \*\*\* to refute respondent's claim that domestic price declines began prior to the entry of subject imports to the U.S. market. We find that the data do not support petitioner's argument. \*\*\* and \*\*\* (prior to subject imports entering the market) and again in 2000 (when subject imports' market share was \*\*\* percent).<sup>83</sup>

We note that the purchasing power of tier one purchasers may also have exerted some downward pressure on prices.<sup>84</sup> Several tier one purchasers introduced the reverse auction internet bidding system in 2000 and forced all suppliers in the U.S. market who wanted to sell to them to participate in the bidding process. Both domestic producers and Roha stated that the internet bidding system had a significant impact on the market for allura red.<sup>85</sup>

In sum, we find that despite evidence of underselling by subject imports there is a lack of correlation between the volume of subject imports and their pricing in the market as well as a lack of correlation between declining or fluctuating domestic prices and rising subject import pricing. The very small volume and market share of subject imports limit their impact on pricing. Therefore, we find that subject imports have not had significant adverse effects on domestic prices during the period of investigation.

#### **D. Impact of the Subject Imports**

Section 771(7)(C)(iii) provides that the Commission, in examining the impact of the subject imports on the domestic industry, "shall evaluate all relevant economic factors which have a bearing on the state of the industry."<sup>86</sup> These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered "within the context of the business cycle and conditions of competition that are distinctive to the industry."<sup>87</sup>

We find that the subject imports of allura red coloring from India have not had a significant impact on the condition of the domestic industry. Although the volume and market share of the subject imports

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<sup>83</sup> CR and PR Table E-1. Moreover, petitioner submitted a document detailing \*\*\* that also contained a statement by \*\*\* This observation by \*\*\* was made at the beginning of the period of investigation and predates the entry of any real subject import volume into the United States. Petitioner Postconference Br. Attachment 7 – \*\*\*. In addition, \*\*\*.

<sup>84</sup> As Chairman Okun noted above, in 1999 while conducting a review of the acquisition by Universal Foods Corporation, the predecessor to Sensient Technologies, of Pointing Holdings Limited, the British Competition Commission found that large customers, many of which are the same multinational corporations present here, have "substantial buying power." Petition Exhibit 43 at 92.

<sup>85</sup> CR at II-2 - II-5.

<sup>86</sup> 19 U.S.C. § 1677(7)(C)(iii); see also SAA at 851 and 885 ("In material injury determinations, the Commission considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they also may demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports." Id. at 885).

<sup>87</sup> 19 U.S.C. § 1677(7)(C)(iii). The statute instructs the Commission to consider the "magnitude of the dumping margin" in an antidumping proceeding as part of its consideration of the impact of imports. In its notice of initiation, Commerce estimated that dumping margins for imports of allura red coloring from India ranged from 137.69 to 226.21 percent. 68 Fed. Reg. 15431 (March 31, 2003).

increased slightly during the period of investigation, the volume and market share were not significant even at their peak. Nothing in the record indicates that subject imports had significant impact

on the condition of the industry during this period. This lack of impact is consistent with the fact that the domestic industry's performance remained strong throughout the period of investigation.

The domestic industry's production levels increased significantly from \*\*\* in 2000 to \*\*\* pounds in 2002.<sup>88</sup> Similarly, the industry's domestic shipments increased, growing from \*\*\* pounds in 2000 to \*\*\* pounds in 2002. Although the industry's share of apparent domestic consumption volume decreased slightly from \*\*\* percent in 2000 to \*\*\* percent in 2002, the industry's dominance over the market remained virtually unchallenged. Moreover, despite a slight increase in capacity during this period, the industry's capacity utilization rates increased significantly from \*\*\* percent in 2000 to \*\*\* percent in 2002.<sup>89</sup>

The domestic industry's financial performance was robust. Gross profits, operating income, operating income ratios and net income all increased from 2000 to 2002.<sup>90</sup> Moreover, despite a decline in unit sales value, the cost of goods sold and SG&A similarly declined leaving operating income per pound relatively unchanged between 2000 and 2002.<sup>91</sup> In sum, the record indicates that the small increase in subject import volumes and lower import prices had little, if any, adverse impact on the financial condition or production operations of the domestic industry.<sup>92</sup>

Sensient argues that it was unable to make necessary capital expenditures or to invest in research and development. However, we note that Sensient had \*\*\* operating income performance and positive cash flow in every year of the period of investigation.<sup>93</sup> In fact, Sensient had \*\*\* during the period of investigation.<sup>94</sup> Moreover, as noted above, Sensient purchased Monarch's facilities in 2000, including its patented extruded production process, but shut down Monarch's production line later that year.<sup>95</sup> This leads us to conclude that the domestic industry has made significant capital investments during the period of investigation, and that its alleged limited expenditures on R&D were more business decisions than economic necessity. \*\*\* throughout the period of investigation, even in 2000, when subject imports were barely present in the market. \*\*\*.<sup>96</sup>

As discussed above, we do not find that the subject import volume had any adverse effects on the domestic industry during the period of investigation. The decline in U.S. prices over the period of investigation was not due to subject imports to any significant degree. In light of these facts and the robust performance of the domestic industry during the period of investigation, we find that there is no reasonable indication that the domestic industry is materially injured by reason of the allegedly LTFV imports and/or subsidized imports of allura red coloring from India.

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<sup>88</sup> CR and PR at Table C-1.

<sup>89</sup> CR and PR at Table C-1.

<sup>90</sup> CR and PR Table VI-1.

<sup>91</sup> CR and PR Table VI-1.

<sup>92</sup> Industry employment indicators were mixed but positive overall. The number of production workers declined from \*\*\*, but hours worked, wages paid, and productivity all posted solid gains. CR at Table III-5. Industry inventories grew by \*\*\* percent over the period of investigation, from \*\*\* pounds to \*\*\* pounds. However, all of this increase occurred between 2001 and 2002, when shipments of subject imports grew by only \*\*\* pounds. CR at Table C-1. Accordingly, subject imports were responsible for no more than a small fraction of the industry's increased inventories.

<sup>93</sup> CR and PR Table VI-4.

<sup>94</sup> CR and PR Table VI-4.

<sup>95</sup> CR at III-1, n.2; PR at III-1, n.2.

<sup>96</sup> CR and PR Table VI-7.

## V. NO REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF ALLEGEDLY LTFV AND SUBSIDIZED SUBJECT IMPORTS FROM INDIA

Section 771(7)(F) of the Act directs the Commission to determine whether an industry in the United States 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.”<sup>97</sup> The Commission may not make such a determination “on the basis of mere conjecture or supposition,” and considers the threat factors “as a whole.”<sup>98</sup> In making our determination, we have considered all factors that are relevant to this investigation.<sup>99</sup> Based on an evaluation of the relevant statutory factors, we find that there is no

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<sup>97</sup> 19 U.S.C. § 1677d(b) and 1677(7)(F)(ii).

<sup>98</sup> 19 U.S.C. § 1677(7)(F)(ii). An affirmative threat determination must be based upon “positive evidence tending to show an intention to increase the levels of importation.” *Metallverken Nederland B.V. v. United States*, 744 F. Supp. 281, 287 (Ct. Int’l Trade 1990), citing *American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1280 (Ct. Int’l Trade 1984); see also *Calabrian Corp. v. United States*, 794 F. Supp. 377, 387-88 (Ct. Int’l Trade 1992), citing H.R. Rep. No. 98-1156 at 174 (1984).

<sup>99</sup> 19 U.S.C. § 1677(7)(F). The Commission must consider, in addition to other relevant economic factors, the following statutory factors in its threat analysis:

- (I) if a countervailable subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement) and whether imports of the subject merchandise are likely to increase,
- (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,
- (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,
- (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices and are likely to increase demand for further imports,
- (V) inventories of the subject merchandise,
- (VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,
- (VII) in any investigation under this subtitle which involves imports of both a raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission under section 1671d(b)(1) or 1673d(b)(1) of this title with respect to either the raw agricultural product or the processed agricultural product (but not both),
- (VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
- (IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

Moreover, the Commission shall consider the threat factors “as a whole” in making its determination “whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur” unless an order issues. In addition, the Commission must consider whether dumping findings or antidumping remedies in markets of foreign countries against the same class of merchandise suggest a threat of material injury to

reasonable indication that an industry in the United States is threatened with material injury by reason of imports of allura red coloring from India that are allegedly subsidized and/or sold in the United States at LTFV.

As an initial matter, we find that the domestic industry is not vulnerable to a threat of material injury by reason of the subject imports from India. As discussed above, the industry's performance remained robust during the period of investigation, with the industry enjoying \*\*\* operating income and positive income ratios each of the three years of the period of investigation.<sup>100</sup> The domestic industry's production, capacity utilization, and shipments all increased during the period of investigation,<sup>101</sup> despite the presence of subject imports. The domestic industry's market share remained above \*\*\* percent from 2000 to 2002.<sup>102</sup>

We find that the small rate of increase in the volume and market share of the subject imports does not indicate a likelihood of substantially increased imports. Subject import volumes had little direct impact, if any, on the domestic industry, and there is no evidence that conditions of competition would change in such a way that any increases in the imminent future would have an adverse impact on the domestic industry. Accordingly, the most recent trends in subject import volumes do not indicate that it is likely that there will be substantially increased imports of subject merchandise in the imminent future.

We also find that there is no indication that unused production capacity or any imminent increases in production capacity in India will lead to substantially increased imports in the imminent future. While the record indicates that the subject producers of allura red coloring in India had substantial unused capacity, this unused capacity existed from the beginning of the period of investigation and did not result in significant export volumes to the United States. In fact, all producers, domestic and foreign, had significant unused capacity.<sup>103</sup> In addition, in 2002 exports of allura red coloring from India to markets other than the United States were approximately three times larger than exports to the United States and nearly doubled over the period of investigation.<sup>104</sup> Because markets other than the United States are, collectively, increasingly more important to Indian producers than the U.S. market, there is no basis to conclude that any unused capacity, if used, would be focused on increasing exports to the United States.<sup>105</sup> Inventories of allura red held by U.S. importers and by Indian producers remained modest in the context of the overall U.S. market.<sup>106</sup> Furthermore, there are no known dumping findings or investigations on allura red coloring in other markets that might impede exports from India to those markets.<sup>107</sup> Thus, we do not find that unused foreign producer capacity or inventories will result in substantially increased imports to the U.S. market.

While allura red coloring can be manufactured using the same equipment as is used to produce other colorants such as \*\*\*, evidence indicates that this potential for product shifting is limited.<sup>108</sup> Because allura red coloring is sold as a package of dyes, a manufacturer must offer a large range of

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the domestic industry.

Factor VII is inapplicable to these investigations.

<sup>100</sup> CR and PR at Table C-1.

<sup>101</sup> CR and PR at Table C-1.

<sup>102</sup> CR and PR Table IV-2.

<sup>103</sup> CR and PR Tables III-1 and VII-1.

<sup>104</sup> CR and PR Table VII-1.

<sup>105</sup> We note that for 2003 the Indian producers project a modest increase in exports to the United States and a much larger increase in exports to other markets. CR and PR Table VII-1.

<sup>106</sup> CR and PR Tables VII-1 and C-1.

<sup>107</sup> CR at VII-1, n.1; PR at VII-1, n.1.

<sup>108</sup> CR at III-4; PR at III-2 - III-3; Conference Tr. at 45.

colors to potential customers in order to successfully bid for business.<sup>109</sup> Thus, converting a production line from entirely making yellow dyes for instance, to making red dyes would be impractical because the manufacturer would be unable to compete for customers demanding a basket containing allura red and yellow coloring. Regardless of any ability of Indian producers to shift from production of other products to production of allura red, there is no basis to conclude that such a shift would actually occur in the imminent future.

Petitioner argues that imports are likely to increase significantly in the imminent future focusing on the possibility that \*\*\* is poised to take all of the business Sensient now has with \*\*\*. \*\*\* has confirmed that \*\*\*.<sup>110</sup> This offer is for about \*\*\* pounds, which if captured by subject imports, would give them a market share of approximately \*\*\* percent. We find, however, that the loss of the \*\*\* account to \*\*\* is not imminent, nor necessarily likely. While the record contains conflicting information on when the Sentient-\*\*\* contract expires, it appears that the contract extends at least through the end of 2003.<sup>111</sup>

In addition, while \*\*\* has offered a price of around \$\*\*\* per pound, which is lower than the \$\*\*\* that Sensient now offers \*\*\* price offer is \*\*\* that recent sales to large customers have gone for in the internet transactions.<sup>112</sup> On balance, we find that because \*\*\* purchases larger volumes than the volumes at issue in these previous internet purchases, there is no reason why it should not be able to secure these types of prices, if not better prices, whether or not subject imports compete for the contract. Moreover, while Sensient argues that its contracts have a meet-or-release clause, \*\*\* has not invoked this clause even though it has received a lower quote.<sup>113</sup>

Additionally, we acknowledge that Roha will continue to fulfill a contract with \*\*\* during 2003, but there is no evidence to suggest that the overall level of subject imports will significantly change from present levels. Based on the above discussion, we find that while subject imports are likely to continue to be present in the U.S. market, they will not reach injurious levels in the imminent future.

We also find it unlikely that subject imports will enter the U.S. market at prices likely to suppress or depress domestic prices to any significant degree or to increase demand for subject imports. As discussed above, the record evidence indicates that subject import prices have had no significant adverse effects on domestic prices. Moreover, the margins of underselling by subject imports have been declining throughout the period of investigation. We see nothing in the record that indicates that conditions of competition in the industry will change so significantly in the imminent future that domestic prices will likely be adversely affected to a significant degree by subject import prices.

We also find that subject imports are not likely to have an actual or potential negative effect on the domestic industry's existing development and production efforts. As discussed above, the domestic industry had \*\*\* capital expenditures during the period of investigation and elected not to spend its operating profits and cash flow on research and development during the period of investigation.<sup>114</sup>

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<sup>109</sup> Conference Tr. at 45. "The typical transaction will be to make an offering on multiple colors that a customer is using, so you wouldn't necessarily just quote on Allura Red. You would quote on blue 1, yellow 5, yellow 6, and Allura Red." (Morris)

<sup>110</sup> CR and PR Table V-7.

<sup>111</sup> \*\*\* Telephone notes of Catherine DeFilippo, April 16, 2003.

<sup>112</sup> Petitioners' Postconference Brief at 8 and Attachment 3. \*\*\* offered price could be slightly higher or lower depending on the applicability of volume discounts and the form of the product chosen. CR at II-2 - II-3; PR at II-1 - II-2.

<sup>113</sup> CR and PR Table V-6. We note that \*\*\*.

<sup>114</sup> CR and PR Table VI-7.

Moreover, capital expenditures actually increased from 2001 to 2002, when the volume and market share of subject imports increased to their highest (albeit modest) levels of the period.<sup>115</sup>

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<sup>115</sup> CR and PR at Tables C-2, Tables IV-4 & IV-7.

Several of the alleged subsidies on which Commerce initiated its CVD investigation may be export subsidies as described in Article 3 of the Subsidies Agreement.<sup>116</sup> We do not believe that these alleged export subsidies are likely to result in an increase in the volume of subject imports. Several of the alleged subsidies have existed for years, dating back to as early as 1980.<sup>117</sup> They did not spur significant allura red exports to the United States during the period of investigation and there is no basis to conclude that they are likely to do so in the imminent future.

Finally, there is no evidence of any other demonstrable adverse trends that indicate a probability that the subject imports will materially injure the domestic industry.<sup>118</sup> On the contrary, trends in the industry's performance have been positive, and support our finding that the industry is not threatened with material injury by reason of the subject imports. Accordingly, we find no reasonable indication that the domestic industry producing allura red coloring is threatened with material injury by reason of subject imports from India.

### **CONCLUSION**

For the reasons stated above, we determine that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of allura red coloring from India that are allegedly subsidized and allegedly sold in the United States at less than fair value.

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<sup>116</sup> Department of Commerce Notice of Initiation, 68 Fed. Reg. 15433, 15435 (March 31, 2003).

<sup>117</sup> See e.g., Petition at 17-35, 38.

<sup>118</sup> 19 U.S.C. § 1677(7)(F)(I)(IX).