

U.S. International Trade Commission

Elemental Sulfur from Canada
Investigation No. AA1921-127 (Review)
Publication 3152, January 1999

VIEWS OF THE COMMISSION

Based on the record in this five-year review, we determine under section 751(c) of the Tariff Act of 1930, as amended (“the Act”), that revocation of the antidumping finding concerning elemental sulfur from Canada is not likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

I. BACKGROUND

In October 1973, the U.S. Tariff Commission determined that an industry in the United States was likely to be injured by reason of dumped imports of elemental sulfur from Canada pursuant to Section 201 of the Antidumping Act, 1921. Subsequently, the Department of Treasury issued an antidumping finding covering these imports.¹ On August 3, 1998, the Commission instituted a review pursuant to section 751(c) of the Act to determine whether revocation of the antidumping finding on elemental sulfur from Canada would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.²

In five-year reviews, the Commission first determines whether to conduct a full review (which would include a public hearing, the issuance of questionnaires, and other procedures) or an expedited review. Specifically, the Commission determines whether individual responses to the notice of institution are adequate and, based on these individually adequate responses, whether the collective responses submitted by two groups of interested parties -- domestic interested parties (such as producers, unions, trade associations, or worker groups) and respondent interested parties (such as importers, exporters, foreign producers, trade associations, or subject country governments) -- show a sufficient willingness among interested parties to participate and provide information requested in a full review, and if not, whether other circumstances

¹ 38 Fed. Reg. 34655 (Dec. 17, 1973).

² 63 Fed. Reg. 41280 (Aug. 3, 1998).

warrant a full review.³

In this review the Commission received two individually adequate responses to its notice of institution, one from a domestic interested party producer of elemental sulfur, Freeport-McMoRan Sulphur, Inc. (“Freeport”), and one from a respondent interested party, Husky Oil Ltd. (“Husky”), a Canadian producer of subject merchandise. Freeport and Husky also filed comments arguing that the Commission should conduct an expedited review because the aggregate response from the opposing interested party group was inadequate.⁴

On November 5, 1998, the Commission found that the responses from both the domestic and respondent interested party groups were inadequate.^{5 6} Pursuant to Section 751(c)(3)(B) of the Act, it voted

³ See 19 C.F.R. § 207.62(a); 63 Fed. Reg. 30599, 30602-05 (June 5, 1998).

⁴ See 19 C.F.R. § 207.62(b) (authorizing, *inter alia*, all interested parties that have responded to the notice of institution to file comments with the Commission on whether the Commission should conduct an expedited review).

⁵ Commissioner Askey notes that the group adequacy approach adopted by the Commission to decide whether or not interested party responses are adequate to warrant full sunset review is not suggested by the Uruguay Round Agreements Act (URAA) or the Statement of Administrative Action (SAA). As the process is currently structured, Commissioners vote on the adequacy of each group, but not on the adequacy of the responses overall. In order to expedite a case, a majority of Commissioners must agree that a particular group is inadequate. Commissioners are therefore constrained in their ability to evaluate the underlying factors independently and to agree on an outcome, albeit for different reasons. The result contradicts the Commission’s entire practice in Title VII cases. In no other Title VII area is a majority of the Commission required to agree on the rationale underlying a condition precedent to a statutory finding.

The current structure can therefore lead to the anomalous result of a full review when a majority of the Commission fails to agree which group is inadequate despite the fact that a majority of Commissioners favors expedition. The group adequacy approach presupposes that the adequacy of each group is clear-cut and permits the decision on group adequacy to control the decision on overall adequacy, and therefore the decision to expedite. In fact, the adequacy or inadequacy of a particular group’s response may reflect merely a difference in market structure since the case was filed but does not necessarily portend a lack of cooperation or clarity in an ensuing “full” investigation. The structure also implies that *group* adequacy considerations inevitably predominate in a Commissioner’s decision of whether to conduct a full review, whereas a Commissioner may decide to conduct a full review, despite group or overall inadequacy, based on other factors.

⁶ Commissioner Crawford concurs with Commissioner Askey that the multi-step “group inadequacy” voting process recently adopted by the Commission to decide whether to expedite a review does
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to conduct an expedited review.^{7 8 9}

The Commission concluded that the domestic interested party group response was inadequate because Freeport's response, although individually adequate, accounted for a low 17% share of domestic production.¹⁰ Moreover, the Commission stated that while recovered sulfur now accounts for most of domestic elemental sulfur production, no recovered sulfur producer responded to the notice of institution. Thus, the Commission found that there was not a sufficient willingness among domestic interested parties to participate in this review and to provide information requested throughout the proceeding.¹¹

⁶(...continued)

not reflect the statute. The statute clearly grants discretion to Commissioners to decide whether or not to expedite a review if they find interested party responses inadequate. Under the "group inadequacy approach," a Commissioner is prohibited from voting to expedite, without regard to his or her own conclusions regarding adequacy, unless a majority of Commissioners have found that one or another (or both) of the "groups" of interested party responses is inadequate. Thus, the ability of a Commissioner to exercise his or her statutory discretion is superseded by a procedural voting rule, and under certain circumstances is foreclosed altogether. This result is inconsistent with the statutory intent that each Commissioner exercise discretion in the decision to expedite.

⁷ 19 U.S.C. § 1675(c)(3)(B).

⁸ Chairman Bragg found both domestic and respondent interested party group responses to be inadequate. However, she voted to conduct a full review based on ambiguous language regarding the like product in the original determination.

⁹ Commissioner Koplan did not concur in the decision to expedite this review and therefore does not join the following three paragraphs.

¹⁰ This figure was based on production data Freeport furnished in its response to the notice of institution and total U.S. production data for sulfur reported by the U.S. Geological Service (USGS). The USGS data appear to overstate total elemental sulfur production in two respects: (1) USGS overstates Frasch sulfur production (which would correspond with Freeport production, because, as explained below, Freeport is the only U.S. Frasch producer) in relation to the data Freeport reported in its response to the notice of institution; (2) USGS included some production of a product other than elemental sulfur (specifically, sulfuric acid). If the USGS data are adjusted to correct these problems, Freeport's share of 1997 domestic production is 21 percent. *See* INV-V-100 (Dec. 9, 1998). This recalculation does not affect the conclusion that the domestic interested party response was inadequate.

¹¹ We emphasize that this conclusion was based on inadequate domestic interested party participation in the review and cooperation with our information requests. It was not premised on inadequate industry "support" for the antidumping finding.

With respect to respondent interested party group response, the Commission concluded that the response was inadequate because Husky's response, although individually adequate, accounted for a low share of both subject imports (***) and of Canadian production (***).¹² The Commission consequently found that there was not a sufficient willingness among respondent interested parties to participate in this review and to provide information requested throughout the proceeding.

Finally, neither Husky nor Freeport contended that a full review would be "an efficient exercise of the resources of either the Commission or the parties."¹³ Instead, both parties requested that the review be expedited.

On December 8, 1998, Freeport, Husky, and Mulberry Corp., a U.S. purchaser and industrial user of elemental sulfur that is a party to the review, filed comments pursuant to 19 C.F.R. § 207.62(d) concerning the determination that the Commission should reach in the review.¹⁴

II. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. Domestic Like Product

In making its determination under section 751(c), the Commission first identifies "the domestic like

¹² Husky's percentage of Canadian production is taken from its response to the notice of institution. *See* Husky Response to Notice of Institution at 23. Husky's percentage of imports is calculated from U.S. import data it provided in its response to the notice of institution and data concerning the total value of subject imports obtained from the U.S. Customs Service. *See* Husky Response to Notice of Institution, Exhibit 16; Confidential Report ("CR") at I-12, Public Report ("PR") at I-9.

¹³ *See* 63 Fed. Reg. at 30603.

¹⁴ Portions of Mulberry's comments contain new factual information, which is not permitted under 19 C.F.R. § 207.62(d). Pursuant to that regulation and 19 U.S.C. § 1677m(g), we have disregarded this information. Under 19 U.S.C. § 1677m(g), the Commission is to disregard new factual information submitted in final party comments in a section 751 proceeding. The comments filed under 19 C.F.R. § 207.62(d) in an expedited five-year review are final party comments for purposes of 19 U.S.C. § 1677m(g).

We urge parties in future expedited five-year reviews to provide citations to the record for the factual assertions made in their comments. This will enable both the parties to the investigation and the Commission to ascertain that such assertions are based on existing information in the record and not on new information which is not permitted under 19 C.F.R. § 207.62(d).

product” and the “industry.”¹⁵ 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 under this subtitle.”¹⁶ In its final five-year review determination, the Department of Commerce (Commerce) defined the imported product covered by the existing antidumping finding as elemental sulfur from Canada.¹⁷

Freeport and Husky both maintain that there is no reason in the instant review for the Commission to find a different domestic like product than it did in its original determination. As a preliminary matter, we observe that the Antidumping Act, 1921 did not contain a “like product” provision and the Commission did not make a like product determination *per se* in its original determination. Instead, it stated that “[i]n making our determination we have considered the industry to consist of those domestic facilities of U.S. producers devoted to the mining and recovery of sulfur.”¹⁸ Thus, the Commission essentially treated all elemental sulfur as a single product.¹⁹

Two processes are used to produce elemental sulfur. The Frasch process is used to mine sulfur reserves that occur in salt domes and sedimentary deposits. “Recovered” sulfur is produced as a

¹⁵ 19 U.S.C. § 1677(4)(A). Section 771(4)(A) of 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.” *Id.*

¹⁶ 19 U.S.C. § 1677(10). *See Nippon Steel Corp. v. United States*, 19 CIT 450, 455 (1995); *Timken Co. v. United States*, 913 F. Supp. 580, 584 (Ct. Int’l Trade 1996); *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). *See also* S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979).

¹⁷ 63 Fed. Reg. 67647 (Dec. 8, 1998).

¹⁸ Elemental Sulfur From Canada, Inv. No. AA1921-127, TC Pub. 617 at 3 (Oct. 1973) (“Original Determination”).

¹⁹ The Commission’s analysis of the condition of the domestic industry, however, focused on Frasch, rather than recovered, sulfur producers as it stated that “the U.S. sulfur industry is clearly undergoing a transition of far-reaching consequences, and one in which the Frasch-sulfur producers are the most vulnerable.” Original Determination, TC Pub. 617 at 3-4.

nondiscretionary byproduct of petroleum and sour natural gas production.²⁰ Freeport and Husky both agree that all elemental sulfur should be a single domestic like product because, notwithstanding the differences in the production processes between Frasch and recovered sulfur, elemental sulfur made by one process is not commercially distinguishable in terms of physical characteristics, end use, interchangeability, or customer perceptions from elemental sulfur made by the other process.²¹

We find, based on the facts available, that the appropriate definition of the domestic like product in this expedited five-year review is all elemental sulfur.

B. Domestic Industry

Section 771(4)(A) of the Act defines the relevant industry as the “domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product”²² In defining the domestic industry in this review, we consider whether any producers of the domestic like product should be excluded from the domestic industry pursuant to the related parties provision in section 771(4)(B) of the Act.²³

²⁰ Original Determination Report at 3; CR at I-6-7, PR at I-5-6.

²¹ Freeport Comments at 7-9; Husky Comments at 5 n.3.

²² 19 U.S.C. § 1677(4)(A). In defining the domestic industry, the Commission's general practice has been to include in the industry producers of all domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market, provided that adequate production-related activity is conducted in the United States. *See United States Steel Group v. United States*, 873 F. Supp. 673, 682-83 (Ct. Int'l Trade 1994), *aff'd*, 96 F.3d 1352 (Fed. Cir. 1996).

²³ 19 U.S.C. § 1677(4)(B). That provision of the statute allows the Commission, if appropriate circumstances exist, to exclude from the domestic industry producers that are related to an exporter or importer of subject merchandise, or which are themselves importers. Exclusion of such a producer is within the Commission's discretion based upon the facts presented in each case. *See Sandvik AB v. United States*, 721 F. Supp. 1322, 1331-32 (Ct. Int'l Trade 1989), *aff'd without opinion*, 904 F.2d 46 (Fed. Cir. 1990); *Empire Plow Co. v. United States*, 675 F. Supp. 1348, 1352 (Ct. Int'l Trade 1987). The primary factors the Commission has examined in deciding whether appropriate circumstances exist to exclude such parties include:

(1) the percentage of domestic production attributable to the importing producer;

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Freeport has alleged that six U.S. producers of elemental sulfur are related to Canadian exporters of elemental sulfur, are U.S. importers of Canadian elemental sulfur, or are related to U.S. importers of such sulfur.²⁴ Five of the six Canadian exporters that Freeport has identified as being related to U.S. producers have expressly been excluded from the scope by Commerce in its five-year review determination.²⁵ There is no evidence or allegation that the U.S. producers to which these exporters are related import merchandise that is currently covered by the antidumping finding.

Even assuming *arguendo* that one or more of the U.S. elemental sulfur producers that Freeport contends are related parties are in fact related parties, Freeport has not argued that appropriate circumstances exist to exclude these firms from the domestic industry. Moreover, because none of these producers responded to the Commission's notice of institution and there is little current producer-specific data pertaining to these firms, there is little information that the Commission could "exclude" concerning these

²³(...continued)

- (2) the reason the U.S. producer has decided to import the product subject to investigation, i.e., whether the firm benefits from the LTFV sales or subsidies or whether the firm must import in order to enable it to continue production and compete in the U.S. market, and
- (3) the position of the related producer vis-a-vis the rest of the industry, i.e., whether inclusion or exclusion of the related party will skew the data for the rest of the industry.

See, e.g., Torrington Co. v. United States, 790 F. Supp. 1161, 1168 (Ct. Int'l Trade 1992), *aff'd without opinion*, 991 F.2d 809 (Fed. Cir. 1993). The Commission has also considered the ratio of import shipments to U.S. production for related producers and whether the primary interest of the related producer lies in domestic production or importation. *See, e.g., Sebacic Acid from the People's Republic of China*, Inv. No. 731-TA-653 (Final), USITC Pub. 2793, at I-7 - I-8 (July 1994).

²⁴ *See* Freeport Response to Notice of Institution at 29-30; Freeport Comments at 10-11.

²⁵ *Compare* Freeport Comments at 11 n.40 with 63 Fed. Reg. at 67647, 67650. As we explain in section III.C. below, because Commerce has expressly excluded these Canadian producers from the scope of the finding, they are not producing "subject merchandise." Because application of the "related parties" provision is dependent on a producer of the domestic like product importing "subject merchandise" or being related to an "exporter or importer of subject merchandise," 19 U.S.C. § 1677(4)(B), these five domestic producers' relationships with Canadian producers as to which the finding has been revoked are insufficient to make them related parties.

producers.²⁶ We consequently do not exclude any producer from the domestic industry in the instant five-year review. Accordingly, we define the domestic industry to encompass all U.S. producers of elemental sulfur.

III. REVOCATION OF THE FINDING ON ELEMENTAL SULFUR IS NOT LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF MATERIAL INJURY WITHIN A REASONABLY FORESEEABLE TIME

A. Legal Standard

In a five-year review conducted under section 751(c) of the Act, Commerce will revoke an antidumping duty order or finding unless it makes a determination that dumping is likely to continue or recur and the Commission makes a determination that material injury would be likely to continue or recur, as described in section 752(a).

Section 752(a) of the Act states that in a five-year review “the Commission shall determine whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.”^{27 28} The URAA SAA indicates that “under the likelihood standard, the Commission will engage in a counter-factual analysis: it must decide the likely impact in the reasonably foreseeable future of an important change in the status quo -- the revocation [of the order] . . . and the elimination of its restraining effects on volumes and prices of imports.”²⁹ Thus, the

²⁶ The report prepared in connection with the original determination did not discuss or present any data relating to the question of related parties, inasmuch as there was no related parties provision in the Antidumping Act, 1921.

²⁷ 19 U.S.C. § 1675a(a).

²⁸ Chairman Bragg notes that Husky contends that “the burden of persuasion [in five-year reviews] would appear to rest with the domestic industry.” Husky Comments at 5. Husky cites no authority in support of this proposition. In fact, nothing in the statute or legislative history assigns a burden of persuasion or proof on any interested party or group of interested parties in five-year reviews. *Compare* 19 U.S.C. § 1675(b)(3) (in changed circumstances review, party seeking revocation of an order or termination of a suspended investigation or suspension agreement has burden of persuasion as to whether there are changed circumstances sufficient to warrant revocation or termination). *See also* Titanium Sponge from Japan, Kazakhstan, Russia, and Ukraine, Inv. Nos. 751-TA-17-20, USITC Pub. 3119 at 11 (Aug. 1998).

²⁹ URAA SAA, H.R. Rep. No. 316, 103d Cong., 2d Sess., vol. I at 883-84.

likelihood standard is prospective in nature.³⁰ The statute states that “the Commission shall consider that the effects of revocation

. . . may not be imminent, but may manifest themselves only over a longer period of time.”³¹ According to the SAA, a “‘reasonably foreseeable time’ will vary from case-to-case, but normally will exceed the ‘imminent’ timeframe applicable in a threat of injury analysis [in antidumping and countervailing duty determinations].”³²

Although the standard in five-year reviews is not the same as the standard applied in original antidumping or countervailing duty investigations, it contains some of the same elements. The statute provides that the Commission is to “consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked.” It directs the Commission to take into account its prior injury determination, whether any improvement in the state of the industry is related to the order under review, and whether the industry is vulnerable to material injury if the order is revoked.³³

Section 751(c)(3)(B) of the Act and the Commission’s regulations provide that in an expedited five-year review the Commission may issue a final determination “based on the facts available, in accordance with

³⁰ While the SAA states that “a separate determination regarding current material injury is not necessary,” it indicates that “the Commission may consider relevant factors such as current and likely continued depressed shipment levels and current and likely continued prices for the domestic like product in the U.S. market in making its determination of the likelihood of continuation or recurrence of material injury if the order is revoked.” SAA at 884.

³¹ 19 U.S.C. § 1675a(a)(5).

³² SAA at 887. Among the factors that the Commission should consider in this regard are “the fungibility or differentiation within the product in question, the level of substitutability between the imported and domestic products, the channels of distribution used, the methods of contracting (such as spot sales or long-term contracts), and lead times for delivery of goods, as well as other factors that may only manifest themselves in the longer term, such as planned investment and the shifting of production facilities.” *Id.*

³³ 19 U.S.C. § 1675a(a)(1). The statute further provides that the presence or absence of any factor that the Commission is required to consider shall not necessarily give decisive guidance with respect to the Commission's determination. 19 U.S.C. § 1675a(a)(5). While the Commission must consider all factors, no one factor is necessarily dispositive. SAA at 886.

section 776.”³⁴ We have relied on this authority in this review. Accordingly, the record in this expedited review is more limited than what we anticipate the record of a typical full five-year review would be.

For the reasons stated below, we determine that revocation of the antidumping finding on elemental sulfur from Canada would not be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time.^{35 36}

B. Conditions of Competition

In evaluating the likely impact of the subject imports on the domestic industry if the finding is revoked, the statute directs the Commission to evaluate all relevant economic factors “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”³⁷ Conditions of competition relevant to the elemental sulfur industry are discussed below.

We first examine conditions of competition pertinent to the supply of elemental sulfur. As noted above, elemental sulfur is produced by two methods. Under the Frasch process, sulfur is mined from reserves

³⁴ 19 U.S.C. § 1675(c)(3)(B); 19 C.F.R. § 207.62(e). Section 776 of the Act, in turn, authorizes the Commission to “use the facts otherwise available” in reaching a determination when: (1) necessary information is not available on the record or (2) an interested party or any other person withholds information requested by the agency, fails to provide such information in the time or in the form or manner requested, significantly impedes a proceeding, or provides information that cannot be verified pursuant to section 782(i) of the Act. 19 U.S.C. § 1677e(a).

³⁵ Section 752(a)(6) of the Act states that “the Commission may consider the magnitude of the margin of dumping” in making its determination in a five-year review. 19 U.S.C. § 1675a(a)(6). The statute defines the “magnitude of the margin of dumping” to be used by the Commission in five-year reviews as “the dumping margin or margins determined by the administering authority under section 1675a(c)(3) of this title.” 19 U.S.C. § 1677(35)(C)(iv). *See also* SAA at 887.

Commerce’s expedited determination in its five-year review provided likely margins for 25 specific Canadian elemental sulfur producers ranging from 0.00 to 87.65 percent. The “all others” margin is 5.56 percent. 63 Fed. Reg. at 67650.

³⁶ Section 752(a)(1)(D) of the Act directs the Commission to take into account in five-year reviews involving antidumping proceedings “the findings of the administrative authority regarding duty absorption.” 19 U.S.C. § 1675a(a)(1)(D). Commerce stated in its five-year review determination that it has not issued any duty absorption findings in this matter. 63 Fed. Reg. at 67649.

³⁷ 19 U.S.C. § 1675a(a)(4).

which occur in salt domes and sedimentary deposits. “Recovered” sulfur is produced as a nondiscretionary byproduct of petroleum and sour natural gas production.³⁸

At the time of the original determination, Frasch sulfur was produced by five companies at 12 sites in the United States.³⁹ Changes in U.S. environmental laws limiting sulfur emissions from refineries and natural gas processing facilities and the sulfur content of fuels have led to increased recovery of sulfur in petrochemical operations since 1990.⁴⁰ Since the time of the original determination, recovered sulfur has replaced Frasch sulfur as the leading source of elemental sulfur in the United States as a result of both increased sulfur recovery and increased production of oil and gas.⁴¹

Today, Frasch sulfur is produced in the United States by only one company -- Freeport -- at two sites, one of which is in the process of being closed.⁴² The share of domestic elemental sulfur production accounted for by Frasch sulfur has fallen from 79 percent in 1972 to 21 percent in 1997.⁴³ The remainder of 1997 U.S. elemental sulfur production -- 79 percent -- was recovered sulfur.⁴⁴

U.S. recovered sulfur producers cannot store or inventory the elemental sulfur that they produce. While excess sulfur can be poured to block from the petrochemical stream, this requires a block storage

³⁸ CR at I-6-7, PR at I-5-6; Original Determination Report at 2-3.

³⁹ Original Determination, TC Pub. 617 at 3. In light of the directive in section 752(a)(1)(A) of the Act, 19 U.S.C. § 1675a(a)(1)(A), we have taken the Commission’s original determination into account both in this discussion of the pertinent conditions of competition and in the discussion below concerning the likely volume, price effects, and impact of the subject imports.

⁴⁰ CR at I-9, PR at I-7; Husky Response to Notice of Institution at 28-29.

⁴¹ Freeport Comments at 26; Husky Comments at 8-9; Mulberry Comments at 7-10.

⁴² See Freeport Response to Notice of Institution at 3. Frasch sulfur, which accounted for 12.3 percent of worldwide elemental sulfur production in 1997, is also produced in Poland, Iraq, China, and republics of the former Soviet Union. *Id.*

⁴³ Compare Original Determination Report at 12 with OINV-V-100 (Dec. 9, 1998).

⁴⁴ See INV-V-100 (Dec. 9, 1998).

license. No U.S. elemental sulfur producer other than Freeport possesses such a license.⁴⁵ Consequently, the U.S. recovered sulfur producers must sell all the elemental sulfur that they produce from their petrochemical operations. This condition of competition was also present at the time of the original determination,⁴⁶ but has become far more important because of the dominance of recovered sulfur operations today.

Because of the foregoing supply conditions, changes in the price of elemental sulfur are not likely to affect the supply of recovered sulfur, as most recovered sulfur producers are not likely to change their production levels in response to changes in the market price.⁴⁷

Parties also state or imply that in light of the prevailing supply conditions, there is a structural imbalance between the supply and demand of elemental sulfur both in the United States market and worldwide.⁴⁸ The increasing supply of elemental sulfur relative to demand was also a condition of competition the Commission observed in its original determination.⁴⁹ As recovered sulfur production has become larger and increasingly dominant, the imbalance between supply and demand has increased.

Another condition of competition relevant to supply concerns transportation. Elemental sulfur is shipped in specially-designed railroad cars. The number and availability of these cars is limited.⁵⁰ The parties agree that availability of rail cars and transportation costs are significant in the economics of the

⁴⁵ Freeport Response to Notice of Institution at 4-5; Husky Response to Notice of Institution at 5-6.

⁴⁶ See Original Determination Report at 26.

⁴⁷ Freeport Comments at 22-24; Freeport Response to Notice of Institution at 9; Husky Response to Notice of Institution at 6; Mulberry Comments at 14-15.

⁴⁸ Freeport Comments at 22, 26-28 (condition of “general over supply” of sulfur present in 1973 has not changed); Husky Comments at 14 (because of growth in recovered sulfur operations, elemental sulfur supply has outpaced demand); Mulberry Comments at 10 (“There is and will continue to be a glut of sulfur in the United States and around the world”).

⁴⁹ Original Determination, TC Pub. 617 at 4.

⁵⁰ See Husky Response to Notice of Institution at 17; Freeport Comments at 38.

elemental sulfur industry.⁵¹ This condition of competition has not changed significantly since the Commission's original determination. What has changed, however, is that transportation considerations no longer appear to divide the U.S. into regional market areas. The apparent regional nature of the elemental sulfur market in 1973 led the Commission in the original determination to focus on the "up-river market" in the North Central United States where it found that the "bulk" of Canadian elemental sulfur was sold in its analysis of the effects of the subject imports.⁵² By contrast, none of the parties to the instant review contend, and nothing in the record indicates, that the U.S. elemental sulfur market is or is likely to become regional in nature. To the contrary, both Husky and Freeport agree that elemental sulfur from Canada and domestically-produced product are currently sold throughout the United States.⁵³

Conditions of competition relevant to demand include the following: Demand for elemental sulfur is mostly a derived demand. The great majority of elemental sulfur is used to produce sulfuric acid. In turn, the majority of sulfuric acid is used in the production of agricultural chemicals, principally phosphate fertilizers. The parties indicate that demand for elemental sulfur is derived primarily from demand for these phosphate fertilizers, the production of which has been fairly steady.⁵⁴ Elemental sulfur constitutes a relatively small proportion of the total cost of the downstream fertilizer product.⁵⁵ The parties describe the substitutability between elemental sulfur and other products as quite limited. They note that elemental sulfur is unusual since it is used as an intermediate chemical agent rather than as an input into another product.⁵⁶ For these reasons,

⁵¹ Freeport Response to Notice of Institution at 9; Husky Response to Notice of Institution at 16-18.

⁵² See Original Determination, TC Pub. 617 at 5.

⁵³ See Freeport Comments at 45, 49; Husky Response to Notice of Institution at 32.

⁵⁴ Freeport Response to Notice of Institution at 3, 7; Husky Response to Notice of Institution at 30-34.

⁵⁵ Freeport Comments at 22; see CR at I-28, PR at I-21.

⁵⁶ Freeport Comments at 21-22; Husky Response to Notice of Institution at 31-32; Mulberry
(continued...)

changes in the price of elemental sulfur are not likely to affect significantly the total demand for elemental sulfur. These conditions of competition have not changed since the Commission's original determination.⁵⁷

Elemental sulfur purchasers are able to change suppliers with relative ease. Elemental sulfur is a commodity product. Its physical qualities tend to be the same regardless of the source of supply.⁵⁸ This condition has not changed since the original determination.⁵⁹ By contrast, the typical contractual relationship between purchaser and supplier has changed since the original determination. At the time of the original determination, most elemental sulfur was sold under contracts ranging between one and ten years in duration, which limited purchasers' ability to switch suppliers.⁶⁰ Today, according to Freeport, elemental sulfur contracts are typically one to two years in duration, and normally contain provisions calling for prices to be renegotiated at set intervals (such as quarterly) or to be tied to a formula or index.⁶¹ Consequently, although price competition between suppliers will not significantly affect the amount of elemental sulfur demanded, it can induce purchasers to switch suppliers.

We find that the conditions of competition in the market for elemental sulfur are not likely to change in the reasonably foreseeable future. Accordingly, in this review the current conditions in the elemental sulfur industry are a reasonable basis from which to analyze the effects of revocation. We also find that conditions

⁵⁶(...continued)
Comments at 15.

⁵⁷ See Original Determination Report at 29.

⁵⁸ CR at I-28, PR at I-21; see Freeport Response to Notice of Institution at 8.

⁵⁹ See Original Determination, TC Pub. 617 at 4.

⁶⁰ See Original Determination Report at 24. Elemental sulfur purchase contracts in 1973 typically had "meet or release" clauses stipulating that if significant quantities of elemental sulfur of a grade comparable to that being delivered by the supplier were offered to the purchaser at a price less than that being charged by the supplier, the supplier was obligated either to meet the lower price or to release that quantity of elemental sulfur from the terms of the contract. *Id.* at 24-25; see Original Determination, TC Pub. 617 at 7.

⁶¹ Freeport Response to Notice of Institution at 8.

of competition are such that any effects of revocation would be likely to manifest themselves within a relatively short period of time.⁶²

C. Likely Volume of Subject Imports

In evaluating the likely volume of imports of subject merchandise if the finding under review is revoked, the Commission is directed to consider whether the likely volume of imports would be significant either in absolute terms or relative to production or consumption in the United States.⁶³ In doing so, the Commission must consider “all relevant economic factors,” including four enumerated factors: (1) any likely increase in production capacity or existing unused production capacity in the exporting country; (2) existing inventories of the subject merchandise, or likely increases in inventories; (3) the existence of barriers to the importation of the subject merchandise into countries other than the United States; and (4) the potential for product shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.⁶⁴

As an initial matter, we must decide which imports we should examine for purposes of our analysis. Freeport contends that we should examine all imports of elemental sulfur from Canada. Husky, however, argues that we should not examine imports from companies as to which Commerce has revoked the antidumping finding.

The statute provides that the Commission will consider the “likely volume of imports of the *subject merchandise*. . . .”⁶⁵ Subject merchandise is defined under section 771(25) of the Act as “the class or kind of merchandise that is within the scope of the investigation, a review, an order under this subtitle or section

⁶² Chairman Bragg does not concur in this statement.

⁶³ 19 U.S.C. § 1675a(a)(2).

⁶⁴ 19 U.S.C. § 1675a(a)(2)(A)-(D).

⁶⁵ 19 U.S.C. § 1675a(a)(2) (emphasis added).

1303 of this title, or a finding under the Antidumping Act, 1921.”⁶⁶ In the instant review, Commerce has expressly excluded from the scope imports of elemental sulfur from Canada from those manufacturers and exporters as to which the finding has been revoked.⁶⁷ Thus, under the plain language of the statute, imports from the revoked companies are not “subject merchandise.” Consequently, for purposes of this review our analysis of likely volume, price, and impact focuses solely on the imports from companies that have not been revoked from the finding.

The record in this expedited review indicates that subject imports accounted for approximately 20 percent of total imports from Canada in 1997, and that total imports from Canada accounted for 12.6 percent of apparent U.S. consumption of elemental sulfur in that year.⁶⁸ Consequently, subject import market share in 1997 was approximately 2.5 percent.⁶⁹

In a five-year review our focus is on whether subject import volume is likely to be significant in the reasonably foreseeable future if the antidumping finding is revoked. Because the facts available indicate that subject import volume is not likely to change significantly if the finding is revoked, we answer this question

⁶⁶ 19 U.S.C. § 1677(25).

⁶⁷ 63 Fed. Reg. at 67447. Commerce regulations specify that when an antidumping duty order or finding is revoked with respect to a specific exporter or producer, that exporter or producer must “agree[] in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Secretary concludes that the exporter or producer, subsequent to the revocation, sold the subject merchandise at less than normal value.” 19 C.F.R. § 351.222(b)(2)(iii). It is true, as Freeport argues, that this provision means that any revoked company can again be made subject to the order as long as the order remains in place. Before this can happen, however, Commerce must conduct an administrative review with respect to the revoked company and find sales at less than fair value.

During the time revocation is effective, however, imports from the revoked companies are not subject to the antidumping duty order. In light of this and the fact that the scope description in Commerce’s five-year review determination expressly excludes product from the revoked companies, we do not agree with Freeport that Commerce’s regulation places imports from the revoked companies within the scope of the finding under review.

⁶⁸ Freeport acknowledges that the producers currently subject to Commerce’s antidumping finding are responsible for a minority of Canadian elemental sulfur production. *See* Freeport Comments at 18.

⁶⁹ CR at I-12, PR at I-9.

in the negative.

We initially observe that the data available indicate that the antidumping finding seems to have had little impact on the market penetration of *total* imports from Canada. In its original determination, the Commission stated that subject import market penetration had been about 10 percent since 1968.^{70 71} During the period from 1995 to 1997, the market penetration of combined subject and nonsubject imports from Canada only ranged from 12.1 to 13.2 percent, despite the revocation of the antidumping finding with respect to many of the largest Canadian producers prior to this period.⁷² Consequently, neither imposition of the original antidumping finding nor its subsequent revocation with respect to most imports has caused any substantial variation in elemental sulfur imports from Canada in the U.S. market. This pattern suggests that revocation of the antidumping finding with respect to the remaining subject imports is not likely to lead to any significant increase in subject imports into the U.S. market.⁷³

We also observe that the record does not indicate that there are barriers to the importation of the subject merchandise into countries other than the United States. To the contrary, the large majority of Canadian elemental sulfur exports (nearly 80 percent) is shipped to countries other than the United States.⁷⁴

⁷⁰ Original Determination, TC Pub. 617 at 7.

⁷¹ Chairman Bragg, Commissioner Crawford, and Commissioner Askey note that in 1974, the first year after the antidumping finding was imposed, market penetration of all elemental sulfur imports from Canada actually rose to 11.8 percent. Table 1, CR at I-13, PR at I-10. By contrast, market penetration of elemental sulfur imports from Canada had been 9.4 percent in 1973. *Id.*

⁷² See Table 1, CR at I-13, PR at I-10. Compare 63 Fed. Reg. at 67647, 67650 with CR at C-3, PR at C-3 and Freeport Comments, Exhibit 7. See also Husky Response to Notice of Institution, Exhibit 14.

⁷³ Chairman Bragg, Commissioner Crawford, and Commissioner Askey note that there has also been relatively little variation in the market penetration of imports from countries other than Canada in recent years. Market penetration for nonsubject imports from countries other than Canada from 1995 to 1997 has varied between 5.0 and 7.4 percent. Table 1, CR at I-13, PR at I-10.

⁷⁴ Freeport Response to Notice of Institution, Exhibit 4. The record does not contain data that would enable us to calculate export ratios for the producers of subject merchandise only.

Because this ratio did not vary significantly from 1995 to 1997,⁷⁵ we give little credence to Freeport's argument that constraints on Canadian exports to third-country markets have increased in recent years. In addition, the persistent imbalance between supply and demand in the U.S. market, reflected by falling sulfur prices since 1985,⁷⁶ limits any incentive for Canadian producers to shift exports from third-country markets to the United States if the antidumping finding is revoked.

Additionally, the ability of Canadian producers, including those subject to the finding, to increase exports to the United States is constrained by their ability to obtain rail cars to transport the elemental sulfur. Freeport acknowledges that an increase in the supply of railroad tank cars would be necessary for Canadian producers to increase significantly their exports to the United States, but argues that the supply of rail cars would increase to meet demand in the event of revocation.⁷⁷ In light of prevailing U.S. market conditions, the substantial presence of nonsubject imports from Canada in the U.S. market, and the presence of export markets other than the United States for Canadian producers, we perceive little incentive for the subject producers to seek an increase in rail car supply if the finding is revoked.

Production "capacity" for the recovered sulfur producers that account for all Canadian production is simply a function of oil or natural gas production. The record indicates that production of subject and nonsubject elemental sulfur in Canada has increased in recent years and that future increases are projected.⁷⁸ Past production increases, however, did not result in increased U.S. market penetration for all Canadian imports, notwithstanding that most of the imports were not subject to the antidumping finding.⁷⁹

⁷⁵ Freeport Response to Notice of Institution, Exhibit 4.

⁷⁶ See Table 2, CR at I-30, PR at I-22; Freeport Response to Notice of Institution, Exhibit 15.

⁷⁷ Freeport Comments at 38.

⁷⁸ See Freeport Response to Notice of Institution, Exhibit 3. Again, the record does not contain production data pertaining exclusively to the producers of subject merchandise.

⁷⁹ Compare Freeport Response to Notice of Institution, Exhibit 3 with Table 1, CR at I-13, PR at I-

Consequently, we conclude that any future increases in elemental sulfur production in Canada are not likely to result in significantly increased imports of subject merchandise if the finding is revoked.

Stockpiles of block sulfur in Canada are, according to Freeport, tantamount to inventories of the product. Accepting Freeport's characterization for the sake of argument, we acknowledge that these stockpiles have increased in recent years.⁸⁰ Although none of the producers subject to the antidumping finding other than Husky responded to the notice of institution, we have assumed *arguendo* that their stockpiles have also increased.^{81 82} Before these producers could export the stockpiled material, however, they would need to incur the expense of converting it to a form in which the material could be transported.⁸³ By contrast, sales of current production would entail no similar expense. Given the existing and likely supply conditions in the U.S. market described above, there would likely be little incentive for conversion in the reasonably foreseeable future if the finding is revoked. We therefore find that the existence of the stockpiles is not likely to result in increased volumes of subject imports if the finding is revoked.

Finally, we observe that, because of the nature of the elemental sulfur production process, no production facility currently being used to produce other products can instead be used to produce elemental sulfur. The lack of any potential for product shifting also supports our conclusion that revocation of the antidumping finding is not likely to lead to an increase in the volume of subject imports such that the likely volume of subject imports would be significant.

⁷⁹(...continued)

10.

⁸⁰ See Freeport Response to Notice of Institution, Exhibit 3.

⁸¹ There are no data in the record indicating to what extent the stockpile increase is attributable to those Canadian producers subject to the antidumping finding.

⁸² Commissioner Crawford and Commissioner Askey note that while revocation of the antidumping finding may reduce the subject producers' incentive to add to their stockpiles, they do not believe that this would lead to a significant increase in subject import volume in light of the considerations discussed above.

⁸³ See Husky Response to Notice of Institution at 5.

D. Likely Price Effects of Subject Imports

In evaluating the likely price effects of subject imports if the antidumping finding is revoked, the Commission is directed to consider whether there is likely to be significant underselling by the subject imports as compared to domestic like products and if the subject imports are likely to enter the United States at prices that otherwise would have a significant depressing or suppressing effect on the price of domestic like products.⁸⁴

The record in this expedited review contains very little pricing data, and provides no information comparing current prices of the domestic like product and the subject imports in the U.S. market.⁸⁵ Consequently, our conclusions regarding the likely price effects if the finding is revoked are drawn largely from our conclusions on likely subject import volumes and the pertinent conditions of competition.⁸⁶

As we observed earlier, subject import market share is not likely to increase significantly if the antidumping finding is revoked. In fact, we find that it is likely to remain approximately at 1997 levels. We also noted that elemental sulfur is a commodity product and that there is a structural imbalance between supply and demand of elemental sulfur both in the U.S. market and worldwide. This imbalance appears to be the result of increasing recovered sulfur production in the face of relatively stable demand. U.S. prices, which

⁸⁴ 19 U.S.C. § 1675a(a)(3). The SAA states that “[c]onsistent with its practice in investigations, in considering the likely price effects of imports in the event of revocation and termination, the Commission may rely on circumstantial, as well as direct, evidence of the adverse effects of unfairly traded imports on domestic prices.” SAA at 886.

⁸⁵ The pricing data cited in the opinion in the original determination focused on Frasch producers (instead of all domestic producers) on the domestic side, and information from the “up-river” market (instead of nationwide data) on the import side. *See Original Determination*, TC Pub. 617 at 6.

⁸⁶ Chairman Bragg notes that, pursuant to statute, when relying on facts available the Commission is entitled to take adverse inferences against interested parties that fail to respond adequately to the Commission’s information requests. 19 U.S.C. § 1675(c)(3)(B), 1677e(b). She further notes that domestic producers of recovered sulfur failed to provide information in response to the Commission’s notice of institution in this review. Accordingly, based on the existing record information regarding likely price effects of revocation, Chairman Bragg infers that revocation of the antidumping finding would not cause significant price effects to U.S. producers of recovered sulfur.

have declined steadily since 1985, reflect this supply and demand imbalance.⁸⁷ We find that this imbalance is likely to continue to put downward pressure on prices in the U.S. market. In light of the low anticipated market share of subject imports and these important conditions of competition, we conclude that the subject imports are not likely to have significant price depressing or suppressing effects in the reasonably foreseeable future.

Another factor pertinent to our analysis is that transportation costs for elemental sulfur are significant. That subject Canadian elemental sulfur producers would need to charge prices sufficient to recover such transportation costs likely would limit their ability to undercut U.S. producers' prices if the antidumping finding is revoked.⁸⁸ Based on the foregoing, we find that revocation of the antidumping finding would not be likely to lead to significant underselling of the subject imports compared to the domestic like product, or to significant price depression or suppression in the reasonably foreseeable future.⁸⁹ Therefore, we find that revocation is not likely to lead to significant price effects.

E. Likely Impact of Subject Imports

In evaluating the likely impact of imports of subject merchandise if the order is revoked, the Commission is directed to consider all relevant economic factors that are likely to have a bearing on the state

⁸⁷ Table 2, CR at I-30, PR at I-22; Freeport Response to Notice of Institution, Exhibit 15.

⁸⁸ Husky argues that the proximity of substantial U.S. end-users of elemental sulfur -- phosphate fertilizer producers located in the Southern and Eastern United States -- to large U.S. elemental sulfur producers located in Louisiana and Texas gives the domestic industry a "tremendous advantage" with respect to transportation costs over the Canadian producers, which are located predominantly in Alberta. *See* Husky Response to Notice of Institution at 31-32.

⁸⁹ Chairman Bragg notes that no U.S. recovered sulfur producer responded to the notice of institution in this review. Consequently, no U.S. recovered sulfur producer furnished any data that would suggest that revocation of the antidumping finding would be likely to lead to any significant changes in its prices for elemental sulfur. The lack of any response regarding the likely price effects following a revocation from the recovered sulfur producers that are responsible for 79 percent of U.S. elemental sulfur production leads her to conclude that revocation of the antidumping finding would not be likely to lead to significant underselling of the subject imports compared to the domestic like product, or to significant price depression or suppression in the reasonably foreseeable future.

of the industry in the United States, including but not limited to: (1) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; (2) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; and (3) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the domestic like product.⁹⁰ All relevant economic factors are to be considered within the context of the business cycle and the conditions of competition that are distinctive to the industry.⁹¹ As instructed by the statute, we have considered the extent to which any improvement in the state of the domestic industry is related to the antidumping finding at issue and whether the industry is vulnerable to material injury if the finding is revoked.

Freeport has not argued that issuance of the antidumping finding led to an improvement in the state of the industry, and there are no data in the record that would support such a conclusion. We also observe that notwithstanding the antidumping finding the Frasch producers, who dominated the domestic industry in 1973, have all exited the market with the exception of Freeport.

Freeport has argued that the domestic industry is vulnerable to material injury if the antidumping finding under review is revoked.^{92 93} We agree that Freeport's mining operations may be vulnerable to material injury in view of the growing predominance of recovered sulfur in the U.S. market. Freeport incurred a large operating loss in 1997.⁹⁴ It also incurred a *** in the first six months of 1998 and announced plans to

⁹⁰ 19 U.S.C. § 1675a(a)(4).

⁹¹ 19 U.S.C. § 1675a(a)(4).

⁹² *See* Freeport Response to Notice of Institution at 27; Freeport Comments at 27-29.

⁹³ Chairman Bragg and Commissioner Askey do not find that Freeport is vulnerable to material injury and do not join the remainder of this paragraph.

⁹⁴ As a result of its change to an independent entity, Freeport took a \$425.4 million write-off of its sulfur assets in 1997. CR at I-20-22, PR at I-15-16; Freeport Response to Notice of Institution, Exhibit 17 at 4.

close one of its two Frasch mines.⁹⁵

In any event, Freeport constitutes a minority of the domestic industry. The recovered sulfur producers that are responsible for 79 percent of U.S. elemental sulfur production did not respond to the notice of institution in this review and there are no data that support a finding of vulnerability for recovered sulfur producers. Accordingly, considering the available data for the domestic industry as a whole, we determine that the domestic industry is not vulnerable to material injury if the antidumping finding is revoked.

We also conclude that subject imports are not likely to have a significant adverse impact on Freeport or the recovered sulfur producers that make up most of the domestic industry if the finding is revoked. We found above that revocation of the antidumping finding is not likely to lead either to significant volumes of subject imports or significant price effects. These findings in turn indicate that the subject imports are not likely to have a significant adverse impact on the domestic industry as a whole in the reasonably foreseeable future if the order is revoked.

Moreover, certain conditions specific to this industry suggest that a significant adverse impact is not likely. Notwithstanding the antidumping finding, Frasch sulfur production in the United States has declined significantly, and the number of Frasch producers and production operations has declined, while recovered sulfur production has increased significantly since the 1970s.⁹⁶ Because U.S. recovered sulfur production is likely to continue to increase independent of the antidumping finding, Freeport's difficulties competing with recovered sulfur producers are likely to continue regardless of whether the antidumping finding is revoked.⁹⁷

⁹⁵ Freeport Response to Notice of Institution, Exhibit 17 at 4. Freeport's vulnerability is mitigated by its long-term contract to supply approximately 75 percent of the elemental sulfur requirements of IMC-Agrico, the largest phosphatic fertilizer producer in the United States. *Id.* A portion of Freeport's sales to IMC-Agrico are made at a price greater than the market price. *See* Husky Response to Notice of Institution at 20-21.

⁹⁶ *See* Table 1, CR at I-13, PR at I-10; Freeport Response to Notice of Institution at 3-4; Original Determination, TC Pub. 617 at 3.

⁹⁷ Indeed, Freeport identifies that the supply of U.S. recovered sulfur is currently insufficient to meet
(continued...)

Revocation would not be likely to have a significant impact on the recovered sulfur producers that account for 79 percent of U.S. elemental sulfur production. As discussed in the conditions of competition section above, recovered sulfur producers' production of elemental sulfur is a function of their production of other petrochemical products, rather than a function of conditions in the elemental sulfur market, and these producers must sell all the elemental sulfur they produce. Consequently, in the event of revocation, subject imports would not be likely to have a significant impact on recovered sulfur producers' production, shipments, or employment of production and related workers within a reasonably foreseeable time. This conclusion, combined with our conclusion regarding price effects, leads us to conclude that revocation is not likely to lead to significant reductions in these producers' revenues or operating performance. This conclusion is supported by the recovered sulfur producers' failure to participate in this review and to submit any data in response to the Commission's information requests that would suggest that, in the event of revocation, subject imports would be likely to have an adverse impact on their operations within a reasonably foreseeable time.⁹⁸

Therefore, considering the domestic industry as a whole, we conclude that revocation of the antidumping finding would not be likely to lead to significant declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity, likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, or likely negative effects on the domestic industry's development and production efforts within a reasonably foreseeable time.

CONCLUSION

For the foregoing reasons, we determine that revocation of the antidumping finding on elemental

⁹⁷(...continued)
domestic demand as a principal reason why its Frasch operations remain commercially viable. *See* Freeport Comments at 14.

⁹⁸ Chairman Bragg notes that she based her conclusion that revocation would not be likely to have a negative impact on the recovered sulfur producers primarily upon their failure to cooperate with the Commission's information requests in this review. *See* footnote 89 above.

sulfur from Canada would not be likely to lead to continuation or recurrence of material injury to the U.S. elemental sulfur industry within a reasonably foreseeable time.