

UNITED STATES INTERNATIONAL TRADE COMMISSION

CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN

Investigation No. 731-TA-807 (Final)

DETERMINATION AND VIEWS OF THE COMMISSION

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## CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN

### DETERMINATION

On the basis of the record<sup>1</sup> developed in the subject investigation, the United States International Trade Commission determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)) (the Act), that an industry in the United States is materially injured<sup>2</sup> by reason of imports from Japan of certain hot-rolled steel products, provided for in headings 7208, 7210, 7211, 7212, 7225, and 7226 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). The Commission finds that critical circumstances do not exist with respect to subject imports from Japan.<sup>3</sup>

### BACKGROUND

The Commission instituted this investigation effective September 30, 1998, following receipt of a petition filed with the Commission and the Department of Commerce by Bethlehem Steel Corp., Bethlehem, PA; U.S. Steel Group, a unit of USX Corp., Pittsburgh, PA; Ispat Inland Steel, East Chicago, IN; LTV Steel Co., Inc., Cleveland, OH; California Steel Industries, Fontana, CA; Gallatin Steel Co., Ghent, KY; Geneva Steel, Vineyard, UT; Gulf States Steel, Inc., Gadsden, AL; IPSCO Steel, Inc., Muscatine, IA; Steel Dynamics, Butler, IN; Weirton Steel Corp., Weirton, WV; Independent Steelworkers Union, Weirton, WV; and the United Steelworkers of America, Pittsburgh, PA. The final phase of the investigation was scheduled by the Commission following notification of a preliminary determination by the Department of Commerce that imports of certain hot-rolled steel products from Japan 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 investigation 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 March 5, 1999 (64 FR 10723). The hearing was held in Washington, DC, on May 4, 1999, and all persons who requested the opportunity were permitted to appear in person or by counsel.

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

<sup>2</sup> Commissioner Askey determines that an industry in the U.S. is threatened with material injury.

<sup>3</sup> Commerce found that critical circumstances do not exist with respect to two Japanese producers: Nippon Steel Corp. and NKK Corp. Chairman Bragg finds that critical circumstances exist with respect to subject imports from Japan. Commissioner Askey did not assess critical circumstances because she did not determine that the industry in the U.S. is materially injured.

## VIEWS OF THE COMMISSION

Based on the record in this investigation, we find that an industry in the United States is materially injured by reason of imports of certain hot-rolled steel products (“hot-rolled steel”) from Japan that have been found by the Department of Commerce (“Commerce”) to be sold at less than fair value (“LTFV”).<sup>1</sup> We further find that critical circumstances do not exist with respect to subject imports from Japan.<sup>2 3</sup>

### **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 imports of the subject merchandise, the Commission first defines the “domestic like product” and the “industry.”<sup>4</sup> Section 771(4)(A) of the Tariff Act of 1930, as amended (“the Act”), defines the relevant industry as the “producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product.”<sup>5</sup> In turn, the Act defines “domestic like product” as: “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation . . . .”<sup>6</sup>

The decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and the Commission has applied the statutory standard of “like” or “most similar in characteristics and uses” on a case-by-case basis.<sup>7</sup> No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation.<sup>8</sup> The Commission looks for clear dividing lines among possible like products, and disregards minor variations.<sup>9</sup> Although the Commission must accept Commerce’s determination 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.<sup>10</sup>

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<sup>1</sup> Commissioner Askey finds that the domestic industry producing hot-rolled steel is threatened with material injury by reason of subject imports from Japan. See Additional and Dissenting Views of Commissioner Askey. She joins parts I-III.A. of this decision, except where otherwise indicated.

<sup>2</sup> Chairman Bragg determines that critical circumstances exist with respect to subject imports from Japan. See infra at 34 n.129.

<sup>3</sup> Because Commissioner Askey finds that the domestic industry is threatened with material injury by reason of subject imports from Japan, she does not reach the issue of critical circumstances. See Additional and Dissenting Views of Commissioner Askey.

<sup>4</sup> 19 U.S.C. § 1677(4)(A).

<sup>5</sup> 19 U.S.C. § 1677(4)(A).

<sup>6</sup> 19 U.S.C. § 1677(10).

<sup>7</sup> See, e.g., Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes and production employees; and, where appropriate, (6) price. See Nippon, 19 CIT at 455, n.4; Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int’l Trade 1996).

<sup>8</sup> See, e.g., Nippon Steel, 19 CIT at 454-55.

<sup>9</sup> Torrington, 747 F. Supp. at 748-49.

<sup>10</sup> Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568 (Fed. Cir. 1996) (Commission may find single like product corresponding to several different classes or kinds defined by Commerce); Torrington, 747 F. Supp. at 748-752 (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

**B. Product Description and Domestic Like Product**

In its final LTFV determination, Commerce defined the imported merchandise within the scope of these investigations as:

certain hot-rolled flat-rolled carbon-quality steel products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not successively superimposed layers) regardless of thickness, and in straight lengths, of a thickness less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (i.e., flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm and of a thickness of not less than 4 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of these investigations.

Specifically included in this scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (“IF”)) steels, high strength low alloy (“HSLA”) steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum.

Steel products to be included in the scope of this investigation, regardless of HTSUS definitions, are products in which: 1) iron predominates, by weight, over each of the other contained elements, 2) the carbon content is 2 percent or less, by weight, and 3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or  
1.50 percent of silicon, or  
1.00 percent of copper, or  
0.50 percent of aluminum, or  
1.25 percent of chromium, or  
0.30 percent of cobalt, or  
0.40 percent of lead, or  
1.25 percent of nickel, or  
0.30 percent of tungsten, or  
0.012 percent of boron, or  
0.10 percent of molybdenum, or  
0.10 percent of niobium, or  
0.41 percent of titanium, or  
0.15 percent of vanadium, or  
0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this investigation unless otherwise excluded.<sup>11</sup>

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<sup>11</sup> Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan, 64 Fed. Reg. 24329, 24330-31 (Department of Commerce May 6, 1999). Commerce also excluded a number of specific products from the scope of this investigation. Id. at 24331.

In the preliminary phase of this investigation, the Commission determined that there was one like product consisting of all hot-rolled carbon steel products within the scope of the investigation.<sup>12</sup> We have been presented with no new evidence or new arguments to warrant changing that finding in this final phase of the investigation. Accordingly, for the same reasons articulated in the preliminary phase, we determine that there is one domestic like product in this investigation consisting of all hot-rolled steel, as defined in Commerce's scope.

### C. Domestic Industry and Related Parties

The domestic industry is defined as “the producers as a {w}hole of a domestic like product . . . .”<sup>13</sup> In defining the domestic industry, the Commission's general practice has been to include in the industry all of the domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market.<sup>14</sup> Based on our finding that the domestic like product consists of all hot-rolled steel, we define the corresponding domestic industry as all producers of hot-rolled steel in the United States, as we did in the preliminary determination.<sup>15</sup>

We must further determine whether any producer of the domestic like product should be excluded from the domestic industry as a related party pursuant to section 771(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.<sup>16</sup>

In the preliminary phase of this investigation, we found that two domestic producers were related parties: National Steel and \*\*\*. We further found that appropriate circumstances did not exist to exclude

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<sup>12</sup> Certain Hot-Rolled Steel Products from Brazil, Japan, and Russia, Inv. Nos. 701-TA-384 (Preliminary) and 731-TA-806-808 (Preliminary), USITC Pub. 3142 (Nov. 1998) (hereinafter “Preliminary Determination”) at 6-7.

<sup>13</sup> 19 U.S.C. § 1677(4)(A).

<sup>14</sup> See United States Steel Group v. United States, 873 F. Supp. 673, 681-684 (Ct. Int'l Trade 1994), aff'd, 96 F.3d 1352 (Fed. Cir. 1996).

<sup>15</sup> Preliminary Determination at 7.

<sup>16</sup> 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;
- (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-à-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).

either of these producers from the domestic industry.<sup>17</sup> In the final phase of this investigation, we have not found any evidence to warrant changing this finding. In addition, none of the parties argued for the exclusion of either company. For the reasons stated in the preliminary phase of the investigation, we determine that appropriate circumstances do not exist to exclude either of these companies from the domestic industry.<sup>18</sup> We therefore define the domestic industry to consist of all domestic producers of hot-rolled steel.

## II. CUMULATION<sup>19</sup>

### A. In General

Section 771(7)(G)(I) of the Act requires the Commission to cumulate imports from all countries as to which petitions were filed on the same day if such imports compete with each other and with domestic like products in the United States market.<sup>20</sup>

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

- (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;
- (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.<sup>21</sup>

While no single factor is necessarily 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.<sup>22</sup> Only a “reasonable overlap” of competition is required.<sup>23</sup>

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<sup>17</sup> Preliminary Determination at 7.

<sup>18</sup> Preliminary Determination at 7.

<sup>19</sup> The negligibility of subject imports is not an issue in this investigation. See 19 U.S.C. § 1677(24).

<sup>20</sup> 19 U.S.C. § 1677(7)(G)(I). There are four exceptions to the cumulation provision, none of which apply to the instant investigation.

<sup>21</sup> 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).

<sup>22</sup> See, e.g., Wieland Werke, AG v. United States, 718 F. Supp. 50 (Ct. Int'l Trade 1989).

<sup>23</sup> See Goss Graphic System, Inc. v. United States, 22 CIT \_\_\_, slip op. 98-147 at 8 (Oct. 16, 1998) (“cumulation does not require two products to be highly fungible”); 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).

## B. Analysis

The petition in this investigation was filed on the same day as the petitions in the companion antidumping and countervailing duty investigations involving Brazil and the antidumping investigation involving Russia. Accordingly, the first statutory test for cumulation is satisfied, and we are required to determine whether there is a reasonable overlap of competition both between the subject imports from Brazil, Japan, and Russia, on the one hand, and the domestic like product, on the other hand, and among the subject imports from Japan, Brazil, and Russia.

The petitioners argue that we should cumulate subject imports from Japan with subject imports from Brazil and Russia.<sup>24</sup> The respondents argue that we should not cumulate subject imports from Japan with subject imports from Russia, primarily because of substantial quality differences with respect to Russian hot-rolled steel when compared to Brazilian and Japanese hot-rolled steel.<sup>25</sup> In the preliminary phase of the investigation, we found a reasonable overlap of competition among the subject imports and among the subject imports and the domestic like product, and therefore cumulated imports from all three subject countries.<sup>26</sup>

In the final phase of this investigation, the record evidence indicates that the subject imports and the domestic merchandise were simultaneously present in the market throughout the period of investigation.<sup>27</sup> Likewise, subject imports and the domestic like product were generally sold in the same channels of distribution.<sup>28</sup> In addition, the subject imports were sold in the same geographic regions as each other and the domestic merchandise.<sup>29</sup>

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<sup>24</sup> Petitioners' Prehearing Brief at 13-22; Petitioners' Posthearing Brief at 10-14, Exhibit 1 at 34-36 & Attachments H, I, and J, and Exhibit 5.

<sup>25</sup> The respondents do not argue that the Commission should not cumulate subject imports from Japan and Brazil for purposes of analyzing present material injury. Respondents' Joint Prehearing Brief at 48-68 and Exhibits 8-13; Respondents' Joint Posthearing Brief at 14-17, Exhibits 1 & 2, and Answers to Commissioners' Questions at 38-39, 62-66, & Exhibit 8; Russian Respondents' Prehearing Brief at 11-16, 22-23, 25-26, 28-30 and Exhibit 1; Russian Respondents' Posthearing Brief at 6-9 and Answers to Commissioners' Questions at 5-7, 12-15.

<sup>26</sup> Preliminary Determination at 9-10.

<sup>27</sup> Confidential Staff Report ("CR") at IV-11 and Table IV-6; Public Staff Report ("PR") at IV-10 and Table IV-6.

<sup>28</sup> CR at I-11-12 and Table I-2; PR at I-9 and Table I-2. Both the domestic producers and importers sell hot-rolled steel to distributors, processors, or service centers, manufacturers of tubular products and other end users, although domestic producers also internally transfer significant amounts of hot-rolled steel to make downstream products. In 1998, nearly half of U.S. merchant market shipments were sold to intermediaries (i.e., distributors, processors, or service centers), and the remaining half of U.S. commercial shipments were sold to manufacturers of tubular products and other end users in significant volumes. Similarly, over 60 percent of imports from Japan and Russia were sold to intermediaries, and significant volumes were also sold to manufacturers of tubular products and other end users. Imports from Brazil were more concentrated in one channel of distribution: more than 90 percent of total U.S. shipments of imports from Brazil was sold to intermediaries, and the remaining volume was sold to manufacturers of tubular products and other end users. While imports from Brazil were more concentrated in one distribution channel than the other subject imports and the domestic like product, the substantial volumes of subject merchandise from all three countries (more than sixty percent of the total volume sold for each subject country) and of the domestic like product (nearly half of the total volume sold in the merchant market) that were sold to intermediaries is more than sufficient to support a finding of a reasonable overlap. Id.

<sup>29</sup> CR at IV-7 and Table IV-5; PR at IV-9 and Table IV-5. Both the domestic like product and the subject imports from all three countries are sold throughout the United States. Subject imports from each of the three countries were present in each of the four geographic regions during the investigation period. All three subject countries had a substantial presence in the Gulf Coast region: 42.9 percent of all imports from Brazil, 59.5 percent

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Finally, the subject imports are sufficiently fungible<sup>30</sup> with each other and the domestic like product to warrant cumulating the subject imports for our analysis. Significantly, most producers, importers, and purchasers reported that subject imports were interchangeable with each other and with the domestic like product.<sup>31</sup> While some quality and product differences limit the Russian product's suitability for certain end uses, when compared to the other subject imports and the like product,<sup>32</sup> the record evidence indicates that significant portions of the subject imports from all three countries and the like product are fairly standardized, "commodity grade" products, generally manufactured to industry standards and suitable for a wide range of applications. For instance, in 1998 based on data submitted in response to Commission questionnaires, a significant portion of domestically produced hot-rolled steel and subject merchandise from the three countries consisted of grades ASTM A-569, ASTM A-570, or ASTM A-607.<sup>33</sup> Moreover, there was significant overlap within these ASTM grades in the same thickness (i.e., a thickness greater than 0.080 inch but less than 0.187 inch).<sup>34</sup> We also note that substantial portions of domestic and subject merchandise were sold without additional processing (i.e., without pickling and/or oiling, without temper rolling or skin passing, and without trimming).<sup>35</sup> We find that these sales in the same grades and

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<sup>29</sup> (...continued)

of imports from Japan, and 54.6 percent of imports from Russia were imported into the Gulf Coast region. Outside of the Gulf Coast region the geographic distribution of subject imports varied somewhat. Imports from Brazil had a notable presence in each of the other regions (24.4 percent in the East, 23.7 percent in the Great Lakes, and 8.9 percent in the West). Imports from Japan were more concentrated in the West region (36.6 percent in the West, 3.7 percent in the East, and 0.2 percent in the Great Lakes), and imports from Russia were more concentrated in the East or Great Lakes regions (31.7 percent in the Great Lakes, 12.8 percent in the East, and 1.0 percent in the West). Still, a majority of imports from both Russia and Japan, and more than 40 percent of imports from Brazil, were entered in the Gulf Coast region. This is more than sufficient to support a finding of a reasonable overlap. Id.

<sup>30</sup> Commissioner Crawford finds that substitutability, not fungibility, is a more accurate reflection of the statute. In this investigation, she finds there is sufficient substitutability to conclude there is a reasonable overlap of competition among the subject imports and between the subject imports and the domestic like product. Therefore, she concurs in the decision to cumulate the subject imports from all three countries. See Dissenting Views of Commissioner Carol T. Crawford in Stainless Steel Bar from Brazil, India, Japan, and Spain, Inv. Nos. 731-TA-678, 679, 681, and 682 (Final), USITC Pub. 2856 (Feb. 1995), for a description of her views on cumulation.

<sup>31</sup> CR at II-17, II-24-25; PR at II-8-13.

<sup>32</sup> CR at II-18, II-24; PR at II-8, II-11-13.

<sup>33</sup> CR & PR at Table IV-3 (showing 46.7 percent of domestic commercial shipments, 89.2 percent of imports from Brazil, 61.9 percent of imports from Japan, and 49.2 percent of imports from Russia in these three grades).

<sup>34</sup> The record evidence indicates that 19.1 percent of the domestic industry's commercial shipments, 46.4 percent of subject imports from Brazil, 25.7 percent of subject imports from Japan, and 22.3 percent of subject imports from Russia were sold in this thickness and in grade ASTM A-569. Likewise, 29.5 of the domestic industry's commercial shipments, 54.9 percent of subject imports from Brazil, 34.1 percent of subject imports from Japan, and 30.3 percent of subject imports from Russia consisted of three grades, ASTM A-569, A-570, and A-607, in a thickness greater than 0.080 inch but less than 0.187 inch. CR & PR at Table IV-3; see also Respondents' Joint Prehearing Brief at Exhibit 9.

<sup>35</sup> CR and PR at Table IV-4. In 1998, 71.0 percent of U.S. producers' commercial shipments, 67.9 percent of subject imports from Brazil, 89.1 percent of subject imports from Japan, and 95.1 percent of subject imports from Russia were neither pickled nor oiled. Likewise, in 1998, 85.2 percent of U.S. producers' commercial shipments, 32.5 percent of subject imports from Brazil, 29.7 percent of subject imports from Japan, and 98.2 percent of subject imports from Russia were neither temper rolled nor skin passed. Similarly, in 1998, 71.3 percent of U.S. producers' commercial shipments, 64.1 percent of subject imports from Brazil, 84.7 percent of subject imports from Japan, and 98.2 percent of subject imports from Russia were mill edge (i.e., as rolled and not trimmed). Id.;

(continued...)

thicknesses, combined with the sales without additional processing, support a finding of a reasonable overlap of competition.

In light of the foregoing, for purposes of the instant determination on Japan, we have cumulated subject imports from Japan with subject imports from Brazil and Russia.

### **III. MATERIAL INJURY BY REASON OF LTFV IMPORTS**

In the final phase of antidumping duty investigations, the Commission determines whether an industry in the United States is materially injured by reason of the subject imports under investigation.<sup>36</sup> In making these determinations, the Commission must consider the volume of the subject imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations.<sup>37</sup> The statute defines “material injury” as “harm which is not inconsequential, immaterial, or unimportant.”<sup>38</sup> In assessing whether the domestic industry is materially injured by reason of subject imports, we consider all relevant economic factors that bear on the state of the industry in the United States.<sup>39</sup> No single factor is dispositive and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>40</sup>

For the reasons discussed below, we determine that the domestic hot-rolled steel industry is materially injured by reason of LTFV imports from Japan.

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

Several distinctive conditions of competition are relevant to our determination.

##### **1. Captive Production**

The domestic industry captively consumes the majority, i.e., over 60 percent, of its production of the domestic like product in the manufacture of downstream articles.<sup>41</sup> Accordingly, we have considered whether the statutory captive production provision requires us to focus our analysis primarily on the merchant market when assessing market share and the factors affecting the financial performance of the domestic industry.<sup>42 43</sup> As discussed in their views concerning the captive production provision, Chairman

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<sup>35</sup> (...continued)  
see also Respondents’ Joint Prehearing Brief at Exhibit 10.

<sup>36</sup> 19 U.S.C. § 1673d(b).

<sup>37</sup> 19 U.S.C. § 1677(7)(B)(I). The Commission “may consider such other economic factors as are relevant to the determination,” but shall “identify each {such} factor . . . and explain in full its relevance to the determination.” 19 U.S.C. § 1677(7)(B).

<sup>38</sup> 19 U.S.C. § 1677(7)(A).

<sup>39</sup> 19 U.S.C. § 1677(7)(C)(iii).

<sup>40</sup> 19 U.S.C. § 1677(7)(C)(iii).

<sup>41</sup> CR and PR at Table I-2; INV-W-082 (April 30, 1999).

<sup>42</sup> The captive production provision, 19 U.S.C. § 1677(7)(C)(iv), provides:

(iv) CAPTIVE PRODUCTION -- If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that --

(continued...)

Bragg and Commissioners Crawford and Askey find that the captive production provision is not applicable in this investigation.<sup>44</sup> As discussed in their views concerning the captive production provision, Vice Chairman Miller and Commissioners Hillman and Koplan find that the captive production provision does apply in this investigation.<sup>45</sup>

## 2. Other Conditions of Competition

U.S. apparent consumption was strong during the period of investigation, and, indeed, during 1998, appears to have been at a record high. Total apparent U.S. consumption of hot-rolled steel rose from 68.5 million short tons in 1996, to 71.0 million short tons in 1997, and to 75.3 million short tons in 1998.<sup>46</sup> On a merchant market basis, apparent U.S. consumption of hot-rolled steel rose from 26.7 million short tons in 1996, to 29.3 million short tons in 1997, and to 33.2 million short tons in 1998.<sup>47</sup>

Imports from non-subject countries maintained a stable presence in the U.S. market throughout the period examined. When measured against total U.S. consumption, the market share of non-subject imports was 5.7 percent in 1996, 5.0 percent in 1997, and 5.9 percent in 1998.<sup>48</sup> In contrast, imports from subject countries increased during the period examined.<sup>49</sup>

Although (as discussed above in our cumulation analysis) there are some quality differences with respect to Russian hot-rolled steel when compared to other subject imports and the domestic like product,

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<sup>42</sup> (...continued)

(I) the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product,

(II) the domestic like product is the predominant material input in the production of that downstream article, and

(III) the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article,

then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii), shall focus primarily on the merchant market for the domestic like product.

<sup>43</sup> Commissioner Askey notes that the statute requires the Commission to analyze the impact of the subject imports on all domestic production operations, including both captive and merchant market shipments. See 19 U.S.C. §§ 1677(4)(A) and 1677(7)(B). Moreover, she notes that, even if the statutory provisions are met and the captive production provision applies, it merely permits the Commission to “focus primarily” on the merchant market operations of the industry; the provision does not allow the Commission to disregard the industry’s captive consumption completely. 19 U.S.C. § 1677(7)(C)(iv).

<sup>44</sup> See Views of Chairman Bragg, Commissioner Crawford, and Commissioner Askey Regarding the Captive Production Provision.

<sup>45</sup> See Views of Vice Chairman Miller, Commissioner Hillman, and Commissioner Koplan Concerning Captive Production. See also Further Views of Commissioner Stephen Koplan Concerning the Third Criterion of the Captive Production Provision.

<sup>46</sup> CR & PR at Table C-1.

<sup>47</sup> CR & PR at Table C-2.

<sup>48</sup> CR & PR at Table C-1.

<sup>49</sup> When measured by total U.S. consumption, the market share of subject imports was 2.0 percent in 1996, 4.2 percent in 1997, and 9.3 percent in 1998. CR & PR at Table C-1.

domestically produced and subject imported hot-rolled steel products are broadly interchangeable.<sup>50</sup> In addition, purchasers indicate that, in making decisions about their hot-rolled steel purchases, price is among the most important factors, along with several other factors (product quality, consistency, and availability).<sup>51 52</sup>

Another condition of competition pertinent to the hot-rolled steel industry is that the domestic industry consists of both integrated (or “BOF”) and minimill (or “EAF”) producers. Generally, the integrated producers use basic oxygen furnaces (“BOF”), which use molten iron as the primary input material in the production of hot-rolled steel. Moreover, as the term “integrated” suggests, most integrated producers own facilities for the production of downstream articles made from the hot-rolled steel they produce. Minimill producers use electric arc furnaces (“EAF”), which use scrap steel as the primary input material in the production of hot-rolled steel.<sup>53</sup> When compared to BOF producers, EAF producers are generally more sensitive to competition in the merchant market because more of their production is sold in the spot market, their captive operations are generally not as substantial, and they generally maintain a lower proportion of long term contracts. In addition, EAF producers are generally more recent entrants to the industry than BOF producers, and when compared to BOF producers, EAF producers’ lower costs and higher productivity permit them on average to sell hot-rolled steel at lower prices.<sup>54</sup>

A further condition of competition is the 1998 strike at General Motors Corp. (“GM”), which lasted for five weeks during June and July of 1998. GM has estimated that the total amount of flat-rolled steel (including hot-rolled, cold-rolled and corrosion resistant steels) that was not purchased by it and its suppliers as a result of the strike-related work stoppages was about 685,000 tons.<sup>55 56 57</sup>

## **B. Volume of the Subject Imports**

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<sup>50</sup> CR at II-17-18, II-24-25; PR at II-8-13.

<sup>51</sup> CR at II-15 & n.9, II-23-24; PR at II-6 & n.9, II-9-10.

<sup>52</sup> For her analysis of the substitutability among the various sources of hot-rolled steel products, see Views of Commissioner Crawford, infra.

<sup>53</sup> CR at I-8; PR at I-7.

<sup>54</sup> See generally CR & PR at Tables C-3 and C-4; INV-W-124 (June 9, 1999) at Attachment 3; Petitioners’ Posthearing Brief at 19-24; Respondents’ Joint Prehearing Brief at 80-95; Respondents’ Joint Posthearing Brief, Answers to Commissioners’ Questions at 1-12. BOF producers’ productivity (short tons per 1,000 hours worked) was \*\*\* in 1996, \*\*\* in 1997, and \*\*\* in 1998. CR & PR at Table C-3. By contrast, EAF producers’ productivity was \*\*\* in 1996, \*\*\* in 1997, and \*\*\* in 1998. CR & PR at Table C-4. On a total market basis, BOF producers’ unit COGS was \*\*\* in 1996, \*\*\* in 1997, and \*\*\* in 1998. CR & PR at Table C-3. On a total market basis, EAF producers’ unit COGS was \*\*\* in 1996, \*\*\* in 1997, and \*\*\* in 1998. CR & PR at Table C-4. On a merchant market basis, BOF producers’ unit COGS was \*\*\* in 1996, \*\*\* in 1997, and \*\*\* in 1998. INV-W-124 (June 9, 1999) at Attachment 3. On a merchant market basis, EAF producers’ unit COGS was \*\*\* in 1996, \*\*\* in 1997, and \*\*\* in 1998. Id.

<sup>55</sup> GM did not provide a figure limited to hot-rolled steel. See CR at II-12; PR at II-4; CR & PR at Table C-1.

<sup>56</sup> Commissioner Crawford concurs that the domestic industry is materially injured by reason of the subject imports, but does not join the remainder of this discussion. For her reasons and analysis, see Views of Commissioner Crawford, infra. Commissioner Crawford joins the discussion, analysis, and conclusion regarding Critical Circumstances, infra.

<sup>57</sup> Commissioner Askey does not join the remainder of these views.

Section 771(7)(C)(i) of the Act provides that the “Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.”<sup>58 59</sup>

The volume of the subject imports increased over the investigation period, more than doubling from 1996 to 1997 and more than doubling again from 1997 to 1998. On a quantity basis, the cumulated subject imports increased from 1.3 million short tons in 1996 to 3.0 million short tons in 1997, and increased again to 7.0 million short tons in 1998, an overall increase of 419.8 percent from 1996 to 1998 and of 132.5 percent from 1997 to 1998.<sup>60</sup> On a value basis, the cumulated subject imports increased from \$410 million in 1996 to \$914 million in 1997, and increased again to \$1.9 billion in 1998, an overall increase of 353.1 percent from 1996 to 1998 and of 103.3 percent from 1997 to 1998.<sup>61</sup>

The market share held by subject imports also more than doubled from 1996 to 1997 and again from 1997 to 1998. In the merchant market, the share held by subject imports increased from 5.0 percent of apparent U.S. consumption, as measured by volume sold in 1996, to 10.2 percent in 1997, and then increased again to 21.0 percent in 1998.<sup>62</sup> For the industry as a whole, the share held by subject imports increased from 2.0 percent of apparent U.S. consumption, as measured by volume sold in 1996, to 4.2 percent in 1997, and then increased again to 9.3 percent in 1998.<sup>63</sup>

As noted above, during the same period, the market share of U.S. consumption held by non-subject imports was essentially flat.<sup>64</sup> Thus, at the same time as subject import volumes and market share increased dramatically, the domestic industry’s market share declined. In the merchant market, the domestic producers’ share declined from 80.4 percent of apparent U.S. consumption in 1996, as measured by volume sold, to 77.8 percent in 1997, and declined again to 65.6 percent in 1998.<sup>65</sup> For the industry as a whole, the domestic producers’ share declined from 92.3 percent of apparent U.S. consumption in 1996, as measured by volume, to 90.8 percent in 1997, and declined again to 84.8 percent in 1998.<sup>66</sup>

As mentioned in our discussion of conditions of competition, overall consumption in the U.S. market increased throughout the period of investigation, but domestic producers were prevented from participating in the increasing demand as subject imports increased their market share. Domestic producers’ merchant market shipments, as measured by volume sold, were 21.5 million short tons in 1996, 22.8 million short tons in 1997, and 21.8 million short tons in 1998.<sup>67</sup> Domestic producers’ total

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<sup>58</sup> 19 U.S.C. § 1677(7)(C)(I).

<sup>59</sup> To the extent that this discussion analyzes merchant market data prior to total market data, it does not reflect the sequence of Chairman Bragg’s analysis. See infra at 44 n.154.

<sup>60</sup> CR & PR at Table C-1.

<sup>61</sup> CR & PR at Table C-1. The lower rate of increase in value terms reflects falling import unit values over the period of investigation.

<sup>62</sup> CR & PR at Table C-2. As measured by value, in the merchant market subject import share rose from 4.5 percent in 1996 to 9.0 percent in 1997, and then to 17.7 percent in 1998. Id.

<sup>63</sup> CR & PR at Table C-1. As measured by value, for the industry as a whole subject import share rose from 1.9 percent in 1996 to 4.1 percent in 1997, and then to 8.4 percent in 1998. Id.

<sup>64</sup> See CR & PR at Tables C-1 and C-2.

<sup>65</sup> CR & PR at Table C-2. As measured by value, in the merchant market domestic producers’ share of apparent U.S. consumption declined from 81.0 percent in 1996 to 79.1 percent in 1997, and then declined again to 68.8 percent in 1998. Id.

<sup>66</sup> CR & PR at Table C-1. As measured by value, for the industry as a whole domestic producers’ share of apparent U.S. consumption declined from 92.5 percent in 1996 to 91.4 percent in 1997, and then declined again to 86.7 percent in 1998. Id. at Note.

<sup>67</sup> CR & PR at Table C-2. As measured by value, in the merchant market domestic producers’ U.S. shipments  
(continued...)

shipments, by volume, were 63.3 million short tons in 1996, 64.5 million short tons in 1997, and 63.8 million short tons in 1998.<sup>68</sup> Significantly, from 1997 to 1998, total apparent U.S. consumption increased by 6.0 percent, while domestic shipments declined by 1.0 percent, as measured by volume.<sup>69</sup> This disparity was even greater in the merchant market: from 1997 to 1998 apparent U.S. consumption in the merchant market increased by 13.2 percent, while domestic producers' commercial shipments declined by 4.4 percent, as measured by volume sold.<sup>70</sup>

Respondents have argued that imports were drawn into the U.S. market due to a shortage of domestic supply of hot-rolled steel in early 1998.<sup>71</sup> A number of purchasers reported experiencing supply and availability problems with respect to domestic producers during early 1998.<sup>72</sup> Yet these problems do not explain the continuing decline in capacity utilization for U.S. producers throughout 1998 or the continued increases in monthly import volumes until the end of the year.<sup>73</sup> Indeed, U.S. producers added capacity in 1998. Moreover, the fall in imported and domestic prices in 1998 is not consistent with a situation of increasing demand and limited excess capacity. Thus, we do not agree with respondents' contention that the significant increase in subject import volume was simply in response to demand that could not be met by the domestic producers in 1998.

In light of the foregoing, we find that both the volume and the increase in volume of subject imports were significant.

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

Section 771(C)(ii) of the Act provides that, in evaluating the price effects of the subject imports, the Commission shall consider whether -- (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States,

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<sup>67</sup> (...continued)

were \$7.5 billion in 1996, \$8.1 billion in 1997, and \$7.2 billion in 1998. Id.

<sup>68</sup> CR & PR at Table C-1. The value of U.S. producers' total shipments were \$21.7 billion in 1996, \$22.6 billion in 1997, and \$21.4 billion in 1998. Id. at Note.

<sup>69</sup> CR & PR at Table C-1.

<sup>70</sup> CR & PR at Table C-2.

<sup>71</sup> See Respondents' Joint Prehearing Brief at 95-115; Respondents' Joint Posthearing Brief at 22-28.

<sup>72</sup> CR & PR at Table II-2; INV-W-124 (June 9, 1999) at Attachment 7.

<sup>73</sup> See INV-W-124 (June 9, 1999) at Attachment 2. Based on the evidence gathered in the preliminary phase of this investigation, the domestic industry's capacity utilization rate in the first half of 1998 was at \*\*\* percent. INV-W-124 (June 9, 1999) at Attachment 5 (capacity utilization rates based on domestic firms that responded to the Commission's questionnaires in both the preliminary and final phases of the investigation and that reported consistent production data; to calculate capacity utilization rates for these firms in the second half of 1998, production and capacity data from the final phase of the investigation for full year 1998 was subtracted from the first half 1998 data reported by these firms in the preliminary phase of the investigation); see also Preliminary Phase Staff Report at Table C-1 (indicating that the domestic industry's capacity utilization rate was \*\*\* percent from January to June 1998). For all of 1998, however, the domestic industry's capacity utilization rate was \*\*\* percent, and from July to December 1998 the industry's capacity utilization rate was estimated at \*\*\* percent. CR & PR at Table C-1; INV-W-124 (June 9, 1999) at Attachment 5. Chairman Bragg does not join in the discussion of partial year data in this footnote.

and (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.<sup>74 75</sup>

As mentioned in our discussion of conditions of competition, domestically produced and subject imported hot-rolled steel products are broadly substitutable, although there were some quality differences with respect to Russian hot-rolled steel, particularly for certain end uses, when compared to other subject imports and the domestic like product. In addition, purchasers indicate that, in making decisions about their hot-rolled steel purchases, price is among the most important factors, along with several other factors (product quality, consistency, and availability).

Prices for both the subject merchandise and the domestic like product showed a mixed trend through 1996 and mid-1997, then declined thereafter, both as measured by quarterly pricing data for the four pricing products for which data were collected and by average unit values. Specifically, the Commission collected quarterly pricing data for four representative products sold to a variety of purchasers. In nearly all instances, the price of the imported and domestic product declined significantly in 1998.<sup>76</sup> Declines were most precipitous in the third and fourth quarters of 1998, at a time when the volume of subject imports was peaking.

The quarterly pricing data indicates a mixed pattern of underselling by the subject imports.<sup>77</sup> The frequency of underselling increased significantly in 1997 and 1998, however, when compared to 1996. In 1996, there were 29 instances of underselling by the subject imports and 32 instances of overselling.<sup>78</sup> In 1997, the underselling by the subject imports became more prevalent than in 1996: there were 48 instances of underselling by the subject imports and 16 instances of overselling.<sup>79</sup> In 1998, underselling by the

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<sup>74</sup> 19 U.S.C. § 1677(7)(C)(ii).

<sup>75</sup> To the extent that this discussion analyzes merchant market data prior to total market data, it does not reflect the sequence of Chairman Bragg's analysis. See *infra* at 44 n.154.

<sup>76</sup> See CR at V-8 to V-18, PR at V-6 to V-15, CR & PR at Tables C-1 and C-2. Average unit values of subject imports declined from \$305.36 per short ton in 1996, to \$304.46 per short ton in 1997, and to \$266.20 per short ton in 1998. The average unit value of imports from Japan declined from \$430.66 in 1996, to \$379.72 per short ton in 1997, and to \$298.46 per short ton in 1998. The average unit value of imports from Brazil declined from \$328.86 per short ton in 1996, to \$321.93 per short ton in 1997, and to \$295.58 per short ton in 1998. The average unit value of imports from Russia were \$262.70 per short ton in 1996, rose to \$280.19 per short ton in 1997, but then declined below the 1996 level to \$240.22 per short ton in 1998. CR & PR at Table C-1. For merchant market sales, domestic producers' average unit values were \$347.01 per short ton in 1996, increased to \$353.86 per short ton in 1997, and then declined below the 1996 level to \$330.51 per short ton in 1998. Overall, domestic producers' average unit values were \$343.24 per short ton in 1996, increased to \$350.87 per short ton in 1997, and declined below the 1996 level to \$335.02 per short ton in 1998. CR & PR at Table C-1 at Note. We recognize that a change in Japanese product mix is partially responsible for decreases in Japanese average unit values. However, the consistent pattern of declines in the quarterly price comparison data in 1998 indicates that the declines in average unit values are not explained by changes in product mix. Instead, we conclude that the substantially increased supply of subject imports reduced prices.

<sup>77</sup> Commissioner Koplán did not base his determination regarding the effect of subject imports on domestic prices on the underselling data. For 1996 and 1997, the quantities reported for subject imports were too small to support comparisons. In his view, the data for 1998 are inconclusive.

<sup>78</sup> CR at V-18; PR at V-15. In 1996, subject imports from Russia had an average underselling margin of 12.1 percent, while subject imports from Brazil and Japan had average overselling margins of 5.1 percent and 6.9 percent, respectively. *Id.*

<sup>79</sup> CR at V-18; PR at V-15. In 1997, subject imports from Russia and Brazil had average underselling margins of 12.6 percent and 8.0 percent, respectively, while subject imports from Japan had an average overselling margin  
(continued...)

subject imports was also prevalent: there were 45 instances of underselling by the subject imports and 22 instances of overselling.<sup>80</sup> In 1998, even the subject imports from Japan, which overall had fewer instances of underselling than the subject imports from Brazil and Russia, increasingly undersold the domestic merchandise.<sup>81</sup> The increased rate of underselling in 1998 of Japanese product coincided with a shift by Japanese producers to the sale of more commodity grade products in 1998.<sup>82</sup> The increased frequency of underselling is consistent with the price depressing effects of the subject imports in 1998.

As noted above, minimills have lower costs and higher productivity rates than the integrated mills, and this competitive advantage to some degree constrains the prices the integrated mills can command for their hot-rolled steel. However, regardless of the price disparities, both EAF and BOF producers' prices declined significantly during the period of investigation, as reflected in unit values of shipments and sales.<sup>83</sup> It is significant that the hot-rolled steel prices of Nucor (which is regarded by the domestic industry and importers alike as an established and efficient minimill and widely looked to as a domestic price leader)<sup>84</sup> declined dramatically during the latter part of 1998 as subject import volumes increased at their fastest rate during the period of investigation.<sup>85</sup> Nucor's prices recovered only as subject imports exited the market.<sup>86</sup>

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<sup>79</sup> (...continued)  
of 3.2 percent. Id.

<sup>80</sup> CR at V-18; PR at V-15. In 1998, subject imports from Russia had an average underselling margin of 13.1 percent, while subject imports from Brazil and Japan had average overselling margins of 2.7 percent and 0.1 percent, respectively. Id.

<sup>81</sup> In 1996, subject imports from Japan undersold the domestic like product in only one instance and oversold the like product in 17 instances. In 1997, the imports from Japan undersold the like product in 9 instances and oversold the like product in 11 instances. In 1998, the imports from Japan undersold the like product in 13 instances and oversold the like product in 11 instances. CR at V-18; PR at V-15.

<sup>82</sup> See Respondents' Joint Prehearing Brief at 148 (arguing that "the Japanese exports of commercial-grade hot-rolled carbon steel to the United States in 1998 were anomalous"). The record evidence also indicates that the Japanese producers sold substantial volumes of hot-rolled steel in the commodity grades and without further processing in 1998. CR at Tables IV-3 and IV-4; Respondents' Joint Prehearing Brief at Exhibits 10 and 11.

<sup>83</sup> EAF producers' merchant market unit values were \*\*\* per short ton in 1996, increased to \*\*\* per short ton in 1997, and then declined to \*\*\* per short ton in 1998, well below the 1996 level. INV-W-124 (June 9, 1999) at Attachment 3 (Table C-4A). EAF producers' overall net sales unit values were \*\*\* per short ton in 1996, rose to \*\*\* per short ton in 1997, and then declined to \*\*\* per short ton in 1998, also well below the 1996 level. CR & PR at Table C-4. BOF producers' merchant market unit values were \*\*\* per short ton in 1996, increased to \*\*\* per short ton in 1997, and then fell well below the 1996 level to \*\*\* per short ton in 1998. INV-W-124 (June 9, 1999) at Attachment 3 (Table C-3A). BOF producers' overall net sales unit values were \*\*\* per short ton in 1996, increased to \*\*\* per short ton in 1997, and then fell well below the 1996 level to \*\*\* per short ton in 1998. CR & PR at Table C-3.

<sup>84</sup> See, e.g., CR at II-1; PR at II-1; Petitioners' Posthearing Brief, Exhibit 1 at 23-24; Respondents' Joint Posthearing Brief, Exhibits 6, 11, Answers to Commissioners' Questions at 11; Tr. at 202-03 (Mr. Stapp), 210-11 (Mr. Zoldi), 250-51 (Mr. Curtis), 257 (Mr. Reilly).

<sup>85</sup> See Petitioners' Posthearing Brief at Attachments F and G; INV-W-124 (June 9, 1999) at Attachment 2.

<sup>86</sup> See Petitioners' Posthearing Brief at Attachments F and G; INV-W-124 at Attachment 2. Nucor's price increase corresponded with an increase in orders for domestic steel in February 1999, following a period of falling orders. The volume of orders on producers' books at the end of February 1999 was still below the volume of orders on the books at the end of every quarter in 1996, 1997 and the first half of 1998. See CR at III-6 n.7; PR at III-5 n.7. Thus, it is not surprising that Nucor's price, while higher, would not have fully recovered to levels that existed in the industry prior to the surge in subject imports. Moreover, long-term contracts negotiated in the fall of 1998 (when domestic prices were falling the fastest) but that only entered into effect in January 1999 may also explain in part any continued depression of domestic prices in 1999. See Petitioners' Posthearing Brief, Exhibit 1

(continued...)

These facts suggest that factors other than increased competition within the domestic industry contributed to the significant price declines in the latter part of the investigation period.

Respondents argue that the GM strike caused domestic prices to decline in 1998.<sup>87</sup> We have considered this argument and agree that the GM strike had some effect on overall demand in 1998 and hence played some role in contributing to declining domestic prices. However, the strike only lasted five weeks and the total quantity of material not purchased during the GM strike (no more than 685,000 tons of all types of flat-rolled steel) was not large enough to explain the kind of price declines that occurred in 1998. Indeed, despite the GM strike, merchant market and overall consumption of hot-rolled steel were at an all-time high in 1998. Thus, at most, we consider the GM strike to be only a partial explanation for declining prices in 1998.

We also find that falling prices in 1998 were not simply the result of falling industry costs. The domestic industry's unit costs of goods sold ("COGS") declined during the period of investigation, but the decline was dwarfed by the decline in the domestic industry's average unit values.<sup>88</sup> Thus, prices declined by much more than did costs, particularly in 1998, in the face of increasing apparent consumption and a substantially increasing volume of subject imports. Significant price declines at a time of record U.S. consumption indicates that the rapid increase of subject imports of hot-rolled steel, which were fairly substitutable with the domestic like product, contributed to the domestic price declines.

In light of the foregoing, we find that the subject imports had significant price depressing effects on domestic prices.

#### **D. Impact of the Subject Imports on the Domestic Industry**

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." These factors include output, sales, inventories, capacity utilization, market share,

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<sup>86</sup> (...continued)

at 24-25. Thus, we do not agree with respondents that any lack of significant price increases even after the cessation of most subject imports in December 1998 is proof that subject imports were not responsible for the 1998 price declines.

<sup>87</sup> See Respondents' Joint Prehearing Brief at 115-25.

<sup>88</sup> For merchant market sales, the domestic industry's unit COGS declined by 2.9 percent from 1996 to 1998 and by 0.9 percent from 1997 to 1998; whereas the domestic industry's average unit values declined by 4.8 percent from 1996 to 1998 and by 6.6 percent from 1997 to 1998. CR & PR at Table C-2. Overall, unit COGS declined by 3.5 percent from 1996 to 1998 and by 1.8 percent from 1997 to 1998; whereas average unit values declined by 2.4 percent from 1996 to 1998 and by 4.5 percent from 1997 to 1998. CR & PR at Table C-1 and Note. A variance analysis confirms that lower average unit values outstripped lower costs in the domestic industry's merchant market sales. See CR & PR at Table VI-4. As with the domestic industry as a whole, a decline in unit COGS does not explain the decline in domestic unit values for either integrated mills or minimills, because unit values fell faster than unit COGS for both types of producers, particularly in 1998. BOF producers' unit COGS for merchant market sales declined by \*\*\* percent from 1996 to 1998 and by \*\*\* percent from 1997 to 1998; whereas unit values declined by \*\*\* percent from 1996 to 1998 and by \*\*\* percent from 1997 to 1998. INV-W-124 (June 9, 1999) at Attachment 3 (Table C-3A). Overall, BOF producers' unit COGS declined by \*\*\* percent from 1996 to 1998 and by \*\*\* percent from 1997 to 1998; whereas net sales unit values declined by \*\*\* percent from 1996 to 1998 and by \*\*\* percent from 1997 to 1998. CR & PR at Table C-3. EAF producers' unit COGS for merchant market sales actually increased by \*\*\* percent from 1996 to 1998 and by \*\*\* percent from 1997 to 1998; whereas unit values declined by \*\*\* percent from 1996 to 1998 and by \*\*\* percent from 1997 to 1998. INV-W-124 (June 9, 1999) at Attachment 3 (Table C-4A). EAF producers' overall unit COGS declined by \*\*\* percent from 1996 to 1998 and actually increased by \*\*\* percent from 1997 to 1998; whereas net sales unit values declined by \*\*\* percent from 1996 to 1998 and by \*\*\* percent from 1997 to 1998. CR & PR at Table C-4.

employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>89 90 91 92</sup>

As discussed earlier, the domestic industry has lost market share throughout the period of investigation at the same time as subject imports have increased their absolute volumes and their market share. The subject imports captured nearly all of the growth in the market in 1998, thereby preventing the domestic industry from increasing its sales in response to overall increasing U.S. apparent consumption. Consequently, most domestic industry performance indicators reflect a sharp decline in 1998 at a time of record demand.

The domestic industry increased its capacity from 67.3 million short tons in 1996, to 70.0 million short tons in 1997, and to 73.5 million short tons in 1998, at a rate largely commensurate with the increasing U.S. consumption from 1996 to 1998.<sup>93</sup> Yet, due to the rapid increase in the volume and market share of subject imports,<sup>94</sup> the domestic industry’s increased capacity almost immediately became excess capacity, as reflected in the industry’s capacity utilization rates declining from 94.5 percent in 1996, to 92.6 percent in 1997, to 87.5 percent in 1998. This was a decline of 7.0 percentage points from 1996 to 1998 and a decline of 5.1 percentage points from 1997 to 1998.<sup>95</sup> As with the industry as a whole, both integrated and minimills’ capacity utilization steadily declined from 1996 to 1998, despite the overall increasing U.S. consumption. EAF producers’ capacity utilization rate was \*\*\* percent in 1996, rose to

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<sup>89</sup> 19 U.S.C. § 1677(7)(C)(iii). See also SAA at 851 and 885 and Live Cattle from Canada and Mexico, Inv. Nos. 701-TA-386 and 731-TA-812-813 (Preliminary), USITC Pub. 3155 at 25, n.148 (Feb. 1999).

<sup>90</sup> As part of its consideration of the impact of imports, the statute specifies that the Commission is to consider “the magnitude of the margin of dumping” in an antidumping proceeding. 19 U.S.C. § 1677(7)(C)(iii)(V). Commerce’s final dumping margins for the Japanese producers were as follows: 19.65 percent for Nippon, 17.86 percent for NKK, 67.14 percent for Kawasaki, and 29.30 percent for “All Others.” 64 Fed. Reg. 24329, 24370 (May 6, 1999). The margins most recently published by Commerce with respect to Brazil and Russia are those in Commerce’s preliminary determination. Commerce’s preliminary dumping margins for the Brazilian producers were as follows: 50.66 percent for CSN, 71.02 percent for Usiminas/Cosipa, and 58.76 percent for “All Others.” 64 Fed. Reg. 8299, 8308 (Feb. 19, 1999). Commerce’s preliminary dumping margins for the Russian producers were as follows: 70.66 percent for Severstal, 217.67 percent for Novolipetsk, 149.54 percent for Magnitogorsk, and 156.58 percent for “All Others.” 64 Fed. Reg. 9312, 9318 (Feb. 25, 1999).

<sup>91</sup> Chairman Bragg notes that she does not ordinarily consider the magnitude of 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).

<sup>92</sup> To the extent that this discussion analyzes merchant market data prior to total market data, it does not reflect the sequence of Chairman Bragg’s analysis. See *infra* at 44 n.154.

<sup>93</sup> Thus, the industry increased its capacity by 9.2 percent from 1996 to 1998 and by 5.0 percent from 1997 to 1998. CR & PR at Table C-1. During the period of investigation, U.S. consumption increased by a remarkably similar 9.9 percent from 1996 to 1998 and by 6.0 percent from 1997 to 1998. Merchant market consumption increased by 24.1 percent from 1996 to 1998 and by 13.2 percent from 1997 to 1998. CR & PR at Tables C-1 and C-2.

<sup>94</sup> Subject imports increased their share of consumption by 7.3 percentage points from 1996 to 1998 and by 5.0 percentage points from 1997 to 1998, and in the merchant market alone by 16.0 percentage points from 1996 to 1998 and by 10.8 percentage points from 1997 to 1998. CR & PR at Tables C-1 and C-2.

<sup>95</sup> CR & PR at Table C-1.

\*\*\* percent in 1997, and then declined well below the 1996 level to \*\*\* percent in 1998.<sup>96</sup> BOF producers' capacity utilization rate declined from \*\*\* percent in 1996, to \*\*\* percent in 1997, and to \*\*\* percent in 1998.<sup>97</sup>

The domestic producers' production and shipments declined from 1997 to 1998, both on a merchant market and overall basis.<sup>98</sup> The domestic industry's financial performance likewise deteriorated significantly. From 1997 to 1998, as apparent consumption increased significantly, operating income declined by more than half.<sup>99</sup> On merchant market sales, the ratio of operating income to net sales declined from 5.9 percent in 1997 to 0.6 percent in 1998, and overall, the ratio declined from 5.5 percent in 1997 to 2.6 percent in 1998.<sup>100 101</sup> This decline was due largely to declines in unit values of the industry's hot-rolled steel shipments and sales. As described above, unit values fell significantly in 1998 as subject imports increased in volume and market share.

The respondents have argued that 1997 was a banner year for the domestic industry and, hence, is not an appropriate year with which to compare the domestic industry's results in 1998. However, U.S. apparent consumption increased throughout the period of investigation, both from 1996 to 1997 and from 1997 to 1998, reaching record levels.<sup>102</sup> Accordingly, we disagree that 1997 is not an appropriate point of comparison for the domestic industry's results in 1998. In a year in which U.S. consumption reached record levels, and the U.S. industry increased its productivity and lowered its costs, 1998 likewise should have been a highly successful year for the domestic hot-rolled steel industry. Instead, the domestic industry, although it maintained an operating profit, performed consistently worse.

We disagree with the respondents' argument that the industry's poor performance in 1998 reflects increased competition within the domestic industry, particularly from EAF producers, rather than the effect of increased subject imports.<sup>103</sup> Minimill competition was an important condition of competition in 1997,

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<sup>96</sup> CR & PR at Table C-4.

<sup>97</sup> CR & PR at Table C-3.

<sup>98</sup> CR & PR at Tables C-1 and C-2.

<sup>99</sup> CR & PR at Tables C-1 and C-2.

<sup>100</sup> CR & PR at Tables C-1 and C-2. In addition, the domestic industry's productivity improved and COGs declined from 1997 to 1998. The domestic industry's productivity (measured in short tons per 1,000 hours worked) increased from 864.8 in 1996, to 905.3 in 1997, and to 938.7 in 1998. As discussed in our analysis of the price effects of the subject imports, the domestic industry's unit COGs declined from 1996 to 1998, but not by as much as the decline in the industry's unit values. CR & PR at Table C-1.

<sup>101</sup> CR & PR at Table C-1. Aside from productivity, which increased during the investigation period, a number of the industry's other employment indicators declined somewhat during the period of investigation. CR & PR at Table III-5 (the number of workers declined from 33,965 in 1996, to 33,518 in 1997, to 32,885 in 1998; hours worked declined from 73,597 in 1996, to 71,634 in 1997, to 68,574 in 1998; wages paid were essentially flat from 1996 to 1998; hourly wages increased somewhat from \$23.04 in 1996, to \$24.13 in 1997, to \$24.46 in 1998; unit production costs were \$26.65 in 1996 and 1997 and declined somewhat to \$26.06 in 1998). U.S. producers' inventories were also relatively stable during the investigation period, both on an absolute basis and relative to production and shipments. CR & PR at Table III-4. Capital expenditures declined significantly from \$1.7 billion in 1996, to \$908 million in 1997, and to \$715 million in 1998. CR & PR at Table VI-7. We also note that one firm filed for bankruptcy protection in September 1998 and another in February 1999. See CR & PR at Table III-1 nn.1 & 3; Petitioners' Prehearing Brief at 51-52, 54; Respondents' Joint Prehearing Brief at 143. Both firms \*\*\*. See Questionnaire Responses of Geneva and Acme Metals, Inc.

<sup>102</sup> We recognize that there were some additional increases in capacity from 1997 to 1998 by EAF producers, but, as discussed below, those increases were not as great as the increases in capacity by EAF producers from 1996 to 1997. INV-W-124 (June 9, 1999) at Attachment 8.

<sup>103</sup> See Respondents' Joint Prehearing Brief at 80-95; Respondents' Joint Posthearing Brief at 20-21, Answers (continued...)

yet the domestic industry performed well that year. The incremental increase in minimill capacity from 1997 to 1998, particularly in light of the substantially larger increase in minimill capacity from 1996 to 1997, does not account for the bulk of the downturn in the domestic industry's financial indicators from 1997 to 1998.<sup>104</sup>

Indeed, the same trends for the industry as a whole are also apparent in the separate results of both integrated mills and minimills. BOF producers' operating income declined significantly from 1997 to 1998, both for merchant market sales and overall. For merchant market sales, operating income as a percent of net sales dropped from \*\*\* percent to \*\*\* percent from 1997 to 1998. Overall, the ratio of operating income to net sales declined from \*\*\* percent in 1997 to \*\*\* percent in 1998.<sup>105</sup> In fact, minimills fared even worse than integrated mills from 1997 to 1998. For open market sales, EAF producers' operating income to net sales dropped from \*\*\* percent to negative \*\*\* percent from 1997 to 1998. Overall, EAF producers' operating income to net sales dropped from \*\*\* percent in 1997 to \*\*\* percent in 1998.<sup>106</sup> The worse financial performance of EAF producers reflects in part their greater dependence on the merchant market, where imports are concentrated. Thus, while we recognize increased competition within the domestic industry has contributed to the domestic industry's poorer performance in 1998, it only partially explains the substantial declines in the domestic industry's performance in 1998.<sup>107</sup>

Although full year data is sufficient to support our affirmative determination, the limited record information concerning the second half of 1998, when compared to data concerning the first half of 1998,

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<sup>103</sup> (...continued)

to Commissioners' Questions at 1-12. Respondents' have also argued that the 1998 GM strike caused the domestic industry's poorer performance in 1998. Respondents' Joint Prehearing Brief at 115-25. For the reasons discussed above, we consider the GM strike to be, at most, only a partial explanation for the domestic industry's poorer performance in 1998.

<sup>104</sup> Most of the increase in minimill "low cost" capacity occurred from 1996 to 1997, rather than from 1997 to 1998. EAF producers increased their capacity from \*\*\* million short tons in 1996, to \*\*\* million short tons in 1997, and to \*\*\* million short tons in 1998. During the same period, BOF producers also increased their capacity, from \*\*\* million short tons in 1996, to \*\*\* million short tons in 1997, and to \*\*\* million short tons in 1998. Although the increase in capacity for EAF producers was greater than for BOF producers from 1996 to 1997, this trend reversed itself from 1997 to 1998: EAF producers increased their capacity by \*\*\* million short tons from 1996 to 1997 and by \*\*\* million short tons from 1997 to 1998; whereas BOF producers increased their capacity by \*\*\* million short tons from 1996 to 1997 and by \*\*\* million short tons from 1997 to 1998. INV-W-124 at Attachment 8.

<sup>105</sup> CR & PR at Table C-3 and INV-W-124 (June 9, 1999) at Attachment 3 (Table C-3A). For merchant market sales, BOF producers' net sales declined from \*\*\* in 1997 to \*\*\* in 1998, and overall net sales declined from \*\*\* in 1997 to \*\*\* in 1998. For merchant market sales, BOF producers' operating income declined from \*\*\* in 1997 to \*\*\* in 1998, and overall operating income declined from \*\*\* in 1997 to \*\*\* in 1998. Id.

<sup>106</sup> CR & PR at Table C-4 and INV-W-124 at Attachment 3 (Table C-4A). For merchant market sales, EAF producers' net sales declined from \*\*\* in 1997 to \*\*\* in 1998, and overall net sales declined from \*\*\* in 1997 to \*\*\* in 1998. Likewise, for merchant market sales EAF producers had operating income of \*\*\* in 1997, which turned into an operating loss of \*\*\* in 1998. And overall, EAF producers had operating income of \*\*\* in 1997, which turned into an operating loss of \*\*\* in 1998. Id.

<sup>107</sup> We also note that Nucor, a mature and efficient minimill, had financial results that were in line with EAF producers as a whole and with the domestic industry as a whole. CR & PR at Tables VI-2 and VI-6. Given that even the minimill leader had substantial declines in its financial results from 1997 to 1998, we do not consider the declines in EAF producers' results as a group and the industry's results as a whole to be a reflection of start-up problems among EAF producers. We also note that although the petitioners and the respondents in their final comment submissions questioned the financial data reported by Nucor, we are satisfied that Nucor's financial information is accurate. As noted in Nucor's questionnaire response, \*\*\*. We also do not find the other alleged inconsistencies in Nucor's financial data to be valid. See INV-W-127 (June 10, 1999) at Attachment 1.

provides further support for the conclusion that subject imports are adversely impacting the domestic industry.<sup>108</sup> For the merchant market, apparent U.S. consumption, when measured by volume, increased by 1.69 percent from 16.5 million short tons in the first half of 1998 to 16.7 million short tons in the second half of 1998.<sup>109</sup> Overall apparent U.S. consumption, when measured by volume, actually increased by 7.56 percent from 36.3 million short tons in the first half of 1998 to 39.0 million short tons in the second half of 1998.<sup>110</sup> However, overall apparent U.S. consumption, when measured by value, declined by 21.64 percent from the first half to the second half of 1998.<sup>111</sup> This fact further confirms that prices declined significantly in the second half of 1998 — when subject imports reached their highest levels.<sup>112</sup>

Derived production and capacity utilization rates for nearly the whole industry show double digit declines from the first half of 1998 to the second half of 1998, both on an overall basis and for the vast majority of individual firms (including both integrated mills and minimills).<sup>113</sup> Moreover, a comparison of the financial data reported in the preliminary phase and final phases of the investigation strongly suggests that the industry's operating income worsened from the first half of 1998 to the second half of 1998, when subject imports reached their highest levels during the investigation period.<sup>114 115</sup> Thus, the domestic industry appears to have been in substantially worse condition during the second half than in the first half of 1998, even though consumption was higher in the second half of 1998. The fact that approximately 40 percent of total subject imports during the three-year period of investigation entered during this same period (i.e., the second half of 1998) confirms that subject imports have had a significant adverse impact on the domestic industry.

In sum, the domestic industry's performance was substantially poorer than what would be expected given record levels of demand in 1998. We recognize that other economic factors — especially increased intra-industry competition — have contributed to the industry's poorer performance in 1998. Having taken these factors into account, however, we find that the substantially increased volume of subject imports at declining prices has materially contributed to the industry's deteriorating performance, as reflected in nearly all economic indicators. Accordingly, in light of the domestic industry's declining production, shipments, market share, prices, capacity utilization, and financial condition, in the face of increasing subject import volume and market share and declining subject import prices, we determine that the domestic industry producing hot-rolled steel is materially injured by reason of LTFV imports from Japan.

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<sup>108</sup> Chairman Bragg has not relied on partial year data in reaching her determination of impact and material injury. Accordingly, she does not join in the discussion of partial year data.

<sup>109</sup> INV-W-124 at Attachment 6.

<sup>110</sup> INV-W-124 at Attachment 6.

<sup>111</sup> Id.

<sup>112</sup> See id. at Attachment 2 (indicating that from January to June 1998, subject import volumes were 2.5 million short tons, and from July to December 1998, subject import volumes increased dramatically to 4.4 million short tons).

<sup>113</sup> INV-W-124 at Attachment 5.

<sup>114</sup> See CR at VI-6-7, VI-14; PR at VI-3 & VI-7; INV-W-124 at Attachment 2.

<sup>115</sup> This is further suggested by the available information concerning merchant market sales, which indicates that the domestic industry's financial performance on trades sales also worsened from the first half to the second half of 1998. See INV-W-124 at Attachment 4. This information is based on merchant market data for most of the domestic industry from the preliminary and final phases of the investigation and on calculations from that data. Net sales declined, when measured by either quantity (from \*\*\* short tons in the first half to \*\*\* short tons in the second half of 1998) or value (from \*\*\* in the first half to \*\*\* in the second half of 1998). Operating income was \*\*\* in the first half of 1998, which turned into an operating loss of \*\*\* in the second half of 1998. The ratio of operating income to net sales declined from \*\*\* percent in the first half of 1998 to negative \*\*\* percent in the second half of 1998. Id.

## V. CRITICAL CIRCUMSTANCES

Because Commerce made an affirmative critical circumstances determination with respect to subject imports from Japan and we have determined that the domestic hot-rolled steel industry is materially injured by reason of subject imports from Japan, we must further determine “whether the imports subject to the affirmative {Commerce critical circumstances} determination . . . are likely to undermine seriously the remedial effect of the antidumping order to be issued.”<sup>116</sup> The URAA SAA indicates that the Commission is to determine “whether, by massively increasing imports prior to the effective date of the relief, the importers have seriously undermined the remedial effect of the order.”<sup>117</sup>

In its final determination, Commerce made affirmative critical circumstances determinations with respect to four Japanese producers (Kawasaki Steel Corporation, Sumitomo, Kobe, and Nisshin).<sup>118</sup> It made negative critical circumstances determinations with respect to two Japanese producers, Nippon and NKK.<sup>119</sup>

Consistent with Commission practice, in considering the timing and volume of imports, we have compared import quantities prior to filing of the petition with those subsequent to the filing of the petition.<sup>120</sup> Although Commerce compared two periods that were both prior to the filing of the petition in making its critical circumstances determination, we are not required to analyze the same comparison periods that Commerce analyzed.<sup>121 122</sup>

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<sup>116</sup> 19 U.S.C. § 1673d(b)(4)(A)(i). The statute further provides that in making this determination:

the Commission shall consider, among other factors it considers relevant--

(I) the timing and volume of the imports,

(II) a rapid increase in inventories of the imports, and

(III) any other circumstances indicating that the remedial effect of the antidumping order will be seriously undermined.

19 U.S.C. § 1673d(b)(4)(A)(ii).

<sup>117</sup> SAA at 877.

<sup>118</sup> See 64 Fed. Reg. 24329, 24338 (May 6, 1999).

<sup>119</sup> See *id.* Commerce has also made affirmative preliminary critical circumstances determinations with respect to all of the Russian producers. 63 Fed. Reg. 65750, 65751 (Nov. 30, 1998). Commerce made a negative preliminary critical circumstances determination with respect to subject imports from Brazil. 64 Fed. Reg. 8299, 8307-08 (Feb. 19, 1999).

<sup>120</sup> See Certain Preserved Mushrooms from China, India, and Indonesia, Inv. Nos. 731-TA-777-779 (Final), USITC Pub. 3159 (Feb. 1999) at 24 (Views of Vice Chairman Miller and Commissioners Hillman and Koplan), 28 (Views of Chairman Bragg and Commissioners Crawford and Askey); Certain Brake Drums and Rotors from China, Inv. No. 731-TA-744 (Final), USITC Pub. 3035 at 19 (April 1997).

<sup>121</sup> See Steel Concrete Reinforcing Bars from Turkey, Inv. No. 731-TA-745 (Final), USITC Pub. 3034 (April 1997) at 34.

<sup>122</sup> We disagree with petitioners’ argument that we should “cumulate” subject imports from Russia with the imports from Japan subject to Commerce’s affirmative critical circumstances determination, for purposes of our critical circumstances determination with respect to Japan. The presence in the statute of cumulation provisions for purposes of material injury and threat of material injury, but not for purposes of critical circumstances, indicates that we should not cumulate in this context. Compare 19 U.S.C. § 1677(7)(G) & (H), with 19 U.S.C. § (continued...)

In recent investigations, we have typically considered six to seven month periods before and after the petition for purposes of the critical circumstances analysis.<sup>123</sup> In this investigation, however, because of Commerce's accelerated schedule, we have considered shorter periods before and after the petition. In no period, do we find that the imports subject to Commerce's affirmative critical circumstances determination would undermine seriously the remedial effect of the order.<sup>124</sup> Imports from the four Japanese producers actually declined from \*\*\* short tons in the five months before the petition to \*\*\* short tons in the five months after the petition. The subject imports did increase by \*\*\* percent from \*\*\* short tons in the three months before the petition to \*\*\* short tons in the three months after the petition. This increase is not significant enough to warrant a finding that the subject imports would undermine seriously the remedial effect of the order.<sup>125 126</sup>

Japanese prices (which include data for all Japanese producers, not simply the four pertinent producers) were generally lower in the fourth quarter of 1998 (i.e., the three months after the filing of the petition) than in the third quarter of 1998 (i.e., the three months before the filing of the petition).<sup>127</sup> However, we do not find this particularly significant, given our conclusion regarding the volume of imports from the four Japanese producers imported after the petition was filed. We do not have inventory data for the four Japanese producers in question. We therefore looked at inventories of all subject imports from Japan. These inventories increased when compared to prior years. However, we do not place much weight on this information because it is not limited to the four producers subject to Commerce's determination and may not be limited to imports made after the petition was filed.<sup>128</sup>

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<sup>122</sup> (...continued)

1673d(b)(4)(A). In addition, we have made individual country determinations in past investigations where more than one country was subject to a critical circumstances determination. See Silicomanganese from Brazil, China, Ukraine, and Venezuela, Inv. Nos. 731-TA-671-674 (Final), USITC Pub. 2836 (Dec. 1994) at I-17-18; Carbon Steel Products, USITC Pub. 2664 at 250-54; Ferrosilicon from Kazakhstan and Ukraine, Inv. Nos. 731-TA-566-567, USITC Pub. 2616 (Mar. 1993) at 32-24.

<sup>123</sup> See Certain Preserved Mushrooms from China, India, and Indonesia, Inv. Nos. 731-TA-777-779 (Final), USITC Pub. 3159 (Feb. 1999) at 24 (Views of Vice Chairman Miller and Commissioners Hillman and Koplan), 28 (Views of Chairman Bragg and Commissioners Crawford and Askey); Certain Brake Drums and Rotors from China, Inv. No. 731-TA-744 (Final), USITC Pub. 3035 at 19 (April 1997); Steel Concrete Reinforcing Bars from Turkey, Inv. No. 731-TA-745 (Final), USITC Pub. 3034 (April 1997) at 34.

<sup>124</sup> Chairman Bragg dissenting. Chairman Bragg finds that the subject imports would undermine seriously the remedial effect of the order. See infra at 34 n.129.

<sup>125</sup> The subject imports also increased by \*\*\* percent from \*\*\* short tons in the two months before the petition to \*\*\* short tons after the petition. INV-W-124 at Attachment 1. However, we do not believe that this two-month period is an appropriate benchmark, because the period is too short in duration. In any event, we do not find that the volume of hot-rolled steel imported by the four Japanese producers in the two months after the petition would undermine seriously the remedial effect of the order.

<sup>126</sup> Commissioner Crawford finds that any surge in the imports is not large enough to undermine seriously the remedial effect of the order. For her interpretation of the statutory requirement, see Certain Preserved Mushrooms from China, India, and Indonesia, Inv. Nos. 731-TA-777-779 (Final), USITC Pub. 3159 (Feb. 1999) at 27-28 (Views of Chairman Bragg and Commissioners Crawford and Askey).

<sup>127</sup> See generally CR & PR at Tables V-1 through V-6.

<sup>128</sup> Together, U.S. importers' 1998 inventories of subject imports from Japan and Japanese producers' 1998 inventories were 763,710 short tons. See CR & PR at Tables VII-2, VII-4.

In sum, we do not find that the record evidence indicates that the subject imports from Japan would seriously undermine the remedial effect of the order. Accordingly, we make a negative critical circumstances finding.<sup>129</sup>

## CONCLUSION

For the foregoing reasons, we determine that the domestic industry producing hot-rolled steel is materially injured by reason of LTFV imports of hot-rolled steel from Japan. We also determine that critical circumstances do not exist with respect to subject imports from Japan.<sup>130</sup>

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<sup>129</sup> Chairman Bragg finds that the most important period for rendering a critical circumstances determination in this investigation is the two months following the filing of the petition, which occurred on September 30, 1998. In this regard, Chairman Bragg notes that subject imports from the four Japanese producers all but ceased following the date on which such imports would have become subject to an affirmative critical circumstances determination, i.e. November 21, 1998.

Subject imports from the four Japanese producers increased by \*\*\* percent from \*\*\* short tons in the two months preceding the petition to \*\*\* in the two months following the petition. In addition, while the average monthly import volume for the four Japanese producers during the period December 1997 to September 1998 was roughly \*\*\* short tons, the average import volume for October and November 1998 was over \*\*\* short tons, representing an increase of roughly \*\*\* percent.

Furthermore, subject imports from the four Japanese producers in October and November 1998 alone constituted over \*\*\* percent of these producers' total exports to the United States in 1998. This two-month import volume corresponds to roughly \*\*\* percent of all subject imports from Japan (from all sources) in 1998.

Based upon the foregoing, Chairman Bragg finds that subject imports from the four Japanese producers would seriously undermine the remedial effect of the order. Accordingly, Chairman Bragg makes an affirmative critical circumstances determination in this investigation.

<sup>130</sup> Chairman Bragg dissenting.



**VIEWS OF CHAIRMAN LYNN M. BRAGG, COMMISSIONER  
CAROL T. CRAWFORD, AND COMMISSIONER THELMA J. ASKEY  
REGARDING THE CAPTIVE PRODUCTION PROVISION**

We find that the captive production provision is not applicable in this investigation.

We first address petitioners' argument that the Commission should consider the applicability of the captive production provision separately for each downstream article that the domestic industry makes from internally transferred hot-rolled steel. The petitioners argue that the captive production provision applies because all of the statutory criteria are met with respect to the domestic industry's transfers of hot-rolled steel to produce cold-rolled and corrosion resistant steels. The petitioners state, however, that under that interpretation of the provision, it would not apply to the domestic industry's internal transfers of hot-rolled steel to produce tubular products and cut-to-length ("CTL") plate. Given that (in their view) the provision is satisfied as to some, but not all, of the industry's captive operations, the petitioners further request that the Commission divide the domestic industry's captive operations and consider that portion of internal transfers used to make tubular products and CTL plate, along with all merchant market sales of hot-rolled steel, in performing the injury analysis.<sup>1</sup> The respondents contest petitioners' product-by-product approach and maintain that the captive production provision does not apply because the first and third statutory criteria are not satisfied.<sup>2</sup>

We do not adopt the petitioners' argument that the captive production provision should be analyzed separately for each downstream article made from internally transferred hot-rolled steel, and the further argument that, if the provision is satisfied with respect to some but not all of those articles, the Commission should examine the merchant market and a certain portion of captive operations. Although the terms "a downstream article" and "that downstream article" are used in the singular throughout the captive production provision, we interpret the terms to mean the plural in cases (such as this one) where more than one downstream article is made from internal transfers of the like product. As a matter of statutory construction, it is well settled that statutory provisions drafted in the singular also imply the plural, particularly when the word "a" is used before the singular form.<sup>3</sup> Moreover, we find that the petitioners' approach is inconsistent with the language of the statute, which requires the Commission to focus primarily on the "merchant market for the domestic like product" if the provision is satisfied rather than focusing on the merchant market for the domestic like product plus some portion of captive operations. Petitioners' hybrid approach would also be difficult if not impossible to administer in many cases where a variety of downstream products are made from internal transfers of the like product. In this investigation, for example, five categories of downstream products are made from the domestic industry's internal transfers

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<sup>1</sup> Petitioners' Prehearing Brief at 22-35 and Exhibits 7, 8, & 10; Petitioners' Posthearing Brief at 25-30 and Exhibits 11 & 12.

<sup>2</sup> Respondents' Joint Prehearing Brief at 15-24 and Exhibit 2; Respondents' Joint Posthearing Brief at 6-11.

<sup>3</sup> See, e.g., 1 U.S.C. § 1 (entitled "Words denoting number, gender, and so forth") ("In determining the meaning of any Act of Congress, unless the context indicates otherwise — words importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular"); Sutherland Statutory Construction (5th Ed.) § 47.34 at 273 (entitled "Singular and plural numbers") ("Common usage in the English language does not scrupulously observe a difference between singular and plural word forms. This is especially true when speaking in the abstract, as in legislation prescribing a general rule for future application. In recognition of this, it is well established, by statute and by judicial decision, that legislative terms which are singular in form may apply to multiple subjects or objects."); id. at 274 ("Issues over singular or plural interpretations often arise in the form of disputes about whether the article "a" restricts the application of the term which it modifies to single objects or subjects. The usual presumption in favor of the natural application appears to be reversed in such cases. It is most often ruled that a term introduced by "a" or "an" applies to multiple subjects or objects unless there is reason to find that singular application was intended or is reasonably understood.").

of hot-rolled steel: (1) tubular products, (2) cold-rolled products, (3) corrosion resistant products, (4) CTL plate, and (5) other products.<sup>4</sup> For these reasons, we have not adopted the petitioners' interpretation of the captive production provision. We now consider whether the captive production provision applies in this investigation.

The threshold criterion of the captive production provision requires us to determine whether "domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market."<sup>5</sup> Significant production of the domestic like product is both internally transferred and sold in the merchant market. In 1998, for instance, the domestic industry's captive consumption accounted for 63.7 percent of the industry's total U.S. shipments, and commercial shipments to the merchant market accounted for 36.3 percent.<sup>6</sup> Therefore, we find that the threshold criterion is satisfied.

The first statutory criterion of the provision requires us to determine whether "the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product."<sup>7</sup> We interpret this to mean that we must consider whether the type or category of the like product that is internally transferred by the domestic industry enters the merchant market for the domestic like product.<sup>8 9</sup> The SAA supports this interpretation. The SAA notes that the law was amended "to address situations in which vertically-integrated U.S. producers sell a significant volume of their production of the domestic like product to U.S. customers (i.e., the merchant market) and internally transfer a significant volume of their production of that same like product for further internal processing into a distinct downstream article (i.e., captive production)."<sup>10</sup> The record evidence indicates that there is significant overlap in the types of hot-rolled steel internally transferred and sold in the merchant market.<sup>11</sup> Accordingly, we find that the first statutory criterion is not satisfied.

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<sup>4</sup> See CR at III-7; PR at III-5.

<sup>5</sup> 19 U.S.C. § 1677(7)(C)(iv).

<sup>6</sup> See CR and PR at Table I-2; see also INV-W-082 (April 30, 1999) (indicating that from 1996 to 1998, between 62.5 and 64.0 percent of the domestic industry's total U.S. shipments were for captive consumption; accordingly, during the same period between 37.5 and 36.0 percent of the domestic industry's U.S. shipments were sold in the merchant market).

<sup>7</sup> 19 U.S.C. § 1677(7)(C)(iv)(I).

<sup>8</sup> See, e.g., Polyvinyl Alcohol from the People's Republic of China, Japan and Taiwan, Inv. Nos. 731-TA-726, 727 and 729 (Final), USITC Pub. 2960 at 12 n.76 (May 1996) ("Commissioner Bragg does not necessarily agree that the first factor ... requires an analysis of whether the downstream product competes with sales in the merchant market of the PVA that is internally transferred. She notes that the statute requires analysis of whether the domestic like product that is internally transferred enters the merchant market for the domestic like product."); Beryllium Metal and High-Beryllium Alloys from Kazakstan, Inv. No. 731-TA-746 (Final), USITC Pub. 3019 (Feb. 1997) at 8 n.43; Stainless Steel Wire Rod from Germany, Italy, Japan, Korea, Spain, Sweden, and Taiwan, Inv. Nos. 701-TA-373 (Final) and 731-TA-769-775 (Final), USITC Pub. 3126 (Sept. 1998) at 46-47 and n.15 (Dissenting Views of Commissioner Askey) ("I believe the better interpretation of this provision {i.e., the first criterion} is that adopted by Chairman Bragg. Chairman Bragg has interpreted this factor as requiring the Commission to assess whether the type or category of domestic like product that is used to produce a downstream product (and not the downstream product itself) enters the merchant market for the domestic like product.").

<sup>9</sup> Commissioner Crawford finds that the third statutory criterion of the captive production provision is not satisfied, and thus does not address the question of whether the other criteria are met. Therefore, she does not join in the discussions of the first and second statutory criteria.

<sup>10</sup> SAA at 852.

<sup>11</sup> Virtually all U.S. mills reported that they could use or substitute hot-rolled steel from other suppliers in their captive operations, and 11 firms reported that they had in fact used, or qualified for use, hot-rolled steel from other  
(continued...)

The second statutory criterion of the provision requires us to determine whether “the domestic like product is the predominant material input in the production of that downstream article.”<sup>12</sup> Hot-rolled steel is the predominant material input in the production of all of the principal downstream products.<sup>13</sup> Accordingly, we find that the second statutory criterion is satisfied.

The third statutory criterion of the provision requires us to determine whether “the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article.”<sup>14</sup> As discussed above, we interpret the term “downstream article” to mean the plural in cases (such as this one) where more than one downstream article is made from the like product. In addition to the reasons set forth above for interpreting the provision in this way, we note that the provision, if satisfied, requires us to focus primarily on the merchant market for the entire domestic like product. Therefore, in analyzing the third criterion, we find it necessary to evaluate all of the downstream articles made from the like product sold in the merchant market, not simply two products (i.e., cold-rolled products and corrosion resistant products), as the petitioners argue.

We conclude that hot-rolled steel sold in the merchant market is generally used in the production of the same downstream articles for which hot-rolled steel is internally consumed. Indeed, in the final phase of this investigation, the record evidence indicates that merchant market purchasers of domestic hot-rolled

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<sup>11</sup> (...continued)

suppliers (although 10 firms had not). CR at III-7; PR at III-6. Moreover, many firms (13 of 21) reported that some of their merchant market sales of hot-rolled steel “were used by their customers to produce the same downstream products that the individual mills produced from captively” consumed hot-rolled steel. CR at III-8-9; PR at III-6. These responses indicate that the type or category of hot-rolled steel internally transferred does in fact enter the merchant market. Ten U.S. mills, that collectively accounted for \*\*\* percent of 1998 captive consumption, reported that the hot-rolled steel that they internally transfer differs “in part or in whole” from the hot-rolled steel that they sell in the merchant market. CR at III-7-8 & n.13; PR at III-6 & n.13. Significantly, however, four of those ten mills, that collectively accounted for \*\*\* percent of 1998 captive consumption, reported that there are grades of hot-rolled steel that they only captively consume but for which there is a domestic market. CR at III-8 n.13; PR at III-6 & n.13. The evidence presented at the hearing was mixed on this issue: domestic producers essentially responded “yes and no” when they were asked whether the types of steel that they internally transfer were the same as or different from the steel that they sell in the merchant market. See Transcript of Commission Hearing Held on May 4, 1999 (“Tr.”), at 130-33 (Mr. Arnett) (Bethlehem Steel Corporation’s Vice President and Controller argued that domestic producers do not face a “make or buy” decision regarding their captive operations, although he acknowledged that the company had occasionally purchased small quantities of hot band in the merchant market during planned maintenance or other outages), 155 (Mr. Conrad) (“I guess it depends — that’s a little bit of yes and no.”), 156-58 (Mr. Arnett, Mr. Narkin, Mr. Conrad). Likewise, the petitioners’ summary of the responses of the \*\*\* petitioning firms that indicated differences in the hot-rolled steel internally transferred and sold in the merchant market, was mixed, although most of the firms (\*\*\* out of \*\*\*) indicated that very high percentages of the hot-rolled steel internally transferred was different from that sold in the merchant market. Significantly, however, all but \*\*\* of those \*\*\* firms indicated that some portion (in percentages ranging from \*\*\* to \*\*\* percent) of their internally transferred hot-rolled steel was the same as the hot-rolled steel sold in the merchant market. See Petitioners’ Posthearing Brief, Exhibit 1 at 31-33 (\*\*\*). All of this evidence indicates that there is significant overlap in the types of hot-rolled steel internally transferred and those sold in the merchant market.

<sup>12</sup> 19 U.S.C. § 1677(7)(C)(iv)(II).

<sup>13</sup> CR at III-7; PR at III-6 (“Typically certain hot-rolled steel products account for 90 percent or more of the raw material costs of producing cut-to-length plate, 80 percent or more of the raw material costs for tubular products, and nearly 100 percent of the raw material costs for cold-rolled products. From 63 to 87 percent of the raw material cost of producing galvanized products, and 90 to 92 percent of the raw material cost of producing plated products, is accounted for by certain hot-rolled steel products.”).

<sup>14</sup> 19 U.S.C. § 1677(7)(C)(iv)(III).

steel use at least 33.4 percent of those purchases to produce four downstream products (i.e., tubular products, cold-rolled products, corrosion resistant products, and CTL plate) that the domestic industry also produces from their own hot-rolled steel. In 1998, 21.8 percent of total merchant market shipments of domestic hot-rolled steel was used to make tubular products.<sup>15</sup> In addition, the petitioners estimate that approximately six percent of merchant market shipments of hot-rolled steel in 1998 was used to make cold-rolled and corrosion resistant products.<sup>16</sup> Furthermore, based on data available from the Commission's 1997 Cut-to-Length Plate investigations, 1,226,405 short tons of hot-rolled steel were purchased in 1996 from U.S. mills to produce CTL plate in the U.S. market.<sup>17</sup> Based on the domestic industry's 1998 merchant market shipments, this amount represents 5.6 percent of total shipments.<sup>18</sup> When this percentage is added to the percentages for the other three downstream articles set forth above (i.e., tubular products, cold-rolled products, and corrosion resistant products), the purchasers' production from domestic hot-rolled steel that was used to make the four downstream articles is 33.4 percent of the purchaser's total 1998 production from domestic hot-rolled steel. This portion (i.e., 33.4 percent) of the purchasers' production from domestic hot-rolled steel is a significant portion of their total production from domestic hot-rolled

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<sup>15</sup> See CR at Table I-2. We believe it is reasonable to conclude that all shipments to manufacturers of tubular products were in fact used to make tubular products. In addition, we note that we have used a ratio based on the amount of hot-rolled steel sold in the merchant for a particular purpose as the numerator, and the total amount of hot-rolled steel sold in the merchant market as the denominator — rather than petitioners' use of a ratio based on the amount of hot-rolled steel sold in the merchant market for a particular purpose as the numerator, and the amount of hot-rolled steel internally transferred for that same purpose as the denominator. In our view, the former is the appropriate ratio, because the SAA indicates that the focus of the third criterion is on whether the amount of the like product sold in the merchant market to produce the downstream article is a "significant portion of the production that enters the merchant market." SAA at 853.

<sup>16</sup> Petitioners estimate that 1,315,000 short tons of domestic producers' 1998 sales of hot-rolled steel in the merchant market are used to make cold-rolled and corrosion resistant products. See Petitioners' Prehearing Brief at 28 (Table 1), 34, and Exhibit 8. This amount represents six percent of the domestic industry's 21,780,520 short tons of hot-rolled steel sold to the merchant market in 1998. See CR at Table III-3; Petitioners' Posthearing Brief at 26. The petitioners' method of estimating the portion of hot-rolled steel shipped to the merchant market for conversion into cold-rolled and corrosion resistant products may undercount such shipments. See Petitioners' Prehearing Brief at Exhibit 8. The back-up worksheet for petitioners' estimate lists only \*\*\* firms purchasing cold-rolled steel and a category of "cold strip producers" without identifying the producers in this category. The worksheet also indicates that cold-strip products not produced by the hot-rolled industry have been excluded in making the calculation. In contrast to petitioners' worksheet, the Staff Report indicates that there are about 10 firms purchasing hot-rolled steel from U.S. mills to make cold-rolled and corrosion-resistant products. CR at III-9 n.14; PR at III-6 n.14. We therefore believe that the petitioners' estimate is conservative.

<sup>17</sup> Certain Carbon Steel Plate from China, Russia, South Africa, and Ukraine, Inv. Nos. 731-TA-753-756 (Final), USITC Pub. 3076 (Dec. 1997) at I-6. This 1.2 million short ton figure represents 5.7 percent of domestic producers' total merchant market shipments of hot-rolled steel in 1996. See CR at Table III-3. The petitioners used this figure in their prehearing brief to calculate the amount of hot-rolled steel sold to make CTL plate, as did the Commission in the Preliminary Determination. See Petitioners' Prehearing Brief at 28 (Table 1); Preliminary Determination at 12 n.60.

<sup>18</sup> The amount of domestically produced hot-rolled steel used to make CTL plate has increased from 1996 to 1998 (based on our findings in the 1999 Cut-to-Length Plate preliminary investigations), and thus this is a conservative estimate (i.e., more than 5.6 percent of the purchases of domestic hot-rolled steel were used to make CTL plate in 1998). See Certain Cut-to-Length Steel Plate from the Czech Republic, France, India, Indonesia, Italy, Japan, Korea, and Macedonia, Inv. Nos. 701-TA-387-393 (Preliminary) and 731-TA-815-822 (Preliminary), USITC Pub. 3181 (April 1999) at I-6 n.16.

steel, and, hence, their purchases of domestic hot-rolled steel are “generally used” to produce the same downstream articles.<sup>19</sup> Accordingly, we find that the third statutory criterion is not satisfied.

In sum, we find that the first and third criteria of the captive production provision are not satisfied. Consequently, the captive production provision does not apply in this investigation.

However, even in circumstances in which the captive production provision does not apply, the Commission has the discretion to consider the significant volume of captive production as a condition of competition.<sup>20 21</sup> Accordingly, we have examined data both for the domestic industry as a whole and for merchant market operations for purposes of our determination.<sup>22 23 24 25</sup>

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<sup>19</sup> In addition, the data collected from purchasers confirms that hot-rolled steel sold in the merchant market is generally used to produce the same downstream articles. U.S. purchasers that responded to the Commission’s questionnaire reported that 21.9 percent of the hot-rolled steel they purchased in 1998 (from all sources) was used to make tubular products, 9.4 percent was used for cold-rolled products, 8.3 percent was used for corrosion-resistant products, and 4.5 percent was used for CTL plate. INV-W-127 (June 10, 1999) at Attachment 2. Hence, according to purchasers, 44.1 percent of the hot-rolled steel sold in the merchant market was used to produce these four downstream products. These purchaser data, however, are not limited to the like product, since purchasers responded based on their purchases from all sources (including the like product, subject imports, and non-subject imports). The reported purchases accounted for 51.2 percent of total 1998 merchant sales of hot-rolled steel in the merchant market. See id. and CR & PR at Table C-2. Given the substitutability between the subject imports and the like product discussed above in our analysis of cumulation, this presumably is a fairly good proxy for the amount of domestic hot-rolled steel sold in the merchant market that was used to make these four downstream products. It is also significant that 13 of 21 responding U.S. firms “reported that a portion of their merchant market sales of certain hot-rolled steel products were used by their customers to produce the same downstream products that the individual mills produced from captively consumed certain hot-rolled steel products.” CR at III-8-9; PR at III-6.

<sup>20</sup> See, e.g., Open-End Spun Rayon Singles Yarn from Austria, Inv. No. 731-TA-751 (Final), USITC Pub. No. 3059 at 6 (Sept. 1997); Certain Emulsion Styrene-Butadiene Rubber from Brazil, Korea, and Mexico, Invs. Nos. 731-TA-794-796 (Final), USITC Pub. 3190 (May 1999) at 13-14; Flat-Rolled Carbon Steel, USITC Pub. 2664 (August 1993) at 15, 17, 22, and 23, aff’d, U.S. Steel Group v. United States, 874 F. Supp. 673 (Ct. Int’l Trade 1994), aff’d, 96 F.3d 1352 (Fed. Cir. 1996).

<sup>21</sup> Commissioner Crawford’s analysis is based on the total domestic market and the domestic industry as a whole.

<sup>22</sup> The respondents have argued that, although we have the discretion to consider captive production as a condition of competition even if we find the captive production provision not to apply, we do not have the discretion to focus primarily on the merchant market in examining quantitative data. See Respondents’ Joint Posthearing Brief, Answers to Commissioner’s Questions at 51-58. As discussed above, however, we have examined data for both the industry as a whole and for the industry’s merchant market operations, as is our consistent practice where a significant portion of domestic production is captively consumed as well as sold in the merchant market. We also note that the Commission has previously rejected the type of argument made by the respondents. See Steel Concrete Reinforcing Bars from Turkey, Inv. No. 731-TA-745 (Final), USITC Pub. 3034 (April 1997) at 21 n.126.

<sup>23</sup> Commissioner Askey believes that it is inappropriate to focus on the merchant market if the captive production provision does not apply.

<sup>24</sup> Chairman Bragg notes that even in circumstances in which the captive production provision does not apply, it is within the Commission’s discretion to consider the significant volume of captive production as a condition of competition. Chairman Bragg does so in this investigation; specifically, Chairman Bragg begins her analysis with an examination of the domestic industry and the domestic market as a whole. Chairman Bragg then considers whether an evaluation of the merchant market conforms with her evaluation of the domestic industry and the domestic market as a whole.

Chairman Bragg finds that the domestic industry is materially injured by reason of subject imports based on her  
(continued...)

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<sup>24</sup> (...continued)

analysis of both the domestic industry and the domestic market as a whole as well as the merchant market data. Much of the Commission's views focuses first on merchant market data and secondly on total market data. Although this order of discussion does not reflect the sequence of Chairman Bragg's analysis, she joins in the discussion of volume, price, and impact, except as otherwise noted.

<sup>25</sup> Commissioner Askey has focused on the total domestic market and the domestic industry as a whole.

**VIEWS OF VICE CHAIRMAN MARCIA E. MILLER,  
COMMISSIONER JENNIFER A. HILLMAN,  
AND COMMISSIONER STEPHEN KOPLAN  
CONCERNING CAPTIVE PRODUCTION**

**Introduction**

We are writing these views to explain our finding that the captive production provision of title VII applies in this investigation.<sup>1 2</sup> At the outset, we note that the captive production provision has proven very difficult to administer. The statutory language and its legislative history are ambiguous, especially with respect to the meaning of the first and third criteria, which are discussed in detail below. The lack of clarity in the statute and legislative history has given rise to differing interpretations of these factors among Commissioners and the parties in this and other investigations. Indeed, no Commissioner in the current investigation has adopted the interpretation of the first criterion previously applied by a majority of the Commission – namely, whether the downstream product produced captively enters the merchant market for the upstream like product.

Nevertheless, we have endeavored to faithfully interpret and apply the captive production provision in reaching our conclusion that the provision does apply in this investigation. We believe our interpretation is most consistent with the text of the provision and with its underlying policy, which is to identify those

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<sup>1</sup> The captive production provision provides as follows:

(iv) CAPTIVE PRODUCTION -- If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that --

(I) the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product,

(II) the domestic like product is the predominant material input in the production of that downstream article, and

(III) the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article,

then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii), shall focus primarily on the merchant market for the domestic like product.

There is no disagreement among the parties that the threshold criterion – *i.e.*, that domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market – is met in this case. There is similarly no disagreement among the parties that the second criterion – *i.e.*, that the domestic like product is the predominant material input in the production of that downstream article – is satisfied here. The parties disagree over the interpretation of the first and third criteria, and over whether these criteria are met in this case.

<sup>2</sup> Upon further examination of this provision, Commissioner Koplan believes that this interpretation is better than the one that he applied in the preliminary phase of this investigation. Commissioner Koplan does not join in the remainder of the Introduction.

situations in which imports compete primarily with sales of the domestic like product in the merchant market.

### **Threshold criterion**

The threshold criterion of the captive production provision requires us to determine whether “domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market.”<sup>3</sup> Significant production of the domestic like product is both internally transferred and sold in the merchant market. In 1998, for instance, the domestic industry’s captive consumption accounted for 63.7 percent of the industry’s total U.S. shipments, and commercial shipments to the merchant market accounted for 36.3 percent.<sup>4</sup> Therefore, we find that the threshold criterion is satisfied.

### **First criterion**

Under the first criterion the Commission must find that “the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product.” We believe the proper interpretation of this criterion is the literal one -- *i.e.*, the “domestic like product” that is transferred for internal processing is in fact processed into a downstream article. In other words, the product transferred for internal processing does stay out of the merchant market for the like product.

In this sense the first criterion serves largely to reinforce that part of the threshold criterion that refers to whether significant production is transferred internally for further processing. For example, a company could internally transfer a certain portion of its production to a related entity with a view to further processing, but that entity ends up putting some or all of the production for sale on the merchant market with little or no further processing. This could result from a variety of causes, such as favorable market conditions in the merchant market, unexpected merchant market orders, or production difficulties in the facilities that produce the downstream product. These situations should be rare and thus the first criterion should be met in nearly all cases in which the threshold test is satisfied.

In this case, no party has argued, and there is no record evidence, that any portion of the nearly two-thirds of domestic hot-rolled production transferred for internal production was in fact sold on the merchant market in hot-rolled form. Thus, we find the first criterion to be met in this case.

We have considered but have not adopted the other two interpretations of this criterion that Commissioners have applied. The first interpretation asks whether the *downstream* product produced captively enters the merchant market for the upstream like product. The text of the provision, which refers to whether the production of the *like product* enters the merchant market, does not support this interpretation. The first criterion makes no mention of the downstream product entering the merchant market.

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<sup>3</sup> 19 U.S.C. § 1677(7)(C)(iv).

<sup>4</sup> See CR and PR at Table I-2; see also INV-W-082 (April 30, 1999) (indicating that from 1996 to 1998, between \*\*\* percent of the domestic industry’s total U.S. shipments were for captive consumption; accordingly, during the same period between \*\*\* percent of the domestic industry’s U.S. shipments were sold in the merchant market).

The second interpretation considers whether the *type or kind* of the like product that is sold on the merchant market differs from that which is internally transferred for further processing. This requires identifying sub-categories of products within the like product and determining whether the categories sold into the two channels differ. This analysis requires an assessment of very minor differences between product types. These differences are, by definition, insufficient to differentiate the products as separate like products. The drafters made no provision for such a fundamental concept as type or kind when determining captive production. Instead, the text of the first criterion simply refers to the “domestic *like product* produced that is internally transferred.” (Emphasis added.)<sup>5</sup>

### **Second criterion**

The second criterion of the provision requires us to determine whether “the domestic like product is the predominant material input in the production of that downstream article.”<sup>6</sup> Hot-rolled steel is the predominant material input in the production of all of the principal downstream products.<sup>7</sup> Accordingly, we find that the second criterion is satisfied.

### **Third criterion**

Under the third criterion, “the production of the domestic like product sold in the merchant market is not generally used in the production of th[e] downstream article” that is produced captively.<sup>8</sup> This criterion clearly applies to industries that manufacture only a single downstream article. The provision’s drafters do not appear to have contemplated cases such as this one in which an industry makes multiple downstream articles.<sup>9</sup>

In cases involving multiple captively-produced downstream articles, we assess the overall degree of overlap between the downstream products produced captively and those produced from the domestic like product in the merchant market. It follows that we take into account both (1) the relative shares of captive production accounted for by each of the downstream products, and (2) the relative shares of merchant market sales accounted for by each of the downstream products.

This approach best assesses the degree to which captive production and sales into the merchant market are used to produce the same products. The extent to which there are common end-products in the two

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<sup>5</sup> The “type or kind” interpretation would most likely render the captive production provision inapplicable in nearly all cases, thereby circumscribing the application of the provision in a manner not intended by Congress.

<sup>6</sup> 19 U.S.C. § 1677(7)(C)(iv)(II).

<sup>7</sup> CR at III-7; PR at III-6 (“Typically certain hot-rolled steel products account for 90 percent or more of the raw material costs of producing cut-to-length plate, 80 percent or more of the raw material costs for tubular products, and nearly 100 percent of the raw material costs for cold-rolled products. From 63 to 87 percent of the raw material cost of producing galvanized products, and 90 to 92 percent of the raw material cost of producing plated products, is accounted for by certain hot-rolled steel products.”).

<sup>8</sup> Although Commissioner Koplán joins in the analysis in this section, see also his Further Views Concerning the Third Criterion of the Captive Production Provision.

<sup>9</sup> We agree with Chairman Bragg and Commissioners Crawford and Askey that the statute does not provide, with respect to the same like product, that the captive production provision can be met for some downstream products but not for others, as petitioners have proposed. Such an approach, which would require the collection and analysis of financial data regarding portions of an industry’s captive production, would be very difficult to administer.

channels can be an important factor in determining whether the like product that is transferred captively does not compete with imports sold on the merchant market.<sup>10</sup>

In this case we find that there is only limited overlap in the downstream products produced captively and the sales of hot-rolled steel on the merchant market. Specifically, in 1998, 81.4 percent of captive production from hot-rolled steel consisted of cold-rolled products (39.0 percent) and corrosion resistant products (42.4 percent).<sup>11</sup> An additional 9.2 percent consisted of other products -- primarily tin products -- that had been processed through a cold rolling mill.<sup>12</sup> Thus, approximately 90 percent of 1998 captive production consisted of these products, nearly all of which were processed through a cold rolling mill.

By contrast, only a small percentage of merchant market sales of the domestic like product are used to make these same products. Based on our examination of the record data, it appears that between 3.7 percent and 17.7 percent of merchant market shipments of the domestic like product are used to make cold-rolled steel or corrosion resistant steel.<sup>13</sup> The actual figure is likely to be significantly below the upper-end 17.7 percent figure.<sup>14</sup> Most merchant market sales of the domestic like product either are not further processed, or are further processed into tubular products, CTL plate, or other products (primarily automotive products).<sup>15</sup>

Thus we find that the vast majority of merchant market sales of hot-rolled steel is *not* used to make the same products as the vast majority (approximately 90 percent) of hot-rolled steel that is captively consumed to make downstream products. We therefore find that the production of the domestic like product sold in the merchant market is not generally used in the production of downstream articles made from captive production.

Our interpretation of the third criterion is consistent with the Commission's decision in the *Polyvinyl Alcohol* (PVA) case.<sup>16</sup> In that case the main product produced captively from PVA was polyvinyl butyral (PVB). A certain percentage of captive production consisted of emulsion polymers. In finding the third

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<sup>10</sup> See SAA at 852 (basis for captive production analysis is recognition that "imports compete primarily with sales of the domestic like product in the merchant market. . . .")

<sup>11</sup> CR at III-7, n. 10; PR at III-5, n. 10.

<sup>12</sup> See *id.*, and Petitioners' Posthearing Brief, responses to Commission questions, p. 29 ("other products" constitute 10.7 percent of captive production; six-sevenths of "other products" are processed through a cold-rolling mill).

<sup>13</sup> The 17.7 percent figure is derived from Attachment 2 of INV-W-127, which tabulates purchaser questionnaire responses. This figure is suspect because it includes purchases of hot-rolled steel from all sources, including domestic, subject and non-subject imported steel. The third criterion requires an examination limited to the domestic like product. The 3.7 percent figure is derived from Attachment 7 of INV-W-124. That attachment contains data only of purchases confirmed to be from domestic sources.

<sup>14</sup> A figure substantially less than 17.7 percent would be more consistent with petitioners' estimate of the quantity of merchant market hot-rolled steel manufactured into cold-rolled or corrosion resistant steel. Petitioners' estimated quantity was approximately 6 percent of sales of the domestic like product into the merchant market. See Petitioners' Prehearing Brief at 28. Moreover, domestic producers are likely to be more reluctant to sell hot-rolled steel to purchasers who intend to manufacture downstream products that compete with the bulk of their own downstream production (*i.e.*, cold-rolled or corrosion resistant steel products).

<sup>15</sup> CR at II-14; PR at II-5, and Attachment 2 of INV-W-127; Petitioners' Posthearing Brief, Exhibit 1 at 30.

<sup>16</sup> See *Polyvinyl Alcohol from China, Japan, and Taiwan*, Inv. Nos. 731-TA-726, 727, and 729 (Final), USITC Pub. 2960 (May 1996).

criterion to be met, the Commission focused on the fact that only a small percentage of merchant market sales of PVA was used to create PVB.<sup>17</sup> By contrast, because emulsion polymers represented only a small portion of captive production, the fact that emulsion polymers were a significant segment of merchant market sales did not prevent the Commission from finding that the third criterion was satisfied. So, too, in this case, the fact that a significant percentage of merchant market sales of the domestic like product is used to make, for example, tubular products, does not alter our finding that the third criterion is met, because tubular products represent only a small percentage of captive consumption of hot-rolled steel.<sup>18 19</sup>

### **Effect of applying the captive production provision**

Because we have found the captive production provision to apply in this case, we have focused primarily on the merchant market in assessing market share and the factors affecting financial performance. The SAA makes clear, however, that we are not to focus exclusively on the merchant market. We read the statute as requiring in all cases that the Commission determine material injury with respect to the industry as a whole, including the industry's performance with respect to both merchant market operations and captive production.

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<sup>17</sup> *Id.* at 13.

<sup>18</sup> We do not agree with an approach that does not take into account the relative shares of downstream products produced captive, because such an approach does not assess the degree of overlap in the two channels, and can lead to anomalous results. For example, the third criterion would still be met when one percent of captive production is used to make the downstream product that accounts for 100 percent of merchant market sales of the like product.

<sup>19</sup> Having found the captive production provision to apply in this investigation, we have also considered whether subject imports are imported by a related party and captively consumed by that importer. *See* SAA at 853. The SAA defines “captive production” as a situation in which “U.S. *producers* . . . internally transfer a significant volume of their production of that same like product for further internal processing into a distinct downstream article. . . .” SAA at 852 (emphasis added). Presumably, captive production has an analogous meaning in the context of related party imports. Applying this definition, this SAA provision would apply only to imports by parties related to foreign *producers* of subject merchandise, which are then captively consumed in the United States. In this case, no importer of subject merchandise who captively consumed its imports is owned or controlled by any of the foreign producers. Thus, there are no “related party importers” as that term is used in the SAA.



## **FURTHER VIEWS OF COMMISSIONER KOPLAN CONCERNING THE THIRD CRITERION OF THE CAPTIVE PRODUCTION PROVISION**

Commissioner Koplan joins Vice Chairman Miller and Commissioner Hillman in the foregoing interpretation of the relatively ambiguous third criterion of the captive production provision. He also notes, however, that this third criterion alternatively could be read as requiring an examination of whether the domestic producers generally use merchant market purchases of the domestic like product in their production of the downstream articles. The provision is not specific as to which entity uses the merchant market domestic like product in the production of the downstream articles. The foregoing discussion in which he joined Vice Chairman Miller and Commissioner Hillman would apply if the provision is read to require an examination of whether the merchant market purchaser is generally using the domestic like product in the production of the same downstream articles as the integrated domestic producers.

However, the provision also could be read as requiring the Commission to establish whether the integrated domestic producers generally utilize the merchant market like product in their production of the downstream articles. Such an analysis would comport with the entire captive production provision in that it would focus on the nature of transfers of the domestic like product, rather than on the nature of the downstream articles produced from the domestic like product. In addition, the third criterion focuses on whether the merchant market like product is “generally used in the production of that downstream article.” The antecedent reference to the downstream article referred to in the third criterion first appears in the threshold criterion of the provision as well as in the first and second criteria. Each of these other references to the downstream articles in the captive production provision appears to refer to the downstream articles manufactured by the integrated domestic producers.

Under this interpretation of the third criterion, it would operate in tandem with the first criterion to establish whether the domestic integrated producers generally purchase hot-rolled steel on the merchant market for the production of their downstream articles. In some instances, the integrated domestic producers may face a “make or buy” situation, or they may purchase significant quantities on the domestic open market to supplement their capacity or to fill in for production shutdowns. If a significant volume of the domestic like product is purchased from the open market by the integrated producers, there would be no justification for focusing primarily on the merchant market. In that instance, the market share and other data typically used by the Commission in its analysis should not be affected by the existence of internal transfers since significant quantities of the open market domestic like product is consumed by the integrated producers.

Conversely, if the domestic like product transferred internally for further processing does not enter the merchant market (criterion one) and the integrated producers do not generally purchase the domestic like product from the merchant market (criterion three), then there might be justification for not analyzing the imports in the same manner as the internal production. Under those circumstances, the integrated producers generally do not participate in the merchant market, either as sellers or as purchasers, for that portion of the domestic like product that is internally consumed. In that instance, the provision would require the Commission to focus primarily (but not exclusively) on the merchant market for market shares and the so-called impact factors in reaching its determination regarding the effect of subject imports on the producers of the domestic like product. Thus, under this interpretation of the provision, Congress has directed the Commission to focus primarily on the merchant market only where there is not a significant flow of merchant market product into or out of the stream of internal production of the downstream articles. Under that interpretation, Commissioner Koplan finds that the third criterion would be met because in the instant case the domestic producers do not generally utilize merchant market hot-rolled product in the production of their downstream articles.

Commissioner Koplan further notes that his determination regarding the applicability of the captive production provision is in some sense rather academic. In any investigation involving significant internal consumption of the domestic like product, he likely would look to the merchant market as an indication of the effects of direct competition between the domestic industry and the unfairly traded imports. Merchant market operations will be affected differently and more directly than will the operations of the domestic industry internally consuming the domestic like product. Similarly, any ultimate determination of material injury or threat of material injury by reason of the subject imports would still involve an analysis of the domestic industry as a whole, whether or not the captive production provision is deemed to apply in any particular investigation.

## VIEWS OF COMMISSIONER CAROL T. CRAWFORD

On the basis of information obtained in this investigation, I determine that the industry in the United States producing certain hot-rolled carbon steel products is materially injured by reason of imports of certain hot-rolled carbon steel products from Japan that are sold in the United States at less-than-fair-value (“LTFV”). I join my colleagues in the findings with respect to like product and domestic industry, in the decision to cumulate the subject imports from Japan, Russia, and Brazil, and in the discussion of the conditions of competition that are distinctive to the domestic industry.<sup>1</sup> I also join the majority in making a negative critical circumstances finding. However, for the reasons discussed below, I do not join the remainder of the majority views.

### I. INTRODUCTION

Although I concur in the majority’s determination that the domestic industry is materially injured by reason of the subject imports, my analysis and reasoning differ significantly. With respect to the captive production provision of the statute, I find that it does not apply. Therefore, I have focused my analysis on the total U.S. market, and have not evaluated the effects of the subject imports on the merchant market. Consequently, the discussion of the merchant market in the majority views is not relevant to my determination.

The majority’s analysis of the conditions of competition includes a discussion of differences between integrated producers and minimills in terms of per unit costs, productivity and competition in the merchant market. While I agree that these differences exist and are important, my analysis focuses on the domestic industry as a whole. Thus the majority’s discussion regarding minimill producers, either collectively or as individual producers, does not apply to my analysis.

A further, fundamental difference between the majority’s analysis and my own is the baseline, or point of comparison, against which to measure the state of the industry (as factually described by the evidence in the record) when making a determination of material injury by reason of the subject imports. My determination results from a comparison of the industry’s present condition with the condition the industry would have experienced had the subject imports not been unfairly traded. On the other hand, a trends analysis compares the condition of the industry with some baseline point in the past when the industry was “healthy,” “normal,” or “doing better.” If the industry is not performing as well as it was at the point in time selected for comparison, it is found to be injured. In my view, this analysis is inadequate for several reasons. Selection of an earlier point in time to define the industry’s profile can be arbitrary, usually differs from the time period for which the Department of Commerce has calculated subsidies or dumping margins, and lacks transparency. It is often the case, as it is here, that the baseline point in time determines the outcome.<sup>2</sup> This lack of transparency leads to a lack of predictability for the market participants that are directly affected by the Commission’s decisions. These problems are compounded when part-year baselines are used.

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<sup>1</sup> For a discussion of my finding regarding the analysis of captive production, *see* Views of Chairman Lynn M. Bragg, Commission Carol T. Crawford, and Commissioner Thelma J. Askey Regarding the Captive Production Provision.

<sup>2</sup> The instant record clearly establishes that the domestic industry is doing well, and is, in the abstract, quite healthy. The domestic industry is operating effectively at full capacity, and its income was substantial in all three years for which data were collected: \$431 million in 1996; \$1.25 billion in 1997; and \$560 million in 1998. Comparing 1996 to 1998 could justify a finding of no material injury, while comparing 1997 to 1998 could justify a finding that the domestic industry *is* materially injured. Transparency and predictability are further diminished if part-year comparisons are used for analysis. If part-year baselines can be justified, they should be adopted consistently, regardless of the outcome, in order to provide market participants a reasonable measure of predictability.

My determination of material injury by reason of subject imports is not based on a timeline comparison. In 1997, the industry had an exceptionally good year, earning operating income of \$1.25 billion. In 1998, the industry also was doing quite well, earning operating income of \$560 million. However, in my view, this level of very healthy profits is not inconsistent with being injured. A runner might win his race even with a sprained ankle. The measure of his injury is not whether he wins. Rather, it is how much better his time would have been had he not sprained his ankle. Just as an exceptionally talented runner might win a race notwithstanding a sprained ankle, it is reasonable to expect that an industry can be doing well in spite of competition from unfairly traded imports.<sup>3</sup> The measure of injury is not whether the industry is doing well, but whether it would have been doing even better had the imports not been unfairly traded. My analysis, described in detail below, adopts a baseline that I believe more accurately reflects both the intent of the statute and realities in the marketplace.

For the foregoing reasons, and because my analysis differs from the majority, my separate views follow.

## II. ANALYTICAL FRAMEWORK

In determining whether a domestic industry is materially injured by reason of the subsidized and LTFV imports, the statute directs the Commission to consider:

- (I) the volume of imports of the merchandise which is the subject of the investigation,
- (II) the effect of imports of that merchandise on prices in the United States for like products, and
- (III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States . . .<sup>4</sup>

In making its determination, the Commission may consider “such other economic factors as are relevant to the determination.”<sup>5</sup> In addition, the Commission “shall evaluate all relevant economic factors which have a bearing on the state of the industry . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>6</sup>

The statute directs that we determine whether a domestic industry is materially injured “by reason of” the unfairly traded imports. Thus we are called upon to evaluate the effect of subsidized and dumped imports on the domestic industry and determine if they are causing material injury. There may be, and often are, other “factors” that are causing injury. These factors may even be causing greater injury than the subsidies and dumping. However, the statute does not require us to weigh or prioritize the factors that independently are causing material injury. Rather, the Commission is to determine whether any injury “by reason of” the unfairly traded imports is material. That is, the Commission must determine if the subject imports are causing material injury to the domestic industry. “When determining the effects of imports on the domestic industry, the Commission must consider all relevant factors that can demonstrate if unfairly traded imports are materially

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<sup>3</sup> An ice cream vendor provides a commercial analogy. A busy ice cream vendor in the park might sell a lot of ice cream cones on a Sunday, even if the streets are blocked off. Nonetheless, he is still “injured” if the blocked streets reduced his customers and sales below what they would have been had the streets been open.

<sup>4</sup> 19 U.S.C. § 1677(7)(B)(I).

<sup>5</sup> 19 U.S.C. § 1677(7)(B)(ii).

<sup>6</sup> 19 U.S.C. § 1677(7)(C)(iii).

injuring the domestic industry.<sup>7</sup> It is important, therefore, to assess the effects of the unfairly traded imports in a way that distinguishes those effects from the effects of other factors unrelated to the subsidies and dumping. To do this, I compare the current condition of the industry to the industry conditions that would have existed without the subsidies and dumping, that is, had the subject imports all been fairly priced. I then determine whether the change in conditions constitutes material injury.<sup>8</sup>

In my analysis of material injury, I evaluate the effects of the subsidies and dumping<sup>9</sup> on domestic prices, domestic sales, and domestic revenues. To evaluate the effects of the subsidies and dumping on domestic prices, I compare domestic prices that existed when the imports were subsidized and dumped with what domestic prices would have been if the imports had been priced fairly. Similarly, to evaluate the effects of the subsidies and dumping on the quantity of domestic sales,<sup>10</sup> I compare the level of domestic sales that existed when imports were subsidized and dumped with what domestic sales would have been if the imports had been priced fairly. The combined price and quantity effects translate into an overall domestic revenue impact. Understanding the impact on the domestic industry's prices, sales, and overall revenues is critical to determining the state of the industry, because the effects on the statutory impact factors<sup>11</sup> (e.g., employment, wages, etc.) are derived from the impact on the domestic industry's prices, sales, and revenues.

I then determine whether the price, sales, and revenue effects of the subsidies and dumping, either separately or together, demonstrate that the domestic industry would have been materially better off if the imports had been priced fairly. If so, the domestic industry is materially injured by reason of the subsidized and dumped imports.

For the reasons discussed below, I determine the domestic industry producing certain hot-rolled carbon steel products is materially injured by reason of the subject imports.

### III. CONDITIONS OF COMPETITION

To understand how an industry is affected by unfair imports, we must examine the conditions of competition in the domestic market. The conditions of competition constitute the commercial environment in which the domestic industry competes with unfair imports, and thus form the foundation for a realistic assessment of the effects of the subsidies and dumping. This environment includes demand conditions, substitutability among and between products from different sources, and supply conditions in the market.

#### A. Demand Conditions

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<sup>7</sup> S. Rep. No. 100-71 at 116 (1987)(emphasis added); Gerald Metals, Inc. v. United States, 132 F.3d 716 (Fed. Cir. 1997) (rehearing denied).

<sup>8</sup> 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 my mode of analysis, expressly holding that my 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, at 1361 (Fed.Cir. 1996), *aff’g* 873 F.Supp. 673, 694-695 (Ct. Int’l Trade 1994).

<sup>9</sup> As part of its consideration of the impact of imports, the statute as amended by the URAA now specifies that the Commission is to consider in an antidumping proceeding, “the magnitude of the margin of dumping.” 19 U.S.C. § 1677(7)(C)(iii)(V).

<sup>10</sup> In examining the quantity sold, I take into account sales from both existing inventory and new production.

<sup>11</sup> 19 U.S.C. § 1677(7)(C)(iii).

An analysis of demand conditions tells us what options are available to purchasers, and how they are likely to respond to changes in market conditions, for example an increase in the general level of prices in the market. Purchasers generally seek to avoid price increases, but their ability to do so varies with conditions in the market. The willingness of purchasers to pay a higher price will depend on the importance of the product to them (e.g., how large a cost factor), whether they have options that allow them to avoid the price increase, for example by switching to alternative products, or whether they can exercise buying power to negotiate a lower price. An analysis of these demand-side factors tells us whether demand for the product is elastic or inelastic, that is, whether purchasers will reduce the quantity of their purchases if the price of the product increases. For the reasons discussed below, I find that the overall elasticity of demand for certain hot-rolled carbon steel products is relatively low. Therefore, purchasers are not likely to reduce their purchases if prices for these products increase.

Importance of the Product and Cost Factor. Key factors that measure the willingness of purchasers to pay higher prices are the importance of the product to purchasers and the significance of its cost. In the case of an intermediate product (e.g., an input), the importance will depend on its cost relative to the total cost of the downstream product in which it is used. When the price of the input is a small portion of the total cost of the downstream product in which it is used, changes in the price of the input are less likely to alter demand for the input or for the downstream product.

Record evidence shows that the cost share of the hot-rolled carbon steel products under investigation here accounts for a relatively high percentage of the intermediate downstream products in which they are used.<sup>12</sup> This high cost share, suggesting a high elasticity of demand, is offset by the substantially smaller cost share in the final downstream products in which they are used.

Alternative Products. Another important factor in determining whether purchasers would be willing to pay higher prices is the availability of viable alternative products. Often purchasers can avoid a price increase by switching to alternative products. If such an option exists, it can impose discipline on producer efforts to increase prices.

Information on the record indicates that only very limited alternative products are available that can substitute for certain hot-rolled carbon steel products.<sup>13</sup> The limited availability of alternative products indicates that demand is likely to be quite inelastic.

Based on the small cost share of certain hot-rolled carbon steel products in the final downstream products in which they are used and the limited availability of substitutable alternative products, I find that the overall elasticity of demand for certain hot-rolled carbon steel products is relatively low. That is, purchasers will not reduce significantly the amount of these hot-rolled carbon steel products they buy in response to a general increase in prices for these products.

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<sup>12</sup> CR at III-7; PR at II-6.

<sup>13</sup> CR at II-12 and II-30; PR at II-4 and II-15.

## B. Substitutability

Simply put, substitutability measures the similarity or dissimilarity of imported versus domestic products from the purchaser's perspective. Substitutability depends upon 1) the extent of product differentiation, measured by product attributes such as physical characteristics, suitability for intended use, design, convenience or difficulty of usage, quality, etc.; 2) differences in other non-price considerations such as reliability of delivery, technical support, and lead times; and 3) differences in terms and conditions of sale. Products are close substitutes and have high substitutability if product attributes, other non-price considerations, and terms and conditions of sale are similar.

While price is nearly always important in purchasing decisions, non-price factors that differentiate products determine the value that purchasers receive for the price they pay. If products are close substitutes, their value to purchasers is similar, and thus purchasers will respond more readily to relative price changes. On the other hand, if products are not close substitutes, relative price changes are less important and are therefore less likely to induce purchasers to switch from one source to another.

Because demand elasticity for certain hot-rolled carbon steel products is relatively low, overall purchases will not decline significantly if the overall prices of certain hot-rolled carbon steel products increase. However, purchasers can avoid price increases from one source by seeking other sources of certain hot-rolled carbon steel products. In addition to any changes in overall demand for certain hot-rolled carbon steel products, the demand for certain hot-rolled carbon steel products from different sources will decrease or increase depending on their relative prices and their substitutability. If certain hot-rolled carbon steel products from different sources are substitutable, purchasers are more likely to shift their demand when the price from one source (i.e., subject imports) increases. The magnitude of this shift in demand is determined by the degree of substitutability among the sources.

Purchasers have three potential sources of certain hot-rolled carbon steel products: the domestic product, subject imports, and nonsubject imports. Purchasers are more or less likely to switch from one source to another depending on the similarity, or substitutability, between and among them. I have evaluated the substitutability among certain hot-rolled carbon steel products from the different sources as follows.

Based on the information in the record, I find that the domestic products are at best moderate substitutes for the subject imports from Brazil and Japan, and poor substitutes for the subject imports from Russia and nonsubject imports. I further find that the subject imports from Brazil and Japan are fairly good substitutes for each other, at best moderate substitutes for the subject imports from Russia, and moderate substitutes for nonsubject imports. Finally, I find that nonsubject imports are poor substitutes for the domestic products and for the subject imports from Russia.

Overall, there is a basic level of substitutability among subject imports, nonsubject imports, and the domestic like product because all three generally must meet ASTM specifications. In addition, the record indicates that substantial amounts of the domestic product, subject imports and nonsubject imports are sold in the same channels of distribution, particularly to distributors, processors or service centers, and to manufacturers of tubular products.<sup>14</sup> However, the overall substitutability is reduced by nonprice factors.

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<sup>14</sup> Figure II-1.

In comparing the domestic like product and the subject imports, the record shows that a majority of importers found that the domestic products and the subject imports were broadly interchangeable.<sup>15</sup> When importers considered products not interchangeable, they typically cited quality differences and the availability of particular grades, sizes, or finishing options as the reasons. With regard to the Japanese products, importers indicated that these products had certain advantages when compared to the domestic products, including better quality in some instances, thinner gauge, longer coils, larger widths, consistent quality, better formability, weldability, accuracy of flatness, and surface cleanliness.<sup>16</sup> Importers found that the Russian imports differed from the domestic products and the other subject imports, particularly with regard to quality, as Russian products generally do not always meet ASTM requirements; have a higher sulfur content and a higher phosphorus content that negatively affect ductility and chemistry; and may have problems with packaging and transportation damage.<sup>17</sup> Other importers indicated that these quality differences in the Russian products limit its end uses when compared to the other subject imports and the domestic products. Another significant difference between the domestic products and the subject imports occurs in lead times. In 1998, the average lead times for products produced to order varied from 48 days for the domestic products, 99 days for the Brazilian products, 113 days for the Japanese products, and 115 days for the Russian products.<sup>18</sup>

Purchasers also indicated that, with regard to product characteristics such as surface quality, tight gauge control, steel cleanliness, etc., a majority would purchase certain hot-rolled steel products from the domestic industry, Japan, and Brazil, but an overwhelming majority would not purchase the Russian products.<sup>19</sup> Additionally, when purchasers compared the subject imports regarding product consistency and quality, the Japanese and Brazilian products were rated superior to the Russian products by nearly all responding purchasers. For these reasons, the subject imports from Russia are at best moderate substitutes for the subject imports from Japan and Brazil.

Based on the preceding discussion of product characteristics, the quality of the subject imports from Brazil and Japan is at least as good as, and perhaps better than, the quality of the domestic products. Purchasers also stated that with regard to quality, the Japanese products were perceived by all purchasers as superior to the Brazilian products. However, purchasers were split on the issue of product consistency as half indicated that the Japanese product was superior to the Brazilian product, while the other half found that the two products were comparable.<sup>20</sup> There is no other information to indicate that substitutability among these sources is reduced, and therefore, based on this evidence, it would appear that subject imports from Brazil and Japan are fairly good substitutes for each other and the domestic products. However, 63.7 percent of domestic consumption was consumed captively in 1998.<sup>21</sup> Thus, less than 40 percent of domestic production is available for open market purchasers to buy. This condition of competition by definition reduces substitutability substantially. Given this large amount of domestic captive consumption, I find that the subject imports from Brazil and Japan can, at best, be considered moderate substitutes for the domestic product.

The quality of subject imports from Russia, as discussed above, is considerably lower than the quality of the domestic products, thus reducing the substitutability between these two sources. The large amount of domestic captive consumption further reduces substantially the substitutability between the domestic products

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<sup>15</sup> CR at II-24; PR at II-11.

<sup>16</sup> CR at II-17; PR at II-8.

<sup>17</sup> CR at II-18; PR at II-8.

<sup>18</sup> CR at II-23; PR at II-11.

<sup>19</sup> Table at CR II-24; Table at PR II-11.

<sup>20</sup> Table II-6.

<sup>21</sup> Table I-2.

and the subject imports from Russia. For these reasons, I find that the subject imports from Russia and the domestic products are poor substitutes for each other.

The record indicates that nonsubject imports, the domestic products and subject imports from Brazil and Japan are not differentiated substantially from each other by quality and other nonprice factors.<sup>22</sup> However, the lower quality of Russian imports reduces the substitutability between these subject imports and nonsubject imports. Thus, on this basis, nonsubject imports are likely fairly good substitutes for the domestic products and the Brazilian and Japanese imports, but likely only moderate substitutes for Russian imports. However, less than one-fourth, but a significant portion, of the nonsubject imports is captively consumed in the U.S. market by the Pohang/U.S. Steel joint venture.<sup>23</sup> This amount of captive consumption of the nonsubject imports reduces the substitutability of nonsubject imports with other sources of supply. In light of the captive consumption of the nonsubject imports, I find that nonsubject imports are moderate substitutes for subject imports from Brazil and Japan, and poor substitutes for subject imports from Russia. Furthermore, the large amount of captive consumption of the domestic products also reduces substitutability, and thus I find that nonsubject imports and the domestic products are poor substitutes for each other.

Based on the above analysis, I find that the domestic products are at best moderate substitutes for the subject imports from Brazil and Japan, and poor substitutes for the subject imports from Russia and nonsubject imports. I further find that subject imports from Brazil and Japan are fairly good substitutes for each other, at best moderate substitutes for the subject imports from Russia, and moderate substitutes for nonsubject imports. Finally, I find that the subject imports from Russia are poor substitutes for nonsubject imports.

### C. Supply Conditions

Supply conditions in the market are a third condition of competition. Supply conditions determine how producers would respond to an increase in demand for their product, and also affect whether producers are able to institute price increases and make them stick. Supply conditions include producers' capacity utilization, their ability to increase their capacity readily, the availability of inventories and products for export markets, production alternatives and the level of competition in the market, especially with regard to the differences between integrated and mini-mills. For the reasons discussed below, I find that the elasticity of supply of certain hot-rolled carbon steel products is quite low.

Capacity Utilization and Capacity. Unused capacity can discipline prices. If there is a competitive market, no individual producer can make a price increase stick. Any attempt at a price increase by one producer would be beaten back by competitors who could produce more product to sell at the prevailing price. Nominal available capacity exceeded the total quantity of subject imports in 1998.<sup>24</sup> However, in 1998 the domestic industry's capacity utilization was quite high, at 87.5 percent.<sup>25</sup> In addition, record evidence indicates that there was a shortage in the market.<sup>26</sup> Based on the high level of capacity utilization and the evidence of shortages, I find that the domestic industry effectively operated at full capacity in 1998.

Inventories and Exports. The domestic industry had 2,771,350 short tons, representing 4.3 percent of production, of these hot-rolled carbon steel products in inventories available at the end of 1998 that it could

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<sup>22</sup> CR at II-28; PR at II-13.

<sup>23</sup> CR at II-28, n.16; PR at II-14, n.14.

<sup>24</sup> Table III-2 and Table IV-2.

<sup>25</sup> Table III-2.

<sup>26</sup> Table II-2.

have shipped into the U.S. market.<sup>27</sup> The domestic industry's exports are very small, and thus do not represent a significant source of supply.<sup>28</sup> Therefore the domestic industry had only small inventories and very small exports available that could have filled the demand supplied by subject imports.

Level of Competition. The level of competition in the domestic market has a critical effect on producer responses to demand increases. A competitive market is one with a number of suppliers in which no one producer has the power to influence price significantly. In the U.S. market, there are at least 24 domestic producers of certain hot-rolled carbon steel products, and thus there is significant competition within the domestic industry.

Nonsubject imports are not a substantial source of competition in this market, accounting for only 5.9 percent of consumption by volume in 1998.<sup>29</sup> Even though there is only limited competition from nonsubject imports, the competition among domestic producers indicates that there is a significant level of competition in the U.S. market for certain hot-rolled carbon steel products.

Notwithstanding the level of competition in the U.S. market, the domestic industry's ability to supply the demand for subject imports is extremely limited, and consequently I find that the elasticity of supply is quite low.

#### IV. MATERIAL INJURY BY REASON OF LTFV IMPORTS OF CERTAIN HOT-ROLLED CARBON STEEL PRODUCTS FROM JAPAN

The statute requires us to consider the volume of subject imports, their effect on domestic prices, and their impact on the domestic industry. I consider each requirement in turn.

##### A. Volume of Subject Imports

As stated previously, for purposes of my determination with respect to the subject imports from Japan, I have cumulated the subject imports from Japan, Russia, and Brazil. The volume of the cumulated subject imports increased from 1,342,905 short tons in 1996 to 3,001,525 short tons in 1997 and to 6,979,859 short tons in 1998. The value of subject imports was \$410.1 million in 1996, \$913.8 million in 1997, and \$1,858 million in 1998.<sup>30</sup> By quantity, subject imports held a market share of 2.0 percent in 1996, 4.2 percent in 1997, and 9.3 percent in 1998. Their market share by value was 1.9 percent in 1996, 4.1 percent in 1997, and 8.4 percent in 1998.<sup>31</sup> 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 its price and volume effects. Based on the market share of cumulated subject imports and the conditions of competition in the domestic market, I find that the volume of the subject imports is significant in light of its price and volume effects.

##### B. Effect of Subject Imports on Domestic Prices

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<sup>27</sup> Table C-1 and Table III-4.

<sup>28</sup> Table III-3.

<sup>29</sup> Table IV-9.

<sup>30</sup> Table IV-2.

<sup>31</sup> Table IV-9.

To determine the effect of the subject imports on domestic prices, I examine whether the domestic industry could have increased its prices if the subject imports had not been subsidized and dumped. As discussed, both demand and supply conditions in the domestic market are relevant. Examining demand conditions helps us understand whether purchasers would have been willing to pay higher prices for the domestic product, or buy less of it, if the subject imports had been sold at fairly traded prices. Examining supply conditions helps us understand whether available capacity and competition among suppliers to the market would have imposed discipline and prevented price increases for the domestic product, even if subject imports had not been unfairly priced.

If the subject imports had not been subsidized and dumped, their prices in the U.S. market would have increased significantly. Thus, if subject imports had been fairly priced, they would have become more expensive relative to domestic certain hot-rolled carbon steel products. In such a case, if subject imports are good substitutes with other certain hot-rolled carbon steel products, purchasers would have shifted towards the relatively less expensive products.

The margins vary by country, but generally are quite large, ranging from 17.86 percent to 67.14 percent for Japan; over 70 percent for Russia; and over 50 percent for Brazil.<sup>32</sup> Therefore, subject imports likely would have been priced significantly higher had they been fairly traded. At the higher, fairly traded prices it is likely that all or nearly all of the demand for the subject imports would have shifted to other sources of supply.

The domestic products and the subject imports from Brazil and Japan are at best moderate substitutes for each other, while the subject imports from Brazil and Japan are moderate substitutes for the nonsubject imports. Therefore, it is likely that, at fairly traded prices, the demand for the subject imports from Brazil and Japan likely would have shifted to both the nonsubject imports and the domestic products. Even though the subject imports from Russia are only poor substitutes for both the domestic products and the nonsubject imports, it is likely that, at fairly traded prices, the demand for the subject imports from Russia also would have shifted to both the domestic products and nonsubject imports. Because subject imports held a cumulated market share of 9.3 percent by quantity in 1998,<sup>33</sup> the shift in demand away from the subject imports would not have been extremely large. Nonsubject imports accounted for only 5.9 percent of the market in 1998,<sup>34</sup> and thus represent only limited competition for the domestic industry. Therefore, nearly all of the demand for the subject imports would have shifted to the domestic products. Even though the shift in demand would not have been extremely large, it would have been sufficiently large that the shift in demand toward the domestic products would have been significant.

The elasticity of demand indicates that domestic suppliers should have been able to increase prices in response to this shift in demand. Although competition from nonsubject imports is limited, there is significant competition among producers within the domestic industry, competitive conditions that normally indicate that price discipline exists in the market. However, the domestic industry is effectively operating at full capacity, and thus has only a very limited ability to supply the demand satisfied by the subject imports. Consequently, the competition among domestic producers would not have enforced price discipline in the market. In addition,

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<sup>32</sup> The Department of Commerce (“Commerce”) has made its final LTFV determination for the subject imports from Japan. Commerce has made only preliminary determinations that the subject imports from Russia are sold at LTFV and that the subject imports from Brazil are subsidized and sold at LTFV. The preliminary antidumping duty margins for Russia are 70.66 - 217.67 percent. The preliminary antidumping and countervailing duty margins for Brazil are 50.66 - 71.02 percent and 6.62 - 9.45 percent, respectively.

<sup>33</sup> Table IV-9.

<sup>34</sup> Table IV-9.

the domestic industry dominates the U.S. market, accounting for about 85 percent of consumption.<sup>35</sup> Because nonsubject imports are such a small presence in the market, it is likely that the domestic industry would have had sufficient market power to be able to increase its prices. In these circumstances, the domestic industry likely would have increased its prices had the subject imports been sold at fairly traded prices. Consequently, I find that subject imports are having significant effects on prices for the domestic hot-rolled carbon steel products.

### C. Impact of Subject Imports on the Domestic Industry

To assess the impact of subject imports on the domestic industry, I consider 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.<sup>36</sup> These factors together either encompass or reflect the volume and price effects of the subsidized and dumped imports, and so I gauge the impact of the subsidies and dumping through those effects.

As I have discussed, the domestic industry would have increased its prices significantly if the subject imports had been sold at fairly traded prices. However, because the domestic industry is effectively operating at full capacity, it would not have been able to increase its output and sales significantly in response to the shift in demand towards the domestic products. Although the domestic industry had inventories available to respond to the shift in demand, its inventories were rather small, and thus any increase in the domestic industry's sales would have been slight. Therefore, the domestic industry likely would not have increased its output significantly and would have increased its sales only slightly had the subject imports been sold at fairly traded prices. Consequently, the impact of the subject imports on the domestic industry would not have been significant.

### V. CONCLUSION

On the basis of the foregoing analysis, I find that the domestic industry would have increased its output and sales only slightly, but would have increased its prices, and therefore its revenues, significantly had the subject imports been fairly traded. Therefore, I find that the domestic industry would have been materially better off if the subject imports had not been subsidized and dumped. Consequently, I determine that the domestic industry producing certain hot-rolled carbon steel products is materially injured by reason of LTFV imports of certain hot-rolled carbon steel products from Japan.

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<sup>35</sup> Table IV-9.

<sup>36</sup> 19 U.S.C. § 1677(7)(C)(iii).

## **ADDITIONAL AND DISSENTING VIEWS OF COMMISSIONER THELMA J. ASKEY**

I do not find that the record in this case supports a determination that the domestic hot-rolled steel industry is suffering material injury by reason of Japanese imports sold in the United States at less than fair value (“LTFV”). I find, however, that the domestic industry is threatened with material injury by reason of the subject imports.<sup>1</sup>

I join the majority’s definition of the domestic like product and the domestic industry, its analysis regarding cumulation of imports from Japan, Russia, and Brazil for purposes of the present material injury determination, and its description of the relevant conditions of competition. My conclusions regarding the inapplicability of the captive production provision are also set forth in the majority’s determination. Below I set forth the reasoning leading to my conclusion that the domestic industry is not currently materially injured, but is threatened with material injury, by reason of the subject imports.

### **I. THE DOMESTIC INDUSTRY IS NOT MATERIALLY INJURED BY REASON OF SUBJECT IMPORTS**

In considering whether the domestic industry is being injured by the subject imports, the Commission is statutorily directed to consider the volume of the subject imports, their effect on prices in the United States for the domestic like product, and the impact of the imports on domestic producers of the domestic like product.<sup>2</sup> The Commission may also consider other relevant economic factors.<sup>3</sup> For the purpose of analyzing volume and price in its material injury determination, the Commission must cumulatively assess the volume and effect of the subject merchandise for all countries for which petitions were filed on the same day if such imports compete with each other and with the domestic like product in the United States.<sup>4</sup> I agree with the Commission’s conclusion that the requirements for cumulation have been met in this case and I have cumulatively assessed the volume and effect of the subject merchandise.

#### **A. Volume**

In considering the volume of the subject imports, the statute directs the Commission to consider whether the volume of the subject imports, or any increase in that volume (either in absolute terms or relative to production or consumption in the United States) is significant.<sup>5</sup>

The volume of subject imports increased from 1.34 million short tons in 1996 to 6.98 million short tons in 1998.<sup>6</sup> This increase, though large in absolute terms, is not significant given the size of the U.S.

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<sup>1</sup> I have not made a “critical circumstances” finding because I determined that the domestic injury was threatened with material injury. The Commission has determined that a critical circumstances finding is triggered by a finding of present material injury. In addition, a critical circumstances finding would have no practical utility in a threat case where duties are imposed only from the date of the final determination. See, Collated Roofing Nails from China and Taiwan, Invs. Nos. 731-TA-757 and 759 (Final), USITC Pub. 3070 at 24-25 (Nov. 1997).

<sup>2</sup> 19 U.S.C. § 1677(7)(B).

<sup>3</sup> Id.

<sup>4</sup> 19 U.S.C. § 1677(7)(G).

<sup>5</sup> 19 U.S.C. § 1677(7)(C)(i).

<sup>6</sup> Confidential Staff Report (“CR”) and Public Staff Report (“PR”) at Table IV-7.

market for hot-rolled steel -- U.S. consumption was 75.25 million short tons in 1998.<sup>7</sup> The increase in subject imports has resulted in a 7.3 percentage point rise in market share, so that in 1998 subject imports held only 9.3 percent of the U.S. market, while the U.S. industry had a dominant market share of 84.8 percent.<sup>8</sup> Nonsubject imports maintained a relatively steady market share of 5.7 percent in 1996 and 5.9 percent in 1998.<sup>9</sup>

## **B. Price**

In considering the price effects of the subject imports, the statute directs the Commission to consider: 1) whether there has been significant price underselling by the subject imports as compared with the price of domestic products; and 2) whether the subject imports otherwise depress prices to a significant degree or prevent price increases (that would otherwise have occurred) to a significant degree.<sup>10</sup>

Data on underselling is often of uncertain value, particularly in cases such as this when only small quantities of subject merchandise were imported in many of the quarters for which comparisons could be made. Japanese imports undersold the domestic products in fewer than half of the instances in which comparisons could be made.<sup>11</sup> Brazilian imports showed more consistent underselling, but the results were still mixed.<sup>12</sup> Further, although the Russian product undersold the domestic product in the large majority of possible price comparisons, this underselling pattern may well be attributable to quality differences between Russian and domestic merchandise.<sup>13</sup>

Prices for the domestic like product unquestionably fell over the POI. The average unit values (“AUVs”) for U.S. producers’ U.S. shipments fell from \$309.21 in 1996 to \$297.22 in 1998.<sup>14</sup> Staff collected pricing comparisons for four common types of hot-rolled steel. Generally speaking, for all four products AUVs reached their height in mid 1997 and declined in 1998 to reach their lowest levels at the end of 1998.<sup>15</sup>

Looking at the record as a whole, imports do not appear to have had significant price suppressing or depressing effects during the three-year period the Commission has traditionally examined in making its material injury determination. Prices unquestionably fell at the end of the period, but overall AUVs did not decline significantly. As discussed below in the impact section, price declines may be attributable to factors other than unfair import competition.

## **C. Impact**

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<sup>7</sup> CR and PR at Table C-1.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> 19 U.S.C. § 1677(7)(C)(ii).

<sup>11</sup> Table at CR V-18; table at PR V-15.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> CR and PR at Table C-1.

<sup>15</sup> CR and PR at Figure V-2.

For purposes of assessing the impact of the subject imports on the domestic industry, the statute directs the Commission to consider several factors, including: 1) declines in the industry's output (i.e., production), sales, market share, profits, productivity, return on investments and capacity utilization; 2) factors affecting domestic prices; 3) negative effects on the industry's cash flow, inventories, wages, growth, and ability to raise capital and investment; 4) negative effects on their existing development and production efforts; and 5) the size of the margin.<sup>16</sup>

The domestic industry's production and sales have in fact grown over the period of investigation. Domestic production and shipments have remained at or near record levels throughout the POI. Production increased 1.1 percent over the POI, while shipments increased 0.9 percent.<sup>17</sup> The industry's market share has declined by 7.5 percent over the POI, with most of the decline (6.0 percent) coming between 1997 and 1998.<sup>18</sup> The domestic industry maintained its productivity and sales over the POI, but did not capture increased sales opportunities presented by rising demand and therefore lost market share.

The domestic industry's profits remained positive throughout the period of investigation, though their levels fluctuated. Operating income rose from \$430.8 million in 1996 to a high of \$1.25 billion in 1997, then fell to \$560.5 million in 1998.<sup>19</sup> Operating margins also fell from a high of 5.5 percent in 1997 to 2.6 percent in 1998. The number of production and related workers employed by the domestic industry fell 3.2 percent over the POI, but productivity during the same period increased by 8.6 percent.<sup>20</sup> Hourly wages rose by \$1.42.<sup>21</sup> In addition, the industry has increased capacity by 9.2 percent from 1996 to 1998, and has managed to maintain generally high levels of capacity utilization, ranging from 94.5 percent in 1996 to a still-high 87.5 percent in 1998.<sup>22</sup>

I have considered the financial position of the domestic industry as a whole because I found that the captive production provision does not apply. The fact that 63.7 percent<sup>23</sup> of domestic production is captively consumed is a relevant condition of competition, but the inapplicability of the captive production provision makes focus on the merchant market inappropriate. Moreover, I note that significant captive consumption effectively protects the domestic industry by providing integrated producers with a guaranteed market in which they do not compete with imports or with non-affiliated domestic producers.

The industry's capital expenditures and research and development expenses fell significantly over the POI, from \$1.67 billion in 1996 to \$714.8 million for capital expenditures and from \$4.0 million in 1996 to \$3.5 million in 1998 for R&D expenses.<sup>24</sup> R&D is not a significant factor in this mature industry; few firms reported it as an expense. These declines do not necessarily signify a prolonged drop in capital

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<sup>16</sup> 19 U.S.C. § 1677(7)(C)(iii). I note that Commerce has found dumping margins ranging from 17.86 percent to 67.14 percent for Japanese producers. 64 Fed. Reg. 24329, 24370 (May 6, 1999). Commerce's preliminary margins for Russian producers ranged from 70.66 percent to 217.67 percent. 64 Fed. Reg. 9312, 9318 (Feb. 25, 1999). Commerce's preliminary margins for Brazilian producers ranged from 50.66 percent to 71.02 percent. 64 Fed. Reg. 8299, 8308 (Feb. 19, 1999).

<sup>17</sup> CR and PR at Table C-1.

<sup>18</sup> Id.

<sup>19</sup> CR and PR at Table VI-5.

<sup>20</sup> CR and PR at Table C-1.

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> CR and PR at Table I-2.

<sup>24</sup> CR and PR at Table VI-7.

expenditures; the domestic industry cannot be expected to sustain record levels of investment in modernization and expansion every year.

Prices declined over the POI, but attributing the price declines to the effects of imports is less clear-cut. Price competition among various domestic producers is keen. Mini-mills, which use electric arc furnaces (“EAF”) as opposed to the basic oxygen furnaces (“BOF”) generally used by integrated producers, have a lower cost structure and significantly higher productivity than integrated mills.<sup>25</sup> They can sell at lower prices and to some degree constrain the prices that integrated mills can ask. Nucor, an EAF producer, is widely considered to be the industry price leader by purchasers.<sup>26</sup>

Overall, the evidence indicates that the domestic industry is not currently experiencing material injury by reason of the subject imports. Certainly the industry’s financial indicators were worse in 1998 than they had been in 1997, but in 1998 the industry remained profitable, and its profitability generally exceeded 1996 levels. Subject import volumes rose and those imports captured market share by supplying increased demand. However, import volumes did not cause the domestic industry to decrease production, although they may have limited the industry’s ability to gain market share in a period characterized by increased demand. Further, import volume increases may be attributed to the inability of the domestic industry to supply growing demand in the market at a time when it was operating at capacity utilization rates ranging from 87.5 to 94.5 percent.

## **II. Subject Imports Threaten the Domestic Industry with Material Injury**

Because I have concluded that the domestic industry is not materially injured by reason of the subject imports from Japan, I must also determine whether the industry is threatened with material injury by reason of those imports.<sup>27</sup> The statute directs me to consider nine enumerated factors when performing this threat analysis.<sup>28</sup> In making my determination, I have considered all statutory factors that are relevant to these investigations.<sup>29</sup>

When performing my threat analysis in these preliminary phase investigations, I have closely considered the statutory requirement that I assess whether “further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued . . .” before making an affirmative threat finding.<sup>30</sup> Moreover, I have closely considered the requirement that my determination may not be made “on the basis of mere conjecture or supposition.” Finally, I have considered the threat factors “as a whole” when making my threat determination.

### **A. Cumulation**

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<sup>25</sup> CR and PR at Tables C-3 & C-4.

<sup>26</sup> CR at II-1; PR at II-1.

<sup>27</sup> 19 U.S.C. §§ 1673d(b), 1677(7)(F).

<sup>28</sup> 19 U.S.C. §1677(7)(F).

<sup>29</sup> 19 U.S.C. § 1677(7)(F)(i). Factors I and VII of section 1677(7)(F)(i) are inapplicable. In addition, the record evidence indicates that the subject merchandise from Japan is not subject to antidumping findings or remedies in any country. CR at VII-6; PR at VII-4. See 19 U.S.C. § 1677(7)(F)(iii)(I).

<sup>30</sup> 19 U.S.C. §§ 1671b(a), 1673b(a), & 1677(7)(F)(ii).

The Commission has the discretion to cumulate imports of the subject merchandise for purposes of making its determination of threat of material injury if such imports meet certain statutory requirements, which are the same as those considered when deciding whether to cumulate for a present material injury determination.<sup>31</sup> In past cases, the Commission has also examined other factors, such as differences in pricing and volume trends among subject countries, in determining whether to cumulate for purposes of the threat determination.<sup>32</sup>

We have already determined that the subject imports in this case meet the statutory factors and therefore they may be cumulated for purposes of my threat determination. I have also examined other relevant factors, and for purposes of my threat analysis I have cumulated imports from Japan and Russia, but not from Brazil.

Brazilian hot-rolled steel is imported in much smaller volumes than steel from Japan and Russia and Brazilian import rates have increased at a considerably lower rate. Brazilian imports totaled 0.45 million short tons in 1998, while Japanese imports were 2.68 million tons and Russian imports were 3.84 million tons.<sup>33</sup> Brazilian imports accounted for only 0.6 percent of domestic consumption in 1998, while Japanese and Russian imports accounted for 3.6 and 5.1 percent, respectively.<sup>34</sup> Further, while imports from all three countries certainly increased over the POI, Brazilian imports grew at a dramatically lower rate (77.6 percent) than those from Japan and Russia (1,014.1 and 353.4 percent, respectively).<sup>35</sup> In addition, the vast bulk of the increase in Brazilian imports occurred from 1996 to 1997; Brazilian imports grew 71.8 percent in that period but increased only 3.4 percent from 1997 to 1998.<sup>36</sup> By contrast, Japanese imports increased by a greater percentage from 1997 to 1998 than from 1996 to 1997. Russian imports increased slightly less from 1997 to 1998 than from 1996 to 1997, but still nearly doubled from 1997 to 1998.<sup>37</sup>

As illustrated above, Japanese and Russian steel imports show similar volume trends. Though proportionately Japanese import volumes showed a greater increase over the period of investigation, Russian import volumes also increased several times over. Moreover, Japanese and Russian imports hold similar shares of the U.S. market -- 3.6 and 5.1 percent respectively. Given the similarities in volume trends and market penetration, I have determined it appropriate to cumulate imports from Japan and Russia for purposes of my threat analysis.

## **B. Analysis of Statutory Threat Factors**

When determining whether the domestic industry is threatened with material injury by reason of the subject imports, the Commission will often examine the health of the industry to determine whether the industry is “vulnerable” to material injury from subject imports, although “vulnerability” is not itself a

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<sup>31</sup> 19 U.S.C. § 1677(H).

<sup>32</sup> *Torrington Co. v. United States*, 790 F. Supp. 1161, 1172 (Ct. Int'l Trade 1992) (affirming Commission's decision not to cumulate for purposes of threat determination when pricing and volume trends among subject countries were not uniform and import penetration was extremely low for most of the subject countries).

<sup>33</sup> CR and PR at Table C-1.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

statutory threat factor. I do not find that the domestic industry is vulnerable in this case. The industry's financial indicators have remained positive, though they are down from 1997 levels.

The statute directs the Commission to consider whether there is "any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports."<sup>38</sup> Japanese producers' capacity is not expected to increase in 1999, but they do have excess capacity. Japanese producers were able to export significant volumes of subject merchandise operating at a 77.5 percent capacity utilization level in 1998. They therefore have excess capacity that they may utilize to increase production. In fact, they have projected an increase in capacity utilization to 86.4 percent in 1999.<sup>39</sup> This increase in capacity utilization corresponds to an increase of 4.8 million short tons of production, and would likely result in greater quantities of hot-rolled steel becoming available for export to the United States. Though some evidence suggests that the Asian market is recovering from its recent downturn and that Asian demand for steel will consequently increase, a U.S. market characterized by consistently strong demand seems a likely target for at least some of the additional production.

The Commission must also consider whether there has been "a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports."<sup>40</sup> Japanese imports alone have increased substantially over the period of investigation, and the rate of increase was much higher for the 1997-1998 period -- 389.2 percent -- than for the 1996-1997 period -- 127.8 percent.<sup>41</sup> Considering Japanese and Russian imports together, the volume of imports has increased 499.6 percent over the POI as a whole, and the volume of imports has more than doubled in each year of the POI.<sup>42</sup>

The market share of subject imports shows similar trends. Japanese market share doubled between 1996 and 1997 and then grew 350 percent between 1997 and 1998.<sup>43</sup> Japanese and Russian market shares together grew 167 percent between 1996 and 1997 and 141 percent between 1997 and 1998.<sup>44</sup> Japanese and Russian imports' share of the U.S. market grew two percentage points between 1996 and 1997 and grew 5.1 percentage points between 1997 and 1998, resulting in an 8.7 percent share of U.S. domestic consumption. The significant rate of increase in volume and market penetration indicate a likelihood of substantially increased imports.

The statute requires that the Commission consider "whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices and are likely to increase demand for further imports."<sup>45</sup> As was the case in determining whether subject imports were having price suppressive or depressive effects for the purpose of the present injury determination, attributing the decrease in prices to subject imports is somewhat difficult. Competition

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<sup>38</sup> 19 U.S.C. § 1677(F)(II).

<sup>39</sup> CR and PR at Table VII-2.

<sup>40</sup> 19 U.S.C. § 1677(F)(III).

<sup>41</sup> CR and PR at Table C-1.

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> 19 U.S.C. § 1677(F)(IV).

between domestic producers is keen, and domestic AUVs did not fall demonstrably in response to the lowering of foreign producers' prices.

Nevertheless, AUVs fell much more in the latter portion of the period of investigation than over the POI as a whole. This fact, coupled with increasing volumes of subject merchandise, indicates that imports are likely to have a significant depressing or suppressing effect on domestic prices and are likely to be in demand in the future. AUVs of the subject merchandise fell significantly more between 1997 and 1998 than between 1996 and 1997. Japanese AUVs fell \$50.94 from \$430.66 per short ton in 1996 to \$379.72 per short ton in 1997, and then fell by \$81.26 to \$298.46 in 1998.<sup>46</sup> AUVs for Russian imports actually rose from 1996 to 1997, but then fell \$39.97 from 1997 to 1998.<sup>47</sup>

The statute also directs the Commission to consider "inventories of the subject merchandise."<sup>48</sup> Japanese inventories in the United States increased from 5,635 short tons in 1996 to 158,638 short tons in 1998.<sup>49</sup> This is not only an absolute increase but also an increase in relative terms. The ratio of inventories to subject imports was 2.3 percent in 1996 and 5.9 percent in 1998.<sup>50</sup> Nevertheless, inventories remain relatively small when compared to total U.S. consumption.

The Commission is to consider whether there is a "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."<sup>51</sup> Japanese producers reportedly manufacture other products, such as cold-rolled steel, steel pipe, galvanized, or stainless steel products on the same equipment used to produce hot-rolled steel.<sup>52</sup>

Part of the Commission's threat determination is considering "the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product."<sup>53</sup> In this case, the domestic industry's level of aggregate capital investment has declined significantly from 1996 to 1998, falling from \$1.67 billion in 1996 to \$714.8 million in 1998.<sup>54</sup> Some of this decline may be explained by the significant capital improvements undertaken by the industry between 1996 and 1998, during which time the domestic producers increased production capacity by 9.2 percent.<sup>55</sup> Investment at those levels is unlikely to occur every year.

The statute also requires the Commission to consider "any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for

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<sup>46</sup> CR and PR at Table C-1. Some of the decline may presumably be attributable to different product mixes and greater sales of low-end merchandise by Japanese producers.

<sup>47</sup> Id.

<sup>48</sup> 19 U.S.C. § 1677(F)(V).

<sup>49</sup> CR and PR at Table C-1.

<sup>50</sup> Id.

<sup>51</sup> 19 U.S.C. § 1677(F)(VI).

<sup>52</sup> CR at VII-5-6; PR at VII-4.

<sup>53</sup> 19 U.S.C. § 1677(F)(VIII).

<sup>54</sup> CR and PR at Table VI-7.

<sup>55</sup> CR and PR at Table C-1.

importation) of the subject merchandise (whether or not it is actually being imported at the time).”<sup>56</sup> Here, the record evidence suggests no other adverse effects.

The record supports the conclusion that the domestic industry is threatened with material injury by reason of the subject imports. The rate of increase in the volume of subject imports is quite substantial -- imports from Japan alone grew 127.8 percent between 1996 and 1997 and 389.2 percent between 1997 and 1998. Japanese and Russian imports together more than doubled in each year of the POI. Japanese producers project an 8.9 percent increase in capacity utilization in the next year, which will enhance their ability to export hot-rolled steel to the United States. In addition, prices declined primarily in the last half of 1998.<sup>57</sup> Though I have not based my decision on part-year data,<sup>58</sup> the record supports the conclusion that rising import volumes began affecting domestic prices at the end of the period of investigation. The likelihood of continued increased imports, as evinced by the rate of volume increase during the POI and the existence of unused capacity, suggests an imminent increase in subject imports that will likely depress prices and that therefore threaten the domestic industry with material injury.<sup>59</sup>

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

<sup>57</sup> CR and PR at Figure V-2.

<sup>58</sup> I generally believe it inappropriate to examine part-year data to sustain an injury determination because of the potential for outcome-determinative manipulation of the appropriate period. I recognize that the Commission has the discretion to identify the appropriate period for review, see Kenda Rubber Indus. v. United States, 630 F. Supp. 354, 359 (Ct. Int'l Trade 1986) (“[T]he Commission has discretion to examine a period that most reasonably allows it to determine whether a domestic industry is injured by LTFV imports.”), but the Commission’s decision must also be made “in light of the record as a whole.” Id. at 358.

<sup>59</sup> I would not have made an affirmative material injury determination but for the suspension of liquidation of entries of the subject merchandise. See, 19 U.S.C. § 1673d(b)(4)(B).