UNITED STATES INTERNATIONAL TRADE COMMISSION

CERTAIN EXPANDABLE POLYSTYRENE RESINS FROM INDONESIA AND KOREA
Investigations Nos. 731-TA-861 & 862 (Preliminary)

DETERMINATIONS AND VIEWS OF THE COMMISSION
(USITC Publication No. 3266, January 2000)

DETERMINATIONS

On the basis of the record[1] developed in the subject investigations, the United States International Trade Commission determines,[2] pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1673b(a)) (the Act), that there is a reasonable indication that an industry in the United States is materially injured by reason of imports from Indonesia and Korea of certain expandable polystyrene resins (EPS resins),[3] provided for in subheading 3903.11.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (LTFV).

COMMENCEMENT OF FINAL PHASE INVESTIGATIONS

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling which will be published in the *Federal Register* as provided in section 207.21 of the Commission's rules upon notice from the Department of Commerce (Commerce) of affirmative preliminary determinations in the investigations under section 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in those investigations under section 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

BACKGROUND

On November 22, 1999, a petition was filed with the Commission and the Department of Commerce by BASF Corporation, Mount Olive, NJ; Huntsman Expandable Polymers Company LC, Salt Lake City, UT; Nova Chemicals, Inc., Moon Township, PA; and StyroChem U.S., Ltd., Radnor, PA, , alleging that an industry in the United States is materially injured or threatened with material injury by

---

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

[2] Commissioner Thelma J. Askey dissenting; Commissioner Deanna Tanner Okun not participating.

[3] For purposes of these investigations, Commerce has defined "certain expandable polystyrene resins" as the raw material manufactured in the form of polystyrene beads, whether of regular (shape) type or modified (block) type, regardless of specification, having a weighted-average molecular weight of between 160,000 and 260,000, containing from 3 to 7 percent blowing agents, and having bead sizes ranging from 0.4 mm to 3 mm. Specifically excluded from this definition is off-grade, off-specification expandable polystyrene resin.

reason of LTFV imports of EPS resins from Indonesia and Korea. Accordingly, effective November 22, 1999, the Commission instituted antidumping duty investigations Nos. 731-TA-861 & 862 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of December 3, 1999 (64 FR 67934). The conference was held in Washington, DC, on December 13, 1999, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on January 6, 2000. The views of the Commission are contained in USITC Publication 3266 (January 2000), entitled *Certain Expandable Polystyrene Resins from Indonesia and Korea: Investigations Nos. 731-TA-861 & 862 (Preliminary)*.

By order of the Commission.

Donna R. Koehnke
Secretary

Issued:

VIEWS OF THE COMMISSION

Based on the record in these investigations, we find that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of expandable polystyrene resins ("EPS") from Indonesia and Korea that are allegedly sold in the United States at less than fair value ("LTFV").[4]

I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS

The legal standard for preliminary antidumping and countervailing duty determinations requires the Commission to determine, based upon the information available at the time of the preliminary determination, whether there is a reasonable indication that a domestic industry is materially injured, threatened with material injury, or whether the establishment of an industry is materially retarded, by reason of the allegedly unfairly traded imports.[5] In applying this standard, the Commission weighs the evidence before it and determines whether "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation."[6]

II. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. In General

To determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the Commission first defines the "domestic like product" and the "industry."[7] Section 771(4)(A) of the Tariff Act of 1930, as amended ("the Act"), defines the relevant domestic industry as the "producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."[8] In turn, the Act defines "domestic like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation . . . ."[9]

The decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and the Commission has applied the statutory standard of "like" or "most similar in

---

[4] Commissioner Askey determines that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of EPS from Indonesia and Korea that are allegedly sold in the United States at LTFV. See Dissenting Views of Commissioner Askey. She joins sections I-III of this opinion. Commissioner Okun did not participate in these determinations.

[5] 19 U.S.C. § 1673b(a); see also American Lamb Co. v. United States, 785 F.2d 994, 1001-1004 (Fed. Cir. 1986); Aristech Chemical Corp. v. United States, 20 CIT 353, 354 (1996).

[6] American Lamb, 785 F.2d at 1001 (Fed. Cir. 1986); see also Texas Crushed Stone Co. v. United States, 35 F.3d 1535, 1543 (Fed. Cir. 1994).

[7] 19 U.S.C. § 1677(4)(A).

[8] Id.

[9] 19 U.S.C. § 1677(10).

characteristics and uses" on a case-by-case basis.[10] No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation.[11] The Commission looks for clear dividing lines among possible like products and disregards minor variations.[12] Although the Commission must accept the determination of the Department of Commerce ("Commerce") as to the scope of the imported merchandise allegedly subsidized or sold at LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified.[13]

B. Product Description

In its notice of initiation, Commerce defined the imported merchandise within the scope of these investigations as follows:

> The scope of these investigations includes certain expandable polystyrene resins in primary forms; namely, raw material or resin manufactured in the form of polystyrene beads, whether of regular (shape) type or modified (block) type, regardless of specification, having a weighted-average molecular weight of between 160,000 and 260,000, containing from 3 to 7 percent blowing agents, and having bead sizes ranging from 0.4 mm to 3 mm.
> Specifically excluded from the scope of these investigations is [sic] off-grade, off-specification expandable polystyrene resins.
> The covered merchandise is found in the Harmonized Tariff Schedule of the United States (HTSUS) subheading 3903.11.00.00. Although this HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise is dispositive.[14]

EPS is a polystyrene-based product made by polymerization of styrene monomer with the addition of expanding or blowing agents. EPS beads resulting from the polymerization process are screened into

---

[10] See, e.g., NEC Corp. v. Department of Commerce, 36 F. Supp. 2d 380, 383 (CIT 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Torrington Co. v. United States, 747 F. Supp. 744, 749, n.3 (CIT 1990), aff'd, 938 F.2d 1278 (Fed. Cir. 1991) ("every like product determination 'must be made on the particular record at issue' and the 'unique facts of each case' "). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes and production employees; and, where appropriate, (6) price. See Nippon, 19 CIT at 455, n.4; Timken Co. v. United States, 913 F. Supp. 580, 584 (CIT 1996).

[11] See, e.g., S. Rep. No. 96-249, at 90-91 (1979).

[12] Nippon Steel, 19 CIT at 455; Torrington, 747 F. Supp. at 748-49. See also S. Rep. No. 96-249, at 90-91 (1979) (Congress has indicated that the like product standard should not be interpreted in "such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not 'like' each other, nor should the definition of 'like product' be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under consideration.").

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

[14] 64 Fed. Reg. 71112 (Dec. 20, 1999).

various sizes for further processing by molders into various packaging and insulation products. EPS beads are called shape grade (also known as regular grade) or block grade (also known as modified grade).[15]

C. Domestic Like Product Issues

Petitioners argue that block and shape grade EPS represent a single domestic like product. Petitioners also argue that cup grade EPS, which is not included within Commerce's scope, should not be included in the domestic like product definition. Respondents have not contested the petitioners' suggested definition of like product. Based on the record developed in the preliminary phase of these investigations, we determine that there is a single domestic like product covering both block and shape grade EPS.

The record indicates that block and shape grade EPS are essentially identical,[16] the only difference being that block grade contains a flame retardant.[17] Both block and shape grade EPS are molded into end products for insulation board and refrigeration and packing components.[18] The physical characteristics and end uses of cup grade EPS differ significantly from either block or shape grade. Cup grade EPS is made from a different feedstock, and has a higher molecular weight, lower residual styrene monomer content, lower yield, and lesser expansion capability.[19] Cup grade is used in the making of food containers and cups.[20]

There is minimal interchangeability between cup grade EPS and either shape or block grade EPS. Block grade cannot be used in cup grade applications because the added flame retardant would create an unacceptable toxicity level. Shape grade EPS also is not interchangeable with cup grade due to the fact that a higher residual monomer would result in an unacceptable "taste" and surface imperfections, as well as a lack of strength.[21] The parties agree that block and shape grade EPS are almost completely interchangeable.[22] Producers of block and shape grade consider cup grade EPS to be a different product.[23] Consumers are also said to perceive cup grade EPS to be a different product.[24]

Block and shape grade EPS, on the one hand, and cup grade EPS, on the other, do not share the same channels of distribution. Block and shape grade EPS are sold directly to end user molders in the merchant market. Most cup grade EPS is not sold in the merchant market but rather is captively consumed by the producing companies.[25]

---

[15] Confidential Report (CR) at I-2, Public Report (PR) at I-2.

[16] Block- and shape-grade EPS are manufactured by similar processes and have similar physical and chemical properties, including particle size and molecular weight distribution, and blowing agent content range. CR at I-4; PR at I-3.

[17] Petitioners' postconference brief at 25; CR at I-4; PR at I-3.

[18] Petitioners' postconference brief at 26; CR at I-4, I-5; PR at I-3-4.

[19] CR at I-4, I-5; PR at I-3.

[20] CR at I-7, I-8; PR at I-5.

[21] Petitioners' postconference brief at 28, 29; CR at I-7; PR at I-5.

[22] Id.

[23] Petitioners' postconference brief at 30; CR at I-8; PR at I-5.

[24] Conference transcript at 9.

[25] Petitioners' postconference brief at 29; CR at I-8, I-9; PR at I-4, I-5. "There are two major users of cup grade EPS in the United States: Dart and Wincup. Dart supplies itself, and it would be very unlikely to use cup grade EPS from Korea or Indonesia. StyroChem supplies WinCup, and I know that WinCup did not import any cup

(continued...)

There are also some distinctions between the manufacturing processes for block and shape grade, and cup grade. While cup-grade EPS is produced using a two-step process, domestic producers more commonly use a one-step process to produce block and shape grades. [26] Block and shape grade prices are described as "roughly equivalent."[27] Cup grade EPS is sold at a price higher than either block or shape grade.[28] For example, molders pay approximately *** cents per pound more for cup grade EPS than for block or shape grade.[29]

There are many similarities between block and shape grade EPS and the distinction of block grade's addition of a flame retardant does not appear to affect end use or interchangeability. Cup grade EPS, however, appears to have clear distinctions from either block or shape grade as to end uses, interchangeability, channels of distribution, producer perceptions, manufacturing processes, and price. Consequently, for purposes of these preliminary determinations we do not include cup grade EPS in the domestic like product, and decide that block and shape grade EPS form a single like product.

D. Domestic Industry and Related Parties

The domestic industry is defined as "the producers as a [w]hole of a domestic like product."[30] In defining the domestic industry, the Commission's general practice has been to include in the industry all of the domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market.[31] Based on our finding that the domestic like product consists of block and shape grade EPS, we conclude that the domestic industry consists of all domestic producers of that merchandise.

III. CUMULATION

A. In General

For purposes of evaluating the volume and price effects for a determination of material injury by reason of the subject imports, section 771(7)(G)(i) of the Act requires the Commission to cumulatively assess the volume and effect of imports of the subject merchandise from all countries as to which petitions were filed and/or investigations self-initiated by Commerce on the same day, if such imports compete with

---

[25] (...continued)
grade EPS from Korea or Indonesia. These two cup manufacturers account for a significant portion of the U.S. market. The other EPS cup manufacturers, MasterContainer and Oklahoma League for the Blind, are supplied by either Nova Chemicals or StyroChem. I have not observed either of these facilities to be carrying inventory material from anywhere in Southeast Asia." Petitioners' Postconference Brief, at Exhibit 17, para. 7, Affidavit of Mike Pate. See also ***'s, NOVA's, and StyroChem's answers to the producer questionnaire.

[26] CR at I-6, I-7, PR at I-4. We note that some block- and shape-grade EPS are also produced using a two-step process. Id.

[27] CR at I-8, PR at I-6.

[28] CR at I-8, I-9, PR at I-6.

[29] CR at I-9; PR at I-6.

[30] 19 U.S.C. § 1677(4)(A).

[31] See United States Steel Group v. United States, 873 F. Supp. 673, 681-84 (CIT 1994), aff'd, 96 F.3d 1352 (Fed. Cir. 1996).

each other and with domestic like products in the U.S. market.[32] In assessing whether subject imports compete with each other and with the domestic like product,[33] the Commission has generally considered four factors, including:

(1) the degree of fungibility between the subject imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;

(2) the presence of sales or offers to sell in the same geographic markets of subject imports from different countries and the domestic like product;

(3) the existence of common or similar channels of distribution for subject imports from different countries and the domestic like product; and

(4) whether the subject imports are simultaneously present in the market.[34]

While no single factor is necessarily determinative, and the list of factors is not exclusive, these factors are intended to provide the Commission with a framework for determining whether the subject imports compete with each other and with the domestic like product.[35] Only a "reasonable overlap" of competition is required.[36]

B. Analysis

We have determined to cumulate the subject imports from Indonesia and Korea. The record in these preliminary investigations indicates that the subject imports from Indonesia and Korea are at least moderately fungible with each other and with the domestic like product.[37] In this regard, the subject imports are sold to the same molders and generally meet the same requirements for molding as domestically-produced EPS.[38] Conference testimony and producer questionnaire responses indicate that the imports from the subject countries are viewed as interchangeable with the domestic like product and with

---

[32] 19 U.S.C. § 1677(7)(G)(I).

[33] The SAA at 848 expressly states that "the new section will not affect current Commission practice under which the statutory requirement is satisfied if there is a reasonable overlap of competition," citing Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898, 902 (Ct. Int'l Trade 1988), aff'd, 859 F.2d 915 (Fed. Cir. 1988).

[34] See Certain Cast-Iron Pipe Fittings from Brazil, the Republic of Korea, and Taiwan, Inv. Nos. 731-TA-278-280 (Final), USITC Pub. 1845 (May 1986), aff'd, Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898 (Ct. Int'l Trade), aff'd, 859 F.2d 915 (Fed. Cir. 1988).

[35] See, e.g., Wieland Werke, AG v. United States, 718 F. Supp. 50 (Ct. Int'l Trade 1989).

[36] See Goss Graphic System, Inc. v. United States, 33 F. Supp. 2d 1082, 1087 (CIT 1998) ("cumulation does not require two products to be highly fungible"); Mukand Ltd., 937 F. Supp. at 916; Wieland Werke, AG, 718 F. Supp. at 52 ("Completely overlapping markets are not required.").

[37] CR at II-7; PR at II–5.

[38] Petitioners' postconference brief at 3; also citing Tr. at 11, 17, and 26.

each other.[39] The Indonesian respondent contends that the high pentane content of subject imports from Indonesia limits its fungibility with the domestic like product and the subject imports from Korea. The record, however, does not indicate that EPS from Indonesia is distinguishable from EPS from other sources by virtue of its pentane content.[40]

The record demonstrates that appreciable quantities of subject imports from Indonesia and Korea were present throughout the period examined in the same geographic markets. Imports of the subject merchandise from Korea occurred in every month during the period examined, and imports from Indonesia have occurred during 20 of the last 21 months reviewed.[41] Indeed, ***.[42]

The record demonstrates that subject imports and domestic EPS are sold through the same channels of distribution.[43] Specifically, EPS is sold directly to producers for molding.[44]

Accordingly, we find a reasonable overlap of competition and cumulate subject imports from Indonesia and Korea for purposes of our analysis of present material injury.[45]

IV. REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF ALLEGEDLY LTFV IMPORTS

In the preliminary phase of antidumping or countervailing duty investigations, the Commission determines whether there is a reasonable indication that an industry in the United States is materially injured by reason of the imports under investigation.[46] In making this determination, the Commission must consider the volume of imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations.[47] The statute defines "material injury" as "harm which is not inconsequential, immaterial, or unimportant."[48] In assessing whether there is a reasonable indication that the domestic industry is materially injured by

---

[39] Petitioners' postconference brief at 33, 34.

[40] The record suggests that at ***. Indonesian Respondent's Postconference Brief at Exhibit 8. Moreover, the Indonesian respondent submitted a report indicating that most EPS produced in the United States contains from *** percent to *** percent pentane, which appears to be within the same pentane range as subject imports from Indonesia. *Compare* Indonesian respondent's postconference brief at Ex. 7 with Ex. 8. Further, the Indonesian respondent failed to articulate what pentane content distinguishes "high-pentane" EPS from "low-pentane" EPS.

In any final phase investigations we intend to explore further the significance of pentane levels in EPS, and any distinctions between the domestic like product and the subject imports in this regard.

[41] Petitioners' postconference brief at 35, and Ex. 4, citing Society of the Plastics Industry, and Census Bureau IM-145 Data as sources.

[42] Indonesian respondent's postconference brief at Exhibit 8.

[43] CR at II-1; PR at II-1.

[44] Petitioners' postconference brief at 35.

[45] Commissioner Askey finds there is no reasonable indication that the domestic EPS industry is materially injured or threatened with material injury by reason of the subject imports. Commissioner Askey does not join the remainder of this opinion. See her dissenting views.

[46] 19 U.S.C. § 1671b(a) and 1673b(a).

[47] 19 U.S.C. § 1677(7)(B)(i). The Commission "may consider such other economic factors as are relevant to the determination" but shall "identify each [such] factor . . . [a]nd explain in full its relevance to the determination." 19 U.S.C. § 1677(7)(B). See also Angus Chemical Co. v. United States, 140 F.3d 1478 (Fed. Cir. 1998).

[48] 19 U.S.C. § 1677(7)(A).

reason of subject imports, we consider all relevant economic factors that bear on the state of the industry in the United States.[49] No single factor is dispositive, and all relevant factors are considered "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."[50]

For the reasons discussed below, we determine that there is a reasonable indication that the domestic industry producing block and shape grade EPS is materially injured by reason of subject imports from Indonesia and Korea that are allegedly sold in the United States at less than fair value.

A. Conditions of Competition

We find two significant conditions of competition relevant to these investigations. First, apparent U.S. consumption by quantity for EPS increased for each year from 1996 to 1998. Apparent consumption rose from 588.8 million pounds in 1996 to 674.7 million pounds in 1998. Apparent U.S. consumption of EPS was 562.5 million pounds in interim (January-September) 1999, which was greater than interim 1998 apparent U.S. consumption of 501.9 million pounds.[51]

Second, we note that EPS is composed primarily of polystyrene monomer, with blowing agents like pentane making up the bulk of the remaining inputs.[52] As the primary raw material, the price of monomer is a key determinant of EPS costs. Monomer prices fell over the period for which data were collected, but are said to have increased during the fourth quarter of 1999.[53] In any final phase investigations, we intend to examine closely the relationship between raw material costs and the price of EPS.

B. Volume

Section 771(7)(C)(i) of the Act provides that the "Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant."[54]

The quantity of cumulated subject imports grew by more than 300 percent during the period examined.[55] In 1996, the total volume of subject imports was 9.4 million pounds. By 1998, the quantity of subject imports had risen to 43.3 million pounds, more than double the 1997 level. Subject import quantity was also substantially higher in interim 1999, at 48.2 million pounds, than in interim 1998, at 30.1 million pounds. The value of subject imports also increased overall during the period examined, exhibiting a pattern similar to the change in volume, although the increases were somewhat less marked.[56]

Importantly, the increase in subject import volume outpaced that of apparent consumption. Measured by quantity, subject import market share increased from 1.6 percent in 1996 to 6.4 percent in

---

[49] 19 U.S.C. § 1677(7)(C)(iii).

[50] Id.

[51] Table IV-3, CR at IV-5, PR at IV-4.

[52] CR at V-1; PR at V-1.

[53] Id. See Petitioners' postconference brief at 10.

[54] 19 U.S.C. § 1677(7)(C)(i).

[55] Table IV-2; CR at IV-3, PR at IV-3.

[56] Table IV-3; CR at IV-5, PR at IV-4.

1998. Interim 1999 subject import market share of 8.6 percent was greater than interim 1998 market share of 6.0 percent.[57]

By contrast, domestic producers' share of domestic EPS consumption, measured by quantity, declined from 89.2 percent in 1996 to 82.3 percent in 1998. The domestic producers' share in interim 1999, 78.5 percent, was lower than the 82.5 percent share in interim 1998.[58] Although there were also increases in nonsubject import volume and market penetration during this period, nonsubject imports do not explain the magnitude of the domestic industry's decline in market share. Nonsubject imports hold a larger share of the market than subject imports and increased that share over the period, holding almost 13 percent of the market in interim 1999. The growth of subject imports, however, exceeded that of nonsubject imports, suggesting that much of the domestic industry's decline in market share is attributable to subject imports. [59]

Based on the foregoing, we conclude that the volume of subject imports, both in absolute terms and relative to consumption in the United States, is significant.

C. Price Effects of the Subject Imports

Section 771(7)(C)(ii) of the Act provides that, in evaluating the price effects of the subject imports, the Commission shall consider whether –

> (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.[60]

In these preliminary investigations we find that the subject imports are good substitutes with the domestic like product. Despite some differences in technical specifications and disadvantages due to their distance from the U.S. market, the subject imports, as previously explained, are generally interchangeable with the domestic like product.[61]

---

[57] Id.

[58] Id.

[59] Id.

[60] 19 U.S.C. § 1677(7)(C)(ii).

[61] *See* CR at II-7-8; PR at II-5.

The record evidence on pricing in this preliminary phase is limited.[62] [63] The available pricing data for subject imports from Korea cover October-December 1997 to July-September 1999, and do not include any data for subject imports from Indonesia. Where data were available, subject imports from Korea were priced below the domestic like product in only 3 of 14 quarterly comparisons.[64] The average unit value data, which may reflect some product differentiation, show a contrary picture. In all periods, the subject imports had substantially lower AUV's than the domestic like product by margins of almost 20 percent.[65]

Pricing and AUV data show declining trends for both the subject imports and the domestic like product throughout the period examined.[66] As noted earlier, at least a portion of this decline is tied to the decline in raw material costs. Because of the decline in monomer prices, domestic producers' cost of goods sold (COGS) declined throughout the period examined. This decline, however, was lower in magnitude than the decline in domestic producers' net sales values.[67] The record also indicates that during the period investigated, the domestic industry was faced with competition from sharply increasing volumes of subject imports. Based on this limited record regarding price, we conclude that the subject imports played a significant role in the price declines, and significantly depressed prices of the domestic like product. We will reexamine price effects of the subject imports more fully in any final investigations when the Commission record should be more complete.

D. Impact

---

[62] Pricing data were collected on EPS products with blowing agent levels of less than 5.5 percent {referred to as "low-pentane" products}. It appears that the majority of EPS products, both domestic and subject imports, may have pentane levels at or above this level, and accordingly we intend to collect more inclusive price information in any final phase investigations. We encourage the parties to suggest appropriate products for collection of pricing data in their comments to the draft questionnaires for any final phase investigations. As noted above, we intend to explore further the relationship between pentane levels and the fungibility and pricing of EPS products for any final phase investigations.

[63] The petition, however, did not contain any allegations of lost sales or lost revenues. If such allegations had been included and verified by Commission staff, additional information with respect to prices and the substitutability of EPS products with differing pentane levels would likely have been available to the Commission for purposes of its preliminary determinations.

[64] Tables V-1-2; CR at V-5-6, PR at V-4-5.

[65] *Compare* Table IV-2; CR at IV-3, PR at IV-2 *with* Table VI-3; CR at VI-6, PR at VI-4. We are mindful, however, that AUV data may reflect differences in product mix and not differences in prices of the same article.

[66] For the cumulated subject imports, the AUV declined from 48 cents per pound in 1996 to 41 cents per pound in 1998; the interim 1999 AUV of 37 cents per pound was lower than the interim 1998 AUV of 43 cents per pound. For the domestic like product, net sales values declined from 59 cents per pound in 1996 to 50 cents per pound in 1998, and the interim 1999 value of 41 cents per pound was lower than the interim 1998 value of 52 cents per pound. *See* Tables V-1-2; CR at V-5-6, PR at V-4-5 (on block-grade product for which pricing data were collected, prices for domestically-produced product declined from 62 cents per pound in the first quarter of 1996 to 45 cents per pound in the third quarter of 1999, and prices for subject imports from Korea declined from *** cents per pound in the fourth quarter of 1997 to 46 cents per pound in the third quarter of 1999; on shape-grade product, prices for domestically-produced product declined from 64 cents per pound in the first quarter of 1996 to 47 cents per pound in the third quarter of 1999, and prices for subject imports from Korea declined from *** cents per pound in the fourth quarter of 1997 to 45 cents per pound in the third quarter of 1999); Table IV-2; CR at IV-3, PR at IV-2 (AUV data for subject imports); Table VI-3; CR at VI-6, PR at VI-4 (AUV data for domestic like product).

[67] *See* Table VI-3; CR at VI-6, PR at VI-4-5 (indicating that COGS declined 4 cents per pound less than AUVs from 1996 to 1998 and 4 cents per pound less than AUVs between interim 1998 and interim 1999).

In examining the impact of the subject imports on the domestic industry, we consider all relevant economic factors that bear on the state of the industry in the United States.[68] These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."[69] [70] [71]

While both the domestic net sales values and unit raw material prices declined over the period examined, the decline in domestic net sales values was greater and the spread between unit selling prices and unit raw material prices narrowed. This declining margin was an important factor in the decline in domestic industry profitability over the period examined.[72] The domestic industry posted an operating income in both 1996 and 1997, after which the financial health of the industry weakened considerably. In 1998 *** domestic producers operated unprofitably and the domestic industry recorded an operating loss as a ratio to net sales of 2.0 percent. During the first three quarters of 1999, this loss reached 7.9 percent, as *** posted a loss.[73]

These losses occurred despite increasing domestic consumption,[74] increasing sales quantities, and decreasing raw material costs.[75] In addition, domestic producers' sales increases did not keep pace with the increases in domestic consumption as the domestic industry's market share declined.[76] Production increases also did not match increases in capacity, so capacity utilization fell.[77] Petitioners further reported

---

[68] 19 U.S.C. § 1677(7)(C)(iii). See also SAA at 851 and 885 ("In material injury determinations, the Commission considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they also may demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports." Id. at 885).

[69] 19 U.S.C. § 1677(7)(C)(iii). See also SAA at 851 and 885 and Live Cattle from Canada and Mexico, Inv. Nos. 701-TA-386 and 731-TA-812-813 (Preliminary), USITC Pub. 3155 (Feb. 1999) at 25, n.148.

[70] The statute instructs the Commission to consider the "magnitude of the dumping margin" in an antidumping proceeding as part of its consideration of the impact of imports. 19 U.S.C. § 1677(7)(C)(iii)(V). In its notice of initiation, Commerce stated that the estimated dumping margins ranged from 43.79 to 89.39 percent for Korea, and from 94.93 to 96.65 percent for Indonesia. 64 Fed. Reg. 71113 (Dec. 20, 1995).

[71] Chairman Bragg notes that she does not ordinarily consider the magnitude of the margin of dumping to be of particular significance in evaluating the effects of subject imports on domestic producers. See Separate and Dissenting Views of Commissioner Lynn M. Bragg in Bicycles from China, Inv. No. 731-TA-731 (Final), USITC Pub. 2968 (June 1996).

[72] CR at VI-3; PR at VI-1.

[73] Table VI-1; CR at VI-2, PR at VI-2.

[74] Table IV-3; CR at IV-5; PR at IV-4.

[75] Sales increased from 597 million pounds in 1996 to 613.7 million pounds in 1998; interim 1999 sales of 498.0 million pounds exceeded interim 1998 sales of 458.2 million pounds. Table VI-1; CR at VI-2, PR at VI -2. Production increased from 593.1 million pounds in 1996 to 601.3 million pounds in 1998; interim 1999 production of 474.5 million pounds exceeded interim 1998 production of 443.4 million pounds. Table III-1; CR at III-4; PR at III-3.

[76] Table IV-3; CR at IV-5; PR at IV-4.

[77] Table III-1; CR at III-4; PR at III-3.

that as a result of subject imports from Indonesia and Korea, there were ***, and ***.[78] Additionally, we note that data for interim 1999 indicate lower capital expenditures and R&D expenses compared to interim 1998.[79]

We find that there is a reasonable indication that the subject imports are having a material impact on the domestic industry. As explained above, the significant and increasing volumes of subject imports have caused the domestic industry to lose market share and have depressed domestic prices to a significant degree. The price depression, in turn, has led to a decrease in the domestic industry's profitability and deteriorating financial condition.

CONCLUSION

For the reasons stated above, we determine that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of expandable polystyrene resins from Indonesia and Korea that are allegedly sold in the United States at less than fair value.

[78] CR/PR at Appendix E.

[79] Table VI-5; CR at VI-8, PR at VI-7.

DISSENTING VIEWS OF COMMISSIONER THELMA J. ASKEY

Based on the record in these preliminary phase investigations, I determine that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of expandable polystyrene resins ("EPS") from Indonesia and Korea that are allegedly sold at less than fair value ("LTFV").[1]

I concur in the conclusions of my colleagues with respect to the domestic like product, the domestic industry, and cumulation of the subject imports for material injury purposes.[2] In these dissenting views, I explain the reasons for my determination that there is no reasonable indication that the domestic industry producing EPS is materially injured or threatened with material injury by reason of the subject imports.

I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS

In a preliminary phase investigation, I am required to determine whether there is a "reasonable indication" of material injury or a threat of material injury by reason of the subject imports.[3] In American Lamb Co. v. United States,[4] the Federal Circuit held that the "reasonable indication" standard does not mean that the Commission is to determine only whether there is a "possibility" of material injury.[5] Instead, the Federal Circuit stated that the Commission may appropriately weigh the record evidence in a preliminary determination in order to determine whether "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation."[6] Indeed, the Federal Circuit has stated that "[t]he statute calls for a reasonable indication of injury, not a reasonable indication of need for further inquiry."[7]

In these investigations, I believe that the record evidence is clear and convincing that the domestic industry is not materially injured or threatened with material injury by reason of the subject imports and that there is little or no likelihood that contrary evidence will arise in final investigations. In this regard, I note that the Commission obtained questionnaire responses from five firms that accounted for 100 percent of U.S. production of EPS during 1998 and from all known significant importers of EPS from the subject countries.[8] The amount of the information now available on the record leads me to conclude that I have a full and accurate picture of this market as it now stands.

---

[1] I note that material retardation of an industry is not an issue in these investigations.

[2] I note that imports for consumption of EPS from Indonesia and Korea during the 12-month period preceding filing of the petition (Nov. 1, 1998 through Oct. 31, 1999) were respectively 7.0 and 34.0 percent of total imports. These volumes exceed the negligibility threshold in the statute. 19 U.S.C. §1677(24)(A).

[3] 19 U.S.C. §§1671b(a)(1) & 1673b(a)(1).

[4] 785 F.2d 994 (Fed. Cir. 1986).

[5] 785 F.2d at 1004.

[6] 785 F.2d at 1001. The Court of International Trade has stated that, when the Commission considers the likelihood that contrary evidence will arise in a final investigation, it "must analyze the 'best information available' contained in the record at the time of its determination and judge the likelihood that evidence contrary to that already gathered will arise in a final determination that would support an affirmative determination." Calabrian Corp. v. U.S. Int'l Trade Comm'n, 794 F. Supp. 377, 386 (Ct. In'tl Trade 1992).

[7] Texas Crushed Stone Co. v. United States, 35 F.3d 1535, 1543 (Fed. Cir. 1994).

[8] CR at III-1, IV-2; PR at III-1, IV-1.

In these circumstances, I believe the record evidence shows that the industry is not currently being injured by the subject imports and is not imminently threatened with injury by the subject imports.[9]

II. NO REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF ALLEGED LTFV IMPORTS FROM INDONESIA AND KOREA

In making a preliminary determination whether there is a reasonable indication that an industry in the United States is materially injured by reason of the allegedly subsidized and LTFV imports under investigation, I must consider the volume of subject imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations.[10] The statute defines "material injury" as "harm which is not inconsequential, immaterial, or unimportant."[11] I have considered all of the relevant economic factors that bear on the state of the industry in the United States.[12] No single factor is dispositive and I have considered all relevant factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."[13]

A. Conditions of Competition

I have considered several conditions of competition in my analysis in these investigations. First, demand for EPS is derived from the demand for block and shape forms of expanded polystyrene used in downstream applications such as packaging and insulation. Because of the general growth in the overall domestic economy, apparent consumption in the U.S. market has grown significantly over the period examined. Specifically, apparent consumption of EPS increased by 6.7 percent from 1996 to 1997 and by 7.4 percent from 1997 to 1998. Moreover, apparent consumption has increased by an additional 12.1 percent during interim (Jan.-Sep.) 1999, when compared to interim (Jan.-Sep.) 1998.[14] Accordingly, the record indicates that demand has been growing rapidly over the period examined.

Second, expandable polystyrene resins are composed primarily of polystyrene monomer, with blowing agents like pentane making up the bulk of the remaining inputs.[15] Both petitioners and respondents agree that monomer is the primary input in the production process.[16] As the primary input, the price of

---

[9] In American Lamb, the Federal Circuit stated that Congress intended the Commission to use preliminary determinations to avoid the cost and disruption to trade caused by unnecessary investigations. 785 F.2d 994 (Fed. Cir. 1986).

[10] 19 U.S.C. §1677(7)(B)(i). The Commission "may consider such other economic factors as are relevant to the determination," but shall "identify each [such] factor . . . and explain in full its relevance to the determination." 19 U.S.C. §1677(7)(B).

[11] 19 U.S.C. §1677(7)(A).

[12] 19 U.S.C. §1677(7)(C)(iii).

[13] Id.; 19 U.S.C. §§1671b(a) & 1673b(a).

[14] CR and PR at Table IV-3.

[15] A conference witness stated that, "It (monomer) is 92 to 93 percent of the weight of the EPS end product. Six percent is pentane." Conference transcript, p. 70.

[16] Petitioners' postconference brief at 10; conference transcript at 65.

monomer is a key determinant of raw material costs. Monomer prices have fallen substantially over the period, from 33 to 21 cents per pound.[17]

Third, the record of this investigation establishes that there is only a moderate degree of substitutability between the domestic products and the subject imports.[18] Most importantly, the record establishes that the subject Indonesian and Korean producers market a more narrow range of products in the United States than the domestic industry, primarily because those producers do not have the ability to produce low-pentane EPS in substantial volumes.[19] Moreover, the subject Korean merchandise has a higher molecular weight than the domestic product, which makes the Korean product process more slowly than the domestic product,[20] but gives its certain advantages like higher tensile strength.[21] In addition, some Korean imports, and all Indonesian imports, are not yet certified to meet relatively common U.S. building codes.[22] Further, the domestic suppliers typically offer superior on-site technical support[23] and enjoy significantly shorter lead times than the subject imports, which affects their desirability by purchasers.[24] All of these factors significantly reduce the substitutability of the domestic and subject merchandise. Accordingly, although the record indicates that price is an important factor in the purchasing decision, the more limited substitutability of the domestic and subject merchandise lessens the importance of price in the purchase decision between the domestic and subject merchandise.

Furthermore, the record establishes that there is a high degree of substitutability between domestic product and nonsubject imports.[25] Both producers and importers agree that nonsubject imports are virtually interchangeable with the domestic product. This is because much of the production in significant nonsubject supplying countries, such as Canada, Mexico and Germany, is affiliated with or even controlled by domestic firms.[26] Accordingly, this indicates that those facilities have the ability to produce merchandise that has the same physical characteristics and quality level as the domestic merchandise. On the other hand, for the same reasons that there is a moderated degree of substitutability between the domestic and subject merchandise, I also find that there is a moderate degree of substitutability between subject imports and domestic and nonsubject product.

---

[17] CR at V-I; PR at V-1.

[18] CR at II-7, PR at II-5.

[19] This results, in part, from the fact that pentane leakage occurs in transit, as well as lagging technology overall. The leakage of pentane in transit over long distances can reduce the resin's rate of expansion upon delivery, an issue that affects the perception of subject imports' quality, particularly in products with very low levels of pentane. CR at II-7-8; PR at II-5.

[20] In this regard, the record indicates that unfamiliarity with the chemical properties of imports from Korea was an early barrier to the use of the Korean product. CR at II-4, fn13; PR at II-3.

[21] CR at II-7-8; PR at II-6.

[22] Id.

[23] Id.

[24] Id.

[25] CR at II-7, PR at II-5.

[26] CR at II-8, PR at II-6, and Office of Investigations Memorandum INV-X-008 supplemented by staff e-mail dated Jan. 6, 2000, 10:46 a.m.

Fourth, nonsubject imports had a sizeable presence in the domestic market. Nonsubject volumes amounted to 54.3 million pounds in 1996, 71.2 million pounds in 1997, 76.4 million pounds in 1998, and were 72.5 million pounds in interim 1999.[27]

B. Volume of Subject Imports

Section 771(7)(C)(i) provides that the "Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant."[28]

The volume of the subject imports increased over the period examined from 9.4 million pounds in 1996 to 43.3 million pounds in 1998.[29] The volume of the subject imports further increased in interim 1999, but at a slower rate that in previous years, to a level of 48.2 million pounds.[30] The market share of the subject imports has also grown during the period, increasing from 1.6 percent in 1996 to 2.7 percent in 1997 and then to 6.4 percent in 1998. The market share of the subject imports has increased further to 8.6 percent in interim 1999.[31]

Although the volume and market share of the subject imports has increased consistently throughout the period of investigation, I find that their volume and market share levels are not at a significant level. First, these increases began from a very low initial volume and market share level in 1996 and have occurred during a period of increasing demand. Thus, although the market share of the subject imports has risen by nearly seven percentage points from 1996 through interim 1999, their market share level still remains relatively low in interim 1999, with the subject imports still occupying only 8.6 percent of the market. The subject imports share of the market is clearly small when compared to the dominant 78.5 percent share of the market still occupied by the domestic industry and the 13.9 percent share of the market occupied by non-subject imports in interim 1999.[32]

Second, as I mentioned above, these increases have occurred during a period of significant growth in demand for EPS in the U.S. market. The record of these investigations clearly establishes that, during this period of rising demand, the domestic industry has added significant capacity and has continued to operate at very high capacity utilization rates.[33] Despite this additional capacity and their continued high levels of capacity utilization, the record indicates that the domestic industry has simply been unable to supply the significant demand increases that have occurred during the period. In fact, the largest consumer of EPS resin in the United States indicated that ***.[34] In light of this, it is clear that the volume and market share increases that occurred during the period were simply the result of the domestic industry not being able to keep up with demand.

Accordingly, I find that the record indicates that the volume of the subject imports is not significant.

---

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

[28] 19 U.S.C. § 1677(7)(C)(i).

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

[30] Id.

[31] CR and PR at Table IV-3.

[32] Id.

[33] The industry has operated at above 90 percent capacity throughout the period examined. CR and PR at Table III-1.

[34] ***.

C. Price Effects of Subject Imports

Section 771(7)(C)(ii) provides that, in evaluating the price effects of the subject imports, the Commission shall consider whether (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.[35]

The record of these investigations indicates that domestic prices have declined significantly throughout the period,[36] and that the domestic industry's profitability levels have decreased significantly during the period as well.[37] Moreover, these declines have occurred during a period when the volume and market share of the subject imports were increasing and their average unit values were consistently below the average unit values of the domestic industry.[38] Without more, these facts might suggest that the subject imports have had some adverse impact on domestic prices.

The record of these preliminary investigations, however, clearly demonstrates to me that there is no more than a minimal causal link between the subject imports and any domestic price movements in this market. First, the large bulk of the declines in domestic prices over the period correspond to significant declines in the industry's raw materials costs. As I noted above, the price of polystyrene monomer, the primary input of EPS, is a key determinant of raw material costs. Monomer prices have fallen substantially over the period examined, from 33 to 21 cents per pound, or by 36.4 percent.[39] This decline has been reflected in the domestic industry's cost-of-goods-sold (COGS), which fell by 8.9 percent from 1996 to 1998, and interim 1999 COGS are 6.6 percent lower than interim 1998 COGS.[40] As a result of this decline, the industry's unit COGS fell by $0.11 during the period, from $0.50 per pound in 1996 to $0.39 per pound in interim 1999.[41] This decline in unit costs accounts for nearly 65 percent of the decline in the domestic prices. Consequently, to a very significant degree, the decline in the industry's prices simply reflects lower raw material costs.

Second, the record further indicates that any additional price declines are not the result of price competition from the subject imports. As I described earlier, the record indicates that there is only a moderate degree of substitutability between domestic product and subject imports yet there is a high degree of substitutability between domestic merchandise and nonsubject imports. The overall level of substitutability between the subject and domestic merchandise is limited by differences in the product mix and the differing chemical properties of the merchandise offered by the subject importers,[42] among other

---

[35] 19 U.S.C. § 1677(7)(C)(ii).

[36] For example, for product 1, domestic prices fell from $0.62 in first quarter 1996 to $0.45 in third quarter 1999; and for product 2, domestic prices fell from $0.64 in first quarter 1996 to $0.47 in third quarter 1999. CR and PR at Tables V-1 and V-2.

[37] The operating income as percentage of net sales for the industry declined from 8.0 percent in 1996 to 6.6 percent in 1997 to -2.0 percent in 1998. It has declined even further, to -7.9 percent, in interim 1999. CR and PR at Table VI-1.

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

[39] CR at V-1; PR at V-1.

[40] CR and PR at Table VI-1.

[41] Id.

[42] In this regard, the record indicates that molders must calibrate their machines differently to run the Indonesian (continued...)

things. Combined with the relatively high degree of substitutability between the nonsubject and domestic merchandise and the relatively large volume of nonsubject imports that are currently in the market, the moderate level of substitutability between domestic product and subject imports leads me to conclude that any domestic price declines, which are not the result of raw materials cost declines, are likely due to competition among the domestic producers and, to a lesser degree, competition between the domestic producers and the nonsubject producers.

Indeed, the available pricing data clearly supports such a finding. In these preliminary investigations, Commission staff obtained pricing data for two EPS products to assess the competition between the subject merchandise and the domestic product. The products chosen for this purpose were suggested by petitioners and confirmed as reasonable by Commission staff. Presumably, these products were chosen by petitioners because petitioners believe the price of these products had been adversely affected by competition from the subject imports. Yet, the data obtained for these products indicates that there was no competition from the subject imports from Indonesia[43] and that the Korean imports have not been significantly underselling the domestic merchandise on sales of these products. In particular, the pricing data indicates that the subject imports from Korea oversold the domestic product in seven out of fifteen possible quarterly comparisons, with margins of overselling ranging from 2.1 to 11.6 percent and that they were priced the same as domestic merchandise in five quarterly comparisons.[44] As a result, the Korean imports undersold domestic product in only three possible comparisons with the highest margin reaching 4.3 percent.[45] Given the absence of price competition from the Indonesian producers and the lack of significant underselling by the Korean imports on these two products (which represent nearly 41 percent of the domestic producers' shipments),[46] the pricing data clearly indicates that subject imports indicates are not having an adverse effect on domestic prices.

Moreover, my price finding is further supported by the absence of any lost sales or revenues allegations in these investigations.[47] While I recognize that lost sales and revenues allegations might have little impact on my analysis when considered in the context of the large amount of other economic data obtained in Title VII investigations, they are nonetheless required by the Commission to be included by petitioners in their petition.[48] In light of their failure to provide any such allegations to the Commission, I can only conclude that there are no lost sales or revenues attributable to subject imports, and therefore, that the subject imports are not having significant price-suppressive or price-depressive effects on domestic prices.

Finally, I note that the domestic industry is facing significant competition from nonsubject suppliers. Nonsubject imports held 9.2 percent of the U.S. market in 1996, rising to 11.3 percent in 1998,

---

[42] (...continued)
product. Inexperienced molders will often ruin whole batches of EPS resin because the molding machines are improperly calibrated for the Indonesian resin. Similarly, the record indicated that unfamiliarity with the chemical properties of imports was also an early barrier to the use of the Korean product. CR at II-4, fn13; PR at II-3, fn13.

[43] In particular, there are no quarterly comparisons between U.S. product and subject merchandise from Indonesia because the Indonesian producers do not make EPS with 5.5 percent or less of pentane. CR at V-7; PR at V-6.

[44] CR and PR at Tables V-1 and V-2.

[45] Id.

[46] CR and PR at V-4.

[47] CR at V-9; PR at V-7.

[48] 19 C.F.R. §207.11(b)(v).

and rising even further to 12.9 percent in interim 1999.[49] At the same time nonsubject imports were increasing their share of the domestic market, their AUVs fell significantly from $0.57 per pound in 1996 to $0.50 per pound in 1998, falling further to $0.44 per pound in interim 1999.[50] These AUVs closely track those of domestic producers.[51] Given the close relationship of these prices and the high substitutability of domestic and subject merchandise, the record indicates that any price declines that are due to import competition are more properly attributable to nonsubject imports.

In sum, I find that the record evidence indicates that any price impact from the subject imports during the period examined has been minimal, at best. Accordingly, I find that the subject imports have not had a significant impact on domestic prices during the period.

D. Impact of the Subject Imports on the Domestic Industry

Section 771(7)(C)(iii) provides that the Commission, in examining the impact of the subject imports on the domestic industry, "shall evaluate all relevant economic factors which have a bearing on the state of the industry," including actual and potential declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, investment, and existing development and production efforts of the domestic industry; and the magnitude of the margin.[52] I have considered these factors within the context of the conditions of competition.[53]

As I previously indicated, the subject imports have had minimal, if any, volume or price effects during the period of investigation. Accordingly, I find that the record also establishes that there is no reasonable indication that the subject imports have had an adverse impact on the condition of the domestic industry. In this regard, I note that the domestic industry retains a commanding 78.5 percent of the

---

[49] CR and PR at Table IV-3.

[50] CR and PR at Table IV-2. Of course, I acknowledge that AUVs are generally poor proxies for price, especially when there are product mix issues. See United States Steel Group v. United States, 96 F.3d 1352, 1363-1365 (Fed. Cir. 1996)(indicating that the use of average unit values may be problematic because of product mix issues). Although AUVs are generally poor proxies for specific pricing data, the only available evidence for nonsubject pricing is the average unit value data. In this case, however, the AUVs of nonsubject sources may be a reasonable proxy because 40 percent of nonsubject imports in 1998 were from sources either controlled or affiliated with domestic producers. Compare CR and PR at Table IV-2 with Office of Investigations Memorandum INV-X-008 supplemented by staff e-mail dated Jan. 6, 2000, 10:46am.

[51] AUVs for domestic product were $0.59 per pound in 1996, $0.55 per pound in 1997, $0.50 per pound in 1998, and $0.41 per pound in interim 1999. In addition, I note that AUVs for subject imports were $0.48 per pound in 1996, $0.46 per pound in 1997, $0.41 per pound in 1998, and $0.37 per pound in interim 1999. CR and PR at Tables III-2 and IV-2. Although AUVs for subject imports are below those of domestic producers, this simply reflects differences in product mix, lower quality, and other differences noted earlier that limit the substitutability between subject imports and domestic EPS.

[52] As part of my consideration of the impact of imports, the statute specifies that the Commission is to consider in an antidumping proceeding, "the magnitude of the dumping margin." 19 U.S.C. §1677(7)(C)(iii)(V). In making my determination, I have considered the margins of dumping announced by Commerce in its notice of initiation. 64 Fed. Reg. 71112, (Dec. 20, 1999).

[53] No party has alleged that the captive production provision, 19 U.S.C. §1677(7)(C)(iv), should be applied.

domestic market for EPS.[54] While the industry's market share has fallen somewhat during the period examined, dropping from 89.2 percent in 1996 to 82.3 percent in 1998, and then to 78.5 percent in interim 1999, the industry's market share declines are due primarily to the industry's inability to satisfy demand completely in a growing market.[55] Moreover, although certain financial indicators of the industry fell over the period, most of its financial indicators showed that the industry's condition has improved. In particular, the industry's domestic shipments and net sales, capital expenditures, wages and productivity all consistently increased throughout the period of investigation. Similarly, the industry's inventories and costs have fallen throughout the period.[56]

Of course, the record indicates that the domestic industry's price declines have outstripped the declines in its overall costs and that the industry has therefore experienced declining profitability levels during the period of investigation. Indeed, the industry incurred losses in 1998 and interim 1999. For the reasons I discussed previously, these price declines (and the accompanying profitability declines) cannot be attributed, in significant part, to the subject imports. I would add, moreover, that the decline in the industry's profitability in 1998 and interim 1999 is directly attributable, to a great degree, to a dramatic increase in the industry's selling, general and administrative ("SG&A") expenses during 1998 and interim 1999. Although SG&A expenses fell modestly by 2.4 percent between 1996 and 1997, they increased dramatically by 43.1 percent between 1997 and 1998, and their interim 1999 amount is nearly that experienced in interim 1998.[57] I would note that, prior to this sharp increase, the domestic industry earned operating margins of 8.0 percent in 1996 and 6.6 percent in 1997.[58] Any profitability declines resulting from unexpected increases in SG&A on the part of the industry cannot properly be attributed to the impact of the subject imports.

Moreover, any profitability declines can also be attributed, in part, to a decline in the domestic producers export sales. The record of these investigations indicates that export sales have accounted for approximately 10 percent of the industry's production and that the AUVs of these exports declined by 20.6 percent over the period from $0.59 per pound in 1996 to $0.47 per pound in 1998, and then to $0.39 in interim 1999. These declines were more significant, on both an absolute and percentage basis, than the decline in the average prices of the industry's domestic sales. Given this and given that the industry overall volume of export sales declined significantly during the period, the losses being experienced by the industry can be attributed, to some degree, to the industry's poorer export sales performance in 1998 and interim 1999.

Given the foregoing, I find that the record clearly indicates that the condition of the domestic industry has not been materially impacted by reason of the subject imports. The lack of any current

---

[54] CR and PR at Table IV-3.

[55] I also note that at least five percent of the industry's overall market share decline of 11.3 percent is due to nonsubject imports. CR and PR at Table IV-3.

[56] Domestic shipments increased by 5.7 percent from 525.1 million pounds in 1996 to 555.0 million pounds in 1998, and are 6.8 percent higher in interim 1999 as compared to interim 1998. Ending inventory quantities fell by 7.7 percent from 52.0 million pounds in 1996 to 48.0 million pounds in 1998, and are only at 24.8 million pounds in interim 1999. Wages paid rose by 6.1 percent from $18.0 million in 1996 to $19.0 million in 1998 and productivity improved by 4.5 percent from 641.2 pounds per hour in 1996 to 670.0 pounds in 1998, rising further to 681.4 pounds per hour in interim 1999. Capital expenditures rose by 28.2 percent from $14.4 million in 1996 to $18.4 million in 1998. CR and PR at Table C-1.

[57] SG&A expenses amounted to $24.9 million in 1996, $24.3 million in 1997, $34.8 million in 1998, and $22.0 million in interim 1999 as compared to $24.7 million in interim 1998. CR and PR at Table VI-1.

[58] CR and PR at Table VI-1.

volume or price effects, when considered together with the overall condition of the industry, indicates to me that the subject imports have not had a more than minimal or tangential causal nexus to any injury that may be suffered by the industry.[59]

III. NO REASONABLE INDICATION OF A THREAT OF MATERIAL INJURY BY REASON OF THE ALLEGED LTFV IMPORTS FROM INDONESIA AND KOREA

A. General

Because I have concluded that there is no reasonable indication that the domestic industry is materially injured by reason of the subject imports from Indonesia and Korea, I must also determine whether the industry is threatened with material injury by reason of those imports.[60] The statute directs me to consider nine enumerated factors when performing this threat analysis.[61] In making my determinations, I have considered all statutory factors that are relevant to these investigations.[62]

When performing my threat analysis in these preliminary phase investigations, I have closely considered the statutory requirement that I assess whether "further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued..." before making an affirmative threat finding.[63] Moreover, I have closely considered the requirement that my determination may not be made "on the basis of mere conjecture or supposition." Finally, I have considered the threat factors "as a whole" when making my threat determinations.

B. Cumulation for Purposes of Threat Analysis

In assessing whether a domestic industry is threatened with material injury by reason of imports from two or more countries, I have discretion to cumulate the volume and price effects of such imports if they meet the requirements for cumulation in the context of present material injury.[64] In deciding whether to cumulate for purposes of making threat determinations, the Commission has in the past also considered whether the subject imports are increasing at similar rates and have similar pricing patterns, including similar levels of underselling.[65] The Court of International Trade has held, however, that the Commission is not required to consider divergent volume and pricing trends in exercising its discretion to cumulate for purposes of its threat analysis[66]

In this case, as previously discussed in the Views of the Commission, I find that the requirements for cumulation in the injury context are met, i.e., all of the petitions were filed on the same day and the

---

[59] Gerald Metals v. United States, 132 F.3rd 716 (Fed. Cir. 1997).

[60] 19 U.S.C. §§1671b(a), 1673b(a) & 1677(7)(F).

[61] 19 U.S.C. §1677(7)(F).

[62] 19 U.S.C. §1677(7)(F)(i). In this regard, I note that Factor VII of section 1677(7)(F)(i) is inapplicable because it covers only raw agricultural products.

[63] 19 U.S.C. §§1671b(a), 1673b(a), & 1677(7)(F)(ii).

[64] 19 U.S.C. §1677(7)(H).

[65] See Torrington Co. v. United States, 790 F. Supp.. 1161 (Ct. Int'l Trade 1992); Metallverken Nederland B.V. v. United States, 728 F. Supp.. 730, 741-42 (Ct. Int'l Trade 1989); Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp.. 1068, 1072 (Ct. Int'l Trade 1988).

[66] Kern Liebers USA, Inc. v. United States, Slip Op. 95-9 at 49-50 (Ct. Int'l Trade, January 27, 1995).

subject imports compete with one another and the domestic merchandise.[67] Accordingly, I have examined whether it is appropriate to exercise my discretion and cumulate the two subject countries for purposes of my threat analysis and have concluded that it is appropriate to cumulate subject imports from Indonesia and Korea. The record shows that the volume and market shares of the subject imports from Indonesia and Korea rose throughout the period examined.[68] In addition, the record indicates that the average unit values of subject imports from Indonesia and Korea declined in a similar fashion.[69] In light of the foregoing, I believe that the volume and price trends of Indonesia and Korea are sufficiently similar to warrant cumulating them. Accordingly, I have exercised my discretion to cumulate the subject imports from Indonesia and Korea for my threat analysis.

C. Consideration of the Statutory Threat Factors

I have considered all of the relevant statutory threat factors when assessing whether there is a reasonable indication that the subject imports from Indonesia and Korea threaten to materially injure the domestic industry.[70] For the reasons set forth below, I find that there is no reasonable indication that the domestic industry is threatened with material injury by reason of the subject imports from Indonesia and Korea. Accordingly, I find that further LTFV imports are not imminent and that material injury by reason of the subject imports would not occur absent an order.[71]

As an initial matter, I find that the domestic industry is not vulnerable to a threat of material injury from the subject imports. Throughout the period, the industry has retained a dominant share of the U.S. market (nearly 80 percent or higher) and there is nothing in the record that indicates the industry is likely to lose its dominant share of the market in the imminent future.[72] Moreover, as I discussed above, most of the industry's financial indicators show that the condition of the industry has generally improved throughout the period. In particular, the domestic industry's domestic shipments and net sales, capital expenditures, wages and productivity all consistently increased throughout the period of investigation.[73] Similarly, the industry's inventories and costs have fallen throughout the period.[74] Given this, I do not find the domestic industry to be vulnerable to the imminent possible effects of the subject imports.

Next, I have also considered whether there is "any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of

---

[67] 19 U.S.C. §1677(7)(G).

[68] CR and PR at Tables IV-2 and IV-3.

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

[70] Since no allegations of subsidization were made with respect to the subject imports from Indonesia and Korea, Factor I of the threat factors is inapplicable to this analysis.

[71] 19 U.S.C. §1677(7)(F)(ii).

[72] CR and PR at Table IV-3.

[73] Domestic shipments increased by 5.7 percent from 525.1 million pounds in 1996 to 555.0 million pounds in 1998, and are 6.8 percent higher in interim 1999 as compared to interim 1998. Ending inventory quantities fell by 7.7 percent from 52.0 million pounds in 1996 to 48.0 million pounds in 1998, and are only at 24.8 million pounds in interim 1999. Wages paid rose by 6.1 percent from $18.0 million in 1996 to $19.0 million in 1998 and productivity improved by 4.5 percent from 641.2 pounds per hour in 1996 to 670.0 pounds in 1998, rising further to 681.4 pounds per hour in interim 1999. Capital expenditures rose by 28.2 percent from $14.4 million in 1996 to $18.4 million in 1998. CR and PR at Table C-1.

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

substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports."[75] In this case, the record indicates that in 1998, capacity utilization in Indonesia and Korea has remained ***, as producers in both countries produced at a capacity use rate of approximately *** percent during that year.[76] Moreover, the subject producers are projected to add a small additional amount of capacity in 2000 and 2001.[77] In light of the *** capacity use rates of the subject producers and the minimal amounts of capacity that will be added in the imminent future, I believe that it is unlikely that the subject Indonesian and Korean producers will be able to substantially increase their export levels to the United States in the imminent future. Moreover, to the extent that the subject producers do have a small level of excess capacity, I note that the improved economic situation in Asia will likely absorb this production.[78]

I have also examined whether there has been "a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports."[79] Although the volume and market share of the subject imports have increased, these increases have occurred primarily because of the domestic industry's inability to supply the increases in domestic demand that also occurred during the period of investigation. Accordingly, I find that these increases do not indicate a likelihood that the volume of the subject imports will substantially increase in the imminent future.

Similarly, I have examined "whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices and are likely to increase demand for further imports."[80] As I explained in my injury views above, the record shows that the subject imports have not had significant effects on the price of domestic merchandise. I do not believe that there is any record evidence to suggest that there will be any significant change in the manner in which the subject imports compete with the domestic merchandise in the imminent future. Accordingly, I find it unlikely that the subject imports will have significant price-depressing or price-suppressing effects on domestic prices in the imminent future.

I have also considered the levels of "inventories of the subject merchandise."[81] The record evidence indicates that the Korean producers and importers have maintained relatively small levels of inventories of the subject merchandise and Indonesian producers and importers have maintained *** levels of inventories during the period of investigation.[82] Moreover, these inventory levels have declined significantly during the period. These small and declining inventory levels pose no threat to the domestic industry, especially given

---

[75] 19 U.S.C. §1677(7)(F)(i)(II).

[76] CR and PR at Tables VII-1 and VII-2.

[77] Id.

[78] Indonesian respondents' postconference brief at 19-21, citing the Asian Development Bank, "Asian Development Outlook 1999 -- Update" and The Economist Intelligence Unit, "Country Report, Indonesia."

[79] 19 U.S.C. §1677(7)(F)(i)(III).

[80] Id.

[81] 19 U.S.C. §1677(7)(F)(i)(V).

[82] Korean end-of-period inventories as of interim 1999 were 13.0 million pounds, and Indonesian end-of-period inventories as of interim 1999 were ***. CR and PR at Tables VII-1 and VII-2. End-of-period inventories held by U.S. importers from Korea declined overall from 1,046,000 pounds in 1996 to 608,000 pounds in 1998. The ratio of inventory to imports fell very sharply both from 1996 to 1998 and from interim 1998 to interim 1999, while the ratio of inventories to U.S. shipments of such imports showed a similar pattern. CR at VII-6; PR at VII-4.

the relatively short shelf life of EPS and the long lead times from subject country markets.[83] Consequently, I do not find that inventory levels of the subject merchandise support a finding of a threat of material injury.

I am also directed to consider whether there is a potential for product-shifting in the subject countries.[84] Here, the record evidence suggests that there is a minimal potential for product shifting.[85] Moreover, I also find that imports have not had actual or potential "negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product."[86] In this regard, I note that the domestic industry has increased its capital expenditures over the period examined from $14.4 million in 1996 to $18.4 million in 1998, or by 28.2 percent.[87]

Finally, I have considered whether "dumping findings or antidumping remedies in other WTO member markets ... suggests a threat of material injury to the domestic industry."[88] The record evidence indicates that the subject merchandise from Indonesia is not subject to antidumping remedies.[89] The record indicates, however, that subject producers in Korea are subject to an antidumping finding in Australia that became effective in 1992.[90] The age of this order leads me to conclude that the Korean producers have already made any adjustments in their export patterns to account for any sales that were lost in the Australian market as a result of the order. Indeed, I note that reported exports from Korea to all other markets (*i.e.*, besides the U.S. market) increased by *** during the period examined.[91] This increase in exports to third-country markets is consistent with the improvement in economic conditions in Asia. Therefore, I find that antidumping remedies in other WTO member markets do not suggest a threat of material injury to the domestic industry.

Finally, I am required by the statute to consider "any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time)."[92] I do not find that the record in these investigations indicates that there are any demonstrable adverse trends suggesting that the subject imports will materially injure the industry in the imminent future.

Accordingly, I find that the domestic industry is not threatened with material injury by reason of the subject imports from Indonesia and Korea.

---

[83] CR at II-5; PR at II-4.

[84] 19 U.S.C. §1677(7)(F)(i)(VI).

[85] Korean respondents state that due to the design and dedication of production facilities, that there is minimal potential for product shifting. Korean respondent's postconference brief at 19.

[86] 19 U.S.C. §1677(7)(F)(i)(VIII).

[87] CR and PR at Table VI-5.

[88] 19 U.S.C. §1677(7)(F)(iii)(I).

[89] CR at VII-3; PR at VII-1-2.

[90] CR at VII-6; PR at VII-4.

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

[92] 19 U.S.C. §1677(7)(F)(i)(IX).

CONCLUSION

For the foregoing reasons, I find that there is no reasonable indication that the domestic expandable polystyrene resins industry is materially injured or threatened with material injury by reason of the subject imports from Indonesia and Korea.