

UNITED STATES INTERNATIONAL TRADE COMMISSION

WHEAT GLUTEN

Investigation No. TA-201-67 (Consistency Determination)

DETERMINATION AND VIEWS OF THE COMMISSION

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# UNITED STATES INTERNATIONAL TRADE COMMISSION

## Investigation No. TA-201-67 (Consistency Determination)

### WHEAT GLUTEN

#### DETERMINATION

On April 3, 2001, the Commission received a request from the United States Trade Representative (“USTR”) that the Commission issue a determination under Section 129(a)(4) of the Uruguay Round Agreements Act (“URAA”)<sup>1</sup> that would render the Commission’s action in connection with *Wheat Gluten*<sup>2</sup> not inconsistent with the findings of the Appellate Body of the World Trade Organization (“WTO”) in its report in *United States – Wheat Gluten*.<sup>3</sup> In response to USTR’s request, the Commission hereby issues a determination and views under Section 129(a)(4) of the URAA that render its action in *Wheat Gluten* not inconsistent with the findings of the Appellate Body in its report in *United States – Wheat Gluten*.

On the basis of the record in the Commission’s 1998 *Wheat Gluten* injury investigation, the reports of the WTO Panel<sup>4</sup> and the Appellate Body in *United States – Wheat Gluten*, and comments received in this Section 129 proceeding in response to the Commission’s notice published in the Federal Register on April 9, 2001,<sup>5 6</sup> the Commission<sup>7</sup> unanimously –

- (1) determines, pursuant to Section 202(b) of the Trade Act of 1974, that wheat gluten is being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article like or directly competitive with the imported article; and
- (2) makes negative findings, pursuant to Section 311(a) of the North American Free-Trade Agreement (“NAFTA”) Implementation Act, with respect to imports of wheat gluten from Canada and Mexico.

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<sup>1</sup> 19 U.S.C. § 3538(a)(4).

<sup>2</sup> *Wheat Gluten*, Inv. No. TA-201-67, USITC Pub. 3088 (March 1998).

<sup>3</sup> *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Report of the Appellate Body, WT/DS/166/AB/R (22 December 2000).

<sup>4</sup> *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Report of the Panel, WT/DS166/R (31 July 2000).

<sup>5</sup> 66 Fed. Reg. 18510 (Apr. 9, 2001). The Commission based its determination on evidence in the original record as of January 15, 1998, the date of the Commission’s vote as to serious injury, the reports of the WTO Panel and Appellate Body in *United States -- Wheat Gluten*, and the submissions in this Section 129(a)(4) proceeding, excluding new information not of record as of January 15, 1998.

<sup>6</sup> Commissioner Devaney joins his colleagues only insofar as their affirmative statement of what the record is.

<sup>7</sup> In this Section 129 proceeding, Commissioners Bragg and Miller adopt their original Views on Injury and supplement those Views as appropriate to address those issues raised by the Section 129 request and the WTO Appellate Body’s findings. Chairman Koplán, Vice Chairman Okun, and Commissioners Hillman and Devaney have conducted a *de novo* review of the record, and based on that review, have adopted the Views of the Commission on Injury in its original report, as supplemented by this determination.



## VIEWS OF THE COMMISSION ON INJURY

### Introduction

On April 3, 2001, the Commission received a request from the United States Trade Representative (“USTR”) that the Commission issue a determination under Section 129(a)(4) of the Uruguay Round Agreements Act (“URAA”)<sup>1</sup> that would render the Commission’s action in connection with *Wheat Gluten*<sup>2</sup> not inconsistent with the findings of the Appellate Body of the World Trade Organization (“WTO”) in its report in *United States – Wheat Gluten*.<sup>3</sup> In response to USTR’s request, we hereby issue a determination and views under Section 129(a)(4) of the URAA that render our action in *Wheat Gluten* not inconsistent with the findings of the Appellate Body in its report in *United States – Wheat Gluten*.

On the basis of the record in the Commission’s 1998 *Wheat Gluten* injury investigation, the reports of the WTO Panel<sup>4</sup> and the Appellate Body in *United States – Wheat Gluten*, and comments received in this Section 129 proceeding in response to the Commission’s notice published in the Federal Register on April 9, 2001,<sup>5 6</sup> we determine, pursuant to section 202(b) of the Trade Act of 1974 (“Trade Act”), that wheat gluten is being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic wheat gluten industry. Pursuant to Section 311(a) of the North American Free-Trade Agreement (“NAFTA”) Implementation Act,<sup>7</sup> we have made negative findings with respect to imports of wheat gluten from Mexico and Canada.<sup>8 9</sup>

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<sup>1</sup> 19 U.S.C. § 3538(a)(4).

<sup>2</sup> *Wheat Gluten*, Inv. No. TA-201-67, USITC Pub. 3088 (March 1998).

<sup>3</sup> *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Report of the Appellate Body, WT/DS/166/AB/R (22 December 2000) (“*United States -- Wheat Gluten Appellate Body Report*”).

<sup>4</sup> *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Report of the Panel, WT/DS166/R (31 July 2000) (“*United States -- Wheat Gluten Panel Report*”).

<sup>5</sup> 66 Fed. Reg. 18510 (Apr. 9, 2001). The Commission based its determination on evidence in the original record as of January 15, 1998, the date of the Commission’s vote as to serious injury, the reports of the WTO Panel and Appellate Body in *United States -- Wheat Gluten*, and the submissions in this Section 129(a)(4) proceeding, excluding new information not of record as of January 15, 1998.

<sup>6</sup> Commissioner Devaney joins his colleagues only insofar as their affirmative statement of what the record is.

<sup>7</sup> 19 U.S.C. § 3371(a).

<sup>8</sup> In this Section 129 proceeding, Commissioners Bragg and Miller adopt their original Views on Injury and supplement those Views as appropriate to address those issues raised by the Section 129 request and the WTO Appellate Body’s findings. Chairman Koplan, Vice Chairman Okun, and Commissioners Hillman and Devaney have conducted a *de novo* review of the record, and based on that review, have adopted the original Views of the Commission on Injury, as supplemented by this determination.

<sup>9</sup> The Commission notes that this determination is informed by the SAA’s direction with respect to Section 129, stating that “the ITC will examine the full range of its discretion under U.S. law.” H. Conf. Rep. 103-316, Vol. 1 (“SAA”) at 354 (1994). The Commission’s action in this proceeding does not establish new standards or interpretations for future Section 201 investigations.

## Background

On September 19, 1997, the Wheat Gluten Industry Council filed a petition with the Commission under Section 202 of the Trade Act requesting relief from imports of wheat gluten.<sup>10</sup> On October 1, 1997, a notice was published in the Federal Register announcing the Commission's commencement of an investigation under Section 202.<sup>11</sup> On January 15, 1998, the Commission<sup>12</sup> unanimously determined that wheat gluten is being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article like or directly competitive with the imported article, and made negative findings with respect to Canada and Mexico pursuant to Section 311(a) of the NAFTA Implementation Act. On March 18, 1998, the Commission transmitted to the President its report on the investigation, including its findings and recommendations with respect to remedy. On June 1, 1998, the President imposed quantitative restrictions on imports of wheat gluten.

In July 1999, the European Communities requested the establishment of a WTO panel with respect to the definitive safeguard measure imposed by the United States on imports of wheat gluten, and a panel was thereafter established by the WTO Dispute Settlement Body. On July 31, 2000, the Panel issued its report with respect to the United States safeguard measure. Both the United States and the European Communities appealed certain issues in the Panel report to the WTO Appellate Body. On December 22, 2000, the Appellate Body issued its report.

On March 15, 2001, the Commission received a request from the USTR under Section 129(a)(1) of the URAA.<sup>13</sup> The request enclosed a copy of the Appellate Body report, and stated that the Appellate Body had found, *inter alia*, that action by the Commission in connection with its *Wheat Gluten* investigation, Investigation No. TA-201-67, was not in conformity with the obligations of the United States under the WTO *Agreement on Safeguards*. The request referred to three findings of the Appellate Body in that regard, contained in paragraphs 80 through 92, 93 through 100, and 156 through 163, respectively, of its report. USTR requested, pursuant to Section 129(a)(1), that the Commission issue an advisory report on whether Title II of the Trade Act permits the Commission to take steps in connection with Investigation No. TA-201-67 that would render its action in that proceeding not inconsistent with those Appellate Body findings.

When the Commission receives a Section 129(a)(1) request from USTR, the Statement of Administrative Action directs it to "examine the full range of its discretion under U.S. law and based on that examination ... advise the Trade Representative whether the law is reasonably susceptible of an interpretation that would allow the [Commission] to take action not inconsistent with the [Appellate Body] report's recommendations."<sup>14</sup> After conducting such an examination, on March 22, 2001, the Commission transmitted to the USTR its advisory report under Section 129(a)(1), which reported that Title II of the Trade Act permits the Commission to take steps in connection with its action in *Wheat Gluten*,

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<sup>10</sup> We adopt from the original Commission report the section of the Commission's Views on Injury entitled "Introduction," as supplemented herein, and the section entitled "Background."

<sup>11</sup> 62 Fed. Reg. 51488 (Oct. 1, 1997).

<sup>12</sup> Chairman Marcia E. Miller, Vice Chairman Lynn M. Bragg, and Commissioner Carol T. Crawford, who all voted in the affirmative, were the three members of the Commission participating in the original investigation.

<sup>13</sup> 19 U.S.C. § 3538(a)(1).

<sup>14</sup> SAA at 354 (1994). The SAA is the authoritative interpretation of the Uruguay Round Agreements Act. *See* 19 U.S.C. § 3511(a)(2).

Investigation No. TA-201-67, that would render its action in that proceeding not inconsistent with the findings of the Appellate Body. On April 3, 2001, the Commission received a request from the USTR that the Commission issue a determination under Section 129(a)(4) of the URAA that would render the Commission's action in connection with *Wheat Gluten* not inconsistent with the findings of the Appellate Body in its report in *United States – Wheat Gluten*.

Section 129(a)(4) provides that, after receiving such a written request from the USTR, the Commission “shall issue a determination in connection with that particular proceeding that would render the Commission's action ... not inconsistent with the findings of the Appellate Body.”<sup>15</sup> The SAA states that:

Subsection (a)(4) provides the mechanism by which, if a majority of the ITC has advised that it may take action consistent with U.S. law to render its actions not inconsistent with an adverse report, the Trade Representative may require the ITC to take such action. Many of the ITC's proceedings are time-limited by statute, and the ITC cannot revisit its actions in those proceedings in the absence of authority provided by subsection (a)(4) or a remand. A written request by the Trade Representative under subsection (a)(4) will provide authority for the ITC to take action with respect to such matters.<sup>16</sup>

After receiving the Section 129(a)(4) request from USTR, the Commission issued a notice in the Federal Register on April 9, 2001, providing for parties to file comments and responses to comments, and for non-parties to file a single set of comments. The notice stated that “[a]ll comments shall be limited solely to information in the record of the original investigation..., and may include comments regarding the Commission's conclusion in the advisory report under section 129(a)(1).”<sup>17</sup>

In this Section 129(a)(4) determination, we address only the three issues raised by USTR's request.

### **Domestic Industry**

We adopt from the original Commission report the section of the Commission's Views on Injury entitled “Domestic Industry.”

### **Increased Imports**

We adopt from the original Commission report the section of the Commission's Views on Injury entitled “Increased Imports.”

### **Serious Injury or Threat**

We adopt from the original Commission report the section of the Commission's Views on Injury entitled “Serious Injury or Threat,” as supplemented herein.

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<sup>15</sup> 19 U.S.C. § 3538(a)(4).

<sup>16</sup> SAA at 355.

<sup>17</sup> 66 Fed. Reg. 18510 (Apr. 9, 2001).



### *Domestic Producers' Allocation Methodologies*

USTR's Section 129(a)(4) request directs the Commission to findings of the Appellate Body contained in paragraphs 156-163 of its report. The Appellate Body concluded that the Panel had erred in making its finding that the Commission's report provided an "adequate, reasoned and reasonable explanation with respect to 'profits and losses.'"<sup>18</sup> The Appellate Body found that the Panel in making this finding should not have relied on clarifications provided by the United States to the Panel that were not contained in the original Commission report. Those clarifications related to the nature of the Commission's careful review of the methodologies used by the domestic producers to allocate costs between wheat gluten, wheat starch, and other derived products in their responses to the Commission's questionnaire.<sup>19</sup> In these Views, we provide further information and explanation of our review of the cost allocation methodologies.

The Commission stated in its original report:

The Commission received usable financial data on wheat gluten operations from three of the four domestic producers of wheat gluten, [Midwest], Manildra, and Heartland.<sup>20</sup> These three firms accounted for the substantial majority of domestic production of wheat gluten. Each of the companies produces wheat gluten and wheat starch in a joint production process. Each of the companies also produces other by-products or related products, especially alcohol. We carefully considered the arguments made by respondents with respect to the allocations made by domestic producers in providing financial data on their wheat gluten operations. *Based on a careful review of the allocation methodologies used by domestic wheat gluten producers in responding to the Commission's questionnaire, we find those allocations to be appropriate.*<sup>21</sup>

Because the cost allocation methodologies of the individual domestic producers are confidential business information, the Commission was constrained in what it could say about the specific allocation methodologies in its public report, and the relevant material in the Commission's original staff report was redacted from the public report as confidential business information.<sup>22</sup> The questions raised by the WTO

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<sup>18</sup> *United States – Wheat Gluten* Appellate Body Report at Paragraph 163.

<sup>19</sup> *United States – Wheat Gluten* Appellate Body Report at Paragraphs 160-162.

<sup>20</sup> The Commission's opinion included a footnote here stating: "The fourth firm, ADM, provided combined data on its U.S. and Canadian wheat gluten and wheat starch operations." *Wheat Gluten*, USITC Pub. 3088, at I-13, n.56.

<sup>21</sup> *Wheat Gluten*, USITC Pub. 3088, at I-13 (emphasis added) (footnotes omitted).

<sup>22</sup> During the WTO Panel proceedings, the Panel made a request to the United States for production of certain confidential business information that the Commission had obtained from the parties during the original investigation, including information relating to the allocation methodologies. The United States advised the Panel that it was unable to provide such information (under the terms of the Agreement on Safeguards as well as under U.S. law) without consent of the submitting parties, but would seek such consent. USTR obtained consent from the domestic producers, conditioned on terms of disclosure to European Communities (EC) personnel that the EC subsequently rejected. Given the EC's position that it could not accept limitations on its representatives' use of such confidential information, no such information was provided to the Panel. The Panel concluded that it had sufficient information to evaluate the Commission's report without the confidential information, and did not draw any adverse inference against the United States. *United States – Wheat Gluten* Panel Report at Paragraphs 8.7 to 8.26. The Appellate Body nevertheless commented that "we ... deplore the conduct of the United States" in not providing the confidential information to the Panel. *United States – Wheat Gluten* Appellate Body Report at

(continued...)



Panel concerned the nature of the Commission's "careful review" of the allocation methodologies, and the basis for the conclusion that they were "appropriate."

As detailed below, the Commission's review of the allocations involved detailed requests by the Commission for information, and extensive follow-up by Commission staff to assure that all the necessary information was in fact obtained. Commission staff traveled to the facilities of three of the domestic producers to learn more about these issues, and made a further trip to conduct an onsite financial verification with respect to the largest producer. At the Commission's hearing, a Commissioner, as well as a Commission attorney, posed substantive questions to the petitioner regarding the domestic producers' allocation methodologies, and received detailed responses in writing from the petitioner. Throughout the entire process, counsel for the association of European Union wheat gluten producers (the "EU respondents"), who were the principal respondents opposed to the petition, had full access to the confidential record pursuant to the Commission's administrative protective order (including all information provided to the Commission about allocation methodologies), and made detailed comments to the Commission about the domestic producers' allocations.

Shortly after the commencement of the investigation, the Commission prepared draft questionnaires to be submitted to the domestic wheat gluten producers, and submitted the draft to all parties for comments. Counsel for the EU respondents submitted detailed comments on the draft questionnaires. In its questionnaires to the domestic producers, the Commission provided specific instructions with respect to the submission of financial data. The Commission directed the domestic producers to provide financial data on overall establishment operations, combined wheat gluten/wheat starch operations, wheat gluten operations alone, and wheat starch operations alone. Firms that did not maintain separate internal profit-and-loss and cost of production data for wheat gluten operations were directed to allocate costs between wheat gluten and wheat starch, to explain their allocation methodology, and to provide worksheets with their calculations. They were also instructed to indicate the accounting basis that they used (U.S. generally accepted accounting principles, or otherwise).

After the questionnaires were sent out, Commission staff traveled to Kansas and Missouri in late October 1997 to visit the facilities of the domestic producers, and interviewed their personnel about a wide range of matters, including allocation methodologies. When the Commission received the questionnaire responses in late October and early November, Commission staff examined the responses in detail. A Commission accountant examined the financial information in the responses, and called each of the domestic producers for clarification of its data, and for additional information, including on allocation issues. Commission staff followed up these oral requests with letters formally requesting this additional information, and received responses from the domestic producers providing the documentation requested.

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<sup>22</sup> (...continued)

Paragraph 171.

The Commission is mindful that the United States, in entering into the Agreement on Safeguards, accepted an obligation to protect confidential information, and we are troubled that the Appellate Body would make this statement without fully considering the express obligations imposed by Article 3.2 of the Agreement. Article 3.2 states that "[a]ny information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. *Such information shall not be disclosed without the permission of the party submitting it.*" (Emphasis added). While the Appellate Body agreed with the Panel's observation that there is a "serious systemic issue" as to the relationship between the confidentiality obligations of WTO Members and their responsibilities when faced with a panel request for information, it failed to address the specific confidentiality obligations imposed by Article 3.2.

These procedures and the evidence of the appropriateness of the domestic producers' accounting methodologies are documented in Commission staff memoranda of the meetings with the parties, staff notes of phone calls to the parties, and letters to the parties, as well as the parties' questionnaire responses and additional submissions of information in response to these Commission requests. Much of the information involved is confidential business information. However, it was all placed in the record of the Commission investigation, and was available to authorized representatives of the parties to the proceeding subject to the Commission's administrative protective order, including representatives of the EU respondents.

After reviewing these materials, on November 25, 1997, counsel for the EU respondents sent a letter to the Commission, contending that there were deficiencies in the domestic producers' questionnaire responses, including with respect to two producers, Midwest Grain Products, Inc. ("Midwest") and Manildra Milling Corporation ("Manildra"), on allocation issues, and urging the Commission to collect additional information from the domestic producers. The next day, a Commission accountant followed up with a call to Manildra seeking certain information that the EU Respondents had identified as needed, and Commission staff followed up with a written request. On December 1, 1997, Manildra responded to Commission staff requests by producing allocation worksheets as requested.

In addition, the Commission selected Midwest, the largest producer, for a two day on-site verification in Atchison, Kansas on December 3 and 4, 1997. This verification was conducted by a Commission auditor, a certified public accountant, who interviewed Midwest personnel, reviewed numerous documents, verified the financial data in Midwest's questionnaire response against its internal records, and addressed certain issues raised by the EU respondents' counsel in its November 25 letter. Midwest is a public corporation whose stock is traded on the NASDAQ stock exchange, and it reported the financial information in its public financial statements on the basis of U.S. generally accepted accounting principles.

To derive the wheat gluten financial data from the overall corporate financial data, the Commission auditor conducted a reconciliation which entailed a detailed evaluation of the firm's operations and accounting system. The Commission auditor reconciled Midwest's questionnaire data on wheat gluten for each period with the product income and loss statements that were derived from the audited financial statements. This was possible because Midwest prepares separate income and loss statements on a monthly basis for each of its divisions, including its wheat gluten division. The Commission auditor reviewed the financial statements for each division and allocations used, and tested their reasonableness with alternative allocation methods.

In addition, the Commission auditor confirmed that the allocation methods used by Midwest to measure the financial performance of each division had been in use for a number of years and were not changed for purposes of the Commission wheat gluten investigation. The auditor concluded that the verification objectives were fully satisfied.

The Commission auditor prepared a detailed 50-page verification report, signed December 15, 1997, including exhibits, which was made a part of the Commission's record in the investigation. While virtually all of the information in the report is confidential business information, it was made available to parties to the proceeding who were subject to the Commission's administrative protective order, including representatives of the EU respondents.

On December 10, 1997, the parties submitted prehearing briefs to the Commission. In their brief, the EU respondents again raised questions about the allocation methodologies used by the domestic

producers.<sup>23</sup> At the public Commission hearing on December 16, 1997, the Commission attorney working on the investigation asked representatives of the domestic producers several questions about their allocation methodologies.<sup>24</sup> Petitioner's counsel responded briefly at the hearing, emphasizing the verification performed by the Commission auditor and the documentation supplied by the domestic producers at Commission staff's request, and then responded in fuller detail in the posthearing brief in order to discuss confidential information without revealing it publicly.<sup>25</sup> After the hearing, Commissioner Crawford posed additional questions to the domestic producers about their allocation methodologies. As the questions posed by Commissioner Crawford show, the issues subsequently raised by the WTO Panel and Appellate Body were not new issues, and were in fact anticipated by the Commission. She asked the domestic producers (1) to explain why their allocation methodologies would not result in the mis-attribution of costs to wheat gluten, and perhaps the under- or over-estimation of profitability; (2) to report the value of wheat starch and any products that might be considered waste; and (3) to explain differences between financial statistics for two wheat gluten producers.<sup>26</sup>

On December 23, 1997, the parties submitted posthearing briefs to the Commission. In its posthearing brief, petitioner answered the questions of Commissioner Crawford and the Commission attorney, and provided further explanation of the allocation methodologies in a detailed 12-page response (much of which is confidential business information).<sup>27</sup>

All reporting firms stated that their financial data were prepared in accordance with U.S. generally accepted accounting principles. As the Commission noted in its original report, one domestic producer, Archer Daniels Midland ("ADM"), did not provide separate breakouts between its United States and Canadian operations, or between its wheat gluten and wheat starch operations.<sup>28</sup> The accounting methodologies used by all the other producers were reviewed by the Commission accounting staff, and checked for reasonable allocation methods. To the extent that the revenues and costs were not directly attributable to a particular product, the Commission staff ascertained that the firms used reasonable allocation methodologies. Commission staff determined that each reporting producer, apart from ADM, had its own cost allocation methodology, and that each used that methodology consistently from year to year.<sup>29</sup> It found that differences among the methodologies used by the responding companies were principally a function of differences in operations and reflected appropriate commercial realities.

Both the Commission and its staff carefully considered the arguments made by the EU respondents with respect to the allocations. While the confidential discussion in the Staff Report cannot be made

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<sup>23</sup> EU Respondents' December 10, 1997, Prehearing Brief at 7-11.

<sup>24</sup> The Commission attorney asked petitioner's representatives: "for each of the firms that you represent, does each of the firms regard wheat gluten as a separate profit center, and do they have a formulation for coming up with figuring out what their financial data is for gluten versus starch? If they do have such a formulation, did they use the same formulation in supplying data in their questionnaire responses, or did they develop a different formulation for purposes of this investigation?" December 16, 1997, Hearing Transcript ("Hearing Tr.") at 112.

<sup>25</sup> Hearing Tr. at 112-114; Petitioner's December 23, 1997, Posthearing Brief at 23-35, 44.

<sup>26</sup> See Petitioner's December 23, 1997, Posthearing Brief at 22.

<sup>27</sup> Petitioner's December 23, 1997, Posthearing Brief at 2-4, 23-35, 44.

<sup>28</sup> *Wheat Gluten*, USITC Pub. 3088, at I-13 n.56. Despite repeated requests from Commission staff, ADM did not provide usable financial data on its U.S. wheat gluten operations. Investigation No. TA-201-67 Public Staff Report ("Report") at II-17 n.45.

<sup>29</sup> Report at II-20.

public,<sup>30</sup> it can be summarized in non-confidential terms.<sup>31</sup> In that discussion, the staff addressed the results of its review of each producer's information, in particular its analysis of the cost allocation methodologies of the two producers whose allocations the EU respondents had challenged. As to one, the report addressed the results of staff's verification of its methodology, particularly recounting how an alternative allocation using a different methodology had been conducted, and did not yield significantly different results. As to the other, the report explained why the EU respondents' contentions, which concerned allocation of certain overhead charges, were based on a mistaken interpretation of the data provided. The report also described how the cost allocation methodologies of the two firms differ from each other.

## Causation

We adopt from the original Commission report the section of the Commission's Views on Injury entitled "Causation," as supplemented herein.

### *Domestic Industry Capacity and Capacity Utilization*

USTR's Section 129(a)(4) request directs the Commission to findings of the Appellate Body contained in paragraphs 80-92 of its report. Those findings address, *inter alia*, the Commission's consideration of industry capacity and capacity utilization in its original report on *Wheat Gluten*. The Appellate Body stated:

We are not satisfied, in light of the data that was before the USITC, that the USITC adequately evaluated the complexities of this issue and, in particular, whether the increases in average capacity, during the investigative period, were causing injury to the domestic industry at the same time as increased imports.... It follows, in this case, that the USITC has *not* demonstrated adequately, as required by Article 4.2(b), that any injury caused to the domestic industry by increases in average capacity has not been "attributed" to increased imports and, in consequence, the USITC could not establish the existence of "the causal link" Article 4.2(b) requires between increased imports and serious injury.<sup>32</sup>

As is reflected in the Commission's 1998 *Wheat Gluten* report, the Commission carefully considered the question of the effects of increases in industry capacity on the condition of the domestic industry, as distinguished from the effects of increased imports.<sup>33</sup> Indeed, during the public hearing in the original investigation, a Commissioner specifically asked the petitioner to address the effects of the added capacity as distinguished from the effects of imports, and petitioner responded both at the hearing and in more detail in its posthearing brief.<sup>34</sup> Petitioner responded that while the trends in import quantity and price had led directly to domestic price declines, the increase in capacity had not done so. It contended that the new capacity had not resulted in increased domestic supply to the market, which might have had a

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<sup>30</sup> See 19 U.S.C. §§ 1332(g), 2252(a)(8).

<sup>31</sup> Report at II-20 (information is redacted as business confidential).

<sup>32</sup> *United States – Wheat Gluten* Appellate Body Report at Paragraph 91.

<sup>33</sup> *Wheat Gluten*, USITC Pub. 3088, at I-12, I-17.

<sup>34</sup> Hearing Tr. at 100.

downward effect on prices; rather, domestic production and shipments had in fact declined as a result of increased imports.<sup>35</sup>

Reported domestic production capacity increased during the early part of the period examined by the Commission, from 162.9 million pounds in 1993 to 253.7 million pounds in 1995.<sup>36</sup> As the Commission stated in its original report, most of that new capacity was in place by June 1995, before the import surge that occurred in crop years 1996 and 1997.<sup>37</sup> There were more modest increases in reported capacity in 1996 and 1997, from 253.7 million pounds in 1995 to 267.2 million pounds in 1996, and to 273.9 million pounds in 1997.<sup>38</sup>

As the Commission found in its original report, these capacity increases were planned and implemented long before the 1996-1997 surge in imports, on the basis of growth in domestic demand and forecasts that this growth in demand would continue.<sup>39</sup> In some cases, the domestic industry's bakery customers specifically requested the domestic producers to expand capacity to meet those customers' needs.<sup>40</sup>

During the period examined, the three existing domestic producers each added production capacity, and a fourth producer entered the market. Manildra made a decision to expand capacity in early 1992, based on requests from its customers. After a one year delay due to a flood, it opened its Hamburg, IA plant in May 1994.<sup>41</sup> Midwest made its decision to increase its productive capacity based on customer demand in the 1993-1994 period, and made substantial expenditures at its plants at Atchison, KS and Pekin, IL.<sup>42</sup> ADM opened a new plant in Walhalla, ND in 1994; it closed that same plant in July 1995.<sup>43</sup> Heartland Wheat Growers ("Heartland") entered the wheat gluten market in 1996. Heartland was conceived as a regional wholesale cooperative in 1992-1993. Construction on its plant in Russell, KS began in July 1993. Heartland began production in June 1996.<sup>44</sup>

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<sup>35</sup> Hearing Tr. at 100-101; Petitioner's December 23, 1997, Posthearing Brief at 42-44.

<sup>36</sup> Report at II-15, Table 5.

<sup>37</sup> *Wheat Gluten*, USITC Pub. 3088, at I-12. References to yearly data are to wheat gluten crop years, which run from July 1 to June 30. *Id.* at I-5, n.2. June 1995 was at the end of crop year 1995.

<sup>38</sup> Report at II-15, Table 5.

<sup>39</sup> *Wheat Gluten*, USITC Pub. 3088, at I-12, I-17.

<sup>40</sup> Hearing Tr. at 81 (Stout).

<sup>41</sup> Hearing Tr. at 81 (Stout); Report at II-8, n.22; II-17.

<sup>42</sup> Hearing Tr. at 81 (Seaberg); Report at II-6, II-17 to II-18.

<sup>43</sup> Report at II-8. The effects of the reported capacity increases in 1996 and 1997 may have been diminished by the shutdown of ADM's idle plant at Walhalla, ND in July 1995 (which did not reopen during the period examined), whose capacity nonetheless continued to be included in the reported capacity figures for 1996 and 1997 (based on information supplied by ADM to Commission staff). See Report at II-8, n.25. Petitioner contended that if the capacity of that shutdown plant were excluded, there would be no net capacity increase for the period of 1995-1997. Hearing Tr. at 101-105.

<sup>44</sup> Report at II-8.

The domestic industry decided to expand capacity well before the surge in imports, and expected to supply its share of any increase in domestic demand.<sup>45</sup> As the Commission stated in its original report, the domestic industry's projection that there would be continued growth in demand and consumption, on which the domestic producers based their decisions to expand capacity, was largely correct; apparent consumption increased nearly 18 percent between 1993 and 1997.<sup>46</sup> However, increased imports in 1996 and 1997 supplied not only their historic share but all of the increase in domestic consumption, and resulted in reductions in domestic production and shipments to their lowest levels during the period examined.<sup>47</sup>

The increase in domestic production capacity had several effects on the domestic industry. It affected the capacity utilization rate, given the mathematical relationship between the two. While domestic production increased by approximately 12 percent between 1993 to 1995, before the import surge, average capacity increased by over 50 percent. Accordingly, as a result of the capacity increase, capacity utilization declined from 78.3 percent in 1993 to 56.2 percent in 1995. During the period that imports surged, capacity utilization declined further to 42.0 percent in 1996, while increasing slightly to 44.5 percent in 1997.<sup>48</sup> While reported average capacity increased by 8 percent from 1995 to 1997, domestic production declined by 14.6 percent during the same period.<sup>49</sup> With respect to the period 1995-1997, the increase in reported capacity had an effect on the capacity utilization rate, but had considerably lesser downward effect than did the sharp decline in domestic production.<sup>50</sup>

As the Commission's original findings indicate, a high capacity utilization rate is generally consistent with strong industry financial performance. However, the initial downward effect on capacity utilization of an increase in industry capacity is not necessarily significant in and of itself. It would be expected that the capacity utilization rate would decline initially as capacity was being added, would then increase as production increased to meet expanding demand, and would, over time, approach the capacity utilization level existing before capacity was increased.

The increase in capacity during the period examined may have had a more than *de minimis* effect on certain financial expense items. Depreciation increased, particularly in 1997, as result of increased capital expenditures in prior years. However, the available data indicate that the increase in industry costs on a per-pound basis during the period examined stemmed largely from an increase in raw material costs, and that depreciation was a relatively minor expense item.<sup>51 52</sup>

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<sup>45</sup> Hearing Tr. at 80-81 (Stout, Seberg), 106-108 (Stout).

<sup>46</sup> *Wheat Gluten*, USITC Pub. 3088, at I-17. While apparent U.S. consumption increased only slightly in the early part of the period examined, from 249.7 million pounds in 1993 to 255.4 million pounds in 1995, it increased sharply in the later part of the period to 294.2 million pounds in 1997. Report at II-25, Table 17.

<sup>47</sup> Report at II-10, Table 1; II-15, Table 5.

<sup>48</sup> The Commission found that this decline constituted a significant idling of productive facilities in the industry. *Wheat Gluten*, USITC Pub. 3088, at I-12.

<sup>49</sup> Report at II-15, Table 5. As previously noted, petitioner contended that if the capacity of ADM's idle Walhalla plant were excluded from the capacity figures for 1996 and 1997, there would have been no net increase in capacity between 1995 and 1997, and, accordingly, no downward effect on the capacity utilization rate during that period. Hearing Tr. at 101-105.

<sup>50</sup> As indicated in the Commission's original findings, the sharp drop in production between 1995 and 1997 was attributable to the surge in imports. *Wheat Gluten*, USITC Pub. 3088, at I-16.

<sup>51</sup> Report at II-18 (specific data are redacted as confidential business information). In its original report, the  
(continued...)

It is important to note that the domestic industry was profitable in 1993, 1994, and 1995, the years during which the vast majority of the capacity was added. For example, we note that industry profitability increased sharply from 1993 to 1994 to its highest level during the period examined, even as capacity utilization declined from 78.3 percent to 67.4 percent as a result of the 28 percent increase in capacity from 1993 to 1994.<sup>53</sup> By contrast, the industry was unprofitable in 1996 and 1997, years in which relatively minor additions to capacity were made.<sup>54</sup> We find that the increases in depreciation expense and interest expense played a role, albeit a modest one, in the sharp deterioration in the financial performance of the domestic industry.

Thus, while the increase in industry capacity had some impact on the condition of the domestic industry, the available data do not indicate that it had a significant effect on industry performance, and we do not attribute the modest impact of the capacity increase to increased imports.

By contrast, as the Commission stated in its original report, there was a causal nexus between the dramatic increase in imports in 1996 and 1997, and declining domestic production, shipments, unit prices, and industry financial performance in those years, even as domestic demand and consumption were increasing.<sup>55</sup> In particular, the significant decline in domestic production and shipments as demand was increasing in 1996 and 1997 cannot be attributed in any degree to the increase in capacity.<sup>56</sup> Indeed, the whole purpose of the capacity expansion decisions made in 1992-1994 was to permit the industry to *increase* production and shipments in response to anticipated increased demand such as occurred in 1996 and 1997. Instead, the decline in domestic production and shipments in 1996 and 1997 was directly attributable to increased imports themselves.

In addition, as the Commission stated in its original report, unit sales values declined in 1996 and 1997, even in the face of increased domestic demand, as a result of the dramatic increase in relatively low-priced imports.<sup>57</sup> This decline in unit sales values is not attributable to the increased capacity.<sup>58</sup> While a significant increase in domestic supply as a result of added capacity might have a downward effect on

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<sup>51</sup> (...continued)

Commission found that the industry had normally been able to pass on higher raw material costs, but was unable to do so in 1996-1997, despite increased demand, because of the dramatic increase in relatively low-priced imports. *Wheat Gluten*, USITC Pub. 3088, at I-17 to I-18.

<sup>52</sup> It is possible that other factory costs and general and administrative costs could be affected by the need to carry additional facilities, equipment, or employees associated with a capacity increase. We note that the industry's other factory costs and selling, general, and administrative costs increased by a relatively small margin over the period examined. Thus, even assuming *arguendo* that the capacity increases affected these expenses, this would have had only a modest impact on the industry's financial performance. In addition, although spending on increased capacity may explain the increase in the industry's interest expense, interest expense, while affecting net income, would not explain the industry's negative operating profitability during 1996 and 1997.

<sup>53</sup> Report at II-15, Table 5; II-18.

<sup>54</sup> *Wheat Gluten*, USITC Pub. 3088, at I-13.

<sup>55</sup> *Wheat Gluten*, USITC Pub. 3088, at I-16.

<sup>56</sup> While U.S. production and shipments were somewhat higher in 1997 than they had been in 1996, they were still significantly lower in both 1996 and 1997 than they had been at any time during the 1993-1995 period. Report at II-15, Table 5; II-16, Table 6.

<sup>57</sup> *Wheat Gluten*, USITC Pub. 3088, at I-17 to I-18.

<sup>58</sup> See Hearing Tr. at 100-101; Petitioner's December 23, 1997, Posthearing Brief at 42-44.

prices, in fact, production and shipments declined in 1996 and 1997 to their lowest levels during the period examined. Thus, it was the surge in imports, and not the capacity expansion, that caused the decline in unit sales values in 1996 and 1997. This decline had a significant negative impact on the industry's financial performance.

Accordingly, we conclude that increased domestic capacity was not a more important cause of serious injury than increased imports. Nor does it detract from our finding that increased imports were an important cause of injury. In making this finding, we do not attribute to increased imports any injury caused by increased domestic capacity.

### **Finding With Respect to NAFTA Imports**

We adopt from the original Commission report the section of the Commission's Views on Injury entitled "Finding With Respect to NAFTA Imports," as supplemented herein.

USTR's Section 129(a)(4) request directs the Commission to findings of the Appellate Body contained in paragraphs 93 through 100 of its report. The Appellate Body stated that in the usual course, the imports included in the competent authority's serious injury determination should correspond to the imports included in the application of the safeguard measure.<sup>59</sup> The Appellate Body further stated:

In our view, however, although the USITC examined the importance of imports from Canada separately, it did not make any explicit determination relating to increased imports, *excluding imports from Canada*. In other words, although the safeguard measure was applied to imports from all sources, *excluding* Canada, the USITC did not establish explicitly that imports from these *same* sources, excluding Canada, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*. Thus, we find that the separate examination of imports from Canada carried out by USITC in this case was not a sufficient basis for the safeguard measure ultimately applied by the United States.<sup>60</sup>

Section 311(a) of the NAFTA Implementation Act provides that if the Commission makes an affirmative injury determination in an investigation under Section 202 of the Trade Act, or if the Commission is equally divided, the Commission must also "find" whether—

- (1) imports of the article from a NAFTA country, considered individually, account for a substantial share of total imports; and
- (2) imports of the article from a NAFTA country, considered individually or, in exceptional circumstances, imports from NAFTA countries considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.

Thus, in order to make an affirmative finding with respect to imports from Canada or Mexico, the Commission must make an affirmative finding on both conditions. If the Commission finds that either condition is not satisfied, it must make a negative finding.

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<sup>59</sup> *United States – Wheat Gluten* Appellate Body Report at Paragraph 96.

<sup>60</sup> *United States – Wheat Gluten* Appellate Body Report at Paragraph 98.



In its original determination, the Commission made negative findings under Section 311(a) of the NAFTA Implementation Act with respect to imports from Mexico and Canada. We found that there were no reported imports from Mexico during the period examined, and thus imports from Mexico did not account for a substantial share of total imports.<sup>61</sup> We found that imports from Canada did account for a substantial share of total imports, but did not contribute importantly to the serious injury caused by imports.<sup>62</sup>

Given USTR's Section 129(a)(4) request, and the Appellate Body's findings contained in paragraphs 93 through 100 of its report, we supplement our findings under Section 311(a). Specifically, we supplement our analysis of whether imports from Canada are contributing importantly to the serious injury caused by increased imports by considering whether increased imports from all sources other than Canada are a substantial cause of serious injury to the domestic industry.<sup>63</sup>

Imports from all sources other than Canada increased significantly, both in actual terms and relative to production. During the period examined, imports of wheat gluten from all sources other than Canada increased from 108 million pounds in 1993 to 161 million pounds in 1997. The vast majority of this increase occurred during the last two years of the period examined, when imports from all sources other than Canada increased from 114 million pounds in 1995 to 139 million pounds in 1996 to 161 million pounds in 1997. Thus, between 1995 and 1997, imports from all sources other than Canada increased by over 40 percent.<sup>64</sup> The ratio of imports from all sources other than Canada to U.S. production followed a similar trend, rising from 84.6 percent in 1993 to 132.4 percent in 1997.<sup>65</sup>

The quantity of imports from all sources other than Canada also increased relative to domestic consumption. Imports from all sources other than Canada, as a share of U.S. consumption, were relatively stable during the first three years of the period examined, declining slightly from 43.2 percent in 1993 to 41.1 percent in 1994, and then increasing somewhat to 44.6 percent in 1995. The ratio of imports from all

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<sup>61</sup> *Wheat Gluten*, USITC Pub. 3088, at I-19. Having found that Mexico does not account for a substantial share of imports, we did not address the question of whether imports from Canada and Mexico considered collectively contribute importantly to the serious injury caused by increased imports. *Id.*

<sup>62</sup> *Wheat Gluten*, USITC Pub. 3088, at I-19. Commissioner Crawford did not reach the question of whether imports from Canada account for a substantial share of total imports, but joined in the Commission's finding that imports from Canada are not contributing to the serious injury caused by increased imports. *Id.* at I-19, n.104.

<sup>63</sup> If we were to find that increased imports from all sources other than Canada were *not* a substantial cause of serious injury to the domestic industry, this would tend to suggest that imports from Canada *did* contribute importantly to the serious injury to the domestic industry. Section 311(b)(2) directs the Commission to consider certain factors in applying the "contribute importantly" standard, which we have considered here, but it does not state that those factors are the exclusive factors that the Commission may consider. We have frequently examined other relevant factors not enumerated in Section 311(b)(2) in conducting this analysis. *See Wheat Gluten*, USITC Pub. 3088 at I-19 (petitioner's views); *Certain Steel Wire Rod*, Inv. No. TA-201-69, USITC Pub. 3207 (July 1999) at I-19 (pricing trends and margins; petitioners' views); *Circular Welded Carbon Quality Line Pipe*, Inv. No. TA-201-70, USITC Pub. 3261 (December 1999) at I-34 to I-35 (pricing trends and margins) and I-51 to I-52 (separate findings of Chairman Bragg) (trends in production capacity); *Crabmeat from Swimming Crabs*, Inv. No. 201-TA-71, USITC Pub. 3349 (August 2000) at I-44 to I-45 (dissenting views) (pricing trends and margins; differences between fresh and pasteurized imports from different sources).

<sup>64</sup> Investigation No. TA-201-67 (Consistency Determination) Public Staff Report ("Section 129 Staff Report") at Table 2.

<sup>65</sup> Section 129 Staff Report at Table 3.

sources other than Canada to consumption then increased sharply from 44.6 percent in 1995 to 52.4 percent in 1996, and to 54.8 percent in 1997.<sup>66</sup> The record reflects that most of this increase consisted of imports from the EU. The record also shows that imports from the EU consistently undersold domestic wheat gluten.

This surge in relatively low-priced imports from all sources other than Canada in 1996 and 1997 coincided with the decline in industry performance described in the “Serious Injury or Threat” section of the Commission’s Views on Injury in its original report, which we adopt herein as supplemented in these Views.<sup>67</sup> There is a direct correlation between the dramatic increase in wheat gluten imports from all sources other than Canada and the significant decline in domestic wheat gluten industry performance in 1996 and 1997. Domestic production, shipments, capacity utilization, unit prices, industry financial performance, and worker productivity all declined during the period of greatest penetration by imports from all sources other than Canada. Moreover, these declines all took place at a time of rising domestic consumption.

We find that imports from Canada are not a more important cause of injury than imports from all sources other than Canada. Imports from Canada declined significantly during the period examined, from 20.5 million pounds in 1993 to 15.8 million pounds in 1997, while imports from all other sources were increasing significantly from 108 million pounds to 161 million pounds in the same period. In 1993, Canada accounted for 15.9 percent of total imports, while in 1997 it accounted for only 8.9 percent of total imports.<sup>68</sup> The ratio of imports from Canada to U.S. production declined from 16.0 percent in 1993 to 12.9 percent in 1997, even as U.S. production declined.<sup>69</sup> The ratio of imports from Canada to U.S. consumption declined from 8.2 percent in 1993 to 5.4 percent in 1997.<sup>70</sup> Moreover, in contrast to the underselling by imports from other sources, 19 of 20 price comparisons between imports from Canada and the domestic product during the period examined showed the imported Canadian product to be priced higher than the U.S.-produced product.<sup>71</sup> Thus, imports from Canada are not a cause of the serious injury experienced by the domestic industry.<sup>72</sup>

Thus, our analysis does not indicate any different result under Section 311 from that indicated by the evidence cited in our original opinion – *i.e.*, the fact that imports from Canada declined significantly during the period examined while imports overall increased likewise suggests that imports from Canada are not contributing importantly to the serious injury caused by increased imports. Rather, we conclude that wheat gluten from all sources other than Canada is being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article like or directly competitive with the imported article.

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<sup>66</sup> Section 129 Staff Report at Table 4.

<sup>67</sup> See *Wheat Gluten*, USITC Pub. 3088, at I-12 to I-14. Our analysis of whether the domestic wheat gluten industry is seriously injured relates to the condition and performance of the domestic industry, and not to the role of imports. Thus, our analysis of serious injury does not differ depending on whether the imports at issue are from all sources or from all sources other than Canada.

<sup>68</sup> Report at II-12.

<sup>69</sup> Section 129 Staff Report at Table 3.

<sup>70</sup> Section 129 Staff Report at Table 4.

<sup>71</sup> Report at II-36.

<sup>72</sup> Petitioner stated in its petition that imports from Canada are not contributing importantly to the serious injury caused by imports. Petition at 27-28.

Indeed, given that import volumes from Canada were declining during the period examined, and that imports from Canada consistently oversold the domestic like product, we find that the analysis of the serious injury caused by imports from all sources other than Canada is essentially identical to the analysis in our original report regarding the serious injury caused by imports from all sources, as that analysis has been supplemented in this determination. We therefore find that our analysis with respect to the other factors that the Commission considered as possible causes of injury besides increased imports is not affected by any difference between imports from all sources and imports from all sources other than Canada. We readopt herein our analysis and findings, as supplemented in this determination, with respect to those other factors,<sup>73</sup> and we do not attribute to increased imports from all sources other than Canada any injury caused by any other factor. Accordingly, for the reasons stated in our original causation analysis, as supplemented in this determination, we find that increased imports from all sources other than Canada are an important cause of serious injury and a cause that is not less than any other cause.

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<sup>73</sup> See *Wheat Gluten*, USITC Pub. 3088, at I-16 to I-18.