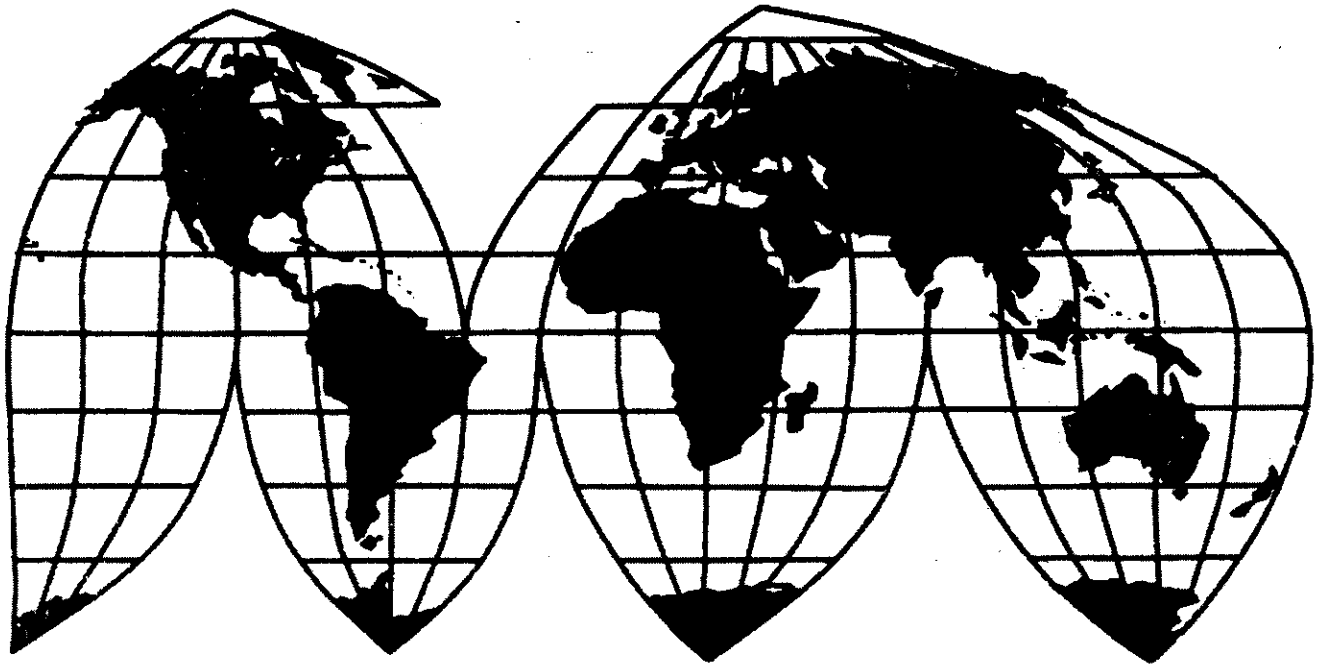
Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From Argentina, Brazil, and Germany (Views on Remand)

Investigations Nos. 731-TA-707-709 (Review) (Remand)

Publication 3754 **February 2005**

U.S. International Trade Commission



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U.S. International Trade Commission

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Note.--Information that would reveal confidential operations of individual concerns may not be published and therefore has been deleted from this report.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 REMAND

I. INTRODUCTION

By an opinion and order dated October 27, 2004 ("Slip Op. 04-133" or "Slip Op."), the U.S. Court of International Trade ("CIT") remanded the Commission's determinations with respect to Argentina, Brazil and Germany in *Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Argentina, Brazil, Germany, and Italy*, Inv. Nos. 701-TA-362 (Review) and 731-TA-707-710 (Review), USITC Pub. 3429 (June 2001). Upon consideration of the remand instructions and evidence in the record of these reviews, the Commission finds on remand that revocation of the antidumping duty orders on certain seamless carbon and alloy steel standard, line, and pressure pipe ("seamless pipe") from Argentina, Brazil and Germany would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[1][2]

II. BACKGROUND

In June 2001, the Commission determined that revocation of the antidumping duty orders on seamless pipe from Argentina, Brazil and Germany would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. Siderca S.A.I.C. ("Siderca"), a producer of the subject merchandise in Argentina, contested the Commission's determination before the CIT.

In Slip Op. 04-133 the CIT directed the Commission:

(1) to clarify which "likely" standard it used in its review determination, and if it employed a "possible" standard rather than the "probable" standard articulated by the Court, to reconsider its findings accordingly;[3]

(2) in connection with its findings on the likely volume of imports, to show that product-shifting is potentially a rational economic option in light of the revocation of the orders;[4]

(3) also in connection with its findings on the likely volume of imports, to clarify how the transnational corporate affiliations of the subject foreign producers in these reviews affect the volume finding;[5]

(4) in connection with its findings on the likely price effects of imports, to further consider the meaning and importance of apparently conflicting record evidence as to the importance of price in purchasing decisions;[6]

(5) also in connection with its findings on the likely price effects of imports, to clarify why the Commission found both likely price depression and price suppression;[7] and

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[1] Vice Chairman Okun and Commissioner Pearson dissenting.

[2] Commissioner Lane did not participate in the original five-year review but did participate in this remand determination.

[3] Slip Op. at 8-9.

[4] Slip Op. at 32.

[5] Slip Op. at 34.

[6] Slip Op. at 41.

[7] Slip Op. at 35-36 n.20.

(6) in connection with its findings on the likely impact of imports, for further discussion and explanation of why the Commission found that certain improvements in the seamless pipe industry's condition did not suffice to defeat a finding of likelihood of material injury.[8]

III. LIKELIHOOD OF CONTINUATION OR RECURRENCE OF MATERIAL INJURY IF ORDERS ARE REVOKED

We have considered the record as a whole in light of the instructions in the Court's opinion. Having considered the Court's instructions and having examined the record consistently with those instructions, we again determine that revocation of the antidumping duty orders on seamless pipe from Argentina, Brazil and Germany would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

We incorporate herein by reference our original views in their entirety and provide further explanation below, as instructed by the Court. In the original determination, the Commission defined the domestic like product as all seamless carbon and alloy steel standard, line, and pressure pipe and tubes not more than 4.5 inches in outside diameter, including redraw hollows.[9] The Commission defined the pertinent domestic industry to encompass all U.S. producers of seamless pipe.[10] The Commission's definitions of the domestic like product and the domestic industry were not at issue in the CIT appeal. The Commission adopts in full these definitions and conclusions for purposes of this remand determination.[11]

The original determination also contained a discussion of the pertinent conditions of competition in the U.S. seamless pipe industry, which the CIT's decision did not call into question. The Commission adopts its prior discussion of the conditions of competition for purposes of this remand determination.[12] [13]

Because the CIT affirmed the Commission's cumulation findings,[14] the Commission does not reconsider those issues and adopts its prior views on those issues in their entirety. [15] [16]

For those Commission findings in the likely material injury section of the original determination that the CIT has not addressed or are not at issue, the Commission adopts its prior views on those issues in their entirety.[17] [18]

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[8] Slip Op. at 43.

[9] Confidential Review Determination ("Views") at 8, CR 78.

[10] Views at 9.

[11] Commissioner Lane adopts these conclusions as a result of her review of the record in this proceeding.

[12] Views at 21-23.

[13] Commissioner Lane adopts this discussion as a result of her review of the record in this proceeding.

[14] Slip Op. at 9-21.

[15] Views at 11-18.

[16] Commissioner Lane has considered the record evidence in these reviews regarding the cumulation of subject imports and adopts the Commission's prior views on this issue in their entirety.

[17] Views at 18-30.

[18] Commissioner Lane has considered the record evidence in these reviews regarding the likely material injury analysis and adopts the pertinent sections of the Commission's prior views in their entirety.

1. The "Likely" Standard

The Court remanded for clarification regarding the Commission's application of the "likely" standard.[19] This issue has been the subject of several decisions by the Court,[20] and of several Commission remands.[21] The Commission has never applied a standard that equates "likely" with "possible," either in the determination at issue here or in any previous five-year review determinations. In our original views in these reviews we applied a "likely" standard that is consistent with how the Court has defined that term in Slip Op. 04-133 as well as in prior opinions addressing this issue.[22] [23] We also adopt from our original views a discussion of the legal standards that apply in five-year reviews.[24]

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[19] Slip Op. at 8-9.

[20] *See NMB Singapore Ltd. v. United States*, 288 F. Supp. 2d 1306, 1352 (Ct. Int'l Trade 2003) ("'likely' means probable within the context of 19 U.S.C. § 1675(c) and 19 U.S.C. § 1675a(a)"); *Nippon Steel Corp. v. United States*, Slip Op. 02-153 at 7-8 (Ct. Int'l Trade Dec. 24, 2002) (same); *Usinor Industeel, S.A. v. United States*, Slip Op. 02-152 at 4 n.3 & 5-6 n.6 (Ct. Int'l Trade Dec. 20, 2002) ("more likely than not" standard is "consistent with the court's opinion"; "the court has not interpreted 'likely' to imply any particular degree of 'certainty'"); *Indorama Chemicals (Thailand) Ltd. v. United States*, Slip Op. 02-105 at 20 (Ct. Int'l Trade Sept. 4, 2002) ("standard is based on a likelihood of continuation or recurrence of injury, not a certainty"); *Usinor v. United States*, Slip Op. 02-70 at 43-44 (Ct. Int'l Trade July 19, 2002) ("'likely' is tantamount to 'probable,' not merely 'possible'").

[21] *Ball Bearings From France, Germany, Italy, Japan, Singapore, and the United Kingdom*, Inv. Nos. 731-TA-391-394, 396, and 399 (Review) (Remand), USITC Pub. 3648 (Dec. 2003); *Grain-Oriented Silicon Electrical Steel From Italy and Japan*, Inv. Nos. 701-TA-355 and 731-TA-659-660 (Review) (Remand), USITC Pub. 3585 (March 2003); *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom* (Views on Remand), Inv. Nos. AA1921-197 (Review), 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350 (Review), and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Review) (Remand), USITC Pub. 3526 (July 2002); and *Corrosion-Resistant Carbon Steel Flat Products From France and Germany*, Inv. Nos. 701-TA-348-349 and 731-TA-615 (Remand), USITC Pub. 3539 (Sept. 2002).

[22] Commissioner Hillman interprets the statute as setting out a standard of whether it is "more likely than not" that material injury would continue or recur upon revocation. She assumes that this is the type of meaning of "probable" that the Court intended when the Court concluded that "likely" means "probable." *See* Separate Views of Vice Chairman Jennifer A. Hillman Regarding the Interpretation of the Term "Likely," in *Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom* (Views on Remand), Inv. Nos. AA1921-197 (Review), 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350 (Review), and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Review) (Remand), USITC Pub. 3526 (July 2002) at 30-31. *See also, Usinor Industeel v. United States*, 26 CIT ___, Slip Op. 02-152 at 5-6 n.6.

[23] Commissioner Lane has interpreted "likely" in the same way in her consideration of this remand. Commissioner Lane notes that, consistent with her views in *Pressure Sensitive Plastic Tape from Italy*, Inv. No. AA1921-167 (Second Review), USITC Pub. 3698 (June 2004), she does not concur with the U.S. Court of International Trade's interpretation of "likely," but she will apply the Court's standard in this review and all subsequent reviews until either Congress clarifies the meaning or the U.S. Court of Appeals for the Federal Circuit addresses this issue.

[24] Views at 18-21.

2. Likely Volume of Subject Imports

A. Background

The Commission based its likely volume finding on several factors. First, the Commission recounted the record from the original investigations, when subject imports' market share ranged between *** and *** percent, and noted that, upon issuance of the orders, subject import volume fell dramatically, never accounting for more than *** percent of the market since then. It then described the significant production capacity for subject merchandise held by producers in the subject countries. It also found that these producers had reported significant overall capacity for seamless pipe products (including products other than the subject merchandise that are produced on the same equipment) and could shift production between subject merchandise and other products. The Commission found that these producers would have an incentive to resume seamless pipe exports to the United States because U.S. prices were generally higher than elsewhere. The Commission found further support for its likely volume finding based on barriers to imports in third country markets affecting producers in Brazil and Germany, the overall export orientation of the subject producers, and transnational corporate affiliations among foreign producers that would enhance their ability to resume exporting to the United States.[25]

The Court held that this likely volume finding was unsupported by substantial evidence and not in accordance with law, for two reasons. First, the Court found that the Commission had failed to show that there is a "meaningful potential for product-shifting."[26] The Court read the Commission's finding of a potential for product shifting as resting solely on a finding that such shifting was physically possible, and not on any analysis of whether it made economic sense to do so.[27] The Court interpreted the product-shifting language in the statute to mean that "something more than physical ability to product-shift must be found" and that product-shifting must be shown to be "otherwise a viable option."[28] The Court noted that in questionnaire responses, almost all of the foreign producers indicated that they could not switch between products because it was not economically feasible to do so.[29] The Court concluded that, because it read the Commission's determination as giving substantial weight to the potential for product-shifting in its likely volume analysis, the Commission must show that "product-shifting is potentially a rational economic option in light of the revocation of the orders." [30]

The second issue raised by the Court regarding the Commission's likely volume finding relates to the Commission's discussion of transnational corporate affiliations, and its statement that "[c]ross-ownership among foreign subject producers appears to be enhancing their ability to supply seamless pipe customers with operations in the United States and abroad through flexible supply arrangements, including global contracts."[31] The Court noted that, to support this statement, the Commission cited to a portion of the Staff Report that stated that respondents gave *mixed* responses on the question of whether there was "an increasing trend on the part of some end users toward using global contracts." The Court found that the "ITC does not make clear how it leaps from respondents' mixed views of a possible contracting trend to the conclusion that the subject country producers have contacts that will accelerate

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[25] Views at 24-27.

[26] Slip Op. at 30.

[27] *Id.*

[28] Slip Op. at 30-31.

[29] Slip Op. at 31 n.16.

[30] Slip Op. at 32.

[31] Views at 26-27.

their marketing and distribution into the United States." The Court remanded "for clarification of how transnational corporate affiliations affect the volume calculus."[32]

B. Product Shifting

On remand, we again find that there is a potential for product shifting among the foreign producers in Argentina, Brazil and Germany[33] if the orders were revoked. This finding is based on more than physical possibility, but rather on substantial record evidence that such a shift was both possible and economically rational. First, there is ample evidence of *actual* product shifting by each of these foreign producers. The record shows that subject country producers have more than the ability or potential to product shift: they actually shifted production during the review period, and it is reasonable to conclude that they did so because it was economically rational. Second, the information in the questionnaire responses of these firms, considered together with the record as a whole, does not support the conclusion that these producers would not switch between products if it were economically feasible to do so.

With respect to actual product shifting, each of the three foreign producers in question reported its production of the subject merchandise and six other categories of tubular products with an outside diameter of 4.5 inches or less (small diameter pipe) in each of the six years in the period 1995 through 2000. These data appear in tables IV-4 (Argentina), IV-6 (Brazil) and V-8 (Germany) of the Staff Report accompanying the Commission determination in these reviews.[34] We have converted the reported tonnage amounts in these tables to percentages of total production of small diameter pipe, to better show the shifts that occurred. These tables with production of the various products expressed as a percentage of total production of small-diameter pipe are in Attachment 1 to these remand results. The data show that each producer shifted production among the seven product categories throughout this six-year period. For example, in Argentina between 1996 and 1997 (two years in which overall seamless pipe production was relatively constant) Siderca shifted some of its production from *** to other products.[35] In Brazil between 1998 and 1999 (two years in which overall seamless pipe production was relatively constant) V&M Brazil shifted some of its production to *** from other products, primarily ***.[36] In Germany between 1997 and 1998 (again, two years in which overall seamless pipe production was relatively constant) V&M Germany shifted some of its production from *** to other products, primarily ***.[37]

The evidence of widespread actual product shifting by the foreign producers detailed in Attachment 1 shows that the subject country producers have more than the potential or ability to product shift in the future if the orders were revoked. It shows that there is (in the Court's words) a "meaningful

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[32] Slip Op. at 33-34.

[33] The foreign producers in question are Siderca in Argentina, V&M Brazil in Brazil, and V&M Germany in Germany. Staff Report (CR 76) at IV-1, IV-4 and IV-8. In that the Commission made a negative determination with respect to the antidumping and countervailing duty orders on seamless pipe from Italy, we have not considered the experience of the Italian producers.

[34] CR 76.

[35] The percentage of its small diameter pipe production devoted to *** declined from *** percent to *** percent, while the production of *** increased from *** percent to *** percent, the production of *** increased from *** percent to *** percent, and the production of *** increased from *** percent to *** percent.

[36] The percentage of its small diameter pipe production devoted to *** increased from *** percent to *** percent, while the production of *** declined from *** percent to *** percent.

[37] The percentage of its small diameter pipe production devoted to *** declined from *** percent to *** percent, while the production of *** increased from *** to *** percent.

potential for product shifting," and that product shifting is "a viable option." This conclusion is buttressed by the fact, cited in our original views, that prices for seamless pipe in the United States are generally higher than elsewhere, making the United States an attractive market,[38] and giving subject country producers an incentive to increase exports to the United States, absent the orders, through product shifting and other means. Furthermore, U.S. producers stated that they would shift production between seamless pipe and other pipe products in response to relative price changes,[39] and the record shows that the production of seamless pipe is the same in the subject countries as in the United States.[40] It is thus reasonable to conclude that product shifting is a viable economic option for subject country producers if the orders were revoked, given the evidence of actual product shifting during the review period and evidence of higher prices in the United States than elsewhere.[41]

The manner in which the foreign producers calculated their capacity to produce the subject merchandise further makes clear that their reported capacity to produce the subject merchandise posed no real restraint on potential production. Siderca reported that it calculated capacity based on "***."[42] V&M Brazil and V&M Germany each stated that they calculated capacity "***."[43] In addition, both U.S. and subject country producers face high fixed costs[44] and strive to keep their mills working at high levels to cover these costs.

The Court stated that "almost all of the foreign producers indicated that they could not switch between products because it was not economically feasible to do so."[45] The Commission does not believe that the information in the questionnaire responses of the foreign producers, when considered together with the record as a whole, supports the conclusion that shifting production among products could not be a viable economic option for these firms.

In response to the question in the Foreign Producer Questionnaire as to whether product shifting was possible in response to relative price changes, Siderca *** and offered the following explanation:

***.[46]

This explanation is not persuasive. Siderca itself referred to "***," and not what it actually does or would be likely to do in the reasonably foreseeable future. The record makes clear that *** percent of Siderca's total sales in 2000 were *not* made pursuant to long-term agreements.[47] The Court has already recognized that Siderca's claim that long-term commitments precluded it from shifting production to the

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[38] Views at 24-25; Hearing Transcript at 28-29 (Gary Gajdzik), PR 63; and V&M Posthearing Brief, Appdx. A at 11, CR 47.

[39] Staff Report at III-2.

[40] Staff Report at I-16.

[41] We believe that the Court may have underestimated the significance in the Commission's analysis of higher U.S. prices for seamless pipe as an incentive for subject foreign producers to ship to the United States. *See* Slip Op. at 28-29 (listing three factors underlying the volume finding, not including higher U.S. prices). We note furthermore that the Commission's consideration of higher prices in the United States as a factor in assessing likely increases in subject import volumes has been upheld by this Court. *Nippon Steel Corp. v. United States*, 301 F. Supp. 2d 1355, 1376 (CIT 2003).

[42] CR 79 at 6.

[43] CR 81 at 5 and 82 at 5.

[44] Domestic Producers' Prehearing Brief at 60 (CR 38).

[45] Slip Op. at 31 n.16.

[46] CR 79 at 8.

[47] Staff Report at II-5.

subject merchandise is unpersuasive.[48] Moreover, the production data discussed above show that such product shifting had, in fact, been occurring, including by Siderca, which between 1996 and 1997 ***.

Both V&M Brazil and V&M Germany *** in response to the Commission's question regarding product shifting. They both gave the following explanation:

***.[49]

Again, the suggestion that product shifting does not occur is at odds with the numerical data provided by these producers. Moreover, the suggestion that prices for all of the relevant tubular products *** is at odds with the record evidence that the different products are subject to different demand characteristics. Demand for seamless pipe is linked to demand in the various end-use sectors, such as the oil and gas industries, petrochemical/chemical industries, energy generation, and various industrial uses (including food processing, transportation, construction, and shipbuilding industries). In the oil and gas sector, seamless pipe is used in the repair, maintenance and building of refineries, unlike OCTG, which is used more in connection with oil and gas exploration and production activity. Thus, demand for seamless pipe may "lag" an increase in demand for OCTG due to increased oil and gas exploration and production.[50]

C. Transnational Corporate Affiliations

Additional support for our likely volume finding is found in the existence of transnational corporate affiliations among many of the subject country producers that would enhance their ability to resume exporting to the United States by providing a ready network for marketing, sales, and distribution. The Commission in its original views described the membership of *each* of the three major foreign producers at issue here in such transnational affiliations – V&M Germany and V&M Brazil as part of the V&M Group, and Siderca as part of the DST group.[51] These affiliations all came into existence after the imposition of the orders underlying these sunset reviews in 1995.[52]

Extensive testimony from industry participants indicates that the existence of these transnational affiliations would enhance the ability of subject foreign producers to ship subject product to the United States if the orders were revoked.[53] For example, one witness testified that "[s]ince all of the producers are either part of the DST Group or the V&M Group, they have the means and distribution networks in place to start shipping immediately . . . ."[54] Indeed, after the orders went into effect, the V&M Group began shipping seamless pipe to the United States from France in significant quantities, rather than from Brazil and Germany.[55] Another explained that "[t]hese foreign producers will absolutely come back in this market, and they will do it in short order. Indeed, they are already here as members of the DST or

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[48] Slip Op. at 27 n.14.

[49] CR 81 at 6 and CR 82 at 6.

[50] Staff Report at II-10; Hearing Transcript at 135-36, 149, 174-75.

[51] Views at 26 n.158.

[52] Views at 26 n.158 and Staff Report at IV-4.

[53] The citation in the Commission's review determination to page V-7 of the Staff Report (which notes mixed views among respondents as to a trend towards global contracts) was not intended to support the Commission's conclusion that transnational corporate affiliations would enhance the ability of subject foreign producers to resume exporting to the United States. The use of global contracts was merely one manifestation of transnational corporate affiliations.

[54] Transcript of Commission Hearing at 28 (Gadjzik, U.S. Steel Group).

[55] Staff Report at IV-8 and IV-12.

Vallourec Mannesmann groups selling other products and with an active distribution network on the ground."[56]

In the Commission's view, the fact that these transnational affiliations had come into being (described in footnote 158 of the Commission's review determination), and the testimony noted above, provide substantial evidence that these affiliations enhance the ability of foreign producers to resume exporting subject product to the United States should the orders be revoked.

D. Overall Volume Finding

Our further consideration of the potential for product shifting, and our clarification of how the transnational corporate affiliations affect the volume analysis, do not change our conclusion that the volume of cumulated subject imports from Argentina, Brazil and Germany will likely be significant if the orders are revoked. Our volume finding continues to be based (and is based, in the case of Commissioner Lane) on a number of factors, in particular the existence of significant production capacity for both subject product and seamless pipe overall among the subject foreign producers, the potential for product shifting, the fact that prices for seamless pipe are generally higher in the United States than elsewhere, the barriers to imports in third country markets affecting producers in Brazil and Germany, the overall export orientation of the subject producers,[57] and transnational corporate affiliations among foreign producers that would enhance their ability to resume exporting subject country product to the United States. We find additional support in the record from our original investigations when, pre-order, subject import market share ranged between *** and *** percent.[58]

With respect to production capacity, we recognize that the foreign producers' capacity utilization rates for subject merchandise were relatively high in 2000, the last year of the review period.[59] However, these high capacity utilization rates were not the norm throughout the review period.[60] Accordingly, the record did not show that consistently high capacity utilization rates would preclude the subject foreign producers from increasing their exports to the United States if the orders were revoked; rather, the bulk of the evidence showed potential unused capacity for subject merchandise. In addition, the fact that product shifting can and does occur makes clear that foreign producers' reported production capacity for subject merchandise does not represent the limit of their ability to export to the United States.

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[56] Transcript of Commission Hearing at 35 (Leland, U.S. Steel Tubular Products). *See also* testimony of Durham, Dixie Pipe, and Binder, Red Man Pipe & Supply, Transcript of Commission Hearing at 38 and 41.

[57] Indeed, the volume of seamless pipe exported by the subject countries, as a percentage of their total shipments, continued to be significant during the review period (Staff Report at Tables IV-3, IV-5 and IV-7), as during the original investigations, leading us to conclude that volumes diverted away from the U.S. market as a result of the orders could be directed back to this market upon removal of the orders, as the Court itself recognized. Slip Op. at n. 17.

[58] We note that the SAA states that "the Commission must consider its prior injury determination(s), including the volume, price effect, and impact of imports on the industry during the period preceding the issuance of an order . . . This consideration is important, because this period is the most recent time during which imports of subject merchandise competed in the U.S. market free of the discipline of an order or agreement." SAA at 884.

[59] The 2000 capacity utilization rates were *** percent in Argentina, *** percent in Brazil, and *** percent in Germany. Staff Report at Tables IV-3, IV-5 and IV-7.

[60] For example, in 1999 the capacity utilization rates were *** percent in Argentina, *** percent in Brazil, and *** percent in Germany. Staff Report at Tables IV-3, IV-5 and IV-7.

Thus, based on all the record evidence, we find that the likely volume of subject seamless pipe imports from Argentina, Brazil and Germany would be significant in the reasonably foreseeable future if the orders were revoked.

3. Likely Price Effects of Subject Imports

A. Background

In its review determination the Commission found that there would likely be significant underselling by subject imports, and that the subject imports were likely to enter the United States at prices that would have a significant depressing and suppressing effect on the price of domestic like products. With respect to likely underselling, the Commission found that there was "a strong incentive for subject imports, upon their return to the U.S. market, to compete on the basis of price to capture sales." This conclusion rested on: (i) the high level of substitutability between the subject imports and the domestic like product; (ii) the importance of price in purchasing decisions; and (iii) the lower prices for subject imports reported by purchasers.[61]

The Commission also found that subject imports likely would have significant price depressing and suppressing effects on the domestic like product if the orders were revoked. It based this finding on the likely significant volume of subject imports if the orders are revoked, the substitutability and lower prices of the subject imports, and the record of consistent underselling by the imports in the original investigations.[62]

The Court held that the Commission's likely price effects finding was unsupported by substantial evidence, with respect to both the underselling and the price depression/suppression elements.

With respect to the Commission's underselling analysis the Court remanded for further consideration of questionnaire responses regarding the importance of price in purchasing decisions. The Court noted that, although the responses to one question in the Purchasers' Questionnaire (the question asking purchasers to list the three most important factors in purchasing decisions) supported the conclusion that price was important in purchasing decisions, the responses to another question (the question asking purchasers to rank 14 specified purchasing factors as very important, somewhat important, or not important) "appear to cloud what might have been a clear picture of price importance."[63] More specifically, in response to this second question, the following five factors were rated as "very important" more often than price: availability, delivery time, product consistency, product quality, and reliability of supply. The Court suggested that the domestic product's superior rating on these five quality factors might have nullified the foreign products' advantage on price, and remanded for "further consideration of the meaning and importance of the second survey which the ITC conducted."[64]

With respect to the Commission's finding of price depression and suppression the Court remanded for two reasons. First, the Court held that this finding must be reevaluated, to the extent that it was based on the "discredited" determinations of likely volume and the importance of price in purchasing decisions. Second, the Court asked the Commission to clarify how price depression and suppression could have been occurring at the same time. The Court observed that such a finding is possible where, for example, firms in an industry react to import competition differently (some lowering prices, while

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[61] Views at 27-28.

[62] *Id.*

[63] Slip Op. at 40.

[64] Slip Op. at 41.

others hold the line), or where the industry as a whole varies its response over time, from suppression to depression and back.[65]

B. The Importance of Price in Purchasing Decisions

In light of the record as a whole, the responses of purchasers to the second survey do not detract from the conclusion in the review determination that price was one of the two factors ranked highest by purchasers in making purchasing decisions, as shown by the results tabulated in Table II-1 of the Staff Report.

After averaging purchaser responses on the importance of particular factors in purchasing decisions, five factors had a higher average "importance rating" than price (as shown in Table II-2 of the Staff Report). In particular (where 1 = not important, 2 = somewhat important, and 3 = very important), price had an average importance rating of 2.5. Product consistency and product quality had an average importance rating of 2.9, reliability of supply had an average rating of 2.8, and availability and delivery time had an average rating of 2.7. These slightly higher importance ratings do not outweigh the clear evidence that price was one of the two most important purchasing factors, as indicated in Table II-1. As the Court noted, and as indicated in Table II-7 of the Staff Report, purchasers also reported that the domestic like product and subject imports were generally comparable with respect to product consistency and product quality,[66] the two factors with the highest average importance rating; this is to be expected, as all of these products must meet ASTM standards.[67] In fact, the general comparability between domestic product and subject imports, and the need for all products to meet ASTM standards, strengthen our conclusion from Table II-1 that price is a key factor in purchasing decisions, as the record indicates that there is no real quality or consistency difference between domestic product and subject merchandise. With respect to the factor with the next highest average importance rating, reliability of supply, the domestic product was ranked only slightly better (with only six out of thirteen responses indicating the domestic product being superior).[68] Thus, with respect to these factors (product consistency, product quality, and reliability of supply), the record indicates that domestic product and subject merchandise are generally comparable, and there are not differences of sufficient degree that purchasers would choose domestic product over subject merchandise based on these factors. In contrast, Table II-7 shows that the domestic product was rated as *inferior* on price (that is, more expensive) in nine of thirteen responses. Thus, we do not find that the importance to purchasers of the three criteria with the highest importance rating – product consistency, product quality, and reliability of supply – negates the clear importance of price in purchasing decisions and the advantage that subject imports had in terms of price.

It is true that the domestic product was generally rated as superior to subject imports in terms of the remaining two factors, availability and delivery time, that had a slightly higher importance ranking than price.[69] However, there is absolutely no evidence in the record that the domestic product enjoyed a

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[65] Slip Op. at 35-36 n.20.

[66] In fact, for these factors domestic product was rated as *inferior* to subject merchandise by one out of five responding purchasers with respect to Argentina, and by two out of six responding purchasers with respect to Germany; no purchasers rated domestic product as superior to subject merchandise on these factors.

[67] Views at 14.

[68] Staff Report at Table II-7.

[69] Staff Report at Table II-7.

price premium on account of these two factors.[70] Moreover, most domestic producers and importers agreed that differences other than price were never a significant factor in sales of seamless pipe.[71] Thus, the evidence on these two factors does not detract from the conclusion, based on the great weight of record evidence, that price is a highly important factor in purchasing decisions, and that this finding supports a likely finding of likely underselling if the orders are revoked.[72]

The importance of price in purchasing decisions is illustrated by the shift that occurred from subject imports to non-subject imports after the antidumping duty orders under review were imposed in 1995. As noted in the Staff Report, the combined U.S. market share of the four subject countries declined from 23.2 percent in 1994 to *** percent in 2000, while the market share of imports from other sources increased from 9.6 percent to *** percent over the same period.[73] The willingness of purchasers to shift from subject imports to non-subject imports after the price of the former was raised (by the imposition of dumping and countervailing duties) provides further evidence of the importance of price in seamless pipe purchasing decisions.

We note that our finding of likely underselling is also supported by the record from the original investigation.[74] As we stated in our original determination, and as recognized by the Court, subject imports significantly undersold the domestic product, with generally large margins of underselling. Our finding of likely underselling is also supported by the fact that a majority of purchasers indicated that prices for domestic product were higher than prices for subject merchandise.

C. Price Depression and Suppression

Because our findings as to the likely volume of imports and as to the importance of price in purchasing decisions have not changed in these remand views, it is unnecessary for us to reevaluate our finding as to the likely price effects of imports, insofar as this latter finding rests on the former findings.

We again find that revocation of the subject antidumping duty orders would likely have significant price depressing *and* suppressing effects on the domestic like product. We have found that the volume of subject imports would likely be significant if the orders were revoked, and that there would be significant underselling by those substitutable products. As a result, there would likely be significant price effects, but we cannot with assurance state whether these price effects would take the form of suppression or depression.

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[70] The Court directs us to consider whether domestic product provides a "better bang for the buck," with domestic product's potential benefits offsetting price differentials. Slip Op. at 40-41. We find no support in the record for such a conclusion.

[71] Staff Report at Tables II-4 and II-5.

[72] We also note that, of the six purchasers that gave "lowest price" a rating of "somewhat important," three ranked price as the second most important of its top three factors in making purchasing decisions, and two ranked price as the third most important of its top three factors in making purchasing decisions. The one purchaser who gave "lowest price" a rating of "not important" nonetheless ranked price as the second most important of its top three factors in making purchasing decisions. Questionnaire responses of ***. CR 123, 117, 113, 127, 118, 126, and 115, respectively.

[73] Staff Report at IV-1.

[74] The SAA states that "the Commission must consider its prior injury determination(s), including the volume, price effect, and impact of imports on the industry during the period preceding the issuance of an order . . . . This consideration is important, because this period is the most recent time during which imports of subject merchandise competed in the U.S. market free of the discipline of an order or agreement." SAA at 884.

In particular, the effect would depend on market conditions in the future, and the particular business decisions of individual firms. For example, in an environment of strong demand and generally rising prices, price effects would normally manifest as price suppression; that is, a lesser rate of increasing prices than would prevail absent the effect of subject imports. On the other hand, in an environment of weak demand and generally steady or falling prices, price effects would normally manifest as price depression; that is, prices falling lower than would prevail absent the effect of subject imports. In addition, as recognized by the Court,[75] particular firms may make different business decisions when competing with increasing volumes of low-priced imports; some may seek to maintain sales volume by cutting their prices; others may cede sales volume and seek to maintain their prices.

Thus, while the record amply supports a finding of likely price effects, the Commission cannot, given the nature of a five-year review, exactly determine the balance between price depression and suppression over time and among individual firms. For example, the record contains conflicting opinions on likely future demand.[76] Moreover, it would be highly speculative at best for the Commission to predict specific future pricing decisions of individual firms. However, in the interest of responding fully to the court's concerns, we note that in the Commission's original investigation it also found that imports had had price depressing and suppressing effects. Domestic prices had declined in the early part of the period of investigation. They then rose as the volume of imports declined, but this increase appeared to have been insufficient to permit the industry to recoup rising costs.[77] In other words, in the original investigation price depression was followed by price suppression. In these reviews, we would expect that the sequence of the two forms of price effects would be reversed. Given that U.S. prices for seamless pipe had been rising at the end of the review period,[78] it seems most probable that industry-wide price suppression would occur first upon revocation of the orders, followed by price depression as imports became more established in the market.

4. Likely Impact of Subject Imports

A. Background

The Commission in its original views first reviewed its impact findings from the original investigation (as it is required to do by 19 U.S.C. § 1675a(a)(1)(A)). The adverse impact of the cumulated subject imports in the original determinations was reflected in the poor financial performance of the domestic industry (notwithstanding its increases in market share, shipments, production, and capacity utilization). The Commission found that underselling by the subject imports suppressed and depressed domestic prices.[79]

Turning to the evidence gathered during the sunset reviews, the Commission found that the domestic industry's financial condition improved somewhat from 1995 to 1997, and that this was related to the imposition of the orders subject to these reviews. However, the domestic industry's financial condition then deteriorated sharply as import levels increased and demand fell, resulting in a substantial operating loss in 1999. Domestic shipments, production, capacity utilization, profits,

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[75] Slip Op. at n.20.

[76] Staff Report at II-11.

[77] *Certain Seamless Carbon and Alloy Standard, Line, and Pressure Steel Pipe from Argentina, Brazil, Germany, and Italy*, Inv. Nos. 701-TA-362 and 731-TA-707 through 710 (Final), USITC Pub. 2910 (July 1995) at I-29.

[78] USITC Pub. 3429 at 23.

[79] Views at 28.

employment, and worker productivity likewise declined precipitously, and one domestic producer declared bankruptcy. The Commission observed that the industry recovered somewhat in 2000, with marked increases in production, capacity utilization, net sales, operating income, capital expenditures, and hourly wages. Nonetheless, from 1995 to 2000, the domestic industry's U.S. shipments of certain seamless pipe declined by 24.6 percent, its production fell by 25.2 percent, its capacity to produce dropped by 18.7 percent, and its capacity utilization decreased from 44.6 percent to 41.0 percent. The Commission was divided on the question of whether the domestic industry was vulnerable to material injury if the orders were revoked.[80]

The Commission found that the likely volume and price effects of the cumulated subject imports would have a significant negative impact on the domestic industry and would likely cause the domestic industry to lose market share. These price and volume declines would likely have a significant adverse impact on the production, shipments, sales, revenue levels, and employment of the domestic industry, and this in turn would have a direct adverse impact on the industry's profitability, as well as its ability to raise capital and make and maintain necessary capital investments. For these reasons, the Commission concluded that revocation of the antidumping duty orders on seamless pipe from Argentina, Brazil and Germany likely would have a significant adverse impact on the domestic industry within a reasonably foreseeable time.[81]

The Court held that the Commission's likely impact finding was unsupported by substantial evidence for two reasons. First, because the impact finding depended on the volume and price effects findings, it remanded the impact finding for reconsideration in light of the remand determinations on volume and price effects. The Court's second reason for remanding on the impact issue was the Commission's "failure to properly account for or explain evidence that suggests that the domestic industry would not be vulnerable to injury even were the order revoked." It remanded for an explanation of "why the SLP industry's newfound strength did not suffice to defeat a finding of likelihood of material injury."[82]

B. Discussion

Because our findings as to the likely volume and price effects of imports have not changed in these remand views, it is unnecessary for us to reevaluate our finding as to the likely impact of imports, insofar as this latter finding rests on the former findings.

After showing some improvement between 1995 and 1997, the domestic industry experienced a deep and extended slump beginning in 1998, and continuing and worsening in 1999. Domestic shipments,[83] production,[84] capacity utilization,[85] profits,[86] employment,[87] and worker productivity[88] all fell

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[80] Views at 28-29 & nn. 179 & 180.

[81] Views at 29-30.

[82] Slip Op. at 42-43.

[83] Domestic shipments fell from 179,715 short tons in 1997 to 130,121 short tons in 1998, and to 103,340 short tons in 1999. Staff Report at Table C-3.

[84] Production fell from 184,080 short tons in 1997 to 127,958 short tons in 1998, and to 110,217 short tons in 1999. Staff Report at Table C-3.

[85] Capacity utilization fell from 53.1 percent in 1997 to 36.0 percent in 1998, and to 26.5 percent in 1999. Staff Report at Table C-3.

[86] The domestic industry's operating income fell from $11.4 million in 1997 to $5.7 million in 1998, then to a *loss* of $11.0 million in 1999; its operating income ratio fell from 8.3 percent in 1997 to 5.4 percent in 1998, and to

sharply over this two-year period.

As the Commission noted in its original views, the industry "recovered *somewhat*" in 2000. There were increases in production,[89] capacity utilization,[90] net sales,[91] operating income,[92] capital expenditures,[93] and hourly wages, but only as compared to 1999 (except for capital expenditures). The industry was, in many respects, in a weaker condition in 2000 than it had been in 1995. We note in particular that its production levels[94] and market share had fallen considerably,[95] the domestic industry's domestic shipments and net sales were lower than in 1995, and its operating income in 2000 did not come close to covering its losses in 1999.[96] Overall, we would not characterize the domestic industry's condition in 2000 as being one of "newfound strength."[97]

In concluding that revocation of the subject antidumping duty orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time we also considered the prospects for future demand for seamless pipe. The record on this subject is mixed. Although U.S. consumption had increased markedly from 1999 to 2000, it was barely higher in 2000 than it had been five years earlier.[98] Predictions of future demand also were mixed.[99] Accordingly, the prospects for demand at the end of the review period do not "defeat a finding of likelihood of material injury."[100]

As noted in the Commission's original views, Commissioners Hillman and Miller found that the domestic industry was vulnerable to material injury if the orders were revoked, and Chairman Koplan found that it was not vulnerable.[101] [102] We affirm these findings. It is, of course, clear in the statute that a

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negative 14.3 percent in 1999. Staff Report at Table C-3.

[87] The number of production workers declined from 320 in 1997 to 257 in 1998 and then rose to 283 in 1999. Staff Report at Table C-3.

[88] Productivity fell from 273.3 tons per 1,000 hours in 1997 to 239.6 tons per 1,000 hours in 1998, and to 190.7 tons per 1,000 hours in 1999. Staff Report at Table C-3.

[89] Production rose from 110,217 short tons in 1999 to 134,365 short tons in 2000. Staff Report at Table C-3.

[90] Capacity utilization rose from 26.5 percent in 1999 to 41.0 percent in 2000. Staff Report at Table C-3.

[91] Net sales rose from 104,550 short tons in 1999 to 136,634 short tons in 2000. Staff Report at Table C-3.

[92] The domestic industry's operating income ratio rose from negative 14.3 percent in 1999 to 6.1 percent in 2000. Staff Report at Table C-3.

[93] Capital expenditures increased from $4,577,000 in 1999 to $26,212,000 in 2000. Staff Report at Table C-3.

[94] Production declined from 179,693 short tons in 1995 to 134,365 short tons in 2000. Staff Report at Table C-3.

[95] The domestic industry's market share declined from 86.9 percent in 1995 to 64.0 percent in 2000. Staff Report at Table C-3.

[96] The domestic industry recorded a loss of $11,005,000 in 1999 and a profit of $6,216,000 in 2000. Staff Report at Table C-3.

[97] Slip Op. at 43.

[98] U.S. consumption was 199,555 short tons in 1995 and 204,268 short tons in 2000. Staff Report at Table C-3.

[99] Views at 21-22 and Staff Report at II-11.

[100] Slip Op. at 43.

[101] Views at 29 n.179 and n.180.

[102] Commissioner Lane finds, based on her review of the record in this case, that the domestic industry was vulnerable to material injury if the orders were revoked and concurs in the discussion of this issue by Commissioners

"no vulnerability" finding under 19 USC 1676a(a)(1)(C) is not determinative in a five-year review determination. The Commission's vulnerability analysis involves an examination of whether the domestic industry is in a weakened or declining state because of the effects of dumped or subsidized imports or because of other economic factors.[103] Whether or not an industry is in a weakened state, the Commission must still determine whether that industry would likely be harmed by subject imports if the order is revoked. The SAA further provides that the

> Commission should not determine that there is no likelihood of continuation or recurrence of material injury simply because the industry has recovered after the imposition of an order . . . because one would expect that the imposition of an order . . . would have some beneficial effect on the industry. Moreover, an improvement in the state of the industry related to an order . . . may suggest that the state of the industry is likely to deteriorate if the order is revoked or the suspended investigation terminated.[104]

Thus, an industry need not be currently in a vulnerable or weakened state in order to find that injury would recur if the order were revoked.

Finally, the record of this review supports the conclusion that the U.S. industry is one that is susceptible to injury from low-priced imports of seamless pipe. As we observed in the pricing section, the U.S. product is highly interchangeable with both subject and non-subject imports, and price is an important factor in purchasing decisions. After the orders on the subject countries were imposed in 1995, imports did not disappear from the U.S. market, but non-subject imports replaced subject imports and were eventually found, in mid-2000 (during the review period), to have materially injured the U.S. industry.[105] The effects of this most recent wave of imports were still evident in the condition of the domestic industry at the end of the review period.

CONCLUSION

For the reasons stated in these remand views and in our original views, we determine that revocation of the antidumping duty orders covering imports of certain seamless pipe from Argentina, Brazil, and Germany would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time.

Hillman and Miller.

[103] The Statement of Administrative Action ("SAA") states that in determining whether an industry is vulnerable, "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 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; *See also, Furfuryl Alcohol from China and Thailand*, Inv. Nos. 731-TA-703 and 705 (Review), USITC Pub. 3412 (Apr. 2001) at 19 *aff'd Indorama Chemicals et al. v. USITC*, Slip Op. 02-105 (CIT).

[104] SAA at 884; *See also Timken v. United States*, Slip Op. 03-168 04-7 (CIT) at 35.

[105] *Certain Seamless Carbon and Alloy Standard, Line, and Pressure Pipe from Japan and South Africa*, Inv. Nos. 731-TA-847 and 850 (Final), USITC Pub. 3311 (June 2000); and *Certain Seamless Carbon and Alloy Standard, Line, and Pressure Pipe from Czech Republic, Mexico, and Romania*, Inv. Nos. 731-TA-846, 848, and 849 (Final), USITC Pub. 3325 (August 2000).

ATTACHMENT 1

Table IV-4
All seamless pipe: Argentine producer's overall capacity, production, and capacity utilization, 1995-2000

Item	Calendar year					
	1995	1996	1997	1998	1999	2000
	Quantity (*short tons*), except where noted					
Overall capacity (*short tons*)	***	***	***	***	***	***
Production of products over 4.5 inches in OD						
Standard, line, & pressure pipe	***	***	***	***	***	***
Other pipe and tube[1]	***	***	***	***	***	***
Total production over 4.5 inches in OD	***	***	***	***	***	***
Production of products 4.5 inches or less in OD – as a percentage of total production of small diameter pipe						
Glass-lined pressure pipe	***	***	***	***	***	***
Certain standard, line, & pressure pipe	***	***	***	***	***	***
Oil country tubular goods	***	***	***	***	***	***
Boiler tubing	***	***	***	***	***	***
Mechanical tubing	***	***	***	***	***	***
Tubing suitable for ball or roller bearings	***	***	***	***	***	***
Other pipe and tube[2]	***	***	***	***	***	***
	Quantity (*short tons*), except where noted					
Total production 4.5 inches or less in OD	***	***	***	***	***	***
Total production	***	***	***	***	***	***
Capacity utilization (*percent*)	***	***	***	***	***	***

1 ***.
2 ***.

Source: Compiled from data submitted in response to Commission questionnaires.

Table IV-6
All seamless pipe: Brazilian producer's overall capacity, production, and capacity utilization, 1995-2000

Item	Calendar year					
	1995	1996	1997	1998	1999	2000
	Quantity (*short tons*), except where noted					
Overall capacity (*short tons*)	***	***	***	***	***	***
Production of products over 4.5 inches in OD						
Standard, line, & pressure pipe	([1])	***	***	***	***	***
Other pipe and tube[1]	([1])	***	***	***	***	***
Total production over 4.5 inches in OD	([1])	***	***	***	***	***
Production of products 4.5 inches or less in OD – as a percentage of total production of small diameter pipe						
Glass-lined pressure pipe	([1])	([1])	([1])	([1])	([1])	([1])
Certain standard, line, & pressure pipe	([1])	***	***	***	***	***
Oil country tubular goods	([1])	***	***	***	***	***
Boiler tubing	([1])	***	***	***	***	***
Mechanical tubing	([1])	***	***	***	***	***
Tubing suitable for ball or roller bearings	([1])	***	***	***	***	***
Other pipe and tube[2]	([1])	***	***	***	***	***
	Quantity (*short tons*), except where noted					
Total production 4.5 inches or less in OD	([1])	***	***	***	***	***
Total production	([1])	***	***	***	***	***
Capacity utilization (*percent*)	([1])	***	***	***	***	***

[1] Not available.
[2] ***.

Source: Compiled from data submitted in response to Commission questionnaires.

Table IV-8
All seamless pipe: German producer's overall capacity, production, and capacity utilization, 1995-2000

Item	Calendar year					
	1995	1996	1997	1998	1999	2000
	Quantity (*short tons*), except where noted					
Overall capacity (*short tons*)	***	***	***	***	***	***
Production of products over 4.5 inches in OD						
Standard, line, & pressure pipe	***	***	***	***	***	***
Other pipe and tube[1]	***	***	***	***	***	***
Total production over 4.5 inches in OD	***	***	***	***	***	***
Production of products 4.5 inches or less in OD – as a percentage of total production of small diameter pipe						
Glass-lined pressure pipe	([1])	([1])	([1])	([1])	([1])	([1])
Certain standard, line, & pressure pipe	***	***	***	***	***	***
Oil country tubular goods	***	***	***	***	***	***
Boiler tubing	***	***	***	***	***	***
Mechanical tubing	***	***	***	***	***	***
Tubing suitable for ball or roller bearings	***	***	***	***	***	***
Other pipe and tube[2]	***	***	***	***	***	***
	Quantity (*short tons*), except where noted					
Total production 4.5 inches or less in OD	***	***	***	***	***	***
Total production	***	***	***	***	***	***
Capacity utilization (*percent*)	***	***	***	***	***	***

1 ***.
2 ***.

Source: Compiled from data submitted in response to Commission questionnaires.

DISSENTING VIEWS OF VICE CHAIRMAN DEANNA TANNER OKUN AND COMMISSIONER DANIEL R. PEARSON

I. INTRODUCTION

Section 751(d)(2) of the Tariff Act of 1930, as amended ("the Act"), requires that the U.S. Department of Commerce ("Commerce") revoke a countervailing duty or an antidumping duty finding in a five-year ("sunset") review unless Commerce determines that dumping or a countervailable subsidy would be likely to continue or recur and the U.S. International Trade Commission ("Commission") determines that material injury to a U.S. industry would be likely to continue or recur within a reasonably foreseeable time.[1]

On October 27, 2004, Judge Donald C. Pogue of the United States Court of International Trade (CIT) remanded to the Commission its review determinations in these investigations. Based on the instructions in that remand order and the record in this five-year review, we determine that revocation of the antidumping duty orders on certain seamless carbon and alloy steel standard, line, and pressure pipe (seamless pipe) from Argentina, Brazil, and Germany 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.[2] [3]

II. REVOCATION OF THE ORDERS ON SEAMLESS PIPE IS NOT LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF MATERIAL INJURY WITHIN A REASONABLY FORESEEABLE TIME

A. Legal Standard

In a five-year review conducted under section 751(c) of the Act, Commerce will revoke a countervailing or antidumping duty order or terminate a suspended investigation unless: (1) it makes a determination that dumping or a countervailable subsidy is likely to continue or recur, and (2) the Commission makes a determination that revocation of an order or termination of a suspended investigation "would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time."[4] The Statement of Administrative Action (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 or termination of a proceeding and the elimination of its restraining effects on volumes and prices of imports."[5] Thus,

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[1] 19 U.S.C. § 1675(d)(2).

[2] Vice Chairman Okun participated in the Commission's review determinations and she incorporates herein sections I, II, III, and IV.B of the Views of the Commission from Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Argentina, Brazil, Germany, and Italy, Inv. Nos. 701-TA-362 and 731-TA-707-710 (Review), USITC Pub. 3429 (June 2001) (Review Determinations), except as modified herein.

[3] Commissioner Pearson did not participate in the Commission's review determinations. He adopts as his own sections I, II, III, and IV.B of the Views of the Commission in the Review Determinations, except as modified herein.

[4] 19 U.S.C. § 1675a(a).

[5] 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). Likewise, the standard applies to suspended investigations that were never completed." SAA at 883.

the likelihood standard is prospective in nature.[6] The statute states that "the Commission shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."[7] 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."[8]

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 or the suspended investigation is terminated."[9] 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 finding or the suspension agreement under review, whether the industry is vulnerable to material injury if the finding is revoked or the suspension agreement is terminated, and any findings by Commerce regarding duty absorption pursuant to 19 U.S.C. § 1675(a)(4).[10]

B. Facts Available

The statute 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.[11] 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

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[6] 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.

[7] 19 U.S.C. § 1675a(a)(5).

[8] 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.

[9] 19 U.S.C. § 1675a(a)(1).

[10] 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. We note that no duty absorption findings have been made by Commerce.

[11] 19 U.S.C. § 1675(c)(3)(B); 19 C.F.R. § 207.62(e). Section 751(c)(3) of the Act and the Commission's regulations provide that in an expedited five-year review the Commission may issue a final determination "based on the facts available, in accordance with section 776 of the Act." Section 776 of the Act, in turn, authorizes the Commission to "use the facts otherwise available" in reaching a determination when: (1) necessary information is not available on the record or (2) an interested party or any other person withholds information requested by the agency, fails to provide such information in the time or in the form or manner requested, significantly impedes a proceeding, or provides information that cannot be verified pursuant to section 782(I) of the Act. 19 U.S.C. § 1677e(a).

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."[12]

C. The "Likely" Standard

The legal standard the Commission is to apply is whether revocation of an order "would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time."[13] In reviewing the Commission's application of the "likely" standard, the U.S. Court of International Trade has found that "likely," as used in the sunset review provisions of the Act, means "probable," and that a Commission affirmative determination in such a review would be deemed by the Court to be in error absent application of this standard.[14] The Court has stated that it views "likely" to equal a standard of "more likely than not."[15] This is the interpretation that the Court has directed us to apply in this remand,[16] and we apply the Court's standard in this review.[17] [18]

For the reasons stated below, we determine that revocation of the antidumping duty orders on seamless pipe from Argentina, Brazil, and Germany 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.

D. Cumulation

In these reviews, the statutory requirement for cumulation, that all of the reviews be initiated on the same day, is satisfied. Based on the record, we find that subject imports from each of the three subject countries would not be likely to have no discernible adverse impact on the domestic industry upon revocation, that subject imports from each of the three subject countries would likely compete with each other and with the domestic like product, and that conditions of competition upon revocation facing subject imports from each of the three subject countries would not be significantly different. We therefore exercise our discretion to cumulate the likely volume and effects of subject imports from Argentina, Brazil, and Germany.

1. Likelihood of No Discernible Adverse Impact

During the original investigations, subject imports from Argentina accounted for as much as *** percent of apparent U.S. consumption; subject imports from Brazil accounted for as much as *** percent,

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[12] SAA at 869.

[13] 19 U.S.C. § 1675a(a).

[14] See NMB Singapore Ltd. V. United States, 288 F. Supp. 2d 1306, 1352 (2003) ("'likely' means probable within the context of 19 U.S.C. §§ 1675(c)) and 1675a(a)"); Nippon Steel Corp., et al. v. United States, Slip Op. 02-153 at 7-8 (Dec. 24, 2002) (same) (Nippon); Usinor Industeel, S.A. v. United States, Slip Op. 02-152 at 6 n.6 (Dec. 20, 2002) (Usinor Industeel III); and Usinor v. United States, Slip Op. 02-70 at 43-44 (July 19, 2002) ("'likely' is tantamount to 'probable,' not merely 'possible'") (Usinor).

[15] Usinor Industeel III, Slip. Op. 02-152 at 6 n.6.

[16] Siderca, S.A.I.C. v. United States, Slip Op. 04-133 at 5-9 (Oct. 27, 2004) (Siderca).

[17] See Additional Views of Vice Chairman Deanna Tanner Okun Concerning the "Likely" Standard.

[18] While, for purposes of this review, Commissioner Pearson does not take a position on the correct interpretation of "likely," he notes that he would have made a negative determination under any interpretation of "likely" other than that equating "likely" with merely "possible."

and subject imports from Germany accounted for as much as *** percent. The orders have effectively excluded subject imports from all three countries from the U.S. market.[19]

Producers of seamless pipe in each of the three countries had *** amounts of unused production capacity for subject pipe in 2002.[20] Each of the producers devoted a significant portion of its production to exports.[21] Each of the producers also produces nonsubject pipe on the same equipment and had both some unused capacity and the technical ability to shift between subject and nonsubject pipe.[22] In light of these conditions and the conditions of competition in the U.S. market likely upon revocation, 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.

2. Reasonable Overlap of Competition and Other Considerations

For the reasons stated in sections III.B.2 and III.B.3 of the Views of the Commission in the Review Determinations, we further find that a reasonable overlap of competition is likely upon revocation, and that subject imports from each of the three subject countries would not be facing significantly different conditions of competition upon revocation.

E. Conditions of Competition

We adopt the conditions of competition as stated in section IV.B of the Views of the Commission in the Review Determinations. However, we note one additional condition. In 2000, antidumping duty orders were instituted against imports of seamless pipe from the Czech Republic, Japan, Romania, and South Africa.[23] In 1998, cumulated subject imports of small diameter seamless pipe from the Czech Republic, Japan, Romania, and South Africa accounted for 35.8 percent of U.S. apparent domestic consumption.[24]

F. Likely Volume of Subject Imports

The Commission is 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 if the orders under review were revoked. In so doing, the Commission shall consider "all relevant economic factors," including four enumerated in the statute: (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 in countries other than the United States; and (4) the potential for product shifting if the

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[19] Confidential version of the staff report (CR), INV-Y-104 (May 24, 2001), at Table I-1.

[20] CR/PR at Tables IV-3, IV-5, and IV-7.

[21] CR/PR at Tables IV-3, IV-5, and IV-7.

[22] CR/PR at Tables IV-4, IV-6, and IV-8.

[23] Certain Seamless Carbon and Alloy Standard, Line, and Pressure Pipe from Japan and South Africa, Inv. Nos. 731-TA-847 and 850 (Final), USITC Pub. 3311 (June 2000); Certain Seamless Carbon and Alloy Standard, Line, and Pressure Pipe from Czech Republic, Mexico, and Romania, Inv. Nos. 731-TA-846, 848, and 849 (Final), USITC Pub. 3325 (August 2000).

[24] USITC Pub. 3311 at Table IV-3.

production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.[25]

In the original determination, the Commission found the volume and market share of cumulated subject imports were significant.[26] Cumulated subject imports from Argentina, Brazil, and Germany accounted for *** percent of apparent domestic consumption at their peak in 1993.[27] Subject imports essentially disappeared from the U.S. market after 1994.[28]

Despite the apparent effectiveness of the orders in excluding subject imports from the U.S. market, we do not find it likely that revocation would lead to significant volumes of subject imports. Subject producers in all three countries operated at *** rates of capacity utilization at the end of the period of review. For the subject product, combined capacity utilization in 2000 was *** percent, and unused subject product capacity in 2000, at approximately *** short tons, was equivalent to approximately *** percent of apparent U.S. consumption in that year. Capacity utilization in 2000 was ***, but responding producers in all three countries generally operated at rates *** those reported by domestic producers throughout the period of review.[29] The long-term trend for capacity in these producers has been downward; combined production capacity for small diameter seamless pipe declined during the original investigations and continued to decline during the period of review, including a further decline at the very end of the period, when overall demand was apparently making a strong recovery.[30]

Only *** short tons of subject merchandise were held in inventory by U.S. importers at the end of 2000.[31] Only the responding producer in Argentina reported holding any inventory;[32] producers in Brazil and Germany reported producing to order only and thus held no inventory.[33] Total reported inventories held by all responding producers were equivalent to less than *** percent of total apparent U.S. consumption in 2000.[34]

Producers in Argentina, Brazil, and Germany all have the ability to produce other products on the same equipment and in fact do each produce a wide variety of nonsubject pipe.[35] Capacity utilization rates for this overall production capacity were generally lower than reported capacity utilization rates for subject seamless pipe. The existence of additional capacity and lower capacity utilization rates might suggest that producers of subject merchandise would be likely to respond to revocation by shifting production away from nonsubject imports to the production of the subject merchandise.

While such product shifting might be possible, a review of the record data suggests that producers have engaged in little product shifting. The responding producers in Argentina, Brazil, and Germany have very different output histories; the responding producer in Argentina concentrated on *** pipe, the producer in Brazil concentrated on *** pipe, especially *** pipe, and the producer in Germany

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[25] 19 U.S.C. § 1675a(a)(2)(A-D).

[26] USITC Pub. 2910 at I-28.

[27] CR/PR at Table I-1.

[28] CR/PR at Table I-1.

[29] *Compare* CR/PR at Tables IV-3, IV-5, and IV-5 *with* Table C-1. Capacity utilization rates in 2000 for the subject merchandise were *** in all three countries individually as well.

[30] CR/PR at Tables IV-3, IV-5, and IV-5.

[31] CR/PR at Table IV-2.

[32] CR/PR at Table IV-3.

[33] CR at IV-8-IV-9 and Table IV-5 (Brazil); IV-12 and Table IV-7 (Germany).

[34] Calculated from CR/PR at Tables I-1 and IV-3.

[35] CR at IV-4 and Table IV-4 (Argentina), IV-8 and Table IV-6 (Brazil), and IV-12 and Table IV-8 (Germany).

concentrated on production of *** pipe.[36] These concentrations remained relatively steady over the entire period of review. Although production levels varied significantly, with peaks in 1997 and 2000 and a notable trough in 1999, product distribution did not. Combined production of large-diameter pipe accounted for *** percent of production in 1995, compared to *** percent in 2000; small-diameter pipe accounted for *** percent in 1995, compared to *** percent in 2000.[37] Product shifting may be possible for each of these producers, but the data on the record suggest that these producers have optimum product distributions and do not deviate much from those positions.[38]

The industries in each of the three countries remain substantially export-oriented. Combined, the producers in Argentina, Brazil, and Germany exported *** percent of subject merchandise in 2000. This was little changed from the levels recorded during the original investigations; in 1994, the producers exported *** percent of all shipments.[39] Even before the orders were imposed, however, the U.S. market accounted for a minority of those exports.[40] The consistency of exports as a share of total shipments suggest that, while the producers remain export-oriented, they adjusted to the orders by finding other outlets for exports. Indeed, the record contains no evidence of barriers to imports of the subject merchandise from Argentina, Brazil, and Germany in any other markets.

It has been argued that producers of subject merchandise would shift shipments from other markets to the U.S. market, and that higher prices in the U.S. market would be a sufficient reason for producers to make such shifts. Assuming that prices in the U.S. are in fact higher, the record does not indicate whether prices would remain sufficiently higher after revocation to provide the necessary inducement to divert shipments from current purchasers in order to sell dumped merchandise in the U.S. market. Given the apparent adjustments producers in each country have made to the imposition of the orders, the record does not contain sufficient evidence to suggest that revocation alone would be sufficient to alter these established patterns.

The producers of subject merchandise in each of the subject countries are now affiliated with multinational producers. Siderca, the producer in Argentina, is a member of the Techint Group (also known as the DST Group), with producers in Italy, Mexico, Japan, and Canada; the producers in Brazil and Germany are affiliated with Vallourec of France.[41] Parties in favor of continuing the orders suggested that these producers may have additional advantages in competing for global contracts. Assuming that such global contracts are in fact an important part of the U.S. market, the ownership of these producers does not suggest that revocation is likely to lead to significant increases in subject import volume.[42] The corporate parents of each of these producers of subject merchandise are already present in

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[36] CR/PR at Tables IV-4 (Argentina), IV-6 (Brazil), and IV-8 (Germany).

[37] Calculated from CR/PR at Tables IV-4 (Argentina), IV-6 (Brazil), and IV-8 (Germany).

[38] The domestic industry did not engage in significant product shifting over the period of review, despite the imposition of orders in 1995, a wave of new less than fair value (LTFV) imports in 1997-1998, and a second set of orders being imposed in 2000. Large diameter pipe accounted for *** percent of production in 1995, *** percent in 2000. The domestic like product accounted for *** percent of domestic production in 1995, *** percent in 2000. CR/PR at Table III-2.

[39] Calculated from CR/PR at Tables IV-3, IV-5, and IV-7.

[40] Calculated from CR/PR at Tables IV-3, IV-5, and IV-7. In 1994, exports to the U.S. market accounted for *** percent of all shipments by producers in Argentina, Brazil, and Germany.

[41] CR at IV-4 and IV-8.

[42] V&M, producers in Brazil and Germany, claim ***. V&M posthearing brief at 4 and Appendix A at 2.

the U.S. market and are already supplying the market from import sources not subject to any orders.[43] It is difficult to see how revocation would be likely to alter these existing patterns.[44]

The record suggests that total production capacity for the subject merchandise in the three countries was lower in 2000 than in the original period of investigation; that capacity utilization rates were ***; that producers had found other export markets, and that corporate parents had found other, unrestrained producers with which to supply U.S. customers; that inventories were ***; and that producers did not engage in significant product-shifting. On the basis of this record, we do not find it likely that the volume of subject imports upon revocation would be significant either in absolute terms or relative to production or consumption in the United States.

G. Likely Price Effects

In evaluating the likely price effects of subject imports if the antidumping orders are revoked, the Commission considers whether there is likely to be significant underselling by the subject imports as compared to domestic like product, and if the subject imports are likely to enter the United States at prices that otherwise would have a significant depressing or suppressing effect on the price of domestic like products.[45]

In the original determinations, the Commission found that price was an important factor in purchasing decisions, and that subject imports significantly undersold the domestic like product. The Commission also found that subject imports had had significant price depressing and suppressing effects.[46]

The record suggests that price remains an important factor in purchasing decisions for seamless pipe, though purchasers were likely to give significant weight to reliability of supply, product quality and consistency, discounts, and availability.[47] Although subject imports have been effectively absent from the U.S. market since 1995, purchasers reported subject imports from all three countries to be always or frequently interchangeable with the domestic like product, and purchasers also generally reported that subject imports were priced lower than the domestic like product.[48]

The record thus suggests that subject imports might enter the market at prices that undersell the domestic like product. However, the record also suggests that such underselling is not likely to be significant or lead to significant price suppression or depression.

Prices for the domestic like product generally increased after the orders on subject imports from Argentina, Brazil, and Germany were imposed. However, in 1998 and 1999, prices for the domestic like product were adversely affected by two events. Imports from the Czech Republic, Japan, Romania, and South Africa increased from 21.8 percent of U.S. consumption in 1997 to 35.8 percent in 1998.[49] Prices for the domestic like product fell in the wake of this substantial increase in imports.

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[43] V&M posthearing brief at 6.

[44] Five of seven responding purchasers reported that seamless pipe from France was less expensive that the domestic like product. CR at V-18 n.12.

[45] 19 U.S.C. § 1675(a)(3).

[46] USITC Pub. 2910 at I-28-I-30.

[47] CR/PR at Tables II-1 and II-2.

[48] CR/PR at Tables II-6 and II-7. We note that Commerce has determined the following margins to be likely upon revocation: 108.13 percent for Argentina, 124.94 percent for Brazil, and 57.72 percent for Germany. CR at I-11. Commerce has made no duty absorption findings.

[49] USITC Pub. 3311 at Table C-1.

After the orders were imposed on subject imports from Argentina, Brazil, and Germany, moderate apparent consumption levels in 1995 and 1996 were followed by two years of exceptionally high apparent consumption. In 1997, apparent U.S. consumption was 257,360 short tons, up 33.4 percent from the year before; in 1998, apparent U.S. consumption was down 8.7 percent from the previous year but still high by recent standards at 234,890 short tons.[50] The following year, before final antidumping orders were imposed on imports from the Czech Republic, Japan, Romania, and South Africa, apparent U.S. consumption plunged, dropping by 37.3 percent to 147,254 short tons. Apparent U.S. consumption in 1999 was lower than any year in the original investigation or the period of review.[51]

The LTFV imports from the Czech Republic, Japan, Romania, and South Africa were addressed through the imposition of antidumping orders. In 2000, apparent U.S. domestic consumption rebounded notably, increasing by 38.7 percent to 204,268 short tons. As a result, prices for the domestic like product stopped sliding, and prices for products 1-4 were higher in the second, third, and fourth quarters than in the preceding quarter or the same quarter in 1999.[52]

Given the renewed strength of apparent U.S. consumption, the likelihood that apparent U.S. consumption will continue to rise,[53] and restraints on LTFV imports, the record suggests that prices for the domestic like product will be relatively strong. We have already found that revocation is not likely to lead to significant volumes of subject imports. Even assuming that subject imports would undersell the domestic like product, the modest volume of subject imports likely upon revocation is not likely to have significant price suppressing or depressing effects on prices for the domestic like product, or to otherwise have significant negative effects on domestic prices.

H. Likely Impact of Subject Imports

In evaluating the likely impact of imports of subject merchandise if the antidumping orders are revoked, the Commission considers 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.[54]

In the original determination the Commission found that the domestic industry experienced poor financial performance as a result of the adverse price effects of subject imports, despite improvements in the domestic industry's market share, shipments, production, and capacity utilization.[55]

The domestic industry experienced significant improvement after the orders were imposed. The industry had operating losses in 1994, the final full year of the original period of investigation. Operating income rose steadily after that, from 2.3 percent of sales in 1995 to 5.1 percent in 1996 to 8.3 percent in 1997. Increases in LTFV imports from the Czech Republic, Japan, Romania, and South Africa led to lower profit margins in 1998, and a sharp contraction in apparent consumption and U.S. shipments left the industry with operating losses again in 1999. But by the following year the combination of

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[50] CR/PR at Table C-1.

[51] CR/PR at Table I-1.

[52] CR/PR at Tables V-1-V-4. Prices for product 5 also generally rose in 2000, but there were no observations in 1999 for comparison. CR/PR at Table V-5.

[53] Siderca posthearing brief at 10-14 and Exh. 1; V&M posthearing brief at Appendix A, p.10.

[54] 19 U.S.C. § 1675(a)(4).

[55] USITC Pub. 2910 at I-31-I-32.

restraints on LTFV imports and a strong recovery in apparent consumption meant a quick and notable recovery for the industry. In 2000, operating income for the domestic industry was 6.1 percent of sales, the second highest margin recorded since 1992.[56]

Compared to the period of the original investigation, the domestic industry has made significant gains. Production capacity in 2000 was 327,838 short tons, compared to *** short tons in 1992. The average unit value of U.S. shipments was $760/short ton in 2000, compared to $664/short ton in 1994. The domestic industry exported only 453 short tons in 1994; in 2000, exports were *** short tons. Inventories in 2000 were lower, both in total amount and as a percentage of shipments, than in any year during the original investigation. Hourly wages were higher, and productivity had risen from 190.6 short tons per 1,000 hours in 1992 to 230.1 short tons per hour in 2000.[57]

All of these improvements, taken together with the industry's ability to bounce back rapidly from the setbacks of LTFV imports and a sharp reduction in consumption, suggest that the industry is not vulnerable. The period of review since the orders were imposed suggest that significant downturns in demand, rather than surges in subject imports, pose a greater threat to the health of the industry. The record suggests that the outlook for demand in the period following revocation is good. Given our findings that revocation is not likely to lead to significant volume of subject imports, and that consequently subject imports are not likely to have significant effects on prices for the domestic like product, we find that revocation is not likely to have a significant adverse impact on the domestic industry within a reasonably foreseeable time.

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[56] CR/PR at Table I-1.

[57] CR/PR at Table I-1.

ADDITIONAL VIEWS OF VICE CHAIRMAN DEANNA TANNER OKUN CONCERNING THE "LIKELY" STANDARD

I write separately to explain why I switched my vote in the underlying five-year review determinations from an affirmative (finding that revocation of the antidumping duty orders would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time) to a negative in this remand proceeding.

As noted in my dissenting views with Commissioner Pearson, the legal standard the Commission is to apply is whether revocation of an order "would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time."[1] While the Commission always must weigh the evidence in order to make this determination, in reviewing the Commission's application of the "likely" standard, the U.S. Court of International Trade has found that "likely," as used in the five-year review provisions of the Act, means "probable" or "more likely than not," and that a Commission affirmative determination in such a review would be deemed by the Court to be in error absent application of this standard.[2]

I do not concur with the Court's interpretation of the "likely" standard. I, however, have adopted this standard in five-year reviews, and I do so in this remand proceeding.[3] I will apply the Court's standard in all reviews until either Congress clarifies the meaning or the U.S. Court of Appeals for the Federal Circuit addresses this issue. Applying this standard, I cannot conclude, based on the record in this proceeding, that revocation of the orders would be more likely than not to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

I explain my interpretation and that of the Court's below.

Again, the Court has found that "likely" means "probable" or "more likely than not." Pursuant to the Usinor Industeel and Usinor remand orders, the Commission issued remand determinations that applied the "probable" standard. In each instance, however, the Commission[4] articulated its disagreement with the statutory construction followed by the Court and limited the standard's application to the immediate determination.

In its remand determination in Usinor Industeel, the Commission stated that the Commission, in rendering its initial determination in those reviews, did not equate "likely" with "probable" or "possible" for purposes of its determination of whether material injury was likely to recur.[5] The Commission stated

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[1] 19 U.S.C. § 1675a(a).

[2] See Siderca, S.A.I.C. v. United States, Slip Op. 04-133 at 6 (Oct. 27, 2004) ("The common meaning of 'likely' is 'probable,' or, to put it another way, 'more likely than not") (Siderca); NMB Singapore Ltd. V. United States, 288 F. Supp. 2d 1306, 1352 (2003) ("'likely' means probable within the context of 19 U.S.C. §§ 1675(c)) and 1675a(a)"); Nippon Steel Corp., et al. v. United States, Slip Op. 02-153 at 7-8 (Dec. 24, 2002) (same) (Nippon); Usinor Industeel, S.A. v. United States, Slip Op. 02-152 at 6 n. 6 (Dec. 20, 2002) ("the court has not interpreted 'likely' to imply any particular degree of 'certainty'") (Usinor Industeel III); and Usinor v. United States, Slip Op. 02-70 at 43-44 (July 19, 2002) ("'likely' is tantamount to 'probable,' not merely 'possible'") (Usinor).

[3] See Pressure Sensitive Tape from Italy, Inv. No. AA1921-167 (Second Review), USITC Pub. 3698 at 15-17 (June 2004).

[4] Vice Chairman Hillman and Commissioner Koplan provided their views on this issue separately in a "separate view" and a "dissent," respectively.

[5] Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, The Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom (Views on Remand), Invs. Nos. AA1921-197 (Review), 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350 (Review), and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Review) (Remand), USITC Pub. 3526 at 6 (July 2002).

its view of the meaning of the word "likely" is found in the statutory language itself and the relevant explication of that text found in the SAA. The Commission noted that the SAA explains that a determination by the Commission in a five-year review "is inherently predictive."[6] As a result of the inherently predictive nature of the inquiry, the SAA explains that "[t]here may be *more than one* likely outcome following revocation."[7] Thus, the Commission stated that reading the term "likely" in conjunction with the SAA led it to conclude that "likely" captures a concept that falls in between "probable" and "possible" on a continuum of relative certainty.[8]

In reviewing the Commission's remand determination in Usinor Industeel, the Court rejected the Commission's interpretation that "likely" captures a concept that falls in between "probable" and "possible" on a continuum of relative certainty.[9] Subsequently, the Court has stated that it "has not interpreted 'likely' to imply any degree of 'certainty,'" but it has indicated that the Court views "likely" to equal a standard of "more likely than not."[10] [11] I note, however, that the Court in this remand proceeding has found that "probable" does indicate a particular level of certainty – "it requires that something be 'more likely so than not.'"[12]

I still read the term "likely" in conjunction with the SAA and conclude that "likely" captures a concept that falls in between "probable" and "possible" on a continuum of relative certainty. I note, however, that the term "likely" certainly does not mean "possible." I have never used such a standard. Again, the SAA explains that "[t]here may be *more than one* likely outcome following revocation."[13] The Court's "likely" standard, however, means that the continuation or recurrence of material injury must be "more likely than not," otherwise the order must be revoked. Congress' recognition of the possibility of "more than one likely outcome" runs counter to the notion that likely means "probable" or "more likely than not."

Although I disagree with the Court's interpretation, I now apply its "likely" standard. These reviews, however, illustrate how the two standards can lead to different results in a narrow range of five-year reviews where the evidence supporting one likely outcome is countered by evidence supporting another likely outcome. Under my interpretation of "likely" and based on the record in this proceeding,

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[6] SAA at 883.

[7] SAA at 883 (emphasis added).

[8] Vice Chairman Hillman stated her separate view that "likely" means "more likely than not," which is the standard she understood the Court to prescribe when it used the term "probable." Separate Views of Vice Chairman Jennifer A. Hillman Regarding the Interpretation of the Term "Likely" at 2. Commissioner Koplan, in dissent, found no error in the Court's construction of the term. Dissenting Views of Commissioner Stephen Koplan Regarding the Interpretation of the Term "Likely" at 1 ("were I to select a synonym for 'likely,' I would accept the Court's conclusion that 'likely' is best equated with 'probable'").

[9] Usinor Industeel III, Slip. Op. 02-152 at 5-6. The Court, however, did not remand the matter to the Commission on those grounds, as the Commission explicitly adopted the Court's definition of "likely" for purposes of making that remand determination. Usinor Industeel III, Slip. Op. 02-152 at 4.

[10] Usinor Industeel III, Slip. Op. 02-152 at 6 n. 6.

[11] Subsequent to Usinor Industeel III, Commissioners Hillman, Koplan, and Miller explicitly stated they were applying the court's definition of "likely" per Usinor Industeel, Usinor, and Nippon. Steel Concrete Reinforcing Bars from Turkey, Inv. No. 731-TA-745 (Review), USITC Pub. 3577 at 13 n. 60 (Feb. 2003).

[12] Siderca, Slip Op. 04-133 at 7 n. 3 (citing A.G. der Dillinger Huttenwerke v. United States, Slip Op. 02-107 at 18 & 18 n. 14 (Sept. 5, 2002)).

[13] SAA at 883 (emphasis added).

there could be "more than one likely outcome;"[14] and thus, revocation of these orders would be likely to lead to recurrence of material injury within a reasonably foreseeable time. Applying the Court's interpretation to the record of this proceeding, however, I conclude that the likelihood of continuation or recurrence of injury is not more likely than any other outcome.[15] Thus, I find in the negative.

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[14] SAA at 883.

[15] For example, under likely volume, I would find that the likely volume of subject imports – if there could be "more than one likely outcome" – would be significant if the orders were revoked based on the likely volume generated by product shifting and transnational corporate affiliations/global contracts, all else being equal. This is based on the fact that seamless pipe prices generally are higher in the United States than elsewhere, thus providing incentive to foreign producers, and the fact that subject producers have a large amount of total steel-making capacity, which they could shift from non-subject product to subject product. While the range of product shifting for the cumulated subject producers has not been great, as detailed in my dissenting views, it has varied to a degree that could make product shifting likely. Moreover, transnational corporate affiliations/global contracts show that the parent companies of subject producers have established a ready U.S. network for marketing, sales and distribution. Moreover, cross-ownership among foreign subject producers appears to be enhancing their ability to supply seamless pipe customers with operations in the United States and abroad through flexible supply arrangements. While responses are mixed, there is substantial evidence to find an increasing trend on the part of some end users toward using global contracts. Transcript of Commission Hearing at 28 (Gadjzik, U.S. Steel Group) and Staff Report at IV-8 and IV-12 (V&M Group switched shipping seamless pipe to the United States from France rather than from Brazil and Germany). Thus, the likely volume of subject imports would be significant if the order were revoked. It is one likely outcome if there could be "more than one likely outcome." However, applying the Court's standard, I cannot conclude that the volume likely to be generated by product shifting and global contracts, all else being equal, is more likely than not.

In addition, I would find that the likely price effects of subject imports – if there could be "more than one likely outcome" – would be significant if the orders were revoked based on the likely volume and the fact that a significant number of purchasers indicated that subject imports are cheaper than the domestic like product. Purchaser questionnaires show that price is one of the three most important factors in deciding from which supplier to purchaser seamless pipe. While this is tempered slightly by the fact that purchasers also ranked other factors such as product quality as more important than price (price was still an important factor), taken together and based on the likely volume of subject imports, the likely price effects would be significant if the order were revoked. Based on this finding of likely underselling, I also would find that the likely volume and underselling of subject imports would likely lead to price depression. It is one likely outcome if there could be "more than one likely outcome." However, applying the Court's standard, I cannot conclude that the price effects likely to be generated is more likely than not.

Finally, taking together the likely volume and likely price effects, I would conclude that if the orders were revoked they would likely have a significant adverse impact on the domestic industry – if there could be "more than only likely outcome."