

U.S. International Trade Commission

Washington, DC 20436

Certain Frozen Fish Fillets From Vietnam

Investigation No. 731-TA-1012 (Preliminary)



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DETERMINATION

On the basis of the record¹ developed in the subject investigation, the United States International Trade Commission determines, pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1673b(a)) (the Act), that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports from Vietnam of certain frozen fish fillets, provided for in subheading 0304.20.60 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (LTFV).

COMMENCEMENT OF FINAL PHASE INVESTIGATION

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigation. The Commission will issue a final phase notice of scheduling, which will be published in the *Federal Register* as provided in section 207.21 of the Commission's rules, upon notice from the Department of Commerce of an affirmative preliminary determination in the investigation under section 733(b) of the Act, or, if the preliminary determination is negative, upon notice of an affirmative final determination in that investigation under section 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigation need not enter a separate appearance for the final phase of the investigation. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigation.

BACKGROUND

On June 28, 2002, a petition was filed with the Commission and Commerce by the Catfish Farmers of America and by individual U.S. catfish processors alleging that an industry in the United States is materially injured and threatened with material injury by reason of LTFV imports certain frozen fish fillets from Vietnam. Accordingly, effective June 28, 2002, the Commission instituted antidumping duty investigation No. 731-TA-1012 (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 July 8, 2002 (67 FR 45147). The conference was held in Washington, DC, on July 19, 2002, and all persons who requested the opportunity were permitted to appear in person or by counsel.

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

VIEWS OF THE COMMISSION

Based on the record in this investigation, we determine that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of certain frozen fish fillets from Vietnam that are allegedly sold in the United States at less than fair value.

I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS

The legal standard for preliminary antidumping duty determinations requires the Commission to determine, 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.¹ 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.”²

As discussed below, we determine that there is a reasonable indication that the domestic industry producing frozen catfish fillets (whether or not breaded or marinated) is threatened with material injury by reason of subject imports.³

II. DOMESTIC LIKE PRODUCT

A. In General

To determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the Commission first defines the “domestic like product” and the “industry.”⁴ Section 771(4)(A) of the Tariff Act of 1930, as amended (“the Act”), defines the relevant domestic industry as the “producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product.”⁵ In turn, the Act defines “domestic like product” as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation”⁶

The decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and the Commission has applied the statutory standard of “like” or “most similar in

¹ 19 U.S.C. §§ 1671b(a), 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).

² 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).

³ See Additional Views of Commissioner Lynn M. Bragg regarding no reasonable indication of material injury and issues warranting that this investigation proceed to the final stage.

⁴ 19 U.S.C. § 1677(4)(A).

⁵ Id.

⁶ 19 U.S.C. § 1677(10).

characteristics and uses” on a case-by-case basis.⁷ No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation.⁸ The Commission looks for clear dividing lines among possible like products, and disregards minor variations.⁹ Although the Commission must accept the determination of the Department of Commerce (“Commerce”) as to the scope of the imported merchandise allegedly sold at less than fair value, the Commission determines what domestic product is like the imported articles Commerce has identified.¹⁰

B. Product Description

The scope of this investigation as defined by Commerce in its notice of initiation covers the following imported merchandise:

frozen fish fillets, including regular, shank, and strip fillets, whether or not breaded or marinated, of the species *Pangasius Bocourti*, *Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*), and *Pangasius Micronemus*. The merchandise subject to this investigation will be hereinafter referred to as frozen “basa” and “tra” fillets, which are the Vietnamese common names for these species of fish. These products are classifiable under article codes 0304.20.60.30 (frozen catfish fillets); 0304.20.60.96 (frozen fish fillets, NESOI); 0304.20.60.43 (frozen freshwater fish fillets); and 0304.20.60.57 (frozen sole fillets) of the Harmonized Tariff Schedule of the United States (“HTSUS”). This investigation covers all frozen fish fillets meeting the above specification, regardless of tariff classification. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.¹¹

⁷ See, e.g., NEC Corp. v. Department of Commerce, 36 F. Supp.2d 380, 383 (Ct. Int’l Trade 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Torrington Co. v. United States, 747 F. Supp. 744, 749, n.3 (Ct. Int’l Trade 1990), aff’d, 938 F.2d 1278 (Fed. Cir. 1991) (“every like product determination ‘must be made on the particular record at issue’ and the ‘unique facts of each case.’”). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes, and production employees; and, where appropriate, (6) price. See Nippon, 19 CIT at 455, n.4; Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int’l Trade 1996).

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

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

¹⁰ Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568 (Fed. Cir. 1996) (Commission may find single domestic like product corresponding to several different classes or kinds defined by Commerce); Torrington, 747 F. Supp. at 748-52 (affirming Commission’s determination of six domestic like products in investigations where Commerce found five classes or kinds).

¹¹ 67 FR 48437, 48437 (July 24, 2002) (footnote omitted). With respect to article code 0304.20.60.57, Commerce noted that “Petitioners have included this tariff classification code because they believe that the merchandise under investigation is entering the United States under this classification based on previous uses of the term ‘sole’ to describe Vietnamese basa and tra.”

Subject imported merchandise will be referred to as “subject imports” or as “frozen basa and tra fillets” hereinafter. Basa and tra are farm-raised white fish that are filleted in sizes that range from 2 to 3 ounces to more than 12 ounces. These fillets typically, but not always, are individually quick frozen, and when destined for the U.S. market, packed in 15-pound boxes for shipment to institutional food service suppliers, restaurant chains, and other large purchasers.¹²

C. Domestic Like Product

Petitioners¹³ and respondents¹⁴ agree that there is no product produced in the United States that is “like” the article subject to investigation. Petitioners argue that the “most similar product in characteristics and uses” to subject imports is frozen catfish fillets (of the native species Ictalurus Punctatus). For purposes of the preliminary phase of this investigation, respondents argue that the Commission also should consider including frozen tilapia and striped bass fillets in the domestic like product. Petitioners and respondents agree that because the scope of this investigation includes breaded and marinated products, the domestic like product should include breaded and marinated products as well, and neither party argues that the Commission should include fresh fillets in the domestic like product in light of the Commission’s decisions in other fish investigations.¹⁵

Where, as here, there is no domestic product that is “like” the subject imports, the statute calls for the Commission to find the domestic product that is “most similar” in characteristics and uses.¹⁶ We find for purposes of the preliminary phase of this investigation that frozen catfish fillets are the domestically produced articles “most similar in characteristics and uses” to subject imports. Parties disagree whether other white fish with similar flavor profiles and other similar characteristics and uses that are sold as frozen fish fillets in the U.S. market should be considered for inclusion in the domestic like product.¹⁷

¹² See, e.g., Petition at 9, 32.

¹³ Petitioners are the Catfish Farmers of America (“CFA”), a trade association representative of domestic catfish farmers and processors, and certain individual domestic catfish processors – America’s Catch, Inc.; Consolidated Catfish Co., L.L.C.; Delta Pride Catfish, Inc.; Harvest Select Catfish, Inc.; Heartland Catfish Company; Pride of the Pond; Simmons Farm Raised Catfish, Inc.; and Southern Pride Catfish Co., Inc. See, e.g., Petition at 4-5, Exh. 3.

¹⁴ Respondents are the Vietnam Association of Seafood Exporters and Producers (“VASEP”) and its individual members.

¹⁵ See, e.g., Petition at 13; Petitioners’ Postconference Brief at 2, Exhs. 2, 5; Conference Tr. at 41-42, 57-59, 90, 128-31, 144-47; Respondents’ Postconference Brief at 1-2, 5.

¹⁶ 19 U.S.C. § 1677(10); see also, e.g., Nepheline Syenite from Canada, Inv. No. 731-TA-525 (Final), USITC Pub. 2502 (Apr. 1992) (finding that glass-grade feldspar (both soda and potash) and aplite are “most similar in characteristics and uses” to subject imports of nepheline syenite).

¹⁷ In any final phase investigation, we will consider specific arguments that the parties advance, including in their comments on draft questionnaires, regarding the potential inclusion in the domestic like product of frozen fish fillets produced from other white fish. We do not include frozen tilapia fillets in the domestic like product in this preliminary phase because the record indicates that domestic producers of tilapia only serve the fresh market, and the only frozen tilapia fillets sold in the United States are imported. See, e.g., Confidential Version of Staff Report, Mem. INV-Z-120 (Aug. 5, 2002) (“CR”) at I-6 to I-7 (quoting Rob Schmid, President of the American Tilapia Association); Public Version of Staff Report (“PR”) at I-4 to I-5; CR/PR at Table V-5; see also, e.g., Respondents’ Postconference Brief at Exh. 3 (Tilapia Offers a “Blank Canvas” for Innovative Chefs Looking to Create a New Whitefish Item for Their Menus (Nov. 2001), located at <http://www.seafoodbusiness.com/buyguide/>

(continued...)

The current record indicates that catfish, basa and tra all are fresh-water, white fish (particularly if Vietnamese processors remove the reddish flesh from the tra), with similar 6-month shelf lives, similar texture, and neutral/mild flavor. Catfish and subject imports are individually quick frozen, typically packaged in 15-pound boxes, and sold in the same size increments predominantly to the same food service and the restaurant chain industries.¹⁸

The record indicates that frozen basa and tra fillets from Vietnam were marketed, sold, and labeled in the United States as “catfish,” until labeling laws prohibited this practice.¹⁹ Whereas twelve of fourteen responding domestic processors and three of five importers reported that there are no substitutes for the subject product (or reported no substitutes for catfish other than subject imports), all responding domestic processors and one importer reported that domestic frozen catfish fillets and frozen basa and tra fillets from Vietnam are used interchangeably, in the same applications.²⁰ Domestic processors and importers, however, reported several differences in product characteristics and sales conditions between frozen catfish fillets and subject imports.²¹ The record indicates that processors employ similar production processes and equipment to produce frozen catfish fillets and subject imports, although a greater percentage of the Vietnamese frozen fillets are produced by hand.²² Given the similar color, size, texture and mild flavor of the fish, the same channels of distribution and similar production processes, we find that frozen catfish fillets are most similar in characteristics and uses to subject imports.²³

Consistent with the parties’ arguments,²⁴ we further find that the domestic like product includes breaded and marinated products regardless of whether we examine the facts under the traditional or semi-finished domestic like product analysis. Under the traditional domestic like product analysis, breaded and marinated frozen catfish fillets have similar physical characteristics and uses as other frozen catfish fillets, but are simply breaded or marinated prior to freezing. Breaded and marinated frozen catfish products are

¹⁷ (...continued)
issue_tilapia.htm on July 23, 2002.

¹⁸ In 2001, sales to food service distributors accounted for 67.2 percent of U.S. commercial shipments by domestic producers on a quantity basis, and sales to restaurant chains accounted for 12.7 percent. Of the five responding importers, three were able to provide information on the channels of distribution. ***. See, e.g., CR at II-1; PR at II-1.

¹⁹ See, e.g., Conference Tr. at 10-11, 13, 21-23; see also, e.g., Petitioners’ Postconference Brief at Exhs. 1-D to 1-I; Respondents’ Postconference Brief at Exhs. 8, 9, 10. The labeling laws are described in more detail in the conditions of competition discussion, infra.

²⁰ See, e.g., CR at II-7 to II-8; PR at II-6 to II-7; CR/PR at Table II-3. Three importers reported that domestic frozen catfish fillets and subject imports are not used interchangeably.

²¹ Differences reported by domestic producers include a wider product range, better quality, availability, and consumer confidence in the domestic product. Differences reported by importers include taste, texture, and color, plus name recognition and the advertising and established distribution channels for the domestic product. See, e.g., CR at II-7 to II-8; PR at II-6 to II-7; CR/PR at Table II-3.

²² See, e.g., CR at I-3 to I-5; PR at I-2 to I-4; Petition at 34; Petitioners’ Postconference Brief at 6.

²³ See, e.g., Nippon, 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 standards 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 the ‘like product’ be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under consideration.”)

²⁴ See, e.g., Petitioners’ Postconference Brief at Exh. 1 at 6; Conference Tr. at 69-70, 72-73; Respondents’ Postconference Brief at 5, R-5 to R-8.

sold through the same channels of distribution as frozen catfish fillets, and involve the same production facilities, processes, and employees.²⁵ Breaded frozen catfish fillets sell for \$0.10 per pound more than unbreaded frozen catfish fillets, and marinated frozen catfish fillets sell for approximately \$0.20 to \$0.25 per pound more than unmarinated fillets.²⁶ Under the semifinished like product analysis,^{27 28} the record indicates that breading and marinating accounts for only approximately 13 percent of the volume of domestically-produced frozen catfish fillets, so the upstream article is not dedicated to the production of the downstream product. The parties agree, however, that frozen catfish fillets are sold in the same markets through the same channels of distribution, whether or not breaded or marinated. Aside from the breading and marinating, frozen catfish fillets and breaded/marinated frozen catfish fillets are identical in physical characteristics and uses. The breading process and the marinating process add about 4 percent and 9 percent, respectively, to the value of the product. Breading and marinating do not require significant production processes.²⁹

Accordingly, for purposes of this preliminary determination, we define the domestic like product as frozen catfish fillets, whether or not breaded or marinated.

III. DOMESTIC INDUSTRY

The domestic industry is defined as “the producers as a [w]hole of a domestic like product”³⁰ In defining the domestic industry, the Commission’s general practice has been to include in the industry all domestic production of the domestic like product, whether toll-produced, captively consumed, or sold in the domestic merchant market.³¹

Having defined the domestic like product, our next inquiry is whether to include catfish farmers in the domestic industry along with processors. In cases involving processed agricultural products, section 771(4)(E) of the 1988 Omnibus Trade and Competitiveness Act authorizes the Commission to include farmers/growers of a raw agricultural product as producers within the domestic industry producing the processed agricultural product if –

²⁵ Petitioners assert that they are not aware of any entity in the United States, other than domestic catfish processors, that breads and/or marinates frozen catfish fillets.

²⁶ See, e.g., Petitioners’ Postconference Brief at 2 n.5, Exh. 1 at 6-7, 12; Respondents’ Postconference Brief at R-7 to R-8; CR at I-4 n.10; PR at I-3 n.10.

²⁷ Under this analysis, the Commission examines (1) whether the upstream article is dedicated to the production of the downstream article or has independent uses; (2) whether there are perceived to be separate markets for the upstream and downstream articles; (3) differences in the physical characteristics and functions of the upstream and downstream articles; (4) differences in the costs or value of the vertically differentiated articles; and (5) the significance and extent of the processes used to transform the upstream into the downstream articles. See, e.g., Uranium from Kazakhstan, Inv. No. 731-TA-539(A) (Final), USITC Pub. 3213 at 6 n.23 (July 1999).

²⁸ The process of breading or marinating occurs prior to freezing, and thus breaded or marinated fillets arguably are upstream products. See, e.g., CR at I-4; PR at I-3.

²⁹ See, e.g., CR at I-4; PR at I-3; Petitioners’ Postconference Brief at 2 n.5, Exh. 1 at 6-7; Respondents’ Postconference Brief at 5, R-5 to R-8.

³⁰ 19 U.S.C. § 1677(4)(A).

³¹ 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).

- (a) the processed agricultural product is produced from the raw agricultural product through a single continuous line of production, and
- (b) there is a substantial coincidence of economic interest between the growers and producers of the processed product based upon relevant economic factors, which may, in the discretion of the Commission, include price, added market value, or other economic interrelationships (regardless of whether such coincidence of economic interests is based upon any legal relationship).³²

Under the first prong of the statute, a continuous line of production exists if:

- (i) the raw agricultural product is substantially or completely devoted to the production of the processed agricultural product; and
- (ii) the processed agricultural product is produced substantially or completely from the raw product.³³

When determining whether the raw agricultural product is “substantially or completely devoted” to the production of the processed agricultural product, the Commission generally looks to the percentage of the raw product used in the processed product.³⁴ For purposes of the preliminary phase of this investigation, we define the raw agricultural product as live food-size catfish. Based on the information in the record of the preliminary phase of this investigation, live food-size catfish is not “substantially or completely devoted” to the production of frozen catfish fillets.³⁵ Approximately 54 percent of the live food-size catfish processed (by weight) is processed into frozen catfish fillets (whether or not breaded or marinated), according to questionnaire responses.³⁶ Further, according to the U.S. Department of Agriculture’s National Agricultural Statistics Service (“NASS”), frozen catfish fillets (including breaded and marinated fillets) accounted for approximately 44 percent, by weight, of all forms of catfish (including fresh) sold by

³² 19 U.S.C. §1677(4)(E)(i).

³³ 19 U.S.C. § 1677(4)(E)(ii).

³⁴ Petitioners define the relevant raw agricultural product as live food-size catfish suitable for processing into frozen catfish fillets, and argue that all statutory prerequisites have been met to include catfish farmers in the domestic industry. See, e.g., Petition at 6, 35-37, Exh. 34; Conference Tr. at 42-44, 67-69; Petitioners’ Postconference Brief at 11-16, Exh. 1 at 3. Respondents argue that the raw agricultural product at issue is live food-size catfish, and maintain that catfish farmers should not be included in the domestic industry because none of the statutory prerequisites have been met. See, e.g., Respondents’ Postconference Brief at 5-6, R-9 to R-23, Exhs. 4-6; Conference Tr. at 90, 147-50.

³⁵ At the preliminary conference, petitioners testified that farmers are not segmented by end use, and farmers sold live catfish to processors for use in either fresh or frozen applications. They noted that processors generally process both fresh and frozen products, but, for example, a particular processor might focus more on the frozen than the fresh market if it has invested in quality, expensive spiral freezing equipment. The record also reflects that the live food-size catfish used to produce shanks, strips, fillets, whole fish, and nuggets are generally the same, although the somewhat smaller- and larger-sized fish might tend to be used more for whole fish to the extent that they are outside the parameters for filleting by machine. See, e.g., Conference Tr. at 58-63, 82-83.

³⁶ See, e.g., CR at I-5; PR at I-4. Data published by NASS also indicate that over 90 percent by weight of the live fish the farmers sell is sold to processors who produce frozen catfish products. See, e.g., CR at III-1; PR at III-1.

domestic processors in 2001.³⁷ While there is no definitive percentage which dictates the issue,³⁸ these percentages appear to be insufficient to satisfy the statute's requirement that the raw product be "substantially or completely devoted" to the production of the processed product.³⁹

With respect to whether the processed agricultural product is produced "substantially or completely" from the raw product, the primary raw material in the production of frozen catfish fillets is whole fresh food-size catfish. In 2001, whole fresh fish accounted for 70.4 percent of the cost of goods sold of frozen catfish fillets in 2001.⁴⁰

Regarding whether there is a substantial coincidence of economic interest between the farmers and the producers of the processed agricultural product, the record in the preliminary phase of this investigation indicates that there is a substantial amount of cross-ownership among the catfish farmers and processors. Farmers sell virtually all of their live catfish to processors, and processors rely wholly on farmers for their input, since, unlike their counterparts in Vietnam that also process other types of fish and seafood, domestic processors only process catfish.⁴¹ Between 1999 and 2002, the average price for whole catfish reached a high of \$0.789 per pound in March and April of 2000, and declined to a low of \$0.549 per pound in January 2002. The average price received for frozen catfish fillets reached a high of \$2.88 per pound in March and April 2000, and a low of \$2.37 per pound in March and April 2002.⁴²

The record demonstrates the importance of catfish farmers to catfish processors and *vice versa*. While the second prong of the statutory test appears to be met, however, because the first prong is not, we do not in the preliminary phase of this investigation apply the processed agricultural provision.⁴³ Accordingly, we define the domestic industry as processing operations producing frozen catfish fillets

³⁷ See, e.g., CR at I-5 n.11; PR at I-4 n.11.

³⁸ See, e.g., H.R. Rep. 40, Part I, 100th Cong., 1st Sess. (1987) at 121; S. Rep. 71, 100th Cong. 1st Sess. at 109 (1987).

³⁹ Petitioners argue that the Commission should take into account yield losses associated with producing frozen catfish fillets. Their methodology, however, is based on the assumption that processors only produce shank fillets, an assumption not warranted by the facts on the current record. Moreover, rather than comparing production of frozen catfish fillets to processors' total output, petitioners in their postconference brief compared production of frozen catfish fillets to processors' total catfish input, *i.e.*, purchases of live catfish. This measure relied on calculations for which there are no definite industry-wide data – an analysis which, in this case, has more risk of error than a simple output to output calculation. See, e.g., CR at II-1 n.1; PR at II-1 n.1.

⁴⁰ See, e.g., CR at V-2; PR at V-2. Approximately 13 percent of the volume of frozen catfish fillets is accounted for by breading and marinating. See, e.g., CR at I-4 n.10; PR at I-3 n.10.

⁴¹ See, e.g., CR at III-1; PR at III-1; CR/PR at Table III-1; Petitioners' Postconference Brief at 14-16; Conference Tr. at 13-15, 27-30.

⁴² See, e.g., CR at V-2; PR at V-2; CR/PR at Figure V-2. Moreover, based on NASS data, there was a 0.962 correlation between the price of whole fish sold to processors and the price of frozen fish fillets sold by processors between January 1999 and March 2002.

⁴³ In light of the apparent high degree of interdependence between farmers and processors in the U.S. market, including the record evidence discussed above of a substantial coincidence of economic interest between farmers and processors, we intend to continue to examine the issue of the applicability of section 771(4)(E) in any final phase investigation.

(whether or not breaded or marinated), not including catfish farming operations, and as noted below, we take into account the role of farmers as an important condition of competition in this industry.⁴⁴

IV. CONDITIONS OF COMPETITION⁴⁵

Several conditions of competition are pertinent to our analysis in this investigation.

Apparent U.S. consumption of certain frozen fish fillets, as measured by quantity, increased from 140.9 million pounds in 1999 to 147.7 million pounds in 2000 and 157.0 million pounds in 2001, and was 45.4 million pounds in interim 2002 compared to 39.7 million pounds in interim 2001.⁴⁶ This increase in apparent U.S. consumption appears to be consistent with a longer term trend at least since 1990.⁴⁷ By value, apparent U.S. consumption increased from \$374.9 million in 1999 to \$392.1 million in 2000 before declining to \$374.0 million in 2001, and was \$95.8 million in interim 2002 compared to \$101.5 million in interim 2001.⁴⁸ A majority of responding domestic producers and three importers reported that demand for certain frozen fish fillets has increased since 1999.⁴⁹ With the exception of a slight increase during the Lenten season, the record indicates that demand for frozen catfish fillets is not highly seasonal.⁵⁰

Since 1999, there have been two primary sources of supply to the U.S. market, domestically produced frozen catfish fillets and subject imports, as nonsubject imports were an insignificant and declining presence.⁵¹ A total of 25 catfish processors currently operate in the United States while at least 12 processors operate in Vietnam.⁵² Both domestic and Vietnamese processors have increased production capacity since 1999.⁵³ Comprehensive NASS data indicate that domestic processors' sales of frozen

⁴⁴ We also must determine whether any producer of the domestic like product should be excluded from the domestic industry pursuant to 19 U.S.C. § 1677(4)(B). 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. Respondents testified at the conference that some domestic processors may be purchasing or importing subject imports from Vietnam then breading or marinating them for sale in the U.S. market, but they did not substantiate these claims in their postconference brief. See, e.g., Conference Tr. at 153-55. Petitioners asserted in their postconference brief their belief that two processors, ***, are purchasing and reselling significant quantities of subject imports because neither cooperated with petitioners' efforts to gather information in preparation for this case and neither responded to the Commission's questionnaires. See, e.g., Petitioners' Postconference Brief at Exh. 1 at 8-9. This issue has been rendered moot by virtue of the fact that the Commission has no specific information from such processors, so there are no data to exclude even if these processors are, in fact, related parties.

⁴⁵ The statutory provision for negligible imports, 19 U.S.C. § 1677(24), does not apply in this investigation because subject imports from Vietnam are more than three percent of total imports in the most recent twelve-month period for which data are available that precedes the filing of the petition. See, e.g., CR/PR at Table IV-12.

⁴⁶ See, e.g., CR/PR at Table IV-1.

⁴⁷ See, e.g., Petitioners' Postconference Brief at 20-21, Exh. 11.

⁴⁸ See, e.g., CR/PR at Table IV-1.

⁴⁹ See, e.g., CR at II-6; PR at II-5.

⁵⁰ See, e.g., Petition at 40-41.

⁵¹ See, e.g., CR/PR at Table IV-1.

⁵² See, e.g., CR at III-1, VII-1; PR at III-1, VII-1.

⁵³ Production capacity in Vietnam increased from 25.4 million pounds in 1999 to 44.2 million pounds in 2000 and to 60.0 million pounds in 2001. Vietnamese production capacity in interim 2002 was 15.5 million pounds

(continued...)

catfish fillets (including breaded and marinated products) increased slightly from 134.6 million pounds in 1999 to 134.7 million pounds in 2000 then declined to 131.6 million pounds in 2001 but were 39.5 million pounds in interim 2002 compared to 34.5 million pounds in interim 2001.⁵⁴

As indicated earlier, the relationship between domestic catfish farmers and domestic processors is an important consideration in this industry given that a substantial majority of food-size catfish is sold to catfish processors, and domestic processors only process catfish. The record indicates that domestic processors generally pass lower prices for processed products down to the farmers.⁵⁵ Conference participants testified that catfish farmers responded to increased volumes of low-priced subject imports by holding onto catfish longer,⁵⁶ cutting their feed expenditures (and, thus, passing associated lower yields onto processors), idling ponds, and eliminating acreage. The record reflects that reporting catfish farmers' net income declined from \$12.8 million in 1999 to \$6.8 million in 2000, and to a net loss of \$4.9 million in 2001.⁵⁷ By 2001, 19 of 34 farmers responding to the Commission's questionnaires reported net losses, whereas only 5 of 34 farmers reported losses in 1999.⁵⁸

Prior to December 10, 2001, the tariff rate applicable to subject imports from Vietnam was the column 2 rate of 5.5 cents per kilogram. Since this date, subject imports from Vietnam have entered the United States tariff-free.⁵⁹ Official import statistics indicate that there were few imports from Vietnam prior to 1999.⁶⁰ The volume of subject imports as measured by exporters' questionnaire responses, however, increased from 4.8 million pounds in 1999 to 11.8 million pounds in 2000 and 24.4 million

⁵³ (...continued)

compared to 14.4 million pounds in interim 2001. See, e.g., CR/PR at Table VII-1. Domestic production capacity increased from 116.3 million pounds in 1999 to 132.8 million pounds in 2000 before declining to 131.1 million pounds in 2001; it was 38.2 million pounds in interim 2002 compared to 29.8 million pounds in interim 2001. See, e.g., CR/PR at Table III-2.

⁵⁴ See, e.g., CR at III-5; PR at III-4. Thirteen domestic processors, representing approximately 66 percent of domestic production of frozen catfish fillets in 2001, provided U.S. supply data. See, e.g., CR at III-1; PR at III-1. These data include two of the largest domestic producers, each accounting for over *** percent of domestic production in 2001. See, e.g., CR/PR at Table III-1. Reported domestic shipments declined irregularly from 1999 to 2001, but were higher in interim 2002 than in interim 2001. U.S. shipments by domestic producers increased from 89.1 million pounds in 1999 to 89.8 million pounds in 2000, declined to 84.4 million pounds in 2001, and were 26.3 million pounds in interim 2002 compared to 21.8 million pounds in interim 2001. See, e.g., CR/PR at Table III-2.

⁵⁵ See, e.g., Conference Tr. at 32, 39, 53; but see, e.g., ***.

⁵⁶ Catfish typically have a 12- to 18-month growth cycle and are not fed during the cooler winter months when they are dormant, but catfish farmers harvest them year-round. See, e.g., Petition at 40-41.

⁵⁷ See, e.g., CR/PR at Table VI-6. Farmers reported a net income of \$4.0 million in interim 2002 compared to a net income of \$7.2 million in interim 2001. See, e.g., CR/PR at Table VI-6. We place limited weight on these interim data to the extent that they show a net income for growers given that growers do not feed the catfish during colder months when catfish are dormant but continue to harvest during this time, but note that the net income level for interim 2002 was lower than that for the corresponding period in 2001. See, e.g., CR at VI-10; PR at VI-5.

⁵⁸ See, e.g., CR/PR at Table VI-6.

⁵⁹ Effective December 10, 2001, imports from Vietnam began receiving Normal Trade Relations ("NTR") tariff treatment after completion and approval of the United States/Vietnam Bilateral Trade Agreement and the President's waiver of the Jackson-Vanik provision.

⁶⁰ See, e.g., CR at V-4; PR at V-3.

pounds in 2001; subject import volume in interim 2002 was 5.9 million pounds compared to 5.0 million pounds in interim 2001.⁶¹

As indicated earlier, the majority of domestically produced frozen catfish fillets and subject imports are sold to food service distributors. Most sales are on the spot market with prices for 15-pound boxes generally set on a per-pound basis.⁶²

While questionnaire responses indicate that subject imports and domestic frozen catfish fillets are used interchangeably, domestic producers and importers also reported important differences between them.⁶³ At the same time, as petitioners explained in their testimony and submissions, subject imports from Vietnam were marketed, labeled, and sold as “catfish.” When initial efforts at labeling the Vietnamese subject imports as basa, china sole, white river cobbler, etc.,⁶⁴ failed to yield many sales, subject imports were marketed as “catfish,” even under product names similar to U.S. producers’ products or that implied U.S.-origin, such as “Delta Fresh Farm Raised Catfish,” “Harvest Fresh Catfish,” “Farm Select Catfish,” and “Cajun Delight Catfish.” In response, domestic producers campaigned at the state and federal levels for changes in the labeling requirements for catfish.⁶⁵ Consequently, section 755 of the 2002 Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act provided that effective November 28, 2001, “[n]one of the funds appropriated or otherwise made available by this Act to the Food and Drug Administration shall be used to allow admission of fish or fish products labeled wholly or in part as “catfish” unless the products are taxonomically from the family *Ictaluridae*.” Section 10806 of the Farm Security and Rural Investment Act of 2002 stated that notwithstanding any other provision of law, for purposes of the Federal Food, Drug, and Cosmetic Act, “the term ‘catfish’ may only be considered to be a common or usual name (or part thereof) for fish classified within the family *Ictaluridae*” and only labeling or advertising for such fish may include the term “catfish.” Section 10816 of that Act further provided for retailers of farm-raised fish (among others) to inform consumers as of September 30, 2004 “at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity,” but it exempted food service establishments.⁶⁶ State labeling laws were also put into effect recently in Mississippi, Louisiana, and Arkansas.⁶⁷

⁶¹ See, e.g., CR/PR at Table IV-1.

⁶² See, e.g., CR at II-1, V-3 to V-4; PR at II-1, V-2.

⁶³ See, e.g., CR at II-6 to II-8; PR at II-5; CR/PR at Table II-3.

⁶⁴ Other names under which frozen basa and tra fillets from Vietnam were marketed in the United States include: basa catfish, bocourti catfish, mekong catfish, striped catfish, sutchi catfish, shortbarbel catfish, giant catfish, basa bocourti, hypobasa, pacific basa, mekong basa, bocourti, giant pangasius, pangasius, swai, sutchi, pacific dory, cobbler, shortbarbel, orange roughy, orange ruffy, white roughy, white ruffy, hypogrouper, and grouper.

⁶⁵ See, e.g., Petition at 2-3, 8.

⁶⁶ See, e.g., Petitioners’ Postconference Brief at Exh. 1-E. The U.S. Food and Drug Administration, Center for Food Safety and Applied Nutrition, Office of Seafood issued “Guidance for Industry” in January 2002, and the Department of Health & Human Services issued a letter to interested parties on January 17, 2002, that explained implementation issues. See, e.g., Respondents’ Postconference Brief at Exhs. 9, 10.

⁶⁷ See, e.g., Petitioners’ Postconference Brief at Exhs. 1-G to 1-I.

V. REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF ALLEGEDLY LESS THAN FAIR IMPORTS OF CERTAIN FROZEN FISH FILLETS⁶⁸

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.”⁶⁹ The Commission may not make such a determination “on the basis of mere conjecture or supposition,” and considers the threat factors “as a whole.”⁷⁰ In making our determination, we have considered all factors that are relevant to this investigation.⁷¹ Based on an evaluation of the entirety of the record, we determine that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of subject imports from Vietnam that allegedly are sold in the United States at less than fair value.

The volume of subject imports increased by 403.5 percent from 1999 to 2001, from 4.8 million pounds in 1999 to 11.8 million pounds in 2000 and to 24.4 million pounds in 2001; subject import volume was 17.7 percent higher in interim 2002 (5.9 million pounds) than in interim 2001 (5.0 million pounds).⁷² Although apparent U.S. consumption by quantity also increased throughout this time, the volume of subject imports increased at a substantially more rapid pace.⁷³ As a result, subject imports’ share of apparent U.S. consumption increased from 3.4 percent in 1999 to 8.0 percent in 2000 and to 15.5 percent in 2001, and was higher in interim 2002 (13.0 percent) than in interim 2001 (12.6 percent).⁷⁴

Vietnamese processors added substantial production capacity between 1999 and 2002. Production capacity in Vietnam increased from 25.4 million pounds in 1999 to 44.2 million pounds in 2000 and 61.0 million pounds in 2001. Vietnamese production capacity in interim 2002 was 15.5 million pounds compared to 14.4 million pounds in interim 2001, although it was projected to decrease to 60.2 million pounds in 2002 and 59.4 million pounds in 2003.⁷⁵ With only a small home market for frozen basa and tra fillets, Vietnamese producers primarily produced for export, and the U.S. market became increasingly more

⁶⁸ See Additional Views of Commissioner Lynn M. Bragg.

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

⁷⁰ 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.” *Metallwerken Nederland B.V. v. United States*, 744 F. Supp. 281 (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).

⁷¹ 19 U.S.C. § 1677(7)(F)(i). Factors I (regarding countervailing subsidies) and VII (involving imports of both a raw agricultural product and any product processed from such raw agricultural product) are inapplicable in this antidumping duty investigation. With respect to the latter factor, only “processed” fish is subject to Commerce’s scope of investigation.

⁷² See, e.g., CR/PR at Table IV-1.

⁷³ Apparent U.S. consumption of certain frozen fish fillets, as measured by quantity, increased by 11.4 percent from 1999 to 2001, from 140.9 million pounds in 1999 to 147.7 million pounds in 2000 and to 157.0 million pounds in 2001, and was 14.3 percent higher in interim 2002 (45.4 million pounds) than in interim 2001 (39.7 million pounds). See, e.g., CR/PR at Table IV-1.

⁷⁴ See, e.g., CR/PR at Table IV-1.

⁷⁵ See, e.g., CR/PR at Table VII-1.

important.⁷⁶ Reporting Vietnamese producers' capacity utilization ranged from 78.0 percent to 88.6 percent between 1999 and 2001, and is projected to be approximately 82 percent in 2002, which indicates 10.9 million pounds of unused production capacity in 2002.⁷⁷ This would be equivalent to 7.0 percent of apparent U.S. consumption and 12.5 percent of domestic production in 2001.

Vietnamese producers' end-of-period inventories increased from 2.6 million pounds in 1999 to 4.5 million pounds in 2000 and to 5.4 million pounds in 2001; Vietnamese producers' end-of-period inventories were 4.7 million pounds in interim 2002 compared to 4.3 million pounds in interim 2001 but were projected to decrease to 3.4 million pounds in 2002 and 3.1 million pounds in 2003.⁷⁸ Importer inventories in the United States also increased through 2001, although these data likely are understated because they are based on questionnaire responses from a small percentage of U.S. importers representing 20 percent of subject imports in 2001.⁷⁹ Although Vietnamese frozen basa and tra fillets are not subject to any antidumping orders or other trade remedies in any other country, processing facilities in Vietnam are used to produce other types of fish and seafood products, which creates a potential for product shifting.⁸⁰ For all of these reasons, we find a likelihood of substantially increased imports of the subject merchandise into the United States.⁸¹

We also find that subject imports 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. Pricing data collected on four specific pricing products showed declines in prices for subject imports and domestically produced frozen catfish fillets between 1999 and 2002. Data also indicate widespread underselling; specifically, subject imports undersold the domestic like product in every quarter for which there were sales of products from both countries, notwithstanding strong demand and increasing apparent U.S. consumption throughout this time.⁸² The average unit value for subject imports and the domestic like product corroborate the declining U.S. prices. The average unit value for subject imports from Vietnam

⁷⁶ Sales to the home market (including internal consumption/intercompany transfers) accounted for 19.8 percent of Vietnamese producers' sales in 1999 before declining to 17.9 percent in 2000 and 12.0 percent in 2001, although they were 15.7 percent in interim 2002 compared to 11.7 percent in interim 2001 and were projected to increase to 14.1 percent in 2002 and 14.2 percent in 2003. See, e.g., CR/PR at Table VII-1. Exports to the United States accounted for 25.6 percent of total sales in 1999 before increasing to 34.8 percent in 2000 and 45.8 percent in 2001, although exports to the United States accounted for 42.0 percent of total sales in interim 2002 compared to 42.3 percent in interim 2001 and were projected to decline to 37.3 percent in 2002 and 32.6 percent in 2003. See, e.g., CR/PR at Table VII-1.

⁷⁷ Capacity utilization in Vietnam increased from 78.0 percent in 1999 to 81.0 percent in 2000 and to 88.6 percent in 2001 and was 86.7 percent in interim 2002 compared to 80.5 percent in interim 2001. Vietnamese capacity utilization was projected to be 81.9 percent in 2002 and 81.8 percent in 2003. See, e.g., CR/PR at Table VII-1.

⁷⁸ See, e.g., CR/PR at Table VII-1.

⁷⁹ Reported importer inventories increased from 146,000 pounds in 1999 to 679,000 pounds in 2000 and to 688,000 pounds in 2001, but were 349,000 pounds in interim 2002 compared to 442,000 pounds in interim 2001. See, e.g., CR at VII-3; PR at VII-3.

⁸⁰ See, e.g., CR at VII-1, VII-3; PR at VII-1.

⁸¹ In any final phase investigation, we intend to examine whether the volume of subject imports in the U.S. market as well as the recently enacted labeling requirements affect the nature of competition between subject imports and domestically produced frozen catfish fillets.

⁸² See, e.g., CR at V-2, V-4 to V-9; PR at V-2 to V-4; CR/PR at Tables V-1 to V-4.

declined from \$1.99 per pound in 1999 to \$1.69 per pound in 2000 and to \$1.41 per pound in 2001; the average unit value for subject imports from Vietnam was \$1.31 per pound in interim 2002 compared to \$1.48 per pound in interim 2001.⁸³ Although the average unit value for domestic producers' U.S. commercial shipments increased from \$2.70 per pound in 1999 to \$2.75 per pound in 2000, it declined to \$2.57 per pound in 2001 and was \$2.23 per pound in interim 2002 compared to \$2.72 per pound in interim 2001.⁸⁴

With respect to the condition of the domestic industry, performance indicators are mixed; while some performance indicators declined over the period of investigation, financial performance improved modestly, at least until the interim period. While domestic production capacity increased overall between 1999 and 2001,⁸⁵ capacity utilization for the domestic industry decreased throughout this period from 76.3 percent in 1999 to 67.8 percent in 2000 and to 66.4 percent in 2001, and was lower in interim 2002 (58.7 percent) than in interim 2001 (66.0 percent).⁸⁶ The domestic industry's production rose from 88.7 million pounds in 1999 to 90.1 million pounds in 2000, then fell to 87.1 million pounds in 2001, but was higher in interim 2002 (22.4 million pounds) than in interim 2001 (19.7 million pounds).⁸⁷ Domestic producers' total shipments increased from 89.4 million pounds in 1999 to 90.2 million pounds in 2000, and declined to 84.8 million pounds in 2001, but their total shipments in interim 2002 (26.6 million pounds) were higher than in interim 2001 (22.0 million pounds).⁸⁸ Domestic producers' share of growing apparent U.S. consumption decreased from 95.5 percent in 1999 to 91.2 percent in 2000 and to 83.9 percent in 2001, and was only slightly higher in interim 2002 (87.0 percent) than in interim 2001 (86.8 percent).⁸⁹ The end-of-period inventories reported by the domestic industry rose from 6.4 million pounds in 1999 to 7.1 million pounds in 2000 and 9.6 million pounds in 2001, and were higher in interim 2002 (5.9 million pounds) than in interim 2001 (5.0 million pounds).⁹⁰ The number of production workers and the total number of hours worked declined between 1999 and 2001, but were higher in interim 2002 than in interim 2001.⁹¹ The

⁸³ See, e.g., CR/PR at Table IV-1. Respondents indicated that this trend can be explained by the shift in Vietnam in product mix from basa to tra. See, e.g., CR at V-4 n.7; PR at V-3 n.7.

⁸⁴ See, e.g., CR/PR at Table III-2.

⁸⁵ Domestic producers' capacity increased from 116.3 million pounds in 1999 to 132.8 million pounds in 2000 then decreased to 131.1 million pounds in 2001 and was higher in interim 2002 (38.2 million pounds) than in interim 2001 (29.8 million pounds). See, e.g., CR/PR at Table III-2. These capacity increases were in line with growth in apparent U.S. consumption between 1999 and 2001 and into 2002. See, e.g., CR/PR at Table IV-1.

⁸⁶ See, e.g., CR/PR at Table III-2.

⁸⁷ See, e.g., CR/PR at Table III-2.

⁸⁸ See, e.g., CR/PR at Table III-2. According to NASS data, domestic processors' sales of frozen catfish fillets increased from 134.6 million pounds in 1999 to 134.7 million pounds in 2000 then declined to 131.6 million pounds in 2001 but were 39.5 million pounds in interim 2002 compared to 34.5 million pounds in interim 2001. See, e.g., CR at III-5; PR at III-4.

⁸⁹ See, e.g., CR/PR at Table IV-1.

⁹⁰ See, e.g., CR/PR at Table III-2. According to NASS data, processors' end-of-period inventories of frozen catfish fillets (including end-of-period inventories of breaded and marinated products) increased from 8.4 million pounds in 1999 to 11.0 million pounds in 2000 and to 12.3 million pounds in 2001 and were 8.7 million pounds in interim 2002 compared to 8.5 million pounds in interim 2001. See, e.g., CR at III-5; PR at III-4. The shelf life for IQF fillets is approximately six months. See, e.g., Conference Tr. at 16, 65.

⁹¹ See, e.g., CR/PR at Table III-2.

domestic industry's productivity, hourly wages, and wages paid generally improved.⁹² The domestic industry's level of capital expenditures decreased from \$9.9 million in 1999 to \$5.8 million in 2000 and then increased to \$22.9 million in 2001, and was higher in interim 2002 (\$6.2 million) than in interim 2001 (\$4.9 million).⁹³

The domestic industry's unit net sales value increased from \$2.75 in 1999 to \$2.79 in 2000, then decreased in 2000 to \$2.58, and was lower in interim 2002 (\$2.29) than in interim 2001 (\$2.72).⁹⁴ Unit cost of goods sold increased from \$2.45 in 1999 to \$2.46 in 2000 but decreased to \$2.23 in 2001, and unit cost of goods was lower in interim 2002 (\$2.07) than in interim 2001 (\$2.41).⁹⁵ Thus, the quantity sold decreased from 1999 to 2000 while the net sales value increased as a result of an increase in the per-pound net sales value. The increase in the per-pound net sales value also coincided with an increase in operating income per pound from 8 cents in 1999 to 10 cents in 2000.⁹⁶ The net sales quantity, net sales value, and the net sales value per pound decreased in 2001 compared to 2000; operating income per pound, however, increased to 11 cents when the per-pound cost of live food-size catfish decreased more than the per-pound net sales value. The quantity sold was higher in interim 2002 compared to interim 2001 but the net sales value was lower, in line with a steep decline in the per-pound net sales value. The operating income margin and the operating income per pound were lower in interim 2002 compared to interim 2001, principally because the per-pound net sales value decreased substantially more than the per-pound cost of food-size live catfish.⁹⁷ Domestic producers reported a number of actual and potential negative effects on their existing development and production efforts.⁹⁸

Based on the record in the preliminary phase of this investigation, we determine that substantially increased dumped imports are imminent, and that these imports are likely to exacerbate price pressure on domestic producers. By the beginning of 2002, the record indicates that processors were unable to keep pace with declining prices by reducing overall costs (primarily raw catfish costs). Processors could not continue to push the negative effects associated with large volumes of low-priced imports down to the farmers, many of whom already are suffering net losses.

CONCLUSION

For the reasons stated above, we determine that there is a reasonable indication that the domestic industry producing frozen catfish fillets, whether or not breaded or marinated, is threatened with material

⁹² See, e.g., CR/PR at Table III-2.

⁹³ See, e.g., CR/PR at Table VI-5. The increase in capital expenditures in 2001 is due, in part, to ***. See, e.g., ***.

⁹⁴ See, e.g., CR/PR at Table VI-2.

⁹⁵ See, e.g., CR/PR at Table VI-1 (data from questionnaire responses). Whole fish represents 70.4 percent of the cost of goods sold of frozen catfish fillets, and farmers' variable cost is feed. Feed prices declined between 1997 and 1999 but increased between 1999 and 2001. See, e.g., CR at V-2; PR at V-2.

⁹⁶ If purchases from related parties are recorded for the costs of goods sold of *** at the cost of the related party rather than value paid, the operating income margin for all combined companies is *** percent in 1999, *** percent in 2000, and *** percent in 2001. CR/PR at Table VI-3 n.6. Producer questionnaires specifically instructed domestic producers to report purchases and transfers from related firms at cost. Producer Questionnaire at 8 (question III-6).

⁹⁷ See, e.g., CR at VI-1; PR at VI-1.

⁹⁸ See, e.g., CR/PR at Exhibit E.

injury by reason of subject imports from Vietnam that are allegedly sold in the United States at less than fair value.

ADDITIONAL VIEWS OF COMMISSIONER LYNN M. BRAGG

As noted, I join the Views of the Commission, finding that the preliminary record in this investigation provides a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of certain frozen fish fillets from Vietnam. However, because I have made an affirmative determination of threat of material injury in this preliminary investigation, I provide additional views to highlight more completely the issues that I believe warrant continuing this investigation to a final stage and accordingly further exploration in any final investigation. These views also discuss no material injury to provide a further context for my threat analysis.

As an initial matter, several fundamental issues are raised but unanswered in this preliminary phase of the investigation, which warrant an affirmative determination under the *American Lamb* standard. An important issue remains unexplored regarding the nature and degree of financial relations between the catfish farmers and the processors that could directly affect the definition of the domestic industry, as well as the compilation and analysis of the domestic industry performance data. For example, basing comparisons on weight versus value data as a measure of the raw agricultural product devoted to production of the processed product may result in different conclusions for the continuous line of production analysis. Similarly, different economic analysis may be warranted when considering the U.S. processors that are owned by farmers and the processors which are part of farmer cooperatives; because of incomplete information, both of these examples require further exploration in any final phase of this investigation.¹ Important issues that also warrant further exploration include: the relation of the six-month shelf life of frozen catfish fillets with the size of both domestic and imported inventories and the prospects for liquidation; the extent to which certain industry processors buy and sell subject imports; and the commodity-nature of the domestic like product and subject merchandise. I also note that depending on how these issues are explored and resolved in any final investigation, the analysis of whether there is present material injury or threat of material injury may differ importantly.

No Reasonable Indication of Present Material Injury

Overall, I note that the domestic industry achieved increasing profitability from 1999 to 2001, which mitigates against a finding of present material injury. Nonetheless, several important performance indicia do evidence that a progressive weakening of the condition of the domestic industry has occurred. Specifically, in the context of a growing U.S. market, the preliminary record indicates that the substantial increase of subject import volume and the substantial declines of U.S. prices have resulted in a weakened condition of the domestic industry, even as the domestic industry unsuccessfully attempted to increase its share of a growing U.S. market by expanding production capacity. A comparison of interim (January-March) period data corroborates a preliminary finding of an imminent threat of material injury by reason of the subject imports that fully emerged by interim 2002.

Volume. The volume of subject imports increased by 403.5 percent between 1999 and 2001, and increased by an additional 17.7 percent between interim periods.² In particular, the volume of subject

¹ It may be that upon additional analysis of more complete information on these issues in the final phase of the investigation that a different conclusion regarding the domestic industry's structure and profitability may emerge than is evidenced by the current preliminary record.

² CR/PR at Table C-1.

imports increased from 4.8 million pounds in 1999 to 24.4 million pounds in 2001.³ The market share of subject imports likewise increased over the entire period of investigation, from 3.4 percent in 1999 to 15.5 percent in 2001, and also increased between interim periods.⁴ At the same time, within the context of the growing U.S. market,⁵ the market share of U.S. producers consistently declined from 95.5 percent in 1999 to 83.9 percent in 2001, while nonsubject imports fluctuated with only a minor share of the U.S. market.⁶ I find that the substantial surge in volume of subject imports is not significant for purposes of analyzing present material injury in light of the preliminary record which indicates increasing profitability of the domestic industry from 1999 to 2001. However, increased subject imports have contributed to the weakening condition of the domestic industry and the substantial surge in volume is an important portent of the imminent threat posed by subject imports.

Price. Price comparisons indicate that subject imports undersold the domestic like product in each month for which data were available and the margins of underselling ranged from 12.6 to 54.9 percent.⁷ Pricing data demonstrate declining price trends for both the subject imports from Vietnam and the domestic like product from 1999 to 2001, and between interim periods as well.⁸ Furthermore, the average unit values (“AUV”) corroborate the declining price trend even as the volume of subject imports increased; in particular, the AUVs of subject imports declined most dramatically from the third quarter of 2000 through the first quarter of 2002,⁹ while the AUVs of the domestic like product tracked import price levels downward, declining by a larger amount during the second half of the period of investigation.¹⁰ In addition, given the relationships between farmers and processors, as well as the commodity nature of the products, I find it important to note also the substantial declines in prices received at the U.S. farmer level.¹¹ Furthermore, purchasers confirmed nine lost sales allegations totaling \$8.4 million and ***.¹² Notwithstanding evidence of uniform underselling, I find that subject imports are not a cause of significant negative price effects for purposes of analyzing present material injury, particularly in light of the increasing profitability of the domestic industry from 1999 to 2001. However, I further find that evidence of uniform underselling is indicative of the imminent threat of material injury posed by subject imports, particularly in light of the weakened condition of the domestic industry evidenced at the end of the period of investigation.

Impact. Although it may be argued that the domestic industry should have performed better in the

³ CR/PR at Table IV-1.

⁴ CR/PR at Table IV-1.

⁵ Apparent U.S. consumption increased by 11.4 percent between 1999 and 2001, and increased by an additional 14.3 percent between interim periods; specifically, apparent U.S. consumption increased from 140.9 million pounds in 1999 to 157.0 million pounds in 2001, and from 39.7 million pounds in interim 2001 to 45.4 million pounds in interim 2002. CR/PR at Table C-1.

⁶ CR/PR at Table IV-1.

⁷ CR/PR at Tables V-1-4; CR at V-9, PR at V-4.

⁸ CR/PR at Tables V-1-4.

⁹ I note that respondents attribute the declining price levels of subject imports to a change in product mix from basa, a higher value fish, to tra, a lower value fish. Even if true, this does not change the fact that weighted average quarterly pricing comparisons indicate uniform underselling.

¹⁰ CR/PR at Table C-1; CR at V-4, PR at V-3, 4.

¹¹ CR at V-2, PR at V-2.

¹² CR/PR at Table V-6.

context of growing demand in the U.S. market, for purposes of this preliminary investigation, I do not find that the domestic industry experienced a significant adverse impact by reason of subject imports. The profitability of the domestic industry increased steadily from 1999 to 2001, but declined sharply in interim 2002.¹³ In particular, operating profits rose from \$6.7 million in 1999 to \$8.5 million in 2001, operating income margins increased from 3.0 percent in 1999 to 4.2 percent in 2001, and the quantity of U.S. shipments increased over the same period.¹⁴ The record indicates that the increase in operating income from 1999 to 2001 was due to a reduction in costs per pound exceeding the reduction in per-pound net sales value.¹⁵ In spite of these performance improvements, several performance indicia demonstrate the weakening of the domestic industry although demand was rising in the U.S. market; in particular, from 1999 to 2001, the quantity and average unit values of net sales decreased, the number of production workers declined, shipment values dropped, domestic production quantity decreased, and domestic inventory grew.¹⁶ Indeed, by 2001, five of 11 domestic producers reported operating losses as compared to three of 11 in 1999.¹⁷ U.S. catfish farmers experienced similar deteriorating financial trends as processors, but with greater losses than the processors as farmers' prices declined at a greater rate than their cost reductions.¹⁸ Although the foregoing data demonstrate that the domestic industry is in a weakened condition, I do not find that the domestic industry experienced a significant adverse impact by reason of subject imports. Nonetheless, it is in this context of a weakened condition of the domestic industry that I evaluate the threat of material injury posed by subject imports.¹⁹

¹³ CR/PR at Table C-1.

¹⁴ Id.

¹⁵ CR/PR at Tables VI-1 & 4; CR at VI-7, PR at V-1.

¹⁶ CR/PR at Table C-1. Capacity utilization of the domestic industry also declined over the period of investigation, as the domestic industry was not able to utilize new capacity to meet growing demand in the U.S. market; thus, given the current excess viability of the unused capacity, the domestic industry is threatened by surging subject import volumes. CR/PR at Table C-1.

¹⁷ CR/PR at Table VI-1.

¹⁸ CR/PR at Tables VI-6 & 8.

¹⁹ See Views of the Commission at Section V.