UNITED STATES INTERNATIONAL TRADE COMMISSION

URANIUM FROM KAZAKHSTAN
Investigation No. 731-TA-539-A (Final)

DETERMINATION AND VIEWS OF THE COMMISSION
(USITC Publication No. 3213, JULY 1999)

UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigation No. 731-TA-539-A (Final)

URANIUM FROM KAZAKHSTAN

DETERMINATION

On the basis of the record[1] developed in the subject investigation, the United States International Trade Commission determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)) (the Act), that an industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of imports from Kazakhstan of uranium, provided for in subheadings 2612.10.10, 2844.10.10, 2844.10.20, 2844.10.50, and 2844.20.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

BACKGROUND

The Commission instituted this investigation effective November 8, 1991, following receipt of a petition filed with the Commission and the Department of Commerce by the Ad Hoc Committee of Domestic Uranium Producers and the Oil, Chemical and Atomic Workers International Union (which has since become the Paper, Allied-Industrial-Chemical Union (PACE)). The Commission's investigation was suspended on October 21, 1992, following Commerce's notification that it was entering into a suspension agreement with Kazakhstan. The final phase of the investigation was continued on January 15, 1999, when Commerce notified the Commission that it was resuming its antidumping investigation with respect to Kazakhstan as a result of the Government of Kazakhstan's termination of its suspension agreement. Notice of the scheduling of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade

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

Commission, Washington, DC, and by publishing the notice in the *Federal Register* of March 3, 1999 (64 FR 10317). The hearing was held in Washington, DC, on June 9, 1999, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on July 23, 1999. The views of the Commission are contained in USITC Publication 3213 (July 1999), entitled "Uranium from Kazakhstan: Investigation No. 731-TA-539-A (Final)."

By order of the Commission

Donna R. Koehnke
Secretary

Issued:

UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigation No. 731-TA-539-A (Final)

URANIUM FROM KAZAKHSTAN

DETERMINATION

On the basis of the record[2] developed in the subject investigation, the United States International Trade Commission determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)) (the Act), that an industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of imports from Kazakhstan of uranium, provided for in subheadings 2612.10.10, 2844.10.10, 2844.10.20, 2844.10.50, and 2844.20.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

BACKGROUND

The Commission instituted this investigation effective November 8, 1991, following receipt of a petition filed with the Commission and the Department of Commerce by the Ad Hoc Committee of Domestic Uranium Producers and the Oil, Chemical and Atomic Workers International Union (which has since become the Paper, Allied-Industrial-Chemical Union (PACE)). The Commission's investigation was suspended on October 21, 1992, following Commerce's notification that it was entering into a suspension agreement with Kazakhstan. The final phase of the investigation was continued on January 15, 1999, when Commerce notified the Commission that it was resuming its antidumping investigation with respect to Kazakhstan as a result of the Government of Kazakhstan's termination of its suspension agreement. Notice of the scheduling of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of March 3, 1999 (64 FR 10317). The hearing was held in Washington, DC, on June 9, 1999, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on July 23, 1999. The views of the Commission are contained in USITC Publication 3213 (July 1999), entitled "Uranium from Kazakhstan: Investigation No. 731-TA-539-A (Final)."

By order of the Commission

Donna R. Koehnke
Secretary

Issued:

---

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

VIEWS OF THE COMMISSION

Based on the record in this investigation, we find that an industry in the United States is not materially injured or threatened with material injury by reason of imports of uranium from Kazakhstan that have been found by the Department of Commerce ("Commerce") to be sold at less than fair value ("LTFV").

I. PROCEDURAL BACKGROUND

This antidumping investigation began with the filing of a petition against LTFV imports of uranium from the Soviet Union on November 8, 1991.[1] The Commission issued an affirmative preliminary determination on December 23, 1991.[2] Two days later, the Soviet Union dissolved into separate republics. Commerce and the Commission continued their respective investigations, with the 12 independent countries that occupied the territory of the former Soviet Union becoming the respondents in 12 separate investigations.[3] Commerce issued preliminary determinations against the newly independent countries in June 1992.[4] On October 16, 1992, Commerce entered into suspension agreements with the six Soviet successor countries that produced uranium. These countries (Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan) accepted quotas on their shipments of uranium to the United States.[5] Ten days later, on October 26, 1992, Commerce terminated the investigations against the remaining countries that did not produce uranium on the grounds that there were no LTFV sales from those countries.[6]

In early 1993, Tajikistan and Ukraine requested the termination of their suspension agreements. Accordingly, Commerce reopened the investigations of those countries in April 1993, and issued final

---

[1] 56 Fed. Reg. 63711 (Dec. 5, 1991). The petition was filed before January 1, 1995, and therefore, is not subject to the Uruguay Round Agreements Act ("URAA"). See URAA, § 291 (a) and (b); 19 U.S.C. § 1675(6)(C)(iii). Consequently, this investigation is conducted pursuant to the law as it existed prior to the URAA. All references to the statute in this determination are to the statute as it existed prior to the URAA, unless otherwise indicated.

In some of the early investigations commenced under the pre-URAA statute but completed after the effective date of the URAA, the Commission stated that investigations were to be "conducted pursuant to the . . . procedural rules of the law as it existed prior to the URAA." See, e.g., Pineapple From Thailand, Inv. No. 731-TA-706 (Final), USITC Pub. 2907 at I-5, n. 1 (July 1995). However, the Commission amended its Rules of Practice and Procedure in July 1996 "to implement the new requirements of the URAA" and "to improve generally the efficiency and effectiveness of the Commission's investigative process." See 61 Fed. Reg. 37818, 37819 (July 22, 1996). These revisions to the rules took effect on August 21, 1996, and were not restricted to investigations governed by the URAA. Therefore, the Commission has applied the current regulations to all procedural aspects of this investigation.

[2] Uranium From the U.S.S.R., Inv. No. 731-TA-539 (Preliminary), USITC Pub. 2471 (Dec. 1991) ("Soviet Uranium").

[3] 57 Fed. Reg. 11064 (Apr. 1, 1992).

[4] 57 Fed. Reg. 23380 (June 3, 1992).

[5] See, e.g., Agreement Suspending the Antidumping Investigation on Uranium from Kazakhstan (Oct. 16, 1992) ("Kazakh Suspension Agreement"), in 57 Fed. Reg. 49222 (Oct. 30, 1992).

[6] 57 Fed. Reg. 48505 (Oct. 26, 1992).

affirmative determinations as to both of them.[7] The Commission resumed its final investigations under the name Uranium from Tajikistan and Ukraine, and issued a negative determination with respect to Tajikistan and an affirmative determination with respect to Ukraine in August 1993.[8]

The suspension agreements against Kazakhstan, Kyrgyzstan, Russia, and Uzbekistan remained in effect, but were subject to a series of amendments that broadened the range of products subject to the agreement and gave the subject countries a larger quota for U.S. imports.[9] Subsequently, Kazakhstan sought a further amendment, but was unable to reach agreement with Commerce. Kazakhstan notified Commerce on November 10, 1998 of its intent to terminate the agreement, and the termination became effective on January 11, 1999. As a result of the termination, Commerce and the Commission resumed their investigations.[10]

The suspension agreements with Kyrgyzstan, Russia, and Uzbekistan and the antidumping order against Ukraine are still in effect.

II. LIKE PRODUCT AND DOMESTIC INDUSTRY

A. Background and Product Description

To determine whether an industry in the United States is materially injured or threatened with material injury by reason of the subject imports, the Commission must first define the "like product" and the "domestic industry."[11] Section 771(4)(A) of the Tariff Act of 1930 ("the Act") defines the relevant industry as the "domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product. . . ."[12] In turn, the statute defines "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 . . . ."[13] The Commission's decision regarding the appropriate like product(s) in an investigation is a factual determination, and the

---

[7] Uranium From Ukraine and Tajikistan, 58 Fed. Reg. 36640 (July 8, 1993) (final) ("Final LTFV Determination – Ukraine").

[8] Uranium From Tajikistan and Ukraine, Inv. Nos. 731-TA-539D-539E (Final), USITC Pub. 2669 (Aug. 1993) ("Uranium From Ukraine"). Vice Chairman Watson and Commissioner Nuzum dissented from the majority's like product determination in Uranium From Ukraine, deciding instead that there were two like products, consisting of high enriched uranium ("HEU") and uranium other than HEU. They voted in the negative with regard to HEU and in the affirmative with regard to low enriched uranium ("LEU"). Of the Commissioners who found a single like product covering all uranium, two voted in the affirmative, and two in the negative. Therefore, the final affirmative determination applied only to uranium other than HEU. Uranium From Ukraine at 35-39 (separate views of Vice Chairman Watson and Commissioner Nuzum).

[9] See, e.g., 60 Fed. Reg. 25692 (May 12, 1995) (dropping price thresholds for Kazakh quota and extending coverage to Kazakh uranium ore enriched in third countries).

[10] Uranium From Kazakhstan, 64 Fed. Reg. 10317 (Mar. 3, 1999) (notice of continuation of review); Uranium From the Republic of Kazakhstan, 64 Fed. Reg. 31179 (June 10, 1999) ("Final LTFV Determination – Kazakhstan").

[11] 19 U.S.C. § 1677(4)(A).

[12] 19 U.S.C. § 1677(4)(A).

[13] 19 U.S.C. § 1677(10).

Commission has applied the statutory standard of "like" or "most similar in characteristics and uses" on a case-by-case basis.[14] Although the Commission must accept the determination of Commerce as to the scope of the imported merchandise found to be subsidized and/or sold at less than fair value, the Commission determines what domestic product is like the imported articles Commerce has identified.[15]

In its final determination, Commerce defined the imported merchandise within the scope of its investigation as follows:

> natural uranium in the form of uranium ores and concentrates; natural uranium metal and natural uranium compounds; alloys, dispersions (including cermets), ceramic products and mixtures containing natural uranium or natural uranium compounds; uranium enriched in U^{235} and its compounds; alloys, dispersions (including cermets), ceramic products, and mixtures containing uranium enriched in U^{235} or compounds of uranium enriched in U^{235}. Both low enriched uranium ("LEU") and HEU are included within the scope of this investigation. LEU is uranium enriched in U^{235} to a level of up to 20 percent, while HEU is uranium enriched in U^{235} to a level of 20 percent or more. . . . HEU is also included in the scope of this investigation. "Milling" or "conversion" performed in a third country does not confer origin for purposes of this investigation. Milling consists of processing uranium ore into uranium concentrate. Conversion consists of transforming uranium concentrate into natural uranium hexafluoride (UF_6). Since milling or conversion does not confer origin, uranium ore or concentrate of Kazakhstan origin that is subsequently milled and/or converted in a third country will be considered of Kazakhstan origin. The Department continues to regard enrichment as conferring origin.[16]

The subject merchandise is a radioactive metal used principally as fuel in nuclear reactors.[17] It is sold in four different forms, which correspond to the four stages of the preparation of uranium as fuel in a nuclear reactor. In the first stage, "concentrators" mine uranium ore and process it to increase the level of

---

[14] See, e.g., 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) common manufacturing facilities, production processes and production employees; (5) customer or producer perceptions; and, where appropriate, (6) price. See Timken Co. v. United States, 913 F. Supp. 580, 584 (CIT 1996). No single factor is dispositive, and the Commission may consider other factors relevant to a particular investigation. The Commission looks for clear dividing lines among possible like products, and disregards minor variations. See, e.g., S. Rep. No. 96-249, at 90-91 (1979); Torrington, 747 F. Supp. at 748-49.

[15] Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568 (Fed. Cir. 1996) (Commission may find single like product corresponding to several different classes or kinds defined by Commerce); Torrington, 747 F. Supp. at 748-52 (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

[16] Final LTFV Determination – Kazakhstan, 64 Fed. Reg. at 31180.

[17] Confidential Staff Report ("CR") at I-5, Public Staff Report ("PR") at I-3 - I-4.

uranium oxide (U_3O_8), resulting in a product known as "uranium concentrate."[18] In the second stage, "converters" transform the U_3O_8 into natural uranium hexafluoride (UF_6), which is a powder at room temperature but becomes a gas with relatively little addition of energy. At this point, the uranium consists of several isotopes, which are forms of the uranium molecule that contain different numbers of neutrons. In the third stage, the "enricher" vaporizes the natural UF_6 and processes it to increase the percentage of U^{235} (the only naturally occurring uranium isotope that is easily fissionable), thereby producing enriched UF_6. In the fourth and final stage, "fabricators" convert the "enriched UF_6" into uranium dioxide (UO_2),[19] which they then pelletize and encase in fuel assembly rods to meet the needs of specific nuclear power plants.[20] The UO_2 in powder or pellet form, in addition to the previous uranium forms, is part of the subject merchandise, but the fuel assembly rods are not.[21] The entire process of transforming U_3O_8 into enriched UO_2 is known as the "uranium fuel cycle."

B. Like Product Issues in This Investigation

The Commission must base its like product determination on the record in this investigation and is not bound by prior determinations concerning the same imported products.[22] In the 1991 preliminary determination in this investigation and the 1993 determination in Uranium From Ukraine, the majority of the Commissioners found that the five-factor semifinished product analysis[23] dictated a single like product

---

[18] For the purposes of these views, we use the terms "uranium concentrate" and "U_3O_8" interchangeably.

[19] Fabricators may also convert enriched UF_6 into a uranium nitrate, metal, or ceramic product. CR at I-8, PR at I-5. For the sake of simplicity, we refer to all of the fabricated forms of enriched uranium as UO_2.

[20] CR at I-5 - I-8, PR at I-4 - I-5.

[21] See supra note 16.

[22] Nippon Steel, at 11; Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1088 (CIT 1988). However, in the event that the Commission finds a different like product or products than it has in prior investigations, it should provide a reasoned explanation of its decision. Id.

[23] The Commission currently considers the following factors in its domestic like product analysis for semifinished merchandise: (1) whether the upstream article is dedicated to the production of the downstream article, or has independent uses; (2) whether there are perceived to be separate markets for the upstream and downstream articles; (3) differences in the physical characteristics and functions of the upstream and downstream articles; (4) differences in the costs or value of the vertically differentiated articles; and (5) significance and extent of the processes used to transform the upstream into the downstream articles. Cattle From Canada and Mexico, Invs. Nos. 731-TA-812-813 and 701-TA-386 (Preliminary), USITC Pub. 3155 at 6, n. 21 (Feb. 1999). At the time of Uranium From Ukraine, the test was articulated somewhat differently. It did not include the third factor from the preceding list (differences in physical characteristics and functions) and included two factors that are no longer considered: the interchangeability of articles at different stages of production and whether the article at an earlier stage of production embodies or imparts to the finished article an essential characteristic or function. Compare Uranium From Ukraine, Pub. 2669 at 10, n. 24 with Cattle, Pub. 3155 at 6, n.21. Since the URAA did not change the substance of the Commission's determination of the products subject to an injury determination, we apply the post-URAA version of the five-factor semifinished product analysis in this investigation.

encompassing all four forms of uranium.[24] We have been presented with no new arguments or new evidence to change that finding in this final phase of the investigation. Accordingly, we determine that there is one domestic like product in this investigation, consisting of all forms of uranium.

Petitioners have raised an additional like product issue by asking the Commission to exclude fuel assemblies from the like product.[25] In Uranium From Ukraine, the Commission defined the like product as "coextensive with the articles subject to investigation,"[26] which, as in this investigation, included uranium but not the mechanisms or materials used to encapsulate uranium for use in nuclear power plants.[27] Thus, Petitioners' like product argument is, in essence, a request that the Commission not expand the like product to include fuel assemblies.[28] [29]

The Commission's current five-factor semifinished product analysis supports Petitioners' request. The differences in physical characteristics between a fuel assembly rod and the uranium in the fuel assembly rod draw a bright line that does not exist between the earlier stages of the uranium fuel cycle. The uranium in a fuel assembly is merely one part of a mechanism custom-designed to deliver uranium to a particular utility.[30] In contrast, at the other stages of production, the uranium is, by weight, the primary element of a commodity chemical or metal.[31] In addition, the processing of enriched UO_2 pellets into fuel assemblies represents between 40 and 45 percent of the cost of the finished fuel assembly.[32] The record

---

[24] Soviet Uranium, Pub. 2471 at 8-9, Uranium From Ukraine, Pub. 2669 at 12. Application of the current semifinished product analysis does not change our conclusion. One of the factors added by the new test, differences in the physical characteristics and functions of the upstream and downstream articles, supports a single like product. Although there are certainly physical differences among the forms of uranium, such as varying levels of U^{235} and ease of vaporization, all uranium is alike in containing significant quantities of U^{235}, and shares a single function – the production of enriched UO_2 for use in nuclear power plants. CR at II-1, PR at II-1. The cost and value added by further processing and the significance of further processing, which are two factors under the current semifinished products analysis, might be seen as supporting separate like products. See CR & PR, Tables III-1 - III-4 & VI-1 - VI-3 & VI-5; CR at VI-10, PR at VI-6. However, as in Uranium From Ukraine, we conclude that the factors favoring a single like product, especially the similarity of functions and the lack of independent markets among the forms of uranium, outweigh the factors suggesting multiple like products.

[25] Petitioners' Prehearing Brief, App. A at 8-10.

[26] Uranium From Ukraine, Pub. 2669 at 12.

[27] See Final LTFV Determination – Ukraine, 58 Fed. Reg. at 36641; Final LTFV Determination – Kazakhstan, 64 Fed. Reg. at 31180.

[28] The questionnaires in this investigation defined the "uranium" for which data were requested as coextensive with the scope. General Information, Instructions, And Definitions For Commission Questionnaires: Uranium from Kazakhstan at 3. Although some of the fabricators could not segregate data on UO_2 processing from data on the remainder of their fuel assembly rod production, none of the parties disagreed with the exclusion of fuel assembly rods from the like product. See, e.g., Respondents' Posthearing Brief, Tab 7 at 5-7.

[29] Commissioner Crawford has given Petitioners the benefit of the doubt and not included fuel assemblies in the like product. Therefore, she does not join the following discussion.

[30] CR at I-8, PR at I-5.

[31] CR at I-8, PR at I-5.

[32] CR at III-9.

contains limited information on the fabricators' manufacturing processes, but the fact that the assemblies are custom-made suggests that the processing is significant.[33] We believe that these considerations outweigh the elements of the semifinished product analysis that suggest a single like product. We place particular importance on the fact that the various forms of uranium are dedicated to the production of fuel assemblies and have no market separate from the uranium fuel cycle.[34] In addition, we note that the Commission generally does not expand the like product to include downstream domestic articles, such as fuel assemblies, when the scope does not encompass a corresponding downstream imported product.[35] Therefore, we find that the like product does not include fuel assemblies.

C. Domestic Industry and Related Parties

Section 771(4) of the Act defines the relevant industry as the "domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."[36] In defining the domestic industry, the Commission's general practice has been to include in the industry producers of all domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market, provided that adequate production-related activity is conducted in the United States.[37] The Commission bases its analysis on a firm's production-related activities in the United States.[38]

Given our like product analysis, we included concentrators, the converter, and the enricher in the domestic industry. We also include fabricators, which are essentially toll producers that make subject

---

[33] CR at I-8.

[34] Indeed, since fabricators make UO_2 primarily for internal use, the market for UO_2 is quite small.

[35] See, e.g., Creatine Monohydrate From the People's Republic of China, Inv. No. 731-TA-814 (Preliminary), USITC Pub. 3177 at 5 (Apr. 1999) Beryllium Metal and High-Beryllium Alloys from Kazakstan, Inv. No. 731-TA-746 (Final), USITC Pub. 3019 at 5 (Feb. 1997); Manganese Metal from the People's Republic of China, Inv. No. 731-TA-724 (Preliminary), USITC Pub. 2844 at 9 (Dec. 1994); Fresh Garlic from the People's Republic of China, Inv. No. 731-TA-683 (Final), USITC Pub. 2825 at I-14 & n. 65 (Nov. 1994).

[36] 19 U.S.C. § 1677(4)(A).

[37] See, e.g., Manganese Sulfate from the People's Republic of China, Inv. No. 731-TA-725 (Final), USITC Pub. 2932, at 5 & n.10 (Nov. 1995) ("the Commission has generally included toll producers that engage in sufficient production-related activity to be part of the domestic industry"). See generally, e.g., Oil Country Tubular Goods from Argentina, Austria, Italy, Japan, Korea, Mexico, and Spain, Inv. Nos. 701-TA-363-364 (Final) and Inv. Nos. 731-TA-711-717 (Final), USITC Pub. 2911 (Aug. 1995) (not including threaders in the casing and tubing industry because of "limited levels of capital investment, lower levels of expertise, and lower levels of employment").

[38] The Commission typically considers six factors to evaluate whether a firm should be included in the domestic industry: (1) the extent and source of a firm's capital investment; (2) the technical expertise involved in United States production activity; (3) the value added to the product in the United States; (4) employment levels; (5) the quantities and types of parts sourced in the United States; and (6) any other costs and activities in the United States leading to production of the like product, including where production decisions are made. See Oil Country Tubular Goods, USITC Pub. 2911 at I-11, n. 37, accord Stainless Steel Wire Rod from India, Inv. No. 731-TA-638 (Final), USITC Pub. 2704 at I-9 - I-10, n. 33 (Nov. 1993).

merchandise (UO_2) for captive consumption in their production of fuel assemblies. A comparison between the converter, which is clearly a member of the domestic industry, and the fabricators is instructive. The fabricators' production of UO_2 pellets adds *** value to the uranium than does conversion of U_3O_8 into UF_6,[39] and fabricators also employ *** more workers.[40] The record does not contain evidence relevant to the remaining factors normally considered in the Commission's domestic industry analysis.[41] Therefore, based on the available information, we include the fabricators in the domestic industry because their costs of converting UF_6 into UO_2 pellets are at least as significant as the converter's cost of making UF_6. However, fabricators' manufacturing operations for fuel assemblies, which are not part of the domestic like product, are excluded from the domestic industry.[42]

We also considered whether two domestic concentrators, Cogema, Inc. and Power Resources, Inc. ("PRI"), are related parties because their parent corporations, Cogema S.A. and Cameco Corp., are involved in the production and trading of Kazakh uranium.[43] If the Commission determines that a domestic producer is a related party, the Commission must then determine whether appropriate circumstances exist to exclude the related party from the domestic industry.[44] Neither Cogema, Inc. nor PRI is related to the exporters or importers of LTFV merchandise, or is itself an importer of that subject merchandise. Although Cogema S.A. and Cameco Corp. are both involved in uranium mining ventures in Kazakhstan, neither of these projects produced any ore during the investigation period.[45] Therefore, neither company is

---

[39] The Final Report indicates that uranium processing by the fabricators represents between 16.5 and 18 percent of the total finished cost of fuel assemblies, while conversion represents 3 percent. CR at I-6, I-8, and III-9. Even Petitioners' figures indicate that conversion and uranium fabricators' uranium processing *** to the uranium fuel cycle. See Petitioners' Prehearing Brief at 24.

[40] Compare Table III-2 with Table III-4.

[41] The parties' comments do not advance this analysis. Petitioners' comparison of fabricators' production costs for UO_2 with finished fuel assemblies does not answer the relevant question of whether the conversion of UF_6 into UO_2 is a significant part of the production of the like product, UO_2. Respondents similarly focus on the finished fuel assemblies and disregard the like product.

[42] We note that *** fabricators were unable to exclude their manufacturing of fuel assemblies from the data they reported to the Commission. CR at III-9 & VI-10, PR at III-4 & VI-6. Pursuant to section 771(4)(D) of the Act, we have assessed injury to those *** fabricators in terms of the reported data, which is "the narrowest group or range of products, which include a like product, for which the necessary information can be provided."

[43] Section 771(4)(B) of the statute states that "[w]hen some producers are related to the exporters or importers, or are themselves importers of the allegedly subsidized or dumped merchandise, the term 'industry' may be applied in appropriate circumstances by excluding such producers from those included in that industry." The Commission's questionnaires show that ***. CR at IV-4. In addition, Petitioners allege that Cogema S.A., owns a uranium ore deposit in Kazakhstan and that Cameco Corp. owns a majority interest in an in situ leaching ("ISL") uranium mining project in Kazakhstan and has a long-term agreement to market uncommitted Kazakh uranium production. Petitioners' Prehearing Brief at 24-26.

[44] See, e.g., Certain Carbon Steel Butt-Weld Pipe Fittings from China and Thailand, Inv. Nos. 731-TA-520-521 (Final), USITC Pub. 2528 at 7-8 (June 1992), 19 U.S.C. § 1677(4)(B).

[45] Testimony of S. Melbye, Hearing Tr. at 148. For Cogema, Inc., the interest is the ownership of uranium deposits in Kazakhstan.

an exporter or producer of the subject merchandise.[46] Consequently, neither Cogema, Inc. nor PRI is a related party.[47] Accordingly, we define the domestic industry to include concentrators, the converter, the enricher, and fabricators.

III. CUMULATION

A. In General

In determining whether there is material injury by reason of LTFV imports, the pre-URAA cumulation provision that governs this investigation requires the Commission to assess cumulatively the volume and effects of imports from two or more countries of articles "subject to investigation" if such imports compete with each other and with the like product in the United States market.[48] Although the URAA did not change the competition criteria, it did make an important change by removing the "subject to investigation" criterion and requiring the cumulation only of imports subject to investigations that result from petitions filed on the same day.[49]

B. Analysis

Section 771(7)(C)(iv) of the pre-URAA Act provides that "the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market." The question posed is whether imports from Kyrgyzstan, Russia, and Uzbekistan are "imports subject to investigation," and thus meet the threshold requirement for cumulation.

The Commission bases its cumulation analysis on the state of the industry on "vote day," the date the Commissioners make their determinations available to the public.[50] In this case, imports from Russia, Kyrgyzstan, and Uzbekistan are under suspension agreements, and are not currently subject to ongoing investigations at Commerce or the Commission.[51] Therefore, we determine that the imports covered by suspension agreements are not "subject to investigation" and, thus, do not meet the threshold requirement

---

[46] Cogema Inc. apparently did import Kazakh uranium that had been enriched in a third country, but under Commerce's scope definition, that merchandise was not within the scope of this investigation. Final LTFV Determination – Kazakhstan, 64 Fed. Reg. at 31181 ("The Department continues to regard enrichment of uranium as conferring origin."). There is no evidence of other importations by Cameco or Cogema, so neither they nor their United States affiliates are importers of the subject merchandise.

[47] Since we determine that neither Cogema nor PRI is a related party, we do not reach the issue of appropriate circumstances.

[48] 19 U.S.C. § 1677(7)(C)(iv); Chaparral Steel Co. v. United States, 901 F.2d 1097, 1105 (Fed. Cir. 1990).

[49] See 19 U.S.C. § 1677(7)(G) (1998).

[50] Chaparral, 901 F.2d at 1105 ("We cannot say that the ITC was unreasonable in evaluating candidates for cumulation on the basis of their unfair trading or the effects of proven unfair trading as of vote day.").

[51] See Certain Fresh Cut Flowers From Canada, Chile, . . . and the Netherlands, Inv. Nos. 701-TA-275-278 (Final); 731-TA-327-331 (Final), USITC Pub. 1956 at 19, n. 19 (Mar. 1987).

for cumulation.[52]

III. NO MATERIAL INJURY BY REASON OF LTFV IMPORTS

In antidumping duty investigations, the Commission determines whether an industry in the United States is materially injured by reason of the subject imports under investigation.[53] [54] In making these

---

[52] We also evaluated whether the "recent order exception" would justify cumulation in this investigation. Under the exception, merchandise imported prior to the issuance of an antidumping or countervailing duty order may be eligible for cumulation in a later investigation of the same merchandise from another country if the merchandise has a "continuing impact as of vote day" in the later investigation and meets the remaining statutory criteria. Chaparral Steel Co. v. United States, 901 F.2d 1097, 1104 (Fed. Cir. 1990); see also Asociacion Colombiana de Exportadores v. United States, 693 F. Supp. 1165, 1172 (CIT 1988) (although cumulation is not mandatory for threat of injury, the Commission has the discretion to cumulate when appropriate); Sulfanilic Acid from The Republic of Hungary, Inv. No. 731-TA-560, USITC Pub. 2835 at 6-7 (Nov. 1994). Imports from Kyrgyzstan, Russia, and Uzbekistan do not meet the requirements of the recent order exception. The suspension agreements are not recent, having been in effect now for six years. Further, we do not find that the imports subject to the investigations six years ago have continuing effects today.

[53] 19 U.S.C. § 1673d(b).

[54] Commissioner Crawford notes that the statute requires that the Commission determine whether a domestic industry is materially injured "by reason of" LTFV imports. She finds that the clear meaning of the statute is to require a determination of whether the domestic industry is materially injured by reason of unfairly traded imports, not by reason of the unfairly traded imports among other things. Many, if not most, domestic industries are subject to injury from more than one economic factor. Of these factors, there may be more than one that independently are causing material injury to the domestic industry. It is assumed in the legislative history that the "ITC will consider information which indicates that harm is caused by factors other than the less-than-fair-value imports." S. Rep. No. 96-249, at 75 (1979). However, the legislative history makes it clear that the Commission is not to weigh or prioritize the factors that are independently causing material injury. Id. at 74; H.R. Rep. No. 96-317 at 46-47 (1979). The Commission is not to determine if the unfairly traded imports are "the principal, a substantial or a significant cause of material injury." S. Rep. No. 96-249 at 74. Rather, it is to determine whether any injury "by reason of" the unfairly traded imports is material. That is, the Commission must determine if the subject imports are causing material injury to the domestic industry. "When determining the effect of imports on the domestic industry, the Commission must consider all relevant factors that can demonstrate if unfairly traded imports are materially injuring the domestic industry." S. Rep. No. 100-71 at 116 (1987) (emphasis added); Gerald Metals v. United States, 132 F.3d 716 (Fed. Cir. 1997) (rehearing denied).

For a detailed description and application of Commissioner Crawford's analytical framework, see Certain Steel Wire Rod from Canada, Germany, Trinidad & Tobago, and Venezuela, Inv. Nos. 731-TA-763-766 (Final), USITC Pub. 3087 at 29 (March 1998) and Steel Concrete Reinforcing Bars from Turkey, Inv. No. 731-TA-745 (Final), USITC Pub. 3034 at 35 (April 1997). Both the Court of International Trade and the United States Court of Appeals for the Federal Circuit have held that the "statutory language fits very well" with Commissioner Crawford's mode of analysis, expressly holding that her mode of analysis comports with the statutory requirements for reaching a determination of material injury by reason of the subject imports. United States Steel Group v. United States, 96 F.3d 1352, 1361 (Fed. Cir. 1996), aff'g 873 F. Supp. 673, 694-95 (CIT 1994).

determinations, the Commission must consider the volume of the subject imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations.[55] The statute defines "material injury" as "harm which is not inconsequential, immaterial, or unimportant."[56] In assessing whether the domestic industry is materially injured by reason of subject imports, we consider all relevant economic factors that bear on the state of the industry in the United States.[57] 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."[58]

We also considered whether the existence of the suspension agreement necessitates a conclusion that the subject imports were fairly traded or noninjurious. The Kazakh Suspension Agreement ("Agreement") was accepted pursuant to section 734(l) of the Act, which authorizes Commerce to suspend an investigation when a nonmarket economy ("NME") country agrees to restrict the volume of its imports to a level that will "prevent the suppression or undercutting of price levels of domestic products by imports of the merchandise under investigation."[59] Commerce determined that the suspension agreement would achieve the statutory goal of preventing imports of Kazakh uranium from undercutting and suppressing domestic prices.[60]

Commerce's finding and the text of the Agreement provide no basis for us to conclude that subject imports from Kazakhstan were or were not sold at LTFV prices, or were or were not injurious.[61] Indeed, section 734 contains two separate provisions for agreements designed to eliminate dumping and injury, sections 734(b) and (c), which suggests that agreements with NME countries under subsection (l) were not

---

[55] 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) (ii).

[56] 19 U.S.C. § 1677(7)(A).

[57] 19 U.S.C. § 1677(7)(C)(iii).

[58] 19 U.S.C. § 1677(7)(C)(iii).

[59] In this regard, the Agreement placed a quota on direct and indirect exports of Kazakh uranium to the United States, with the amount of the quota dependent on U.S. market prices. Kazakh Suspension Agreement, sections IV.A and IV.C. Exports pursuant to contracts entered prior to March 5, 1992, or shipped for processing in the United States followed by reexport to another country were exempt from the quota. Kazakh Suspension Agreement, paras. IV.H and IV.K.

[60] Kazakh Suspension Agreement, 57 Fed. Reg. at 49222. The Assistant Secretary for Import Administration issued a declaration stating that the Agreement met the statutory requirements. 57 Fed. Reg. at 49221.

[61] We also note that Respondents stated that LTFV sales could continue under the agreement. Respondents' Posthearing Brief, Tab 2 at 1. The Commission has determined in the past that the existence of a quota does not by itself eliminate injury. See Shop Towels from Bangladesh, Inv. No. 731-TA-514 (Final), USITC Pub. 2487 at 20 (Mar. 1992) ("the existence of an import quota does not preclude the Commission from making an affirmative determination."); Sweaters Wholly or in Chief Weight of Manmade Fibers from Hong Kong, the Republic of Korea, and Taiwan, Invs. Nos. 731-TA-448-450 (Final), USITC Pub. 2312 at 40-41 (Sept. 1990).

intended to achieve these goals.[62] [63] Nor does the Agreement necessitate a conclusion that imports from Kazakhstan have no price effects. Although Commerce found that the Agreement "prevent[s] suppression or undercutting of price levels" with respect to imported Kazakh uranium,[64] the statute gives the Commission a broader mandate – to evaluate any effect of subject imports "on prices in the United States for like products."[65] Moreover, it is recognized that Commerce and the Commission are permitted to reach different conclusions in implementing the same statutory language.[66] Therefore, the price undercutting and suppression finding in the agreement does not preclude a finding by the Commission that the subject imports had a negative effect on U.S. prices.

However, for the reasons discussed below, we determine that the domestic uranium industry is not materially injured by reason of LTFV imports from Kazakhstan.

---

[62] It is true that suspension agreements with NME countries under section 734(l) and agreements to eliminate the injurious effect of imports under section 734(c) share some characteristics, notably in requiring a finding that the agreement both prevents the suppression and undercutting of domestic prices and is in the public interest. However, section 734(c) requires an additional finding, absent from section 734(l), that "the agreement will eliminate completely the injurious effect of exports to the United States of that merchandise." The inclusion of injurious effect as a separate factor in section 734(c) shows a Congressional understanding that the prevention of price undercutting and advancement of the public interest do not by themselves eliminate injurious effects.

[63] Commissioner Askey notes that the reason Congress enacted a "special rule" for nonmarket economy countries was that such agreements often could not meet the requirements of suspension agreements entered into under section 734(b), which requires the elimination of dumping, or under section 734(c), which requires the complete elimination of all injurious effect, which is calculated on the basis of the amount by which foreign market value exceeds U.S. price. 19 U.S.C. § 1673c(c)(1). Calculating effective dumping margins proved difficult, if not impossible, for nonmarket economy countries, as did calculating an accurate foreign market value. Nevertheless, agreements under section 734(l) must presumably eliminate most, if not all, of the injurious effect of the subject imports in order to be in the public interest, even if they do not meet the technical requirements of section 734(c).

[64] See Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan: Suspension of Investigations and Amendment of Preliminary Determinations, 57 Fed. Reg. 49220, 49221 (Oct. 30, 1992).

[65] 19 U.S.C. § 1677(7)(B)(i)(II). These effects include price underselling, suppression, and depression. 19 U.S.C. § 1677(7)(C)(ii).

[66] As the CIT noted in holding that Commerce's like product determination for standing purposes is not binding on the Commission's like product determination for the injury determination, possibilities for inconsistencies between Commerce and the Commission

> are built into the law. The very fact of separation of the two parts of the decisions required by the unfair trade laws may lead to superficial inconsistencies. As long as the inconsistencies resulting from the plain language of the statute do not lead to results which Congress could not have intended, they should be tolerated.

Hosiden Corp. v. United States, 810 F. Supp. 322, 332 (CIT 1992), quoting Algoma Steel Corp. v. United States, 688 F. Supp. 639 (CIT 1988), aff'd, 865 F.2d 240, cert. denied, 492 U.S. 919 (1989).

A. Conditions of Competition

The following conditions of competition in the uranium industry are relevant to our determination. First, the various forms of uranium – U_3O_8, natural UF_6, enriched UF_6, and UO_2 – are commodity products. Uranium of any form is, for the most part, substitutable with uranium of the same form produced elsewhere in the world.[67] All forms of uranium except UO_2 are traded on a worldwide basis.[68] There is also some competition among the different forms of uranium.[69] Uranium concentrate (U_3O_8) can be substituted for enrichment services to a limited degree,[70] and utilities may buy pre-existing enriched UF_6 in another company's inventory as a substitute for purchasing U_3O_8 or natural UF_6 and paying for conversion and/or enrichment.[71]

Second, trade restrictions and intergovernmental agreements affect exports of uranium from the successor countries to the former Soviet Union, known collectively as the Newly Independent States ("NIS"). Suspension agreements between Commerce and Kyrgyzstan, Russia, Uzbekistan, and, until recently, Kazakhstan, limited the volume of uranium these countries could sell into the United States. For Russia, the limitation took the form of a tied sales arrangement, whereby utilities could purchase Russian uranium only if the utilities bought an equivalent quantity of domestically produced uranium.[72] The other suspension agreements imposed numerical quotas, with the quota being increased if the price of uranium in the United States increased.[73] Uranium from Ukraine has been subject to a United States antidumping duty order since 1993, and there were almost no imports from that country during the investigation period.[74] In addition, the European Atomic Energy Community ("EURATOM") countries limit imports of uranium from the NIS.[75] Collectively, these restrictions have resulted in a two-tiered pricing structure. Uranium eligible for sale in the United States and EURATOM countries (known as "restricted market uranium") bears a higher price than uranium that can only be sold in countries without import restrictions (known as

---

[67] CR at II-39, PR at II-22. Nonsubject enriched UF_6 and UO_2 that currently is located in Kazakhstan is an exception to this general observation, as it is of questionable quality compared to forms of uranium that are sold in the United States. CR at VII-4, PR at VII-2.

[68] CR & PR at II-1; CR at I-8, PR at I-5.

[69] CR at II-10, PR at II-6.

[70] The volume of enrichment services is measured in "separative work units" ("SWU"), which measure the effort expended in the enrichment process. CR at I-7, PR at I-4. An enricher may decrease the number of SWU necessary to achieve a given concentration of U^{235} by increasing the quantity of UF_6 input into the production process. See Petitioners' Prehearing Brief at 38, n. 112.

[71] CR at II-2, PR at II-1 - II-2.

[72] As with the other countries subject to suspension agreements, Russia's quota was originally based on the prevailing market price. See Agreement Suspending the Antidumping Investigation on Uranium From the Russian Federation, App. A., 57 Fed. Reg. 49220, 49241 (Oct. 30, 1992). A subsequent amendment replaced this system with the matched sales arrangement. See Amendment to the Agreement Suspending the Antidumping Investigation on Uranium From the Russian Federation, 59 Fed. Reg. 15373, 15374 (Apr. 1, 1994).

[73] See, e.g., Amendment to the Agreement Suspending the Antidumping Investigation on Uranium From Kazakhstan, As Amended, 60 Fed. Reg. 25692, 25693 (May 12, 1995).

[74] See CR at I-3, PR at I-2 & App. D.

[75] CR at II-4, PR at II-3.

"unrestricted market uranium").[76]

Uranium imports from Russia also are affected by the Russian HEU Agreement, under which the United States has committed to buying low-enriched UF_6 produced in Russia from high enriched uranium that was part of the Soviet military stockpile. Petitioner U.S. Enrichment Corp. ("USEC"), as executive agent of the U.S. Government, is responsible for implementing this agreement.[77] For part of the investigation period, the United States Government bought the enriched UF_6 in its entirety. However, the agreement currently allows USEC to pay Russia in kind for the natural uranium contained in the enriched UF_6 (by swapping an equivalent quantity of unenriched UF_6) and to pay in cash only for the value of enrichment.[78] USEC is committed to purchasing 5.5 million SWU[79] per year from Russia for the 1999-2014 period, which represents *** of the company's U.S. enrichment sales.[80] USEC's aggregate sales of enrichment services and enriched uranium decreased over the investigation period, so the company had to reduce production in its U.S. facilities to accommodate the continuing flow of Russian enriched uranium under the HEU Agreement. As a result, USEC lost economies of scale, which increased unit costs and decreased profits.[81]

Third, although the NIS account for a significant portion of the world uranium supply, numerous other countries also supply nonsubject uranium. During the investigation period, Canada and Australia each have shipped more U_3O_8 to the United States (while presumably maintaining other export markets) than ***.[82] There were also substantial volumes of nonsubject U_3O_8 imports from South Africa and Namibia during the investigation period.[83] Taken together, U.S. imports of nonsubject U_3O_8 from countries other than the NIS were more than *** Kazakhstan's likely U_3O_8 production capacity for 1999.[84]

Fourth, an overhang of natural and enriched UF_6 inventories in the United States and throughout the world represents another source of uranium supply. USEC alone held an inventory of natural UF_6 at

---

[76] CR at II-4 - II-5, PR at II-3.

[77] CR at II-2, PR at II-1 - II-2.

[78] CR at III-6, PR at III-6. Russia is currently keeping the in-kind transfers of natural UF_6 in inventory, but is allowed to release more of the inventory into the market every year. See 42 U.S.C. §2297h-10(b)(5).

[79] See supra, note 70 for a definition of "SWU."

[80] CR at II-2, PR at II-1. We also note that SWU purchased under the Russian HEU Agreement represent *** of U.S. electric utilities' current and projected requirements for enrichment. CR at II-33, PR at II-18.

[81] CR at III-7 - III-8, and Table VI-4. See also Testimony of P. Sewell, Hearing Tr. at 33 ("USEC is obligated to purchase large quantities of Russian SWU, which in turn displace USEC's own production, as a result, despite vigorous cost cutting, USEC's average production costs have gone up."); Testimony of D. Culp, Hearing Tr. at 171 ("USEC's competitive position and profitability have been adversely affected by . . . it's [sic] mandatory purchase of the SWU of the Russian HEU program.").

[82] Compare CR & PR, Tables VII-1 and D-3.

[83] See CR & PR, App. D.

[84] See CR & PR at D-1. We measured Kazakh capacity as described in the discussion of capacity in section IV.B.

the end of the first quarter of 1999 that is ***.[85] The U.S. Department of Energy has a separate large stockpile of natural UF_6. However, the United States Government's commitment in March 1999 to withhold this material from the marketplace may lessen its future effect on prices.[86]

Fifth, these inventories, which are typically held by producers and owned by utilities,[87] allow the producers and utilities to engage in a variety of non-cash transactions. Companies holding uranium in different locations may swap equivalent quantities to avoid transportation costs or government restrictions.[88] ***.[89] Such alternative transactions can result in the disaggregation of an advanced stage of uranium (such as natural or enriched UF_6) into the raw material (U_3O_8 or natural UF_6) and processing (conversion or enrichment) used to make it.[90] This process creates separate, but interrelated, markets for the uranium and enrichment components of enriched UF_6. Consequently, a given quantity of uranium may change ownership a number of times before its consumption in a nuclear power plant.

Sixth, the U.S. uranium market also is being altered by deregulation of electrical utilities, which effectively puts nuclear power plants in competition with other sources of electricity.[91] Since the cost of fuel assembly rods represents a significant portion of a nuclear power plant's operating expenses, utilities that own nuclear facilities face increasing pressure to cut costs by obtaining price reductions from traditional uranium suppliers. Utilities also might bypass the uranium fuel cycle through direct purchases of enriched UF_6. Finally, we note that U.S. demand for uranium, as measured by reactor requirements, is projected to remain fairly steady or decrease slightly, in the imminent future.[92]

B. Volume of the Subject Imports

1. In General

Section 771(7)(B)(i)(I) of the Act provides that the Commission "shall consider the volume of imports of the merchandise which is the subject of the investigation." Section 771(7)(C)(i) requires that we evaluate "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."[93]

As an initial matter, we find that the merchandise subject to investigation does not include enriched UF_6 and UO_2 currently located in Kazakhstan (the "Kazakh Stockpile"). Section 735(b) of the Act authorizes the Commission to make a final determination exclusively with regard to "merchandise with

---

[85] CR at II-33, PR at II-18, & Tables III-1 & III-3. USEC is statutorily mandated to conduct its business in a manner that will not disrupt the uranium market. CR at III-6, PR at III-3.

[86] CR at II-3 - II-4, PR at 2.

[87] CR at II-3, PR at II-2.

[88] CR & PR at V-1.

[89] CR & PR at V-1.

[90] CR at II-8, PR at II-5. For example, a company that owned a supply of natural UF_6 and needed enriched UF_6 might exchange its unenriched material for enriched UF_6 owned by another company and then pay money for the value added by enrichment, thus obtaining enrichment without a direct payment to USEC.

[91] CR at I-12, PR at I-7 - I-8.

[92] CR at II-33, PR at II-18.

[93] 19 U.S.C. § 1677(7)(C)(i).

respect to which the administering authority has made an affirmative [final] determination . . . ." In defining the merchandise subject to its determination, Commerce stated that "[t]he Department continues to regard enrichment of uranium as conferring origin."[94] Kazakhstan has no capacity for producing natural UF_6 or enriching UF_6.[95] The record shows that the uranium in the Kazakh Stockpile was enriched in the territory now controlled by the Russian Federation and shipped to Kazakhstan prior to the dissolution of the Soviet Union.[96] Therefore, under Commerce's scope definition, the uranium in the Kazakh Stockpile is not a product of Kazakhstan for the purposes of this determination.[97] [98]

2. Application of section 734(j)

A majority of the Commission concluded that section 734(j) of the Act ("the Special Rule") applies to this investigation.[99] We acknowledge that the applicability of the Special Rule in this investigation is unclear. We note, in particular, that the Special Rule explicitly applies only to agreements under subsections (b) and (c) ("LTFV sales agreements" and "injurious impact agreements," respectively). Nevertheless, we conclude that it should be interpreted as applying equally to agreements with NME countries, like Kazakhstan, that are entered under subsection (l) ("NME agreements"). We reach this conclusion because section 734 contains two additional provisions, subsection (e) ("Procedures Provision")

---

[94] Final LTFV Determination – Kazakhstan, 64 Fed. Reg. at 31181.

[95] CR at VII-3, PR at VII-2.

[96] Memorandum from John D. Greenwald to R. Michael Gadbaw at 2 in Kazakhstan Prehearing Brief, Appendix 6, CR at VII-3; Petitioners' Prehearing Brief at 59.

[97] We considered the parties' arguments on this issue made before the Commission and Commerce and found that they did not identify any ambiguity that would allow us to go beyond the plain meaning of Commerce's scope definition. We note further that the Commission does not have the authority to grant Petitioners' request that we "treat the Kazakh . . . stockpiles as Kazakh-origin material" in spite of the fact that they "are uranium of Russian origin subject to the Russian suspension agreement (because they consist of [uranium] enriched in the territory of the Russian Federation). . . ." Petitioners' Prehearing Brief at 59. See Cambridge Lee Industries, Inc. v. United States, 728 F. Supp. 748, 750 (CIT 1989) ("In its investigation, the Commission may not modify the class or kind of imported merchandise examined by Commerce."); A.N. Deringer, Inc. v. United States, 723 F. Supp. 816, 819 (CIT 1989) ("Commerce possesses the exclusive authority to clarify and delineate the scope of an antidumping finding."), aff'd, 904 F.2d 46 (Fed. Cir. 1990); Algoma Steel Corp. v. United States, 688 F. Supp. 639, 644 (CIT 1988), aff'd, 865 F.2d 240 (Fed. Cir. 1989), cert. denied, 109 S.Ct. 3244 (1989). We also note that Commerce's scope definition does not indicate that conversion of U_3O_8 or UF_6 into UO_2 in Kazakhstan would confer origin.

[98] Chairman Bragg and Commissioner Askey find that the inclusion of the Kazakh Stockpile as subject merchandise would not have changed their determinations. The record shows that only a small portion of the uranium in the stockpile meets U.S. specifications. Uncertainty about the level of impurities in the remainder of the stockpile and the necessity for further processing make that material uncompetitive with domestic uranium, and prevent it from having any imminent injurious impact. See Testimony of Tony Schillmoller, Hearing Tr. at 163-166, Respondents' Posthearing Brief, Tab 14. Therefore, Chairman Bragg and Commissioner Askey conclude that the stockpile uranium and the subject merchandise together do not have and are not likely to have an effect on the domestic industry that is materially different from the effect of the subject merchandise by itself, as described in the remainder of these views.

[99] Commissioners Crawford and Askey do not join in this conclusion.

and subsection (f) (the "Effects Provision") that explicitly apply only to LTFV sales agreements and injurious impact agreements. If such references are interpreted as excluding NME agreements, then the Special Rule, the Procedural Provision, and the Effects Provision do not apply to NME agreements. In that case, the powers delegated by the Effects Provision, such as the ability to suspend an investigation and to terminate the suspension of liquidation implemented by a preliminary LTFV sales determination, would be unavailable when Commerce accepts an NME agreement. We do not believe that Congress intended such a result. We also note that Congress's application of the Special Rule to any "case in which the administering authority has terminated a suspension of investigation under subsection (i)(1)" appears to assume the Special Rule would apply to all such agreements, including NME agreements.

There are differing views on the application of subsection (j). Chairman Bragg and Vice Chairman Miller conclude that this provision requires the Commission to evaluate the effect of the Agreement that covered the subject merchandise, and to disregard that effect in our analysis of the subject merchandise. Specifically, since the Kazakh Suspension Agreement was designed to "prevent the suppression or undercutting of price levels of domestic products," through the imposition of quotas, the Commission must consider the effect of the agreement in its evaluation of the price and volume effects of the subject merchandise. During the investigation period, Kazakhstan's price-based quota allowed sales to U.S. customers in excess of one million pounds of U_3O_8 per year in 1996 and 1997 in addition to shipments pursuant to contracts entered prior to the effective date of the Agreement.[100] Even so, average annual imports of Kazakh uranium were below the quota levels in 1996 and 1997.[101] Thus, the Agreement does not appear to have restrained the volume of imports from Kazakhstan in 1996 and 1997. In 1998, the allowed level of imports was reduced to zero because of the decline in prevailing U.S. prices, and, therefore, the Agreement did restrain the volume of imports from Kazakhstan in 1998.[102] As discussed below, however, the decline in prices in 1998 was the result of other market factors. Thus, based on the 1996 and 1997 experience, we conclude that the Agreement had little or no effect on the volume of imports during the investigation period.[103]

---

[100] See Kazakh Suspension Agreement, sec. IV.C.1, 57 Fed. Reg. at 49223; Amendment to the Agreement Suspending the Antidumping Investigation on Uranium From Kazakhstan, as Amended, 60 Fed. Reg. 25692 (May 12, 1995); 60 Fed. Reg. 52368 (Oct. 6, 1995); 61 Fed. Reg. 15468 (Apr. 8, 1996); 61 Fed. Reg. 52407 (Oct. 7, 1996); 62 Fed. Reg. 53807 (Oct. 16, 1997); 63 Fed. Reg. (Apr. 7, 1998); Kazakhstan Prehearing Brief at 11, n. 7.

[101] Testimony of D. Sloan, Hearing Tr. at 146; Declaration of T. McGraw & B. Frame at 1, in Nukem Prehearing Brief, Exh. 9. See also Tables IV-2 and IV-3. Based on unit values and on data from importers indicating that Kazakhstan exported only U_3O_8 and UO_2, we conclude that "other uranium" consisted of misclassified uranium concentrate. To compare the data accurately, we determined the quantity of U_3O_8 in the ore based on an 82.5 percent concentration. CR at I-6, PR at I-4. We then converted the quantity of U_3O_8 into pounds using a factor of 2.2046 lbs./kg. Imports of UO_2 were converted to U_3O_8 equivalent using a ratio of 2.60 lbs. U_3O_8 per kgU. We note that these figures may be overstated by the inclusion of UO_2 that was later reexported. CR at II-22, PR at II-12.

[102] 63 Fed. Reg. 16973 (Apr. 7, 1998); 63 Fed. Reg. 53644 (Oct. 6, 1998).

[103] Chairman Bragg and Vice Chairman Miller note that imports from Kazakhstan rose from 1996 to 1997 and then fell in 1998, the year that the quota fell to zero. However, the volume of subject imports in the first quarter of 1998 was less than one quarter of annual subject import volume for 1997, which suggests that any increase in subject imports leveled off and began decreasing prior to the institution of the zero quota level. See CR & PR, Table IV-2. Thus, the effect of the zero quota, if any, was minor during the investigation period, and whether it was disregarded in accordance with the Special Rule does not effect

Commissioners Hillman and Koplan conclude that the Special Rule requires the Commission to make its assessment of material injury and threat without regard to the effect of the Agreement. Thus, they assume that the agreement did not eliminate LTFV sales, injurious effects, or price suppression and undercutting on the part of subject imports and consider all of the imports as unfairly traded and potentially injurious. Commissioners Hillman and Koplan agree with Petitioners that in this context, an analysis of whether there would have been material injury by reason of subject imports at the present time in the absence of the Kazakh Suspension Agreement is not appropriate.[104] They do not interpret the statute as providing for such an analysis. Moreover, the immense changes in the uranium industry and the absence of any reliable data on exports of uranium from Kazakhstan prior to the filing of the petition would make any such projection highly speculative.

Commissioners Crawford and Askey note that the statute authorizes three types of suspension agreements: 1) an agreement to eliminate the dumping or to cease exports under section 734(b); 2) an agreement to eliminate the injurious effect of the imports under section 734(c); and 3) an agreement to restrict the volume of the imports under section 734(l). Suspension agreements under subsections (b) and (c) are agreements between Commerce and exporters of the merchandise, while a suspension agreement under subsection (l) is an agreement between Commerce and a sovereign, nonmarket country. They further note that section 734(j) provides the Commission specific guidance with respect to suspension agreements under subsections (b) and (c).

Commissioners Crawford and Askey have considered the parties' arguments concerning whether section 734(j) "applies" to the subsection (l) suspension agreement with Kazakhstan. In essence, the parties interpret section 734(j) as requiring the Commission to consider the fact that a suspension agreement covering imports from market economies has been in effect and to incorporate the effects of the suspension agreement into the Commission's injury analysis. Based on this interpretation, the parties then argue whether the Commission similarly is required to consider a suspension agreement covering imports from a nonmarket economy country. Regardless of how one interprets the statute, section 734(j) does not "apply" to suspension agreements under subsection (l). On its face, section 734(j) refers only to suspension agreements with exporters from market economies; it does not refer to suspension agreements with nonmarket economy countries. Assertions that this omission is inadvertent do not withstand scrutiny. Section 734(j) was enacted in 1979. Subsequently, in 1988 subsection (l) was added to provide a "special rule" for nonmarket economy countries.[105] Both section 734(l)(1)(A) and section 734(l)(2) include specific cross references to other subsections of section 734, that is, to subsections (d) and (i), respectively. However, there is no cross reference to subsection (j). Given that subsection (l): was enacted nearly a decade after subsection (j); is a "special rule" for suspension agreements with sovereign countries (as opposed to exporting firms); and contains cross references to certain subsections of section 734 but contains no cross reference to subsection (j), in their view the best, even compelling, reading of the statute is that Congress' failure to refer to suspension agreements with nonmarket economy countries in section 734(j) was not an inadvertent omission. Consequently, Commissioners Crawford and Askey conclude that section 734(j) does not "apply" to suspension agreements with nonmarket economy countries.

In Commissioner Crawford's view, the parties' arguments are based on an incorrect interpretation of the statute. Section 734(j) provides specific guidance to the Commission in situations where the underlying antidumping investigation is resumed or continued after a suspension agreement under subsections (b) or (c) has been entered into. The statute states that the Commission "shall consider all of

---

the outcome of our analysis.

[104] See Petitioners' Posthearing Brief, Tab 2 at 5.

[105] H.R. Rep. No. 100-576 at 593-594 (1988).

the subject merchandise, without regard to the effect of any suspension agreement under subsection (b) or (c)." (Emphasis added.) On its face, the object of section 734(j) is to address the volume of the imports the Commission must consider in its injury determination. Absent subsection (j) the Commission could conclude that imports are fairly traded if they are covered by a suspension agreement that eliminates the dumping under subsection (b) or if the imports are covered by a suspension agreement that eliminates the injurious effect under subsection (c). The Commission could then exclude these fairly traded imports from the volume of the subject imports that it considers. Subsection (j) prevents the Commission from doing so. Specifically, the statute requires the Commission to consider all of the imports covered by either of these types of suspension agreements as unfairly traded imports, even if the agreements eliminated the dumping or the injurious effect. Quite simply, section 734(j) defines the volume of unfairly traded imports that the Commission must consider in its injury determination. The possibility that the Commission might conclude that imports are fairly traded when covered by a suspension agreement with a nonmarket economy country under section 734(l) does not arise. Such a suspension agreement eliminates neither the dumping nor the injurious effect of the imports, and thus there is no basis for the Commission to conclude that the imports are fairly traded, i.e., not being dumped and causing injury. Therefore, a statutory provision preventing the Commission from reaching such a conclusion is not necessary. Consequently, the Commission can only conclude that imports covered by a suspension agreement under subsection (l) continue to be subject imports and must be considered as such when evaluating the volume of subject imports in the injury analysis. Based on this interpretation of the statute, whether section 734(j) "applies" to a suspension agreement with a nonmarket economy country is not a meaningful question.

3. Volume of the subject imports

There are several ways to measure sales volume in the uranium industry: in terms of the value of total sales during a given period, the volume sold within each sector, and the volume of uranium required by U.S. utilities each year. The total sales value of imported Kazakh uranium was $12.8 million in 1996. Sales value fell to $12.2 million in 1997, and fell again to $7.8 million in 1998. Imports were valued at $3.7 million in the first quarter of 1998, and there were no imports in the first quarter of 1999.[106] These quantities represented U.S. market shares of 0.4 percent in 1996 and 1997, 0.3 percent in 1998, 0.6 percent in the first quarter of 1998, and 0 percent in the first quarter of 1999.[107] In terms of volume, the imports of U_3O_8 from Kazakhstan amounted to 893,000 pounds in 1996, 979,000 pounds in 1997, 614,000 pounds in 1998, 361,000 pounds in the first quarter of 1998, and 0 pounds in the first quarter of 1999. These volumes represented 2.0 percent of U.S. utilities' reactor requirements in 1996, 2.0 percent in 1997, and 1.3 percent in 1998.[108] Kazakh U_3O_8 also represented a relatively small share of total U.S. U_3O_8 sales during the investigation period.[109]

---

[106] CR & PR, Table IV-3. We have excluded the value of nonsubject merchandise from the totals reported in these tables.

[107] Id.

[108] See CR at II-33, PR at II-18. Expressing imports as a percentage of utilities' deliveries of uranium for enrichment yields similar results, with market shares of 1.8 percent in 1996, 2.4 percent in 1997, and 1.5 percent in 1998. Id.

[109] Expressed as the sum of domestic U_3O_8 sales and total U_3O_8 imports, the total volume of U_3O_8 sales in the United States was 37.6 million pounds in 1996, 37.5 million pounds in 1997, and 27.8 million pounds in 1998, of which imports from Kazakhstan represented 2.4 percent in 1996, 3.0 percent in 1997, and 2.4 percent in 1998. We note that this calculation probably overstates Kazakh market shares, as

The volume and market penetration of nonsubject imports were between 10 and 90 times greater than the volume and market share of imports from Kazakhstan, regardless of the measurement used.[110] We find that neither the volume of subject imports nor the change in the volume of subject imports is significant.[111]

C. Price Effects of the Subject Imports

> Section 771(C)(ii) of the Act provides that, in evaluating the price effects of the subject imports, the Commission shall consider whether -- (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, 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.[112]

U.S. purchasers typically buy U_3O_8 and conversion, enrichment, and fabrication services pursuant to long-term contracts that last for three to five years.[113] Spot market sales are most prevalent for U_3O_8, representing between 10 and 20 percent of total sales. The existence of these long-term contracts, many of which are at prices more favorable than those currently prevalent in the market, has limited any effect that the subject merchandise has had on the prices for the domestic like product.[114] Moreover, the volume of subject imports is so small, both in relation to total domestic consumption of uranium and in relation to the various market segments, that we cannot conclude that any underselling, price suppression, or price depression by subject imports was significant.[115] [116]

"other uranium" imported from nonsubject countries may have included U_3O_8.

[110] See CR & PR at D-3 & Tables IV-2 & IV-4. Measured in terms of value, subject imports from Kazakhstan peaked in 1996 at $12.8 million, when imports from all other sources were $1,175 million. Measured in terms of volume of U_3O_8, subject imports of Kazakh uranium peaked in 1997 at 979,000 pounds, when imports from all other countries combined were 16.8 million pounds.

[111] Commissioner Crawford joins only in the factual, numerical discussion of the volume of imports here. She does not rely on any analysis of trends in the market share of subject imports or other factors in her determination of material injury by reason of the subject imports. She makes her finding of the significance of volume in the context of the price effects and impact of the subject imports. For the reasons discussed below, she finds that the volume of subject imports is not significant in light of its lack of price effects and impact.

[112] 19 U.S.C. § 1677(7)(C)(ii).

[113] CR at V-5, PR at V-3.

[114] CR at II-4 - II-6, CR at II-3 - II-4.

[115] Given Chairman Bragg and Vice Chairman Miller's conclusion that the Agreement, which has as its object preventing the undercutting and suppression of domestic prices, had little or no effect on the volume of subject imports during the investigation period, they conclude that it did not place a significant limitation on the effect that subject imports had on domestic producers' prices.

[116] Commissioner Crawford concurs that the subject imports are not having significant effects on domestic prices. She has given Petitioners the benefit of the doubt and assumed that none of the subject imports would have been sold in the U.S. market at fairly traded prices, and that all of the demand for the subject imports would have shifted to domestic uranium. However, given the small volume of the subject

The record shows that Kazakh merchandise was rarely, if ever, sold in direct competition with U.S. merchandise during the investigation period. There were no contemporaneous sales of subject imports and domestic uranium on comparable terms, no specific lost revenue allegations, and no specific lost sales allegations.[117] Nor were there any lost sales or lost revenue allegations that might suggest direct competition between subject imports and domestic merchandise.[118] Although Petitioners note that the two-tier pricing structure, which reflects world market prices, would normally result in Kazakh uranium being sold for less than domestic merchandise, there is no record evidence suggesting that the subject merchandise actually undersold domestic merchandise, or suppressed or depressed domestic prices.

Accordingly, we find that the subject imports did not adversely affect prices for the domestic like product.

D. Impact of the Subject Imports on the Domestic Industry

Section 771(7)(C)(iii) provides that the Commission, in examining the impact of the subject imports on the domestic industry, "shall evaluate all relevant economic factors which have a bearing on the state of the industry." These factors include output, sales, inventories, capacity utilization, market share, 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."[119]

In Uranium From Ukraine, the Commission segmented its analysis based on the four stages of the uranium fuel cycle, considering U_3O_8 imports in the context of the concentrators, natural UF_6 imports with the converter, and so on.[120] However, the uranium market has changed substantially since 1993. The same analysis would be less useful in this investigation, and might even be misleading. Most important, the Russian HEU agreement resulted in the entry of 9,800 SWU in Russian enriched UF_6 into the U.S. market during the investigation period,[121] allowing utilities to bypass the first three steps of the traditional uranium fuel cycle by buying enriched uranium directly. Depending on the structure of the transaction, USEC's sale of the Russian material might compete with its own sales of enrichment services, domestic concentrators' sales of U_3O_8, or both.[122] The ready availability of enriched UF_6 has led to the accumulation of large inventories of U_3O_8 and natural UF_6 in the United States,[123] which would likely suppress demand and prices for these forms of uranium.

---

imports, the increase in demand for domestic uranium would have been so small that the domestic industry would not have been able to increase its prices.

[117] CR at V-11 & V-15, PR at V-4 & V-6.

[118] CR at V-15, PR at V-6.

[119] 19 U.S.C. § 1677(7)(C)(iii).

[120] See Uranium from Ukraine, Pub. 2669 at 32 (majority views) & 43 (dissenting views of Commissioners Brunsdale & Crawford).

[121] In 1998, Russian SWU represented 38 percent of USEC's total enrichment sales. CR at VI-7, PR at VI-5.

[122] CR at II-9 - II-10.

[123] CR at II-3 - II-4, PR at II-2.

Attempting to assign complex transactions involving multiple forms of uranium to one market segment would be arbitrary. Furthermore, strict segmentation would ignore the impact that sales of one form of uranium have on the others. Therefore, we have analyzed the impact of the full volume of the subject merchandise on the entirety of the domestic like product and industry.[124] We do recognize, however, that some degree of disaggregated analysis is unavoidable, since it is impossible to combine the financial performance of domestic producers at different stages of the uranium fuel cycle.

We conclude that the volume of subject imports was simply too small during the investigation period to have had a material effect. Regardless of the measurements used for volume and size of the market, Kazakh uranium held a minuscule share of the total U.S. market during the investigation period.[125] Therefore, we find that the small volume of subject merchandise did not have a material impact on the domestic industry as a whole.[126]

Also, domestic producers showed disparate financial results during the investigation period, with some performing quite well and others quite poorly. We conclude that the subject imports are not responsible for the losses or declining profitability that occurred. In the aggregate, concentrators registered operating losses throughout the investigation period, with gross losses highest in 1997.[127] One concentrator closed its facility in 1999, and another is in the process of doing so.[128] However, we conclude that these conditions are the result of factors discussed in the volume section – the large volume of nonsubject U_3O_8 imports and uranium inventories in the United States, which prevented price increases, and the growing volume of the natural UF_6 component imported under the Russian HEU Agreement, which depressed prices. We find that subject imports did not have a material effect on the concentrators.

We recognize that sales of U_3O_8 could affect the demand for USEC's enrichment services. However, the record does not indicate that subject imports had such effects to a significant degree during the investigation period.[129] Although the unit value for the company's enrichment services did not change

---

[124] Moreover, the statute does not require us to engage in a segmented analysis. See Copperweld Corp. v. United States, 682 F. Supp. 552, 566 (CIT 1988) ("neither the governing statute nor its legislative history require the ITC to adopt any particular analysis when the market consists of several segments.").

[125] Kazakh market share peaked at 0.6 percent of the value of U.S. consumption in the first quarter of 1998, 2.9 percent of reactor requirements in 1997, and 3.5 percent of total U_3O_8 equivalent delivered by U.S. utilities for enrichment in 1997.

[126] Commissioner Crawford concurs that the subject imports are not having a significant impact on the domestic industry. As noted previously, she has assumed that all of the demand for the subject imports would have shifted to domestic uranium had the subject imports been fairly traded. However, given the small volume of the subject imports, the increase in demand for domestic uranium would have been so small that the domestic industry would not have been able to increase its output, sales, or revenues significantly. Therefore, the domestic industry would not have been materially better off if the subject imports had not been dumped.

[127] CR & PR, Tables VI-1 & VI-2. Operating losses were $3.3 million in 1996, $26.1 million in 1997, $*** million in 1998, $2.5 million in the first quarter of 1998, and $4.9 million in the first quarter of 1999.

[128] CR & PR at III-1.

[129] Commissioner Askey notes that the decline in USEC's profitability appears to be predominantly due to the Russian HEU Agreement. CR at VI-8, PR at VI-5, and Table VI-4. USEC's profits decreased steadily over the investigation period: $300.2 million in 1996, $242.2 million in 1997, $141.1 million in 1998, $136.7 million in the first quarter of 1998, and $98.2 million in the first quarter of

substantially over the investigation period, its unit costs increased substantially when it reduced production levels in response to increased sales of Russian enriched UF_6, thereby sacrificing economies of scale.[130] Imports of U_3O_8 from Kazakhstan, which varied between 761,000 and 1,408,000 pounds per year during the investigation period, were too small to have a material effect on USEC's much larger consumption of U_3O_8.[131]

ConverDyn, the sole U.S. converter, cannot have been adversely affected by subject imports, as its profitability *** during the investigation period.[132] Fabricators' operating income improved during the investigation, showing ***, although they ***.[133] Again, we conclude that the volume of subject imports was too small to have had a material effect on this uranium producing segment.[134] Moreover, the fabricators generally indicated that they had not been injured by subject imports.[135]

For the foregoing reasons, we determine that the domestic industry producing uranium is not materially injured by reason of dumped imports from Kazakhstan.

1999.

[130] CR at VI-8, PR at VI-5, and Table VI-4. USEC's unit value for U.S. sales was *** in 1996, *** in 1997, *** in 1998, *** in the first quarter of 1998, and *** in the first quarter of 1999. Total production fell steadily over the period, from *** SWU in 1996 to *** SWU in 1997, and *** SWU in 1998. Enrichment levels in the first quarter of 1999 were somewhat larger than in the same period in the previous year. CR & PR, Table III-3. The unit cost of goods sold increased from *** in 1996, to *** in 1997, *** in 1998, *** in the first quarter of 1998, and *** in the first quarter of 1999.

[131] USEC estimated that it uses between 7.4 and 10.1 kilograms of natural UF_6 to produce one kilogram of enriched UF_6 with an assay typical in the U.S. market. This suggests a likely consumption of between 9 and 18 million kilograms of uranium each year during the investigation period, which represents between 31 and 47 million pounds of U_3O_8. See Petitioners' Prehearing Brief at 38, n. 112, CR at II-1, n. 2.

[132] CR & PR, Table VI-3. ConverDyn's operating income margin *** percent in 1996 to *** percent in 1997, and *** percent in 1998. Profits in the interim period of 1999 were *** than in the interim period of the previous year.

[133] CR & PR, Table VI-6. Operating income was ***. The fabricators had an operating *** in the first quarter of 1999.

[134] Chairman Bragg and Commissioner Askey note that Kazakh U_3O_8 imports that did not cause a material injury to concentrators would not have had any greater effect on the processor three steps along the production process.

[135] CR at III-8, PR at III-4. We placed limited weight on this information, since the fabricators' position may have been motivated by their desire to have access to subject merchandise from Kazakhstan.

IV. NO THREAT OF MATERIAL INJURY BY REASON OF LTFV IMPORTS[136]

Section 771(7)(F) of the Act directs the Commission to determine whether a U.S. industry is threatened with material injury by reason of imports "on the basis of evidence that the threat of material injury is real and that actual injury is imminent." The Commission is not to make such a determination "on the basis of mere conjecture or supposition."[137] We have considered all the statutory factors that are relevant to this investigation.[138]

Kazakhstan does not have the capacity to produce natural UF_6 or to enrich natural UF_6 purchased

---

[136] In assessing whether a domestic industry is threatened with material injury by reason of imports from two or more countries, the Commission has discretion to cumulate the volume and price effects of such imports if they compete with each other and the domestic like product and are subject to investigation. 19 U.S.C. § 1677(7)(F)(iv). However, no other imports were subject to investigation as of the date of our determination and, thus, cumulation is not an issue.

[137] 19 U.S.C. § 1677(7)(F)(ii). An affirmative determination must be based upon "positive evidence tending to show an intention to increase the levels of importation." Metallverken Nederland, B.V. v. United States, 744 F. Supp. 281, 287 (CIT 1990), citing American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1280 (CIT 1984), aff'd sub nom., Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985). See supra, section II.B.

[138] The statute lists ten factors:

> (I) information . . . as to the nature of the subsidy,
> (II) any increase in production capacity or existing unused capacity in the exporting country . . . ,
> (III) any rapid increase in U.S. market penetration and the likelihood that the penetration will increase to an injurious level,
> (IV) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise,
> (V) any substantial increase in inventories of the merchandise in the United States,
> (VI) the presence of underutilized capacity for producing the merchandise in the exporting country,
> (VII) any other demonstrable adverse trends that indicate the probability that the importation (or sale for importation) of the merchandise . . . will be the cause of actual injury;
> (VIII) the potential for product shifting . . .,
> (IX) in any investigation . . . which involves imports of both a raw agricultural product . . . and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting . . .
> (X) the actual and potential negative effects on the existing development and production efforts of the domestic industry . . .

19 U.S.C. § 1677(7)(F)(i)(I)-(X). In addition, the Commission must consider whether dumping findings or antidumping remedies in markets of foreign countries against the same class or kind of merchandise suggest a threat of material injury to the domestic industry. 19 U.S.C. § 1677(7)(F)(iii)(I). There is no evidence of any third-country antidumping findings or remedies against subject imports of uranium. The Commission does not need to analyze factors (I) or (IX) because this investigation does not involve subsidized merchandise or imports of agricultural products.

elsewhere.[139] Although there is a Kazakh facility that produces UO_2, there is no evidence that it is capable of meeting U.S. standards.[140] Therefore, U_3O_8 production is the only capacity relevant to this investigation. Since unconcentrated uranium ore falls within the scope of investigation, we based our capacity analysis on Kazakhstan's reported *** million pound capacity to mine U_3O_8,[141] rather than its more limited capacity to mill ore into concentrate.[142] If output continued in the future at 1998 levels, capacity utilization would be *** percent. Therefore, Kazakhstan has unused capacity to produce U_3O_8 that could be available for export to the United States.[143]

For the reasons discussed below, we find that the price for Kazakh uranium is likely to rise in the imminent future. Such an increase is likely to spur the Kazakh producer to operate at or near its full capacity.[144] Respondents claim that the additional production will not be directed to the United States because most Kazakh production already is committed to sales to other countries in 1999 and 2000.[145] However, Kazakhstan historically has exported a large portion of its uranium output to the United States, and the United States currently represents a substantial portion of the world uranium demand that is not covered by an existing contract.[146] Based on these facts, we find that a portion, but not all, of the increase in Kazakh output is likely to be sold in the United States.

---

[139] CR at VII-3, PR at VII-2.

[140] CR at VII-4 - VII-5, PR at VII-2. In addition, because natural UF_6 must be enriched prior to production of UO_2 for consumption in the United States and Kazakhstan has no enrichment facility, any UO_2 produced in Kazakhstan would not fall within Commerce's definition of the subject merchandise.

[141] Government of Kazakhstan Revised Foreign Producer Questionnaire at 6-7. We noted Petitioners' allegation that Kazakh mining capacity will increase by 260,000 pounds in 2000. However, ***. CR at VII-2, n. 4, PR at VII-1, n. 4.

[142] We did not include the *** in our capacity calculation, as there is no record evidence to contradict the Government of Kazakhstan's statement that ***. See CR at VII-2, PR at VII-1.

[143] Kazakhstan does not have a home market for U_3O_8.

[144] In accordance with section 734(j) of the Act, we disregarded the effect of the suspension agreement in determining the likely volume and market penetration in our threat of material injury analysis. Indeed, Kazakhstan has exercised its option to terminate the agreement. Commissioners Crawford and Askey do not join this footnote.

[145] CR at II-23 - II-24, PR at II-12; Testimony of D. Sloan, Hearing Tr. at 147. Nukem provided additional evidence on this point in the form of an affidavit appended to the final comments on information that it submitted on July 8, 1999. That affidavit repeated evidence already on the record and identified ***. The *** and the fact that an individual who had not previously testified before the Commission corroborated evidence already on the record were new information. The staff had mistakenly instructed Nukem that it could file this information with the final comments. Petitioners objected in a telephone call to the staff, and were informed that, pursuant to 19 C.F.R. § 207.30(b), any comments containing new information would be disregarded by the Commission. However, the affidavit was mistakenly circulated to the Commission without an appropriate warning that it contained new information and was included in the record along with other evidence. We find that the information contained in the affidavit was largely repetitive of information already on the record, and the new information was not sufficiently detailed to lend additional weight to the previously submitted information. Therefore, we find that the mistaken inclusion in the record of the Nukem affidavit did not affect the outcome of the determination.

[146] CR at VII-2, PR at VII-1; Testimony of R.M. Stout, Hearing Tr. at 24.

However, even if Kazakhstan exported 100 percent of its production to the U.S. market, the volume of subject imports would still not rise to a significant or injurious level. Assuming that prices for Kazakh uranium rose to the current restricted market price, the *** million pounds of Kazakh U_3O_8 would represent only *** percent of the total value of U.S. uranium consumption.[147] Further, as measured by volume, Kazakh U_3O_8 would represent approximately *** percent of U.S. utilities' projected reactor requirements in 2000 and 2001.[148] [149] We find that either volume is not likely to be injurious.[150] Furthermore, as discussed below, subject imports are not likely to have a significant effect on domestic prices. These considerations lead us to conclude that importation of total Kazakh U_3O_8 output would not result in material injury to the portion of the domestic industry consisting of the concentrators.[151] Therefore, subject imports are not likely to have a material effect on the converter, the enricher, or the fabricators, which are less directly affected by U_3O_8 sales.[152]

We find there is little probability that the subject imports will enter the United States at prices that will have a suppressive or depressive effect on prices of the domestic merchandise. As noted above, the subject imports currently are not having a significant effect on domestic prices.[153] Further, the negative effect of imports of uranium under the Russian HEU Agreement will continue into the future and is likely to increase as the quantity of natural uranium that the Agreement allows into the U.S. market increases.[154] In addition, the termination of the Kazakh Suspension Agreement will eliminate a major distinction between Kazakh uranium and restricted market uranium, which should cause the Kazakh price to rise closer to the restricted market price.[155] In any event, the gap between restricted and unrestricted prices has narrowed

---

[147] See EIA, Uranium Industry Annual 1998 at 21, Table 12 (Apr. 1999), CR & PR, Table IV-4.

[148] CR at II-33, PR at II-18. Measured against utilities' total anticipated purchases, imports from Kazakhstan would represent *** percent in 2000 and *** percent in 2001. Id.

[149] We note that for 2000 and 2001, 86 and 61 percent, respectively, of U.S. utilities anticipated total market requirements are already under contract. CR at II-33, PR at II-18.

[150] Commissioners Crawford and Askey note that during the investigation period, nonsubject imports responded much more quickly, and to a greater degree, to shifts in supply than did sales of the domestic merchandise. Levels of U_3O_8 imports from nonsubject countries fluctuated by a much greater degree during the investigation period than did domestic shipments. Compare CR & PR at D-3 & Table III-1. This suggests that any increase in subject imports is likely to displace nonsubject imports instead of domestic production.

[151] Commissioner Crawford's determination is based on the domestic industry as a whole, and thus she does not join this statement.

[152] No party has alleged that there is a potential for product shifting. We note that ***. ***.

[153] Commissioners Crawford and Askey conclude that the primary determinant of U.S. prices at the current time and in the foreseeable future is the prevailing world market price. CR at II-5, n. 16, PR at II-3, n. 16. All parties cited data on world market prices as an authoritative measurement of price levels in the U.S. market. In addition, all segments of the U.S. industry export 20 percent or more of their total production, which indicates that they are subject to world market forces. See CR & PR, Tables III-1 - III-IV.

[154] See 42 U.S.C. § 2297h-10(b)(5).

[155] Prices for Ukrainian uranium underwent a similar increase after termination of the suspension agreement with that country. Testimony of T. Wilner, Hearing Tr. at 254.

since the implementation of the suspension agreements.[156] Therefore, we find that differences between the average price levels of subject merchandise and the domestic like product are unlikely to result in significant underselling if the volume of subject imports increases. Finally, even if we were to speculate that the full volume of Kazakh production would be exported to the United States, that amount would not be large enough to have any significant effect on prices.

The industry's aggregate research and development expenses increased from 1996 to 1997, then stayed relatively flat from 1997 to 1998. These expenses were *** percent lower in the first quarter of 1998 than in the same period in 1997. ***.[157] Therefore, while industry R&D levels are likely to decrease in the imminent future, subject imports will have no effect on this development. Finally, U.S. inventories of subject merchandise, which are the final statutory threat factor, do not threaten the domestic industry because the importer does not hold inventories of subject merchandise in the United States.[158]

For the reasons discussed above, we find that the domestic industry producing uranium is not threatened with material injury by reason of the subject imports from Kazakhstan.

CONCLUSION

For the foregoing reasons, we determine that the domestic industry producing uranium is not materially injured or threatened with material injury by reason of LTFV imports of uranium from Kazakhstan.

---

[156] See Petitioners' Posthearing Brief, Tab. 6.A.

[157] CR at II-18, PR at II-10.

[158] CR at VII-5, PR at VII-2 & Table VII-1.