

UNITED STATES INTERNATIONAL TRADE COMMISSION

STEEL RAILS FROM CANADA

Investigations Nos. 701-TA-297 (Review) and 731-TA-422 (Review)

DETERMINATIONS AND VIEWS OF THE COMMISSION

(USITC Publication No. 3269, January 2000)

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

Investigations Nos. 701-TA-297 (Review) and 731-TA-422 (Review)

**STEELS RAILS FROM CANADA**

**DETERMINATIONS**

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

**BACKGROUND**

The Commission instituted these reviews on June 1, 1999 (64 F.R. 29353, June 1, 1999) and determined on September 3, 1999 that it would conduct expedited reviews (64 F.R. 50108, September 15, 1999). The Commission transmitted its determinations in these reviews to the Secretary of Commerce on January 24, 2000. The views of the Commission are contained in USITC Publication 3269 (January 2000), entitled Steel Rails from Canada: Investigations Nos. 701-TA-297 (Review) and 731-TA-422 (Review).

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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)).

## VIEWS OF THE COMMISSION

Based on the record in these five-year reviews, we determine under section 751(c) of the Tariff Act of 1930, as amended (“the Act”), that revocation of the countervailing and antidumping duty orders covering steel rails from Canada would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

### I. BACKGROUND

In September 1989, the Commission determined that an industry in the United States was being threatened with material injury by reason of imports of steel rails from Canada that were subsidized and being sold at less than fair value.<sup>2</sup> That same month, the Department of Commerce (“Commerce”) issued countervailing and antidumping duty orders on imports of steel rails from Canada.<sup>3</sup> On June 1, 1999, the Commission instituted these reviews pursuant to section 751(c) of the Tariff Act of 1930, as amended (“the Act”), to determine whether revocation of the countervailing and antidumping duty orders on steel rails would likely lead to continuation or recurrence of material injury.<sup>4</sup>

In five-year reviews, the Commission initially determines whether to conduct a full review (which would include a public hearing, the issuance of questionnaires, and other procedures) or an expedited review, as follows. First, the Commission determines whether individual responses of interested parties 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>5</sup> If the Commission finds the responses from either group of interested parties to be inadequate, the Commission may determine, pursuant to section 751(c)(3)(B) of the Act, to conduct an expedited review unless it finds that other circumstances warrant a full review.

In these reviews, the Commission received a joint response to the notice of institution from Pennsylvania Steel Technologies, Inc. (“PST”) and Rocky Mountain Steel Mills, Inc. (“RMSM”). The joint response contained company-specific information. The joint domestic respondents claimed to represent all domestic production of new steel rail.<sup>6</sup> No producer, exporter, or U.S. importer of steel rails from Canada filed a response to the notice of institution.

On September 3, 1999, the Commission voted to conduct expedited reviews in the subject five-year reviews involving steel rails.<sup>7</sup> In this regard, the Commission determined that the domestic interested party

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<sup>2</sup> New Steel Rails from Canada, Inv. Nos.701-TA-297 and 731-TA-422 (Final) USITC Pub. 2112 (August 1988) (“Original Determination”) at 2.

<sup>3</sup> 54 Fed. Reg. 39032 (Sept. 22, 1989) (countervailing duty order, amended 55 Fed. Reg. 35702 (Aug. 31, 1990)) and 54 Fed. Reg. 38263 (Sept. 15, 1989) (antidumping).

<sup>4</sup> 64 Fed. Reg. 29353 (June 1, 1999).

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

<sup>6</sup> Response of Pennsylvania Steel Technologies, Inc., and Rocky Mountain Steel Mills, Inc., to the Notice of Institution, July 21, 1999, at 5 (hereinafter “Joint Response”).

<sup>7</sup> 64 Fed. Reg. 50108 (Sept. 15, 1999).

group response was adequate.<sup>8</sup> Because the Commission did not receive a response from any respondent interested party, the Commission determined that the respondent interested party group response was inadequate.<sup>9</sup> The Commission did not find any circumstances that would warrant conducting a full review. The Commission, therefore, determined to conduct an expedited review.<sup>10</sup>

## 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> Commerce defined new steel rails as:

carbon, high carbon, alloy, or other quality steel, and includes, but is not limited to, standard rails, all main line sections (of more than 30 kilograms per meter or 60 pounds per yard), heat-treated or head-hardened (premium) rails, transit rails, contact rail (or “third rail”) and crane rails. Rails are used by the railroad industry, by rapid transit lines, by subways, in mines and in industrial applications. Specifically excluded from these orders are light rails (rails which are less than 30 kilograms per meter or 60 pounds per yard). Also excluded are relay rails which are used rails taken up from a primary railroad track and relaid in a railroad yard or on a secondary track. A changed circumstance review in 1996 partially revoked the antidumping duty order on new steel rails, except light rails, from Canada with regard to 100ARA-A new steel rails, except light rails, from Canada. Also, nominal 60 pounds per yard steel rails are outside the scope of this order.<sup>13</sup>

New steel rails are used on railway roadbeds and in other industrial and municipal settings to permit the movement of locomotive and other rolling stock. A rail consists of a head for supporting wheel treads and guiding wheel flanges; a web for girder strength; and a base for fastening the rail to its support. In both the U.S. and Canadian markets, most rails are produced to American Railway Engineering Association (AREA) standards and are used for the replacement or upgrading of worn track. New

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<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.

<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 (CIT 1996); Torrington Co. v. United States, 747 F. Supp. 744, 748-49 (CIT 1990), aff'd, 938 F.2d 1278 (Fed. Cir. 1991). See also S. Rep. No. 96-249 at 90-91 (1979).

<sup>13</sup> See Commerce’s website ([http://www.ita.doc.gov/import\\_admin/records/sunset](http://www.ita.doc.gov/import_admin/records/sunset)) at Case History and Scope Information. The subject products currently are classified under HTS subheadings 7302.10.1010, 7302.10.1015, 7303.10.1035, 7302.10.1045, 7302.10.5020, and 8548.90.0000. Subject rails that are non-alloy enter under a column 1 general duty rate of 0.2 percent and subject alloy rails enter under the column 1 general duty rate of 1.8 percent. Subject rails classified under HTS subheading 8548.90.0000 enter duty free. The HTS subheadings are provided for convenience and for Customs purposes, but Commerce’s written description of the merchandise is dispositive as to the scope of the product coverage. CR at I-6, PR at I-5-I-6.

steel rails may differ according to size, weight, composition, and end use. There are four basic rail shapes: tee, crane, girder, and contact. Tee rails, the most common rail shape, are used in open track construction. Crane rails are used on crane runways and carry heavy concentrated loads at low speeds. Girder rails are produced to American Society for Testing and Materials (ASTM) standards and are not symmetrical in section. Contact rails carry electrical current for electric transit systems.<sup>14</sup>

The rail industry grades new steel rails according to chemistry, finishing, and compliance with AREA standards. Standard grade rails are made from carbon steel, while premium rails are made from alloy steel or have been tempered to increase their strength. Prime rails are all those new rails that meet AREA standards. New steel rails that fail a quality inspection but are otherwise suitable for other, non-mainline applications (such as on a private siding) are industrial rails.<sup>15</sup>

In the original investigations, the Commission determined that the domestic like product included all new steel rails, including both prime and industrial rails but excluding light rails.<sup>16</sup> PST and RMSM state that they agree with the Commission's previous like product definition and that there is no information that suggests changing the definition.<sup>17</sup> We find that there is no evidence on the record of these five-year reviews that would suggest a reason for revisiting the Commission's original determination of the domestic like product. Accordingly, we define the domestic like product as new steel rails, excluding light rails.

## **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>18</sup> In accordance with our domestic like product determination, we find the domestic industry to consist of all domestic producers of new steel rails.

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<sup>14</sup> CR at I-7-I-8, PR at I-6.

<sup>15</sup> CR at I-9, PR at I-6.

<sup>16</sup> Original Determination at 10. One Commissioner defined the domestic like product differently. Id. at 90.

<sup>17</sup> Joint Response at 46-47.

<sup>18</sup> 19 U.S.C. § 1677(4)(A).

### III. REVOCATION OF THE COUNTERVAILING AND ANTIDUMPING DUTY ORDERS ON NEW STEEL RAILS WOULD LIKELY LEAD TO CONTINUATION OR RECURRENCE OF MATERIAL INJURY WITHIN A REASONABLY FORESEEABLE TIME

#### A. Legal Standard

In a five-year review conducted under section 751(c) of the Act, Commerce will revoke a countervailing or antidumping duty order unless: (1) it makes a determination that dumping is likely to continue or recur, and (2) the Commission makes a determination that revocation of an order “would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.”<sup>19</sup> The 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 order] . . . and the elimination of its restraining effects on volumes and prices of imports.”<sup>20</sup> Thus, the likelihood standard is prospective in nature.<sup>21</sup> The statute states that “the Commission shall consider that the effects of revocation . . . may not be imminent, but may manifest themselves only over a longer period of time.”<sup>22</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>23 24</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

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<sup>19</sup> 19 U.S.C. § 1675a(a).

<sup>20</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>21</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 [sic] prices for the domestic like product in the U.S. market in making its determination of the likelihood of continuation or recurrence of material injury if the order is revoked.” SAA at 884.

<sup>22</sup> 19 U.S.C. § 1675a(a)(5).

<sup>23</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>24</sup> In analyzing what constitutes a reasonably foreseeable time, Commissioner Koplan examines all the current and likely conditions of competition in the relevant industry. He defines “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, he considers 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, this 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.

of the subject merchandise on the industry if the order is revoked.”<sup>25</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>26 27</sup>

Section 751(c)(3) of the Act and the Commission’s regulations provide that in an expedited five-year review the Commission may issue a final determination “based on the facts available, in accordance with section 776.”<sup>28</sup> We 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. 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.”<sup>29</sup> As noted above, no respondent interested party responded to the Commission’s notice of institution. Accordingly, we have relied on the facts available in these reviews, which consist primarily of the records in the Commission’s original investigations on steel rails, limited information collected by the Commission since the institution of these reviews, and information submitted by the domestic producers.

For the reasons stated below, we determine that revocation of the countervailing and antidumping duty orders on new steel rails from Canada would be likely to lead to continuation or recurrence of material injury to the domestic injury within a reasonably foreseeable time.

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<sup>25</sup> 19 U.S.C. § 1675a(a)(1).

<sup>26</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>27</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 expedited five-year review determination that it has not issued any duty absorption finding in this case. 64 Fed. Reg. 73013 (Dec. 29, 1999).

<sup>28</sup> 19 U.S.C. § 1675(c)(3)(B); 19 C.F.R. § 207.62(e). Section 776 of the Act, in turn, authorizes the Commission to “use the facts otherwise available” in reaching a determination when: (1) necessary information is not available on the record or (2) an interested party or any other person withholds information requested by the agency, fails to provide such information in the time or in the form or manner requested, significantly impedes a proceeding, or provides information that cannot be verified pursuant to section 782(I) of the Act. 19 U.S.C. § 1677e(a). The statute permits the Commission to use adverse inferences in selecting from 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 information from the record of our original determination and any other information placed on the record. Id.

<sup>29</sup> SAA at 869.

## B. Conditions of Competition

In evaluating the likely impact of the subject imports on the domestic industry, the statute directs the Commission to consider all relevant economic factors “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>30</sup>

The current conditions of competition are similar in many ways to those existing at the time of the original investigations. First, overall demand is driven primarily by the need for new tracks resulting from rail line expansions, replacement of existing lines, and changes in track usage. Of these, replacement of existing track remains the primary source of demand.<sup>31</sup> Demand has increased significantly since the period examined in the original investigations, from approximately \*\*\* short tons in 1986 to \*\*\* short tons in 1996.<sup>32</sup> Demand has continued to grow since 1996, increasing to \*\*\* short tons in 1997 and \*\*\* short tons in 1998.<sup>33</sup>

Second, as in the original investigations, demand for new steel rails continues to shift from standard rails to higher quality, longer wearing premium rails.<sup>34</sup> The domestic industry asserts that it is striving to develop new products with increased hardness and longer wear capabilities.<sup>35</sup>

Third, approximately \*\*\* percent of the market for new steel rails consists of purchases by Class I railroads, which are the largest class of railroads.<sup>36</sup> Smaller railroads (Class II and III railroads) account for \*\*\* percent of the market, with transit authorities, distributors, and contractors making up the remainder of the market.<sup>37</sup> The domestic producers report that there has been significant reconfiguration of the market since the period examined in the original investigations, as the 16 North American railroads then in existence have been consolidated into six major railroads, four in the United States and two in Canada.<sup>38</sup>

Fourth, virtually all new steel rails are purchased through an annual quote or bid procedure during which suppliers generally must provide several rounds of bids to the purchaser.<sup>39</sup> Only those suppliers that the purchaser has qualified as meeting AREA and other specifications may submit bids.<sup>40</sup> Accordingly,

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<sup>30</sup> 19 U.S.C. § 1675a(a)(4).

<sup>31</sup> Original Determination at A-29; Joint Response at 37.

<sup>32</sup> CR at Table I-3, PR at Table I-3.

<sup>33</sup> CR at Table I-3, PR at Table I-3.

<sup>34</sup> CR at I-8, PR at I-6. During the period examined in the original investigations, \*\*\* percent of domestic shipments of new rails were prime rails, \*\*\* percent were industrial rails, and the remaining small percentage consisted of all other rails (i.e., crane, girder, and electrical rails). CR at I-9, PR at I-7. In contrast, \*\*\* percent of subject imports from Canada consisted of prime rails and \*\*\* percent were industrial rails, with small volumes of other forms of rails. Id.

<sup>35</sup> CR at I-8, PR at I-6.

<sup>36</sup> CR at I-9, n.19, PR at I-7, n.17. They are defined as railroads that earn \$250 million or more per year. Id.

<sup>37</sup> CR at I-9, PR at I-7.

<sup>38</sup> CR at I-9-10, n. 22, PR at I-7, n.20.

<sup>39</sup> CR at I-10, PR at I-7.

<sup>40</sup> CR at I-10, PR at I-7.

once past qualification, there is a significant degree of fungibility among qualified prime rail.<sup>41</sup> The bidding system maximizes the buying power of rail purchasers.<sup>42</sup>

Fifth, during the original investigations, the industry was already fairly consolidated, with a limited number of producers. Since then, further consolidation has occurred. Of the three domestic producers during the original investigations, only two remain in the industry.<sup>43</sup> The industry remains capital intensive, with high fixed costs and a consequent incentive to maintain high operating rates.<sup>44</sup>

Sixth, the Canadian industry also has changed since the original investigations. During the period examined in the original investigations, there were two Canadian producers with substantial rail-producing capacity, Algoma and Sysco. Since the original investigations, Algoma has ceased production of steel rails and Sysco remains the only active Canadian producer.<sup>45</sup> At the time of the original investigations, Algoma was by far the more significant producer of subject imports; Sysco had fewer, and smaller, sales.<sup>46</sup>

Lastly, non-subject imports have increased significantly both in volume and market share terms. In 1988, nonsubject imports totaled \*\*\* short tons, or \*\*\* percent of total apparent domestic consumption.<sup>47</sup> By 1998, nonsubject imports had increased to \*\*\* short tons, or \*\*\* percent of total apparent domestic consumption.<sup>48</sup> Voluntary restraint agreements limiting exports from Europe and Japan that were in place during the original investigations have expired.<sup>49</sup>

Based on the record evidence, we find that these conditions of competition in the U.S. steel rails market are not likely to change significantly in the reasonably foreseeable future. Accordingly, we find that current conditions in the U.S. steel rails market provide us with a basis upon which to assess the likely effects of revocation of the antidumping duty orders within the reasonably foreseeable future.

### **C. Likely Volume of Subject Imports**

In evaluating the likely volume of imports of subject merchandise if the orders under review are revoked, the Commission is directed to consider whether the likely volume of imports would be significant either in absolute terms or relative to production or consumption in the United States.<sup>50</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)

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<sup>41</sup> Joint Response at 14.

<sup>42</sup> Joint Comments at 7.

<sup>43</sup> CR at I-11, PR at I-9.

<sup>44</sup> Original Determination at 21; Joint Response at 21.

<sup>45</sup> CR at I-22, PR at I-18.

<sup>46</sup> Original Determination at A-91.

<sup>47</sup> CR at Table I-3, PR at Table I-3.

<sup>48</sup> CR at Table I-3, PR at Table I-3.

<sup>49</sup> Original Determination at A-14; CR at I-5, n.9, PR at I-4-I-5, n.9.

<sup>50</sup> 19 U.S.C. § 1675a(a)(2).

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>51</sup>

In making its original determination, the Commission found that the industry producing new steel rails was not materially injured by reason of the subject imports from Canada.<sup>52</sup> The Commission concluded that there were substantial volume and market share increases in subject imports but that the market penetration was not then significant.<sup>53</sup> While focusing on the subject industry in Canada as a whole, the Commission found the existence of Sysco's "significant excess capacity," along with its export orientation, its increased attention to the U.S. market, and its need to seek out exports to be factors supporting a finding that the domestic industry was threatened with material injury.<sup>54</sup>

Since the imposition of the orders, subject imports from Canada have essentially left the U.S. market.<sup>55</sup> From a peak of \*\*\* short tons in 1988, subject imports had fallen to 383 short tons in 1997.<sup>56</sup> In 1998, subject imports, composed mostly of alloy rails, rose to 2,426 short tons.<sup>57</sup> But even in 1998 subject imports were only \*\*\* percent of total apparent domestic consumption.<sup>58</sup> However, several factors indicate that Sysco would likely export significant quantities of steel rails to the United States if the countervailing and antidumping duty orders were revoked.

First, as in the original investigations, Sysco has significant unused capacity. In the years 1986-88 capacity utilization by both subject producers, including Algoma, peaked at \*\*\* percent.<sup>59</sup> Algoma's decision to cease production of the subject merchandise has \*\*\* total capacity. Subject capacity in Canada, which was \*\*\* short tons in the years 1986-88, was 300,000 short tons in 1998.<sup>60</sup> Moreover, in 1996, Sysco could barely utilize one-third of its available capacity.<sup>61</sup> By 1998, Sysco's capacity utilization rate had declined to 23.3 percent, leaving the company with approximately 230,000 short tons of unused rail-making capacity.<sup>62</sup>

Second, Sysco has a strong incentive to increase its exports of steel rails. Like all producers of steel rails, Sysco must maintain high capacity utilization rates to cover the substantial fixed costs normal to the industry.<sup>63</sup> Like the domestic producers, Sysco has made significant investments in its plant in recent years.<sup>64</sup> Moreover, the company faces additional pressure to increase sales and revenues, as it is currently

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<sup>51</sup> 19 U.S.C. § 1675a(a)(2)(A)-(D).

<sup>52</sup> Original Determination at 14.

<sup>53</sup> Original Determination at 14.

<sup>54</sup> Original Determination at 19-20. The Commission also noted that the decline in Canadian demand had left both Sysco and Algoma with significantly more unused capacity. Id. at 20-21.

<sup>55</sup> CR at I-15, PR at I-12.

<sup>56</sup> CR at Table I-2, PR at Table I-2.

<sup>57</sup> CR at Table I-2, PR at Table I-2.

<sup>58</sup> CR at Table I-3, PR at Table I-3.

<sup>59</sup> CR at Table I-4, PR at Table I-4.

<sup>60</sup> CR at Table I-4, PR at Table I-4.

<sup>61</sup> CR at Table I-4, PR at Table I-4.

<sup>62</sup> CR at Table I-4, PR at Table I-4.

<sup>63</sup> Original Determination at 21.

<sup>64</sup> CR at I-24, PR at I-18-I-19.

owned by the Province of Nova Scotia and efforts are ongoing to privatize the company.<sup>65</sup> Sysco's own business plan projects significant production expansion for the years 2000 and 2001, with total shipments rising from approximately 69,766 short tons in 1998 to 182,000 short tons and 206,200 short tons in 2000 and 2001 respectively.<sup>66</sup> Similarly, Sysco plans to expand its export shipments from 18,522 short tons in 1998 to 95,800 short tons by 2001.<sup>67</sup> Nonetheless, even with this planned expansion in production, Sysco's available unused capacity would remain substantial at approximately 94,000 short tons in 2001.<sup>68</sup> Moreover, prior qualification problems have reduced Sysco's domestic sales in recent years.<sup>69</sup>

Third, Sysco is well-positioned to increase its exports to the U.S. market. Although Sysco's plans specifically state that the U.S. market is not a target for its planned additional production at present, Sysco already sells to the two Canadian Class I railroads.<sup>70</sup> Those Canadian railroads apply the same standards and specifications to their rail purchases as do Class I railroads in the United States.<sup>71</sup> Furthermore, both of the Canadian railroads have ownership interests or other business relationships with Class I railroads in the United States.<sup>72</sup> The U.S. market is more lucrative than other export markets.<sup>73</sup>

Sysco is also a significant exporter of semi-finished blooms, an intermediate product from which steel rails are produced.<sup>74</sup> Sysco devotes approximately 700,000 tons of raw steel capacity to producing these intermediate products.<sup>75</sup> In the absence of the discipline imposed by the countervailing and antidumping duty orders on steel rails, Sysco would have an incentive to consume more of its own intermediate product to produce the higher-value finished rails for export.<sup>76 77</sup>

Based on the foregoing, we find it likely that the subject producer in Canada would, upon revocation of the orders, increase exports to the U.S. market, and that the subject import volume would rise significantly if the discipline of the orders was removed.<sup>78</sup> Based on the record in these reviews, we conclude that, absent the restraining effect of the order, subject imports would likely increase to a significant level.

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<sup>65</sup> CR at I-24, PR at I-19.

<sup>66</sup> CR at Table I-5, PR at Table I-5.

<sup>67</sup> CR at Table I-5, PR at Table I-5.

<sup>68</sup> CR at Tables I-4 and I-5, PR at Tables I-4 and I-5.

<sup>69</sup> CR at I-24, n.52, PR at I-19, n.50.

<sup>70</sup> CR at I-25, PR at I-19.

<sup>71</sup> CR at I-25-I-26, PR at I-19.

<sup>72</sup> CR at I-25-I-26, PR at I-19.

<sup>73</sup> Joint Response at 45.

<sup>74</sup> CR at I-26, PR at I-20.

<sup>75</sup> CR at I-26, PR at I-20.

<sup>76</sup> CR at I-26, PR at I-20.

<sup>77</sup> Inventory levels are not known, but inventories have typically not been important in this industry, as most sales are made in response to specific orders. CR at I-10, PR at I-7; Joint Response at 25.

<sup>78</sup> See SAA at 890.

#### **D. Likely Price Effects**

In evaluating the likely price effects of subject imports if the orders are revoked, the Commission is directed to consider whether there is likely to be significant underselling by the subject imports as compared with domestic like products 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 domestic like products.<sup>79</sup>

In the original investigations, the Commission did not find significant underselling, noting that in most instances the Canadian producers were the only bidders for the contracts they actually won.<sup>80</sup> The Commission noted that, in cases where Canadian producers had competed with domestic producers for contracts, Canadian bids had typically fallen in the middle of other domestic bids.<sup>81</sup> Moreover, it also found that other sales were of “trial lot” sizes where the sales price was not important.<sup>82</sup> Despite not finding evidence of then-current underselling, for purposes of its threat analysis, the Commission found that the impact of the presence of competitive Canadian bids, as well as the high rate of the subsidization received by Sysco, the high dumping margins, and Sysco’s export orientation, would likely lead to the subject Canadian imports having depressive or suppressive effects on domestic prices.<sup>83</sup>

Recent pricing data are limited. Subject imports did increase in 1998, and landed duty-paid unit values for subject imports of alloy rails were significantly lower than the unit values for other, non-subject imports of alloy rails.<sup>84</sup> After being significantly lower in 1996 and 1997, landed duty-paid unit values for non-alloy subject imports were actually slightly higher than the unit values for non-subject non-alloy rails.<sup>85</sup>

Factors that the Commission found compelling in its original investigations have not changed. Most steel rails are still sold through a bidding process.<sup>86</sup> Steel rails are substitutable after they have passed through the qualification process.<sup>87</sup> Sysco has had quality problems in the past and has at times been unable to supply adequate product for Class I railroads. At the time of the original determinations, Canadian manufacturers produced a far higher share of industrial rail, which, as noted previously, is prime rail that cannot pass a quality inspection, than did the domestic producers.<sup>88</sup> In 1996, Sysco lost its largest customer, Canadian National, because of quality problems.<sup>89</sup> However, Sysco has recently requalified and is currently able to sell to both Canadian Class I railroads, both of which employ quality standards

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<sup>79</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>80</sup> Original Determination at 14.

<sup>81</sup> Original Determination at 14-15.

<sup>82</sup> Original Determination at 15.

<sup>83</sup> Original Determination at 19-20, 23.

<sup>84</sup> CR at Table I-2, PR at Table I-2.

<sup>85</sup> CR at Table I-2, PR at Table I-2.

<sup>86</sup> CR at I-10, PR at I-7.

<sup>87</sup> Joint Response at 14.

<sup>88</sup> CR at I-9, PR at I-7. Sysco remains qualified to sell the lower-quality industrial rails in the U.S. market. Joint Response at 26.

<sup>89</sup> CR at I-24, n.52, PR at I-19, n.50.

comparable to those of U.S. Class I railroads.<sup>90</sup> Given its ability to meet quality standards for Canadian Class I railroads, Sysco is likely to pass similar qualification processes used by all U.S. purchasers.<sup>91</sup> Once past qualification, price likely will be an important factor in competition for a railroad's purchases.<sup>92</sup> Given the degree of fungibility among qualified steel rails, Sysco is likely to reenter the market and attempt to regain market share through low pricing. The bidding process increases the likelihood that a producer may have a depressing effect on prices even in those cases in which it does not actually win bids.<sup>93 94</sup>

Based on the record in these reviews, we find it likely that revocation of the countervailing and antidumping duty orders would be likely to lead to significant underselling by the subject imports of the domestic like product, as well as significant price depression and suppression, within a reasonably foreseeable time.<sup>95</sup>

### **E. Likely Impact of Subject Imports**

In evaluating the likely impact of imports of subject merchandise if the orders are 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>96</sup> All relevant economic factors are to be considered within the context of the business cycle and the conditions of competition that are distinctive to the industry.<sup>97</sup> As instructed by the statute, we have considered the

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<sup>90</sup> Joint Response at 27.

<sup>91</sup> According to domestic producers, all producers have experienced problems with the Class I qualification, and Sysco is in fact already qualified to sell to some Class I railroads in the United States. Joint Response at 11.

<sup>92</sup> Joint Response at 13, 14.

<sup>93</sup> Domestic producers supplied third-country pricing data which they present as additional evidence of Sysco's practice of underselling. Joint response at 29-31. In the absence of greater detail regarding the nature of these sales, Commissioners Askey, Koplan, and Okun do not rely on these data for their findings.

<sup>94</sup> Chairman Bragg, Vice Chairman Miller, and Commissioner Hillman find that the data supplied by the domestic producers indicating that Sysco had underbid them on particular sales to \*\*\* provide further support for a finding that, if the orders were revoked, Sysco would offer low prices in order to win sales in the United States.

<sup>95</sup> Commissioner Askey also considered the high likely rates of subsidies and the high likely dumping margins to be significant in her analysis of the likely volume effects of revocation of the orders.

<sup>96</sup> 19 U.S.C. § 1675a(a)(4).

<sup>97</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. In its expedited review, Commerce found the dumping margin likely to occur upon revocation of the antidumping duty order was 38.79 percent. 64 Fed. Reg. 73013, 73015 (Dec. 29, 1999).

Section 752 (a)(6) of the Act states that "the Commission may consider ... the magnitude of the net countervailable subsidy" in making its determination in a five-year review investigation. 19 U.S.C. § 1675a(a)(6).  
(continued...)

extent to which any improvement in the state of the domestic industry is related to the countervailing and antidumping duty orders at issue and whether the industry is vulnerable to material injury if the orders are revoked.<sup>98</sup>

In the original investigations, the Commission found that the domestic industry was experiencing material injury, though not by reason of subject imports, and the industry's weakness left it vulnerable to additional increases in subject imports.<sup>99</sup> In finding the domestic industry vulnerable the Commission particularly noted poor financial performance and declines in capital expenditures and research and development.<sup>100</sup>

We find the record presents mixed evidence regarding the current vulnerability of the domestic industry. Subject imports largely disappeared from the market after the imposition of the countervailing and antidumping duty orders.<sup>101</sup> Total apparent domestic consumption, and domestic shipments, were significantly higher in the years 1996-98 than in 1986-88.<sup>102</sup> Domestic producers were able to invest \$\*\*\* in improved and modernized facilities since the imposition of the orders.<sup>103</sup> The domestic industry's financial performance \*\*\*, with \*\*\*.<sup>104</sup>

However, the domestic producers characterize their profit margins as \*\*\*; one of the domestic producers reported an overall profit margin of \*\*\* percent for 1998.<sup>105</sup> These \*\*\* profit margins occurred in a year of unusually high domestic demand and production, with domestic production in 1998 a full \*\*\*

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<sup>97</sup> (...continued)

Although the statute does not expressly define the "magnitude of the net countervailable subsidy" to be used by the Commission in five-year review investigations, it states that "[t]he administering authority shall provide to the Commission the net countervailable subsidy that is likely to prevail if the order is revoked or the suspended investigation is terminated." 19 U.S.C. § 1675a(a)(b)(3). The statute further provides that Commerce "shall normally choose a net countervailable subsidy that was determined under section 1671d of this title or subsection (a) or (b)(1) of section 1675 of this title." *Id.* In its expedited review, Commerce found that the net countervailable subsidy likely to prevail if the order were revoked was 94.57 percent. 64 Fed. Reg. 73519, 73522 (Dec. 30, 1999).

The statute also requires the Commission to consider information about the nature of any countervailable subsidies and whether they are of the type described in Article 3 (subsidies contingent upon export or the use of domestic content) or Article 6.1 (subsidies deemed to cause "serious prejudice" to other WTO members) of the WTO Subsidies Agreement. 19 U.S.C. § 1675a(a)(6). In this case, Commerce did not identify any export or domestic content subsidies. However, Commerce did find several subsidies—namely, subsidies to cover operating losses, direct debt forgiveness, and grants to cover debt repayment—that are listed in Article 6.1 of the Subsidies Agreement. 64 Fed. Reg. at 73522 (Dec. 30, 1999).

<sup>98</sup> The SAA states that in assessing whether the domestic industry is vulnerable to injury if the orders are 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>99</sup> Original Determination at 26.

<sup>100</sup> Original Determination at 12-13.

<sup>101</sup> CR at I-15, PR at I-12.

<sup>102</sup> CR at Table I-3, PR at Table I-3.

<sup>103</sup> CR at I-14, PR at I-11.

<sup>104</sup> CR at I-14, PR at I-11.

<sup>105</sup> CR at I-14, PR at I-11; Joint Response at 34-36. \*\*\*. Joint Response at 34-36.

percent greater than that in 1988.<sup>106</sup> \*\*\*.<sup>107</sup> With recent significant capital improvements, the domestic industry still has \*\*\*, and the pressure for higher technology and improved products makes this an industry where capital expenditures and research and development are essential in maintaining competitiveness.<sup>108</sup> While domestic producers still dominate the U.S. market, their share of the market \*\*\* from \*\*\* percent in 1996 to \*\*\* percent in 1998. In comparison, in 1988, domestic producers' share of the U.S. market was \*\*\* percent.<sup>109</sup> Non-subject imports have increased, with the non-subject share of total apparent domestic consumption \*\*\* from \*\*\* percent in 1996 to \*\*\* percent in 1998.<sup>110</sup> Thus, while the evidence is mixed, the record indicates that the industry is somewhat vulnerable to material injury if the orders are revoked.<sup>111</sup>

As described above, we find it likely that revocation of the orders would result in a significant increase in the volume of subject imports, and that these shipments would likely depress the industry's prices. We find that these developments would have a significant adverse impact on the production, shipment, sales, and revenue levels of the domestic industry. This reduction in the industry's production, sales, and revenue levels would have a direct adverse impact on the industry's profitability as well as its ability to raise capital and make and maintain necessary capital investments. Accordingly, based on the limited record in this review, we conclude that, if the countervailing and antidumping duty orders were revoked, 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 countervailing and antidumping duty orders on new steel rails from Canada would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time.

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<sup>106</sup> CR at Table I-1, PR at Table I-1.

<sup>107</sup> CR at I-14, PR at I-11.

<sup>108</sup> CR at I-14 and n.36, PR at I-11 and n.34.

<sup>109</sup> CR at Table I-3, PR at Table I-3.

<sup>110</sup> CR at Table I-3, PR at Table I-3.

<sup>111</sup> Chairman Bragg finds that the domestic industry is not vulnerable.