

UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigations Nos. 731-TA-757 and 759 (Final)

COLLATED ROOFING NAILS FROM CHINA AND TAIWAN

DETERMINATIONS

On the basis of the record¹ developed in the subject investigations, the United States International Trade Commission determines,² pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)) (the Act), that an industry in the United States is threatened with material injury by reason of imports from China and Taiwan of collated roofing nails (“CR nails”),³ provided for in subheading 7317.00.55 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).⁴

BACKGROUND

The Commission instituted these investigations effective November 26, 1996, following receipt of a petition filed with the Commission and the Department of Commerce by the Paslode Division of Illinois Tool Works, Vernon Hills, IL. The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by the Department of Commerce that imports of CR nails from China and Taiwan were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. § 1673b(b)). Notice of the scheduling of the Commission’s investigations and of a public hearing 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 May 27, 1997 (62 FR 28731). The hearing was held in Washington, DC, on September 30, 1997, and all persons who requested the opportunity were permitted to appear in person or by counsel.

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

² Commissioner Carol T. Crawford dissenting.

³ CR nails are roofing nails made of steel, having a length of $\frac{13}{16}$ inch to $1\frac{13}{16}$ inches (or 20.64 to 46.04 millimeters), a head diameter of 0.330 inch to 0.415 inch (or 8.38 to 10.54 millimeters), and a shank of 0.100 inch to 0.125 inch (or 2.54 to 3.18 millimeters), whether or not galvanized, that are collated with two wires.

⁴ The Commission further determines, pursuant to 19 USC § 1673(b)(4)(B), that it would not have found material injury by reason of subject imports but for the suspension of liquidation of the merchandise under investigation.

VIEWS OF THE COMMISSION

Based on the record in these investigations, we find that an industry in the United States is threatened with material injury by reason of imports of collated roofing nails from China and Taiwan that have been found by the Department of Commerce (“Commerce”) to be sold in the United States at less than fair value (“LTFV”).¹

I. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. In General

To determine whether an industry in the United States is materially injured or threatened with material injury by reason of the subject imports, the Commission first defines the “domestic like product” and the “industry.” Section 771(4)(A) of the Tariff Act of 1930, as amended (“the Act”), defines the relevant 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.”² 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.”³

Our decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and we apply the statutory standard of “like” or “most similar in characteristics and uses” on a case-by-case basis.⁴ No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation.⁵ The Commission looks for clear dividing lines among possible like products, and disregards minor variations.⁶ Although the Commission must accept the determination of Commerce as to the scope of the imported merchandise sold at LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified.⁷

¹ Commissioner Crawford determines that an industry in the United States is neither materially injured nor threatened with material injury by reason of imports of the subject merchandise from China and Taiwan. *See* Dissenting Views of Commissioner Carol T. Crawford.

² 19 U.S.C. § 1677(4)(A).

³ 19 U.S.C. § 1677(10).

⁴ *See, e.g., Nippon Steel Corp. v. United States*, 19 CIT ___, Slip Op. 95-57 at 11 (Apr. 3, 1995). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) common manufacturing facilities, production processes and production employees; (5) customer and producer perceptions; and, where appropriate, (6) price. *See id.* at 11 n.4; *Timken Co. v. United States*, 913 F. Supp. 580, 584 (Ct. Int’l Trade 1996).

⁵ *See, e.g.,* S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979).

⁶ *Torrington Co. v. United States*, 747 F. Supp. 744, 748-49 (Ct. Int’l Trade 1990), *aff’d*, 938 F.2d 1278 (Fed. Cir. 1991).

⁷ *Hosiden Corp. v. Advanced Display Manufacturers*, 85 F.3d 1561 (Fed. Cir. 1996) (Commission may find single like product corresponding to several different classes or kinds defined by Commerce); *Torrington*, 747 F. Supp. at 748-752 (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

B. Domestic Like Product Issues

In its final determinations, Commerce defined the scope of merchandise subject to investigation as

[collated roofing] nails made of steel, having a length of 13/16 inch to 1-13/16 inches (or 20.64 to 46.04 millimeters), a head diameter of 0.330 inch to 0.415 inch (or 8.38 to 10.54 millimeters), and a shank diameter of 0.100 inch to 0.125 inch (or 2.54 to 3.18 millimeters), whether or not galvanized, that are collated with two wires (“CR nails”).⁸

CR nails are used in pneumatic nail-driving tools (“nail guns”) to fasten shingles and flashing materials to roofs.⁹

We have considered two principal domestic like product issues in the final phase of these investigations, both of which concern whether CR nails produced by the petitioner (the Paslode Division of Illinois Tool Works, Inc.) should be included in the same domestic like product as other domestically produced CR nails.¹⁰ The first issue, which was raised by the respondents, involves whether petitioner’s CR nails are “like” the merchandise subject to investigation. The second issue involves whether petitioner’s CR nails and other domestic CR nails constitute two separate domestic like products.

⁸ Collated Roofing Nails from the People’s Republic of China, 62 Fed. Reg. 51410, 51411 (Oct. 1, 1997) and Collated Roofing Nails from Taiwan, 62 Fed. Reg. 51427, 51427 (Oct. 1, 1997).

⁹ Confidential Report (“CR”) at I-3 to I-4, Public Report (“PR”) at I-3.

¹⁰ In our preliminary determinations, we declined to include hand-driven roofing nails (“bulk roofing nails”) or collated roofing staples (“CR staples”) in the domestic like product, because we found clear dividing lines between each of these products and CR nails. Collated Roofing Nails from China, Korea, and Taiwan, Inv. Nos. 731-TA-757-759 (Preliminary), USITC Pub. 3010 (Jan. 1997) (“Prelim. Deters.”) at 4-7. No party in the final phase of these investigations has requested the Commission to include bulk roofing nails or CR staples in the domestic like product.

Additional information gathered during the final phase of these investigations regarding bulk roofing nails does not indicate that the domestic like product definition should be expanded to include bulk roofing nails. See CR at I-6, PR at I-4 to I-5, and the responses to the producers’ and importers’ questionnaires at pages 12 and 10, respectively (providing additional information regarding bulk roofing nails not materially different from that gathered in the preliminary determinations). With regard to CR staples, the information on the record is essentially the same as that gathered in the preliminary determinations. See CR at II-4 to II-5 and n.22, PR at II-3 and n.22, and transcript of September 30, 1997 hearing (“Hearing Tr.”) at 18 (Heinlen) (providing no material information regarding CR staples not contained in the record of the preliminary investigations). Accordingly, for the reasons stated in the preliminary determinations, we determine that bulk roofing nails and CR staples are not included in the domestic like product in these investigations.

In the final phase of these investigations, we also considered whether roofing nails collated with a plastic belt (“plastic-collated roofing nails”) should be included in the domestic like product. We find a clear dividing line between plastic-collated roofing nails and CR nails, and thus do not include them in the domestic like product. The two types of roofing nails are not interchangeable: plastic-collated roofing nails cannot function in standard nail guns, and CR nails cannot function in nail guns made for plastic-collated roofing nails. CR at I-5, PR at I-4. As a consequence, customers perceive that the two types of nails are not substitutable, due to the expense of the corresponding nail gun. CR at I-11 and II-5, PR at I-7 and II-3. The collating processes, equipment, and production employees used to make plastic-collated roofing nails are different from those used to make CR nails. CR at I-7, PR at I-5. Finally, the price of plastic-collated roofing nails is *** than the price of CR nails. CR at I-11, PR at I-8; *** at page 12; and memorandum to the File from T. Quilter (Oct. 20, 1997).

Respondents point to two alleged physical differences, which, they claim, limit the interchangeability of petitioner's CR nails with other CR nails, thereby justifying their exclusion from the domestic like product.¹¹ Respondents first argue that the location of the collating wires on petitioner's CR nails is different than other CR nails.¹² In the petitioner's product, the collating wires are attached closer to the head of the nail than are the collating wires used in other producers' CR nails.¹³ The placement of the collating wires is uniform among all other producers.¹⁴

We decline to exclude petitioner's CR nails from the domestic like product based on the position of the collating wires on the nails. The statute directs the Commission to define a domestic like product that is "like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation."¹⁵ Commerce has defined the article subject to investigation as "CR nails made of steel, having [certain dimensions], that are collated with two wires."¹⁶ The Commission generally defines the domestic like product by reference to the subject merchandise as defined by Commerce.¹⁷ Petitioner's CR nails are like the subject merchandise as defined by Commerce, despite the difference in the location of the collating wires relative to the other domestically produced CR nails.

Respondents also argued that petitioner's CR nails differ from other producers' CR nails with regard to the angle at which the roofing nails are oriented relative to the collating wires.¹⁸ Petitioner responded that there was no difference in the angle of collation during the period of investigation, although it concedes that until 1992 its CR nails were collated at a 10-degree angle.¹⁹ Petitioner explained that it began producing CR nails with the 15-degree, universal angle when it introduced a new nail gun model in 1992, prior to the beginning of the period of investigation.²⁰ The record also reflects that the packaging materials for petitioner's nail gun and CR nails indicate that petitioner's CR nails are collated at the 15-

¹¹ Prehearing Brief of CANA (Tianjin) Hardware Industrial Co., Ltd.; Wuxi Jiangchao Metalwork Co., Ltd.; and Beijing Central Top Metal Co., Ltd. ("Respondents' Prehearing Brief") at 2-8.

¹² Respondents' Prehearing Brief at 3.

¹³ CR at I-5, PR at I-4.

¹⁴ CR at II-6, PR at II-4.

¹⁵ 19 U.S.C. § 1677(4)(A).

¹⁶ 62 Fed. Reg. 51427 (Taiwan), 62 Fed. Reg. 51411 (China).

¹⁷ See Certain Pasta from Italy and Turkey, Inv. Nos. 701-TA-365-366 (Preliminary) and 731-TA-734-735 (Preliminary), USITC Pub. 2905 (July 1995) at I-10 to I-11 (finding a domestic like product for oriental-style noodles, which come within Commerce's definition of the subject imports, but which were not actually imported from the subject countries during the period of investigation); Institutional Melamine Dinnerware from China, Indonesia, and Taiwan, Inv. Nos. 731-TA-741-743 (Preliminary) USITC Pub. 3016 (Feb. 1997) at 5 (indicating that the domestic like product must be defined by reference to the scope of the investigation, as described by Commerce). In any event, the record indicates that the subject imports include a small amount of CR nails that are collated using the same high wire collation as petitioner. CR at II-6 n.25, PR at II-4 n.25.

¹⁸ See Respondents' Prehearing Brief at 3, Respondents' Posthearing Brief at Exhibit 4 (containing a drawing indicating that the angle of collation is different in petitioner's CR nails, despite marking on the packing materials to the contrary), and Hearing Tr. at 69, 71 (Morrell).

¹⁹ Hearing Tr. at 19, 56 (Heinlen), Petitioner's Posthearing Brief at 4-5 and Exhibit 5 at pages 1 and 4, Petitioner's Prehearing Brief at 6-7, Petitioner's Postconference Brief at 25.

²⁰ Hearing Tr. at 56 (Heinlen), Prehearing Brief at 6-7.

degree, universal angle.²¹ Despite contrary claims by respondents, we find that no difference existed with regard to the angle of collation for CR nails manufactured during the period of investigation.²² Accordingly, we decline to exclude petitioner's CR nails from the domestic like product based on the angle of collation.^{23 24}

We next consider the Commission's traditional six factors to determine whether petitioner's CR nails and other producers' CR nails constitute two separate domestic like products.

Physical characteristics and uses. Petitioner's and other domestic producers' CR nails are nearly identical in physical characteristics and have the same uses. Both types of CR nails are galvanized steel wire nails that have large heads, are produced to the strict tolerances required to prevent jamming in nail guns, and are collated with two wires.²⁵ As noted above, petitioner's CR nails differ from other domestic producers' CR nails by the placement of the collating wires.²⁶ Nevertheless, we find the CR nails of petitioner and other domestic producers to be very similar in physical characteristics. With respect to uses, all CR nails are used in nail guns to fasten shingles and flashing materials to roofs.²⁷

Interchangeability. The record is somewhat mixed regarding whether petitioner's and other producers' CR nails are interchangeable. Because CR nails are intended for use in nail guns, interchangeability encompasses two issues: whether petitioner's CR nails function acceptably (without

²¹ Respondents' Posthearing Brief at Exhibit 4, page 1 ("The current Paslode's carton is marking 15 degree"), Petitioner's Posthearing Brief at Exhibit 5, pages 4-5.

²² Although we find the record mixed on whether petitioner's CR nails differ from other CR nails in the angle of collation, we find credible petitioner's explanation that it began producing CR nails with the universal angle of collation prior to the period of investigation. We place significant weight on the testimony presented at the hearing by a witness with an official capacity at Paslode as well as Paslode's nail gun and CR nail packaging materials, which indicate that Paslode has adopted the 15-degree, universal angle. The Commission is cognizant that the witness conceded he did not have direct knowledge of events in 1992, which was prior to his employment at Paslode. See Hearing Tr. at 19, 56 (Heinlen), Petition at App. 3, page 1. See Petitioner's Posthearing Brief at Exhibit 5, pages 4 & 5 (containing copies of packaging materials). We place less weight on the drawing prepared by respondents and the testimony of other witnesses with little access to information regarding Paslode's production decisions. Respondents' Posthearing Brief at Exhibit 4, Hearing Tr. at 69, 71 (Morrell).

²³ Even if we were persuaded that a difference in the angle of collation existed during the period of investigation, we would still find that petitioner's CR nails should not be excluded from the domestic like product, because petitioner's CR nails are like the subject merchandise as defined by Commerce. We also conclude that the alleged difference would not change our conclusion, based on our analysis of the six domestic like product factors discussed below, that there is a single domestic like product, which includes petitioner's CR nails. We note also that respondents characterized the alleged difference in the angle of collation as less significant than the difference in the placement of the collating wires. Respondents' Prehearing Brief at 3-8, Hearing Tr. at 86-87 (Morrell), Transcript of December 17, 1996 conference ("Conference Tr.") at 90-91 (Morrell). We note further that a witness for a respondent conceded at the hearing that petitioner's 7/8-inch and 1-inch CR nails function acceptably in other companies' nail guns, despite the alleged difference in the angle of collation. Hearing Tr. at 69-71, 86 (Morrell).

²⁴ Commissioner Crawford does not join in the conclusion that no differences existed in the angle of collation between Paslode's CR nails and other CR nails. She does, however, concur that a difference in the angle of collation does not support the exclusion of Paslode's CR nails from the like product definition.

²⁵ CR at I-4, PR at I-3.

²⁶ Commissioner Crawford also acknowledges the possibility of differences in the angle of collation between Paslode's CR nails and other CR nails.

²⁷ CR at I-3 to I-4, PR at I-3.

jamming) in nail guns made by other companies, and whether other producers' CR nails function acceptably in petitioner's nail guns.²⁸

The record indicates that petitioner's 7/8-inch and 1-inch CR nails function without jamming in other manufacturers' nail guns.²⁹ These shorter CR nails account for approximately one quarter of domestic sales.³⁰ With regard to petitioner's longer CR nails, the record is mixed. A slight majority of purchasers questioned (13 of 23) indicated that petitioner's CR nails could be used interchangeably in other companies' nail guns.³¹ Nine purchasers, however, indicated that petitioner's CR nails do not function in other companies' nail guns, and one purchaser indicated it did not know.³² Two CR nail distributors gave conflicting testimony on the issue at the hearing.³³ The record also contains conflicting data from tests using petitioner's CR nails in other manufacturers' nail guns.³⁴

Record evidence regarding the second issue -- whether other producers' CR nails function in petitioner's nail guns -- is also somewhat mixed. We consider this issue to be less significant because it appears that only a small proportion of the nail guns used during the period of investigation was made by petitioner.³⁵

Most purchasers questioned (15 out of 23) indicated that other producers' CR nails functioned in petitioner's nail guns, although several added that only petitioner's newer model guns accepted the CR nails, and one added that the nail gun first required modification.³⁶ Three responded that other producers' CR nails did not function in petitioner's nail guns, and four indicated they did not know (one answered "yes and no").³⁷ The record indicates that other producers' CR nails functioned acceptably in two of petitioner's three nail guns in use during the period of investigation. Petitioner sold nail gun model PY134R until

²⁸ It is undisputed that petitioner's CR nails function in nail guns made by petitioner and that other producers' CR nails function in any one of the other nail guns on the market.

²⁹ Hearing Tr. at 70 and 86 (Morrell).

³⁰ CR at V-4 and V-8 n.7, PR at V-3 and V-5 n.7 (indicating that the 1-inch CR nail makes up *** percent of the CR nails for which pricing data were available and that pricing data were available for *** percent of U.S. producers' domestic shipments); Hearing Tr. at 70 (Morrell).

³¹ CR at I-10, PR at I-7. Petitioner testified that 60 to 80 percent of all its CR nails are used in nail guns manufactured by other companies. Hearing Tr. at 20 (Heinlen), 23 (Manfroni).

³² CR at I-10, PR at I-7.

³³ Hearing Tr. at 23 (Manfroni), 70, 86 (Morrell).

³⁴ Petitioner's Posthearing Brief at Exhibit 5 and in submitted videotape (indicating that petitioner's CR nails function in nail guns made by other companies without jamming); and Respondents' Posthearing Brief at Exhibit 5 (indicating that petitioner's CR nails jammed at an unacceptable rate when fired in an Atro nail gun).

³⁵ See Conference Tr. at 88-89 (Morrell) (indicating that certain nail gun makers not including petitioner, Stanley-Bostitch, or International Staple and Machine, accounted for at least 50 percent of nail guns in use), and Petitioner's Posthearing Brief at Exhibits 5 & 6 and Respondents' Posthearing Brief at Exhibit 2, Hearing Tr. at 35 (Manfroni), 70 (Morrell) (identifying, collectively, at least 17 brands of nail guns).

³⁶ CR at II-7, PR at II-5.

³⁷ *Id.*

1993.³⁸ Both petitioner and respondents agree that this older model accepted other producers' CR nails.³⁹ Relatively few of this type of petitioner's nail gun, however, were probably in use except during the early part of the POI, given that the lifespan of a nail gun is approximately one-and-a-half to perhaps four years.⁴⁰ From 1992 until late 1996, petitioner sold model 3175R, which petitioner concedes could not accept other producers' CR nails unless the gun's feed claw was filed down by the purchaser.⁴¹ This model presumably accounted for the majority of petitioner's nail guns in use during the period of investigation. In late 1996, petitioner began selling the 3175R model with a modified feed claw, allowing it to accept other producers' nails without modification.⁴² Although this model was introduced late in the period of investigation, presumably not insignificant numbers were sold because of the relatively short lifespan of nail guns.

Based on the foregoing, particularly the fact that a majority of purchasers reported that petitioner's CR nails function in other companies' nail guns and that other companies' CR nails function in petitioner's nail guns, we find a moderate degree of interchangeability between petitioner's CR nails and other producers' CR nails, and thus fail to find a clear dividing line between these product on this basis.⁴³

Channels of Distribution. Both petitioner's CR nails and other domestic producers' CR nails were sold through the same channels of distribution during the period of investigation.⁴⁴

Production facilities, processes, and production employees. Nail-forming equipment is generic in nature, and can be used to form any type of collated nail, roofing or otherwise.⁴⁵ Thus, petitioner and other domestic producers of CR nails generally use the same type of production equipment and processes. Some minor production process differences exist, however, with regard to ***.⁴⁶

³⁸ Hearing Tr. at 37 (Heinlen) (indicating the introduction of the succeeding model in 1992); memorandum to the File regarding telephone conversation between *** and M. Diehl (clarifying that, despite the ***; and respondents' Posthearing Brief at "Answers to Questions Presented at the Hearing" at p. i.

³⁹ Hearing Tr. at 37 (Heinlen) and respondents' Posthearing Brief at "Answers to Questions Presented at the Hearing" pp. i and ii (both indicating that the PY134R accepted other producers' CR nails).

⁴⁰ Hearing Tr. at 39-40 (Manfroni) (indicating that the average lifespan of a nail gun is one-and-a-half to two years); notes by A. Preece regarding visit to trade show on August 11 and 12, 1997 (an exhibitor indicating a possible lifespan of 4 years or more with proper maintenance and mentioning a kit sold to allow replacement of the "o-rings" said to often fail in nail guns after 2 years).

⁴¹ *Id.* at 37-38 (Heinlen). Petitioner claims that the modification necessary to allow these guns to accept other producers' CR nails was simple and widely known. Conference Tr. at 37 (Heinlen). The record indicates that less than half of the purchasers questioned knew how to perform that modification. Nine out of 23 purchasers questioned knew how to perform the necessary modification. CR at II-7, PR at II-5.

⁴² Hearing Tr. at 39 (Heinlen) and petitioner's Prehearing Brief at 7.

⁴³ Commissioner Crawford considers interchangeability in her analysis of the like product. She is careful to distinguish substitutability, which she considers in her analysis of material injury by reason of less than fair value subject imports. Commissioner Crawford concurs with her colleagues that Paslode's CR nails have a sufficient degree of interchangeability with other domestic CR nails to support the Commission's like product determination. She, however, concludes that evidence in the record indicates that the degree of substitution in the market between Paslode's CR nails and nails from other producers, imports and domestic, is limited.

⁴⁴ CR at I-8 to I-9 and II-1, PR at I-5 and II-1.

⁴⁵ CR at I-6 n.18 and III-1, PR at I-4 n.18 and III-1.

⁴⁶ Petitioner ***. CR at I-6 nn.19 & 21, PR at I-4 nn.19 & 21. Its finished nails ***. *Id.* The ***. CR at I-6 n.21, PR at I-4 n.21. ***. *Id.*

Producer and Customer Perceptions. Both Stanley-Bostitch, Inc. (“Bostitch”), the largest domestic producer, and petitioner reported that petitioner’s CR nails can be used in all nail guns.⁴⁷ *** stated, however, that its CR nails cannot be used in petitioner’s nail guns.⁴⁸ With regard to purchasers, as indicated above, a slight majority viewed petitioner’s CR nails and other producers’ CR nails as substitutes. A significant minority, however, did not view the two types of CR nails as substitutes.

Prices. Prices for petitioner’s CR nails and other domestic producers’ CR nails were not significantly different.⁴⁹

Conclusion. We conclude that the record does not indicate a sufficiently clear dividing line between petitioner’s CR nails and other producers’ CR nails to find these products to be separate domestic like products. The different placement of the collating wires in the petitioner’s CR nails appears to limit their interchangeability with other CR nails, or at least the perception of their interchangeability with other CR nails, but not to an extent that indicates a clear dividing line between these products. Moreover, both types of CR nails have the same end use, generally similar physical characteristics, are sold through the same channels of distribution, and are similar in price. Accordingly, we find a single domestic like product consisting of all steel wire nails of the dimensions described by Commerce that are collated with two wires, including those produced by petitioner.

C. Domestic Industry and Related Parties

The Commission is directed to consider the impact of the subject imports on the domestic industry, defined as “the producers as a [w]hole of a domestic like product.”⁵⁰ Based on our domestic like product definition, there is one domestic industry consisting of producers of CR nails.

We must further determine whether any producer of the domestic like product should be excluded from the domestic industry pursuant to section 771(4)(B). One domestic producer, Bostitch, imported the subject merchandise during the period of investigation.⁵¹ Bostitch is also ***.⁵² Bostitch is thus a related party, and we may exclude it from the domestic industry if “appropriate circumstances” exist.⁵³

⁴⁷ CR at I-10, PR at I-7 and ***.

⁴⁸ ***. As indicated above, petitioner maintains that its PY134R (sold until 1993) and its modified 3175R (sold beginning in late 1996) accept all CR nails. Petitioner also took the position that the earlier version of its model 3175R could accept all CR nails following a simple modification of the tool’s “feed claw.” See discussion of “*Interchangeability*,” above.

⁴⁹ Figure F-1, CR and PR at Appendix F, page F-3.

⁵⁰ 19 U.S.C. § 1677(4)(A).

⁵¹ CR at III-2 and n.6, PR at III-2 and n.6.

⁵² CR at III-2 n.6, PR at III-2 n.6.

⁵³ 19 U.S.C. § 1677(4)(B). Factors the Commission has examined in deciding whether appropriate circumstances exist to exclude a related party include the percentage of domestic production attributable to the importing producer; the reason the U.S. producer has decided to import the product subject to investigation; whether inclusion or exclusion of the related party will skew the data for the rest of the industry; the ratio of import shipments to U.S. production for related producers; and whether the primary interest of the related producer lies in domestic production or importation. See, e.g., Torrington Co. v. United States, 790 F. Supp. 1161 (Ct. Int’l Trade 1992), *aff’d without opinion*, 991 F.2d 809 (Fed. Cir. 1993). See also Engineered Process Gas Turbo-Compressor Systems from Japan, Inv. No. 731-TA-748 (Final), USITC Pub. 3042 (June 1997) at 10 n.26.

We determine that appropriate circumstances do not exist to exclude Bostitch from the domestic industry. Bostitch's primary interest appears to lie in domestic production rather than importation. Bostitch's imports of the subject merchandise were *** compared to its domestic production during the period of investigation.⁵⁴ Bostitch is also the largest domestic producer of CR nails.⁵⁵ The *** volume of its imports (relative to its domestic production) suggests that Bostitch's interests lie in domestic production.⁵⁶ Accordingly, we define the domestic industry to include all domestic producers of CR nails: the Paslode Division of Illinois Tool Works, Inc. ("Paslode" or the "petitioner"), Bostitch and International Staple and Machine Co. ("International").

II. CONDITION OF THE DOMESTIC INDUSTRY⁵⁷

In assessing whether a domestic industry is materially injured or threatened with material injury by reason of LTFV imports, we consider all relevant economic factors that bear on the state of the industry in the United States.⁵⁸ These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."⁵⁹ ⁶⁰

We consider the condition of the domestic industry against a background of rising consumption. Apparent U.S. consumption rose from 1994 to 1995, and from 1995 to 1996, measured by quantity.⁶¹ Consumption was higher in interim (January-June) 1997 than in interim 1996.⁶²

⁵⁴ Bostitch's imports of the subject merchandise, as a percentage of Bostitch's domestic production of CR nails, were *** percent in 1994 and 1995, *** percent in 1996, and *** percent in interim 1997. CR at III-2, PR at III-2. ***. CR at III-2 n.4, PR at III-2 n.4.

⁵⁵ CR at III-2 and n.4, PR at III-1 and n.4. Bostitch accounts for *** percent of reported domestic CR nail production. CR and PR at VI-1.

⁵⁶ We note Bostitch's support of the petition. Bostitch's Prehearing Brief at 1.

⁵⁷ Commissioner Crawford joins her colleagues in this investigation in a discussion of the "condition of the industry" even though she does not make her determination based on industry trends. Rather she views the discussion as a factual recitation of the data collected concerning the statutory impact factors.

⁵⁸ 19 U.S.C. § 1677(7)(C)(iii).

⁵⁹ *Id.*

⁶⁰ Much of the information regarding the factors considered in this section is business confidential. Accordingly, the public version of this opinion contains only nonnumerical characterizations of that information. 19 C.F.R. § 201.6(a)(1).

⁶¹ Apparent U.S. consumption rose *** percent from 1994 to 1995, from *** pounds to *** pounds. Apparent U.S. consumption rose an additional *** percent from 1995 to 1996, to *** pounds. Table C-1, CR and PR at C-3.

⁶² Consumption was *** percent higher in interim 1997 (*** pounds) than in interim 1996 (*** pounds). *Id.*

The quantity of U.S. producers' shipments rose from 1994 to 1995 and from 1995 to 1996.⁶³ The quantity of shipments was also higher during interim 1997 than during interim 1996.⁶⁴ By value, U.S. shipments were flat from 1994 to 1996, falling slightly from 1994 to 1995, and rising slightly more from 1995 to 1996.⁶⁵ The value of U.S. shipments was higher, however, in interim 1997 than in interim 1996.⁶⁶ The domestic industry's production showed little variation from 1994 to 1995 and rose from 1995 to 1996.⁶⁷ Production during interim 1997 was higher than during interim 1996.⁶⁸ End-of-period inventories fell from 1994 to 1995, and fell more from 1995 to 1996.⁶⁹ End-of-period inventories were slightly higher, however, for interim 1997 than for interim 1996.⁷⁰

The domestic industry's share of apparent consumption showed declines both from 1994 to 1995, and from 1995 to 1996, whether measured by quantity or value.⁷¹ The domestic industry's market share was lower during interim 1997 than during interim 1996, when measured by quantity, and essentially the same when measured by value.^{72 73}

Production capacity rose from 1994 to 1995, but declined from 1995 to 1996 to a level below that of 1994.⁷⁴ Capacity figures were higher for interim 1997 than for interim 1996.⁷⁵ Capacity utilization fell

⁶³ U.S. producers' shipments rose *** percent from 1994 to 1995, from *** pounds to *** pounds. Shipments rose a further *** percent from 1995 to 1996, to *** pounds. From 1994 to 1996, the rise in shipments was *** percent. Table C-1, CR at C-4, PR at C-3.

⁶⁴ U.S. producers' shipments were *** pounds in interim 1997, *** percent higher than the *** pounds shipped in interim 1996. *Id.*

⁶⁵ The value of U.S. shipments fell *** percent from 1994 to 1995, from *** to ***. In 1996, the value of U.S. shipments increased *** percent from 1995 levels to ***. From 1994 to 1996 the value rose *** percent. *Id.*

⁶⁶ The value of U.S. shipments was *** percent higher in interim 1997 (***) than in interim 1996 (***). *Id.*

⁶⁷ Domestic production rose *** percent from 1994 to 1995, from *** pounds to *** pounds. From 1995 to 1996, production increased *** percent, reaching *** pounds. *Id.*

⁶⁸ Production was *** pounds during interim 1996 compared to *** pounds during interim 1997, a rise of *** percent. *Id.*

⁶⁹ From 1994 to 1995, end-of-period inventories fell *** percent, from *** to *** pounds. From 1995 to 1996, end-of-period inventories fell *** percent to *** pounds. *Id.*

⁷⁰ End-of-period inventories were *** pounds in interim 1996, compared to *** pounds in interim 1997. Table III-1, CR at III-4, PR at III-2.

⁷¹ The domestic industry's market share, measured by quantity, fell from *** percent in 1994 to *** percent in 1995. It then fell to *** percent in 1996. By value, the domestic industry's share of apparent consumption fell from *** percent in 1994 to *** percent in 1995, and then fell to *** percent in 1996. Table IV-4, CR at IV-6, PR at IV-5.

⁷² The domestic industry's market share, measured by quantity, was *** percent during interim 1996 and *** percent in interim 1997. By value, its market share was *** percent in interim 1996, and *** percent in interim 1997. *Id.*

⁷³ Commissioner Crawford notes that the presence of imports in the domestic market represents a condition of competition directly affecting the domestic industry's market share. Throughout the period of investigation imports were the dominant supplier of demand for CR nails. Subject imports supplied *** percent of the domestic market in 1996 and nonsubject imports supplied *** percent of the domestic market in 1996. Table C-1, CR and PR at C-3.

⁷⁴ Production capacity rose by *** percent from 1994 to 1995, from *** pounds in 1994, to *** pounds in 1995. Production capacity was *** percent lower in 1996 than 1995, however, falling to *** pounds. Table C-1, CR at

(continued...)

from 1994 to 1995, but rose above 1994 levels in 1996.⁷⁶ Capacity utilization was also higher in interim 1997 than in interim 1996.^{77 78}

The number of production and related workers (PRWs), hours worked, and wages all increased from 1994 to 1995.⁷⁹ From 1995 to 1996, the number of PRWs declined slightly, remaining higher than in 1994.⁸⁰ The number of PRWs was higher, however, in interim 1997 than in interim 1996.⁸¹ Hours worked fell in 1996, to a level below that in 1994.⁸² Hours worked were higher during interim 1997 than during interim 1996, however.⁸³ Wages continued to rise in 1996, and were higher in interim 1997 than in interim 1996.⁸⁴ Productivity, measured by pounds produced per hour, fell from 1994 to 1995, but rose by a greater amount in 1996, and was higher in interim 1997 than in interim 1996.⁸⁵

Sales revenues were flat from 1994 to 1996, although they were higher in interim 1997 than in interim 1996.⁸⁶ The average per-pound value of sales fell from 1994 to 1995, and from 1995 to 1996, but was higher in interim 1997 than in interim 1996.⁸⁷

⁷⁴ (...continued)
C-4, PR at C-3.

⁷⁵ Production capacity was *** pounds in interim 1996 and *** pounds in interim 1997, an increase of *** percent. *Id.*

⁷⁶ Capacity utilization was *** percent in 1994, *** percent in 1995, and *** percent in 1996. Table III-1, CR at III-3, PR at III-2.

⁷⁷ Capacity utilization was *** percent in interim 1996 and *** percent in interim 1997. *Id.*

⁷⁸ Commissioner Crawford notes that the evidence in the record demonstrates that the domestic industry does not have the capacity to supply the demand for CR nails in the domestic market. In 1996 the domestic industry reported an average capacity quantity of *** million pounds, while the U.S. consumption quantity for 1996 was *** million pounds. Table C-1, CR at C-3 and C-4, PR at C-3.

⁷⁹ For the years 1994 and 1995 respectively, the number of PRWs was *** and ***, hours worked by PRWs were *** and ***, and wages paid to PRWs were *** and ***. Table III-1, CR at III-4, PR at III-2.

⁸⁰ The number of PRWs in 1996 was ***. *Id.*

⁸¹ The number of PRWS in interim 1997 was ***, compared to *** in interim 1996. *Id.*

⁸² Hours worked by PRWs in 1996 fell to ***, compared to *** in 1994. *Id.*

⁸³ In interim 1997, hours worked by PRWs was *** compared to *** in interim 1996. *Id.*

⁸⁴ Wages paid to PRWs were *** in 1996, *** in interim 1996, and *** in interim 1997. *Id.*

⁸⁵ Pounds produced per hour rose to *** in 1996, compared to *** and *** in 1994 and 1995. In interim 1996, pounds produced per hour were ***, compared to *** in interim 1997. *Id.*

⁸⁶ Sales revenues were *** in 1994, *** in 1995, *** in 1996, *** for interim 1996 and *** for interim 1997. Table VI-1, CR at VI-3, PR at VI-2.

⁸⁷ Average per-pound sales values were *** in 1994, *** in 1995, *** in 1996, *** in interim 1996, and *** in interim 1997. *Id.*

The record does not contain reliable industrywide data on cost of goods sold or profitability.⁸⁸ Reliable data on these indicators do exist for petitioner and International, which accounted for about *** of domestic production during the period of investigation.⁸⁹ These two firms' combined *** from 1994 and 1995, and became *** in 1996.⁹⁰ The two companies had *** on a combined basis for interim 1996, and *** for interim 1997.⁹¹

Industrywide capital expenditures were much higher in 1995 than in other full or partial years of the period of investigation, due to the opening of a CR nail plant in 1995.⁹² Capital expenditures were higher in 1996 than in 1994, although they were lower in interim 1997 than in interim 1996.⁹³ Spending on research and development increased from 1994 to 1995, and from 1995 to 1996.⁹⁴ Spending on research and development was slightly lower in interim 1997 than in interim 1996.^{95 96}

III. CUMULATION

Section 771(7)(G)(i) requires the Commission to cumulate imports from all countries as to which petitions were filed and/or investigations self-initiated by Commerce on the same day, if such imports

⁸⁸ Bostitch, which accounted for about *** of domestic production of CR nails during the period of investigation, *** information on its COGS for CR nails. *Compare* Table III-1, CR at III-4, PR at III-2 to CR at III-5 n.10, PR at III-2 n.10. Bostitch's Prehearing Brief at 2. ***. *See* CR at VI-8 to VI-9, PR at VI-3. The Commission examined two other methodologies by which to allocate ***, but concludes that neither is reliable. *See* INV-U-075 (October 30, 1997). We note in this regard that the different allocation methodologies resulted in *** estimates of profitability for Bostitch. CR at VI-8 to VI-9, PR at VI-3; INV-U-075 (October 30, 1997).

We also considered whether to calculate Bostitch's profitability based on its operations for ***. We conclude, however, that Bostitch's *** profitability data are not a satisfactory surrogate for the profitability of its CR nails operations. Bostitch has stated that its *** (CR at III-5 n.12, PR at III-2 to III-3 n.12), claiming that its CR nails operations have been adversely affected by imports from the subject countries (CR at III-2 n.4, PR at III-1 n.4). Bostitch's claim of *** on CR nails is consistent with its decision to *** other types of nails during the period of investigation. CR at III-5 nn.10 & 12, PR at III-2 to III-3 nn.10 & 12.

⁸⁹ *Compare* Table III-1, CR at III-4, PR at III-2 to CR at III-5 n.10, PR at III-2 n.10.

⁹⁰ The combined *** of *** and *** was *** percent for 1994, and *** percent for 1995. On a combined basis, the two companies had *** of *** percent in 1996. Table 1b of memorandum INV-U-075 (Oct. 30, 1997).

⁹¹ For interim 1996, the two companies had *** of *** percent, on a combined basis. For interim 1997, they had *** of *** percent. *Id.*

⁹² Capital expenditures were *** in 1995, more than *** than the capital expenditure in 1996 (***), which was the year with the next highest capital expenditure during the POI. Table VI-3, CR at VI-12, PR at VI-4. *See* CR at VI-1 and VI-11, PR at VI-1 and VI-3 (indicating that petitioner *** in a CR nail-producing plant in 1995).

⁹³ Capital spending was *** in 1994, *** in 1996, *** in interim 1996, and *** in interim 1997. Table VI-3, CR at VI-12, PR at VI-4.

⁹⁴ R&D spending was *** in 1994, *** in 1995, and *** in 1996. *Id.*

⁹⁵ The figures for interim 1996 and 1997 are *** and ***, respectively. *Id.*

⁹⁶ Based on the foregoing, Commissioner Newquist finds that the domestic industry is vulnerable to the continuing adverse effects of the dumped imports of CR nails from China and Taiwan. He therefore does not reach the issue of whether or not there is material injury by reason of subject imports of CR nails. He instead proceeds directly to the discussion of whether or not there is threat of material injury by the subject imports.

compete with each other and with domestic like products in the United States market.⁹⁷ The antidumping petitions regarding China and Taiwan were filed on the same day. Thus, the only issue before the Commission is whether exports from China and Taiwan satisfy the “competition” requirement for cumulation.

In assessing whether imports compete with each other and with the domestic like product,⁹⁸ the Commission has generally considered four factors, including:

- (1) the degree of fungibility between the imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;⁹⁹
- (2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product;
- (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and
- (4) whether the imports are simultaneously present in the market.¹⁰⁰

⁹⁷ 19 U.S.C. § 1677(7)(G)(i). There are four exceptions to the cumulation provision, one of which applies here. 19 U.S.C. § 1677(7)(G)(ii). The applicable exception provides that imports from countries with respect to which the investigation has been terminated shall not be cumulated with other subject imports. *Id.* Consequently, imports of CR nails from Korea are not eligible for cumulation with subject imports from China and Taiwan because the investigation regarding Korea was terminated. *See* 19 U.S.C. § 1677(7)(G)(ii)(II) and Collated Roofing Nails from Korea, 62 Fed. Reg. 53799 (Oct. 16, 1997) (Commission notice of termination of investigation of CR nails from Korea).

⁹⁸ The Statement of Administrative Action submitted to Congress in connection with the Uruguay Round Agreements Act (P.L. 103-465, approved Dec. 8, 1994) (“URAA”) expressly states that “the new section will not affect current Commission practice under which the statutory requirement is satisfied if there is a reasonable overlap of competition.” Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. 316, Vol. 1, 103d Cong., 2d Sess. (1994) (“SAA”) at 848 *citing* Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898, 902 (Ct. Int’l Trade 1988), *aff’d* 859 F.2d 915 (Fed. Cir. 1988).

⁹⁹ Commissioner Crawford notes that the Court of International Trade has recognized repeatedly that analyses of substitutability may vary under different provisions of the statute, based upon the requirements of the relevant statutory provision. *E.g.* U.S. Steel Group v. United States, 873 F. Supp. 673, 697 (1994); R-M Industries, Inc. v. United States, 848 F. Supp. 204, 210, n.9 (1994); BIC Corporation v. United States, 964 F. Supp. 391 (1997). Commissioner Crawford finds that substitutability, not fungibility, is a more accurate reflection of the statute. In these investigations, she finds there is sufficient substitutability to conclude that subject imports compete with each other and that subject imports compete with the domestic like product. Therefore, she concurs in cumulating subject imports from China and Taiwan.

¹⁰⁰ *See* Certain Cast-Iron Pipe Fittings from Brazil, the Republic of Korea, and Taiwan, Inv. Nos. 731-TA-278-280 (Final), USITC Pub. 1845 (May 1986), *aff’d*, Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898 (Ct. Int’l Trade), *aff’d*, 859 F.2d 915 (Fed. Cir. 1988).

Although no single factor is determinative, and the list of factors is not exclusive, these factors are intended to provide the Commission with a framework for determining whether the imports compete with each other and with the domestic like product.¹⁰¹ Only a "reasonable overlap" of competition is required.¹⁰²

In the preliminary determinations, the Commission cumulated imports from China and Taiwan.¹⁰³ We found a significant degree of fungibility between imports of the subject merchandise from China and Taiwan, and between the subject imports and the domestic like product.¹⁰⁴ Domestic producers and importers reported that the subject imports from China and Taiwan were interchangeable, as were the subject merchandise and the domestic like product.¹⁰⁵ It was not disputed that the domestic like product and the subject imports from both countries compete in the same geographical markets nationwide.¹⁰⁶ We also found an overlap in channels of distribution for the subject imports and domestic like product, most of which are sold through roofing products distributors.¹⁰⁷ We found further that subject merchandise from China and Taiwan was simultaneously present in the U.S. market, with imports from both countries recorded during each complete year of the period of investigation, as well as during interim 1996.¹⁰⁸

In the final phase of these investigations, we have obtained no contrary information that would lead to a different cumulation finding. In fact, the record provides further support for the finding that the subject imports of CR nails are fungible both with each other and with the domestic like product.¹⁰⁹ Moreover, no party argued that the Commission should not cumulate the subject imports during the preliminary phase or in this final phase of these investigations.¹¹⁰ Accordingly, we cumulate the subject imports from China and Taiwan for purposes of analyzing whether the domestic industry is materially injured by reason of the LTFV imports.

¹⁰¹ See, e.g., Wieland Werke, AG v. United States, 718 F. Supp. 50 (Ct. Int'l Trade 1989).

¹⁰² See Wieland Werke, 718 F. Supp. at 52 ("Completely overlapping markets are not required."); United States Steel Group v. United States, 873 F. Supp. 673, 685-86 (Ct. Int'l Trade 1994), *aff'd*, 96 F.3d 1352 (Fed. Cir. 1996).

¹⁰³ Prelim. Deters. at 12-13. The Commission also cumulated CR nails from Korea, subject imports that were then still subject to investigation.

¹⁰⁴ Prelim. Deters. at 12.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 13.

¹⁰⁷ *Id.* at 13, I-7.

¹⁰⁸ *Id.* at 13.

¹⁰⁹ CR at II-9 to II-10, PR at II-6 to II-7 (a large majority of importers questioned reporting interchangeability among the Chinese, Taiwanese, and domestically produced CR nails). Notwithstanding somewhat mixed record evidence regarding the interchangeability of petitioner's CR nails with other CR nails discussed above in section I, the record supports the conclusion that the subject imports and the domestic like product (or at least the bulk of domestic production) are sufficiently fungible to warrant cumulation. Commissioner Crawford does not join in this footnote.

¹¹⁰ At the hearing, several witnesses testified that Chinese CR nails are inferior in quality and therefore not fungible with domestically produced CR nails. Hearing Tr. at 10 (Umejima), 75 (Morrell), 92-95 (Reilly). They did not, however, comment on cumulation expressly, despite a staff request. Memorandum to the file from M. Diehl regarding October 3, 1997 telephone conversation with ***, counsel to respondents. Despite their testimony, we find a significant degree of fungibility between the subject imports from China and both subject imports from Taiwan and domestically produced CR nails based in part on questionnaire responses from importers, most of which indicated that the CR nails from the three sources are interchangeable. CR at II-9 to II-10, PR at II-6 to II-7.

IV. NO MATERIAL INJURY BY REASON OF LTFV IMPORTS

In the final phase of an antidumping investigation, the Commission determines whether an industry in the United States is materially injured by reason of the LTFV imports under investigation.¹¹¹ In making this determination, the Commission must consider the volume of imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations.¹¹² Although the Commission considers causes of injury to the industry other than the LTFV imports, it is not to weigh causes.^{113 114} For the reasons discussed below, we determine that the domestic CR nail industry is not materially injured by reason of LTFV imports from China and Taiwan.

A. Volume of Subject Imports

Section 771(7)(C)(i) provides that the “Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or

¹¹¹ 19 U.S.C. § 1673d(b). The statute defines “material injury” as “harm which is not inconsequential, immaterial, or unimportant.” 19 U.S.C. § 1677(7)(A).

¹¹² 19 U.S.C. § 1677(7)(B)(i). The Commission “may consider such other economic factors as are relevant to the determination,” but shall “identify each [such] factor . . . and explain in full its relevance to the determination.” 19 U.S.C. § 1677(7)(B).

¹¹³ *See, e.g., Gerald Metals, Inc. v. United States*, 937 F. Supp. 930, 936 (Ct. Int’l Trade 1996), *appeal pending*; *Citrosuco Paulista, S.A. v. United States*, 704 F. Supp. 1075, 1101 (Ct. Int’l Trade 1988).

¹¹⁴ Commissioner Crawford notes that the statute requires that the Commission determine whether a domestic industry is “materially injured by reason of” the subsidized and LTFV imports. She finds that the clear meaning of the statute is to require a determination of whether the domestic industry is materially injured by reason of subsidized and LTFV imports, not by reason of the subsidized and LTFV imports among other things. Many, if not most, domestic industries are subject to injury from more than one economic factor. Of these factors, there may be more than one that independently are causing material injury to the domestic industry. It is assumed in the legislative history that the “ITC will consider information which indicates that harm is caused by factors other than less-than-fair-value imports.” S. Rep. No. 249, 96th Cong., 1st Sess. 75 (1979). However, the legislative history makes it clear that the Commission is not to weigh or prioritize the factors that are independently causing material injury. *Id.* at 74; H.R. Rep. No. 317, 96th Cong., 1st Sess. 46-47 (1979). The Commission is not to determine if the subsidized and LTFV imports are “the principal, a substantial or a significant cause of material injury.” S. Rep. No. 96-249 at 74 (1979). Rather, it is to determine whether any injury “by reason of” the subsidized and LTFV imports is material. That is, the Commission must determine if the subject imports are causing material injury to the domestic industry. “When determining the effect of imports on the domestic industry, the Commission must consider all relevant factors that can demonstrate if unfairly traded imports are materially injuring the domestic industry.” S. Rep. No. 71, 100th Cong., 1st Sess. 116 (1987) (emphasis added).

For a detailed description of Commissioner Crawford’s analytical framework, *see Polyvinyl Alcohol from China, Japan, and Taiwan*, Inv. Nos. 731-TA-726, 727, and 729 (Final), USITC Pub. 2960 at 25-26 (May 1996). Both the Court of International Trade and the United States Court of Appeals for the Federal Circuit have held that the “statutory language fits very well” with Commissioner Crawford’s mode of analysis, expressly holding that her mode of analysis comports with the statutory requirements for reaching a determination of material injury by reason of the subject imports. *United States Steel Group v. United States*, 96 F.3d 1352, 1361 (Fed. Cir. 1996), *aff’d* 873 F. Supp. 673, 694-95 (Ct. Int’l Trade 1994).

consumption in the United States, is significant.”¹¹⁵ The volume of subject imports increased throughout the period of investigation.¹¹⁶ Subject imports rose 59.3 percent from 1994 to 1996, and were 18.3 percent higher in interim 1997 than in interim 1996.¹¹⁷ The subject imports increased at a greater rate than U.S. apparent consumption, resulting in market share gains during the period of investigation. The market share of the subject imports increased from *** percent in 1994 to *** percent in 1996.^{118 119 120 121}

B. Price Effects of Subject Imports

Section 771(7)(C)(ii) provides that, in evaluating the price effects of the subject imports, the Commission shall consider whether--(I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.^{122 123}

¹¹⁵ 19 U.S.C. § 1677(7)(C)(i).

¹¹⁶ As noted earlier (see note 73 *supra*) Commissioner Crawford acknowledges the presence of nonsubject imports in the domestic market. The quantity of nonsubject imports increased from 31.2 million pounds in 1994 to 37.8 million pounds in 1996. Table IV-1, CR at IV-2, PR at IV-2. Although their market share declined during the period of investigation, nonsubject imports maintained a greater share of the domestic market than the LTFV imports throughout the period of investigation. Table IV-2, CR at IV-3, PR at IV-3.

¹¹⁷ The quantity of subject imports, in pounds, was *** in 1994, *** in 1995, *** in 1996, *** in interim 1996, and *** in interim 1997. Table C-1, CR and PR at C-3. Value figures for the subject imports are not available. Table C-1, CR at C-3 and C-4 n.4, PR at C-3.

¹¹⁸ Table IV-4, CR at IV-6, PR at IV-5.

¹¹⁹ Based on the foregoing, Chairman Miller finds that the volume of subject imports and the increase in that volume over the period are significant.

¹²⁰ Vice Chairman Bragg notes that for the reasons discussed in section IV.C below, she finds the volume of subject imports and the increase in this volume not to be sufficient, either in absolute terms or relative to production or consumption, to have had a significant present adverse impact on the domestic industry.

¹²¹ Commissioner Crawford notes that while subject imports did increase, domestic consumption of CR nails also increased. While it is clear that the larger the volume of subject imports, the larger the effect they will have on the domestic industry, whether the volume is significant cannot be determined in a vacuum, but must be evaluated in the context of their price effects and impact. Based on the increasing demand in the domestic market for CR nails, the inability of the domestic industry to supply the demand in the market, the market share of subject and nonsubject imports and the conditions of competition in the domestic market for CR nails, she finds that the volume of subject imports of CR nails is not significant.

¹²² 19 U.S.C. § 1677(7)(C)(ii).

¹²³ To evaluate the effects of the alleged dumping on domestic prices, Commissioner Crawford compares domestic prices that existed when the imports were dumped with what domestic prices would have been if the subject imports had been fairly traded. In most cases, if the subject imports had not been traded unfairly, their prices in the U.S. market would have increased. In these investigations, the alleged dumping margins for subject imports range from relatively low for some of the Taiwanese exporters, to high for Chinese subject imports. Thus, subject imports likely would have been priced only slightly higher had they been fairly traded in some instances and significantly higher in other instances. The degree of substitution between domestic CR nails and subject imports is limited. As previously noted (see note 78) the domestic industry did not have the available capacity to

(continued...)

The record confirms that price is a significant factor in purchasing decisions for CR nails, which are essentially a commodity-type product.¹²⁴ Subject imports and the domestic like product are generally interchangeable, as discussed above. Although there were some perceptions of differences in quality between the subject imports and the domestic like product, the record supports the conclusion that any such differences do not significantly limit interchangeability. Nearly all importers with an opinion reported that the subject imports could be used interchangeably with domestically-produced CR nails.¹²⁵ Given these market conditions, large or rapidly increasing volumes of low-priced LTFV imports can have significant adverse price effects.

The subject imports consistently undersold the domestic like product.¹²⁶ Margins of underselling were high, ranging from 18.4 to 46.6 percent over the period of investigation, with most margins between 20 and 30 percent.¹²⁷ We thus find significant underselling by the subject imports.

Prices of domestically-produced 1-inch and 1-1/4-inch CR nails declined *** and *** percent, respectively, during the period of investigation.¹²⁸ These CR nails sizes are estimated to account for *** percent of U.S. producers' shipments of CR nails.¹²⁹ Likewise, the net sales value of CR nails per pound by U.S. producers fell *** percent from 1994 to 1996.¹³⁰ These price declines occurred despite significantly increased demand for CR nails.¹³¹ The Commission also confirmed several instances of sales lost to the subject imports due to their lower price.¹³²

¹²³ (...continued)

supply the increasing demand for CR nails. Domestic purchasers could not obtain the supply of CR nails from the domestic industry to meet market demand and purchasers were placed on allocation by the domestic industry's largest producer. *** CR at PR at III-2, II-2, and III-5 nn. 10-12, PR at III-1, II-1, III-2 to III-3 nn.10-12. The record further reflects that Bostitch has *** CR at III-6, PR at III-3. Capacity limitations would have severely limited the ability of domestic producers to replace CR nails supplied by LTFV subject imports. Further, purchasers' perceived substitution problems with Paslode's CR nails would have further limited any shift in demand from LTFV CR nails to domestic CR nails. Purchasers would have resisted any significant increase in domestic producer prices. On the supply side, any attempt by an individual supplier in the domestic industry to increase its prices in response to any limited shift in demand that may have taken place would have been challenged by competitors, primarily nonsubject imports that represent the dominant supplier in the domestic market. Under such supply and demand conditions, any effort by a domestic supplier to raise its prices significantly would have been beaten back by its competitors. Therefore, significant effects on domestic prices cannot be attributed to the unfair pricing of subject imports. Consequently, Commissioner Crawford finds that subject imports are not having significant effects on prices of domestic CR nails.

¹²⁴ Nineteen of 24 purchasers listed price as among the three most important factors in their purchasing decisions. CR at II-8, PR at II-5.

¹²⁵ CR at II-9, PR at II-7, and importers' questionnaire responses at pages 15 and 16.

¹²⁶ Tables V-1 and V-2, CR at V-5 and V-6, PR at V-3 and V-4.

¹²⁷ *Id.*

¹²⁸ CR at V-8, PR at V-4.

¹²⁹ CR at V-4, PR at V-3.

¹³⁰ Table C-1, CR at C-4, PR at C-3. Net sales value per pound fell from \$*** to \$*** per pound from 1994 to 1996. Table VI-2, CR at VI-6, PR at VI-2.

¹³¹ U.S. apparent consumption rose *** percent from 1994 to 1996, and was *** percent higher in interim 1997 than in interim 1996, measured by quantity. Table C-1, CR and PR at C-3.

¹³² CR at V-10 to V-15, PR at V-5 to V-7.

Accordingly, in light of evidence that subject imports compete with the domestic like product on the basis of price, consistent underselling by significant margins, declines in prices and net sales per pound for the domestic products over the period of investigation, and lost sales due to low subject import prices, we find that the increasing volume of subject imports from China and Taiwan that entered the United States during the period of investigation depressed prices for the domestic like product to a significant degree.¹³³

C. Impact of Subject Imports

Section 771(7)(C)(iii) provides that the Commission, in examining the impact of the subject imports on the domestic industry, “shall evaluate all relevant economic factors which have a bearing on the state of the industry,” as described above in section II.^{134 135 136 137}

¹³³ We do not believe that the higher net sales value per pound for interim 1997 (\$***) than for interim 1996 (\$***) materially detracts from our price finding. We generally give less weight to interim data than to full year data. The full year data for net sales value per pound indicates a decline from \$*** in 1994 to \$*** in 1995, and further to \$*** in 1996. Table C-1, CR and PR at C-3. Even if we were confident that the interim data for 1997 were representative of the entire year, it would still indicate a net sales value per pound lower than in 1994. *Id.*

¹³⁴ 19 U.S.C. § 1677(7)(C)(iii). The statute specifies that the Commission is to consider “the magnitude of the margin of dumping” in its evaluation of the impact of imports on the domestic industry. 19 U.S.C. § 1677(7)(C)(iii)(V); *see also* 19 U.S.C. § 1677(35)(C); URAA Statement of Administrative Action (“SAA”), H.R. Rep. 316, 103d Cong., 2d Sess., vol. I at 850 (this provision “does not alter the requirement in current law that none of the factors which the Commission considers is necessarily dispositive of the Commission’s material injury analysis”). The statute further states that the dumping margins that the Commission is to consider in making a final determination are those “most recently published by the administering authority prior to the closing of the Commission’s administrative record.” 19 U.S.C. § 1677(35)(C)(ii). The margins as amended by Commerce are 2.98 and 40.28 percent for subject Taiwanese producers, and 118.41 for subject Chinese producers. *See* October 24, 1997 memorandum for The File from Team, Office 5, AD/CVD Enforcement Group II.

¹³⁵ Chairman Miller does not find the magnitude of the margins of dumping to be particularly significant in the context of these investigations.

¹³⁶ Vice Chairman Bragg notes that she does not ordinarily consider the margin of dumping to be of particular significance in evaluating the effects of subject imports on domestic producers. *See* Separate and Dissenting Views of Commissioner Lynn M. Bragg in Bicycles from China, Inv. No. 731-TA-731 (Final), USITC Pub. 2968 (June 1996).

¹³⁷ As previously stated, Commissioner Crawford does not evaluate impact based on trends in statutory impact factors. In her analysis of material injury by reason of alleged dumped imports, Commissioner Crawford evaluates the impact of subject imports on the domestic industry by comparing the state of the industry when the imports were dumped with what the state of the industry would have been had the imports been fairly traded. In assessing the impact of the subject imports on the domestic industry, she considers, among other relevant factors, output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, research and development and other relevant factors as required by 19 U.S.C. § 1677(7)(C)(iii). These factors together either encompass or reflect the volume and price effects of the dumped imports, and so she gauges the impact of the dumping through those effects. In this regard, the impact on the domestic industry’s prices, sales and overall revenues is critical, because the impact on the other industry indicators (*e.g.*, employment, wages, etc.) is derived from this impact. As noted above, there is no substantial evidence that the domestic industry would have been able to increase its prices significantly if subject imports had been sold at fairly traded prices. Had subject imports been fairly priced, there would have been an insignificant shift in demand from subject imports to the domestic industry due to capacity limitations in the domestic industry and perceived

(continued...)

Although the volume and market penetration of subject imports rose during the period of investigation and the subject imports had significant price-depressing effects on sales of the domestic like product, we cannot conclude definitively that the subject imports are having a significant adverse impact on the domestic industry. Many important indicators of the domestic industry's condition improved over the period of investigation. Specifically, the domestic industry's production, shipments, net sales, and number of PRWs all rose.¹³⁸ Capacity utilization also increased, although primarily as a result of reductions in CR nail production capacity.¹³⁹

Other factors, however, were not as favorable. These include the declining market share held by the domestic industry, falling net sales value per pound, and an essentially flat trend in the value of total net sales.¹⁴⁰ The combined *** of petitioner and International *** over the period of investigation. We consider their combined *** to be an additional indicator of the impact of the subject imports on the domestic industry. However, these two producers represent only approximately *** of domestic production and, therefore we assign relatively little weight to this evidence.¹⁴¹

Taking all factors into account, we do not believe that the record demonstrates that the current adverse impact of the subject imports on the domestic industry is sufficient in magnitude to constitute material injury. We therefore determine that the domestic industry producing CR nails is not materially injured by reason of the subject imports from China and Taiwan.

¹³⁷ (...continued)

substitution problems with the Paslode CR nails. If subject imports had been fairly traded, to satisfy the demand for CR nails purchasers would have continued to purchase a decreased quantity of subject imports and would have increased their purchases of nonsubject imports. In other words, had subject imports not been dumped, the domestic industry would not have been able to increase its output and sales, and therefore its revenues, significantly. Consequently the domestic industry would not have been materially better off if the subject imports had been fairly traded. Therefore, Commissioner Crawford does not find that LTFV traded Chinese and Taiwanese imported CR nails are having a significant impact on the domestic industry and she finds that the domestic industry producing CR nails is not materially injured by reason of LTFV imports of CR nails from China and Taiwan.

¹³⁸ From 1994 to 1996, production rose *** percent, shipments rose *** percent, and net sales rose *** percent, all measured by quantity. Table C-1, CR at C-4, PR at C-3. The number of PRWs rose *** percent from 1994 to 1996. *Id.*

¹³⁹ Capacity utilization increased from *** to *** percent from 1994 to 1996, although average production capacity fell *** percent over the same time period. *Id.* The drop in production capacity came entirely as a result of ***. Compare CR at III-5 n.12, PR at III-2 n.10 to Table III-1, CR at III-4, PR at III-2 (regarding capacity); and Bostitch's Prehearing Brief at 5-6 and CR at III-2 n.4 and III-5 n.12, PR at III-1 n.4 and III-2 to III-3 n.12 (regarding the profitability of Bostitch's CR nails). Bostitch stated further that it is "especially sensitive to imports of the [subject merchandise]" and that its CR nails operations "have been adversely affected by [those] imports." CR at III-2 n.4, PR at III-1 n.4. We regard Bostitch's decision to *** as an additional indicator of the adverse impact of the subject imports.

¹⁴⁰ *Id.*

¹⁴¹ We note again the difficulty in assessing industry profitability in these investigations. As indicated in section II above, we are unable to calculate reliable estimates of Bostitch's profitability. Moreover, because Bostitch accounts for *** percent of domestic production, and because some estimates of Bostitch's profitability indicate operating margins *** the joint figures for petitioner and International, we do not consider that the combined operating margins for petitioner and International are necessarily representative of industrywide profitability. See CR and PR at VI-1, and discussion of Bostitch's profitability at section II above. We note that no single factor bearing on the state of the industry is dispositive. 19 U.S.C. § 1677(7)(E)(ii).

V. THREAT OF MATERIAL INJURY BY REASON OF LTFV IMPORTS¹⁴²

Section 771(7)(F) of the Act directs the Commission to determine whether the U.S. industry is threatened with material injury by reason of the subject imports by analyzing whether “further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted.”¹⁴³ The Commission may not make such a determination “on the basis of mere conjecture or supposition,” and considers the threat factors “as a whole” in making its determination whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued.¹⁴⁴ In making our determination, we have considered all statutory factors¹⁴⁵ that are relevant to these investigations.¹⁴⁶

For the reasons discussed below, we find that the domestic CR nails industry is threatened with material injury by reason of the subject imports from China and Taiwan.

We have cumulated the LTFV imports from China and Taiwan for purposes of our threat analysis. Under section 771(7)(H) of the Act, the Commission may “to the extent practicable” cumulatively assess the volume and price effects of subject imports from all countries as to which petitions were filed on the same day if the requirements for cumulation for material injury analysis are satisfied.¹⁴⁷ We determined in section III above that the requirements for cumulation for material injury analysis are satisfied in these investigations, and we apply the same analysis here and determine in our discretion to cumulate the LTFV imports for our threat analysis as well.¹⁴⁸

The record indicates that there has been a significant rate of increase of the volume of subject merchandise imported into the United States, indicating the likelihood of substantially increased imports in the near future. As noted previously, the volume of the subject imports increased 59.3 percent from 1994

¹⁴² Commissioner Crawford does not join in this section. *See* Commissioner Crawford’s Dissenting Views.

¹⁴³ 19 U.S.C. § 1673b(a) and 1677(7)(F)(ii).

¹⁴⁴ 19 U.S.C. § 1677(7)(F)(ii). While the language referring to imports being imminent (instead of “actual injury” being imminent and the threat being “real”) is a change from the prior provision, the SAA indicates the “new language is fully consistent with the Commission’s practice, the existing statutory language, and judicial precedent interpreting the statute.” SAA at 854.

¹⁴⁵ The statutory factors have been amended to track more closely the language concerning threat of material injury determinations in the WTO Antidumping Agreement and Subsidies and Countervailing Measures Agreement, although “[n]o substantive change in Commission threat analysis is required.” SAA at 855.

¹⁴⁶ 19 U.S.C. § 1677(7)(F)(i). Factor I regarding consideration of the nature of the subsidies is inapplicable because there have not been any subsidies alleged. Factor VII regarding raw and processed agriculture products is also inapplicable to the products at issue. Additionally, the record indicates that there are no known dumping findings or antidumping remedies in effect in other countries with respect to CR nails from China or Taiwan. CR at VII-1, PR at VII-1. *See* 19 U.S.C. § 1677(7)(F)(iii)(I).

¹⁴⁷ 19 U.S.C. § 1677(7)(H).

¹⁴⁸ Although Commissioner Newquist did not join section III of the opinion, he agrees that the subject imports compete with each other and the domestic like product. He notes that, in his view, once a like product determination is made, that determination establishes an inherent level of fungibility within that like product. Only in exceptional circumstances could Commissioner Newquist find products to be “like” and then turn around and find that, for purposes of cumulation, there is no “reasonable overlap of competition” based on some roving standard of substitutability. *See* Additional and Dissenting Views of Chairman Newquist in Flat-Rolled Carbon Steel Products, USITC Pub. 2664 (August 1993).

to 1996, and was 18.3 percent higher in interim 1997 than in interim 1996.¹⁴⁹ This rate of increase in subject imports outpaced growth in domestic demand, resulting in increased market shares for the subject imports, from *** percent in 1994 to *** percent in 1996.¹⁵⁰ The record also demonstrates existing unused capacity and a substantial increase in production capacity in the exporting countries, indicating the likelihood of substantially increased volumes of subject imports to the United States in the near future. The aggregate production capacity of the subject foreign producers more than doubled from 1994 to 1996.¹⁵¹ Moreover, there is significant unused capacity among the Chinese producers (35 percent of capacity in 1996), and Chinese and Taiwanese producers project further increases in capacity in the future.¹⁵² These increases in foreign production capacity are most likely to be directed at the U.S. market, which accounted for approximately 90 percent of the Chinese producers' shipments and over 95 percent of the Taiwanese producers' shipments during the period of investigation.¹⁵³ ¹⁵⁴ The record does not demonstrate that there will be significant increases in home market consumption in either China or Taiwan based on the very small quantity of home market sales during the period of investigation.¹⁵⁵

The record also indicates that imports of the subject merchandise are entering at prices likely to significantly depress prices of the domestic like product, or suppress price increases that otherwise would have occurred.¹⁵⁶ Margins of underselling were consistent during the period of investigation, mostly in a range between 20 and 30 percent, and we conclude that this trend is likely to continue in the future.¹⁵⁷ As discussed previously, we find that subject imports have depressed prices of the domestic like product to a significant degree, and we conclude that subject imports are likely to depress prices or suppress price increases to a significant degree in the future.¹⁵⁸

¹⁴⁹ Table C-1, CR and PR at C-3.

¹⁵⁰ Table IV-4, CR at IV-6, PR at IV-5.

¹⁵¹ Tables VII-1 and VII-2, CR at VII-2 and VII-4, PR at VII-1.

¹⁵² Table VII-1, CR at VII-2, PR at VII-1; response to foreign producers' questionnaire of ***, as clarified by Mr. *** in telephone conversation on Oct. 24, 1997; and INV-U-078 (Nov. 3, 1997).

¹⁵³ Tables VII-1 and VII-2, CR at VII-2 and VII-4, PR at VII-1.

¹⁵⁴ The available data regarding importers' inventories of the subject merchandise show a decline in inventories over the period of investigation. We place little weight on that indication, however, because the data are incomplete and because it is not certain to what extent reported data pertain to the LTFV imports. CR at VII-5, PR at VII-2.

¹⁵⁵ Tables VII-1 and VII-2, CR at VII-2 and VII-4, PR at VII-1.

¹⁵⁶ The price of the subject imports has remained essentially flat during the period of investigation, and there is no indication of a change in the near future. Figure V-3, CR at V-7, PR at V-4.

¹⁵⁷ Tables V-1 and V-2, CR at V-5 and V-6, PR at V-3 and V-4; and CR at V-9, PR at V-5.

¹⁵⁸ Although Commissioner Newquist did not join section IV of this opinion, he generally agrees with that discussion for purposes of the instant analysis. He additionally notes that, in his analytical framework, "evaluation of the magnitude of the margin of dumping" is not generally helpful in answering the questions posed by the statute: whether the domestic industry is threatened with material injury and, if so, whether such threat of material injury is by reason of the subject imports.

*** domestic producers reported present negative effects from the subject imports and reported that they anticipated negative effects in the future.¹⁵⁹ ¹⁶⁰ We view Bostitch's assertions of actual and anticipated negative effects from subject imports to be consistent with its ***.¹⁶¹

We believe that as the volumes of subject imports continue to increase, the price pressure exerted by these imports will increase, resulting in further reductions in prices or suppression of price increases, leading to losses in domestic industry revenues and profitability. We view the falling net sales value per pound for the domestic like product during the three-year period of investigation as an indicator that other measures of the industry's condition will in turn deteriorate in the near future if the escalating price pressure exerted by the subject imports continues.¹⁶² ¹⁶³ ¹⁶⁴

Finally, we do not find that but for the suspension of liquidation, we would have found the domestic industry to be experiencing present material injury. Available data do not indicate that, absent suspension of liquidation in May of 1997, the domestic industry would have been materially injured by reason of subject imports.

In sum, based on the rapid increases in the volume and market share of the subject imports, unused foreign production capacity, increases in foreign production capacity and projected future increases, the significant adverse price effects of the subject imports, and certain adverse trends bearing on the condition of the domestic industry, we find that the domestic industry producing CR nails is threatened with material injury by reason of the subject imports from China and Taiwan.

¹⁵⁹ *** domestic producers reported that the subject imports have caused the ***. One domestic producer anticipated an ***, and another anticipated ***. CR at VI-11, PR at VI-4.

¹⁶⁰ Commissioner Newquist notes that although the petitioner may have previously enjoyed a fairly small captive market for its nails -- dedicated for use in its nail guns -- such captive market was eliminated during the period of investigation by modifications to the guns. Therefore, the petitioner is clearly on equal footing with other domestic producers concerning the adverse impact of the subject imports.

¹⁶¹ CR at III-5 nn.10 & 12, PR at III-2 to III-3 nn.10 & 12.

¹⁶² As indicated previously, we do not believe that the higher net sales value per pound for interim 1997 than for interim 1996 materially detracts from our price finding. We generally give less weight to interim data than to full year data, which indicates a decline from \$*** in 1994 to \$*** in 1995, and further to \$*** in 1996. Table C-1, CR and PR at C-3. Even if we were confident that the interim data for 1997 was representative of the entire year, it would still indicate a net sales value per pound lower than in 1994. *Id.*

¹⁶³ The *** for Paslode and International also represent a possible additional adverse trend, although for the reasons described previously we do not view them as necessarily representing the profitability for the entire domestic industry and therefore place comparatively little weight on them.

¹⁶⁴ We reject the argument of the respondents that there is no threat of material injury to the domestic industry because the domestic industry would not experience any significant increase in sales volume or price after the application of the antidumping duties. Respondents' Posthearing Brief at 2-4. Our affirmative threat finding is based on the factors discussed in the text above, not on the expectation that the imposition of antidumping duties would produce benefits for the domestic industry. *See id.* at 4 (arguing that "the application of dumping duties would produce no benefits for U.S. CR nail producers"). In our view, the statute does not instruct the Commission to evaluate the remedial effect of the potential antidumping duty. With regard to respondents' contention, however, we note that the subject imports gained market share primarily at the expense of the domestic industry, rather than the nonsubject imports, during the period of investigation. Table IV-4, CR at IV-6, PR at IV-5. This fact tends to refute respondents' supposition that the volume of subject imports would be replaced by nonsubject imports after the imposition of antidumping duties.

VI. DETERMINATION REGARDING CRITICAL CIRCUMSTANCES

Commerce made affirmative critical circumstances determinations with regard to certain subject imports from both China and Taiwan.¹⁶⁵ Petitioner argues that we should find that the imports subject to Commerce's affirmative critical circumstances determination are likely to undermine seriously the remedial effect of the antidumping duty order to be issued.¹⁶⁶

In investigations pre-dating the Uruguay Round Agreements Act ("URAA"), the Commission did not reach the issue of critical circumstances when it made a determination of threat of material injury on the ground that "a finding that retroactive imposition of antidumping duties is necessary to prevent recurrence of material injury would be inconsistent with [a] finding that the domestic industry is threatened with material injury at this time."¹⁶⁷ One of the URAA's amendments to the critical circumstances provision was deletion of the statutory reference to "recurrence of material injury." This revision was made to avoid creating any impression that critical circumstances cases and section 751 reviews, where the Commission must make findings about the likelihood of continuation or recurrence of material injury, should apply the same legal standard.¹⁶⁸ Nevertheless, we do not believe that this amendment was intended to modify the Commission's prior practice of rendering critical circumstances determinations only when it made an affirmative determination of material injury by reason of subject imports.

The remedy created by an affirmative critical circumstances determination would generally be of no practical utility in the context of a threat determination. The effect of affirmative findings on critical circumstances by Commerce and the Commission is to permit suspension of liquidation for a time 90 days earlier than is normally authorized.¹⁶⁹ When the Commission makes an affirmative threat determination, however, duties are ordinarily imposed not from the time of suspension of liquidation, but from the time of notice of the Commission's final determination.¹⁷⁰ The Commission anticipates that this procedure will be followed in the instant investigations. In such circumstances, the establishment of an earlier date for suspension of liquidation cannot result in the imposition of retroactive duties, or any additional duties.¹⁷¹

Additionally, the statute still contains language requiring that there be a Commerce finding of either a "history of dumping and material injury by reason of dumped imports" or importer knowledge that "there would be material injury" by reason of the imports as a prerequisite for an affirmative critical circumstances determination.¹⁷² This requirement suggests that there must still be a nexus between "massive imports" and material injury -- rather than threat of material injury -- to the domestic industry. Indeed, a purpose of the critical circumstances provision is more fully to remedy the domestic industry for any material injury it has sustained as of the time of the Commission determination. When the Commission concludes that the domestic industry is not sustaining current material injury by reason of imports, but is threatened with material injury in the imminent future, there would appear to be no reason to authorize a

¹⁶⁵ Collated Roofing Nails from the People's Republic of China, 62 Fed. Reg. 51410, 51413-14, 51419 (Oct. 1, 1997) and Collated Roofing Nails from Taiwan, 62 Fed. Reg. 51427, 51429, 51437 (Oct. 1, 1997).

¹⁶⁶ Petitioner's Posthearing Brief at 13.

¹⁶⁷ *E.g.*, Stainless Steel Flanges from India and Taiwan, Inv. No. 731-TA-639-640 (Final), USITC Pub. 2724 at I-21 n.112 (Feb. 1994).

¹⁶⁸ SAA at 877.

¹⁶⁹ 19 U.S.C. § 1673b(e)(2).

¹⁷⁰ 19 U.S.C. § 1673e(b)(2).

¹⁷¹ As indicated above, the Commission has not made an affirmative "but for" finding in these investigations.

¹⁷² *See* 19 U.S.C. § 1673d(a)(3).

retroactive remedy. Accordingly, we decline to consider whether critical circumstances exist because we do not find that the domestic industry is presently experiencing material injury by reason of the subject imports from China and Taiwan.

CONCLUSION

For the reasons stated above, we determine that the domestic industry producing CR nails is threatened with material injury by reason of subject imports from China and Taiwan.

DISSENTING VIEWS OF COMMISSIONER CAROL T. CRAWFORD

NO THREAT OF MATERIAL INJURY BY REASON OF LTFV IMPORTS OF COLLATED ROOFING NAILS FROM CHINA AND TAIWAN

On the basis of information obtained in these investigations, I determine that an industry in the United States is not threatened with material injury by reason of LTFV imports of subject imports of collated roofing nails from China and Taiwan. Section 771(7)(F) of the Act directs the Commission to determine whether a U.S. industry is threatened with material injury by reason of the subject merchandise 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”.¹⁷³ The Commission considers the threat factors “as a whole”¹⁷⁴ and may not make such a determination “on the basis of mere conjecture or supposition”.¹⁷⁵ In making my determination, I have considered all of the statutory factors¹⁷⁶ that are relevant to these investigations¹⁷⁷ and have determined that the domestic industry producing collated roofing nails is not threatened with material injury by reason of the LTFV imports from China and Taiwan.¹⁷⁸

I do not find that there is a significant increase in production capacity or unused capacity in the exporting countries likely to result in a substantial increase in subject imports into the United States. Even though production capacity has increased and some capacity is available in China, there is *** capacity in Taiwan, and there is no indication that subject imports will increase significantly in the immediate future. Capacity utilization remained at a high level, with a utilization rate of *** percent in 1996 for Taiwan and a rate of *** percent in 1995 for China.¹⁷⁹ At these levels of capacity utilization, subject exporters would have difficulty increasing exports to the U.S. market.

While subject imports increased their market share by *** percentage points between 1995 and 1996, this increase took place at the same time that domestic consumption increased *** percent between

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

¹⁷⁴ While the language referring to imports being imminent (instead of “actual injury” being imminent and the threat being “real”) is a change from the prior provision, the SAA indicates the “new language is fully consistent with the Commission’s practice, the existing statutory language, and judicial precedent interpreting the statute.” SAA at 184.

¹⁷⁵ 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. U.S.*, 744 F. Supp. 281, 287 (CIT 1990). See also *Calabrian Corp. v. United States*, 794 F. Supp. 377, 387 and 388 (Ct. Int’l Trade 1992), citing H.R. Rep. No. 1156, 98th Cong., 2d Sess. 174 (1984).

¹⁷⁶ The statutory factors have been amended to track more closely the language concerning threat of material determinations in the Antidumping and Subsidies Agreements, although “[n]o substantive change in Commission threat analysis is required.” SAA at 185.

¹⁷⁷ 19 U.S.C. § 1677(7)(F)(I). Factor I regarding consideration of the nature of the subsidies alleged is inapplicable because there have not been subsidies alleged. Factor VII regarding raw and processed agricultural products is also inapplicable to the products at issue.

¹⁷⁸ For my threat analysis, I have considered cumulated subject imports from China and Taiwan pursuant to § 771(7)(H) of the statute, for the same reasons stated above in Section II of the Commission’s opinion.

¹⁷⁹ Table VII-2, CR at VII-5, PR at VII-2.

1995 and 1996. Subject imports, nonsubject imports and domestic production all increased shipments between 1995 and 1996 to satisfy rising demand for CR nails in the domestic market.¹⁸⁰

In my determination of no material injury by reason of LTFV imports of collated roofing nails from China and Taiwan, I demonstrated that subject imports have had no significant effect on domestic prices. In light of the competition among CR roofing nail suppliers in the U.S. market and other conditions of competition, I find no evidence that this will change in the immediate future. Therefore, I conclude that subject imports will not enter the United States at prices that will have a depressing or suppressing effect on domestic prices, or that are likely to increase demand for further subject imports.

At the end of 1996, inventories of subject collated roofing nails represented approximately *** percent of all U.S. shipments in 1996, by quantity.¹⁸¹ These inventories are not significant, thus I do not find that subject import inventories constitute a threat of material injury.

There is no information in the record indicating that there is any potential for product-shifting. Finally, there is no indication of any convincing evidence of any recent or imminent changes in subject import levels or domestic market structure, that indicate the probability that there is likely to be material injury by reason of imports of the subject merchandise.

Given the high capacity utilization rates found in subject countries, the dominant role in the domestic market of nonsubject imports, the lack of substantial evidence that a significant increase in the quantity of subject imports is imminent, and the conditions of competition discussed above in Section II of the Commission's opinion, I find that the domestic industry producing collated roofing nails is not threatened with material injury by reason of LTFV imports of collated roofing nails from China and Taiwan.

¹⁸⁰ Table C-1, CR and PR at C-3.

¹⁸¹ Tables VII-1 and VII-2, CR at VII-2 and VII-4, PR at VII-1.