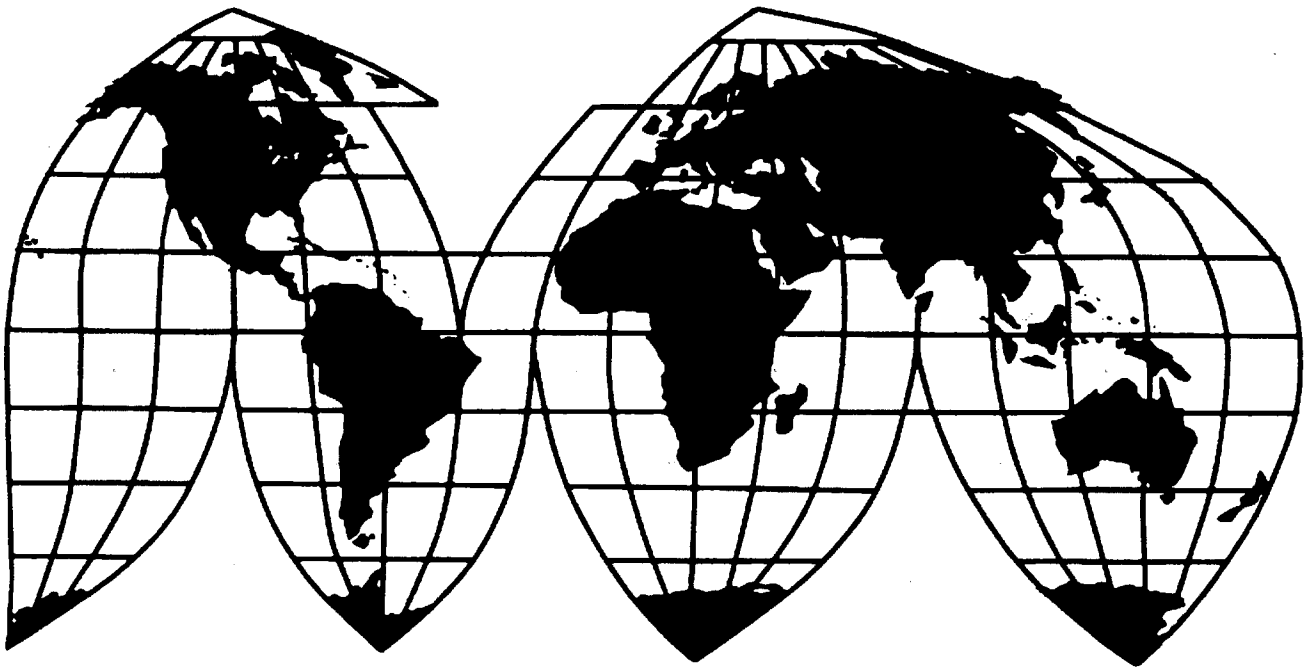
# Tin- and Chromium-Coated Steel Sheet From Japan (Views on Remand)

Investigation No. 731-TA-860 (Final) (Third Remand)

**Publication 3751** **December 2004**

**U.S. International Trade Commission**



Washington, DC 20436

# U.S. International Trade Commission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In August 2000, the Commission determined that an industry in the United States was materially injured by reason of imports of tin- and chromium-coated steel sheet ("tin mill products") from Japan that the U.S. Department of Commerce found to be sold in the United States at less than fair value.[1] On December 31, 2001, the U.S. Court of International Trade remanded the Commission's affirmative determination for further explanation.[2] In March 2002, the Commission issued its first remand determination, finding that an industry in the United States was materially injured by subject imports of tin mill products from Japan.[3]

On August 9, 2002, the Court issued its second decision in the proceeding, vacating the Commission's affirmative determination and ordering the Commission to enter a negative determination.[4] On October 3, 2003, the U.S. Court of Appeals for the Federal Circuit vacated the Court of International Trade's decision,[5] finding that the Court of International Trade had gone "beyond its statutorily-assigned role to 'review'" because "it engaged in refinding facts (e.g., by determining witness credibility), or interposing its own determinations on causation and material injury itself."[6] However, the Federal Circuit directed the Commission on remand to "attend to all the points made by the Court of International Trade" in its second decision.[7]

On February 23, 2004, the Commission issued its second remand determination, finding that the subject tin mill imports materially injured the industry.[8] On October 14, 2004, the Court of International Trade again remanded the Commission's second remand determination.[9] The Court ordered the Commission to "issue a negative material injury determination" in the investigation[10] but ordered the Commission to "determine whether a threat of injury dispute remains" in the matter.[11] On remand, as required by the Court of International Trade, the Commission issued a determination that an industry in the United States is not materially injured or threatened with material injury by reason of imports of subject tin mill products from Japan.

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[1] *Tin- and Chromium-Coated Steel Sheet from Japan,* Investigation No. 731-TA-860 (Final), USITC Pub. 3337 (Aug. 2000).

[2] *Nippon Steel Corp. v. United States*, 182 F. Supp.2d 1330 (Ct. Int'l Trade 2001).

[3] Views of the Commission on Remand, *Tin- and Chromium-Coated Steel Sheet from Japan*, Investigation No. 731-TA-860 (Remand), USITC Pub. 3493 (March 2002).

[4] *Nippon Steel Corp. v. United States*, 223 F. Supp.2d 1349 (Ct. Int'l Trade 2002).

[5] *Nippon Steel Corporation v. International Trade Commission*, 345 F.3d 1379, 1381-82 (Fed. Cir. 2003) (*"Nippon III"*).

[6] *Nippon III* at 1381.

[7] *Nippon III* at 1382.

[8] Views of the Commission on Second Remand, *Tin- and Chromium-Coated Steel Sheet from Japan,* Investigation No. 731-TA-860 (Second Remand), USITC Pub. 3674 (February 2004).

[9] *Nippon Steel Corporation, et al. v. United States, et al.*, Slip op. 04-131 (October 14, 2004)(*"Nippon IV"*).

[10] *Nippon IV* at 66.

[11] *Nippon IV* at 67.

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Note.–Information that would reveal confidential operations of individual concerns may not be published and therefore has been deleted from this report. Such deletions are indicated by asterisks.

## VIEWS OF THE COMMISSION ON THIRD REMAND

By opinion and order dated October 14, 2004, the U.S. Court of International Trade remanded the Commission's second remand determination in Tin- and Chromium-Coated Steel Sheet from Japan, Inv. No. 731-TA-860 (Final) (Second Remand), USITC Pub. 3674 (February 2004). *Nippon Steel Corporation, et al. v. United States, et al.*, Slip op. 04-131 (October 14, 2004) ("*Nippon IV*"). In that decision, the Court ordered the Commission to "issue a negative material injury determination" in the investigation.[1] The Court also remanded the determination to the Commission so the Commission could "determine whether a threat of injury dispute remains" in the matter.[2]

In accordance with the Court's order, we issue a determination that an industry in the United States is not materially injured by reason of imports of tin- and chromium-coated steel sheet ("tin mill products") from Japan that the Department of Commerce found to be sold in the United States at less than fair value ("LTFV").[3] [4] In addition, in accordance with the Court's instructions, we have considered the issue of threat and issue a determination that an industry in the United States is not threatened with material injury by reason of LTFV imports of tin mill products from Japan. As we explain below, we believe that this outcome is dictated by the Court's findings in *Nippon IV*; it is not, however, the determination we would have made in the absence of those findings.

## I. BACKGROUND

This investigation has a lengthy and somewhat complex procedural history, which includes three separate and comprehensive determinations by the Commission, three opinions by the Court of International Trade, and an opinion by the U.S. Court of Appeals for the Federal Circuit. Because these decisions place our current remand determination in context, we summarize the procedural history of the matter below.

In August 2000, the Commission issued its original injury determination in the antidumping investigation covering tin mill products from Japan.[5] In its determination, the Commission majority found that subject imports grew rapidly over the period of investigation ("POI"),[6] undersold the domestic merchandise on an increasing basis during the POI, suppressed and depressed domestic prices during the

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[1] *Nippon IV* at 66.

[2] *Nippon IV* at 67.

[3] Vice Chairman Deanna Tanner Okun, Commissioner Marcia E. Miller, Commissioner Jennifer A. Hillman, and Commissioner Charlotte R. Lane join in these majority views.

[4] Chairman Stephen Koplan and Commissioner Daniel Pearson concurring. Chairman Koplan reaffirms his original views, finding that an industry in the United States is not materially injured or threatened with material injury by reason of subject imports of tin- and chromium-coated steel sheet from Japan that the Department of Commerce found to be sold in the United States at less than fair value. *See* Dissenting Views of Chairman Stephen Koplan, *Tin- and Chromium-Coated Steel Sheet from Japan,* Investigation No. 731-TA-860 (Final), USITC Pub. 3337 at 21 (Aug. 2000). Commissioner Pearson also reaffirms his prior views, finding that an industry in the United States is not materially injured or threatened with material injury. *Tin- and Chromium-Coated Steel Sheet from Japan,* Investigation No. 731-TA-860 (Final)(Second Remand), USITC Pub. 3674 at 1, n. 7 (Feb. 2004). Commissioner Pearson did not participate in either the original vote or the vote on the first remand. As noted in the Commission's second remand determination, he has adopted as his own the views in Sections I and II of the Commission's Original Determination and the Dissenting Views of Chairman Koplan. Id.

[5] *Tin- and Chromium-Coated Steel Sheet from Japan,* Investigation No. 731-TA-860 (Final), USITC Pub. 3337 (Aug. 2000) ("Original Determination").

[6] Original Determination at 10-11.

POI,[7] and had a significant adverse impact on the domestic industry, whose condition deteriorated considerably during the period in the face of increasing import volumes.[8]

In September 2000, the Japanese respondents appealed the Commission's affirmative determination to the CIT. On December 31, 2001, the Court of International Trade issued a decision in the appeal. *Nippon Steel Corp. v. United States*, 182 F. Supp.2d 1330 (Ct. Int'l Trade 2001)(*"Nippon I"*). The Court affirmed the Commission's finding that the volume of the subject imports had been significant during the POI[9] but remanded the Commission's pricing and impact analysis for a "more complete analysis."[10] Among other things, the Court directed the Commission to explain several aspects of its price comparison methodologies, to reconsider its underselling findings, and to reevaluate its findings with respect to the price sensitivity of the market, lost sales data, and the effects of subject imports on domestic prices.[11] The Court also directed the Commission to reexamine its causation analysis by taking into account the impact of non-price factors on purchasing decisions and the role of non-subject imports in the market.[12]

In March 2002, the Commission issued its first remand determination.[13] After reconsidering the record, the Commission again made an affirmative injury finding. The Commission compiled a new series of price comparison charts, explained its pricing methodology in detail, and performed additional analysis of subject import pricing.[14] The Commission also explained why quality and delivery issues were not the sole cause of increased import volumes, why certain conditions of competition in the market (such as the alleged compartmentalization of the negotiating processes for domestic and subject merchandise and certain contractual clauses pertaining to the competitive prices that some domestic suppliers are expected to meet) did not limit the impact of imports on the industry, why there was a correlation between import pricing and purchasers' purchasing patterns, and the relative impact of subject and non-subject imports in the market.[15]

On August 9, 2002, the Court issued its second decision in the proceeding. *Nippon Steel Corp. v. United States*, 223 F. Supp.2d 1349 (Ct. Int'l Trade 2002) (*"Nippon II"*). In that opinion, the Court vacated the Commission's affirmative material injury determination and expressly ordered the Commission to enter a negative determination.[16] As grounds for this decision, the Court asserted that the Commission "cite{d} no evidence that can sustain" its affirmative injury finding.[17] According to the Court, the Commission failed to follow its pricing instructions, failed to explain adequately why underselling was significant, failed to explain whether there was a correlation between subject and domestic pricing, and failed to explain why quality and service, rather than price, were not the reasons that purchasers shifted sales to the subject imports.[18] The Court also asserted that the Commission

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[7] Original Determination at 11-16.

[8] Original Determination at 16-17.

[9] *Nippon I* at 1335-1340.

[10] *Nippon I* at 1356.

[11] *Nippon I* at 1356-57.

[12] *Nippon I* at 1356-57.

[13] Views of the Commission on Remand, *Tin- and Chromium-Coated Steel Sheet from Japan*, Investigation No. 731-TA-860 (Remand), USITC Pub. 3493 (March 2002) ("First Remand Determination").

[14] First Remand Determination at 2-14.

[15] First Remand Determination at 14-46.

[16] *Nippon II* at 1371-72.

[17] *Nippon II* at 1351.

[18] *Nippon II* at 1353-60 & 1366-69.

incorrectly assessed conditions of competition in the market and inaccurately analyzed the impact of non-subject imports in the tin mill market.[19]

The Commission appealed *Nippon II* to the U.S. Court of Appeals for the Federal Circuit. On October 3, 2003, the Federal Circuit vacated the Court of International Trade's decision in *Nippon II*. *Nippon Steel Corporation v. International Trade Commission*, 345 F.3d 1379, 1381-82 (Fed. Cir. 2003) (*"Nippon III"*). After noting that the record included "two long and detailed opinions by the four person Commission majority and two exceptionally thorough and incisive opinions by the Court of International Trade," the Federal Circuit stated that, at its core, the Commission and the lower Court simply disagreed about the "degree to which the purchasers' testimony on the reasons for increased imports of the subject imports was undercut by subsequently produced documents."[20] The Federal Circuit stated, however, that "it is ultimately irrelevant to our decision whether the Commission or the Court of International Trade did better at drawing the most reasonable inferences from the economic documents as compared to testimonial assertions."[21]

Instead, the Federal Circuit stated, "{u}nder the statute only the Commission may find the facts and determine causation and ultimately injury – subject, of course, to Court of International Trade review under the substantial evidence standard."[22] The Federal Circuit held that the Court of International Trade went "beyond its statutorily-assigned role to 'review'" because "it engaged in refinding facts (e.g., by determining witness credibility), or interposing its own determinations on causation and material injury itself."[23] For this reason, the Federal Circuit vacated the lower Court's decision in *Nippon II*. However, because of the "multiplicity, specificity, and cogency" of the Court's critiques of the Commission's remand determination, the Federal Circuit stated that the Commission should on remand "attend to all the points made by the Court of International Trade, especially those of {*Nippon II*} which the Commission has not yet had the opportunity to address."[24]

On February 23, 2004, the Commission issued its second remand determination.[25] In that opinion, the Commission addressed in detail all of the Court's criticisms in *Nippon II*. In response to the Court's criticisms, the Commission reopened the record on certain pricing issues, revised its price underselling analysis, prepared three new price comparison charts to perform its underselling analysis, explained why underselling was significant and why subject imports affected domestic prices significantly during the period, and discussed why underselling correlated with the increased purchases of subject imports by purchasers.[26] The Commission further explained, relying on significant record evidence, that subject imports had been used in sales negotiations to extract price concessions from domestic producers, that domestic and subject sales negotiations were not kept separate from one

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[19] *Nippon II* at 1360-66 & 1369-72. Defendant-Intervenor Weirton Steel filed a motion with the Court seeking reconsideration of the Court's opinion in *Nippon II*. Weirton argued in the motion that the Court should not have directed the Commission to enter a negative injury determination because the Commission had not had the opportunity to address whether subject imports threatened the domestic tin-mill industry with material injury. *Nippon Steel Corporation v. United States*, Order dated September 26, 2002, at 1-2 ("*Nippon Reconsideration Decision*"). The Court noted that it had not overlooked the possibility of a remand but stated that "[t]his was not a viable threat case." Id.

[20] *Nippon III* at 1380-81.

[21] *Nippon III* at 1381.

[22] *Nippon III* at 1381.

[23] *Nippon III* at 1381.

[24] *Nippon III* at 1382.

[25] Views of the Commission on Second Remand, *Tin- and Chromium-Coated Steel Sheet from Japan*, Investigation No. 731-TA-860 (Second Remand), USITC Pub. 3674 (February 2004) ("Second Remand Determination").

[26] Second Remand Determination at 6-26.

another,[27] that price was a significant factor driving increased purchases of subject imports during the period, and that non-subject imports were no more important a cause of injury to the industry than the subject imports.[28]

On October 14, 2004, the CIT issued its third opinion in this appeal. Although the Court affirmed some aspects of the Commission's decision, it rejected the bulk of the Commission's pricing and causation findings, noting that, in its view, the record evidence simply "will not support an affirmative" injury finding.[29] Although the Court acknowledged that there were "some increases in the volume of subject imports,"[30] the Court determined that the record did not show that "subject imports had a significant effect on domestic prices, or that purchasers bought significant volumes of subject imports by reason of lower prices."[31] Upon reviewing the record, the Court concluded that, in its view, "not only was Japanese underselling and domestic price depression or suppression insignificant over the period of investigation, but certain conditions of competition also minimized any effect subject imports could have had on domestic prices."[32]

As support for this finding, the Court, in effect, made a number of factual findings based on its review of the record. According to the Court, the record showed that: "lower priced imports had only a low to moderate ability to impact the domestic industry's sales and prices," "Japanese and U.S. price negotiations were compartmentalized," the "majority of the {market's} product was supplied by domestic producers," certain clauses in several domestic supply contracts "limit{ed} price competition domestically," "superior domestic lead times seem to translate into price premiums" and acted to "segregate Japanese and U.S. price negotiations," and the "principal supporter of the petition had no documentary evidence of Japanese price competition."[33] According to the Court, this evidence showed that "the effect of subject imports on domestic prices was not significant" during the POI.[34]

As for causation, the Court found that, in its view, the record showed that "purchasers bought increased volumes of Japanese imports because of concerns with domestic producers' product quality and reliable delivery" and that "non-subject imports were an important competitive factor in the domestic market during the period of investigation."[35] As a result, the Court determined that "the harm suffered by the domestic industry was not by reason of subject imports."[36]

In sum, the Court concluded, the "record fully supports a negative determination and <u>will not</u> support an affirmative one."[37] After considering whether to permit the Commission to re-open the record to seek additional information, the Court stated that any "such information would not change the result" but "likely would be more support for a negative determination." The Court added that, while flawed, the "investigation gathered most of the relevant material," but that the "information simply does not

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[27] The Commission again expressed its lack of confidence in the testimony of purchasers who claimed there was a segregation of negotiations and pricing between domestic and subject imported tin mill products.

[28] Second Remand Determination at 26-61.

[29] *Nippon IV* at 65.

[30] *Nippon IV* at 64.

[31] *Nippon IV* at 64.

[32] *Nippon IV* at 64.

[33] *Nippon IV* at 64-65.

[34] *Nippon IV* at 65.

[35] *Nippon IV* at 65.

[36] *Nippon IV* at 65.

[37] *Nippon IV* at 65 (emphasis in original).

support an affirmative determination."[38] The Court therefore remanded the Commission's second remand determination with "instructions to issue a negative material injury determination."[39] The Court also instructed the Commission to "determine whether a threat of injury dispute remains," even though, as the Court noted, it has "previously declined to remand this matter for a determination of threat of material injury, largely on the basis that {the petitioner} Weirton neither raised the issue of threat before the court, nor presented a viable threat case" before the Commission.[40]

## II. THE DOMESTIC INDUSTRY IS NOT MATERIALLY INJURED BY REASON OF SUBJECT IMPORTS OF TIN- AND CHROMIUM-COATED STEEL SHEET FROM JAPAN

As indicated above, the Court has ordered the Commission to issue a negative material injury determination in this proceeding. *Nippon IV* at 66. To comply with the Court's explicit order, we must issue a negative injury finding in the place of our previous affirmative determination. Thus, we issue a determination that an industry in the United States is not materially injured by reason of subject LTFV imports of tin mill products from Japan.

Although we comply with the Court's order, we are concerned the Court has again exceeded the scope of its review authority in this case. As noted above, the Court of Appeals for the Federal Circuit expressly held in *Nippon III* that the Court of International Trade "exceeded its authority" to review our determination when, in *Nippon II*, it "engaged in re-finding facts (e.g., by determining witness credibility), {and} interposing its own determinations on causation and material injury itself."[41] In its most recent opinion, we believe that the lower Court has committed the same mistakes identified by the Federal Circuit in *Nippon III*. For example, the Court has again re-found facts by substituting its view of the record for that of the Commission on such important issues as the significance of subject underselling or the existence of correlations between underselling and increased purchases of subject imports during the POI. The Court has also rejected the Commission's witness credibility determinations, substituting in its place the Court's own assessment of the accuracy of testimony offered by purchasers during the investigation.

Finally, by directing the Commission to issue a determination that subject imports did not cause material injury to the industry, the Court has again substituted its own findings on the ultimate issues of causation and injury for those of the Commission, even though the Federal Circuit specifically directed the Court in *Nippon III* not to do so.[42] Thus, despite the Federal Circuit's clear guidance on this matter, the Court has issued a decision that, in essence, reverses the Commission's own affirmative current injury determination, and directs the Commission to adopt the Court's findings as its own.[43] [44]

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[38] *Nippon IV* at 65.

[39] *Nippon IV* at 66.

[40] *Nippon IV* at 66-67.

[41] *Nippon III* at 1381.

[42] *Nippon III* at 1381 (holding the Court of International Trade "exceeded its authority" by "interposing its own determinations on causation and material injury itself") (emphasis added).

[43] *Nippon IV* at 65-66.

[44] Because Chairman Koplan reaffirms his original negative determination in this investigation, he does not join in the majority's opinion. *See* Dissenting Views of Chairman Stephen Koplan, *Tin- and Chromium-Coated Steel Sheet from Japan,* Inv. No. 731-TA-860 (Final), USITC Pub. 3337 (Aug. 2000). However, he notes that the Court of Appeals for the Federal Circuit held in *Nippon III* that the Court of International Trade exceeded its authority to review the Commission majority's decision by interposing its own determinations on causation and material injury itself. *Nippon III* at 1381. He shares the majority's concern that the Court has exceeded the scope of its review

(continued...)

The Court's order gives us no leeway on this matter and we have no alternative but to comply with it. Because the Court has directed us to enter a negative material injury determination, we do so in these views.

## III. THE DOMESTIC INDUSTRY IS NOT THREATENED WITH MATERIAL INJURY BY REASON OF SUBJECT IMPORTS OF TIN- AND CHROMIUM-COATED STEEL SHEET FROM JAPAN

In *Nippon IV*, the Court of International Trade also directed the Commission to "determine whether a threat of injury dispute remains" in this proceeding.[45] We have therefore considered whether the domestic tin mill industry is threatened with material injury by reason of the subject imports. Given the Court's findings on key issues pertaining to injury and causation, we issue a determination that an industry in the United States is not threatened with material injury by reason of LTFV subject imports of tin mill products from Japan.

As an initial matter, we note that we are constrained significantly in performing our threat analysis by the factual findings that the Court made in *Nippon IV,* and by the Court's own prior statements on the threat issue. In *Nippon IV*, the Court rejected as unsupported by substantial evidence our findings that (i) the subject imports undersold domestic merchandise on a significant and increasing basis during the POI, (ii) purchasers purchased increased volumes of subject imports during the period due to low subject import pricing, (iii) the subject imports suppressed and depressed domestic prices during the POI, and (iv) there was a significant causal connection between the deterioration of the industry during the period and the volumes and prices of subject imports. Furthermore, the Court did not simply reject our analysis as unsupported by substantial evidence. It also reviewed the record and made its own factual findings on these issues, all of which led it to determine that subject imports did not cause, and could not have caused, the material injury being suffered by the industry.[46] The Court enunciated key conditions of competition that, in its view, severely limited the impact that subject imports had on domestic prices and on the condition of the domestic industry.[47] Although the Court discussed these conditions as applicable to the Commission's current injury determination, they are directly relevant to our assessment of the likelihood that subject imports will have adverse effects on domestic prices and the U.S. industry's performance in the imminent future as well.

Given the Court's findings on the absence of price effects from subject imports and their lack of impact on the industry, it is difficult to see how we could reasonably issue an affirmative threat determination in this investigation without ignoring the Court's opinion and order in *Nippon IV*, which we are neither permitted nor willing to do.[48]

We discuss our negative threat determination below.

### A. General Legal Standards

Section 771(7)(F) of the Act directs the Commission to determine whether the U.S. industry is threatened with material injury by reason of the subject imports by analyzing whether "further dumped or

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[44] (...continued)
authority in its remand opinion and order. Commissioner Pearson, who also previously issued a negative determination in this proceeding, shares the concerns of Chairman Koplan.

[45] *Nippon IV* at 67.

[46] See, e.g., *Nippon IV* at 64-65.

[47] *Nippon IV* at 33-48.

[48] Furthermore, as the Court itself acknowledged in *Nippon IV* (at 66), it has previously indicated that this case is simply "not a viable threat case." *Nippon Reconsideration Decision* at 2.

subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted."[49] The Commission may not make such a determination "on the basis of mere conjecture or supposition," and considers the threat factors "as a whole" in making its determination whether dumped or subsidized imports are imminent and whether material injury by reason of subject imports would occur unless an order is issued.[50] In making our determination, we have considered all statutory threat factors that are relevant to this investigation.[51]

### B. No Threat of Material Injury By Reason of the Subject Imports of Tin Mill Products from Japan

As an initial matter, we find that the industry is vulnerable to a threat of material injury from the subject imports in the imminent future. The domestic tin mill industry's condition was considerably worse at the end of the period than at the beginning of the period. In particular, during the period from 1997 to 1999 (the period preceding the filing of the petition), the domestic industry's market share fell by 6.5 percentage points, its production levels dropped by 7.9 percent, its shipment quantities fell by 9.2 percent, its average unit values for domestic shipments fell by 4.6 percent, and the number of production-related workers employed in the industry declined by 13.3 percent.[52] Similarly, the industry's net sales quantities fell by 7.2 percent, its net sales revenues decreased by 11.8 percent, its gross profits turned from positive to negative, its operating losses grew by 532 percent, and its operating loss margins worsened by 5.6 percentage points.[53] In our view, the industry's condition deteriorated to such an extent during the period that it was vulnerable to material injury by additional volumes of subject imports.[54]

We further find that there is a likelihood that the subject imports of tin mill products from Japan will increase their volume and market penetration into the United States significantly in the imminent future. In this regard, the record shows that the volume of subject imports grew rapidly during the period of investigation, increasing by 35.6 percent between 1997 and 1998, by 37.0 percent between 1998 and 1999, and by 8.1 percent between interim 1999 and interim 2000.[55] The market share of the subject imports also grew significantly during the period of investigation, particularly toward the end of the period, increasing from *** percent in 1997 to *** percent in 1999, and then reaching *** percent in interim 2000.[56] In our view, the significant increases in the volume and the market penetration of the subject imports during the period of investigation indicate there is a likelihood of

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[49] 19 U.S.C. § 1677(7)(F)(ii).

[50] 19 U.S.C. § 1677(7)(F)(ii).

[51] 19 U.S.C. § 1677(7)(F)(i). These factors include: any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country; a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports; whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on the domestic prices and are likely to increase demand for further imports; inventories of the subject merchandise; the potential for product shifting; and the actual and potential negative effects on the existing development and production efforts of the domestic industry. 19 U.S.C. § 1677(7)(F)(i). Statutory threat factor (I) is inapplicable, as no countervailable subsidies are involved, and statutory threat factor (VII) is inapplicable, as no imports of agricultural products are involved. Id.

[52] CR and PR at Table C-1.

[53] CR and PR at Table C-1.

[54] The Court itself acknowledged that "there seems to be no dispute as to the injured state of the domestic industry." *Nippon Reconsideration Decision* at 2.

[55] CR and PR at Table IV-2.

[56] CR and PR at Table C-1.

substantially increased imports in the imminent future absent an order. In this regard, we note that the Court affirmed our finding that the volume of subject imports was significant during the POI.[57]

The record also shows there is existing unused production capacity in Japan that could be used to ship significant additional volumes of subject merchandise to the United States in the imminent future. The Japanese producers reported unused capacity of 374,244 tons in 1999, the final full year of the period, and projected they would have 351,388 tons of excess capacity in full year 2000.[58] Both amounts of unused capacity are greater than the volume of subject tin mill merchandise imported into the United States in 1999.[59] Moreover, the Japanese producers also projected they would have excess capacity of 275,918 tons in 2001,[60] which would equal 82 percent of total subject imports in 1999.[61] Thus, although the Japanese producers reported operating at capacity utilization rates ranging between *** and *** percent during the period of investigation, they also clearly had sufficient capacity to increase their shipments to the United States during the imminent future.[62]

Although inventory levels in Japan declined between 1997 and 1999,[63] inventory levels for subject imports in the United States grew during the period.[64] On an absolute level, subject inventories in the United States increased by nearly 1752 percent between 1997 and 1999 and grew further between interim 1999 and 2000, although they remained at moderate levels.[65] As a percentage of total imports during the period, U.S. inventories grew as well, increasing from 0.3 percent of subject imports in 1997 to 3.5 percent of subject imports in 1999 and interim 2000.[66] Given these increases in inventory levels in the United States, it seems likely that the subject imports will continue to increase inventories in the United States as a means of supplying their U.S. purchasers.[67]

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[57] *Nippon I* at 1335-40. In this regard, the Court affirmed the Commission's finding that "Japanese imports displaced a significant portion of the industry's declining market share." *Nippon I* at 1337.

[58] CR and PR at Table VII-2.

[59] Compare CR and PR at Table VII-2 with CR and PR at Table IV-2.

[60] CR and PR at Table VII-2

[61] CR and PR at Table IV-2.

[62] CR and PR at Table VII-2. In this regard, we note that the Japanese industry was able to increase its shipments to the United States during the period of investigation, despite the fact that it was operating at what counsel for the Japanese producers call "full capacity." Willkie Farr Comments on Threat at 6. Moreover, although counsel for the Japanese producers indicate that projected third country demand in 2000 and 2001 will take up the Japanese industry's excess capacity, Willkie Farr Comments on Threat at 6, the record indicates that their third country shipments remained relatively stable between 1997 and 1999, and then declined somewhat between interim 1999 and interim 2000. CR and PR at Table VII-2. We do not believe that the Japanese producers' projections of substantial increases in their third country shipments in full year 2000 and 2001 are consistent with this historical pattern.

[63] CR and PR at Table VII-2. Inventories in Japan did increase between interim 1999 and 2000, however, growing from 242,717 tons to 247,332 tons. Id.

[64] CR and PR at Table VII-3.

[65] CR and PR at Table VII-3. U.S. inventories increased from 634 tons in 1997 to 11,741 tons in 1999. Id. They increased between interim 1999 and interim 2000 as well, growing from 11,114 tons to 13,812 tons. Id.

[66] CR and PR at Table VII-3.

[67] We have also considered whether there is the potential for product-shifting in Japan. The record suggests that the Japanese producers have a limited ability to shift production between subject and non-subject products. CR at VII-2 n.2, PR at VII-1 n.2; Foreign Producer Responses of Kawasaki, Nippon Steel, NKK, and Toyo Kohan. However, given the trends in subject volumes and market share, the availability of excess capacity, and, to a lesser degree, the level of U.S. inventories, the record indicates that there are likely to be significant additional subject imports in the imminent future.

In sum, we find that the record indicates that recent trends with respect to the volume of imports, unused capacity in Japan, and, to a lesser extent, U.S. inventory levels all indicate that there is likely to be a significant additional increase in the volume of subject imports imported into the United States in the imminent future absent an order.[68]

We have also considered whether imports of the subject merchandise are entering the U.S. market at prices that are likely to have a significant depressing or suppressing effect on domestic prices and are likely to increase demand for further imports in the imminent future. In our prior determinations, we found that (i) subject imports undersold the domestic merchandise in a significant and increasing manner during the POI, (ii) subject underselling depressed and suppressed domestic prices significantly, and (iii) subject underselling caused the industry to experience a cost-price squeeze during the POI.[69] We also concluded that purchasers had increased their purchases of subject imports during the period of investigation due, in significant part, to underselling by the subject imports.[70]

In *Nippon IV*, the Court rejected all of these findings on the grounds that they were unsupported by substantial evidence. Upon reviewing the record, the Court determined that, in its view, "not only was Japanese underselling and domestic price depression or suppression insignificant over the period of investigation, but certain conditions of competition also minimized any effect subject imports could have had on domestic prices."[71] The Court also held in *Nippon IV* that "the record does not show that . . . purchasers bought significant volumes of subject imports by reason of lower prices," adding that any "harm suffered by the domestic industry was not caused by lower-priced Japanese {tin mill products}."[72]

In the Court's view, the record showed that "lower-priced imports had only a low to moderate ability to impact the domestic industry's sales and prices," that "Japanese and U.S. price negotiations were compartmentalized," that the "majority of {the market's} product was supplied by domestic producers," that certain clauses in several domestic supply contracts "limit{ed} price competition domestically," that "superior domestic lead times seem to translate into price premiums" and acted to "segregate Japanese and U.S. price negotiations," and that the "principal supporter of the petition had no documentary evidence of Japanese price competition."[73] Thus, the Court determined, the record evidence showed that "the effect of subject imports on domestic prices was not significant."[74] Given these factual findings by the Court and that conditions of competition do not appear likely to change significantly in the tin mill market in the imminent future, we believe that, despite the likely increased volumes of subject imports in the imminent future and the vulnerable state of the domestic industry, the Court's opinion precludes us from finding that the subject imports are likely to enter at prices that will suppress or depress domestic prices in the imminent future or at prices that will increase demand for further imports in the imminent future.

Based on our review of the statutory threat factors, we determine that it is likely that significant additional imports of subject tin mill products from Japan will enter the United States in the imminent

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[68] We also note that Indonesia imposed an antidumping order of 68 percent on Japanese tin-plate products in April 1999. CR at VII-2, PR at VII-1. This fact also provides support for our finding that there will likely be a significant additional increase in subject imports in the imminent future. However, as explained below, the Court's findings on price effects and causal link preclude us from finding that there will be any impact on the industry of these additional subject import volumes in the imminent future.

[69] Second Remand Determination at 6-26, First Remand Determination at 7-14 & 24-27, and Original Determination at 11-16.

[70] Second Remand Determination at 15-22 & 44-57, First Remand Determination at 10-13, 31-39, and Original Determination at 18.

[71] *Nippon IV* at 64.

[72] *Nippon IV* at 64.

[73] *Nippon IV* at 64-65.

[74] *Nippon IV* at 65.

future absent issuance of an antidumping order. However, given the Court's finding that subject imports had no impact on domestic prices and that there was no causal link between increased subject imports and the declines in the industry's condition during the period of investigation, we issue a determination that the domestic tin mill industry is not threatened with material injury by reason of LTFV subject imports of tin mill products from Japan.[75] We make this finding despite the fact that the industry was clearly vulnerable to the future impact of the subject imports and despite our finding that there is likely to be continued significant increases of low-priced subject imports into the United States in the imminent future.

## IV. CONCLUSION

For the foregoing reasons, we issue a determination that the domestic tin mill products industry is not materially injured or threatened with material injury by reason of LTFV imports from Japan. As we noted above, we believe this outcome is dictated by the Court's findings in *Nippon IV*. It is not, however, the determination we would have made in the absence of those findings.

[75] We have also considered the likely impact of the subject imports on the existing development and production efforts of the domestic tin mill industry. The record indicates that the industry's capital expenditures increased from $ *** in 1997 to $ *** in 1999 but declined between interim 1999 to interim 2000 from $ *** to $ ***. CR and PR at Table VI-5. The industry's research and development expenses declined somewhat during the period, falling from $ *** to $ *** in 1999, and declining even further in interim 2000. Id. Nonetheless, given the Court's finding that there is no causal link between the industry's deteriorating condition and the subject imports, we find that the subject imports are not likely to have a significant impact on the industry's development and production efforts in the imminent future.