

UNITED STATES INTERNATIONAL TRADE COMMISSION

Polychloroprene Rubber From Japan  
Investigation No. AA1921-129 (Review)

DETERMINATION AND VIEWS OF THE COMMISSION  
(USITC Publication No. 3212, July 1999)

# UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigation No. AA1921-129 (Review)

## POLYCHLOROPRENE RUBBER FROM JAPAN

### DETERMINATION

On the basis of the record<sup>1</sup> developed in the subject five-year review, the United States International Trade Commission determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. § 1675(c)) (the Act), that revocation of the antidumping finding on polychloroprene rubber from Japan would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.<sup>2</sup>

### BACKGROUND

The Commission instituted this review on August 3, 1998 (63 F.R. 41282) and determined on November 5, 1998 that it would conduct a full review (63 F.R. 63747, November 16, 1998). Notice of the scheduling of the Commission's review and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* on December 16, 1998 (63 F.R. 69306). The hearing was held in Washington, DC, on June 3, 1999, and all persons who requested the opportunity were permitted to appear in person or by counsel.

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

<sup>2</sup> Commissioners Crawford and Askey dissenting.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on July 26, 1999. The views of the Commission are contained in USITC Publication 3212 (July 1999), entitled *Polychloroprene Rubber from Japan (Inv. No. AA1921-129 (Review))*

By order of the Commission.

Donna R. Koehnke  
Secretary

Issued:

## VIEWS OF THE COMMISSION

Based on the record in this five-year review, we determine under section 751(c) of the Tariff Act of 1930, as amended (“the Act”), that revocation of the antidumping finding covering polychloroprene rubber from Japan would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.<sup>1</sup>

### I. BACKGROUND

In October 1973, the Tariff Commission determined that an industry in the United States was being injured by reason of imports of polychloroprene rubber from Japan that were being sold at less than fair value (“LTFV”).<sup>2</sup> The Treasury Department (“Treasury”) published an antidumping finding on December 6, 1973.<sup>3</sup> The Commission in a related investigation in 1989 found no reasonable indication that the U.S. industry was materially injured or threatened with material injury by reason of imports of polychloroprene rubber from France and Germany that were alleged to be sold at LTFV.<sup>4</sup> The Commission instituted this five-year review with respect to polychloroprene rubber from Japan on August 3, 1998.<sup>5</sup>

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

In this review, the Commission received two responses to its notice of institution. One response was received from DuPont Dow Elastomers L.L.C. (“DuPont Dow”), a U.S. producer and importer of the subject merchandise. The second response was received from Denki Kagaku Kogyo Kabushiki Kaisha

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<sup>1</sup> Commissioner Crawford and Commissioner Askey dissenting. See Dissenting Views of Commissioners Carol T. Crawford and Thelma J. Askey. They join in Sections I, II, and IIIA-B of these views, except as otherwise noted.

<sup>2</sup> Polychloroprene Rubber From Japan, Inv. No. AA1921-129, USITC Pub. 622 (Oct. 1973).

<sup>3</sup> 38 Fed. Reg. 33593 (Dec. 6, 1973).

<sup>4</sup> Polychloroprene From France and The Federal Republic of Germany, Inv. Nos. 731-TA-446 and 447 (Preliminary), USITC Pub. 2233 (Nov. 1989). The petition in the 1989 case was brought by E.I. du Pont de Nemours & Co., the petitioner in the original investigation of polychloroprene rubber from Japan and a partner in the joint venture that owns DuPont Dow Elastomers L.L.C., a domestic interested party in this review.

<sup>5</sup> 63 Fed. Reg. 41284 (Aug. 3, 1998).

<sup>6</sup> See 19 C.F.R. § 207.62(a); 63 Fed. Reg. 30599, 30602-05 (June 5, 1998).

("Denka"), a foreign producer/exporter of the subject merchandise. Denka responded through its wholly-owned New York subsidiary, which Denka had appointed to represent it in the Commission proceeding.<sup>7</sup> Both of these parties also filed comments on the adequacy of the responses to the notice of institution.

On November 5, 1998, the Commission determined that the individual interested party responses to its notice of institution were adequate and that both the domestic interested party group response and the respondent interested party group response were adequate.<sup>8</sup> The Commission consequently determined to conduct a full five-year review.<sup>9</sup>

Shortly after the Commission solicited questionnaire responses, Denka informed the Commission that it would no longer participate in the review and would not respond to the Commission's questionnaires.<sup>10</sup> DuPont Dow, the sole remaining interested party who is a party to the review, appeared at the hearing and submitted prehearing and posthearing briefs.

## II. DOMESTIC LIKE PRODUCT AND INDUSTRY

### A. Domestic Like Product

In making its determination under section 751(c), the Commission defines the "domestic like product" and the "industry."<sup>11</sup> The Act defines "domestic like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle."<sup>12</sup> In its final five-year review determination, the Department of Commerce ("Commerce") defined the subject merchandise as polychloroprene rubber, an oil resistant synthetic rubber also known as polymerized chlorobutadiene or neoprene, currently classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) as items 4002.42.00, 4002.49.00, 4003.00.00, 4462.15.21 [sic] and 4462.00.00 [sic].<sup>13</sup>

The product subject to Commerce's scope is an elastomer resulting from the polymerization of

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<sup>7</sup> Denka, by letter of August 31, 1998, notified the Commission that it had "nominated Denka Corporation [in New York] ('the Company') as contact point with the Commission and also [had] duly authorized the representative of the Company to act, appear and plead and sign, file and verify replies, rejoinders, communication and other documents in respect of the Review as may be deemed necessary." Letter from Hiromitsu Niigaki, Denka, to Donna R. Koehnke (Aug. 31, 1998).

<sup>8</sup> See Vote Sheet for Action Request INV-98-505 (Nov. 5, 1998).

<sup>9</sup> See 63 Fed. Reg. 69306 (Dec. 16, 1998).

<sup>10</sup> Letter from Donald Cameron of Kay, Scholer, Fierman, Hays & Handler to Donna R. Koehnke (March 15, 1999). Prior to this, Denka's New York subsidiary had responded, by letter of January 20, 1999, to a letter of January 6, 1999 from Commission staff requesting information on imports of the subject merchandise. Letter from Toichi Tagaki, Denka Corp., New York, to John Giamalva (Jan. 20, 1999).

<sup>11</sup> 19 U.S.C. § 1677(4)(A).

<sup>12</sup> 19 U.S.C. § 1677(10). See Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int'l Trade 1996); Torrington Co. v. United States, 747 F. Supp. 744, 748-49 (Ct. Int'l Trade 1990), aff'd, 938 F.2d 1278 (Fed. Cir. 1991). See also S. Rep. No. 96-249 at 90-91 (1979).

<sup>13</sup> 63 Fed. Reg. 67656, 67657 (Dec. 8, 1998).

chloroprene (2-chloro-1, 3 butadiene) monomer and is available in both dry polymers and liquid (aqueous) latex grades.<sup>14</sup>

The starting point of our like product analysis in a five-year review is the like product definition in the Commission's original determination. Because the Antidumping Act, 1921, did not contain a "like product" provision, the Commission did not make a like product determination *per se* in its original determination. Instead, it stated that the "domestic industry" at issue consisted "of the facilities in the United States devoted to the production of polychloroprene rubber."<sup>15</sup> In the context of current statutory terminology, the Commission effectively treated all polychloroprene rubber within the scope of the original investigation as a single domestic like product. We find no circumstances in this review that would warrant a different definition.

In this review, we have considered the Commission's like product determination in the related 1989 investigation of imports of polychloroprene rubber from France and Germany.<sup>16</sup> The scope of imports subject to that investigation was the same as the scope determined by Commerce in the instant review.<sup>17</sup> In the 1989 investigation, the Commission considered four like product issues: 1) whether the like product should include synthetic elastomers other than polychloroprene; 2) whether the dry and latex forms of polychloroprene should be considered separate like products; 3) whether different types and grades of dry polychloroprene should be considered separate like products; and 4) whether the like product should include compounded polychloroprene.<sup>18</sup> The Commission decided against either defining the domestic like product more broadly than the subject merchandise or finding several like products.<sup>19</sup>

While our prior findings are not binding,<sup>20</sup> we find no basis in the record of this review for varying the like product definition. The record does not show significant changes in the product at issue since either the original or the 1989 investigation so as to warrant the Commission revisiting the like product issue in this review. No party has argued for a like product definition different from the domestic products that correspond to the scope of imported merchandise defined by Commerce, and the record evidence does not indicate that a different definition is warranted.

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<sup>14</sup> Confidential Staff Report ("CR") at I-9, Public Staff Report ("PR") at I-6.

<sup>15</sup> USITC Pub. 622 at 3.

<sup>16</sup> USITC Pub. 2233.

<sup>17</sup> 54 Fed. Reg. 42970, 42971 (Oct. 19, 1989).

<sup>18</sup> USITC Pub. 2233 at 3.

<sup>19</sup> USITC Pub. 2233 at 4-9.

<sup>20</sup> See, e.g., *NEC Corp. v. Department of Commerce*, 36 F. Supp. 2d 380, 384 (Ct. Int'l Trade 1998); *Nippon Steel Corp. v. United States*, 19 CIT 450, 455 (1995); *Torrington Co. v. Untied States*, 747 F. Supp. 744, 749, n.3 (Ct Int'l Trade 1990), *aff'd*, 938 F.2d 1278 (Fed. Cir. 1991) ("every like product determination 'must be based on the particular record at issue' and the 'unique facts of each case'"); *Citrosuco Paulista, S.A. v. United States*, 704 F. Supp. 1075, 1088 (Ct. Int'l Trade 1988). However, in the event that the Commission finds a different domestic like product or products than it has in prior investigations, it should provide a reasoned explanation of its decision. *Id.*

Accordingly, for purposes of this review, we determine that there is a single domestic like product consisting of all polychloroprene rubber corresponding to Commerce's scope definition.

B. Domestic Industry

Section 771(4)(A) of the Act defines the relevant industry as the "domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."<sup>21</sup> In defining the domestic industry, the Commission's general practice has been to include in the industry producers of all domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market, provided that adequate production-related activity is conducted in the United States.<sup>22</sup>

In defining the domestic industry in this review, we considered whether any producers of the domestic like product should be excluded from the domestic industry pursuant to the related parties provision in section 771(4)(B) of the Act.<sup>23</sup> That provision of the statute allows the Commission, if appropriate circumstances exist, to exclude from the domestic industry producers that are related to an exporter or importer of subject merchandise, or which are themselves importers. Exclusion of such a producer is within the Commission's discretion based upon the facts presented in each case.<sup>24</sup>

A related parties issue arises with respect to DuPont Dow, the only current producer of the domestic like product.<sup>25</sup> DuPont Dow and a Japanese company operate a joint venture in Japan that manufactures polychloroprene rubber.<sup>26</sup> DuPont Dow exports polychloroprene rubber from Japan to the United States through another joint venture with the same Japanese company.<sup>27</sup> DuPont Dow owns \*\*\*.<sup>28</sup> Consequently, DuPont Dow fits the related party definition under the statute.

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<sup>21</sup> 19 U.S.C. § 1677(4)(A).

<sup>22</sup> See, e.g., United States Steel Group v. United States, 873 F. Supp. 673, 682-83 (Ct. Int'l Trade 1994), aff'd, 96 F.3d 1352 (Fed. Cir. 1996).

<sup>23</sup> The report prepared in connection with the original determination did not discuss or present any data pertaining to the question of related parties, in that the Antidumping Act, 1921, did not have a related parties provision.

<sup>24</sup> See, e.g., Torrington Co. v. United States, 790 F. Supp. 1161, 1168 (Ct. Int'l Trade 1992), aff'd without opinion, 991 F.2d 809 (Fed. Cir. 1993); Sandvik AB v. United States, 721 F. Supp. 1322, 1331-32 (Ct. Int'l Trade 1989), aff'd without opinion, 904 F.2d 46 (Fed. Cir. 1990); Empire Plow Co. v. United States, 675 F. Supp. 1348, 1352 (Ct. Int'l Trade 1987).

<sup>25</sup> CR at I-13, II-1, PR at I-9, II-1. The Bayer Corporation ceased producing polychloroprene rubber in the United States in 1998 and did not import subject merchandise during the 1997-98 period for which the Commission sought information in this review. CR at II-1, PR at II-1.

<sup>26</sup> CR at I-13-14, PR at I-9.

<sup>27</sup> CR at I-13-14, PR at I-9.

<sup>28</sup> Letter from DuPont Dow to Donna R. Koehnke (Oct. 7, 1998).

DuPont Dow reported that \*\*\*.<sup>29</sup> DuPont Dow estimated that in 1997\*\*\*.<sup>30</sup>

DuPont Dow accounted for the vast majority of domestic production of the like product during 1997 and the first half of 1998, and became the only domestic producer in July 1998 when the Bayer Corporation (“Bayer”) closed its U.S. plant.<sup>31</sup> The small amount of subject merchandise imported by DuPont Dow through its Japanese joint venture suggests that DuPont Dow’s interests lie principally in domestic production, a factor we have considered in deciding that appropriate circumstances do not exist to exclude a related party.<sup>32</sup> Accordingly, we find that appropriate circumstances do not exist to exclude DuPont Dow as a related party in this review and conclude that the domestic industry consists of all domestic producers of polychloroprene rubber, which currently is comprised solely of DuPont Dow.

### **III. REVOCATION OF THE FINDING ON POLYCHLOROPRENE RUBBER WOULD BE LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF MATERIAL INJURY WITHIN A REASONABLY FORESEEABLE TIME<sup>33</sup>**

#### **A. Legal Standard**

In a five-year review conducted under section 751(c) of the Act, Commerce will revoke an antidumping finding unless: (1) it makes a determination that dumping is likely to continue or recur, and (2) the Commission makes a determination that revocation of the finding “would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.”<sup>34</sup> The Uruguay Round Agreements Act (“URAA”) Statement of Administrative Action (“SAA”) states that “under the likelihood standard, the Commission will engage in a counter-factual analysis; it must decide the likely impact in the reasonably foreseeable future of an important change in the status quo -- the revocation [of the finding] . . . and the elimination of its restraining effects on volumes and prices of imports.”<sup>35</sup> Thus, the likelihood standard is prospective in nature.<sup>36</sup> The statute states that “the Commission shall consider that the effects

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<sup>29</sup> CR at I-14, PR at I-9.

<sup>30</sup> Letter from DuPont Dow to Donna R. Koehnke (Oct. 7, 1998).

<sup>31</sup> CR at II-1, III-5, PR at II-1, III-1.

<sup>32</sup> See, e.g., Sorbitol From France, Inv. No. 731-TA-44 (Review), USITC Pub. 3165 at 6 (March 1999).

<sup>33</sup> Commissioner Crawford and Commissioner Askey determine that revocation of the finding on polychloroprene rubber would not be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time, but otherwise join in Sections I, II, and IIIA-B of these views.

<sup>34</sup> 19 U.S.C. § 1675a(a).

<sup>35</sup> SAA, H.R. Rep. No. 103-316, Vol. I, at 883-84 (1994). The SAA states that “[t]he likelihood of injury standard applies regardless of the nature of the Commission’s original determination (material injury, threat of material injury, or material retardation of an industry).” SAA at 883.

<sup>36</sup> While the SAA states that “a separate determination regarding current material injury is not necessary,” it indicates that “the Commission may consider relevant factors such as current and likely continued depressed shipment levels and current and likely continued prices for the domestic like product in the U.S. market in making its determination of the likelihood of continuation or recurrence of material injury if the order is revoked.” SAA at 884.

of revocation . . . may not be imminent, but may manifest themselves only over a longer period of time.”<sup>37</sup> According to the SAA, a “‘reasonably foreseeable time’ will vary from case-to-case, but normally will exceed the ‘imminent’ time frame applicable in a threat of injury analysis [in antidumping and countervailing duty investigations].”<sup>38 39</sup>

Although the standard in five-year reviews is not the same as the standard applied in original antidumping or countervailing duty investigations, it contains some of the same fundamental elements. The statute provides that the Commission is to “consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked.”<sup>40</sup> It directs the Commission to take into account its prior injury determination, whether any improvement in the state of the industry is related to the order under review, and whether the industry is vulnerable to material injury if the order is revoked.<sup>41 42</sup>

For the reasons stated below, we determine that revocation of the antidumping finding on polychloroprene rubber from Japan would be likely to lead to continuation or recurrence of material injury to the domestic polychloroprene rubber industry within a reasonably foreseeable time.<sup>43 44</sup>

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<sup>37</sup> 19 U.S.C. § 1675a(a)(5).

<sup>38</sup> SAA at 887. Among the factors that the Commission should consider in this regard are “the fungibility or differentiation within the product in question, the level of substitutability between the imported and domestic products, the channels of distribution used, the methods of contracting (such as spot sales or long-term contracts), and lead times for delivery of goods, as well as other factors that may only manifest themselves in the longer term, such as planned investment and the shifting of production facilities.” *Id.*

<sup>39</sup> In analyzing what constitutes a reasonably foreseeable time, Commissioners Crawford and Koplán examine all the current and likely conditions of competition in the relevant industry. They define “reasonably foreseeable time” as the length of time it is likely to take for the market to adjust to a revocation. In making this assessment, they consider all factors that may accelerate or delay the market adjustment process including any lags in response by foreign producers, importers, consumers, domestic producers, or others due to: lead times; methods of contracting; the need to establish channels of distribution; product differentiation; and any other factors that may only manifest themselves in the longer term. In other words, their analysis seeks to define “reasonably foreseeable time” by reference to current and likely conditions of competition, but also seeks to avoid unwarranted speculation that may occur in predicting events into the more distant future.

<sup>40</sup> 19 U.S.C. § 1675a(a)(1).

<sup>41</sup> 19 U.S.C. § 1675a(a)(1). The statute further provides that the presence or absence of any factor that the Commission is required to consider shall not necessarily give decisive guidance with respect to the Commission’s determination. 19 U.S.C. § 1675a(a)(5). While the Commission must consider all factors, no one factor is necessarily dispositive. SAA at 886.

<sup>42</sup> Section 752(a)(1)(D) of the Act directs the Commission to take into account in five-year reviews involving antidumping proceedings “the findings of the administrative authority regarding duty absorption.” 19 U.S.C. § 1675a(a)(1)(D). Commerce stated in its five-year review determination that it has not issued any duty absorption findings in this matter. *See* 63 Fed. Reg. at 67658.

<sup>43</sup> Commissioner Crawford and Commissioner Askey dissenting. Their dissenting views follow.

<sup>44</sup> Chairman Bragg and Commissioners Koplán and Askey note that the statute authorizes the Commission to take adverse inferences in five-year reviews, but emphasize that such authorization does not relieve the Commission of its obligation to consider the record evidence as a whole in making its determination. “[T]he  
(continued...)

B. Conditions of Competition

In evaluating the likely impact of the subject imports on the domestic industry if a finding is revoked, the statute directs the Commission to evaluate all relevant economic factors “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>45</sup> In performing our analysis under the statute, we have taken into account the following conditions of competition in the U.S. market for polychloroprene rubber.

Polychloroprene rubber is produced in several grades for a variety of end uses.<sup>46</sup> Within each grade and application, U.S. and Japanese polychloroprene rubber are highly substitutable products that compete on the basis of price.<sup>47 48</sup> While Japanese production methods differ from those of the domestic producers, the same grades of polychloroprene can be manufactured by all suppliers.<sup>49</sup>

The record also reveals that worldwide demand for polychloroprene rubber declined from 252,000 metric tons in 1988 to 244,000 metric tons in 1997.<sup>50</sup> In North America, consumption fell from 86,000 metric tons in 1988 to 72,000 metric tons in 1997.<sup>51</sup> And in the United States, consumption decreased by \*\*\* percent in volume and \*\*\* percent in value from 1997 to 1998.<sup>52</sup>

These declines in demand are expected to continue for the foreseeable future<sup>53</sup> due primarily to the

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<sup>44</sup> (...continued)

Commission balances all record evidence and draws reasonable inferences in reaching its determinations.” SAA at 869 [emphasis added]. Practically speaking, when only one side has participated in a five-year review, much of the record evidence is supplied by that side, although that data is supplemented with publicly available information. We generally give credence to the facts supplied by the participating parties and certified by them as true, but base our decision on the evidence as a whole, and do not automatically accept the participating parties’ suggested interpretation of the record evidence. Regardless of the level of participation and the interpretations urged by participating parties, the Commission is obligated to consider all evidence relating to each of the statutory factors and may not draw adverse inferences that render such analysis superfluous. “In general, the Commission makes determinations by weighing all of the available evidence regarding a multiplicity of factors relating to the domestic industry as a whole and by drawing reasonable inferences from the evidence it finds most persuasive.” Id.

<sup>45</sup> 19 U.S.C. § 1675a(a)(4).

<sup>46</sup> CR at I-10-11, PR at I-7-8.

<sup>47</sup> CR at II-21-22, PR at II-9-10; Bayer Posthearing Statement at 3 (June 14, 1999).

<sup>48</sup> We also find that quality of product and reliability of supply, along with price, are important factors in purchasing decisions. CR at II-20, PR at II-9.

<sup>49</sup> Letter from Toichi Tagaki, Denka Corp., New York, to John Giamalva (Jan. 20, 1999).

<sup>50</sup> CR at II-15, PR at II-6. The percentage of world synthetic rubber consumption attributable to polychloroprene rubber decreased from 3.7 percent to 2.8 percent over the same period. CR at II-15-16, PR at II-6.

<sup>51</sup> Worldwide Rubber Statistics, IISRP; see CR at II-16, PR at II-6.

<sup>52</sup> CR at I-16, PR at I-11.

<sup>53</sup> CR at II-17, PR at II-7.

shift to functionally competitive products by polychloroprene rubber customers.<sup>54</sup> In the automotive sector, synthetic rubber elastomers are expected to continue to gain market share because these materials are better able to withstand increasing under-the-hood operating temperatures.<sup>55</sup> Collectively, technological requirements, more restrictive environmental laws, and less expensive alternatives leading to substitution away from polychloroprene rubber are expected to continue to decrease worldwide polychloroprene rubber demand.<sup>56</sup> Nevertheless, the record reveals that the industry worldwide has excess production capacity.<sup>57</sup>

We also recognize that polychloroprene rubber facilities cannot manufacture any other type of product and require a significant level of continuing investment.<sup>58</sup> DuPont Dow, the world's largest producer of polychloroprene rubber, has completed a major modification of its manufacturing process since the original investigation which improved the safety and efficiency of its process and increased its yields at lower costs.<sup>59</sup> DuPont Dow has also \*\*\* since 1973 and expects \*\*\*.<sup>60</sup>

As noted earlier, Bayer closed its U.S. plant, with a capacity of 27,000 metric tons per year, at the end of July 1998, making DuPont Dow the sole domestic producer of polychloroprene rubber.<sup>61</sup> Bayer indicated it ceased its U.S. production because \*\*\*.<sup>62</sup>

Nonsubject imports increased in 1998 and imports from \*\*\*.<sup>63</sup> The U.S. market share held by U.S. producers decreased by \*\*\* percentage points in terms of volume from 1997 to 1998, while the market share held by nonsubject imports increased by exactly the same amount and the market share held by subject imports remained constant at \*\*\* percent each year.<sup>64</sup> The overall level of nonsubject imports has increased significantly since the original investigation.<sup>65</sup>

Another condition of competition we have considered is the increasing level and unit volumes of U.S. exports of polychloroprene rubber. U.S. producers increased their export shipments of

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<sup>54</sup> DuPont Dow Prehearing Brief at 9.

<sup>55</sup> CR at I-12-13, PR at I-9.

<sup>56</sup> CR at II-16, PR at II-7. Bayer predicts a \*\*\* percent annual decline in worldwide demand for polychloroprene rubber, while DuPont Dow estimates that the decline in worldwide demand will slow to \*\*\* percent annually since most of the obvious substitutions for polychloroprene rubber have already taken place. While DuPont Dow forecasts a slow erosion of demand for polychloroprene rubber, it also sees a base market that could continue for 30 years or more. CR at II-16-17, PR at II-7.

<sup>57</sup> Table IV-5, CR at IV-6, PR at IV-4.

<sup>58</sup> CR at I-11, II-3-4, PR at I-8, II-2.

<sup>59</sup> CR at I-12, PR at I-9.

<sup>60</sup> CR at II-3, PR at II-2.

<sup>61</sup> CR at II-1, PR at II-1. See also Response of Denka to Notice of Institution at 4.

<sup>62</sup> CR at III-2, PR at III-1.

<sup>63</sup> CR at II-1, PR at II-1. See also Bayer Posthearing Statement at I-2 (June 14, 1999).

<sup>64</sup> CR at I-17, PR at I-11.

<sup>65</sup> Table I-1, CR at I-4, PR at I-3.

polychloroprene rubber from 1997 to 1998, although the volume of exports at the time of the original investigation was \*\*\*.<sup>66</sup> While U.S. producers' U.S. shipments decreased \*\*\* percent in quantity from 1997 to 1998, their export shipments, which accounted for \*\*\* percent of the volume of total shipments in 1998, increased by \*\*\* percent.<sup>67</sup> U.S. producers' average unit selling prices for exports were considerably below their average unit selling prices for their domestic trade sales, and consequently, due to the significant volume of exports, may have had an adverse impact on their profitability.<sup>68</sup> At the same time, U.S. producers state it would be difficult to shift sales between the United States and other markets in the short term, i.e., within a year,<sup>69</sup> and predict the current level of exports to \*\*\*.<sup>70</sup>

Based on the record evidence, we find that these conditions of competition in the polychloroprene rubber market are not likely to change significantly in the reasonably foreseeable future. Accordingly, for purposes of this review, we find that current conditions in the polychloroprene rubber market provide us with a reasonable basis from which to assess the likely effects of revocation of the antidumping finding within a reasonably foreseeable time.

### C. Likely Volume of Subject Imports

In evaluating the likely volume of subject imports if the finding under review is revoked, the Commission is directed to consider whether the likely volume would be significant either in absolute terms or relative to production or consumption in the United States.<sup>71</sup> In doing so, the Commission must consider "all relevant economic factors," including four enumerated factors: (1) any likely increase in production capacity or existing unused production capacity in the exporting country; (2) existing inventories of the subject merchandise, or likely increases in inventories; (3) the existence of barriers to the importation of the subject merchandise into countries other than the United States; and (4) the potential for product shifting<sup>72</sup> if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.<sup>73</sup>

The statute provides that when an interested party withholds information that has been requested by the Commission, the Commission may "use the facts otherwise available in reaching" its determination.<sup>74</sup> As noted above, Denka, the sole respondent interested party to respond to the

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<sup>66</sup> Table I-1, CR at I-4, PR at I-3.

<sup>67</sup> CR at III-2, PR at III-1.

<sup>68</sup> CR at III-12, PR at III-3.

<sup>69</sup> CR at II-5, PR at II-3. DuPont Dow states, for example, that European contracts are usually for \*\*\* or more and that \*\*\*. Id.

<sup>70</sup> DuPont Dow Prehearing Brief at 31.

<sup>71</sup> 19 U.S.C. § 1675a(a)(2).

<sup>72</sup> Product shifting is not a relevant factor in our analysis given that the production facilities and processes used to manufacture polychloroprene rubber are unique to that product and are not used to manufacture other products. CR at I-11, II-3-4, PR at I-8, II-2.

<sup>73</sup> 19 U.S.C. § 1675a(a)(2)(A)-(D).

<sup>74</sup> 19 U.S.C. § 1677e(a). The statute permits the Commission to use adverse inferences in selecting from

(continued...)

Commission's notice of institution, later withdrew from the proceeding without responding to the Commission's questionnaire. The record contains only limited data provided by foreign producers: Denka's response to the notice of institution and comments on adequacy, a letter from Denka's New York subsidiary in response to questions from Commission staff, and the questionnaire response of DuPont Dow's joint venture in Japan. Accordingly, in analyzing volume and price, we have relied primarily on the facts available in this review, which consist mainly of the record in the original investigation, information provided by DuPont Dow, and information collected by Commission staff since the institution of the review, including public data published by the International Institute of Synthetic Rubber Producers ("IISRP").<sup>75</sup>

Imports of polychloroprene rubber from Japan trebled between 1968 and 1972, before the antidumping finding was imposed,<sup>76</sup> and then ceased after the finding was in place.<sup>77</sup> The cessation of imports appears to reflect the remedial effects of the order.<sup>78</sup>

Several factors support the conclusion that subject import volumes are likely to be significant if the finding is revoked. First, despite a steady drop in global demand for polychloroprene rubber, Japanese producers have significantly increased their production capacity, whereas total non-Japanese capacity has declined. We have considered both the IISRP public data on Japanese production capacity and DuPont Dow's information that estimates Japanese production capacity to be higher than does the public data.<sup>79</sup> DuPont Dow reports Denka's total production capacity at approximately \*\*\*<sup>80</sup> whereas IISRP data show Denka's production capacity at 45,000 metric tons from 1988 to 1990, and at 48,000 metric tons from 1991 to 1998.<sup>81</sup> DuPont Dow contends that Denka and Tosoh Corporation ("Tosoh"),

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<sup>74</sup> (...continued)

among the facts otherwise available when an interested party has failed to cooperate by acting to the best of its ability to comply with a request for information. 19 U.S.C. § 1677e(b). Such adverse inferences may include selecting from the record of the original determination and from any other information placed on the record. Id.

<sup>75</sup> See CR at IV-5, PR at IV-2.

<sup>76</sup> USITC Pub. 622 at 3.

<sup>77</sup> CR at II-6, PR at II-3.

<sup>78</sup> Chairman Bragg notes in this regard that the SAA states that "[i]f the Commission finds that pre-order conditions are likely to recur, it is reasonable to conclude that there is likelihood of continuation or recurrence of injury." SAA at 884.

<sup>79</sup> CR at II-6-7, IV-5, PR at II-3-4, IV-2.

<sup>80</sup> CR at IV-5, PR at IV-2-3.

<sup>81</sup> Table IV-4, CR at IV-5, PR at IV-3. We note that IISRP data show total Japanese production capacity, in metric tons, as follows: 85,000 (1988); 89,000 (1989); 92,000 (1990-91); and 88,000 (1993-94, 1996-97). Table IV-4, CR at IV-5, PR at IV-3.

Denka reported the 1998 capacity of the Japanese producers, based on IISRP data, as follows (in metric tons): \*\*\*. Response of Denka to Notice of Institution at 3 (Sept. 18, 1998).

two Japanese producers of subject merchandise, \*\*\* their production capacity by almost \*\*\* percent from 1977 to 1999, whereas total non-Japanese capacity \*\*\* during the same period.<sup>82 83</sup>

We further note that the Japanese producers must export 60 percent of their production to maintain full capacity utilization given that the Japanese producers have increased significantly their capacity.<sup>84</sup> In the face of declining Asian demand in recent years, Japanese exports to Europe \*\*\*, and their exports to the Americas \*\*\* during the first four months of 1998 as compared with the same period of 1997.<sup>85</sup> As the new polymer substitutes increasingly gain a foothold in the Japanese market, as they have in the United States, Japanese demand is expected to decline even further.<sup>86</sup> In response, the Japanese producers have shifted large quantities of their exports to new markets in a short period of time. We note in addition that the higher average prices in the U.S. market for polychloroprene rubber, as compared with other markets,<sup>87</sup> provide an incentive for the Japanese producers to shift exports to the United States should the finding be revoked.

The Japanese producers' ability to shift polychloroprene rubber exports quickly to new regions, as explained above, coupled with apparent excess capacity, indicates that they are well-equipped to commence significant exports to the United States upon revocation of the finding. This fact viewed in light of their behavior at the time of the original investigation, when subject imports trebled from 1968 to 1972,<sup>88</sup> suggests that they would behave similarly if the finding were revoked. Accordingly, we find that the current low market share of subject imports is a result of the restraining effects of the finding rather than the Japanese producers' unwillingness or inability to ship significant volumes to the United States. We further find that subject import volumes would increase to significant levels in the event of revocation.

#### D. Likely Price Effects of Subject Imports

In evaluating the likely price effects of subject imports if the antidumping finding is revoked, the Commission is directed to consider whether there is likely to be significant underselling by the subject imports as compared with the domestic like product and whether the subject imports are likely to enter

the United States at prices that would have a significant depressing or suppressing effect on the prices of

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<sup>82</sup> CR at II-6, PR at II-3.

<sup>83</sup> We take an adverse inference against Denka in selecting from the facts otherwise available and rely upon the higher Japanese production capacity figures provided by the U.S. producer. See 19 U.S.C. § 1677e(b). We find that Denka has failed to cooperate to the best of its ability, and that the unrefuted evidence provided by the U.S. producer that is contrary to Denka's interests is credible, particularly given DuPont Dow's extensive participation in the Japanese market through its affiliation with its joint venture in Japan that produces polychloroprene rubber and has knowledge of the competitive conditions in that market. See CR at II-7, IV-5, PR at II-3-4, IV-2; DuPont Dow Posthearing Brief at 3-4.

<sup>84</sup> CR at IV-4, PR at IV-2; hearing transcript at 16.

<sup>85</sup> CR at II-7, PR at II-4; DuPont Dow Prehearing Brief at 13-15.

<sup>86</sup> Hearing transcript at 34-35, 81.

<sup>87</sup> CR at V-6, PR at V-3.

<sup>88</sup> USITC Pub. 622 at 3.

domestic like products.<sup>89</sup>

In the original investigation, the Commission found that the subject imports consistently undersold the domestic product and had a growing adverse impact on prices in the domestic market.<sup>90</sup> We further note that price is a significant factor in U.S. purchasing decisions and that the Japanese product is readily substitutable for the domestic like product within most applications.<sup>91</sup>

We note that U.S. prices for polychloroprene rubber have remained relatively constant during the past two calendar years<sup>92</sup> and that the domestic industry's profitability is dependent on its ability to maintain high capacity utilization and prices near current levels.<sup>93</sup> Because substitution for polychloroprene rubber by alternative synthetic elastomers is driven by factors other than just price, such as performance and environmental requirements, the U.S. industry estimates that it can benefit only marginally by lowering its costs so as to recapture or maintain market share with respect to the alternative products.<sup>94</sup>

We note further that nonsubject imports to the United States increased in terms of both volume and value from 1997 to 1998, which has put additional downward pressure on domestic prices.<sup>95</sup>

There is no evidence regarding Japanese prices in the U.S. market due to the virtual cessation of imports from Japan since the 1973 finding was imposed.<sup>96</sup> However, the domestic industry provided evidence indicating that Japanese producers likely would aggressively price their product in the U.S. market if the finding were revoked. We rely generally for our price analysis, as we did for our volume analysis, on credible information provided by the U.S. producers that has not been refuted by the Japanese producers.<sup>97</sup> In this regard, we find, as noted previously, that Japanese subject merchandise is highly substitutable for the domestic product.<sup>98</sup>

With respect to relative prices, in Canada, polychloroprene price levels reportedly average \*\*\*

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<sup>89</sup> 19 U.S.C. § 1675a(a)(3). The SAA states that “[c]onsistent with its practice in investigations, in considering the likely price effects of imports in the event of revocation and termination, the Commission may rely on circumstantial, as well as direct, evidence of the adverse effects of unfairly traded imports on domestic prices.” SAA at 886.

<sup>90</sup> USITC Pub. 622 at 4.

<sup>91</sup> CR at II-21-22, PR at II-9-10; Bayer Posthearing Statement at 3 (June 14, 1999).

<sup>92</sup> CR at V-15-18, PR at V-5-6.

<sup>93</sup> DuPont Dow Posthearing Brief at Part III, p. 3.

<sup>94</sup> CR at II-10-11, PR at II-5; DuPont Dow Posthearing Brief at Part III, p. 5.

<sup>95</sup> Table I-1, CR at I-4, PR at I-3.

<sup>96</sup> CR at II-6, PR at II-3.

<sup>97</sup> As we did in our volume analysis, we take an adverse inference against Denka in selecting from the facts otherwise available for our price analysis. We choose to rely on this information as evidence to support the conclusion that Denka would undersell the U.S. producers by significant margins. See n.83, supra.

<sup>98</sup> CR at II-21-22, PR at II-9-10; Bayer Posthearing Statement at 3 (June 14, 1999).

those in the United States \*\*\* as a result of the growing Japanese presence in that market.<sup>99</sup> The Japanese producers' market share in Canada is estimated \*\*\*.<sup>100</sup> Bayer confirms that the experience of its affiliated company in the Canadian market shows that prices for polychloroprene rubber during 1997 and 1998 were \*\*\* percent below the equivalent U.S. prices and that imports from Japan were a significant factor in the market price differential.<sup>101</sup> Polychloroprene rubber prices in one Brazilian market segment have also allegedly dropped 17 percent in the past two years as a result of Japanese pricing.<sup>102 103</sup> The Japanese producers' current pattern of \*\*\* is indicative of their likely behavior in the U.S. market if the finding were revoked.<sup>104</sup>

Based on the evidence in the record, we find it likely that the Japanese producers would offer attractively low prices to U.S. purchasers to regain market share should the finding be revoked.<sup>105</sup> As demand continues to decline and the domestic industry faces greater competition from nonsubject imports, the increased and significant volumes of subject imports that would be added to the supply of polychloroprene rubber in the U.S. market were the finding to be revoked would likely have significant depressing or suppressing effects on prices for the domestic like product. Accordingly, we find that revocation of the antidumping finding would be likely to lead to significant price effects, including significant underselling by the subject imports of the domestic like product, as well as significant price depression or suppression, in the reasonably foreseeable future.

#### E. Likely Impact of Subject Imports

In evaluating the likely impact of imports of subject merchandise if the finding is revoked, the Commission is directed to consider all relevant economic factors that are likely to have a bearing on the state of the industry in the United States, including but not limited to: (1) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; (2) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; and (3) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the domestic like product.<sup>106</sup> All relevant economic factors are to be considered within the context of the business cycle and the conditions of

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<sup>99</sup> CR at V-6, PR at V-3.

<sup>100</sup> DuPont Dow Posthearing Brief at 9.

<sup>101</sup> CR at V-6, PR at V-3; Bayer Posthearing Statement at 2-3 (June 14, 1999). Bayer further states that the experience of its parent company in Europe is similar in that prices for imported polychloroprene rubber from Japan are \*\*\*. *Id.* at 3.

<sup>102</sup> DuPont Dow Posthearing Brief at 9.

<sup>103</sup> DuPont Dow alleges that Japanese underselling in these markets has lowered polychloroprene rubber prices. DuPont Dow Prehearing Brief at 18.

<sup>104</sup> DuPont Dow Posthearing Brief at 10.

<sup>105</sup> DuPont Dow forecasts that, should the finding be revoked, the average U.S. price would drop from \*\*\*. DuPont Dow Prehearing Brief at 18.

<sup>106</sup> 19 U.S.C. § 1675a(a)(4).

competition that are distinctive to the industry.<sup>107</sup> As instructed by the statute, we have considered the extent to which any improvement in the state of the domestic industry is related to the antidumping finding at issue and whether the industry is vulnerable to material injury if the finding is revoked.<sup>108</sup>

In the original determination, the Commission found that Japanese imports at less than fair value, which trebled between 1968 and 1972, caused material injury to the domestic industry.<sup>109</sup> The Commission found that sales of subject imports at less than fair value contributed to the domestic industry's lost sales, lower profits, and loss of market share despite an increase in domestic demand.<sup>110</sup> The Commission also determined that the increased sales of subject merchandise, which consistently sold below the domestic product, had a growing, adverse impact on prices in the domestic market.<sup>111</sup>

The domestic industry as a whole has improved materially since the imposition of the finding. Subject imports virtually ceased after the 1973 finding.<sup>112</sup> The domestic industry asserts that the cessation of imports from Japan contributed to its ability to make needed investments to improve its production processes, resulting in improved safety and efficiency and higher production yields at lower costs.<sup>113</sup>

The record in this review indicates that the industry is performing well. DuPont Dow's net sales quantities and values \*\*\* during 1997-98.<sup>114</sup> Operating income margins for the domestic industry

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<sup>107</sup> 19 U.S.C. § 1675a(a)(4). Section 752(a)(6) of the Act states that "the Commission may consider the magnitude of the margin of dumping" in making its determination in a five-year review. 19 U.S.C. § 1675a(a)(6). The statute defines the "magnitude of the margin of dumping" to be used by the Commission in five-year reviews as "the dumping margin or margins determined by the administering authority under section 1675a(c)(3) of this title." 19 U.S.C. § 1677(35)(C)(iv). See also SAA at 887. Commerce published dumping margins in its final five-year review determination as follows: Denki Kagaku Kogyo, K.K., 0 percent; Denki Kagaku Kogyo, K.K./Hoei Sangyo Co., Ltd., 55 percent; Suzugo Corp., 55 percent; and All others, 55 percent. 63 Fed. Reg. at 67658.

<sup>108</sup> The SAA states that in assessing whether the domestic industry is vulnerable to injury if the finding is revoked, the Commission "considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they may also demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports." SAA at 885.

<sup>109</sup> USITC Pub. 622 at 3.

<sup>110</sup> USITC Pub. 622 at 4.

<sup>111</sup> USITC Pub. 622 at 4.

<sup>112</sup> We note that the overall level of nonsubject imports has increased since the original investigation and that \*\*\*, forcing DuPont Dow to \*\*\* its production capacity significantly, from \*\*\* million pounds in 1981 to \*\*\* million pounds in 1998. Table I-1, CR at I-4, PR at I-3; DuPont Prehearing Brief at 22.

<sup>113</sup> CR at I-12, II-6, PR at I-8, II-3.

<sup>114</sup> CR at III-5, PR at III-2.

increased to \*\*\* percent in 1998 from \*\*\* percent in 1997.<sup>115</sup> The domestic industry's gross profits were \*\*\* in 1998 as compared to \*\*\* in 1997, and the industry overall was profitable during the period.<sup>116</sup>

We do not find that the domestic industry is currently in a weakened state, as contemplated by the vulnerability criterion of the statute, given its strong operating performance and improved profitability.<sup>117 118 119</sup> We take into account, however, in considering whether material injury would recur in the reasonably foreseeable future were the finding revoked, that global demand continues to decline and global capacity presently exceeds demand. Moreover, new synthetic rubber elastomers are likely to continue to gain market share, as a result of technological, cost, and environmental considerations.<sup>120</sup>

In this context, we conclude that if the finding is revoked, the likely volume of subject imports would be significant and that these imports would have significant adverse price effects. Given the substitutable nature of the product, we find that a significant volume of low-priced subject imports would likely have a significant adverse impact on the production, shipments, sales, and revenue levels of the domestic industry. DuPont Dow estimates that, if the finding were to be revoked, its U.S. sales, total sales, operating incomes, and net income would all decline \*\*\*.<sup>121</sup> This reduction in the industry's production, sales, and revenue levels would have a direct adverse impact on the industry's profitability and employment levels as well as its ability to raise capital and make and maintain necessary capital investments. Accordingly, we conclude that, if the antidumping finding is revoked, the subject imports would be likely to have a significant adverse impact on the domestic industry within a reasonably foreseeable time.

## CONCLUSION

For the foregoing reasons, we determine that revocation of the antidumping finding on polychloroprene rubber from Japan would be likely to lead to continuation or recurrence of material injury to the U.S. polychloroprene rubber industry within a reasonably foreseeable time.

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<sup>115</sup> Table III-5, CR at III-6, PR at III-2. DuPont Dow's \*\*\*. CR at III-5, PR at III-2.

<sup>116</sup> Table III-5, CR at III-6, PR at III-2.

<sup>117</sup> CR at III-5, Table C-1, C-4, PR at III-2, C-3.

<sup>118</sup> SAA at 885 ("The term 'vulnerable' relates to susceptibility to material injury by reason of dumped or subsidized imports. This concept is derived from existing standards for material injury and threat of material injury. . . If the Commission finds that the industry is in a weakened state, it should consider whether the industry will deteriorate further upon revocation of an order. . .").

<sup>119</sup> We note DuPont Dow's argument that the U.S. industry is one that is vulnerable to recurrence of material injury should the order be revoked due to \*\*\*. DuPont Dow Posthearing Brief at 11.

<sup>120</sup> CR at I-12-13, PR at I-9.

<sup>121</sup> DuPont Dow Prehearing Brief at 25, 31. While DuPont Dow forecasts no gain in U.S. market share by nonsubject imports, it predicts that it would lose market share to low-priced imports from Japan, resulting in a revenue \*\*\* over a five-year period. *Id.* at 16. It also predicts its \*\*\* in production and development efforts would further \*\*\* sales and force additional \*\*\* in production. *Id.* at 26-27.

**DISSENTING VIEWS OF COMMISSIONERS  
CAROL T. CRAWFORD AND THELMA J. ASKEY**

Section 751(d) requires that the Department of Commerce (Commerce) revoke a countervailing duty or an antidumping finding in a five-year (“sunset”) review unless Commerce determines that dumping or a countervailable subsidy would be likely to continue or recur and the Commission determines that material injury would be likely to continue or recur within a reasonably foreseeable time.<sup>1</sup> In this review of the finding on polychloroprene rubber from Japan, we find that material injury is not likely to continue or recur within a reasonably foreseeable time if the finding is revoked.

We join our colleagues in their discussion regarding domestic like product and domestic industry and in their explanation of the relevant legal standard. We also join in their discussion of the relevant conditions of competition but add further observations below.

As a preliminary matter, we note that this full sunset investigation is somewhat unusual in that Denki Kagaku Kogyo Kabushiki Kaisha (“Denka”), the only foreign producer to respond to the notice of institution, subsequently ceased participating in this review. We are disappointed with Denka’s decision to withdraw its participation in this review. In a case such as this, where only one party participates in an investigation or review, that party has an advantage in terms of being able to present its information to the Commission without rebuttal from the other side. However, irrespective of the source of information on the record, the statute obligates the Commission both to investigate the matters at issue and to evaluate the data before it in terms of the statutory criteria.<sup>2</sup> Therefore, the Commission cannot merely accept the participating party’s information and characterizations thereof without question and without evaluating other available information.<sup>3 4</sup>

**A. Conditions of Competition**

In evaluating the impact of subject imports on the domestic industry if the finding is revoked, the statute directs the Commission to evaluate all the relevant economic factors “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>5</sup> Discussed below are the additional conditions of competition that weigh significantly in our determination that revocation of the finding is not likely to lead to continuation or recurrence of material injury to the polychloroprene rubber industry within a reasonably foreseeable time.

In the 25 years since the finding was put into place, the domestic polychloroprene rubber industry has changed significantly. Most importantly, largely as a result of the presence of a wide variety of substitute products, the industry is in decline. Apparent domestic consumption of polychloroprene rubber

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<sup>1</sup> 19 U.S.C. §§ 1675(d)(2), 1675a(a)(1).

<sup>2</sup> 19 U.S.C. § 1675a(a).

<sup>3</sup> See, e.g., *Alberta Pork Producers’ Mktg. Bd. v. United States*, 669 F. Supp. 445, 459 (Ct. Int’l Trade 1987) (“Commission properly exercised its discretion in electing not to draw an adverse inference from the low response rate to questionnaires by the domestic swine growers since the fundamental purpose of the rule to ensure production of relevant information is satisfied by the existence of the reliable secondary data.”).

<sup>4</sup> See *supra*, note 44 in the majority opinion.

<sup>5</sup> 19 U.S.C. § 1675a(a)(4).

was \*\*\* tons in 1972. By 1998, however, it had decreased by \*\*\* percent to \*\*\* tons.<sup>6</sup> We note that since Bayer ceased domestic production in July 1998,<sup>7</sup> the domestic industry is now comprised of one producer, DuPont Dow, which currently holds the majority of domestic consumption. In 1997, DuPont Dow captured \*\*\* percent of apparent domestic consumption, and \*\*\* percent in 1998.<sup>8</sup> Evidence on the record suggests that as the sole domestic producer, DuPont Dow wields substantial market power within the domestic market. Specifically, it appears to have considerable power over pricing and the ability to discourage purchasers from seeking alternate suppliers for more than minor portions of their needs.

More specifically, evidence on the record suggests that DuPont Dow has flexibility in the prices it charges its customers. Raw materials costs declined during 1997-98<sup>9</sup> and raw materials make up almost half of the cost of goods sold for domestic producers.<sup>10</sup> \*\*\* stated that its prices tracked raw material prices and that polychloroprene prices have fallen as raw material prices have dropped. By contrast, \*\*\* indicated that raw material prices do not directly drive polychloroprene rubber prices.<sup>11</sup> Rather, Dupont Dow stated that its prices are based on “\*\*\*.”<sup>12</sup> \*\*\*<sup>13</sup>. In fact, one purchaser claimed that DuPont Dow controls the market price for polychloroprene rubber.<sup>14</sup> Accordingly, the record evidence suggests that DuPont Dow has considerable power over domestic market prices.

Moreover, DuPont Dow also appears to have the ability to discourage purchasers from seeking to fill more than small quantities of their polychloroprene rubber needs through purchases from DuPont Dow’s competitors. The company has indicated that it is hesitant to provide \*\*\* from DuPont Dow.<sup>15</sup>

Finally, we also note that IISRP data show that consumption is declining and is projected to continue declining slowly in Europe and the United States, while it is projected to continue to increase in all other parts of the world, particularly in Asia and Oceania and in Latin America.<sup>16</sup>

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<sup>6</sup> CR and PR at Table I-1.

<sup>7</sup> CR at II-1; PR at II-1.

<sup>8</sup> CR and PR at Table III-6 and Table C-1. We also note that the world market is extremely concentrated; there are only two major European producers, two major Japanese producers and the one domestic producer. CR at II-1; PR at II-1.

<sup>9</sup> CR at V-1; PR at V-1.

<sup>10</sup> CR at III-10-11; PR at III-3.

<sup>11</sup> CR at V-1; PR at V-1.

<sup>12</sup> CR at V-1; PR at V-1.

<sup>13</sup> CR at II-1; PR at II-1.

<sup>14</sup> CR at II-2; PR at II-1.

<sup>15</sup> Letter from John D. Greenwald, Ronald I. Meltzer and Amber L. Cottle, on behalf of DuPont Dow Elastomers, L.L.C., to Donna R. Koehnke, July 6, 1999, p. 2.

<sup>16</sup> CR at IV-7; PR at IV-5.

## B. General Considerations

The statute directs us to take into account several general considerations.<sup>17</sup> We have taken into account the Commission's prior injury determination, including the volume, price effects, and impact of the subject imports on the industry before the finding was issued.<sup>18</sup> First, as recounted above, the industry is declining worldwide, as alternatives to polychloroprene rubber become more readily available and cost effective. U.S. consumption quantity declined by \*\*\* percent between 1972 and 1998; U.S. producer shipments declined by roughly \*\*\* during the same period.<sup>19</sup> By contrast, during the period of the original investigation, consumption and production were increasing. Between 1971 and 1972, U.S. consumption quantity increased by almost \*\*\* percent; domestic producer shipments increased by roughly \*\*\* percent.<sup>20</sup> Accordingly, the current market is very different than it was in 1972: rather than increasing, the current market is clearly in decline.

Market shares have been redistributed since 1971-72 as well. During the original period of investigation, Japanese imports held \*\*\* and \*\*\* percent of the market, respectively; non-subject imports held \*\*\* and \*\*\* percent, respectively; and the domestic producers held \*\*\* and \*\*\* percent, respectively.<sup>21</sup> In 1998, nonsubject imports made up \*\*\* percent of the market and domestic producers held \*\*\* percent.<sup>22</sup> Accordingly, the marketplace is very different than it was in 1972.

In addition, as the sole domestic producer DuPont Dow clearly dominates the domestic market and its financial data demonstrate that DuPont Dow is performing well at this time.<sup>23</sup> Therefore, based on the industry's current performance, we conclude that the domestic industry is not vulnerable to material injury if the finding is revoked.<sup>24</sup>

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<sup>17</sup> 19 U.S.C. § 1675a(a)(1). We are to take into account the Commission's prior injury determinations, consider whether any improvement in the state of the industry is related to the finding, consider whether the industry is vulnerable to material injury in the event of revocation, and consider any duty absorption findings made by Commerce. *Id.* Commerce has made no findings of duty absorption in this case. 63 Fed. Reg. 67656, 67658 (Dec. 8, 1998). The statute also provides that the Commission may consider the margin of dumping when making its determination. 19 U.S.C. § 1675a(a)(6). Commerce determined that the margins it would expect in the event of revocation would be 55 percent for Denki Kagaku Kogyo, KK./Hoei Sangyo Co., Ltd., Suzugo Corporation and "all others," and zero for Denki Kagaku Kogyo, K.K. 63 Fed. Reg. at 67658.

<sup>18</sup> 19 U.S.C. § 1675a(a)(1)(A). According to the Statement of Administrative Action ("SAA") to the Uruguay Round Agreements Act, if pre-finding conditions are likely to recur, it is reasonable to conclude that there is a likelihood of continuation or recurrence of injury. H. R. Rep. No. 103-316, vol. 1 at 884 (1994).

<sup>19</sup> CR at I-4; PR at I-3.

<sup>20</sup> *Id.*

<sup>21</sup> CR at I-4; PR at I-3.

<sup>22</sup> CR at I-4; PR at I-3.

<sup>23</sup> See *infra* Section E.

<sup>24</sup> Commissioner Crawford finds that the magnitude of any adverse effects of revocation is likely to increase with the degree of vulnerability of the industry. She finds that the domestic industry in this review is not particularly vulnerable to injury if the finding is revoked.

### C. Volume

The Commission is to consider whether the likely volume of subject imports if the finding under review is revoked would be significant either in absolute terms or relative to production or consumption in the United States.<sup>25 26</sup> In so doing, the Commission shall consider “all relevant economic factors,” including four enumerated in the statute: (1) any likely increase in production capacity or existing unused production capacity in the exporting country; (2) existing inventories of the subject merchandise, or likely increases in inventories; (3) the existence of barriers to the importation of the subject merchandise in countries other than the United States; and (4) the potential for product shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.<sup>27</sup>

Our focus in a sunset review is whether subject import volume is likely to be significant within a reasonably foreseeable time if the antidumping finding or order is revoked. Although the available data suggest that the existing antidumping finding in this review has had a significant impact on the market penetration of subject imports, the existing domestic share of the U.S. market is not likely to be adversely effected if the finding is revoked. While domestic consumption of polychloroprene rubber has decreased since the period of the original investigation, U.S. production of such merchandise over the period has been consolidated in one domestic producer.

Subject imports accounted for approximately \*\*\* percent of U.S. consumption quantity in both 1997 and 1998. By comparison, nonsubject imports maintained market shares of \*\*\* percent in 1997 and \*\*\* percent in 1998, the domestic industry captured market shares of \*\*\* percent and \*\*\* percent, respectively.<sup>28</sup> With the departure of Bayer from the domestic industry, however, DuPont Dow is clearly positioned to integrate some significant portion of Bayer’s former market share. Thus, a single domestic producer dominates the U.S. market.

DuPont Dow argues that subject imports would increase significantly in the absence of the existing finding. According to DuPont Dow, both Denka and Tosoh have expanded their production capacity in “sharp contrast” to all other producers of polychloroprene rubber and in the face of decreasing Japanese and Asian demand for such merchandise. Thus, DuPont Dow contends that the U.S. market is a prime target for excess Japanese production capacity.

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<sup>25</sup> 19 U.S.C. § 1675a(a)(2).

<sup>26</sup> In analyzing whether revocation of a finding or order would be likely to lead to a continuation or recurrence of material injury within a reasonably foreseeable time, Commissioner Crawford takes as her starting point the date on which the revocation would actually take place. In this review, the finding would be revoked in January 2000. 19 U.S.C. § 1675(c)(6)(iv).

<sup>27</sup> 19 U.S.C. § 1675(a)(2)(A)-(D). The SAA indicates that the statutory factors specified for analysis of volume, price, and impact are a combination of those used to determine both material injury by reason of subject imports and threat of material injury in original antidumping and countervailing duty investigations. See SAA at 886.

<sup>28</sup> CR and PR at Table C-1.

However, Denka reported near full capacity utilization. Denka also reported that it has existing export market relationships in Asia and Europe.<sup>29</sup> In addition, given the existing corporate affiliation of DuPont-Showa Denko and DuPont Dow, we find it improbable that DuPont-Showa Denko would jeopardize DuPont Dow's domestic interests through a significant increase in the volume of exports of the subject merchandise to the United States. Moreover, while we have little information concerning production data for Tosoh, we note that it reportedly accounts for \*\*\* of total Japanese production capacity of polychloroprene rubber and has no presence in the U.S. market.<sup>30</sup> Given these facts and the minimal level of existing subject merchandise exports to the United States, it is likely that Japanese producers will continue to focus their exports on markets that are forecasted to grow and that are collectively much larger than the United States.<sup>31</sup>

Because the U.S. market is dominated by a single domestic producer and several nonsubject suppliers, and because markets other than the United States are the focus of the overwhelming majority of subject merchandise, we find that revocation of the antidumping finding is not likely to lead to an increase in the volume of subject imports such that the likely volume of subject imports would be significant within a reasonably foreseeable time.

#### **D. Price**

In evaluating the likely price effects of the subject merchandise in the event of revocation, the Commission shall consider (1) whether imports are likely to be sold at a significantly lower price than the domestic like product, and (2) whether imports are likely to enter the United States at prices that otherwise would have a significant depressing or suppressing effect on the price of domestic like product.<sup>32</sup>

The record in this review contains no pricing data on subject polychloroprene rubber in the United States. We therefore have no information comparing current prices of the domestic like product and subject imports in the U.S. market. Consequently, our conclusions regarding the likely price effects if the finding is revoked are drawn largely from our conclusions on likely subject volumes and the pertinent known conditions of competition.

As discussed above, demand for polychloroprene rubber is declining in the face of the growing availability of modern synthetic rubbers that are more specifically targeted to particular customer needs and are more cost-effective. Data on the record also show that raw material costs are down, but that domestic prices have remained relatively stable. By contrast, DuPont Dow submitted evidence to show

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<sup>29</sup> CR at IV-2-3; PR at IV-1. The International Institute of Synthetic Rubber Producers ("IISRP") reports that total Japanese polychloroprene rubber capacity was 85,000 metric tons in 1988, 92,000 metric tons in 1993 and 88,000 metric tons in 1998. CR at II-6-7; PR at II-3. Dupont Dow disputes this figure, stating that its own intelligence regarding Japanese capacity is more reliable than IISRP numbers because some producers do not provide accurate information to the IISRP. CR at II-7; PR at II-3. We see no reason not to accept the IISRP figures. However, applying the higher number would not lead us to change our conclusion in this review.

<sup>30</sup> CR at IV-2-3; PR at IV-2.

<sup>31</sup> See CR at IV-7; PR at IV-5.

<sup>32</sup> 19 U.S.C. § 1675a(3). The SAA states that "[c]onsistent with its practice in investigations, in considering the likely price effects of imports in the event of revocation or termination, the Commission may rely on circumstantial, as well as direct, evidence of the adverse effects of unfairly traded imports on domestic prices." SAA at 886.

that prices in other markets were lower than in the United States. DuPont Dow argues that the evidence it has presented confirms that worldwide underselling by Japanese producers threatens to suppress prices in the United States.<sup>33</sup> However, given that DuPont Dow -- which holds the significant majority of domestic market share -- has considerable power over domestic prices for polychloroprene rubber (and has confirmed that it has the ability to \*\*\*), that raw material costs have declined while domestic prices have remained stable, that prices in foreign markets have been falling<sup>34</sup> and that U.S. prices are the highest in the world, we find DuPont Dow's known conditions of competition arguments concerning price suppression to be unpersuasive.

In addition, we have already concluded that the likely volume of subject imports would not be significant in the absence of the existing finding. Therefore, the likely volume of subject imports would be too small to have a significant price suppressing or depressing effect in the domestic market within a reasonably foreseeable time.

Consequently, in light of our conclusion regarding the likely volume of subject merchandise in the absence of the existing finding and the pertinent n discussed above, we find that such subject imports are too minimal to have discernible adverse price effects within a reasonably foreseeable time.

#### **E. Impact**

When considering the likely impact of subject imports, the Commission is to consider all relevant economic factors that are likely to have a bearing on the state of the industry in the United States, including: (1) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; (2) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; and (3) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more enhanced version of the domestic like product.<sup>35</sup>

Subject imports are not likely to have a significant adverse impact on the domestic polychloroprene rubber industry if the finding is revoked. As noted above, subject imports account for only \*\*\* percent of U.S. consumption, compared with domestic industry's dominant \*\*\* percent market share.<sup>36</sup> Moreover, in the absence of the existing finding, we have already concluded that subject imports would simply be too small to have any discernable volume or price effects on the domestic industry within a reasonably foreseeable time. Furthermore, in light of the significant market share held by nonsubject imports, any increase in subject imports resulting from a revocation of the existing finding would also come at the expense of nonsubject imports in rough proportion to their existing market share.

In addition, DuPont Dow's financial data show that it is performing well at this time. The company's total net sales increased by \*\*\* percent between 1997-98<sup>37</sup> and increased its market share. Gross profits increased by \*\*\* percent, operating income increased by \*\*\* percent, total net sales quantities

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<sup>33</sup> Prehearing Brief of DuPont Dow Elastomers, May 20, 1999, p. 16.

<sup>34</sup> Post-Hearing Brief and Answers to Commissioners Questions on Behalf of DuPont Dow Elastomers, L.L.C., June 14, 1999, pp. 8-10.

<sup>35</sup> 19 U.S.C. § 1675a(a)(4).

<sup>36</sup> CR and PR at Table I-1.

<sup>37</sup> CR and PR at Table III-6.

and value have increased and operating margins have increased from \*\*\* percent in 1997 to \*\*\* percent in 1998.<sup>38</sup>

The record also indicates that Dupont Dow's financial performance is better with respect to its export sales than with its domestic sales because its domestic business is declining.<sup>39</sup> This suggests that DuPont Dow is not operating competitively within its own market, where it holds the overwhelmingly dominant market position, yet is competitive outside the United States, where it competes with a variety of other suppliers, including Japanese producers.

Consequently, we find that subject imports would not be likely to have a significant impact on domestic polychloroprene rubber producers' cash flow, inventories, employment, wages, growth, ability to raise capital, or investment within a reasonably foreseeable time in the event the finding is revoked. In conjunction with our conclusion regarding likely volume and price effects, we find that revocation is not likely to lead to a significant reduction in U.S. producers' output, sales, market share, profits, productivity, ability to raise capital, or return on investments within a reasonably foreseeable time. We therefore find that revocation is not likely to have a negative impact on the domestic industry in the reasonably foreseeable future.

## **F. CONCLUSION**

Subject imports are not likely to have adverse volume or price effects in the event of revocation, and are therefore not likely to have a negative impact on the domestic industry. Thus, we find that material injury is not likely to continue or recur within a reasonably foreseeable time if the antidumping finding is revoked.

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<sup>38</sup> CR at III-5 and Table III-6; PR at III-2 and Table III-6.

<sup>39</sup> CR at III-5; PR at III-2.