

UNITED STATES INTERNATIONAL TRADE COMMISSION

ELECTROLYTIC MANGANESE DIOXIDE FROM GREECE AND JAPAN

Investigations Nos. 731-TA-406 and 408 (Review)

DETERMINATIONS AND VIEWS OF THE COMMISSION

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# UNITED STATES INTERNATIONAL TRADE COMMISSION

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## ELECTROLYTIC MANGANESE DIOXIDE FROM GREECE AND JAPAN

### DETERMINATIONS

On the basis of the record<sup>1</sup> developed in the subject five-year reviews, the United States International Trade Commission determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. § 1675(c)) (the Act), that revocation of the antidumping duty orders on electrolytic manganese dioxide from Greece and Japan would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.<sup>2</sup>

### BACKGROUND

The Commission instituted these reviews on May 3, 1999 (64 F.R. 23675) and determined on August 25, 1999 that it would conduct full reviews (64 F.R. 46407, August 25, 1999). Notice of the scheduling of the Commission's reviews 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* on October 6, 1999 (64 F.R. 54353). The hearing was held in Washington, DC, on March 2, 2000, 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> Chairman Lynn M. Bragg dissenting.

## VIEWS OF THE COMMISSION

Based on the record in these five-year reviews, we determine under section 751(c) of the Tariff Act of 1930, as amended (“the Act”), that revocation of the antidumping duty orders covering electrolytic manganese dioxide (“EMD”) from Greece and Japan would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.<sup>1</sup>

### I. BACKGROUND

In April 1989, the Commission determined that an industry in the United States was being materially injured by reason of less than fair value (“LTFV”) imports of EMD from Greece and Japan.<sup>2</sup> Commerce issued antidumping duty orders with respect to EMD from these countries on April 17, 1989.<sup>3</sup> On May 3, 1999, the Commission instituted reviews pursuant to section 751(c) of the Act to determine whether revocation of the antidumping duty orders on EMD from Greece and Japan would likely lead to continuation or recurrence of material injury.<sup>4</sup>

In five-year reviews, the Commission initially determines whether to conduct a full review (which would generally include a public hearing, the issuance of questionnaires, and other procedures) or an expedited review, as follows. First, the Commission determines whether individual responses to the notice of institution are adequate. Second, based on those responses deemed individually adequate, the Commission determines whether the collective responses submitted by two groups of interested parties – domestic interested parties (producers, unions, trade associations, or worker groups) and respondent interested parties (importers, exporters, foreign producers, trade associations, or subject country governments) – demonstrate a sufficient willingness among each group to participate and provide information requested in a full review.<sup>5</sup> If the Commission finds the responses from both groups of interested parties to be adequate, or if other circumstances warrant, it will determine to conduct a full review.<sup>6</sup>

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<sup>1</sup> Chairman Bragg dissenting. See Dissenting Views of Chairman Lynn M. Bragg.

<sup>2</sup> Electrolytic Manganese Dioxide From Greece and Japan, Invs. Nos. 731-TA-406 & 408 (Final), USITC Pub. 2177 (Apr. 1989) (“Original Determination”).

<sup>3</sup> See 54 Fed. Reg. 15243 (Apr. 17, 1989); 54 Fed. Reg. 15244 (Apr. 17, 1989).

<sup>4</sup> 64 Fed. Reg. 23675 (May 3, 1999).

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

<sup>6</sup> Commissioner Askey notes that the group adequacy approach adopted by the Commission is not required or even suggested by the Uruguay Round Agreements Act (“URAA”) or the Statement of Administrative Action (“SAA”). As the process is currently structured, Commissioners must vote on the adequacy of responses submitted by two separate groups, a “domestic” interested party group and a “respondent” interested party group. This process precludes individual Commissioners from deciding whether the overall level of responses submitted by the parties is adequate, which is the approach suggested by the language of both the URAA and SAA (at 880). Moreover, this approach incorrectly presupposes that it is only when “adequate” responses are submitted by both the “domestic” and “respondent” groups that the Commission will obtain a sufficient amount of additional information in a full review to warrant conducting such a full review. Finally, the process adopted by the Commission precludes expediting a review unless a majority of Commissioners agree that one of the group responses is inadequate. As a result of this procedural rule, unless a majority agrees which group is inadequate, the Commission will not expedite a review, even if a majority of the Commission is in favor of expediting the review.

One of the flaws of the Commission’s approach is highlighted by the circumstances of this case. Here, the two major  
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In these reviews, the Commission received responses to the notice of institution from: (1) Chemetals, Inc. (“Chemetals”) and Kerr-McGee Chemical, LLC (“Kerr-McGee”) (collectively, “Petitioners”), which are domestic producers of EMD, and (2) Eveready Battery Company (“Eveready”), which produces EMD in the United States \*\*\*. No response to the notice of institution was received from any producer or exporter of subject merchandise from Greece or Japan.<sup>7</sup> Accordingly, on August 5, 1999, the Commission determined that the domestic interested party group responses were adequate in both reviews, and that the respondent interested party group response was adequate for the review concerning EMD from Greece.<sup>8 9</sup> Pursuant to section 751(c)(5) of the Act,<sup>10</sup> the Commission decided to conduct full five-year reviews with regard to EMD from both Greece and Japan.<sup>11</sup>

Tosoh Hellas A.I.C. (“Tosoh Hellas”) and Tosoh Corp. (“Tosoh Japan”) (collectively, “Tosoh”), producers of EMD in Greece and Japan, respectively, entered their appearances in these reviews on November 17, 1999. On March 2, 2000, the Commission held a hearing in these reviews, at which representatives of Petitioners, Tosoh, and Eveready appeared. The Petitioners filed briefs in support of continuation of the orders, and Tosoh and Eveready filed briefs in opposition to continuation of the orders.

## II. DOMESTIC LIKE PRODUCT AND INDUSTRY

### A. Domestic Like Product

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<sup>6</sup> (...continued)

subject producers of EMD did not respond to the notice of institution. In many sunset reviews, this would have led to an expedited review, presumably because these companies “would not provide adequate information if the [Commission] conducted a full-fledged review.” SAA at 880. Nonetheless, the two producers did choose to participate in this proceeding after the Commission proceeded to a full review. Accordingly, the failure of these companies to respond to the notice of initiation was not necessarily an indication of their intent not to cooperate in a full review nor did it indicate that the Commission would not obtain significant additional useful information in the full review. For a further discussion of Commissioner Askey’s views concerning the Commission’s adequacy approach, see Elemental Sulphur from Canada, Inv. No. AA1921-127 (Review), USITC Pub. 3152 at 5, n. 5 (Jan. 1999).

<sup>7</sup> Explanation of Commission Determinations on Adequacy, Electrolytic Manganese Dioxide from Greece and Japan, Invs. Nos. 731-TA-406 & 408 (Review).

<sup>8</sup> 64 Fed. Reg. 46407 (Aug. 25, 1999).

<sup>9</sup> Chairman Bragg and Commissioner Hillman dissented from the finding that the respondent interested party group response was adequate with respect to Greece. 64 Fed. Reg. 46407, n. 1 (Aug. 25, 1999).

<sup>10</sup> 19 U.S.C. § 1675(c)(5).

<sup>11</sup> See Explanation of Adequacy. The Commission decided to conduct a full review concerning EMD from Japan, notwithstanding the inadequate respondent interested party group response in this review, to promote administrative efficiency in light of its decision to conduct a full review concerning EMD from Greece. Id. Chairman Bragg and Commissioners Crawford and Hillman dissented from this decision.

In making its determination under section 751(c) of the Act, the Commission defines “the domestic like product” and the “industry.”<sup>12</sup> The Act defines “domestic like product” as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle.”<sup>13</sup> The Commission's decision regarding the appropriate domestic like product(s) in an investigation or review is based on the facts, record, and legal parameters of the proceeding in question.<sup>14</sup> In a section 751(c) review, the Commission must also take into account “its prior injury determinations.”<sup>15</sup>

In its final five-year review determination for Electrolytic Manganese Dioxide From Japan, Commerce defined the subject merchandise as follows:

manganese dioxide (MnO<sub>2</sub>) that has been refined in an electrolysis process. The subject merchandise is an intermediate product used in the production of dry-cell batteries. EMD is sold in three physical forms, powder, chip, or plate, and two grades, alkaline and zinc chloride. EMD in all three forms and both grades is included in the scope of the order. There has been one scope clarification with regard to EMD from Japan. On January 6, 1992, the Department ruled that high-grade chemical manganese dioxide (CMD-U) is within the scope of the order. This merchandise is currently classifiable under the Harmonized Tariff Schedule (“HTS”) item number 2820.10.0000.<sup>16</sup>

EMD is a black powder with a gamma crystalline structure that is used in dry-cell batteries. There are two grades of EMD – alkaline grade and zinc chloride grade, although zinc chloride grade has not been produced in the United States in recent years. The two grades differ primarily in the particle size and pH, which are imparted during the finishing process. Alkaline- and zinc-chloride-grade EMD are essentially identical in all other physical characteristics.<sup>17</sup>

In the original investigation, the Commission defined the like product as all EMD.<sup>18</sup> The Commission expressly explained that this definition includes zinc chloride grade, alkaline grade, titanium anode, and graphite anode EMDs.<sup>19</sup> No party has argued for a different domestic like product definition in these reviews, and there is no information that indicates a need to revisit the Commission’s original

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<sup>12</sup> 19 U.S.C. § 1677(4)(A).

<sup>13</sup> 19 U.S.C. § 1677(10). See NEC Corp. v. Dep’t of Commerce, Slip Op. 98-164 at 8 (CIT, Dec. 15, 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Torrington Co. v. United States, 747 F. Supp. 744, 749 n.3 (CIT 1990), *aff’d*, 938 F.2d 1278 (Fed. Cir. 1991). See also S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979).

<sup>14</sup> See, e.g., Citrosuco Paulista, S.A., v. United States, 704 F. Supp. 1075, 1087-88 (CIT 1988) (while each original investigation is *sui generis*, and the Commission is not bound by prior like product determinations, the like product definition must be based on a rational basis discernible to the reviewing court).

<sup>15</sup> 19 U.S.C. § 1675a(a)(1)(a).

<sup>16</sup> Electrolytic Manganese Dioxide From Japan, 64 Fed. Reg. 67858, 67859 (Dec. 3, 1999) (final, sunset rev.) (“EMD From Japan”) (citations omitted), citing Electrolytic Manganese Dioxide from Japan, 57 Fed. Reg. 395 (Jan. 6, 1992) (final scope ruling). The same language appears in Commerce’s determination with regard to Greece. See Electrolytic Manganese Dioxide From Greece, 64 Fed. Reg. 67861 (Dec. 3, 1999) (final, sunset rev.) (“EMD From Greece”).

<sup>17</sup> CR at I-11, PR at I-6 - I-7.

<sup>18</sup> Original Determination, Pub. 2177 at 7.

<sup>19</sup> Original Determination, Pub. 2177 at 7. Graphite anode and titanium anode EMD refer to the type of anode used in the electrolysis process. Id. at 6.

determination of the domestic like product.<sup>20</sup> Therefore, for the reasons outlined in the Commission's original determination, we define the domestic like product as all EMD.

## **B. Domestic Industry**

Section 771(4)(A) of the Act defines the relevant industry as the “domestic producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product.”<sup>21</sup> In accordance with our domestic like product determinations, we determine that the domestic industry consists of all domestic producers of EMD.

## **C. Related Parties**

We must further decide 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), which 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 that are themselves importers. Exclusion of such a producer is within the Commission's discretion based upon the facts presented in each case.<sup>22</sup> \*\*\*.<sup>23</sup>

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<sup>20</sup> All indications are, in fact, to the contrary. *See, e.g.*, CR at I-11 - I-15, PR at I-6 - I-9. We note that Eveready subdivides alkaline EMD into three grades: regular, high quality/high drain, and high tech. CR at I-12, PR at I-7. However, Eveready states that the differences among these grades do not rise to the level that would justify treating them as separate domestic like products. Eveready Response to the Notice of Institution at 24-25. Indeed, the grades defined by Eveready \*\*\*, and differ from each other in relatively minor ways. *See generally* CR at I-11 - I-15, PR at I-6 - I-9. \*\*\*.

<sup>21</sup> 19 U.S.C. § 1677(4)(A).

<sup>22</sup> *See Sandvik AB v. United States*, 721 F. Supp. 1322, 1331-32 (CIT 1989), *aff'd without opinion*, 904 F.2d 46 (Fed. Cir. 1990); *Empire Plow Co. v. United States*, 675 F. Supp. 1348, 1352 (CIT 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 (CIT 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).

<sup>23</sup> CR at III-4, PR at III-3; *see* section 771(4)(B)(i) of the Act, 19 U.S.C. § 1677(4)(B)(i).

However, we find that appropriate circumstances do not exist to exclude \*\*\* from the domestic industry.<sup>24 25</sup>

### **III. REVOCATION OF THE ANTIDUMPING DUTY ORDERS ON EMD WOULD BE LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF MATERIAL INJURY WITHIN A REASONABLY FORESEEABLE TIME**

#### **A. Cumulation**

##### **1. Framework**

Section 752(a) of the Act provides that:

the Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b) or (c) of this title were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.<sup>26</sup>

Thus, cumulation is discretionary in five-year reviews. However, the Commission may exercise its discretion to cumulate only if the reviews are initiated on the same day and the Commission determines that the subject imports are likely to compete with each other and the domestic like product in the U.S. market. The statute precludes cumulation if the Commission finds that subject imports from a country are likely to have no discernible adverse impact on the domestic industry.<sup>27</sup> We note that neither the statute nor the SAA provides specific guidance on what factors the Commission is to consider in determining that imports “are likely to have no discernible adverse impact” on the domestic industry.<sup>28</sup> With respect to this provision, the Commission generally considers the likely volume of the subject imports and the likely impact of those imports on the domestic industry within a reasonably foreseeable time if the orders are revoked.<sup>29</sup>

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<sup>24</sup> \*\*\* states that it imported \*\*\* short tons (“ST”) of \*\*\*. CR at III-5, PR at III-3. Such volumes are equivalent to less than \*\*\* percent of \*\*\* annual U.S. production. CR & PR, Table IV-1; CR at III-2, PR at III-1. \*\*\*, seem to indicate that the company’s primary interest lies in domestic production.

<sup>25</sup> For the reasons discussed later in this opinion, Vice Chairman Miller, Commissioner Hillman, and Commissioner Koplán also do not find that \*\*\* is likely to import significant volumes of subject merchandise if the order is revoked. Therefore, they conclude that the primary interest of \*\*\* will continue to be in domestic production.

<sup>26</sup> 19 U.S.C. § 1675a(a)(7).

<sup>27</sup> 19 U.S.C. § 1675a(a)(7).

<sup>28</sup> SAA, H.R. Rep. No. 103-316, vol. I (1994).

<sup>29</sup> Commissioner Askey notes that the Act clearly states that the Commission is precluded from exercising its discretion to cumulate if the imports from a country subject to review are likely to have “no discernible adverse impact on the domestic industry” upon revocation of the order. 19 U.S.C. § 1675a(a)(7). Thus, the Commission must focus on whether the imports will  
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The Commission has generally considered four factors that provide a framework for determining whether the imports compete with each other and with the domestic like product.<sup>30</sup> Only a “reasonable overlap” of competition is required.<sup>31</sup> In five-year reviews, the relevant inquiry is whether there likely would be competition even if none currently exists. Moreover, because of the prospective nature of five-year reviews, we have examined not only the Commission’s traditional competition factors, but also other significant conditions of competition that are likely to prevail if the orders under review are revoked. The Commission has considered factors in addition to its traditional competition factors in other contexts where cumulation is discretionary.<sup>32</sup>

In these reviews, the statutory requirement that both of the EMD reviews be initiated on the same day is satisfied. We do not find that subject imports from any of the subject countries are likely to have no discernible adverse impact on the domestic industry if the orders are revoked.<sup>33</sup>

## 2. Reasonable Overlap of Competition

At the present time, Japanese and Greek EMD are fungible with each other and with the domestic like product. \*\*\* rates EMD from Japan and Greece as comparable in all respects except \*\*\* and \*\*\*, with the Greek product having \*\*\* quality than the Japanese product.<sup>34</sup> \*\*\* reports that \*\*\*

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

impact the condition of the industry discernibly as a result of revocation, and not solely on whether there will be a small volume of imports after revocation, *i.e.*, by assessing their negligibility after revocation of the order. For a full discussion of her views on this issue, see Additional Views of Commissioner Thelma J. Askey in Potassium Permanganate from China and Spain, Invs. Nos. 731-TA-125-126 (Review), USITC Pub. 3245 (Oct. 1999).

<sup>30</sup> The four factors generally considered by the Commission in assessing whether imports compete with each other and with the domestic like product are: 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. *See, e.g., Wieland Werke, AG v. United States*, 718 F. Supp. 50 (CIT 1989).

<sup>31</sup> *See Mukand Ltd. v. United States*, 937 F. Supp. 910, 916 (CIT 1996); Wieland Werke, AG, 718 F. Supp. at 52 (“Completely overlapping markets are not required.”); United States Steel Group v. United States, 873 F. Supp. 673, 685 (CIT 1994), *aff’d*, 96 F.3d 1352 (Fed. Cir. 1996).

<sup>32</sup> *See, e.g., Torrington Co. v. United States*, 790 F. Supp. at 1172 (affirming Commission's determination not to cumulate for purposes of threat analysis when pricing and volume trends among subject countries were not uniform and import penetration was extremely low for most of the subject countries); Metallwerken Nederland B.V. v. United States, 728 F. Supp. 730, 741-42 (CIT 1989); Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp. 1068, 1072 (CIT 1988).

<sup>33</sup> For a discussion of the analytical framework of Vice Chairman Miller and Commissioners Hillman and Koplan regarding the application of the “no discernible adverse impact” provision, see Malleable Cast Iron Pipe Fittings From Brazil, Japan, Korea, Taiwan, and Thailand, Invs. Nos. 731-TA-278-280 (Review) and 731-TA-347-348 (Review). For a further discussion of Commissioner Koplan’s analytical framework, see Iron Metal Construction Castings from India; Heavy Iron Construction Castings from Brazil; and Iron Construction Castings from Brazil, Canada, and China, Invs. Nos. 803-TA-13 (Review); 701-TA-249 (Review) and 731-TA-262, 263, and 265 (Review) (Views of Commissioner Stephan Koplan Regarding Cumulation).

<sup>34</sup> CR at II-42, PR at II-19 - II-20.

EMD is comparable to Japanese and Greek EMD in all respects except \*\*\*, where the U.S. merchandise has the advantage. \*\*\* states that domestically-produced \*\*\*,<sup>35</sup>

Japanese, Greek, and U.S. producers are currently qualified to supply \*\*\*, leading us to conclude that there would be a geographic overlap among the two subject import sources and the domestic like product if the orders were revoked.<sup>36</sup> They also use the same channels of distribution, selling directly to the purchaser through sales representatives of the domestic producers or Japanese or Greek importers.<sup>37</sup> As in the original investigation, Mitsubishi Corp. is a joint owner (with Tosoh Japan) of Tosoh Hellas, and its role in importing both Japanese and Greek EMD during the original investigation period suggests that merchandise from the two subject countries would use the same distribution channels if the orders were revoked.<sup>38</sup> Finally, EMD from both Greece and Japan was imported into the United States throughout the original investigation period, in 1998, and in the first nine months of 1999,<sup>39</sup> which is evidence that the subject merchandise is likely to be simultaneously present in the market with the domestic like product.

As in the Original Determination, the relationship between Tosoh Japan, Mitsubishi, and Tosoh Hellas plays an important role in our analysis.<sup>40 41 \*\*\*42</sup> which suggests that Tosoh Japan would also make use of \*\*\*. Moreover, Tosoh Japan would have an incentive to coordinate sales between itself and Tosoh Hellas so as to maximize profits. We believe these situations would continue if the orders were revoked.

Overall, we find that there likely would be a reasonable overlap of competition between subject imports from Greece and Japan and the domestic like product, as well as among the subject imports from these countries, if the antidumping duty orders covering EMD were revoked.

### 3. Other Considerations

The record indicates that, if the orders are revoked, subject imports would likely compete in the U.S. market under similar conditions of competition. We have considered the common ownership of

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<sup>35</sup> CR at II-40 - II-41, PR at II-19.

<sup>36</sup> Tosoh Corp. Posthearing Brief, Att. 1 at 16.

<sup>37</sup> CR at IV-1, PR at IV-1.

<sup>38</sup> Original Determination, Pub. 2177 at 13-14.

<sup>39</sup> Final Report to the Commission, Electrolytic Manganese Dioxide From Greece and Japan, Invs. Nos. 731-TA-406 & 408 (Final), Table 18.

<sup>40</sup> Original Determination, Pub. 2177 at 14.

<sup>41</sup> Commissioner Askey does not join in this paragraph. She notes that, in the absence of probative data indicating that the related producers in Greece and Japan would actually coordinate their U.S. export shipments upon revocation of an order, it is speculative to assume that the companies would do so. Indeed, she believes that it is more reasonable to assume that a corporate parent would establish a facility in a country for the purpose of making sales to that country and its neighboring countries, not for the purpose of establishing operations to export to the United States. Moreover, she notes that, if the two companies did coordinate their U.S. shipments, it is reasonable to presume that they would attempt to minimize their level of competitive overlap. Accordingly, this fact does not tend not to support cumulation of the two countries.

<sup>42</sup> According to Eveready, for purchases of Greek EMD, \*\*\*. Eveready Response to the Notice of Institution at 15-16 (June 22, 1999).

Tosoh Hellas and Tosoh Japan as particularly relevant to this point.<sup>43</sup> We also considered the record evidence that Tosoh Hellas and Tosoh Japan \*\*\*, with a sizable portion of their output devoted to zinc chloride grade EMD.<sup>44</sup> Both of these foreign producers are export oriented, but expressed the intention of continuing to service existing customers outside of the United States.<sup>45</sup> Both sold small amounts of EMD in the United States during the review period, maintained qualification to sell to \*\*\*, and were \*\*\*.<sup>46</sup> For these reasons, we conclude that it is appropriate to exercise our discretion to cumulate subject imports from Greece and Japan in these reviews.

## **B. Legal Standard In a Five-Year Review**

In a five-year review conducted under section 751(c) of the Act, Commerce will revoke a countervailing or antidumping duty order unless: (1) it makes a determination that dumping or subsidization is likely to continue or recur, and (2) the Commission makes a determination that revocation of an order “would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.”<sup>47</sup> The SAA states that “under the likelihood standard, the Commission will engage in a counter-factual analysis; it must decide the likely impact in the reasonably foreseeable future of an important change in the status quo – the revocation [of the order] . . . and the elimination of its restraining effects on volumes and prices of imports.”<sup>48</sup> Thus, the likelihood standard is prospective in nature.<sup>49</sup> The statute states that “the Commission shall consider that the effects of revocation . . . may not be imminent, but may manifest themselves only over a longer period of time.”<sup>50</sup> According to the SAA, a “‘reasonably foreseeable time’ will vary from case-to-case, but normally will exceed the ‘imminent’ time frame applicable in a threat of injury analysis [in antidumping and countervailing duty investigations].”<sup>51 52</sup>

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<sup>43</sup> Commissioner Askey does not join this statement.

<sup>44</sup> CR at IV-4, n. 8 & IV-7, n. 11, PR at IV-2, n. 8 & IV-3, n. 11.

<sup>45</sup> CR & PR, Tables IV-2 & IV-3, Tr. at 193 (J. Vacadaris).

<sup>46</sup> CR & PR, Tables II-4 & IV-1; Eveready Prehearing Brief at 16.

<sup>47</sup> 19 U.S.C. § 1675a(a).

<sup>48</sup> SAA, H.R. Rep. No. 103-316, vol. I, at 883-84 (1994). The SAA states that “[t]he likelihood of injury standard applies regardless of the nature of the Commission’s original determination (material injury, threat of material injury, or material retardation of an industry).” SAA at 883.

<sup>49</sup> While the SAA states that “a separate determination regarding current material injury is not necessary,” it indicates that “the Commission may consider relevant factors such as current and likely continued depressed shipment levels and current and likely continued [sic] prices for the domestic like product in the U.S. market in making its determination of the likelihood of continuation or recurrence of material injury if the order is revoked.” SAA at 884.

<sup>50</sup> 19 U.S.C. § 1675a(a)(5).

<sup>51</sup> SAA at 887. Among the factors that the Commission should consider in this regard are “the fungibility or differentiation within the product in question, the level of substitutability between the imported and domestic products, the channels of distribution used, the methods of contracting (such as spot sales or long-term contracts), and lead times for delivery of goods, as well as other factors that may only manifest themselves in the longer term, such as planned investment and the shifting of production facilities.” *Id.*

<sup>52</sup> In analyzing what constitutes a reasonably foreseeable time, Commissioner Koplan examines all the current and likely conditions of competition in the relevant industry. He defines “reasonably foreseeable time” as the length of time it is likely to take for the market to adjust to a revocation. In making this assessment, he considers all factors that may accelerate or delay the

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Although the standard in five-year reviews is not the same as the standard applied in original antidumping or countervailing duty investigations, it contains some of the same fundamental elements. The statute provides that the Commission is to “consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked.”<sup>53</sup> It directs the Commission to take into account its prior injury determination, whether any improvement in the state of the industry is related to the order under review, and whether the industry is vulnerable to material injury if the order is revoked.<sup>54</sup> Section 752(a)(1)(D) of the Act directs the Commission to take into account in five-year reviews involving antidumping proceedings “the findings of the administrative authority regarding duty absorption.”<sup>55</sup>

We note that Section 776(a) of the Act authorizes the Commission to take adverse inferences in five-year reviews, but such authorization does not relieve the Commission of its obligation to consider the record evidence as a whole in making its determination.<sup>56</sup> Section 751(c)(3)(B) of the Act specifically provides that in an expedited five-year review the Commission is to issue “a final determination based on the facts available, in accordance with section 776.” Section 776 of the Act, however, does not limit the use of facts available to an expedited review.

We generally give credence to the facts supplied by the participating parties and certified by them as true, but base our decision on the evidence as a whole, and do not automatically accept the participating parties’ suggested interpretation of the record evidence. Regardless of the level of participation and the interpretations urged by participating parties, the Commission is obligated to consider all evidence relating to each of the statutory factors and may not draw adverse inferences that render such analysis superfluous. “In general, the Commission makes determinations by weighing all of the available evidence regarding a multiplicity of factors relating to the domestic industry as a whole and by drawing reasonable inferences from the evidence it finds most persuasive.”<sup>57</sup>

In evaluating the likely volume of imports of subject merchandise if the orders under review are revoked, the Commission is directed to consider whether the likely volume of subject imports would be significant either in absolute terms or relative to production or consumption in the United States.<sup>58 59</sup> In

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<sup>52</sup> (...continued)

market adjustment process including any lags in response by foreign producers, importers, consumers, domestic producers, or others due to: lead times; methods of contracting; the need to establish channels of distribution; product differentiation; and any other factors that may only manifest themselves in the longer term. In other words, this analysis seeks to define “reasonably foreseeable time” by reference to current and likely conditions of competition, but also seeks to avoid unwarranted speculation that may occur in predicting events into the more distant future.

<sup>53</sup> 19 U.S.C. § 1675a(a)(1).

<sup>54</sup> 19 U.S.C. § 1675a(a)(1). The statute further provides that the presence or absence of any factor that the Commission is required to consider shall not necessarily give decisive guidance with respect to the Commission’s determination. 19 U.S.C. § 1675a(a)(5). While the Commission must consider all factors, no one factor is necessarily dispositive. SAA at 886.

<sup>55</sup> 19 U.S.C. § 1675a(a)(1)(D). Commerce did not find that any of the producers or importers of subject merchandise had absorbed antidumping duties on their sales during the review period. *See generally* EMD From Japan, 64 Fed. Reg. 67858; EMD From Greece, 64 Fed. Reg. at 67861.

<sup>56</sup> 19 U.S.C. § 1675(c)(3)(B).

<sup>57</sup> SAA at 869.

<sup>58</sup> 19 U.S.C. § 1675a(a)(2).

<sup>59</sup> Section 752(a)(1)(D) of the Act directs the Commission to take into account in five-year reviews involving antidumping

(continued...)

doing so, the Commission must consider “all relevant economic factors,” including four enumerated factors: (1) any likely increase in production capacity or existing unused production capacity in the exporting country; (2) existing inventories of the subject merchandise, or likely increases in inventories; (3) the existence of barriers to the importation of the subject merchandise into countries other than the United States; and (4) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.<sup>60</sup>

In evaluating the likely price effects of subject imports if the orders are revoked, the Commission is directed to consider whether there is likely to be significant underselling by the subject imports as compared with domestic like products and whether the subject imports are likely to enter the United States at prices that would have a significant depressing or suppressing effect on the price of domestic like products.<sup>61</sup>

In evaluating the likely impact of imports of subject merchandise if the order is revoked, the Commission is directed to consider all relevant economic factors that are likely to have a bearing on the state of the industry in the United States, including but not limited to: (1) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; (2) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; and (3) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the domestic like product.<sup>62</sup> All relevant economic factors are to be considered within the context of the business cycle and the conditions of competition that are distinctive to the industry.<sup>63</sup> As instructed by the statute, we have considered the extent to which any improvement in the state of the domestic industry is related to the antidumping duty orders at issue and whether the industry is vulnerable to material injury if the order is revoked.<sup>64</sup>

For the reasons stated below, we determine that revocation of the antidumping duty orders on EMD from Greece and Japan would not be likely to lead to continuation or recurrence of material injury to the domestic injury within a reasonably foreseeable time.

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<sup>59</sup> (...continued)

proceedings “the findings of the administrative authority regarding duty absorption.” 19 U.S.C. § 1675a(a)(1)(D). Commerce has not issued any duty absorption determinations in the instant reviews.

<sup>60</sup> 19 U.S.C. § 1675(a)(2)(A)-(D).

<sup>61</sup> 19 U.S.C. § 1675a(a)(3). The SAA states that “[c]onsistent with its practice in investigations, in considering the likely price effects of imports in the event of revocation and termination, the Commission may rely on circumstantial, as well as direct, evidence of the adverse effects of unfairly traded imports on domestic prices.” SAA at 886.

<sup>62</sup> 19 U.S.C. § 1675a(a)(4).

<sup>63</sup> 19 U.S.C. § 1675a(a)(4). Section 752(a)(6) of the Act states that “the Commission may consider the magnitude of the margin of dumping” in making its determination in a five-year review investigation. 19 U.S.C. § 1675a(a)(6). The statute defines the “magnitude of the margin of dumping” to be used by the Commission in five-year review investigations as “the dumping margin or margins determined by the administering authority under section 1675a(c)(3) of this title.” 19 U.S.C. § 1677(35)(C)(iv). See also SAA at 887. In its reviews, Commerce found that revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping at the following margins: 77.73 percent for Mitsui, 71.91 for Tosoh Japan, 73.30 for all other producers in Japan, and 36.72 for Tosoh Hellas and all other producers in Greece. EMD From Japan, 64 Fed. Reg. at 67861, EMD From Greece, 64 Fed. Reg. at 67864.

<sup>64</sup> The SAA states that in assessing whether the domestic industry is vulnerable to injury if the order is revoked, the Commission “considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they may also demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports.” SAA at 885.

### C. Conditions of Competition

In evaluating the likely impact of the subject imports on the domestic EMD industry, the statute directs the Commission to consider all relevant economic factors “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>65</sup>

There are two grades of EMD, alkaline and zinc chloride, which are used exclusively to produce batteries of the same name.<sup>66</sup> The production processes for the two types of EMD differ in that alkaline grade requires titanium anodes, while zinc chloride grade can be made with both titanium and other types of anodes.<sup>67</sup> Although some foreign producers, including Tosoh, make both alkaline and zinc chloride grade EMD, the U.S. producers make exclusively alkaline grade EMD.<sup>68</sup> Alkaline EMD is typically customized to perform best in a particular battery production plant. However, alkaline EMD that meets U.S. producers’ standards \*\*\*.<sup>69</sup> In addition, high quality zinc chloride grade EMD may sell for the same price as alkaline grade EMD.<sup>70</sup>

The alkaline EMD market is characterized by a small number of suppliers and purchasers. There are only eight alkaline EMD producers in the world that meet the quality requirements of U.S. battery producers – Kerr-McGee, Chemetals, Eveready, Delta (with plants in Australia and South Africa), Mitsui Denman (with a plant in Ireland), Tosoh Japan, Mitsui Mining and Smelting (“Mitsui”), and Tosoh Hellas.<sup>71</sup> The three domestic producers, Delta, and Mitsui Denman are the only companies that sell large quantities of EMD in the U.S. market, where there are only four significant purchasers – Eveready, Duracell, Rayovac, and Mutec.<sup>72</sup> Although there are a number of alkaline battery producers outside the United States, two of the U.S. purchasers – Eveready and Duracell – produce alkaline batteries in facilities outside the United States, and are among the largest, if not the largest, consumers of alkaline EMD in the world.<sup>73</sup> To improve EMD quality and battery performance, battery manufacturers must work closely with the EMD producers and test any experimental products under actual production conditions. These considerations force EMD suppliers and purchasers to form long-term commercial relationships.<sup>74</sup>

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<sup>65</sup> 19 U.S.C. § 1675a(a)(4).

<sup>66</sup> CR at I-11, PR at I-6. Eveready alleged that there is a further segregation of alkaline EMD into standard, high-drain, and high-tech grades, \*\*\*. Eveready Prehearing Brief at 5-6, CR at II-12, PR at I-7. We did not rely on Eveready’s allegation in our analysis.

<sup>67</sup> Tr. at 65 (J. Worthington).

<sup>68</sup> CR at I-11, IV-4, n. 8 & IV-7, n. 11, PR at I-6, IV-2, n. 8, & IV-3, n. 11.

<sup>69</sup> CR at II-13, PR at II-6.

<sup>70</sup> Tr. at 28 (D. DeCraene) \*\*\*.

<sup>71</sup> Tr. at 203 (G. Hooks). However, \*\*\*.

<sup>72</sup> Petitioners’ Prehearing Brief at 23, Tosoh Prehearing Brief at 5. CR at II-3 - II-4.

<sup>73</sup> Tr. at 36 (J. Burrows).

<sup>74</sup> CR at II-5, PR at II-3.

EMD is usually sold under long-term contracts, each lasting for a year or more, although spot purchases do occasionally occur.<sup>75</sup> The contracts usually specify a price and quantity, although \*\*\*.<sup>76</sup>

Since the original investigation, the demand for alkaline batteries in both the United States and the rest of the world has increased rapidly, spurred by the popularity of handheld electronic devices and a long-term shift away from zinc chloride batteries.<sup>77</sup> Although production capacity has historically kept pace with demand in the EMD industry, that did not occur during the review period. Producers have made incremental increases in the capacity of existing plants, but no producer has built a new plant, and the rate of the increase in capacity has been lower than the rate of increase in apparent U.S. consumption of EMD.<sup>78</sup> As a result, demand is likely to exceed the available production capacity on a worldwide basis sometime in 2001 or 2002.<sup>79</sup> Petitioners' witnesses testified that they could \*\*\*.<sup>80</sup> \*\*\*.<sup>81</sup> However, EMD producers' proposals were contingent on large increases in prices and, even if begun immediately, would not reach commercial levels of production until \*\*\* at the earliest.<sup>82</sup> Petitioners' capacity expansion proposals do not appear to be sufficient to meet the increase in demand that is likely to occur<sup>83</sup> and, thus, demand for EMD in the United States is likely to exceed the available supply in the foreseeable future.

The volume of subject imports decreased immediately after the imposition of antidumping duties. However, the volume of nonsubject imports soon began to increase, reaching a level at which nonsubject producer Delta is consistently \*\*\* of EMD to U.S. purchasers.<sup>84</sup> These imports are necessary to serve demand that domestic producers cannot fill.<sup>85</sup> Nonsubject imports' U.S. point-of-shipment prices have generally been \*\*\* than the U.S. f.o.b. plant prices; however, the delivered prices charged by Kerr McGee, Delta, and Chemetals \*\*\*.<sup>86</sup>

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<sup>75</sup> CR at V-6, PR at V-5.

<sup>76</sup> CR at V-7, PR at V-5.

<sup>77</sup> CR at II-27 & II-34, PR at II-11 and II-16.

<sup>78</sup> CR at III-1 - III-2, PR at III-1, \*\*\* and Tr. at 191 (J. Vacadaris). For example, domestic producers' capacity increased \*\*\* percent in 1998 and \*\*\* percent in the first nine months of 1999 as compared with the same period in 1998. In contrast, apparent domestic consumption increased by \*\*\* percent in 1998 and by \*\*\* percent in 1999. CR & PR, Table C-1.

<sup>79</sup> Tosoh Prehearing Brief at 10; \*\*\*, *in* Letter from W.N. Harrell Smith, IV, to Donna R. Koehnke, Exh. 18 (Apr. 7, 2000) ("Kerr McGee Documents").

<sup>80</sup> \*\*\*.

<sup>81</sup> Producers typically sought \*\*\* as prerequisites for any capacity expansion. *See* Petitioners' Posthearing Brief, Exh. J, \*\*\*.

<sup>82</sup> Petitioners' Posthearing Brief, Addendum at 13; \*\*\*.

<sup>83</sup> This holds true both at the current rate of increase in demand, \*\*\*, which may be inflated by hoarding for the year 2000 and a severe hurricane season in 1999, and at the \*\*\* rate of increase, five to eight percent, that Kerr McGee projected in filings at the SEC. CR & PR, Table I-4, Kerr-McGee 10-K Report at 9.

<sup>84</sup> CR & PR, Table V-3.

<sup>85</sup> Compare CR & PR, Table I-4 with Table III-1.

<sup>86</sup> Compare CR & PR, Table V-3 with CR & PR, Figure V-7.

Although EMD is traded on a world-wide basis, purchasers prefer to buy locally if possible.<sup>87</sup> This is due in part to transportation costs, which can be prohibitive.<sup>88</sup> Prices differ on a regional basis, and are generally highest in Japan, lower in the United States, and lower still in Europe and Asia.<sup>89</sup>

Finally, Eveready is the only integrated producer of EMD in the United States. It consumes all of the EMD it produces in its own battery making operations.<sup>90</sup> Therefore, the Commission could not include Eveready in the financial results for the domestic industry, as there was no way to convert the company's transfer values into actual market values.<sup>91</sup> However, Eveready's data were included in other aggregate domestic industry statistics.<sup>92</sup>

We do not expect the foregoing conditions of competition to change appreciably if the antidumping duty orders are revoked. Accordingly, we find that current conditions in the U.S. EMD industry provide us with a basis upon which to assess the likely effects of revocation of the antidumping duty orders within the reasonably foreseeable future.

#### **D. Likely Volume of Subject Imports**

In the original investigation, the Commission found that the volume and market share of the subject imports increased in each year of the investigation period and, therefore, were significant.<sup>93</sup> Since the antidumping duty orders went into effect, subject imports of EMD from Greece and Japan have been almost completely absent from the U.S. market.<sup>94</sup> During the review period, the volume and market share of subject imports was extremely low in terms of both units shipped and value.<sup>95</sup>

We note that there is some excess capacity in Greece and Japan, which could be used to increase production of alkaline EMD by as much \*\*\* ST this year.<sup>96</sup> It is unlikely that the subject producers would ship this entire volume to the United States, as they believe that demand from their existing customers is likely to increase.<sup>97</sup> But even if they did, there would likely be no significant effect on the volume sold by domestic producers. U.S. purchasers are likely to use any increased volume of EMD available from

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<sup>87</sup> For example, \*\*\*. See Tosoh Corp. Posthearing Brief, Exh. 1, item 3, Table 1 (following page 7). Eveready has a policy of using U.S.-made EMD in its U.S. plants. Tr. at 205-206 (G. Hooks); see also CR at II-17, PR at II-7.

<sup>88</sup> See CR at II-17, PR at II-7.

<sup>89</sup> CR at II-17, PR at II-7, Tr. at 36 (Burrows).

<sup>90</sup> CR at III-2, PR at III-1. We note that section 771(7)(A) establishes that the captive production provision, section 771(7)(C)(iv), applies only in determinations under sections 703(a), 705(b), 733(a), and 735(b). See 19 U.S.C. § 1677(7)(B). Therefore, it does not apply to five-year reviews pursuant to section 751(c).

<sup>91</sup> CR at III-8, n. 11, PR at III-4, n. 11.

<sup>92</sup> Data for Eveready are included unless otherwise noted in all tables in the staff report, including those reporting domestic industry capacity, production, shipments, and costs of production.

<sup>93</sup> Original Determination, Pub. 2177 at 15.

<sup>94</sup> CR at II-23, PR at II-9.

<sup>95</sup> CR & PR, Tables I-3 & I-4.

<sup>96</sup> We did not include Japan Metals & Chemicals Co. in our estimate of alkaline EMD capacity, as that company produces lower quality EMD and does not produce alkaline grade EMD. CR at IV-3, n. 5; PR at IV-2, n. 5. The three subject producers of alkaline EMD had a \*\*\* percent capacity utilization in the first three quarters of 1999. Including a \*\*\*, they will have a total capacity of approximately \*\*\* ST this year. See CR & PR, Tables IV-2 & IV-3; CR at IV-6, PR at IV-2 - IV-3.

<sup>97</sup> CR at II-26 - II-27, PR at II-11.

subject producers to meet the projected increase in demand, which domestic producers cannot satisfy because they are currently producing at full capacity.<sup>98</sup> Any remaining increase in the volume of subject imports would be likely to result in a decrease in the volume of nonsubject imports, rather than the domestic like product. Delta and Mitsui Denman charge \*\*\* prices \*\*\* the domestic producers on a delivered basis, and domestic purchasers have stated their preference for U.S.-produced EMD.<sup>99</sup> In any event, the subject producers plan no major increases in capacity before \*\*\*.<sup>100</sup> Therefore, subject producers' unutilized capacity should decrease in the foreseeable future, as their current customers' needs increase.

U.S. importers' inventories of the subject merchandise were \*\*\* throughout the investigation period. Foreign producers' inventories rose from 1997 to 1998, but then fell in 1999, and were \*\*\* percent lower in September 1999 than they were in September 1998. In light of the incipient supply shortfall, inventories are unlikely to rise significantly in the foreseeable future.<sup>101</sup>

There do not appear to be any barriers barring shipment of subject merchandise to countries other than the United States. Indeed, the subject producers already have an established presence in many other countries.<sup>102</sup>

There does not appear to be any incentive for the subject producers either to convert current production of zinc chloride grade EMD to alkaline grade or to decrease sales to third countries or the home market in order to shift volume to the United States in the reasonably foreseeable future. Although delivered prices for EMD in the United States are higher than in Europe or Asia, sales to the United States would incur added duty and transportation costs that would make returns to the foreign producers less attractive than returns on sales to existing customers in other countries.<sup>103</sup> There is also no reason for subject producers to reduce production of zinc chloride grade EMD in order to increase production of alkaline grade EMD for sale in the United States, since the two grades are priced at similar levels.<sup>104</sup> Nor are subject producers likely to shift shipments from home or third-country markets. They currently supply EMD to \*\*\*,<sup>105</sup> which are likely to oppose any efforts to divert EMD from their foreign plants to service their U.S. plants.<sup>106</sup> Similarly, a strategy of cutting production volume to increase sales to the United States could also lead to supply shortfalls in third markets, straining supply relationships in a market that places a premium on long-term relationships.

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<sup>98</sup> Kerr-McGee projected an increase in EMD demand of between five and eight percent annually for the 1999-2004 period, which suggests an increase in demand of \*\*\* ST per year. *See* SEC Edgar database, Kerr-McGee 1998 10K Report, at 9, *in* Tosoh Prehearing Brief, Attachment. The only planned increase in capacity by the domestic industry in 2000 is a \*\*\*. CR & PR at III-1. The capacity expansions discussed by domestic producers for 2001 and 2002 would similarly fall short of the projected increase in demand. *See* above, notes 21 - 22.

<sup>99</sup> \*\*\*. CR at II-40 - II-41, PR at II-19. Eveready has stated a preference for U.S. EMD. Tr. at 205-206 (G. Hooks).

<sup>100</sup> CR at IV-4 - IV-7, PR at IV-2 - IV-3.

<sup>101</sup> We note that inventories in the EMD industry \*\*\*. CR at II-18, nn. 36 & 37; PR at II-8, nn. 36 & 37.

<sup>102</sup> *See, e.g.*, CR at IV-4 & IV-6, PR at IV-2 & IV-3.

<sup>103</sup> CR at V-1 - V-2, PR at V-1; Tr. at 193 (J. Vacadaris).

<sup>104</sup> Tr. at 52 (D. DeCraene) & 223 (J. Vacadaris). Tosoh Corp. predicts that demand for zinc chloride grade EMD will decrease by \*\*\* percent, and that its own production of zinc chloride grade EMD will decrease accordingly as it facilitates existing customers' switch to alkaline batteries. Tosoh Posthearing Brief, Att. 1 at 6.

<sup>105</sup> Tosoh Corp. Posthearing Brief at 3.

<sup>106</sup> Tr. at 240 (G. Hooks).

Accordingly, based on the facts in the record of these reviews, we conclude that the volume of subject imports from Greece and Japan is not likely to reach significant levels within a reasonably foreseeable time if the antidumping duty order is revoked.

### **E. Likely Price Effects**

In the original investigation, the Commission found that the subject imports undercut and depressed domestic EMD prices, which fell steadily throughout the investigation period.<sup>107</sup> The Commission concluded that competition between Chemetals and Kerr-McGee was not responsible for declining prices because Duracell had a Buy American policy in effect that made it unnecessary for the two U.S. producers to compete with each other on a price basis. In contrast, the Commission found that the subject producers had an incentive to undercut domestic prices to gain the sales necessary to utilize underutilized capacity. It found support for this conclusion in the fact that, after a fire took Eveready's EMD plant out of operation, U.S. prices decreased, and subject imports from Japan captured the bulk of Eveready's business,<sup>108</sup> even though a sudden fall in output would be expected to result in price increases. The Commission determined that these factors indicated that subject imports depressed and suppressed the prices for the domestic like product.

With subject imports currently at extremely low levels, the Commission's pricing analysis in these reviews did not yield any comparisons between the domestic like product and the subject imports, or unit values that would allow meaningful aggregate comparisons. Other evidence on the record, however, provides a basis for us to conclude that subject imports are not likely to undersell the domestic like product, or significantly depress or suppress domestic prices within a reasonably foreseeable time.

After an initial increase in U.S. prices following imposition of the antidumping duty orders, domestic prices have generally remained stable throughout the 1990s.<sup>109</sup> In light of the expected shortage of supply, if the subject producers can produce enough EMD to increase shipments to the United States, they have no incentive to undersell U.S. producers. U.S. purchasers appear to be willing to pay the going price to any producer that meets their specifications,<sup>110</sup> and have solicited sales from foreign producers, removing the need for promotional pricing.<sup>111</sup> Nor is there any need to cut prices significantly in order to generate sales volume. With the perception of future shortages, some purchasers already have needs that current suppliers do not meet. Finally, the subject producers in Greece and Japan face a disincentive against aggressive pricing in the United States. \*\*\*, and are likely to seek a global price reduction if they receive one in the United States.<sup>112</sup> Therefore, negative repercussions in other markets would more than offset any benefit gained by using large price reductions to obtain a greater volume of sales in the United States.

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<sup>107</sup> Original Determination, Pub. 2177 at 15-16.

<sup>108</sup> Original Determination, Pub. 2177 at 18-19.

<sup>109</sup> CR at II-5 & II-33, PR at II-3 & II-15.

<sup>110</sup> CR at II-13, PR at II-6.

<sup>111</sup> CR & PR, Tables II-4 & IV-1; Eveready Prehearing Brief at 16.

<sup>112</sup> CR at II-27 - II-28, PR at II-12. *See also* Tosoh Posthearing Brief at 3. Eveready's head of purchasing testified that prices for EMD in Europe and Asia did not influence the prices that the company paid in the United States. Tr. at 241 (G. Hooks). However, he attributed this disconnect to the fact that Eveready buys only from domestic producers in the United States and only from non-U.S. producers outside the United States. This situation would change if the order were removed and Eveready \*\*\* order EMD from Greece. \*\*\*.

Increased shipments of subject merchandise to the United States are not likely to depress or suppress overall pricing levels to a significant degree. Although an increase in total supply could reduce the price at which supply and demand reached equilibrium in a static market, demand for EMD is increasing. Consistent with our conclusion that subject imports would fill increased demand that domestic producers cannot meet, we conclude that prices for subject imports would not significantly affect prices for the existing volume of sales.

Finally, we note that producers of the subject merchandise face the same incentives as any producer to increase profits by raising prices where possible, and that the impending EMD shortage would likely lead to an increase in prices. \*\*\*<sup>113</sup>. It is likely that the subject producers will attempt to initiate this process by seeking price increases from their existing customers. In this context, it is unlikely that they would simultaneously offer lower prices to U.S. customers.

For the foregoing reasons, we find that revocation of the antidumping duty orders would not be likely to lead to significant underselling by the cumulated subject imports of the domestic like product, or to significant price depression and suppression, within a reasonably foreseeable time.

## **F. Likely Impact**

In the original investigation, the Commission noted that Kerr-McGee converted from graphite to titanium anodes in 1985 and Chemetals' predecessor, Foote Mineral Co., only began production in 1986.<sup>114</sup> The Commission found that the domestic industry's attempts to maintain production levels and market share had caused shipment and production data to improve slightly. However, these improvements had been accompanied by a decrease in both average unit values and operating margins.<sup>115</sup>

The record in these reviews indicates that the domestic industry's operating margins have improved \*\*\* since the original investigation, moving from a loss position to \*\*\* of profitability.<sup>116</sup> This has occurred because the industry's unit costs have \*\*\* as the last year of the original investigation period, while average unit values are \*\*\* higher.<sup>117</sup> The industry's capacity \*\*\* as large, while production has \*\*\*. As a result, capacity utilization is greater, and has reached the point at which the industry is producing at full capacity. The number of production workers and hours worked is also greater than at any point during the original investigation period.<sup>118</sup>

There is little information on the record that would suggest that the industry is vulnerable.<sup>119</sup> The domestic industry appears to be highly competitive with world suppliers. Purchasers rate Kerr-McGee as

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<sup>113</sup> \*\*\*.

<sup>114</sup> Original Determination, Pub. 2177 at 9.

<sup>115</sup> Original Determination, Pub. 2177 at 9-10.

<sup>116</sup> CR & PR, Table I-1.

<sup>117</sup> Compare CR & PR, Table III-6 with Final Report to the Commission (confidential version) at A-42, Electrolytic Manganese Dioxide From Greece and Japan, Invs. Nos. 731-TA-406 & 408 (Final).

<sup>118</sup> CR & PR, Table I-1.

<sup>119</sup> The final comments on new information submitted by Tosoh Corp. improperly referenced information that was not on the administrative record. In accordance with section 207.68(b) of the Commission's Rules of Practice and Procedure, we disregarded such information in reaching our final determination. See 19 C.F.R. § 207.68(b).

producing \*\*\*,<sup>120</sup> and recognize that Chemetals \*\*\*.<sup>121</sup> The domestic producers are operating at full capacity and over the period of review have been drawing down inventory levels.<sup>122</sup> The industry's operating profits were \*\*\* during the review period, as was almost every other performance indicator normally considered by the Commission.<sup>123</sup> Given the likelihood of an EMD shortage in the reasonably foreseeable future, demand is likely to remain strong and the industry's condition is likely to remain strong or \*\*\*.

This improvement in the industry's condition appears to have begun with price increases that followed the imposition of antidumping duty orders in 1989. The prices charged by Kerr-McGee and Chemetals increased by \*\*\* percent, from \*\*\* per short ton in 1988 to \*\*\* per short ton in 1991.<sup>124</sup> We conclude that this initial improvement is related to the antidumping duty orders. However, the volume of nonsubject imports rose along with the prices. After smaller increases in 1989 and 1990, the volume of nonsubject imports increased threefold in 1991, spurred by the entry of EMD from Australia into the U.S. market and the quintupling of the volume of EMD imported from Ireland.<sup>125</sup> By 1994, nonsubject imports had attained a market share \*\*\* than subject imports had held at their peak in 1988.<sup>126</sup> The domestic industry not only survived this challenge, but prospered. By 1997, it had gained back some of the market share lost to nonsubject imports and was operating at \*\*\* profit margins.<sup>127</sup> This performance indicates a further strengthening in the domestic industry, as witnessed by the ability of both Kerr-McGee and Chemetals to increase their output and improve the quality of their EMD to world-class levels.

Therefore, we conclude that pre-order conditions will not recur if the order is lifted. Prior to the original investigation period, Japanese producers were "the predominant suppliers of EMD in the U.S."<sup>128</sup> The U.S. producers had only recently entered the market for high-quality alkaline EMD, and could not match the quality of the Japanese product.<sup>129</sup> The situation has since changed. As noted above, U.S. producers can now match Japanese quality,<sup>130</sup> have increased their capacity, and have reached \*\*\* levels of profitability. Therefore, we do not expect subject imports to have the same effect that they did during the original investigation period.

In light of global supply limitations, the parity between domestic EMD and EMD from the subject countries, and the EMD purchasers' preference for sourcing locally, we conclude that the subject imports are unlikely to have a significant negative effect on domestic producers' production or market share. There is no evidence that domestic producers' costs of production \*\*\*, and subject imports are unlikely to

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<sup>120</sup> See CR at II-40, PR at II-19; \*\*\*.

<sup>121</sup> CR at II-13, n. 22, PR at II-6, n. 22.

<sup>122</sup> CR & PR, Tables III-1 & III-3.

<sup>123</sup> See CR & PR, Tables III-1, III-2, III-4 & III-5.

<sup>124</sup> CR at II-5, PR at II-3.

<sup>125</sup> Chemetals & Kerr-McGee Response to the Notice of Institution, Exh. 2 (June 22, 1999).

<sup>126</sup> Petitioners' Response to the Notice of Institution, Exh. 2.

<sup>127</sup> CR & PR, Table I-1.

<sup>128</sup> Original Determination, Pub. 2177 at 17. At that point, subject producers' production capacity was \*\*\* that of domestic producers. See Original Staff Report, Tables 6, 16 & 17.

<sup>129</sup> Original Determination, Pub. 2177 at 9-10, 19-20.

<sup>130</sup> Subject producers' alkaline EMD capacity is now \*\*\* than domestic producers' capacity. CR & PR, Tables III-1, IV-2 & IV-3.

suppress or depress prices to a significant degree. Therefore, subject imports are unlikely to have a significant negative effect on the financial performance of the domestic industry if the orders are revoked.

Finally, we find that subject imports are not likely to have a significant negative effect on the domestic industry's existing development and production efforts. \*\*\*.<sup>131</sup> Finally, we note that the U.S. battery producers have in the past sought to invigorate competition by helping lower quality producers to improve their product.<sup>132</sup> Therefore, we expect that U.S. purchasers will continue to work with domestic EMD producers to develop derivative or more advanced versions of the domestic like product even if the orders are revoked.

Accordingly, based on the record in these reviews, we conclude that if the antidumping duty orders are revoked, subject imports from Greece and Japan would not be likely to have a significant adverse impact on the domestic industry within a reasonably foreseeable time.

## CONCLUSION

For the foregoing reasons, we determine that revocation of the antidumping duty order on imports of EMD from Greece and Japan would not be likely to lead to continuation or recurrence of material injury to the U.S. EMD industry within a reasonably foreseeable time.<sup>133</sup>

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<sup>131</sup> \*\*\* Tr. at 189 (G. Bohlke).

<sup>132</sup> Original Determination, Pub. 2177 at 17, n. 54.

<sup>133</sup> Commissioner Bragg dissenting.

## DISSENTING VIEWS OF CHAIRMAN LYNN M. BRAGG

Based upon the record in these investigations, I find under section 751(c) of the Tariff Act of 1930, as amended (“the Act”), that revocation of the antidumping duty orders on electrolytic manganese dioxide (“EMD”) from Greece and Japan would be likely to lead to the continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. I therefore dissent from the determination of the majority.

As a starting point, I recognize that the record indicates that the U.S. market is likely nearing a supply shortfall.<sup>1</sup> However, even accepting that the volume of subject imports will increase in response to any supply shortfall, the record indicates that subject producers have both the ability and incentive to ship a significant volume of EMD into the U.S. market above and beyond the volume necessary to cover any likely supply shortfall, and as discussed below, such imports will likely undersell the domestic like product resulting in significant negative price effects in the U.S. market. As a result, domestic producers will likely experience declining financial performance and a decreased ability to expand production capacity to meet growing EMD demand in the U.S. market.

### I. DOMESTIC LIKE PRODUCT AND DOMESTIC INDUSTRY

#### A. DOMESTIC LIKE PRODUCT

In its final sunset review determinations, Commerce defined the scope of the EMD orders as:

electrolytic manganese dioxide (“EMD”). EMD is manganese dioxide (MnO<sub>2</sub>) that has been refined in an electrolysis process. The subject merchandise is an intermediate product used in the production of dry-cell batteries. EMD is sold in three physical forms, powder, chip, or plate, and two grades, alkaline and zinc chloride. EMD in all three forms and both grades is included in the scope of the order.

In its original determinations, the Commission found “the minor physical differences between zinc chloride grade, alkaline grade, titanium anode, and imported graphite anode EMD to be insufficient bases for separate like product treatment.”<sup>2</sup> Therefore, it found that the domestic like product for the subject merchandise consisted of all EMD. None of the parties to these reviews has contested the original like product finding, and the record contains no evidence suggesting that a different like product definition would be more appropriate.<sup>3</sup>

In performing my like product analysis, I begin with Commerce’s scope determination and look to see if there are clear dividing lines among possible like products. In this regard, I consider whether different types of products represent a “continuum” of articles within one like product rather than separate like products. In this review, I define the like product to include all EMD.

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<sup>1</sup> Petitioners’ Posthearing Brief at Exh. K at 8 (\*\*\*).

<sup>2</sup> Electrolytic Manganese Dioxide from Greece and Japan, Invs. Nos. 406 & 408 (Final), USITC Pub. 2177 at 7 (April 1989) (“Original Determination”).

<sup>3</sup> See CR at I-10-I-16, PR at I-6-I-9.

## B. DOMESTIC INDUSTRY

Section 771(4)(A) of the Act defines the relevant industry as the “domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product.”<sup>4</sup> In defining the domestic industry, the Commission’s general practice has been to include in the industry producers of all domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market, provided that adequate production-related activity is conducted in the United States.<sup>5</sup>

Based upon my domestic like product finding above, I define the domestic industry as all domestic producers of EMD.

## C. RELATED PARTIES

Having defined the domestic industry as all domestic producers of EMD, I turn to the issue of whether appropriate circumstances exist to exclude any domestic producer from the domestic industry as a related party. The related parties provision, 19 U.S.C. § 1677(4)(B), allows for the exclusion of certain domestic producers from the domestic industry for the purposes of an injury determination. Applying the provision involves two steps. First, the Commission must determine whether a domestic producer meets the definition of a related party.<sup>6</sup> Second, if a producer is a related party, the Commission may exclude such a producer from the domestic industry if “appropriate circumstances” exist.<sup>7</sup>

Exclusion of a related party is within the Commission’s discretion based upon the facts presented in each case.<sup>8</sup> The rationale for the related parties provision is the concern that domestic producers who are related parties may be shielded from any injury that might be caused by the subject imports.<sup>9</sup>

The record indicates that \*\*\*, a domestic producer of EMD, was also an importer of \*\*\* during

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<sup>4</sup> 19 U.S.C. § 1677(4)(A).

<sup>5</sup> See, e.g., Stainless Steel Wire Rod from Germany, Italy, Japan, Korea, Spain, Sweden, and Taiwan, Invs. Nos. 701-TA-373, 731-TA-769-775 (Final), USITC Pub. 3126, at 7 (September 1998); Manganese Sulfate from the People’s Republic of China, Invs. Nos. 731-TA-725 (Final), USITC Pub. 2932, at 5 & n.10 (November 1995) (“the Commission has generally included toll producers that engage in sufficient production-related activity to be part of the domestic industry”); Oil Country Tubular Goods from Argentina, Austria, Italy, Japan, Korea, Mexico, and Spain, Inv. Nos. 701-TA-363 and 364 and 731-TA-711-717 (Final), USITC Pub. 2911 (August, 1995) (not including threaders in the casing and tubing industry because of “limited levels of capital investment, lower levels of expertise, and lower levels of employment”).

<sup>6</sup> Section 771(4)(B), 19 U.S.C. § 1677(4)(B).

<sup>7</sup> 19 U.S.C. § 1677(4)(B).

<sup>8</sup> See Torrington Co. v. United States, 790 F. Supp. at 1168; Sandvik AB v. United States, 721 F. Supp. 1322, 1331-32 (CIT 1989), aff’d without opinion, 904 F.2d 46 (Fed. Cir. 1990); Empire Plow Co. v. United States, 675 F. Supp. 1348, 1352 (CIT 1987).

<sup>9</sup> See Torrington Co., 790 F. Supp. at 1168; Empire Plow Co., 675 F. Supp. at 1353-54; S. Rep. No. 249, 96th Cong. 1st Sess. at 83 (1979) (“where a U.S. producer is related to a foreign exporter and the foreign exporter directs his exports to the United States so as not to compete with his related U.S. producer, this should be a case where the ITC would not consider the related U.S. producer to be a part of the domestic industry”).

the review period,<sup>10</sup> which makes it a related party by definition.<sup>11</sup> However, the record also indicates that the volume of subject imports \*\*\*, thus indicating that \*\*\* primary interests lie in domestic production and not importation.<sup>12</sup> Accordingly, I determine that appropriate circumstances do not exist to exclude \*\*\* from the domestic industry as a related party.

## II. CUMULATION

### A. ANALYTICAL FRAMEWORK

As set forth in previous views, in considering whether to cumulate subject imports in a sunset review, I first assess: (1) whether the reviews were initiated on the same day; and (2) the likely reasonable overlap of competition among subject imports and between subject imports and the domestic like product, in the event the orders are revoked.<sup>13</sup>

If, as a result of the foregoing assessment, I determine that subject imports are amenable to cumulation, I then proceed to examine whether the statutory exception precludes cumulation of such imports that are otherwise amenable to cumulation.

Upon review of the record in these reviews, I find, as discussed below, that there is likely to be a discernible adverse impact to domestic EMD producers as result of revocation of each subject order individually. I therefore cumulate subject imports from Greece and Japan.

### B. REASONABLE OVERLAP OF COMPETITION

The record indicates that the subject imports from Greece and Japan and the domestic like product are fungible.<sup>14</sup> The record also indicates that U.S. sales of Greek and Japanese subject imports and the domestic like product are now and would likely continue to be made through similar channels of distribution.<sup>15</sup> In addition, Greek and Japanese subject imports and the domestic like product are likely to be sold by U.S. producers and importers in all areas of the United States.<sup>16</sup>

Based upon all the foregoing, I find a likely reasonable overlap of competition among subject imports from Greece and Japan and the domestic like product in the event of revocation.

### C. DISCERNIBLE ADVERSE IMPACT

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<sup>10</sup> CR at III-4, PR at III-3.

<sup>11</sup> See section 771(4)(B)(i) of the Act, 19 U.S.C. § 1677(4)(B)(I). \*\*\* accounted for \*\*\* percent of U.S. production of EMD in 1998. CR and PR at Table I-2.

<sup>12</sup> CR at III-4-III-6, PR at III-3; CR at III-2, PR at III-1.

<sup>13</sup> See Separate Views of Chairman Lynn M. Bragg Regarding Cumulation in Sunset Reviews, Potassium Permanganate from China and Spain, Invs. Nos. 731-TA-125-126 (Review), USITC Pub. 3245 (October 1999) at 27-30; Separate Views of Chairman Lynn M. Bragg Regarding Cumulation, Brass Sheet and Strip from Brazil, Canada, France, Germany, Italy, Japan, Korea, the Netherlands, and Sweden, Invs. Nos. 701-TA-269 and 270 (Review) and 731-TA-311-317 and 379-380 (Review), USITC Pub. 3290 (April 2000) at 27-32.

<sup>14</sup> CR at II-42, PR at II-19; CR at II-40-II-41, PR at II-19.

<sup>15</sup> CR at I-15, PR at I-9.

<sup>16</sup> CR at II-9, PR at II-4.

## 1. GREECE

Based upon the sole Greek EMD producer Tosoh Hellas' most recent capacity utilization rates and an optimal capacity utilization rate of \*\*\* percent, Tosoh Hellas currently has the ability to produce an additional \*\*\* short tons of EMD which potentially could be made available for export to the U.S. market, and which is equivalent to over \*\*\* percent of 1998 apparent U.S. consumption and nearly \*\*\* percent of 1998 domestic EMD production.<sup>17</sup> The record therefore indicates that, in the event of revocation, Tosoh Hellas has the ability to ship a significant volume of subject imports into the United States. The record also indicates that Tosoh Hellas is qualified to supply \*\*\*, and in fact recently shipped a small volume of subject merchandise to \*\*\*.<sup>18</sup>

In addition, subject imports from Greece would likely undersell the domestic like product in the event of revocation. Subsequent to the issuance of the order at issue, subject imports from Greece have been nearly absent from the U.S. market.<sup>19</sup> Therefore, the most reliable pricing information on the record is the pricing information from the original investigation. And based upon the original pricing data, the record indicates that subject imports from Greece would likely undersell the domestic like product in the event of revocation.<sup>20</sup>

Based upon the foregoing, I determine that in the event of revocation subject imports from Greece will likely have a discernible adverse impact on the domestic EMD industry. Accordingly, I find that subject imports from Greece are amenable to cumulation.

## 2. JAPAN

Based upon the most recent Japanese capacity utilization rates and an optimal capacity utilization rate of \*\*\* percent, Japanese EMD producers currently have the ability to produce an additional \*\*\* short tons of EMD which potentially could be made available for export to the U.S. market, and which is equivalent to over \*\*\* percent of 1998 apparent U.S. consumption and nearly \*\*\* percent of 1998 domestic EMD production.<sup>21</sup> In addition, the record indicates that Japanese producers' production capacity will increase by \*\*\* short tons in the near term, thus bringing the volume of potential Japanese EMD available for shipment to the United States to over \*\*\* short tons, which is equivalent to over \*\*\* percent of 1998 apparent U.S. consumption and over \*\*\* percent of 1998 total domestic EMD production.<sup>22</sup>

The record also indicates that subject imports from Japan would likely undersell the domestic like product in the event of revocation. Subsequent to the issuance of the order at issue, subject imports from

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<sup>17</sup> CR and PR at Table IV-2; CR and PR at Table I-4; CR and PR at Table III-1. I note that respondents argue that their "ideal capacity utilization rate" is \*\*\*, Tosoh Prehearing Brief at 11. However, as recently as 1998, Tosoh Hellas operated at a capacity utilization rate of \*\*\*, and at the time of the original investigation, Tosoh Hellas' capacity utilization rate was as high as \*\*\* percent. Tosoh Prehearing Brief at 11; Original CR at A-52.

<sup>18</sup> CR and PR at Table II-4; CR at II-23, PR at II-10.

<sup>19</sup> CR at II-23, PR at II-9.

<sup>20</sup> Original Determination at 15-21.

<sup>21</sup> CR and PR at Table IV-3; CR and PR at Table I-4; CR and PR at Table III-1. The record indicates that in 1999 Tosoh Japan operated near \*\*\* percent capacity utilization. Tosoh Prehearing Brief at 42.

<sup>22</sup> CR at IV-6; CR and PR at Table I-4; CR and PR at Table III-1.

Japan have been nearly absent from the U.S. market.<sup>23</sup> Therefore, the most reliable pricing information currently on the record is the pricing information from the original investigation. And based upon the original pricing data, the record indicates that subject imports from Japan would likely undersell the domestic like product in the event of revocation.<sup>24</sup>

Based upon the foregoing, I determine that in the event of revocation subject imports from Japan will likely have a discernible adverse impact on the domestic EMD industry. Accordingly, I find that subject imports from Japan are amenable to cumulation. I therefore cumulate subject imports from Greece and Japan in performing my analysis.

### **III. REVOCATION OF THE ORDERS ON EMD FROM GREECE AND JAPAN IS LIKELY TO LEAD TO THE CONTINUATION OR RECURRENCE OF MATERIAL INJURY WITHIN A REASONABLY FORESEEABLE TIME**

#### **A. LEGAL STANDARD**

In a five-year review conducted under section 751(c) of the Act, Commerce will revoke an antidumping duty order unless: (1) it makes a determination that dumping is likely to continue or recur; and (2) the Commission makes a determination that revocation of an order “would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.”<sup>25</sup> The Uruguay Round Agreements Act (“URAA”) Statement of Administration Action (“SAA”) provides that “under the likelihood standard, the Commission will engage in a counter-factual analysis; it must decide the likely impact in the reasonably foreseeable future of an important change in the status quo – the revocation [of the finding] . . . and the elimination of its restraining effects on volumes and prices of imports.”<sup>26</sup> Thus, the likelihood standard is prospective in nature. The statute states that “the Commission shall consider that the effects of revocation . . . may not be imminent, but may manifest themselves only over a longer period of time.”<sup>27</sup> According to the SAA, a “‘reasonably foreseeable time’ will vary from case-to-case, but normally will exceed the ‘imminent’ time frame applicable in a threat of injury analysis” in antidumping and countervailing duty investigations.<sup>28</sup>

Although the standard in five-year reviews is not the same as the standard applied in original antidumping or countervailing duty investigations, it contains many of the same fundamental elements. The statute provides that the Commission is to “consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the [orders are] revoked.”<sup>29</sup> It directs the Commission to take into account its prior injury determination, whether any improvement in the state of the industry is related to the order under review, and whether the industry is vulnerable to material injury if the order is revoked.”<sup>30</sup>

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<sup>23</sup> CR at II-23, PR at II-9.

<sup>24</sup> Original Determination at 15-21.

<sup>25</sup> 19 U.S.C. § 1675a(a).

<sup>26</sup> URAA SAA, H.R. Rep. No. 103-316, vol. I, at 883-84 (1994).

<sup>27</sup> 19 U.S.C. § 1675a(a)(5).

<sup>28</sup> SAA at 887.

<sup>29</sup> 19 U.S.C. 1675a(a).

<sup>30</sup> *Id.*

For the reasons set forth below, I determine that revocation of the antidumping duty orders on EMD from Greece and Japan would be likely to lead to the continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time.

## **B. CONDITIONS OF COMPETITION**

In evaluating the likely impact of the subject imports on the domestic industry if the orders are revoked, the statute directs the Commission to evaluate all relevant economic factors “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>31</sup> In performing my analysis under the statute, I have taken into consideration the following conditions of competition for EMD.

First, the U.S. EMD market has an extremely small number of buyers and sellers.<sup>32</sup> Therefore, revocation of the orders has the potential to shift the short run balance between supply and demand in favor of EMD buyers.<sup>33</sup>

Second, EMD purchasers and producers strive to maintain long-term relationships with each other.

Third, demand for batteries is increasing in the United States and around the world, especially for smaller batteries used in handheld electronics, with a consequent increase in demand for EMD.<sup>34</sup>

Fourth, the record indicates that the U.S. market is likely nearing a supply shortfall.<sup>35</sup>

Fifth, domestic and subject producers have the ability to supply all quality levels of EMD consumed in the United States.<sup>36</sup> Although the record indicates that \*\*\*,<sup>37</sup>

Sixth, nonsubject imports are priced in the same range as domestically produced merchandise and play an increasingly important role in the domestic market.<sup>38</sup>

Seventh, EMD prices are highest in Japan, somewhat lower in the United States, and lower still in the rest of the world. Thus, foreign producers have an incentive to sell EMD into the U.S. market.<sup>39</sup>

Eighth, U.S. dry cell battery producers and the domestic market in which they compete are the largest and most technologically advanced in the world.<sup>40</sup> Since foreign EMD producers must keep up with the latest technological developments, they have a strong incentive to sell their product in the U.S. market.<sup>41</sup>

Ninth, U.S. EMD producers have no viable alternative to selling in the United States, since the other major EMD markets in Europe and Japan have tariff barriers to entry, and an EMD plant cannot be used to make other products.<sup>42</sup>

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<sup>31</sup> 19 U.S.C. § 1675a(a)(4).

<sup>32</sup> Petitioners’ Prehearing Brief at 23; Tosoh Prehearing Brief at 5.

<sup>33</sup> CR at II-1, PR at II-1.

<sup>34</sup> Tosoh Posthearing Brief at 3.

<sup>35</sup> Petitioners’ Posthearing Brief at Exh. K at 8 (\*\*\*) .

<sup>36</sup> CR and PR at Table II-4.

<sup>37</sup> \*\*\*.

<sup>38</sup> \*\*\*.

<sup>39</sup> Petitioners’ Posthearing Brief, Question Responses at 31.

<sup>40</sup> Petitioners’ Prehearing Brief at 2.

<sup>41</sup> Petitioners’ Prehearing Brief at 24.

<sup>42</sup> Petitioners’ Prehearing Brief at 26.

Finally, once EMD producers have qualified with a given purchaser, there is a high degree of substitution among EMD producers qualified with the given purchaser.<sup>43</sup> In this context, price becomes an important factor affecting purchasing decisions.<sup>44</sup>

### C. LIKELY VOLUME OF SUBJECT IMPORTS

In evaluating the likely volume of imports of subject merchandise if the orders under review are revoked, the Commission is directed to consider whether the likely volume of imports would be significant either in absolute terms or relative to production or consumption in the United States.<sup>45</sup> In doing so, the Commission must consider “all relevant economic factors,” including four enumerated factors: (1) any likely increase in production capacity or existing unused production capacity in the exporting country; (2) existing inventories of the subject merchandise, or likely increases in inventories; (3) the existence of barriers to importation of the subject merchandise into countries other than the United States; and (4) the potential for product shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.<sup>46</sup>

The record indicates that subject producers from Greece and Japan currently have, or will shortly have, the ability to produce an additional \*\*\* short tons of EMD which potentially could be made available for export to the U.S. market, and which is equivalent to \*\*\* percent of 1998 apparent U.S. consumption and nearly \*\*\* percent of 1998 domestic EMD production.<sup>47</sup>

The record also indicates that, in the event of revocation, subject producers will have both the ability and incentive to shift sales from current clients to U.S. clients, further increasing the potential volume of subject imports available for export to the United States.<sup>48</sup> Subject producers contend that they would not abandon existing clients in order to supply U.S. demand.<sup>49</sup> However, during the original investigation subject producers did in fact shift sales from non-U.S. purchasers to U.S. purchasers, thus indicating both an ability and willingness to re-direct sales from existing purchasers to the U.S. market in the event of revocation.<sup>50</sup>

More recent factual information also evidences subject producers’ ability to re-direct sales to the United States. Tosoh Hellas indicated that \*\*\* of its production is under one-year contracts.<sup>51</sup> Tosoh Hellas would therefore have the ability to shift sales to the U.S. market when its current contractual

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<sup>43</sup> CR at II-38, PR at II-17.

<sup>44</sup> CR at II-39, PR at II-18.

<sup>45</sup> 19 U.S.C. § 1675a(a)(2).

<sup>46</sup> 19 U.S.C. § 1675a(a)(2)(A)-(D).

<sup>47</sup> CR and PR at Table IV-2; CR and PR at Table IV-3; CR at IV-6, PR at IV-3; CR and PR at Table I-4; CR and PR at Table III-1.

<sup>48</sup> Respondents claim that their capacity utilization rates are constrained by having to service customers with differing EMD specifications. Tosoh Prehearing Brief at 11. If so, subject producers could choose to shift sales away from several smaller purchasers to a few large U.S. purchasers in an effort to increase their EMD production efficiency and capacity utilization rates.

<sup>49</sup> Tosoh Prehearing Brief at 25.

<sup>50</sup> Original CR at A-52-A-53.

<sup>51</sup> Tosoh Posthearing Brief at 8.

commitments expire. In addition, the custom in the Japanese market is to rely upon informal contracts, thus indicating that Japanese subject producers have an immediate ability to shift their considerable sales of EMD destined for non-Japanese markets to the United States.<sup>52</sup>

I therefore determine that, based upon the subject producers' ability to significantly increase the volume of subject imports into the United States and the incentives to obtain higher prices in the U.S. market while servicing a few large, technologically sophisticated purchasers, revocation of the antidumping duty orders will likely result in significant volumes of subject imports from Greece and Japan.

#### **D. LIKELY PRICE EFFECTS OF SUBJECT IMPORTS**

In evaluating the likely price effects of subject imports if the antidumping duty orders are revoked, the Commission is directed to consider whether there is likely to be significant underselling by the subject imports as compared with the domestic like product. The Commission must also consider whether the subject imports are likely to enter the U.S. at prices that would have a significant price depressing or suppressing effect on the domestic like product.<sup>53</sup>

Due to the near absence of subject imports in the U.S. market subsequent to the issuance of the orders, there is little current evidence upon which to make price comparisons between domestic EMD and subject imports. Nonetheless, I have considered all relevant economic factors within the context of the business cycle and the conditions of competition distinctive to the industry. As instructed by the statute, I have also considered the extent to which any improvement in the state of the domestic industry is related to the antidumping duty orders at issue and whether the industry is vulnerable to material injury if the order is revoked.

During the original period of investigation, subject imports were found to have depressed and undercut domestic EMD prices, with a resulting adverse impact on the domestic industry.<sup>54</sup> Following imposition of the antidumping orders at issue, the average price obtained by domestic EMD producers rose by \*\*\* percent in the first two years.<sup>55</sup> Subsequently, domestic EMD prices have been relatively flat, until recently when they have trended slightly lower as a result of increased competition from non-subject imports.<sup>56</sup>

In this context, \*\*\* has indicated that it believes domestic prices are currently too high and that it \*\*\* so that it will be able to obtain subject EMD at "reasonable prices."<sup>57</sup> It is therefore apparent that \*\*\* will attempt to use subject imports to leverage prices for the domestic product lower. This determination is further supported by record evidence indicating that revocation of the orders has the potential to shift the short run balance between supply and demand in favor of EMD purchasers.<sup>58</sup> U.S. EMD purchasers therefore will have both the ability and incentive to utilize unfairly priced subject imports to decrease the price of domestic EMD in the event of revocation.

I therefore conclude that given the high degree of substitution among qualified purchasers and the

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<sup>52</sup> Tosoh Posthearing Brief at 8. Japanese producers' exports to markets other than the United States totaled \*\*\* short tons in 1998. CR and PR at Table IV-3.

<sup>53</sup> 19 U.S.C. § 1675a(a)(3).

<sup>54</sup> Original Determination at 15-21.

<sup>55</sup> CR at II-23.

<sup>56</sup> CR at V-6-V-25, PR at V-5-V-9; CR at II-33, PR at II-15.

<sup>57</sup> \*\*\*.

<sup>58</sup> CR at II-1, PR at II-1.

importance of price in purchasing decisions, the likely significant volume of subject imports will result in likely significant negative price effects to the domestic industry in the event of revocation.

#### **E. LIKELY IMPACT OF SUBJECT IMPORTS**

When considering the likely impact of subject imports, the Commission is to consider all relevant economic factors likely to have a bearing on the state of the industry in the United States, including: (1) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; (2) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; and (3) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more enhanced version of the domestic like product.<sup>59</sup>

As discussed above, revocation of the antidumping duty orders would be likely to lead to significant increases in the volume of subject imports at prices that likely would cause price depression and subsequent erosion of the domestic industry's profitability. In turn, these declines would likely result in critical worker layoffs, idling of plant capacity, and the inability to make capital expenditures and fund research and development essential to product development and sales, all of which will significantly impede the ability of domestic producers to compete in the U.S. market.

Accordingly, I conclude that if the antidumping duty orders on subject imports from Greece and Japan are revoked, the likely significant volumes of subject imports would likely result in significant negative price effects, and thus have a likely significant adverse impact on the domestic industry within a reasonably foreseeable time.

#### **IV. CONCLUSION**

Based upon the foregoing, I find that revocation of the antidumping duty orders on EMD from Greece and Japan would be likely to lead to continuation or recurrence of material injury to the domestic EMD industry within a reasonably foreseeable time.

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<sup>59</sup> 19 U.S.C. § 1675a(a)(4).