

UNITED STATES INTERNATIONAL TRADE COMMISSION

OLEORESIN PAPRIKA FROM INDIA  
Investigation No. 731-TA-923 (Preliminary)

DETERMINATION AND VIEWS OF THE COMMISSION  
(USITC Publication No. 3415, April 2001)

# UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigation No. 731-TA-923 (Preliminary)

## OLEORESIN PAPRIKA FROM INDIA

### DETERMINATION

On the basis of the record<sup>1</sup> 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 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 oleoresin paprika, provided for in subheading 3301.90.10<sup>2</sup> 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).

### BACKGROUND

On March 6, 2001, a petition was filed with the Commission and the Department of Commerce by Rezolex, Ltd. Co., Las Cruces, NM, alleging that an industry in the United States is materially injured and threatened with material injury by reason of LTFV imports of oleoresin paprika from India. Accordingly, effective March 6, 2001, the Commission instituted antidumping duty investigation No. 731-TA-923 (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 14, 2001 (66 FR 14934). The conference was held in Washington, DC, on March 26, 2001, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on April 20, 2001. The views of the Commission are contained in USITC Publication 3415 (April 2001), entitled *Oleoresin Paprika from India: Investigation No. 731-TA-923 (Preliminary)*.

By order of the Commission.

**Donna R. Koehnke**

Secretary

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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)).

<sup>2</sup> Other applicable subheadings identified in Commerce's scope include 1301.90.90, 1302.19.90, 3203.00.80, 3205.00.05, and 3301.90.50.

## VIEWS OF THE COMMISSION

Based on the record in this investigation, 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 oleoresin paprika from India that are allegedly sold in the United States at less than fair value.

### 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, threatened with material injury, or whether the establishment of an industry is materially retarded, by reason of the allegedly unfairly traded imports.<sup>1</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>2</sup>

### II. DOMESTIC LIKE PRODUCT AND INDUSTRY

#### A. Domestic Like Product

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>3</sup> Section 771(4)(A) of the Tariff Act of 1930, as amended (“the Act”), defines the relevant domestic industry as the “[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>4</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>5</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>6</sup> No single factor is dispositive, and the Commission

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<sup>1</sup> 19 U.S.C. § 1673b(a); see also American Lamb Co. v. United States, 785 F.2d 994, 1001-04 (Fed. Cir. 1986); Ranchers-Cattlemen Action Legal Foundation v. United States, 74 F. Supp.2d 1353, 1368-69 (Ct. Int’l Trade 1999).

<sup>2</sup> American Lamb, 785 F.2d at 1001; see also Texas Crushed Stone Co. v. United States, 35 F.3d 1535, 1543 (Fed. Cir. 1994).

<sup>3</sup> 19 U.S.C. § 1677(4)(A).

<sup>4</sup> 19 U.S.C. § 1677(4)(A).

<sup>5</sup> 19 U.S.C. § 1677(10).

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

may consider other factors it deems relevant based on the facts of a particular investigation.<sup>7</sup> The Commission looks for clear dividing lines among possible like products and disregards minor variations.<sup>8</sup> The Commission must base its domestic like product determination on the record in this investigation, and it is not bound by prior determinations pertaining even to the same imported products.<sup>9</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 less than fair value, the Commission determines what domestic product is like the imported articles Commerce has identified.<sup>10</sup>

Commerce’s notice of initiation defines the imported merchandise within the scope of this investigation as follows:

oleoresin extracts made from red peppers (generally known as “oleoresin paprika”), regardless of solvent content or pepper pungency. Other names that refer to this product may include, but are not limited to, paprika oleoresin, oleoresin of paprika, paprika extract, extract of paprika, and “ORP.” Manufacturers typically produce oleoresin paprika from the pepper variety called *Capsicum Annum L*, but they may produce oleoresin paprika from other red pepper varieties. Except as specified below, all products, concentrations, and qualities of oleoresin paprika regardless of pepper source are included in this investigation.

The merchandise subject to this investigation may enter under 1301.90.9090, 1302.19.9040, 3203.00.8000, 3205.00.0500, 3301.90.1010, 3301.90.1050, and 3301.90.5000 of the Harmonized Tariff Schedule of the United States (HTSUS), but these subheadings also cover products that are outside the scope of this investigation. Specifically excluded from the scope of this investigation are any oleoresin extracts of red peppers that have an American Spice Trade Association (ASTA) value of less than 500 ASTA or 20,000 Color Units (500 ASTA x 40 = 20,000 Color Units) as determined by spectrophotometric measurement. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.<sup>11</sup>

We considered whether the domestic like product should include artificial colors or other

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States, 913 F. Supp. 580, 584 (Ct. Int’l Trade 1996).

<sup>7</sup> See, e.g., S. Rep. No. 96-249 at 90-91 (1979).

<sup>8</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>9</sup> Nippon, 19 CIT at 455; Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1169 n.5 (Ct. Int’l Trade 1988) (particularly addressing like product determination); Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1087-88 (Ct. Int’l Trade 1988).

<sup>10</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 748-52 (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

<sup>11</sup> Oleoresin Paprika from India, 66 Fed. Reg. 17408 (Mar. 30, 2001).

oleoresins as well as oleoresin paprika.<sup>12</sup> Oleoresin paprika is typically the extract of dry paprika peppers, and it is a red, viscous oil used primarily to color food products.<sup>13</sup> The producer and importer questionnaire responses indicate that there are relatively few substitutes for oleoresin paprika in its end uses. While artificial food colorings may be used as a substitute, the color difference relative to oleoresin paprika is large, changes in their prices do not affect the price of oleoresin paprika, and different producers and production processes are involved.<sup>14</sup> The other oleoresins reported to be produced in the United States using the same production equipment as oleoresin paprika are from other spices, carrots, and jojoba,<sup>15</sup> that presumably would yield different colors than paprika peppers. Differences in color, flavor, and fitness for human consumption limit the interchangeability of the various types of oleoresins. Based on these factors, we do not include artificial food colors or other oleoresins in the domestic like product. Accordingly, we define the domestic like product coextensively with the scope of this investigation as oleoresin paprika.

## **B. Domestic Industry and Related Parties**<sup>16</sup>

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.<sup>17</sup> During the period of investigation, four companies operated extraction facilities in the United States, petitioner Rezolex, Kalsec, as well as Gilroy Foods and Rogers Foods, both of which ceased production during the period of investigation.<sup>18</sup> Based on our determination regarding the domestic like product, we define the domestic industry as all producers of oleoresin paprika.

We must further determine whether any producer of the domestic like product should be excluded from the domestic industry pursuant to section 771(4)(B) of the Act. That provision of the statute allows the Commission, if appropriate circumstances exist, to exclude from the domestic industry producers that are related to an exporter or importer of subject merchandise or which are themselves importers.<sup>19</sup> Exclusion of such a producer is within the Commission's discretion based upon the facts presented in each case.<sup>20</sup>

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<sup>12</sup> None of the parties raised any issue with respect to the definition of the domestic like product.

<sup>13</sup> Confidential Staff Report ("CR") at I-2; Public Staff Report ("PR") at I-1.

<sup>14</sup> CR at II-4; PR at II-3.

<sup>15</sup> CR at II-1 to II-2; PR at II-1, II-2.

<sup>16</sup> We considered whether growers and processors of paprika peppers should be included in the domestic industry under 19 U.S.C. § 1677(4)(E), but concluded that oleoresin paprika is not produced from paprika peppers through a single continuous line of production since only a small percentage (\*\*\*) of paprika peppers are used in the production of oleoresin paprika.

<sup>17</sup> See United States Steel Group v. United States, 873 F. Supp. 673, 681-84 (Ct. Int'l Trade 1994), aff'd, 96 F.3d 1352 (Fed. Cir.1996).

<sup>18</sup> CR at III-1; PR at III-1.

<sup>19</sup> 19 U.S.C. § 1677(4)(B).

<sup>20</sup> Sandvik AB v. United States, 721 F. Supp. 1322, 1331-32 (Ct. Int'l Trade 1989), aff'd mem., 904 F.2d 46 (Fed. Cir. 1990); Empire Plow Co. v. United States, 675 F. Supp. 1348, 1352 (Ct. Int'l Trade 1987). The primary factors the Commission has examined in deciding whether appropriate circumstances exist to exclude the related parties include: (1) the percentage of domestic production attributable to the importing producer; (2) the reason the U.S. producer has decided to import the product subject to investigation, i.e., whether the firm benefits from the less than fair value sales or subsidies or whether the firm must import in order to enable it to continue production and compete in the U.S. market; and (3) the position of the related producers vis-a-vis the rest of the industry, i.e.,

\*\*\*, a domestic producer of oleoresin paprika, imported subject merchandise from India during the investigation period, and it, therefore, is a related party under the statute.<sup>21</sup> \*\*\* accounted for approximately \*\*\* percent of domestic oleoresin paprika production, and it imported from India approximately \*\*\* percent of its sales. It reported that it imported oleoresin paprika from India \*\*\*.<sup>22</sup> Because \*\*\* accounts for a significant share of the domestic production of oleoresin paprika, its imports of subject merchandise are \*\*\* compared to the size of its domestic production. The record, therefore, indicates that its interests lie primarily in domestic production and not importation, and that \*\*\* is not deriving a significant benefit from its subject imports. Accordingly, we find that appropriate circumstances do not exist to exclude \*\*\* from the domestic industry.

### **III. NO REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF ALLEGEDLY LESS THAN FAIR VALUE IMPORTS<sup>23</sup>**

In the preliminary phase of an antidumping duty investigation, 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>24</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>25</sup> The statute defines “material injury” as “harm which is not inconsequential, immaterial, or unimportant.”<sup>26</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>27</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>28</sup>

For the reasons discussed below, we determine that there is no reasonable indication that the domestic oleoresin paprika industry is materially injured by reason of subject imports from India.

#### **A. Conditions of Competition**

The following conditions of competition are pertinent to our analysis.

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whether inclusion or exclusion of the related party will skew the data for the rest of the industry. See, e.g., Torrington Co. v. United States, 790 F. Supp. 1161, 1168 (Ct. Int’l Trade 1992), aff’d mem., 991 F.2d 809 (Fed. Cir. 1993). The Commission has also considered the ratio of import shipments to U.S. production for related producers and whether the primary interests of the related producers lie in domestic production or in importation. See, e.g., Melamine Institutional Dinnerware from China, Indonesia, and Taiwan, Inv. Nos. 731-TA-741-743 (Final), USITC Pub. 3016 at 14 n.81 (Feb. 1997).

<sup>21</sup> CR at III-1; PR at III-1.

<sup>22</sup> CR at III-1; PR at III-1; CR/PR at Table III-1.

<sup>23</sup> We find that subject imports of oleoresin paprika from India are not negligible under 19 U.S.C. § 1677(24), as they were 43.8 percent of total imports of oleoresin paprika in the most recent twelve month period for which data are available. CR/PR at Table IV-1.

<sup>24</sup> 19 U.S.C. § 1673b(a).

<sup>25</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>26</sup> 19 U.S.C. § 1677(7)(A).

<sup>27</sup> 19 U.S.C. § 1677(7)(C)(iii).

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

Due to color instability, fresh paprika peppers cannot be stored.<sup>29</sup> Once farmers harvest the paprika peppers, processors usually grade, wash, and dehydrate them from an 80 percent moisture level to a 3 to 4 percent moisture level within a 48-hour period. The resulting dry paprika must be extracted quickly or stored under expensive low-temperature conditions; otherwise, the dry paprika will lose on average 2 to 3 color points per day. Once the product has been extracted, oleoresin paprika is more stable and can be stored in inventory for longer periods of time.<sup>30</sup> The extraction process includes washing the dry pepper with hexane to remove the oil, followed by distillation to remove the hexane, then filtration and other refining. The final production step usually includes standardizing the crude oleoresin paprika to specific color values with an agent such as soy or cottonseed oil to establish the exact color required by the customer.<sup>31 32</sup>

The color of the paprika pepper influences the color of the crude oleoresin paprika. The color value of paprika peppers varies from year to year based on changes in growing conditions, weather, and other such factors.<sup>33</sup> Crop yields in the United States and elsewhere are dependent upon factors such as weather patterns and crop disasters. For example, the record indicates that extensive wind and insect damage affected the supply of paprika peppers in the United States in 1999.<sup>34</sup> Such uncertainties lead purchasers of oleoresin paprika to rely on multiple suppliers.<sup>35</sup>

Domestic producers sell the oleoresin paprika that they produce to both distributors and end users, whereas importers of Indian oleoresin paprika predominantly sell to end users.<sup>36</sup> Oleoresin paprika is sold on a color and weight basis. Subject imports, nonsubject imports, and the domestic like product were sold in a number of standard color unit denominations (e.g., 40,000, 80,000, and 100,000 color units) during the period of investigation. In addition to being imported in standard color unit denominations, subject oleoresin paprika from India also was imported in nonstandard color units, such as 116,000 or 105,000 color units, based on prorated prices. Importers then added value to those imports by standardizing the color value or incorporating the product into flavor blends.<sup>37</sup>

Although industry participants reported that demand for oleoresin paprika has been relatively stable, the record indicates that apparent U.S. consumption increased significantly between 1998 and

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<sup>29</sup> The harvest period in the southwestern U.S. region, where paprika peppers are grown, begins about October 15<sup>th</sup> and runs approximately to the end of December. Because of the instability of the raw material (fresh paprika peppers) and intermediate product (dry paprika), the petitioner invested in expensive continuous process production equipment so that it could extract during harvest season. Conference Tr. at 26-28, 42-43.

<sup>30</sup> Conf. Tr. at 25-26, 29-30, 41-43.

<sup>31</sup> Petition at 7-8.

<sup>32</sup> Color is determined by spectrophotometric measurement of the color absorption at a wavelength of 460 nm. There are two industry color value references, the American Spice Trade Association (“ASTA”) analysis and the Color Unit analysis. The formula for conversion from ASTA to Color Units is: ASTA value x 40 = Color Units.

<sup>33</sup> Petition at 8; Conference Tr. at 19-20.

<sup>34</sup> CR at II-1 to II-2, III-3; PR at II-1, III-1.

<sup>35</sup> Conference Tr. at 58, 68.

<sup>36</sup> CR at II-1; PR at II-1.

<sup>37</sup> Conference Tr. at 85-86.

2000.<sup>38</sup> Non-subject imports were present in the U.S. market throughout the period of investigation.<sup>39</sup>

The record reflects that the degree of substitution between domestic and imported oleoresin paprika depends upon such factors as relative prices, quality (e.g., grade standards, reliability of supply, defect rates), and conditions of sale (e.g., price discounts/rebates, lead times between order and delivery dates, payment terms, product services).<sup>40</sup> Purchasers of oleoresin paprika have specification sheets with detailed performance characteristics regarding minimum or maximum impurities, color, hue,<sup>41</sup> sludge level, and acetone insoluble level.<sup>42</sup> The record indicates that there are differences between subject imports of oleoresin paprika from India and the domestic like product with respect to a number of such performance characteristics. Whereas domestic and nonsubject producers only use varieties of red, sweet paprika peppers and a similar production process to produce oleoresin paprika, Indian producers use red, chili peppers that contain capsaicin (or heat), an unusually powerful and pungent substance. Petitioner and respondents agree that a double extraction process must be performed on the chili peppers in India to lower the heat levels, and the resulting product does not have a consistent quality, is more vulnerable to color loss and faster oxidation, and may have heavier sludge, a greater residual pungency, a different hue, and lower quality than the domestic like product and nonsubject imports.<sup>43</sup> Conference testimony by purchasers and importers,<sup>44</sup> as well as questionnaire responses from domestic producers and importers<sup>45</sup> support these facts. Accordingly, the evidence on the record indicates that in many

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<sup>38</sup> CR/PR at Table IV-1.

<sup>39</sup> Nonsubject imports increased from 180,000 pounds in 1998 to 376,000 pounds in 1999 before decreasing to 324,000 pounds in 2000. CR/PR at Table C-1.

<sup>40</sup> CR at II-4, II-5; PR at II-3.

<sup>41</sup> Hue refers to the ratio of yellow pigment to red pigment. Conference Tr. at 87-88.

<sup>42</sup> Conference Tr. at 81-83.

<sup>43</sup> Respondents' Postconference Brief at 10; Conference Tr. at 45-48. In some instances, oleoresin paprika produced in India has a hue that is more yellow than red.

<sup>44</sup> A representative from purchaser McCormick Company testified that the company does not purchase oleoresin paprika from India for commercial use. Irrespective of the price level of subject imports from India, he argued, the product is not interchangeable with the domestic like product or products from nonsubject countries, as it does not meet McCormick's requirements for heat, color, and sludge level. Other important considerations include reliability to meet delivery terms and requirements, quality control, product consistency, and technical service. Conf. Tr. at 53-57, 68-72, 84-85. A representative from importer Manheimer testified that the company has, on occasion, had quality problems with subject imports from India due to excess sedimentation, residual pungencies, or differences in hue and stability. She testified that customers buy the product that suits their needs, and if they need oleoresin paprika with no residual pungency, no matter what the price of the Indian oleoresin paprika is, they will not buy the Indian product. She also explained that Manheimer has three customers that will only purchase domestically-produced oleoresin paprika. Respondents' Postconference Brief at 10, Exhibit 4; Conference Tr. at 45-48, 73-74.

<sup>45</sup> The record indicates that the residual pungency in the oleoresin paprika from India makes it unsuitable for many food applications where spiciness would be undesirable, such as salad dressings and breadings. These are applications served by the domestic like product and imports from nonsubject countries. CR at II-4; PR at II-3.

In their questionnaire responses, three of four importers reported that domestic and Indian oleoresin paprika are not interchangeable, citing differences in pigment quality and pungency. One indicated domestic oleoresin paprika must be used for products sold to a particular purchaser. The only responding producer and all responding importers indicated differences in product characteristics or sales conditions between domestically-produced oleoresin paprika and oleoresin paprika imported from India are a significant sales factor, and the importers indicated that differences in heat, hue, color stability, and sludge are significant sales factors. CR at II-5 to II-6; PR at II-4. With respect to the substitutability between subject and nonsubject imports, three of four responding importers indicated that they are not used interchangeably and that Spanish oleoresin paprika is usually higher in quality than the Indian product. CR at II-7; PR at II-5.

applications, there is limited substitutability between subject imports and domestically-produced oleoresin paprika.<sup>46</sup>

## **B. Volume of 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>47</sup>

Apparent U.S. consumption by quantity rose each year from 1998 to 2000, with a significant overall increase of \*\*\* percent during that time.<sup>48</sup> The volume of subject imports from India declined from 213,000 pounds in 1998 to 149,000 pounds in 1999, before rising to 252,000 pounds in 2000.<sup>49</sup> Overall, the volume of subject imports from India grew at a slower pace than apparent U.S. consumption between 1998 and 2000, and subject imports from India lost market share during that time.<sup>50</sup> Domestic producers’ U.S. shipments increased between 1998 and 1999 and again between 1999 and 2000.<sup>51</sup> Domestic producers’ share of apparent U.S. consumption declined from \*\*\* percent in 1998 to \*\*\* percent in 1999, a year in which extensive wind and insect damage affected the supply of domestic paprika peppers in the United States.<sup>52</sup> Domestic producers maintained the same market share in 2000 that they held in 1999.<sup>53</sup> In contrast, the volume of nonsubject imports increased from 180,000 pounds in 1998 to 376,000 pounds in 1999 before declining moderately to 324,000 pounds in 2000.<sup>54</sup> The share of apparent U.S. consumption attributable to nonsubject imports increased from \*\*\* percent between 1998 and 1999, before decreasing to \*\*\* percent in 2000, a level that was well above their share in 1998.<sup>55</sup>

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<sup>46</sup> In some applications, such as where the paprika flavoring is already a component of the food product and where some pungency will be acceptable, where a coloring agent and oleoresin capsicum are used, or for the meat seasonings or snack food industries, subject imports from India may be somewhat more substitutable for the domestic like product and nonsubject imports. Blending the Indian product with oleoresin paprika from domestic or nonsubject sources enhances its substitutability with the domestic like product and nonsubject imports in some applications.

<sup>47</sup> 19 U.S.C. § 1677(7)(C)(i).

<sup>48</sup> CR/PR at Tables IV-1, C-1. By value, apparent U.S. consumption rose from 1998 to 1999 before declining in 2000, with an overall decrease of \*\*\* percent. CR/PR at Tables IV-1, C-1.

<sup>49</sup> CR/PR at Tables IV-1, C-1. The value of subject imports from India declined from \$2.2 million in 1998 to \$1.3 million in 1999 before increasing to \$2.2 million in 2000. CR/PR at Tables IV-1, C-1. We note that there are at least two growing seasons of red peppers in India per year, with a major Indian crop that occurs in December or January, just after the U.S. crop, and a second in April, but there may be smaller crops throughout the year. Conference Tr. at 79, 91.

<sup>50</sup> As a share of apparent U.S. consumption by quantity, subject imports from India accounted for \*\*\* percent of the market in 1998, \*\*\* percent in 1999, and \*\*\* percent in 2000, a level that was lower than their share in 1998. CR/PR at Tables IV-1, C-1.

<sup>51</sup> CR/PR at Tables III-1, C-1.

<sup>52</sup> CR at II-1 to II-2, III-3; PR at II-1, III-1; CR/PR at Table IV-1, C-1.

<sup>53</sup> CR/PR at Tables IV-1, C-1.

<sup>54</sup> CR/PR at Tables IV-1, C-1. By value, nonsubject imports increased from \$2.4 million in 1998 to \$3.7 million in 1999, then increased to \$3.8 million in 2000. CR/PR at Tables IV-1, C-1.

<sup>55</sup> CR/PR at Tables IV-1, C-1.

Although the absolute volume of subject imports increased somewhat over the period of investigation, we do not find the increase relative to either U.S. production or apparent U.S. consumption to be significant. This finding is based primarily on the limited substitutability between subject imports and the domestic like product and, as discussed below, the absence of a significant adverse impact by reason of subject imports. We also considered the increase in domestic shipments and apparent U.S. consumption over the period of investigation.

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

Section 771(7)(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>56</sup>

The record indicates that, whether measured in terms of average unit values or the quarterly pricing data collected on four specific oleoresin paprika products for the period 1998 to 2000, prices generally declined during the period of investigation.<sup>57</sup> Raw material costs also generally declined during the period of investigation.<sup>58</sup>

In this investigation, there are several limitations regarding the pricing data. Rezolex sells to both distributors and end users while the importers of oleoresin paprika from India sell mostly to end users,<sup>59</sup> and the record suggests that there may be as much as a \*\*\* percent mark-up to end-users.<sup>60</sup> The pricing data did not account for these differences. While the pricing data showed widespread overselling, this may be largely attributable to differences in channels of distribution and end uses. The usefulness of the direct pricing data is also limited by the fact that \*\*\*.<sup>61</sup> Accordingly, we do not assign much probative weight to the pricing data and the evidence of overselling.

Due to these limitations regarding the pricing data, we primarily relied on petitioner's testimony,

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<sup>56</sup> 19 U.S.C. § 1677(7)(C)(ii).

<sup>57</sup> CR/PR at Tables V-1 to V-4, C-1. With respect to the data on the four pricing products, the prices for domestically-produced oleoresin paprika and subject imports from India decreased from 1998 to 2000, with the price of domestically-produced oleoresin paprika falling by a slightly greater amount. Of the 34 instances where prices for domestic oleoresin paprika and subject oleoresin paprika imports could be compared, there were only 3 instances where the imported product from India was priced below the domestically-produced oleoresin paprika, and margins of underselling were 20.3 percent, 20.4 percent, and 34.9 percent. In all other comparisons, the subject imports from India oversold the domestically-produced oleoresin paprika at margins of overselling that ranged from 4.7 percent to 38.6 percent. CR/PR at Tables V-1 to V-4. As discussed herein, due to limitations regarding this pricing data, we do not find such data probative.

<sup>58</sup> CR at VI-5; PR at VI-1.

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

<sup>60</sup> CR at V-4 to V-5 & n.12; PR at V-3 to V-4 & n.12.

<sup>61</sup> CR at V-4 n.10; PR at V-3 n.10.

respondents' acknowledgment of underselling at the conference,<sup>62</sup> and other anecdotal evidence suggesting that subject imports of oleoresin paprika from India generally sell for less than the domestic like product in the U.S. market.<sup>63</sup> Anecdotal evidence of underselling is more consistent with record information, as set forth in the conditions of competition section, indicating that the subject imports are lower quality, and have a greater residual pungency that makes the subject imports undesirable for many applications.

While the subject imports may have undersold the domestic like product, because of the limited substitutability between the subject imports and the domestic like product and in light of our analysis regarding the lack of significant volume and impact by reason of subject imports, we do not find any underselling that may have occurred by subject imports to be significant, and we do not find that subject imports otherwise depressed or suppressed prices to a significant degree.

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

In examining the impact of the subject imports on the domestic industry, we consider all relevant economic factors that bear on the state of the industry in the United States.<sup>64</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 affected industry."<sup>65 66 67</sup>

To assess the impact of subject imports on the domestic industry, we relied on financial and trade data provided by petitioner as well as information provided by domestic producer Kalsec.<sup>68</sup> Domestic producer, Rogers Foods, ceased producing oleoresin paprika in February 1998, but \*\*\*, we included its capacity data in our analysis as well.<sup>69</sup>

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<sup>62</sup> See, e.g., Conference Tr. at 48, 56.

<sup>63</sup> Average unit values are not reliable indicators of price comparisons in this industry in light of differences in product mix in terms of color units, both over time and among the various sources.

<sup>64</sup> 19 U.S.C. § 1677(7)(C)(iii); see also SAA at 851, 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.")

<sup>65</sup> 19 U.S.C. § 1677(7)(C)(iii); see also SAA at 851, 885; Live Cattle from Canada and Mexico, Invs. Nos. 701-TA-386, 731-TA-812-813 (Preliminary), USITC Pub. 3155 (Feb. 1999) at 25 n.148.

<sup>66</sup> The statute instructs the Commission to consider the "magnitude of the dumping margin" in an antidumping proceeding as part of its consideration of the impact of imports. 19 U.S.C. § 1677(7)(C)(iii) (V). In its notice of initiation, Commerce revised the calculations in the petition and estimated that dumping margins for imports of oleoresin paprika from India ranged from 22.29 to 46.75 percent. 66 Fed. Reg. 17408 (Mar. 30, 2001).

<sup>67</sup> Commissioner Bragg notes that she does not ordinarily consider the magnitude of dumping to be of particular significance in evaluating the effects of subject imports on the domestic products. See Separate and Dissenting Views of Commissioner Lynn M. Bragg in Bicycles from China, Inv. No. 731-TA-731 (Final), USITC Pub. 2968 (June 1996); Anhydrous Sodium Sulfate from Canada, Inv. No. 731-TA-884 (Preliminary), USITC Pub. 3345 (Sept. 2000) at 11 n.63.

<sup>68</sup> Although Kalsec did not provide financial data, the data which Kalsec did provide \*\*\*.

<sup>69</sup> CR/PR at Tables III-1, C-1; CR at III-1 to III-3; PR at III-1.

Domestic production of oleoresin paprika decreased from \*\*\* pounds in 1998 to \*\*\* pounds in 1999 – a year in which petitioner reported that extensive wind and insect damage affected the domestic supply of paprika peppers in the United States<sup>70</sup> – but then increased to \*\*\* pounds in 2000.<sup>71</sup> Because domestic capacity remained stable throughout this time, capacity utilization followed the same trends as domestic production.<sup>72</sup> The quantity of domestic producers’ U.S. shipments increased every year between 1998 and 2000, and these increases coincided with increasing apparent U.S. consumption.<sup>73</sup>

Domestic market share decreased between 1998 and 1999 at the same time that the volume and market share of subject imports from India declined, and remained stable between 1999 and 2000, when the volume and market share of subject imports from India increased.<sup>74</sup> Total net sales by quantity for Rezolex \*\*\*.<sup>75</sup> The record shows a significant \*\*\* between 1998 and 2000, from \*\*\* in 1998 to \*\*\* in 2000, an increase of \*\*\* percent.<sup>76</sup> The domestic industry experienced an \*\*\* in 1998 and \*\*\* in 1999 and 2000.<sup>77</sup> The domestic industry’s operating margins improved between 1998 and 2000, increasing from \*\*\* in 1998 to \*\*\* in 2000.<sup>78</sup> We note that the decisions by Gilroy Foods to dismantle its oleoresin paprika producing facility and by Rogers Foods to cease producing oleoresin paprika occurred early in the period of investigation.<sup>79</sup> Importantly, subject imports from India were declining during that period of time.<sup>80</sup>

Although Rezolex’s capital expenditures declined between 1998 and 1999, they increased \*\*\* between 1999 and 2000.<sup>81</sup> The number of the domestic industry’s production and related workers remained stable between 1998 and 2000, as their hours worked increased.<sup>82</sup> Overall, the data on industry performance contained in the administrative record indicate that the domestic industry is performing well. We do not find, therefore, that subject imports are adversely impacting the domestic industry.

We determine, as discussed above, that standing alone, evidence that subject imports from India may have undersold the domestic like product does not persuade us that there is a reasonable indication that the domestic industry is materially injured by reason of subject imports from India, particularly in light of our findings on the limitations on the substitutability between subject imports from India and domestically-produced oleoresin paprika, and our findings that the volume of subject imports is not significant and that subject imports are not adversely impacting the domestic industry. Accordingly, we determine that there is no reasonable indication that the domestic oleoresin paprika industry is materially

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<sup>70</sup> CR at II-1 to II-2, III-3; PR at II-1, III-1.

<sup>71</sup> CR/PR at Tables III-1, C-1.

<sup>72</sup> CR/PR at Tables III-1, C-1.

<sup>73</sup> CR/PR at Tables III-1, C-1.

<sup>74</sup> CR/PR at Tables IV-1, C-1.

<sup>75</sup> In 2000, Rezolex accounted for \*\*\* percent of reported U.S. production of oleoresin paprika. CR at VI-1; PR at VI-1.

<sup>76</sup> CR/PR at Table C-1. Only one of ten lost revenue claims was confirmed, and lost revenues for that claim amounted to \*\*\*. CR/PR at Table V-5.

<sup>77</sup> In order to analyze the domestic industry’s operating income on a comparable basis between 1998 and 2000, the data for \*\*\* were adjusted to include owners’ salaries. CR at VI-4; PR at VI-1.

<sup>78</sup> CR at VI-4; PR at VI-1.

<sup>79</sup> CR at III-1; PR at III-1.

<sup>80</sup> CR/PR at Tables IV-1, C-1.

<sup>81</sup> CR/PR at Table C-1.

<sup>82</sup> CR/PR at Table C-1.

injured by reason of subject imports from India.

#### IV. NO REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF SUBJECT IMPORTS FROM INDIA ALLEGEDLY SOLD AT LTFV

Section 771(7)(F) of the Act directs the Commission to determine whether there is a reasonable indication that a 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.”<sup>83</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>84</sup> In making our determination, we have considered all factors that are relevant to this investigation.<sup>85</sup> Based on an evaluation of the relevant statutory factors, we find that there is no reasonable indication that an industry in the United States is threatened with material injury by reason of subject imports of oleoresin paprika from India that are allegedly sold in the United States at less than fair value.

As an initial matter, we reiterate our observation that overall, the domestic industry is currently performing well. We acknowledge that the volume of subject imports from India increased between 1999 and 2000, that foreign production capacity in India increased somewhat over the period of investigation, and note respondents’ admission at the conference that a new production facility is forthcoming. Nevertheless, we do not find the potential increase in foreign production capacity to be a real and imminent threat to the domestic industry because shipments to the United States were a small and declining share of Indian producers’ total oleoresin paprika shipments between 1998 and 2000.<sup>86</sup> In addition, Indian producers had some excess production capacity and some ability to shift production from other products to oleoresin paprika throughout the period of investigation, particularly in 1999 when domestic supply was compromised by the poor 1999 domestic paprika pepper harvest; they did not, however, use either to increase significantly their U.S. market share, despite no apparent restraints on the level of their imports at that time. There is no indication that they would do so in the future.<sup>87</sup> \*\*\*<sup>88</sup> \*\*\* and still reported \*\*\*.<sup>89</sup> Finally, consistent with our findings regarding the lack of significant price effects by subject imports in our present material injury analysis, we do not find that subject imports are likely to

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<sup>83</sup> 19 U.S.C. §§ 1673b(a) and 1677(7)(F)(ii).

<sup>84</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>85</sup> 19 U.S.C. § 1677(7)(F)(i). Factor I regarding countervailable subsidies and Factor VII regarding raw and processed agriculture products are inapplicable to the product at issue. See 19 U.S.C. § 1677(7)(F)(i)(I) and (VII).

<sup>86</sup> CR at VII-2; PR at VII-1. Exports to the United States as a share of India’s total shipments declined from \*\*\* percent in 1998, to \*\*\* percent in 1999, to \*\*\* percent in 2000. Id. The record indicates that importers typically do not maintain inventories in the United States, or, if they do, it is a mixed product consisting of oleoresin paprika from several sources, CR at VII-1; PR at VII-1, so we do not consider inventories to be a significant factor in this investigation.

<sup>87</sup> CR at VII-2; PR at VII-1; CR/PR at Tables IV-1, C-1. Indian producers’ capacity utilization levels increased from \*\*\* percent in 1998 to \*\*\* percent in 2000, and are projected to increase to \*\*\* percent in 2001 and \*\*\* percent in 2002.

<sup>88</sup> CR at VI-6; PR at VI-1.

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

have a significant depressing or suppressing effect on domestic prices, or are likely to increase demand for further subject imports, particularly in light of the limited substitutability of the domestic like product and subject imports.

Based on these factors, we determine that there is no reasonable indication that the domestic industry producing oleoresin paprika 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 oleoresin paprika from India that are allegedly sold in the United States at less than fair value.