

UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigations Nos. 303-TA-21 (Review) and 731-TA-451, 461, and 519 (Review)
GRAY PORTLAND CEMENT AND CEMENT CLINKER FROM JAPAN,
MEXICO, AND VENEZUELA

DETERMINATION AND VIEWS OF THE COMMISSION
(USITC Publication No. 3361, October 2000)

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DETERMINATIONS

On the basis of the record² developed in the subject five-year reviews, the United States International Trade Commission determines,³ pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. § 1675(c)) (the Act), that revocation of the antidumping duty orders on gray portland cement and cement clinker from Japan and Mexico would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time⁴ and that termination of the suspended investigations on gray portland cement and cement clinker from Venezuela would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

BACKGROUND

The Commission instituted these reviews on August 2, 1999 (64 F.R. 41958) and determined on November 4, 1999 that it would conduct full reviews (64 F.R. 62689, November 17, 1999). Notice of the scheduling of the Commission's reviews 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 April 5, 2000 (65 F.R. 17901).⁵ The hearing was held in Washington, DC, on August 15, 2000, and all persons who requested the opportunity were permitted to appear in person or by counsel.

¹ The investigation numbers are as follows: Japan is 731-TA-461 (Review); Mexico is 731-TA-451 (Review); and Venezuela is 303-TA-21 (Review) and 731-TA-519 (Review).

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

³ Commissioner Bragg not participating.

⁴ Commissioner Askey dissenting.

⁵ The Commission revised and extended its schedule for these reviews on September 7, 2000 (65 F.R. 55269, September 13, 2000).

VIEWS OF THE COMMISSION ¹

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 antidumping duty orders covering gray portland cement and cement clinker from Mexico and Japan would be likely to lead to continuation or recurrence of material injury to regional industries in the United States within a reasonably foreseeable time;² and that termination of the suspended antidumping duty and countervailing duty investigations covering gray portland cement and cement clinker from Venezuela would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

I. BACKGROUND

The four reviews before the Commission involve separately conducted original investigations for each of the three countries.³ In each of the original investigations, the Commission defined a single domestic like product, gray portland cement and cement clinker, and found appropriate circumstances existed to conduct a regional industry analysis.

On August 23, 1990, the Commission determined that an industry in the United States was being materially injured by reason of imports of gray portland cement and cement clinker from Mexico that were being sold at less than fair value.⁴ In making its determination, the Commission concluded that appropriate circumstances existed for a regional industry analysis, with the regional industry consisting of the U.S. producers in the “Southern-tier Region.”⁵ On August 30, 1990, the Department of Commerce (“Commerce”) issued an antidumping duty order on imports of gray portland cement and cement clinker from Mexico.⁶

On April 29, 1991, the Commission determined that an industry in the United States was being materially injured by reason of imports of gray portland cement and cement clinker from Japan that were being sold at less than fair value.⁷ In making its determination, the Commission concluded that appropriate circumstances existed for a regional industry analysis, with the regional industry consisting of the U.S. producers in the “Southern California Region.” On May 10, 1991, Commerce issued an antidumping duty order on imports of gray portland cement and cement clinker from Japan.⁸ On appeal, the U.S. Court of International Trade (“CIT”) reversed the Commission majority’s determination to cumulate imports of cement from Japan and Mexico on the basis that there was no evidence that imports from Mexico already subject to an antidumping duty order caused present material injury, and remanded the Commission majority’s present material injury determination.⁹ The CIT subsequently affirmed the Commission

¹ Commissioner Lynn M. Bragg did not participate in these reviews.

² Commissioner Askey dissenting. She writes separately to explain her views in this proceeding but joins in Sections I, II, III, IV, V.A, V.B, VI.A, VI.B, and VI.C of this opinion. See Concurring and Dissenting Views of Commissioner Thelma J. Askey.

³ The two reviews regarding Venezuela involve an original countervailing duty investigation and an original antidumping duty investigation, both of which were conducted at the same time.

⁴ Gray Portland Cement and Cement Clinker from Mexico, Inv. No. 731-TA-451 (Final), USITC Pub. 2305 (Aug. 1990) (“Mexico Cement”).

⁵ The Southern-tier Region consists of the States of Florida, Alabama, Mississippi, Louisiana, Texas, New Mexico, Arizona, and California. Mexico Cement, USITC Pub. 2305 at 14-17 and 53.

⁶ 55 Fed. Reg. 35443 (Aug. 30, 1990).

⁷ Gray Portland Cement and Cement Clinker from Japan, Inv. No. 731-TA-461 (Final), USITC Pub. 2376 (April 1991) (“Japan Cement”).

⁸ 56 Fed. Reg. 21658 (May 10, 1991).

⁹ Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608, 628-29 (CIT 1993).

majority's affirmative remand determination finding a threat of material injury by reason of LTFV imports from Japan.¹⁰

In July 1991, the Commission determined that there was a reasonable indication that an industry in the United States was being materially injured by reason of imports of gray portland cement and cement clinker from Venezuela that allegedly were subsidized and being sold at less than fair value.¹¹ In making its determination, the Commission concluded that appropriate circumstances existed for a regional industry analysis, with the regional industry consisting of the U.S. producers in the "State of Florida Region". On August 21, 1991, Commerce issued a preliminary determination that imports of gray portland cement and cement clinker from Venezuela were being subsidized, and on November 11, 1991, a preliminary determination that such imports were being sold at LTFV. Commerce subsequently entered into suspension agreements with Venezuela and suspended the antidumping duty investigation with respect to subject imports on February 27, 1992, and suspended the countervailing duty investigation on March 17, 1992.¹²

On August 2, 1999, the Commission instituted these reviews pursuant to section 751(c) of the Act to determine whether termination of the suspended investigations on gray portland cement and cement clinker from Venezuela and revocation of the antidumping duty orders on gray portland cement and cement clinker from Mexico and Japan would likely lead to continuation or recurrence of material injury.¹³

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 each of the 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 within each group to participate and provide information requested in a full review.¹⁴ If the Commission finds the responses from both groups of interested parties to be adequate, or if other appropriate circumstances warrant, it will determine to conduct a full review.

In a joint response to the notice of institution in these reviews, the Commission received company specific information for each represented domestic producer broken out by the three separate regional domestic industries defined in the original investigations, as follows: The Committee For Fairly Traded Mexican Cement (an *ad hoc* coalition of 21 Southern Tier U.S. producers of the domestic like product); The Committee For Fairly Traded Japanese Cement (an *ad hoc* association of five Southern California U.S. producers of the domestic like product); and The Committee For Fairly Traded Venezuelan Cement (an *ad hoc* association of four Florida U.S. producers of the domestic like product). This joint response also was on behalf of three labor unions representing workers engaged in the production of the domestic like product (the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; the Paper, Allied-Industrial Chemical and Energy Workers International Union; and the

¹⁰ Gray Portland Cement and Cement Clinker from Japan, Inv. No. 731-TA-461 (Remand), USITC Pub. 2657 (June 1993), *aff'd*, Mitsubishi Materials Corp. v. United States, 918 F. Supp. 422 (CIT 1996).

¹¹ Gray Portland Cement and Cement Clinker from Venezuela, Inv. Nos. 303-TA-21 and 731-TA-519 (Preliminary), USITC Pub. 2400 (July 1991) ("Venezuela Cement").

¹² See Agreement Suspending the Antidumping Investigation on Gray Portland Cement and Cement Clinker from Venezuela ("Venezuelan AD Suspension Agreement"), in 57 Fed. Reg. 6706 (Feb. 27, 1992) and Agreement Suspending the Countervailing Duty Investigation on Gray Portland Cement and Cement Clinker from Venezuela ("Venezuelan CVD Suspension Agreement"), in 57 Fed. Reg. 9242 (Mar. 17, 1992).

¹³ 64 Fed. Reg. 41958 (Aug. 2, 1999).

¹⁴ See 19 C.F.R. § 207.62(a); 63 Fed. Reg. 30599, 30602-05 (June 5, 1998).

International Union of Operating Engineers). The Commission also received adequate responses from two other regional U.S. producers of the domestic like product (Rio Grande Portland Cement Corporation and Sunbelt Cement of Texas, LP). In the Mexican and Venezuelan reviews, the Commission received responses from Cementos Apasco, S.A. de C.V. (“Apasco”) (a Mexican producer of subject merchandise); CEMEX, S.A. de C.V. (“CEMEX”) (a Mexican producer and exporter of subject merchandise), jointly with its wholly owned subsidiary, Sunbelt Cement of Texas, LP (“CEMEX USA”) (a U.S. producer and the exclusive U.S. importer of Mexican and Venezuelan subject merchandise for CEMEX), and its subsidiary Corporacion Venezolana de Cementos, S.A. de C.A. (“Vencemos”) (a Venezuelan producer of subject merchandise); Cementos de Chihuahua, S.A. de C.V. (“CDC”) (a Mexican producer of the subject merchandise); Rio Grande Portland Cement Corporation (a U.S. affiliate of CDC that is a U.S. producer and U.S. importer of the subject merchandise from Mexico); and Cementos Caribe, C.A. (“Caribe”) (a Venezuelan producer and exporter of the subject merchandise). The Commission did not receive a response to the notice of institution from any respondent interested party in the review concerning Japan.

On November 4, 1999, the Commission determined that both the domestic and respondent interested party group responses to its notice of institution for the reviews concerning Mexico and Venezuela were adequate.¹⁵ Pursuant to 19 U.S.C. § 1675(c)(5), the Commission decided to conduct full reviews with regard to Mexico and Venezuela. Because no respondent interested party responded for the review concerning Japan, the Commission determined that the respondent interested party group response for that review was inadequate. However, the Commission decided to conduct a full review of the order regarding Japan to promote administrative efficiency in light of the Commission’s decision to conduct full reviews with respect to Mexico and Venezuela.

The three Committees and the three labor unions listed above (collectively, “Domestic Producers”) filed briefs and appeared at the hearing in opposition to revocation of the orders and termination of the suspended investigations. CEMEX and GCC Cemento, S.A. de C.V. (“GCCC”) (formerly CDC) filed briefs and appeared at the hearing in support of revocation of the antidumping duty order on imports from Mexico. Vencemos filed briefs and appeared at the hearing in support of termination of the suspended Venezuelan investigations. Taiheiyo Cement Corporation, Mitsubishi Materials Corporation, Ube Industries, Ltd., Sumitomo Osaka Cement Co., Ltd., and Tokuyama Corporation (collectively, “Japanese Respondents”) jointly filed briefs and appeared at the hearing in support of revocation of the antidumping duty order on imports from Japan.

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.”¹⁶ 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.”¹⁷

¹⁵ See Explanation of Commission Determination on Adequacy in Gray Portland Cement and Cement Clinker from Japan, Mexico, and Venezuela. See also 64 Fed. Reg. 62689 (Nov. 17, 1999).

¹⁶ 19 U.S.C. § 1677(4)(A).

¹⁷ 19 U.S.C. § 1677(10). See NEC Corp. v. Department of Commerce, 36 F. Supp.2d 380, 383 (CIT 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Torrington Co. v. United States, 747 F. Supp. 744, 749 n.3 (CIT 1990), aff’d, 938 F.2d 1278 (Fed. Cir. 1991). See also S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979).

In its final full sunset review of the antidumping duty order on gray portland cement and cement clinker from Mexico, Commerce defined the scope of the review as the subject merchandise covered by the order, including:

gray portland cement and clinker (“portland cement”) from Mexico. Gray portland cement is a hydraulic cement and the primary component of concrete. Clinker, an intermediate material product produced when manufacturing cement, has no use other than of being ground into finished cement. Gray portland cement is currently classifiable under the Harmonized Tariff Schedule (“HTS”) item number 2523.29 and cement clinker is currently classifiable under HTS item number 2523.10. Gray portland cement has also been entered under HTS item number 2523.90 as other hydraulic cements. In its only scope ruling, the Department determined that masonry cement is not within the scope of the order. The HTS subheadings are provided for convenience and customs purposes only. Our written description of the scope of the proceeding is dispositive.¹⁸

Commerce’s definition of the subject merchandise for each of the four reviews -- Japanese,¹⁹ Mexican, Venezuelan antidumping duty,²⁰ and Venezuelan countervailing duty²¹-- is similar.²²

¹⁸ 65 Fed. Reg. 41049, 41050 (July 3, 2000).

¹⁹ In its final expedited sunset review of the antidumping duty order on gray portland cement and cement clinker from Japan, Commerce defined the subject merchandise as:

gray portland cement and cement clinker (“portland cement”) from Japan. Gray portland cement is a hydraulic cement and the primary component of concrete. Cement clinker, an intermediate material produced when manufacturing cement, has no use other than grinding into finished cement. Microfine cement was specifically excluded from the antidumping duty order. Gray portland cement is currently classifiable under the Harmonized Tariff Schedule (“HTS”) item number 2523.29 and cement clinker is currently classifiable under HTS item number 2523.10. Gray portland cement has also been entered under HTS item number 2523.90 as other hydraulic cements. The Department made two scope rulings regarding the subject merchandise.

65 Fed. Reg. 11549, 11550 (March 3, 2000). In footnote 2 of this notice, Commerce elaborated on these scope rulings as follows:

See Scope Rulings, 57 FR 19602 (May 7, 1992), classes G and H of oil well cement are within the scope of the order; and Scope Ruling, 58 FR 27542 (May 10, 1993), nittetsu super fine cements is not within the scope of the order.

Id.

²⁰ In its final full sunset review of the suspended Venezuelan antidumping duty investigation, Commerce defined the subject merchandise as:

gray portland cement and cement clinker (“portland cement”) from Venezuela. Gray portland cement is a hydraulic cement and the primary component of concrete. Clinker, an intermediate material product produced when manufacturing cement, has no use other than of being ground into finished cement. Oil well cement is also included within the scope of the investigation. Gray portland cement is currently classifiable under the Harmonized Tariff Schedule (“HTS”) item number 2523.29 and cement clinker is currently classifiable under HTS item number 2523.10. Gray portland cement has also been entered under HTS item number 2523.90 as other hydraulic cements. The HTS subheadings are provided for convenience and customs purposes only. Our written description of the scope of the proceeding is dispositive.

65 Fed. Reg. 41050, 41051 (July 3, 2000).

²¹ In its final expedited sunset review of the suspended Venezuelan countervailing duty investigation,

(continued...)

The subject merchandise is a hydraulic cement used predominantly in the production of concrete, which in turn is consumed almost entirely by the construction industry.²³ The principal end uses of portland cement are highway construction, using ready-mix concrete, and building construction, using ready-mix concrete, concrete blocks, and precast concrete units. All cement, including imports, generally conforms to the standards established by the American Society for Testing and Materials (“ASTM”). While there are five types of gray portland cement as defined by ASTM, types I and II account for approximately 90 percent of U.S. shipments.²⁴ In processing gray portland cement, raw materials containing chemical components of calcium carbonate, silica alumina, and iron oxide are ground, blended, and sintered in a kiln to produce cement clinker. Cement clinker, which is in the form of small, grayish-black pellets, is ground with gypsum to produce finished cement, which is in the form of grayish powder. Cement clinker has no use other than being ground into finished cement.

In each of the original determinations, the Commission found that gray portland cement and cement clinker constituted a single domestic like product.²⁵ The record indicates that the product itself has remained essentially unchanged since the original investigations. The parties have presented no arguments²⁶ that the Commission should revisit its original definition of the domestic like product, and the record does not suggest any reason for doing so. We therefore define a single domestic like product consisting of gray portland cement and cement clinker coextensive with the scope of review for each of the four reviews.

B. Domestic Industry

²¹ (...continued)

Commerce defined the subject merchandise covered by this suspended investigation as:

gray portland cement and cement clinker (“portland cement”) from Venezuela. Gray portland cement is a hydraulic cement and the primary component of concrete. Cement clinker, an intermediate material produced when manufacturing cement, has no use other than grinding into finished cement. Oil well cement is also included within the scope. Microfine cement was specifically excluded from the scope. Gray portland cement is currently classifiable under the Harmonized Tariff Schedule (“HTS”) item number 2523.29 and cement clinker is currently classifiable under HTS item number 2523.10. Gray portland cement has also been entered under HTS item number 2523.90 as other hydraulic cements. The HTS subheadings are provided for convenience and customs purposes only. The written product description remains dispositive as to the scope of the product coverage.

65 Fed. Reg. 11554 (Mar. 3, 2000).

²² The differences between the scopes of the four reviews are: 1) the definition for the Mexican review explicitly excludes masonry cement, while the other reviews are silent on this item; 2) the definition for the Japanese and two Venezuelan reviews explicitly includes oil well cement within the scope of review, while the Mexican review is silent on this item; and 3) the definition for the Japanese and the Venezuelan antidumping duty reviews explicitly exclude microfine cement from the scope of review, while the Mexican and Venezuelan countervailing duty reviews are silent on this item.

²³ Confidential Staff Report (“CR”) at I-26-I-33; Public Staff Report (“PR”) at I-23 - I-28.

²⁴ CR at I-27; PR at I-23. Type II cement meets all the requirements of type I cement and may be used in lieu of type I. *Id.*

²⁵ Mexico Cement, USITC Pub. 2305 at 3; Japan Cement, USITC Pub. 2376 at 13; Venezuela Cement, USITC Pub. 2400 at 4.

²⁶ We note that in each of the underlying investigations the parties also did not dispute the definition of the domestic like product.

Section 771(4)(A) of the Act defines the relevant industry as the domestic “producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product.”²⁷ 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.²⁸ The Commission bases its analysis on a firm’s production-related activities in the United States.²⁹ Consistent with our domestic like product determination, we find one domestic industry, consisting of all domestic producers of gray portland cement and cement clinker within the defined regions.

Two domestic industry issues have been raised in these reviews as discussed below regarding: (1) whether appropriate circumstances exist to conduct regional industry analyzes for these reviews, and (2) whether appropriate circumstances exist to exclude any related parties.

III. REGIONAL INDUSTRY ANALYSIS

A. Background

In each of the original investigations, the Commission found appropriate circumstances existed to conduct a regional industry analysis.³⁰ The Commission defined different regions for each of the original, separately-conducted investigations.³¹ In the original Mexican Cement investigation, the Commission defined the appropriate region as the Southern Tier Region consisting of the States of Florida, Alabama, Mississippi, Louisiana, Texas, New Mexico, Arizona, and California.³² In the original Japanese Cement investigation, the Commission considered whether the Southern California region, as proposed by

²⁷ 19 U.S.C. § 1677(4)(A).

²⁸ See, e.g., Uranium from Russia, Ukraine, and Uzbekistan, Inv. Nos. 731-TA-539-C, E and F (Review), USITC Pub. 3334 at 14-15 (Aug. 2000); Manganese Sulfate from the People’s Republic of China, Inv. No. 731-TA-725 (Final), USITC Pub. 2932, at 5 & n.10 (Nov. 1995) (“the Commission has generally included toll producers that engage in sufficient production-related activity to be part of the domestic industry”). See, e.g., United States Steel Group v. United States, 873 F. Supp. 673, 682-83 (CIT 1994), aff’d, 96 F.3d 1352 (Fed. Cir. 1996).

²⁹ See Certain Cut-to-Length Steel Plate from France, India, Indonesia, Italy, Japan, and Korea, Inv. Nos. 701-TA-387-391 and 731-TA-816-821 (Final), USITC Pub. 3273 at 8-9 (Jan. 2000).

³⁰ The Commission has found it appropriate to use a regional industry analysis in 13 of the 14 previous investigations concerning portland cement. In the one national case, the petitioner proposed a national, rather than regional, industry. See Venezuela Cement, USITC Pub. 2400 at 6, n.11 and A-5 (Table 1).

³¹ The cases under review were filed and conducted as separate single country investigations. The regions proposed and ultimately used by the Commission in each investigation differed based on the particular facts of each investigation.

³² Mexico Cement, USITC Pub. 2305 at 14-17 and 53. The Commission majority used the Southern Tier Region in its analysis, although it found that either the Southern Tier Region or the alternative Southern Tier Region (excluding northern California and the inland counties of the Gulf States) appeared to meet the statutory test. Id. Petitioners had proposed that four states -- Arizona, New Mexico, Texas, and Florida -- were the appropriate region or regions to consider regarding subject imports from Mexico. Mexico Cement -- Preliminary, USITC Pub. 2235 at 7. The Commission rejected proposals for multiple regions and added the States of Louisiana, Mississippi, and Alabama to make the proposed states a contiguous region. The Commission also added the State of California to the Southern Tier Region in part because 20-30 percent of subject imports from Mexico entered that state. Mexico Cement, USITC Pub. 2305 at 9 and 53; Mexico Cement -- Preliminary, USITC Pub. 2235 at 7-15.

petitioners, or a larger region, the State of California, was the appropriate region.³³ The Commission determined that both regions satisfied the market isolation criteria but found the more appropriate region for its analysis was Southern California.³⁴ In the original Venezuelan preliminary investigations, the Commission found that the statewide Florida region, as proposed by petitioners, was the appropriate region.³⁵

The parties to these reviews acknowledged that three separate, but overlapping, regions appear to exist and assumed that the Commission would adopt regional industry definitions similar to those in the original investigations. Domestic Producers contended that “the Commission should consider either the Southern Tier Region or the CA-AZ-NM-TX Region” for the Mexican review, the State of California for the Japanese review, and the State of Florida for the Venezuelan reviews.³⁶ While Mexican respondent CEMEX had originally stated that a national industry analysis was appropriate and that the Southern Tier was an arbitrary delineation of a regional industry, it later acknowledged that “a regional industry appears to exist in the Southern Tier and appears likely to continue to exist in the foreseeable future.”³⁷ CEMEX, however, argued that “subject imports from Mexico are not likely to be concentrated in the Southern Tier in the foreseeable future. . . . [and thus] the Commission must issue a negative determination here.”³⁸ The Japanese respondents indicated that their arguments would be the same whether the Commission defined Southern California or a larger region for its analysis.³⁹ The Venezuelan respondent “assume[d] arguendo the existence of a domestic regional industry,” but charged that “there is no concentration of Venezuelan imports in any region sufficient to analyze injury on a regional basis under the statute.”⁴⁰

B. General Considerations

Section 752(a)(8) of the Act provides the Commission a special rule in five-year reviews for regional industries. The statute states that in a five-year review involving a regional industry:

the Commission may base its determination on the regional industry defined in the original investigation under this subtitle, another region that satisfies the criteria established in section 1677(4)(C) of this title, or the United States as a whole. In determining if a regional industry analysis is appropriate for the determination in review, the Commission shall consider whether the criteria established in section 1677(4)(C) of this title are likely to be satisfied if the order is revoked or the suspended investigation is terminated.⁴¹

³³ Japan Cement, USITC Pub. 2376 at 13, 17-20, and 47-50.

³⁴ Japan Cement, USITC Pub. 2376 at 17-20 and 47-50.

³⁵ Venezuela Cement, USITC Pub. 2400 at 7.

³⁶ Domestic Producers’ Posthearing Brief at 10, 19, and 23; Domestic Producers’ Prehearing Brief at 20-28, 30-31, and Exhibits 11 and 12; Domestic Producers’ Response to Commission Questions at 56-57.

³⁷ Mexican Respondent - CEMEX’s Prehearing Brief at 2, 62, 63, 70-71; Mexican Respondent - CEMEX and GCCC’s Comments on Draft Questionnaires at 2-4; Mexican Respondent - CEMEX’s Comments on Adequacy at 3.

³⁸ Mexican Respondent - CEMEX’s Prehearing Brief at 63-70. CEMEX contends that if the Mexican order is revoked subject imports from Mexico will be sold in regions outside the Southern Tier. It points to business plans *** to support this argument. Id. at 75-80.

³⁹ Japanese Respondents’ Prehearing Brief at 5.

⁴⁰ Venezuelan Respondent’s Prehearing Brief at 2.

⁴¹ 19 U.S.C. § 1675a(a)(8).

The Uruguay Round Agreements Act (“URAA”) Statement of Administrative Action (“SAA”) clarifies that “the Commission is not bound by any determination it may have made in the original investigation regarding the existence of a regional industry.”⁴² However, the SAA, on the other hand, seems to contemplate that the Commission have “sufficient evidence” to warrant revisiting its original regional industry determination.⁴³

The Commission takes into account any effect that the order or suspension agreement may have had on the marketing and distribution patterns for the subject product in analyzing whether the market isolation and import concentration criteria are likely to be satisfied in the event of revocation or termination.⁴⁴ The Commission also takes into account any prior regional industry definition, any product characteristics that lend themselves to a regional market, and whether any changes in the isolation of the region or import concentration are related to the importation of the order or suspension agreement.⁴⁵

In considering whether appropriate circumstances exist to use a regional industry analysis, the statute directs the Commission to take a series of steps. The statute, 19 U.S.C. § 1677(4)(C), provides that:

In appropriate circumstances, the United States, for a particular product market, may be divided into 2 or more markets and the producers within each market may be treated as if they were a separate industry if--

- (i) the producers within such market sell all or almost all of their production of the like product in question in that market, and
- (ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States.

In such appropriate circumstances, material injury, the threat of material injury, or material retardation of the establishment of an industry may be found to exist with respect to an industry

⁴² SAA, H.R. Rep. No. 103-316, vol. I at 887 (1994).

⁴³ SAA at 887. Specifically, the SAA states:

If there is sufficient evidence to warrant revisiting the original regional industry determination, the Commission may base its likelihood determination on: (1) the regional industry defined by the Commission in the original investigation; (2) another regional industry satisfying the criteria of amended section 771(4)(C); or (3) the United States industry as a whole.

Id. at 887-888.

⁴⁴ SAA at 888. The SAA specifically states:

Given the predictive nature of a likelihood of injury analysis, the Commission’s analysis in regional industry investigations will be subject to no greater degree of certainty than in a review involving a national industry. Because the issuance of an order or the acceptance of a suspension agreement may have affected the marketing and distribution patterns of the product in question, the Commission’s analysis of a regional industry should take into account whether the market isolation and import concentration criteria in section 771(4)(C) are likely to be satisfied in the event of revocation or termination. Neither the Commission nor interested parties will be required to demonstrate that the regional industry criteria currently are satisfied.

Id.

⁴⁵ SAA at 888. Specifically, the SAA states:

The Commission should take into account any prior regional industry definition, whether the product at issue has characteristics that naturally lead to the formation of regional markets (*e.g.*, whether it has a low value-to-weight ratio and is fungible), and whether any changes in the isolation of the region or in import concentration are related to the imposition of the order or the acceptance of a suspension agreement.

even if the domestic industry as a whole, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of that product, is not injured, if there is a concentration of dumped imports or imports of merchandise benefitting from a countervailable subsidy into such an isolated market and if the producers of all, or almost all, of the production within that market are being materially injured or threatened by material injury, or if the establishment of an industry is being materially retarded, by reason of the dumped imports or imports of merchandise benefitting from a countervailable subsidy. The term “regional industry” means the domestic producers within a region who are treated as a separate industry under this subparagraph.⁴⁶

The CIT has described the steps taken by the Commission in a regional industry analysis as follows:

The statute sets up three prerequisites which must be satisfied before the Commission can reach an affirmative determination under a regional industry analysis. The Commission must determine that there is: (1) a regional market satisfying the requirements of the statute, (2) a concentration of dumped imports into the regional market, and (3) material injury or threat thereof to producers of all or almost all of the regional production, or material retardation to the establishment of an industry, due to the subsidized or dumped imports. The Commission will move on to the next step only if each preceding step is satisfied.⁴⁷

⁴⁶ 19 U.S.C. § 1677(4)(C). The URAA changes to the regional industry provisions were not intended to affect substantive Commission practice. The definition of “regional industry” in the last sentence was added and technical language changes were made by the URAA. The URAA also amended the statute to require that Commerce “to the maximum extent possible, direct that duties be assessed only on the subject merchandise of the specific exporters or producers that exported the subject merchandise for sale in the region concerned during the period of investigation.” 19 U.S.C. § 1673e(d). Therefore, Commerce will “exclude from the [antidumping duty] order, to the ‘maximum extent possible,’ those exporters or producers that did not export for sale in the region during the period of investigation.” SAA at 859 and 860.

⁴⁷ Texas Crushed Stone Co. v. United States, 822 F. Supp. 773, 777 (CIT 1993), aff’d, 35 F.3d 1535 (Fed. Cir. 1994) (“the ITC’s case-by-case approach represents a ‘legitimate policy choice [] made by the agency in interpreting and applying the statute.’” Id. at 1542), aff’g Crushed Limestone from Mexico, Inv. No. 731-TA-562 (Preliminary), USITC Pub. 2533 (July 1992) (“Limestone”). See also Atlantic Sugar, Ltd. v. United States, 519 F. Supp. 916, 920 (CIT 1981)(court cautioned against “[a]rbitrary or free handed sculpting of regional markets.”).

C. Analysis

According to the SAA, the Commission should take into account in five-year reviews involving regional industries any prior regional industry definition and whether the subject product has characteristics that naturally lead to the formation of regional markets (e.g., whether it has a low value-to-weight ratio and is fungible).⁴⁸ We have taken into account each of the Commission's prior regional industry definitions in our analysis and determine that the record again supports finding three separate regional industries, which correspond, or are similar, to those defined in the original investigations. As in the original investigations, separate and different regions are appropriate in each of these reviews to reflect the particular region likely to be affected by the subject imports. Regarding characteristics that naturally lead to the formation of regional markets, the evidence shows that gray portland cement is a fungible product, with domestically produced product and subject imports interchangeable.⁴⁹ Its relatively low value-to-weight ratio substantially affects transportation costs and limits the distances within which cement is shipped. Due to high inland transportation costs, nearly 80 percent of domestic gray portland cement and virtually all imports in the Southern Tier region are shipped to customers located within 200 miles of the production site or import terminal.⁵⁰ Moreover, the industry practice of "base point" pricing, which results in a "freight equalization" system,⁵¹ makes transportation costs an important component of cement prices.⁵²

1. Market Isolation Criteria

a. Mexican Cement Review

Producers in the Southern Tier region shipped 85 percent of their U.S. shipments of gray portland cement within the region throughout the period of review.⁵³ While the regional producers' percentage of within region shipments has declined somewhat since the original Mexican Cement investigation, we find

⁴⁸ SAA at 888. The Commission has found, in the past, that "appropriate circumstances" exist for the Commission to engage in a regional industry analysis for products with low value-to-weight ratios and where high transportation costs make the areas in which the product is produced necessarily isolated and insular. See, e.g., Limestone, USITC Pub. 2533; Nepheline Syenite, USITC Pub. 2502; Venezuela Cement, USITC Pub. 2400; Japan Cement, USITC Pub. 2376; Mexico Cement, USITC Pub. 2305.

⁴⁹ CR at I-26 and Tables II-2 and II-3; PR at I-23 and Tables II-2 and II-3.

⁵⁰ CR at I-15, II-1, V-1, and Table I-2; PR at I-13, II-1, V-1 and Table I-2. Average inland transportation costs per ton nearly double if cement in any of the three regions is shipped from 100-199 miles compared with less than 100 miles. Id. at Table I-2. For example, average transportation costs per ton for shipments of cement of 0-99 miles are \$7.50 in the Southern Tier region, \$7.02 in the Southern California region, and \$7.00 in the Florida region, compared with \$13.91, \$12.97, and \$14.50 for shipments of 100-199 miles in the respective regions. Id.

⁵¹ Equalizing freight means that the customer pays only the cost of the freight from the nearest source, while the producer pays the difference in freight from the plant. CR at V-6; PR at V-2 - V-4.

⁵² U.S. inland transportation costs were estimated by U.S. producers to range between 8 and 18 percent of total delivered cost. CR/PR at V-1. Based on official import data, transportation costs for subject imports from Japan, Mexico, and Venezuela to the United States (excluding U.S. inland costs) are estimated to be 26.8 percent, 32.1 percent, and 21.9 percent, respectively, of the total cost of subject products on a c.i.f. basis compared to customs values. Id.

⁵³ CR/PR at Table I-3A. In the original Mexican Cement determination, the Commission found that "the share of within-region shipments of cement was between 89 and 91 percent for producers in the southern-tier region during the period of investigation." Mexico Cement, USITC Pub. 2305 at 14 and 53.

the current level satisfies the statutory criterion that “producers within such market sell all or almost all of their production of the domestic like product in that market.”⁵⁴

The share of consumption in the Southern Tier region that was supplied by U.S. producers outside the region was lower during the period of review than during the original Mexican Cement investigation, 6.8 percent in 1997, 5.1 percent in 1998, and 4.9 percent in 1999.⁵⁵ We find that these percentages satisfy the statutory criterion that “demand in that market is not supplied to any substantial degree, by producers of the product in question located elsewhere in the United States.”⁵⁶

Having found that the two market isolation criteria are satisfied, we determine that a regional industry exists for the Southern Tier region.

b. Japanese Cement Review

Over the period of review, producers in the Southern California region shipped, on average, about 63 percent of their U.S. shipments of gray portland cement within the region.⁵⁷ This percentage is lower

⁵⁴ 19 U.S.C. § 1677(4)(C)(i). This level is within the range the Commission previously has considered sufficient to satisfy this criterion. See Texas Crushed Stone, 822 F. Supp. 773, aff'd, 35 F.3d 1535 (Fed. Cir. 1994); Cemex, S.A. v. United States, 790 F. Supp. 290, 292-294 (CIT 1992), aff'd, 989 F.2d 1202 (Fed. Cir. 1993).

⁵⁵ CR/PR at Table I-1A.

⁵⁶ 19 U.S.C. § 1677(4)(C)(ii). These percentages fall within the range that the Commission previously has considered sufficient to satisfy this criterion. The Court of International Trade has suggested that a level of 12 percent of total supply from outside of the region may be too high to be considered insubstantial “in the abstract,” but nonetheless affirmed a Commission determination holding that the market isolation criteria were satisfied when 12 percent of regional consumption was supplied by producers outside the region. Atlantic Sugar, 519 F. Supp. at 919-920 (CIT 1981). The Commission has found that an average of 10.5 percent of outside supply was acceptable and on several occasions that percentages of less than 10 percent were acceptable. See, e.g., Venezuela Cement, USITC Pub. 2400 at 8-10; Mexico Cement, USITC Pub. 2305 at 15; Sugars and Syrups from Canada, Inv. No. 731-TA-3 (Final), USITC Pub. 1047 at 4, 14 (March 1980); Portland Hydraulic Cement from Australia and Japan, Inv. Nos. 731-TA-108 and 109, USITC Pub. 1310 at 9 (November 1982); Frozen French Fried Potatoes from Canada, Inv. No. 731-TA-93 (Preliminary), USITC Pub. 1259 at 7 (June 1982); 12-Volt Lead-Acid Type Automotive Storage Batteries from the Republic of Korea, Inv. No. 731-TA-261 (Preliminary), USITC Pub. 1710 at 8 (June 1985).

⁵⁷ CR/PR at Table I-3B. Southern California regional producers’ shipments within the region were 63 percent in 1997, 60 percent in 1998, and 63 percent in 1999. Id. This is lower than the level in the original Japanese Cement investigation, when the Commission found that producers within the region shipped 82.6 percent of their production within the Southern California region in 1990. Japan Cement, USITC Pub. 2376 at 18 and 48.

than the range that the Commission typically considers to satisfy the statutory market isolation criteria.⁵⁸ In this review, the Commission finds sufficient evidence to warrant revisiting the originally defined region.⁵⁹

The Domestic Producers have proposed that the entire State of California is a more appropriate region for the Japanese Cement review because the Southern and Northern California markets have now become more integrated markets than during the original investigation.⁶⁰ The Japanese Respondents have indicated that their arguments are the same whether the region is defined as Southern California or the larger State of California region.⁶¹ In the original Japanese Cement investigation, the Commission determined that both regions met the statutory criteria but decided that the smaller region, Southern California, was the appropriate region primarily because it appeared more isolated at the time and differences in market trends were apparent.⁶² In making this finding, the Commission majority in Japan Cement, however, noted that “Southern California producers shipped an increasing percentage of their production to destinations in Northern California during the period of investigation.”⁶³

While it is not clear what, if any, effect the order has had on marketing and distribution patterns for California producers,⁶⁴ there has been an apparent integration of the Southern and Northern California markets since the original investigation. We find that this increased integration, which the Commission contemplated in the original determination, is sufficient evidence to warrant revising the originally defined region. California cement producers shipped 80-85 percent of their U.S. shipments within the State of California during the period of review.⁶⁵ We find this level satisfies the statutory criterion that “producers within such market sell all or almost all of their production of the domestic like product in that market.”⁶⁶

⁵⁸ CR/PR at Table I-3B. See, e.g., Steel Concrete Reinforcing Bars from Turkey, USITC Pub. 3034 at 14 (April 1997) (about 90 percent found to be sufficient); Venezuela Cement, USITC Pub. 2400 at 7 and 27 (July 1991) (over 95 percent found to be sufficient); Japan Cement, USITC Pub. 2376 at 18, 44 (April 1991) (82.6 percent found to be sufficient); Operators for Jalousie and Awning Windows from El Salvador, Inv. Nos. 701-TA-272 and 731-TA-319 (Final), USITC Pub. 1934 at 9 (January 1987) (over 80 percent found to be sufficient); Round White Potatoes, Inv. No. 731-TA-124 (Final), USITC Pub. 1463 at 7 (December 1983) (84 percent found to be sufficient); Portland Hydraulic Cement from Australia and Japan, Inv. Nos. 731-TA-108 and 109 (Final), USITC Pub. 1310 at 5 (October 1983) (92 percent found to be sufficient); Frozen French Fried Potatoes, Inv. No. 731-TA-93 (Preliminary), USITC Pub. 1259 at 7 (June 1982) (66 percent found not to be sufficient). There is no precise numerical percentage required to meet this criterion. See Texas Crushed Stone, 822 F. Supp. 773, aff'd, 35 F.3d 1535 (Fed. Cir. 1994); Cemex, S.A., 790 F. Supp. at 292-294, aff'd, 989 F.2d 1202 (Fed. Cir. 1993) (In reviewing the regional industry analysis, the CIT held that “there is nothing in the statute, case law, or administrative practice to indicate Congressional intent to bind the ITC to a precise numerical percentage.”).

⁵⁹ 19 U.S.C. § 1675a(a)(8) and SAA at 887-888.

⁶⁰ In evaluating the order on Japan, Domestic Producers propose that “the Commission should define the region as California. . . [since it] satisfies the statutory market isolation criteria better than Southern California and would encompass a greater proportion of post-order imports from California.” They contend that “Southern and Northern California have now become more integrated markets” than during the original investigation and acknowledge that CEMEX “has demonstrated that northern and southern California are ‘cointegrated.’” Domestic Producers’ Posthearing Brief at 19; Domestic Producers’ Prehearing Brief at 24-27, 31-32, and Exhibit 13.

⁶¹ Japanese Respondents’ Prehearing Brief at 5.

⁶² Japan Cement, USITC Pub. 2376 at 19-20 and 48-50.

⁶³ Japan Cement, USITC Pub. 2376 at 19.

⁶⁴ SAA at 888.

⁶⁵ Calculated from CR/PR at Table C-6. State of California regional producers’ shipments within the region were 79.9 percent in 1997, 84.2 percent in 1998, 85.8 percent in 1999, 83.5 percent in interim period (Jan.-Mar.) 1999, and 85.7 percent in interim period (Jan.-Mar.) 2000. Id.

⁶⁶ 19 U.S.C. § 1677(4)(C)(i). This level is within the range the Commission previously has considered sufficient to satisfy this criterion. See Texas Crushed Stone, 822 F. Supp. 773, aff'd, 35 F.3d 1535 (Fed. Cir.

(continued...)

The percentage of consumption in the State of California region that was supplied by U.S. producers outside the region was low during the period of review and similar to that during the original Japanese Cement investigation.⁶⁷ U.S. producers outside the State of California region supplied from 3 percent to 6 percent of the State of California regional consumption during the period of review.⁶⁸ We find that these percentages satisfy the statutory criterion that “demand in that market is not supplied to any substantial degree, by producers of the product in question located elsewhere in the United States.”⁶⁹

Having found that the two market isolation criteria are satisfied, we determine that a regional industry exists for the State of California region.

c. Venezuelan Cement Reviews⁷⁰

Producers in the Florida region shipped about 95 percent of their U.S. shipments of gray portland cement within the region throughout the period of review.⁷¹ We find this level satisfies the statutory criterion that “producers within such market sell all or almost all of their production of the domestic like product in that market.”⁷²

The share of regional consumption supplied by U.S. producers outside the Florida region was 11.3 percent in 1997, 11.0 percent in 1998, and 9.1 percent in 1999, which was similar to that supplied in the original investigations.⁷³ We find that these percentages satisfy the statutory criterion that “demand in that

⁶⁶ (...continued)

1994); Cemex, S.A., 790 F. Supp. at 292-294, aff'd, 989 F.2d 1202 (Fed. Cir. 1993). In the original Japanese Cement investigation, the Commission found that the State of California met this criterion since its producers shipped 93 percent of their production in 1990 within the state. Japan Cement, USITC Pub. 2376 at 18 and 48.

⁶⁷ CR/PR at Table I-1B. In the original Japanese Cement investigation, the Commission found that the second market isolation factor was met since producers outside the State of California region supplied only 3.5 percent of statewide consumption in 1990. The Commission also found that the Southern California region met this criterion since producers outside this region supplied only 1.6 percent of the region’s consumption in 1990. Japan Cement, USITC Pub. 2376 at 18-19 and 48.

⁶⁸ Domestic Producers’ Prehearing Brief, Exhibit 13 at 2. In addition, the share of regional consumption supplied by U.S. producers outside the Southern California region was 5.6 percent in 1997, 2.0 percent in 1998, and 7.5 percent in 1999. CR/PR at Table I-1B.

⁶⁹ 19 U.S.C. § 1677(4)(C)(ii). These percentages fall within the range that the Commission previously has considered sufficient to satisfy this criterion. See note 56 supra.

⁷⁰ Commissioner Miller does not join this section. She finds that a regional industry analysis is appropriate for the reviews on Venezuela. See Separate Views Of Commissioner Marcia E. Miller On Gray Portland Cement and Cement Clinker From Venezuela.

⁷¹ CR/PR at Table I-3C. Florida regional producers’ shipments within the region were 96 percent in 1997 and in 1998, and 95 percent in 1999. Id. This is similar to the level in the original Venezuelan Cement investigations, when producers in the State of Florida shipped over 95 percent of their cement production within the state throughout the period of investigation. Venezuela Cement, USITC Pub. 2400 at 7, 27, and 40.

⁷² 19 U.S.C. § 1677(4)(C)(i). This level is within the range the Commission previously has considered sufficient to satisfy this criterion. See Texas Crushed Stone, 822 F. Supp. 773, aff'd, 35 F.3d 1535 (Fed. Cir. 1994); Cemex, S.A., 790 F. Supp. at 292-294, aff'd, 989 F.2d 1202 (Fed. Cir. 1993).

⁷³ CR/PR at Table I-1C. This is similar to the levels in the original Venezuelan Cement investigations. In those investigations, the Commission noted that the percentage of outside shipments, which was 10.5 percent throughout the period of investigation, exceeded percentages in several previous investigations, but concluded that it supported treating Florida as an isolated market. Venezuela Cement, USITC Pub. 2400 at 8-10, 27-29, and 40. The percentage of the Florida region consumption supplied by U.S. producers outside the state increased from 6.5 percent in 1988 to 15.6 percent in the first quarter of 1991. Id. at 8 and Table 4.

market is not supplied to any substantial degree, by producers of the product in question located elsewhere in the United States.”⁷⁴

Having found that the two market isolation criteria are satisfied, we determine that a regional industry exists for the State of Florida region.

2. Concentration of Imports

In the second step of the regional industry analysis, we determine whether the statutory requirement of concentration of imports within the pertinent region is satisfied. The statute does not define concentration. The legislative history to the URAA indicates that “no precise mathematical formula is reliable in determining the minimum percentage which constitutes sufficient concentration.”⁷⁵ The SAA provides that concentration of imports will be found to exist “if the ratio of the subject imports to consumption is clearly higher in the regional market than in the rest of the U.S. market, and if such imports into the region account for a substantial proportion of total subject imports entering the United States.”^{76 77} The SAA cautions that there is no “benchmark” for determining what constitutes a concentration; rather it

⁷⁴ 19 U.S.C. § 1677(4)(C)(ii). These percentages fall within the range that the Commission previously has considered sufficient to satisfy this criterion. See note 56 *supra*.

⁷⁵ SAA at 860. The Commission historically has found concentration percentages higher than 80 percent of total imports subject to investigation to be sufficient. See, e.g., Portland Hydraulic Cement, USITC Pub. 1310 at 10; Offshore Platform Jacket, USITC Pub. 1848 at 10; Sugars and Syrups from Canada, Inv. No. 731-TA-3 (Final), USITC Pub. 1047 (Mar. 1980). While the requisite concentration has also been found at levels as low as 43 percent, the Commission has questioned whether concentration levels of 60-80 percent are sufficient. See, e.g., Round White Potatoes, USITC Pub. 1463 at 7; Certain Steel Wire Nails from the Republic of Korea, Inv. No. 731-TA-26 (Final), USITC Pub. 1088 at 11 and 12 (Aug. 1980); Japan Cement, USITC Pub. 2376 at 20 and 21, 48-50, *aff'd*, although remanded on other grounds, Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608, 615 (CIT 1993); Venezuela Cement, USITC Pub. 2400 at 10 and 11. Compare Certain Welded Carbon Steel Pipes and Tubes from Taiwan, Inv. No. 731-TA-349 (Final), USITC Pub. 1994 (July 1987) and Certain Welded Carbon Steel Pipes and Tubes from the Philippines and Singapore, Inv. Nos. 731-TA-293, 294, 296 (Final), USITC Pub. 1907 at 6 and 7, n. 19 (Nov. 1986).

⁷⁶ SAA at 860.

⁷⁷ Prior to the URAA, the Commission considered the import penetration ratio only in particular circumstances where imports outside the region were widely dispersed or the regional industry was a significant portion of the national industry. This Commission practice was affirmed by Texas Crushed Stone, 35 F.3d 1535 (Fed. Cir. 1994). See also Japan Cement, Inv. 731-TA-461 (Final), USITC Pub. 2376 (April 1991) at 21, n. 47 (the Commission “would not consider it of much weight if Southern California represented but a very small share of overall U.S. consumption”).

should be decided on a case-by-case basis.^{78 79} The courts have affirmed the Commission's case-by-case approach to applying the statute.⁸⁰

a. Mexican Cement Review

During the period of review, 100 percent of total subject imports from Mexico entered the Southern Tier region.⁸¹ The ratio of subject imports from Mexico to consumption within the Southern Tier region was 3.0 percent and to consumption outside the Southern Tier region was 0.0 percent during the period of review.⁸²

Based on a comparison of the market share of subject imports from Mexico in the Southern Tier region to the market share of subject imports from Mexico outside the region, and consideration of the proportion of total subject imports from Mexico that enter the Southern Tier region, we find that subject imports from Mexico would likely be sufficiently concentrated in the Southern Tier region.⁸³ The pattern of these imports during the original investigation further indicates that such a concentration is likely if the orders were revoked. In particular, the evidence does not indicate that Mexican producers' shipping patterns are likely to shift upon revocation to concentration levels that are not sufficient to meet the criterion. Therefore, we proceed on a regional industry basis to the issue of whether there is a likelihood of continuation or recurrence of material injury if the antidumping duty order on subject imports from Mexico is revoked.

b. Japanese Cement Review

During the period of review, very small amounts of subject imports from Japan entered the United States. The percentage of total subject imports from Japan entering the State of California region was 70

⁷⁸ SAA at 860. See also Mitsubishi Materials, 820 F. Supp. at 614-615 (CIT 1993).

⁷⁹ Similar to the Commission's findings in the original Mexico Cement and Japan Cement investigations, we find that it is not appropriate to aggregate imports from two countries for purposes of considering import concentration levels in our regional industry analysis even though we may or may not exercise our discretion to cumulate such imports for purposes of our material injury analysis. See Mexico Cement, USITC Pub. 2305 at 25, n.53, and 53; Japan Cement, USITC 2376 at 21, n.46, and 33-35. See also Steel Concrete Reinforcing Bars from Austria, Belarus, China, Indonesia, Japan, Korea, Latvia, Poland, Moldova, Russia, Ukraine, and Venezuela, Inv. Nos. 731-TA-872-883 (Preliminary), USITC Pub. 3343 at 12 (August 2000) ("we do not believe that the statutory language provides that subject imports into the region should be cumulated for purposes of determining whether there is sufficient import concentration within the region."). Accord Mexican Respondent - CEMEX's Prehearing Brief at 73-75.

⁸⁰ Texas Crushed Stone, 35 F.3d 1535 (Fed. Cir. 1994); Cemex, 790 F. Supp. at 292-294 (CIT 1992), aff'd, 989 F.2d 1202 (Fed. Cir. 1993).

⁸¹ CR/PR at Table I-3A.

⁸² CR/PR at Table I-3A.

⁸³ In the original Mexican Cement determination, the Commission found that the import concentration requirement was met; imports of Mexican cement into the Southern Tier region ranged from 91 percent to 95 percent of total imports from Mexico. The ratio of subject imports from Mexico to consumption within the Southern Tier region was 11 percent and to consumption outside the Southern Tier region was 1 percent in 1989. Mexico Cement, USITC Pub. 2305 at 16, n.30, and 53.

percent in 1998 and 97 percent in 1999.⁸⁴ Import penetration ratios for subject imports from Japan within and outside the State of California region were very small.⁸⁵

A comparison of the market share of subject imports from Japan in the State of California region to the market share of subject imports from Japan outside the region, and consideration of the proportion of total subject imports from Japan that enter the California region, indicates that subject imports from Japan would likely be sufficiently concentrated in the California region. The pattern of these imports during the original investigation further indicates that such a concentration is likely if the orders were revoked.⁸⁶ In particular, there is no indication that Japanese producers' shipping patterns are likely to change upon revocation. Therefore, we proceed on a regional industry basis to the issue of whether there is a likelihood of continuation or recurrence of material injury if the antidumping duty order on subject imports from Japan is revoked.

c. Venezuelan Cement Reviews

During the period of review, import penetration was higher within the Florida region than outside this region.⁸⁷ However, the proportion of total subject imports from Venezuela that entered the Florida region has declined during the period of review to levels the Commission previously has found insufficient to satisfy the concentration test. The percentage of total subject imports from Venezuela entering the Florida region fell substantially and steadily over the period of review, from 64 percent in 1997 to 53 percent in 1998 and 45 percent in 1999.⁸⁸ In contrast, during the original investigations, the Florida region accounted for an increasing concentration of Venezuelan imports of cement, reaching 98 percent of total Venezuelan imports in 1991.⁸⁹

The Commission is not required in a five-year review to demonstrate that the regional industry criteria are currently satisfied. However, the record does not indicate that the proportion of total subject imports from Venezuela entering the Florida region is likely to satisfy the import concentration criteria if the suspended investigations are terminated. In particular, we find that the record does not indicate that marketing and distribution patterns have been affected by the acceptance of the suspension agreements.⁹⁰ The imports of Venezuelan cement have been subject to an antidumping suspension agreement that

⁸⁴ CR/PR at Table I-3B.

⁸⁵ The ratio of subject imports from Japan to consumption within the State of California region was 0.1 percent in 1998, 0.2 percent in 1999, 1.1 percent in interim period (Jan.-Mar.) 1999, and 1.3 percent in interim period (Jan.-Mar.) 2000. In contrast, the ratio of subject imports from Japan to consumption outside the State of California region was 0.0 percent in each of these periods. CR/PR at Tables C-2, C-4, and C-6.

⁸⁶ In the original Japanese Cement investigation, imports of Japanese cement into the State of California region ranged from 67.5 percent to 79.2 percent of total imports from Japan during the period of investigation. The ratio of subject imports from Japan to consumption within the State of California region was 10.7 percent and to consumption outside the California region was 0.8 percent in 1990. Japan Cement, USITC Pub. 2376 at Table 4.

⁸⁷ The ratio of subject imports from Venezuela to consumption within the Florida region was 12.0 percent in 1997 and 10.0 percent in 1998 and 1999. In contrast, the ratio of subject imports from Venezuela to consumption outside the Florida region was less than 0.5 percent in 1997, and 1.0 percent in 1998 and 1999. CR/PR at Table I-3C.

⁸⁸ CR/PR at Table I-3C. In addition, there were imports of cement clinker from Venezuela into the Florida region during the period of review, accounting for 48.9 percent of total U.S. imports of cement clinker from Venezuela in 1999. CR/PR at Tables IV-2C and IV-2D.

⁸⁹ CR/PR at Table I-3C. During the original investigations, the percentage of total subject imports from Venezuela entering Florida was 66 percent in 1988, 64 percent in 1989, 83 percent in 1990, and 98 percent in 1991. Id.

⁹⁰ See SAA at 888.

established a floor price.⁹¹ There has been no cash deposit requirement under the countervailing duty suspension agreement.⁹² Thus, the Venezuelan suspension agreements do not limit the quantity of subject imports that can enter the Florida region, or in fact the entire U.S. market, at fairly traded prices.⁹³ There is no indication on the record that these agreements provide any incentive to ship subject imports to customers outside of the Florida region as opposed to those within that region. Thus, we find that the existence or absence of these suspension agreements has no appreciable effect on relative subject import levels within and outside of the Florida region.

While subject imports from Venezuela have remained at relatively constant volumes in the Florida region, they have increased substantially in other areas of the United States.⁹⁴ In fact, imports of gray portland cement from Venezuela into the Florida region during the period of review was at a level only slightly above that in 1991, immediately prior to the acceptance of the suspension agreements.⁹⁵ At the same time, apparent cement consumption in Florida has increased by 17.5 percent from 1997 to 1999 and non-subject imports of cement have entered the Florida region in substantially increasing volumes.⁹⁶ Subject imports of cement from Venezuela into the Florida region accounted for only 10.3 percent of apparent consumption in this region by quantity in 1999 compared to 18.2 percent in 1991.⁹⁷

⁹¹ Venezuelan AD Suspension Agreement in 57 Fed. Reg. 6706 (Feb. 27, 1992). The basis for the suspended antidumping investigation was an agreement by Vencemos and Caribe, producers/exporters that, at the time, accounted for substantially all of the subject products from Venezuela, to make necessary price revisions to eliminate completely any amount by which the foreign market value of their merchandise exceeded the United States price of the subject merchandise. Commerce has periodically reviewed and adjusted the floor price.

⁹² The countervailing duty suspension agreement “completely offset[s] or eliminate[s] the amount of net bounty or grant pertaining to the subject merchandise exported directly or indirectly to the United States.” 57 Fed. Reg. 9242, 9243 (Mar. 17, 1992) (Venezuelan CVD Suspension Agreement) and Issues and Decisions Memo for the Sunset Review of Gray Portland Cement and Cement Clinker from Venezuela: Final Results from Jeffrey A. May to Joseph A. Spetrini, Acting Assistant Secretary for Import Administration, dated Feb. 28, 2000 at 2 (“Memo”). At the time of the suspension agreement, Commerce terminated any cash deposit requirement regarding the countervailing duty investigation, and has indicated that the cash deposit requirement under the countervailing duty investigation for both Caribe and Vencemos would have been zero regardless of whether the suspension agreement was effectuated. 57 Fed. Reg. at 9244 and Memo at 2. While Commerce found, in its sunset review, that termination of the suspended investigation would be likely to lead to continuation or recurrence of a countervailable subsidy, it indicated that “we cannot determine the net countervailable subsidy likely to prevail under the instant review.” 65 Fed. Reg. 11554 (Feb. 28, 2000).

⁹³ The record also indicates that the prices for imports of Venezuelan cement have consistently exceeded the benchmark floor prices routinely adjusted by Commerce. Venezuelan Respondent’s Posthearing Brief at Attachment 1.

⁹⁴ CR/PR at Tables I-1C and I-1D.

⁹⁵ CR/PR at Table I-1C. Subject imports of cement from Venezuela into the Florida region were 861,000 tons in 1997, 777,000 tons in 1998, and 861,000 tons in 1999. Imports of cement clinker from Venezuela into the Florida region were 177,000 short tons in 1999. CR at Table IV-2C. During the original investigation, subject imports of cement from Venezuela into the Florida region were 414,000 tons in 1988, 444,000 tons in 1989, 1.1 million tons in 1990, and 762,000 tons in 1991. Id. at Table I-1C.

⁹⁶ CR/PR at Table C-3. The volume of non-subject imports entering the Florida region increased by 67.9 percent from 1997 to 1999. Id. In 1999, Florida apparent consumption by quantity was 19.3 percent higher than in 1988 and 82.6 percent higher than in 1991. Id. at Table I-1C.

⁹⁷ CR/PR at Table I-1C. Gray portland cement imported from Venezuela accounted for a declining share of total imports into the Florida region during the period of review, declining from 32.2 percent by quantity in 1997 to 22.0 percent in 1999. Id.

In contrast, imports of Venezuelan cement have entered various U.S. markets other than the Florida region in increasing volumes.⁹⁸ Imports of Venezuelan cement into the entire U.S. market increased by 42.5 percent from 1997 to 1999.⁹⁹ While Florida still may be a natural and significant market for Venezuelan cement, it appears that in part due to the ability to ship relatively long distances by ocean freight, Venezuelan imports have become more geographically diversified, increasingly entering the east and gulf coast markets of the United States.¹⁰⁰ These differing import trends have occurred despite the lack of barriers to increased entry into the Florida region for these imports during the period of review. As discussed above, there is no evidence to indicate that these changes in market and distribution patterns are due to the suspension agreements, and no evidence that import patterns likely would shift toward more concentration in the Florida region if the suspended investigations were terminated.^{101 102}

While subject imports from Venezuela were higher in the Florida region than outside the region during the period of review, we find that subject imports from Venezuela into the Florida region are not likely to account for a substantial proportion of total U.S. imports of cement from Venezuela in the reasonably foreseeable future if the suspended investigations are terminated. Thus, we find that imports from Venezuela are not likely to be sufficiently concentrated to satisfy the import concentration requirements for a regional industry analysis, and therefore cannot proceed to the analysis of likely continuation or recurrence of material injury. We therefore find that suspended investigations on imports of gray portland cement and cement clinker from Venezuela should be terminated.¹⁰³

⁹⁸ In 1999, 45.7 percent of imports of Venezuelan cement entered through the Miami and Tampa, FL customs districts, 11.4 percent through the Baltimore, MD district, 11.3 percent through the New Orleans, LA district, 8.1 percent through the San Juan, PR district, 4.4 percent through the Charlotte, NC district, 4.2 percent through the Savannah, GA district, and 4.2 percent through the Boston, MA district. CR at I-53; PR at I-42. Venezuelan producers reportedly shipped *** of their total cement shipments to export markets other than the U.S. market during the period of review, which is similar to the share reported for those shipments in the original investigations. *Id.* at Table IV-8 and Venezuela Cement, USITC Pub. 2400 at A-47, Table 20.

⁹⁹ CR/PR at Tables C-3 and C-4.

¹⁰⁰ While the imposition of an antidumping duty order against Venezuelan cement by Brazil in July 2000 may result in some additional imports into the U.S. market, the quantity of Venezuelan cement entering Brazil was relatively small and there is no evidence that any shifting of such imports to the U.S. market would be more likely to enter Florida than other U.S. markets. CR at IV-50 and Table IV-8; PR at IV-30 and Table IV-8.

¹⁰¹ We have considered evidence provided by Domestic Producers alleging reductions in purchases of Venezuelan cement in non-Florida markets by U.S. importers in 2000- 2003 and do not find it compelling on the issue of whether import concentration likely will increase in the Florida region if the suspended investigations are terminated. Our conclusion on likely concentration is based on the subject imports' pronounced trend away from concentration in the Florida region, not on any particular sales or contracts. Domestic Producers' Posthearing Brief at 27-28; Venezuelan Respondent's Final Comments at 4-8 and Attachment 2.

¹⁰² We also note that further increases in Venezuelan exports likely are limited by cement clinker capacity constraints. While Venezuelan producers' capacity utilization for cement was *** in 1999. CR/PR at Tables IV-8 and IV-9.

¹⁰³ 19 U.S.C. § 1677(4)(C). In Texas Crushed Stone, the Federal Circuit upheld the Commission's determination to terminate the investigation upon finding that import concentration was not sufficient. 35 F.3d at 1543 (Fed. Cir. 1994), *aff'g*, 822 F. Supp. at 781 (CIT 1993) ("the Commission determined that the first criteria . . . was satisfied. The second criteria . . . was not satisfied. Therefore, the Commission could not proceed to the third criteria. . . ."), *aff'g*, Limestone, USITC Pub. 2533. The Federal Circuit stated:

Here, the ITC determined that the requirement of concentration of dumped imports into the regional market was not satisfied. Under these circumstances, it could not proceed to the issue of material injury or threat of material injury. Accordingly, there was no need to examine evidence relevant only to that issue.

(continued...)

IV. RELATED PARTIES

In defining the domestic regional industries in these reviews, we have considered whether any U.S. producers of gray portland cement and cement clinker should be excluded from the relevant regional industries pursuant to 19 U.S.C. § 1677(4)(B). That provision of the statute allows the Commission, if appropriate circumstances exist, to exclude from the domestic regional industry for the purposes of an injury determination producers that are related to an exporter or importer of the subject merchandise, or which are themselves importers.¹⁰⁴ Exclusion of such a producer is within the Commission's discretion based upon the facts presented in each case.¹⁰⁵

In the original investigations, the Commission considered whether domestic producers that either were owned by a foreign producer, imported subject product, or ground imported subject product should be excluded as related parties, and found that appropriate circumstances to do so did not exist.¹⁰⁶

The record indicates that a number of domestic producers in each of our defined regional industries have imported subject merchandise and/or are related to subject foreign producers. In the Southern Tier region, U.S. producers CEMEX USA and Rio Grande imported subject merchandise from their corporate

¹⁰³ (...continued)
35 F.3d at 1543.

¹⁰⁴ 19 U.S.C. § 1677(4)(B).

¹⁰⁵ See Sandvik AB v. United States, 721 F. Supp. 1322, 1331-32 (CIT 1989), aff'd without opinion, 904 F.2d 46 (Fed. Cir. 1990); Empire Plow Co. v. United States, 675 F. Supp. 1348, 1352 (CIT 1987). 19 U.S.C. § 1677(4)(B). The primary factors the Commission has examined in deciding whether appropriate circumstances exist to exclude a related party include:

- (1) the percentage of domestic production attributable to the importing producer;
- (2) the reason the U.S. producer has decided to import the product subject to investigation, i.e., whether the firm benefits from the LTFV sales or subsidies or whether the firm must import in order to enable it to continue production and compete in the U.S. market; and
- (3) the position of the related producer vis-a-vis the rest of the industry, i.e., whether inclusion or exclusion of the related party will skew the data for the rest of the industry.

See, e.g., Torrington Co. v. United States, 790 F. Supp. 1161, 1168 (CIT 1992), aff'd without opinion, 991 F.2d 809 (Fed. Cir. 1993). The Commission has also considered the ratio of import shipments to U.S. production for related producers and whether the primary interest of the related producer lies in domestic production or importation. See, e.g., Carbon Steel Butt-Weld Pipe Fittings from Brazil, China, Japan, Taiwan, and Thailand, Inv. Nos. 731-TA-308-310 and 520-521 (Review), USITC Pub. 3263 at 5-7 (Dec. 1999); Stainless Steel Plate from Sweden, Inv. No. AA1921-114 (Review), USITC Pub. 3204 at 10 (July 1999); Sugar from the European Union; Sugar from Belgium, France, and Germany; and Sugar and Syrups from Canada, Inv. Nos. 104-TAA-7, AA1921-198-200, and 731-TA-3 (Review), USITC Pub. 3238 at 14 (Sept. 1999). See also S. Rep. No. 249, 96th Cong., 1st Sess. 83 (1979) ("where a U.S. producer is related to a foreign exporter and the foreign exporter directs his exports to the United States so as not to compete with his related U.S. producer, this should be a case where the ITC would not consider the related U.S. producer to be a part of the domestic industry").

¹⁰⁶ Mexico Cement, USITC Pub. 2305 at 21 and 53; Japan Cement, USITC Pub. 2375 at 13 and n.24; Venezuela Cement, USITC Pub. 2400 at 13.

parents, Mexican producers CEMEX and GCCC, respectively.^{107 108} As importers of subject merchandise, CEMEX USA and Rio Grande are related parties and thus can be excluded from the Southern Tier regional industry if appropriate circumstances exist.

CEMEX USA and Rio Grande accounted for *** and ***, respectively, of Southern Tier regional production during the period of review.¹⁰⁹ While each company's imports relative to their regional production appear to be substantial, about *** in 1999,¹¹⁰ they have investments in U.S. production operations that indicate their interests are in both importing and in domestic production.¹¹¹ Finally, CEMEX USA's financial position is *** to the other regional producers,¹¹² and Rio Grande's financial position is *** the other regional producers.¹¹³ Based on this record, we find that appropriate circumstances do not exist to exclude either CEMEX USA or Rio Grande from the Southern Tier regional industry.

In the State of California region, U.S. producers Mitsubishi and California Portland are owned by Japanese cement producers Mitsubishi and Taiheiyo, respectively.¹¹⁴ Imports from Japan into the California region, which had been as high as 1.7 million short tons in 1989, declined to zero after the order in 1991 and essentially remained at zero through 1997.¹¹⁵ California Portland¹¹⁶ and Mitsubishi accounted for *** of the small volume of imports from Japan into the region in 1998 and 1999.¹¹⁷ As importers of subject merchandise, California Portland and Mitsubishi are related parties and thus can be excluded from the California regional industry if appropriate circumstances exist.

Mitsubishi accounted for *** of State of California regional production during the period of review.¹¹⁸ California Portland's two facilities combined accounted for *** of State of California regional

¹⁰⁷ CR at I-49; PR at I-38. During the period of review, CEMEX USA and Rio Grande accounted for all imports from Mexico into the Southern Tier region, which increased from 978,000 tons in 1997 to 1.2 million tons in 1999. *Id.* and Table I-1A. In 1999, CEMEX USA accounted for about *** imported by Rio Grande. CR at I-49, n.64; PR at I-38, n.64.

¹⁰⁸ We recognize that CEMEX recently publicly announced plans to acquire another U.S. producer, Southdown, including its four Southern Tier production operations and numerous inland and import terminals. We reopened the record in these reviews to include new factual information on this announced acquisition and to accept comments from parties on this issue. *See* INV-X-211 (Oct. 2, 2000). This acquisition, which is conditional on two-thirds of Southdown's shares being tendered and is subject to regulatory approval, is not final. Thus, we have given it limited consideration in our analysis.

¹⁰⁹ Calculated from CR/PR at Table E-1.

¹¹⁰ CEMEX USA stated that it imported because there was "****." CR at I-49, n.63; PR at I-38, n.63. Rio Grande indicated that it "****." *Id.*; Mexican Respondent - GCCC's Prehearing Brief at 19-22.

¹¹¹ CR at I-49, n.64 and Table E-1; PR at I-38, n.64 and Table E-1. Mexican Respondents - GCCC's Prehearing Brief at 16-17.

¹¹² CR/PR at Table E-8. CEMEX USA was ranked *** Southern Tier regional producers by its operating income margin in 1999, which at ***. *Id.*

¹¹³ CR/PR at Table E-8. Rio Grande was ranked *** Southern Tier regional producers by its operating income margin in 1999, which at ***. *Id.*

¹¹⁴ CR at I-51; PR at I-41 - I-42.

¹¹⁵ *Japan Cement*, USITC Pub. 2376 at A-21 and CR at Table I-1B and I-51; PR at Table I-1B and I-41 - I-42.

¹¹⁶ In the original investigation, California Portland's predecessor was one of three firms that accounted for *** imports from Japan into Southern California. CR at I-51, n.71; PR at I-41, n.71.

¹¹⁷ Imports from Japan into the California region were 16,000 short tons in 1998 and 32,000 short tons in 1999. CR/PR at Table C-6. Japanese Respondents' Prehearing Brief at 4-5.

¹¹⁸ Calculated from CR/PR at Table E-1.

production during the period of review.¹¹⁹ Both Mitsubishi and California Portland have made investments in U.S. production operations indicating that their interests are in both importing and domestic production.¹²⁰ The Japanese respondents contend that CPC and Mitsubishi are both significant regional producers with massive capital investments whose interests lie first and foremost as domestic regional producers.¹²¹ While Mitsubishi and California Portland-Mojave's financial positions have *** the other regional producers, California Portland-Colton's financial position has consistently been *** the other regional producers.¹²² Based on this record, we find that appropriate circumstances do not exist to exclude either Mitsubishi or California Portland from the California regional industry.

V. CUMULATION

A. Framework

Section 752(a) of the Act provides that:

the Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b) or (c) of this title were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.¹²³

Thus, cumulation is discretionary in five-year reviews. However, the Commission may exercise its discretion to cumulate only if the reviews are initiated on the same day and the Commission determines that the subject imports are likely to compete with each other and the domestic like product in the U.S. market. The statute precludes cumulation if the Commission finds that subject imports from a country are likely to have no discernible adverse impact on the domestic industry.¹²⁴ We note that neither the statute nor the SAA provides specific guidance on what factors the Commission is to consider in determining that imports “are likely to have no discernible adverse impact” on the domestic industry. With respect to this provision,

¹¹⁹ Calculated from CR/PR at Table E-1.

¹²⁰ CR at I-51-52; PR at I-41-42. Japanese Respondents' Prehearing Brief at 4-5; Japanese Respondents' Posthearing Brief, Appendix A at 3.

¹²¹ Japanese Respondents' Prehearing Brief at 4-5. The Japanese respondents have argued that CPC and Mitsubishi should be included in the domestic industry and that exclusion of the *** producers in the region, CPC and Mitsubishi respectively, would “irretrievably skew the data.” These respondents allege that imports have represented only a *** of CPC's and Mitsubishi's total business, ranging from *** in 1999 of combined imports and production of the two companies. They attribute the increase in imports to the soaring demand in California. *Id.*

¹²² CR/PR at Table E-9. Mitsubishi and California Portland-Mojave were ranked *** Southern California regional producers by their operating income margins in 1999, which at ***. California Portland-Colton, on the other hand, was ranked *** Southern California regional producers by its operating income margin in 1999, which at ***. *Id.*

¹²³ 19 U.S.C. § 1675a(a)(7). As discussed above, we have rendered negative determinations with respect to the two suspended investigations of subject imports from Venezuela, and thus we do not consider these imports as candidates for cumulation.

¹²⁴ 19 U.S.C. § 1675a(a)(7).

the Commission generally considers the likely volume of the subject imports and the likely impact of those imports on the domestic industry within a reasonably foreseeable time if the orders are revoked.^{125 126}

The Commission has generally considered four factors intended to provide a framework for determining whether the imports compete with each other and with the domestic like product.¹²⁷ Only a “reasonable overlap” of competition is required.¹²⁸ In five-year reviews, the relevant inquiry is whether there likely would be competition even if none currently exists. Moreover, because of the prospective nature of five-year reviews, we have examined not only the Commission’s traditional competition factors, but also other significant conditions of competition that are likely to prevail if the orders under review are revoked. The Commission has considered factors in addition to its traditional competition factors in other contexts where cumulation is discretionary.^{129 130}

¹²⁵ For a discussion of the analytical framework of Chairman Koplan and Commissioners Miller and Hillman regarding the application of the “no discernible adverse impact” provision, see Malleable Cast Iron Pipe Fittings From Brazil, Japan, Korea, Taiwan, and Thailand, Inv. Nos. 731-TA-278-280 (Review) and 731-TA-347-348 (Review). For a further discussion of Chairman Koplan’s analytical framework, see Iron Metal Construction Castings from India; Heavy Iron Construction Castings from Brazil; and Iron Construction Castings from Brazil, Canada, and China, Inv. Nos. 803-TA-13 (Review); 701-TA-249 (Review) and 731-TA-262, 263, and 265 (Review) (Views of Commissioner Stephen Koplan Regarding Cumulation).

¹²⁶ Commissioner Askey notes that the Act clearly states that the Commission is precluded from exercising its discretion to cumulate if the imports from a country subject to review are likely to have “no discernible adverse impact on the domestic industry” upon revocation of the order. 19 U.S.C. § 1675a(a)(7). Thus, the Commission must focus on whether the imports will impact the condition of the industry discernibly as a result of revocation, and not solely on whether there will be a small volume of imports after revocation, i.e., by assessing their negligibility after revocation of the order. For a full discussion of her views on this issue, see Additional Views of Commissioner Thelma J. Askey in Potassium Permanganate from China and Spain, Inv. Nos. 731-TA-125-126 (Review), USITC Pub. 3245 (Oct. 1999).

¹²⁷ The four factors generally considered by the Commission in assessing whether imports compete with each other and with the domestic like product are: (1) the degree of fungibility between the imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions; (2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product; (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and (4) whether the imports are simultaneously present in the market. See, e.g., Wieland Werke, AG v. United States, 718 F. Supp. 50 (CIT 1989).

¹²⁸ See Mukand Ltd. v. United States, 937 F. Supp. 910, 916 (CIT 1996); Wieland Werke, AG, 718 F. Supp. at 52 (“Completely overlapping markets are not required.”); United States Steel Group v. United States, 873 F. Supp. 673, 685 (CIT 1994), aff’d, 96 F.3d 1352 (Fed. Cir. 1996)). We note, however, that there have been investigations where the Commission has found an insufficient overlap in competition and has declined to cumulate subject imports. See, e.g., Live Cattle from Canada and Mexico, Inv. Nos. 701-TA-386 and 731-TA-812-813 (Preliminary), USITC Pub. 3155 at 15 (Feb. 1999), aff’d sub nom, Ranchers-Cattleman Action Legal Foundation v. United States, 74 F. Supp.2d 1353 (CIT 1999); SRAMs from the Republic of Korea and Taiwan, Inv. Nos. 731-TA-761-762 (Final), USITC Pub. 3098 at 13-15 (Apr. 1998).

¹²⁹ See, e.g., Torrington Co. v. United States, 790 F. Supp. at 1172 (affirming Commission's determination not to cumulate for purposes of threat analysis when pricing and volume trends among subject countries were not uniform and import penetration was extremely low for most of the subject countries); Metallwerken Nederland B.V. v. United States, 728 F. Supp. 730, 741-42 (CIT 1989); Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp. 1068, 1072 (CIT 1988).

¹³⁰ The cumulation provision of the statute includes a provision regarding regional industry determinations, which limits those imports that may be cumulated to subject imports entering the region or regions determined by the Commission. See 19 U.S.C. § 1677(7)(G)(iv); see also SAA at 850 (“any cumulation analysis is based on

(continued...)

In these reviews, the statutory requirement for cumulation that all reviews be initiated on the same day is satisfied.

B. Likelihood of No Discernible Adverse Impact

Although Japanese respondents and Mexican respondents urged the Commission to find that imports from Japan would be likely to have no discernible adverse impact on the domestic industry if the orders were revoked,¹³¹ we find that the no discernible adverse impact provision is not satisfied with respect to subject imports from either Mexico or Japan.

While there were virtually no imports of gray portland cement from Japan into the California region after imposition of the antidumping duty order, imports from Japan in very small but increasing volumes returned to this region in 1998 and 1999.¹³² Moreover, during the original investigation, substantial volumes of Japanese cement imports entered the California region.¹³³ Japanese cement producers have substantial excess capacity.¹³⁴ While Japan's home market accounted for 89.0 percent of its total shipments of cement in 1999, substantial volumes of cement are shipped to export markets other than the United States.¹³⁵ Accordingly, we do not find that the subject imports from Japan would be likely to have no discernible adverse impact on the domestic industry if the antidumping duty order is revoked.

Subject imports from Mexico have remained in the Southern Tier market in the years since the imposition of the antidumping duty order. Moreover, the quantity of U.S. imports of gray portland cement and cement clinker from Mexico into the Southern Tier region has increased by 24.4 percent from 1997 to 1999.¹³⁶ Based on the current level of imports from Mexico and the likely volume of subject imports in the reasonably foreseeable future, we do not find that the subject imports from Mexico would be likely to have no discernible adverse impact on the Southern Tier region if the order is revoked.

¹³⁰ (...continued)

imports entering the pertinent region(s)").

¹³¹ Japanese Respondents' Prehearing Brief at 9-10; Japanese Respondents' Posthearing Brief at 11. Mexican Respondents argued that cumulation was not permitted because there is no likelihood that imports from Japan would have a discernible adverse impact on the domestic Southern Tier regional industry. Mexican Respondents -- CEMEX and GCCC's Response to Commission Questions at 18-21. Conversely, Domestic Producers argued that "[s]ubject imports from all three countries will unquestionably have a discernible adverse impact." Domestic Producers' Response to Commission Questions at 92.

¹³² CR/PR at Table C-6. Subject imports of cement from Japan into the California region were 16,000 tons in 1998, 32,000 tons in 1999 and interim period (Jan.-Mar.) 1999, and 36,000 tons in interim period (Jan.-Mar.) 2000.

¹³³ During the original investigation, subject imports of cement from Japan into the California region were 349,000 tons in 1986, 486,000 tons in 1987, 1.2 million tons in 1988, 1.7 million tons in 1989, and 1.3 million tons in 1990. Japan Cement, USITC Pub. 2376 at A-21.

¹³⁴ CR/PR at Tables IV-6 and IV-7. In 1999, the industry in Japan had 90.0 million short tons of production capacity for gray portland cement clinker and 83.8 million short tons of production capacity for cement. The industry's capacity utilization was 78.2 percent for cement clinker and 88.7 percent for cement. Id. In 1999, the Japanese industry's excess capacity was 19.6 million short tons for cement clinker and 9.4 million short tons for cement. Id. The Japanese respondents indicated that Japanese producers track clinker but not cement capacity. Thus, according to these respondents, "[c]linker capacity, for the Japanese producers, is the most accurate and reliable measure of capacity in this industry as well as the meaningful measure of any excess Japanese capacity." Japanese Respondents' Posthearing Brief, Appendix A (Responses to Commission Questions) at 1-2.

¹³⁵ CR/PR at Table IV-6.

¹³⁶ CR/PR at Table C-1.

C. Reasonable Overlap of Competition and Other Considerations¹³⁷

In the original Mexico Cement and Japan Cement determinations, the Commission majority found the statutory criteria for mandatory cumulation were satisfied and cumulated imports of cement from Japan and Mexico.¹³⁸ In these reviews, Domestic Producers urged the Commission to exercise its discretion and cumulate appropriate subject imports for each review.¹³⁹ The Mexican respondents and Japanese respondents contended that imports of cement from Japan should not be cumulated with imports from Mexico because there is only minimal overlap in the regions and the conditions of competition differ.¹⁴⁰

In determining whether to exercise our discretion to cumulate subject imports from Mexico with those from Japan, we examined whether, upon revocation of the antidumping duty orders, subject imports from Mexico would likely compete in the U.S. market under similar conditions of competition with subject imports from Japan and with the domestic like product. As an initial matter, we considered the likelihood of a reasonable overlap of competition among the products from Mexico, Japan, and the United States. In this regard, the parties generally agree that gray portland cement is a fungible product, and that gray portland cement from one country is generally physically interchangeable with gray portland cement from another.¹⁴¹ These subject imports and the U.S. product have similar channels of distribution and are likely to be simultaneously present in the regional markets.¹⁴² However, any geographic overlap of sales is likely to be limited.¹⁴³ Subject imports from Mexico are shipped throughout the Southern Tier region whereas subject imports from Japan would likely be limited to only one subsection of the Southern Tier, the State of

¹³⁷ Commissioner Askey does not join Section V.C. See Concurring and Dissenting Views of Commissioner Thelma J. Askey.

¹³⁸ Mexico Cement, USITC Pub. 2305 at 25-26 (Commissioner Brunsdale), and 53 (Concurrence by Commissioner Lodwick) (“I therefore determine that consideration of the cumulation issue in these circumstances is required as a matter of law.”); Japan Cement, USITC Pub. 2376 at 30-35. The Commission majority’s cumulation decision in the original Japan Cement determination was reversed on appeal on the basis that Mexican imports were not still subject to investigation, which was a criterion for staggered case cumulation in the pre-URAA statute. See Mitsubishi Materials, 820 F. Supp. at 619-622 (CIT 1993).

¹³⁹ Domestic Producers’ Prehearing Brief at 56-57; Domestic Producers’ Response to Commission Questions at 88-100.

¹⁴⁰ Japanese Respondents’ Posthearing Brief at 10-11; Japanese Respondents’ Prehearing Brief at 5-15; Mexican Respondents’ -- CEMEX and GCCC -- Response to Commission Questions at 21-23. Mexican and Japanese Respondents’ argument that the statute does not authorize cumulation in a five year review of a regional industry case fails to recognize that cumulation is provided for in five year reviews and there is no specific direction in the statute or legislative history that instructs the Commission not to apply it in such regional industry cases. Moreover, section 1677 of this title, including the definitions of domestic like product, related parties, and regional industry in 19 U.S.C. § 1677(4), may be applied to five-year reviews unless a more specific provision in section 1675a applies. Mexican Respondents -- CEMEX and GCCC’s Response to Commission Questions at 15-18; Japanese Respondents’ Final Comments at 15, n.67.

¹⁴¹ CR at I-26, I-33, II-27 and Tables II-3 and II-4; PR at I-23, I-28, II-14 and Tables II-3 and II-4. Gray portland cement, whether U.S., Mexican, Japanese, or from other countries, is principally consumed by the construction industry and sold to ready-mix concrete manufactures. CR at I-28 and I-29 and Table I-6; PR at I-24 and I-25 and Table I-6.

¹⁴² Gray portland cement from subject countries have traveled through the same or similar channels of distribution as U.S. gray portland cement. The majority of gray portland cement is distributed to readymix concrete operations. CR at I-33, V-2, and Tables I-6 and V-1; PR at I-28, V-2, and Tables I-6 and V-1.

¹⁴³ Only small volumes of Mexican cement and Japanese cement were simultaneously present in California with the U.S. product in 1998 and 1999. CR/PR at Table C-6.

California.¹⁴⁴ Moreover, although significant volumes of imports from Mexico have continued to enter other parts of the Southern Tier region since imposition of the antidumping duty order, only small amounts of such imports have entered the State of California.¹⁴⁵ While subject imports from Mexico may enter the State of California in larger volumes if the order was revoked, the established Mexican distribution arrangements in California would likely limit the geographical overlap with imports from Japan, particularly in Northern California.¹⁴⁶

In addition, the record indicates that if the orders were revoked, subject imports from Mexico and Japan would likely not compete under similar conditions of competition. First, while Mexican cement producers currently have no U.S. affiliates that produce subject merchandise in California,¹⁴⁷ U.S. subsidiaries of Japanese cement producers accounted for a significant percentage of domestic production in the California region during the period of review.¹⁴⁸ Second, while the Southern Tier overall may be a natural market for Mexico, sections of this region other than California are closer to Mexican cement plants. California, on the other hand, is a natural shipping destination for Japanese cement exports. Finally, Japanese and Mexican cement producers have substantial differences in the absolute levels and trends of production capacity, as well as in the levels of excess capacity.¹⁴⁹ While Japanese producers have reduced their capacity since the original investigation, their production capacity still is extremely large and their capacity utilization levels have declined during the period of review.¹⁵⁰ Thus, Japanese producers have extremely large volumes of excess capacity.¹⁵¹ While Mexican producers have increased their production capacity since the original investigation and have substantial production capacity, their capacity

¹⁴⁴ California accounted for about 30 percent of Southern Tier regional consumption in 1999. Calculated from CR/PR at Tables C-1 and C-6.

¹⁴⁵ CR/PR at Table C-6 and Japan Cement, USITC Pub. 2376 at A-21.

¹⁴⁶ While the Japanese producers have access to substantial import terminal capacity in both Northern and Southern California, CEMEX's import terminal capacity is substantial in Southern California, and more limited in Northern California. CEMEX currently has two active import terminals in Southern California with an annual throughput capacity of *** and one active import terminal in Northern California with an annual throughput capacity of ***. CR/PR at Table II-1. Japanese producers control one import terminal (MCC-Lucky) and are affiliated through a limited partnership with another import terminal (Allied) in Southern California with total throughput capacity of *** and are in the processing of building a deep water import terminal in Northern California with an expected annual throughput capacity of 700,000 to 800,000 short tons to replace the "Golden Arrow" floating terminal, which has an annual throughput capacity of 1.0 million short tons. CR at I-51- I-52; PR at I-41 - I-42, and Tr. at 20.

¹⁴⁷ While there are publicly announced plans for Mexico's CEMEX to acquire U.S. producer Southdown, including its California production operation, this acquisition is not final and thus as discussed above we have given it limited consideration in our analysis.

¹⁴⁸ Japanese producers owned regional production facilities accounting for *** of regional production in 1997 and *** in 1999. Calculated from CR/PR at Table E-1. See, e.g., Color Picture Tubes from Canada, Japan, Korea, and Singapore, Inv. Nos. 731-TA-367-370 (Review), USITC Pub. 3291 at 13 (Apr. 2000); Brass Sheet and Strip from Brazil, Canada, France, Germany, Italy, Japan, Korea, the Netherlands, and Sweden, Inv. Nos. 701-TA-269&270, and 731-TA-311-317 and 379-380 (Review), USITC Pub. 3290 at 14 (Apr. 2000).

¹⁴⁹ See, e.g., Certain Steel Wire Rope from Japan, Korea, and Mexico, Inv. Nos. AA1921-124 and 731-TA-546-547 (Review), USITC Pub. 3259 at 11 (Dec. 1999); Potassium Permanganate from China and Spain, Inv. Nos. 731-TA-125 and 126 (Review), USITC Pub. 3245 at 10 (Oct. 1999).

¹⁵⁰ Japanese production capacity was 83.8 million short tons for cement and 90.0 million short tons for cement clinker in 1999. Its capacity utilization for cement declined from 98.8 percent in 1997 to 88.7 percent in 1999 and for cement clinker declined from 91.2 percent in 1997 to 78.2 percent in 1999. CR/PR at Tables IV-6 and IV-7.

¹⁵¹ In 1999, Japanese excess capacity was 19.6 million short tons for cement clinker and 9.4 million short tons for cement. CR/PR at Tables IV-6 and IV-7. As discussed above, Japanese respondents have indicated that cement clinker capacity was the more meaningful figure. See note 134 *supra*.

is less than half that of the Japanese producers.¹⁵² Production capacity utilization for Mexican producers increased slightly during the period of review; although there still is substantial Mexican excess capacity, it is lower than that in Japan.¹⁵³

Thus, we find that if the orders were revoked, subject imports from Mexico and Japan would likely have limited geographical overlap and would likely not compete under similar conditions of competition, and therefore we do not exercise our discretion to cumulate subject imports from Mexico and Japan in these reviews.

VI. LIKELIHOOD OF CONTINUATION OR RECURRENCE OF MATERIAL INJURY IF THE ANTIDUMPING DUTY ORDERS ON MEXICO AND JAPAN ARE REVOKED

A. Legal Standard In A Five-Year Review

In a five-year review conducted under section 751(c) of the Act, Commerce will revoke a countervailing or antidumping duty order or terminate a suspended investigation unless: (1) it makes a determination that dumping is likely to continue or recur, and (2) the Commission makes a determination that revocation of an order or termination of a suspended investigation “would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.”¹⁵⁴ 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 or termination of a proceeding and the elimination of its restraining effects on volumes and prices of imports.”¹⁵⁵ Thus, the likelihood standard is prospective in nature.¹⁵⁶ The statute states that “the Commission shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time.”¹⁵⁷ 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].”^{158 159}

¹⁵² Mexican cement production capacity was *** short tons in 1999. CR/PR at Table IV-4.

¹⁵³ Mexican capacity utilization for cement increased from *** in 1999. Its excess capacity for cement was *** short tons in 1999. CR/PR at Table IV-4.

¹⁵⁴ 19 U.S.C. § 1675a(a).

¹⁵⁵ SAA, H.R. Rep. No. 103-316, vol. I, at 883-84 (1994). The SAA states that “[t]he likelihood of injury standard applies regardless of the nature of the Commission’s original determination (material injury, threat of material injury, or material retardation of an industry). Likewise, the standard applies to suspended investigations that were never completed.” SAA at 883.

¹⁵⁶ 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.

¹⁵⁷ 19 U.S.C. § 1675a(a)(5).

¹⁵⁸ 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.*

¹⁵⁹ In analyzing what constitutes a reasonably foreseeable time, Commissioner Koplán examines all the current and likely conditions of competition in the relevant industry. He defines “reasonably foreseeable time” as the

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Although the standard in five-year reviews is not the same as the standard applied in original antidumping or countervailing duty investigations, it contains some of the same fundamental elements. The statute provides that the Commission is to “consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated.”¹⁶⁰ 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 or the suspension agreement under review, whether the industry is vulnerable to material injury if the order is revoked or the suspension agreement is terminated, and any findings by Commerce regarding duty absorption pursuant to 19 U.S.C. § 1675(a)(4).¹⁶¹

We note that the statute authorizes the Commission to take adverse inferences in five-year reviews, but such authorization does not relieve the Commission of its obligation to consider the record evidence as a whole in making its determination.¹⁶² 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.”¹⁶³ In this case, a few respondent interested parties did not provide questionnaire responses and/or participate in these reviews. Accordingly, we have relied on the facts available in these reviews, which consist primarily of the information collected by the Commission since the institution of these reviews, and information submitted by the domestic producers, respondent parties and other parties in these reviews.

In evaluating the likely volume of imports of subject merchandise if the order under review is revoked, the Commission is directed to consider whether the likely volume of subject imports would be significant either in absolute terms or relative to the production or consumption in the United States.¹⁶⁴ 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

¹⁵⁹ (...continued)

length of time it is likely to take for the market to adjust to a revocation or termination. 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.

¹⁶⁰ 19 U.S.C. § 1675a(a)(1).

¹⁶¹ 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.

¹⁶² 19 U.S.C. § 1675(e).

¹⁶³ SAA at 869.

¹⁶⁴ 19 U.S.C. § 1675a(a)(2).

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.¹⁶⁵

In evaluating the likely price effects of subject imports if the order 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 price of domestic like products.¹⁶⁶

In evaluating the likely impact of imports of subject merchandise if the order 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.¹⁶⁷ 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.¹⁶⁸ 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 duty order or suspension agreements at issue and whether the industry is vulnerable to material injury if the order is revoked.¹⁶⁹

For the reasons stated below, we determine that revocation of the antidumping duty order on gray portland cement and cement clinker from Mexico and Japan would be likely to lead to continuation or recurrence of material injury to the Southern Tier regional industry and the California regional industry, respectively, within a reasonably foreseeable time.¹⁷⁰

B. All or Almost All Standard in Regional Industry Injury Analysis

¹⁶⁵ 19 U.S.C. § 1675(a)(2)(A)-(D).

¹⁶⁶ 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.

¹⁶⁷ 19 U.S.C. § 1675a(a)(4).

¹⁶⁸ 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 of the antidumping duty order on gray portland cement and cement clinker from Japan, Commerce found that revocation of this order would likely lead to continuation or recurrence of dumping and assigned company-specific margins of 69.89 percent for Nihon, 70.52 percent for Onoda, and an all other rate of 70.23 percent. 65 Fed. Reg. at 11550 (Mar. 3, 2000). In the final results of its full review regarding subject imports from Mexico, Commerce found revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping. Commerce assigned Mexican company-specific margins of 91.94 percent for CEMEX/GCCC/Hidalgo, 53.26 percent for Apasco, and an all other Mexican rate of 59.91 percent. 65 Fed. Reg. at 41050 (July 3, 2000).

¹⁶⁹ The SAA states that in assessing whether the domestic industry is vulnerable to injury if the order 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.

¹⁷⁰ Commissioner Askey dissenting. See Concurring and Dissenting Views of Commissioner Thelma J. Askey.

Under a regional industry injury analysis, producers of “all or almost all” of the production in the region must be materially injured or threatened with material injury by reason of the subject imports.¹⁷¹ There is no specification in the statute or prior Commission determinations as to what percentage of domestic production constitutes “all or almost all” in the context of regional injury analysis. The Court of International Trade has held that, for determining the “all” criterion, “a numerical analysis would not be appropriate under the regional injury provision . . . [because] numerous factors must be considered and a quantitative analysis is inappropriate.”¹⁷² The CIT has held that the “Commission did not err in failing to apply a fixed percentage test of eighty to eighty-five percent” in determining whether a regional industry was injured.¹⁷³

Generally, after determining whether the aggregate regional data shows material injury, the Commission next examines individual producer data “as appropriate to determine whether anomalies exist that an aggregate analysis would disguise.”¹⁷⁴ In examining individual producer data, the Commission is “not required to adopt the pure plant-by-plant inquiry” and “[u]se of either a straight aggregate or pure plant-by-plant method in determining injury in a regional analysis is not mandated by statute or case law.”¹⁷⁵

While the statute or legislative history provide no specific guidance on how the “all, or almost all” requirement should be applied to the prospective likelihood of continuation or recurrence of material injury analysis in a five-year review, some guidance may be garnered from the CIT’s approval of the Commission’s application in an affirmative threat determination.¹⁷⁶ In these reviews, the parties disagreed on how the “all or almost all” standard should be applied in a five-year review.¹⁷⁷

¹⁷¹ 19 U.S.C. § 1677(4)(C).

¹⁷² Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608, 616 and 617 (CIT 1993); Cemex, S.A. v. United States, 790 F. Supp. 290, 294 (CIT 1992), aff’d, 989 F.2d 1202 (Fed. Cir. 1993).

¹⁷³ Mitsubishi Materials, 820 F. Supp. at 616 and 617 (CIT 1993); Cemex, 790 F. Supp. at 294 (CIT 1992), aff’d, 989 F.2d 1202 (Fed. Cir. 1993).

¹⁷⁴ Rebar from Turkey, USITC Pub. 3034 at 23 and nn.141-142. Accord Mitsubishi Materials, 820 F. Supp. at 617 and 618 (CIT 1993); compare, Mitsubishi Materials Corp. v. United States, 918 F. Supp. 422, 427 (CIT 1996) (aggregate analysis of regional producers sufficient to satisfy the “all or almost all” standard where industry conditions were common to each regional producer); Cemex, 790 F. Supp. at 294 -296 (“to the extent that some safeguard is required to assure that the ‘all or almost all’ standard is met, it was satisfied by examination of data regarding individual plants.”) (CIT 1992), aff’d, 989 F.2d 1202 (Fed. Cir. 1993).

¹⁷⁵ Mitsubishi Materials, 820 F. Supp. at 618 (CIT 1993); Cemex, 790 F. Supp. at 294 and 296 (CIT 1992), aff’d, 989 F.2d 1202 (Fed. Cir. 1993).

¹⁷⁶ In affirming the Commission’s affirmative threat determination on remand in Japanese Cement, the Mitsubishi Materials court stated:

This Court does not need to determine, however, whether the Commissioners’ analysis in this regard was sufficient to satisfy the all or almost standard because their use of aggregate data in this case was appropriate. The factors supporting imminent threat to all or almost all of the industry are based on industry conditions common to each and every domestic producer in the Southern California market.

918 F. Supp. at 427 (CIT 1996).

¹⁷⁷ Domestic Producers contended that “[w]here the Commission’s analysis is prospective -- as in a threat case or a sunset review -- there is no basis whatsoever for conducting a plant-by-plant analysis. . . [since] the Commission does not need to make a ‘separate determination regarding current material injury.’” Domestic Producers’ Response to Commission Questions at 60-65. In contrast, Mexican Respondents - CEMEX and GCCC maintained that the “counter-factual nature of a sunset review makes an aggregate analysis particularly susceptible to disguising anomalies that examination of individual plant information would otherwise highlight” and that a

(continued...)

C. 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.”¹⁷⁷ The following conditions of competition in the gray portland cement and cement clinker industry are relevant to our determination.

Gray portland cement is a fungible, commodity product, with domestically-produced product and imported (subject and non-subject) product readily interchangeable.¹⁷⁹ Price is an important factor in purchasing decisions.¹⁸⁰ Due to cement’s relatively low value-to-weight ratio, U.S. inland transportation costs account for a relatively large share of the delivered price of gray portland cement and are a limiting factor on the distances to which cement is shipped.¹⁸¹ As a result, the market for gray portland cement tends to be regional in nature.¹⁸²

Demand for gray portland cement in the Southern Tier and the California regions has increased substantially since the original investigations and during the period of review. In the Southern Tier region, apparent consumption increased by 30.7 percent from 1989 to 1999 and by 19.3 percent from 1997 to 1999 alone.¹⁸³ Increases in demand differed somewhat by state within the Southern Tier region, with the strongest growth markets since 1991 in Arizona (102 percent), Texas (80 percent), Florida (62 percent), Mississippi (60 percent), and New Mexico (55 percent).¹⁸⁴ Demand in the California region declined substantially from 1990 to 1993, but increased by 6.5 percent from 1990 to 1999 and by 30.6 percent from 1997 to 1999.¹⁸⁵ In 1999, apparent consumption in the California region essentially returned to its 1989 peak level.¹⁸⁶

Demand for cement is dependent on the demand for concrete, which is essential to all types of construction, particularly residential building, commercial building, and highways.¹⁸⁷ Since demand for cement is derived entirely from the demand for concrete and cement accounts for only a small component of the cost of construction, it is relatively inelastic.¹⁸⁸ Demand for cement tends to be cyclical in nature because it is determined by the level of general construction. However, overall demand for cement is less

¹⁷⁷ (...continued)

plant-by-plant analysis is required of all or almost all producers in a regional industry sunset review. Mexican Respondents -- CEMEX and GCCC’s Response to Commission Questions at 41-44. The Japanese respondents contended that operational differences between the different producers compels “the Commission to examine the data on both a plant-by-plant and aggregate basis.” Japanese Respondents’ Prehearing Brief at 30-33; Japanese Respondents’ Response to Commission Questions at 8.

¹⁷⁸ 19 U.S.C. § 1675a(a)(4).

¹⁷⁹ CR at I-26 - I-27, I-33, and II-27 - II-28; PR at I-23 - I-24, I-28, and II-14 - II-15. All cement generally conforms to ASTM standards.

¹⁸⁰ CR at II-26; PR at II-14. More than half of responding purchasers ranked price as the most important factor in purchasing decisions.

¹⁸¹ CR at I-15, II-1, V-1, and Table I-2; PR at I-13, II-1, V-1, and Table I-2. Average inland transportation costs per ton nearly double if cement in either of the two regions is shipped from 100-199 miles compared with less than 100 miles. *Id.* at Table I-2. Conversely, ocean freight transportation is relatively inexpensive and does not result in substantial additional costs for shipping further distances.

¹⁸² CR/PR at II-1.

¹⁸³ CR/PR at Table I-1A.

¹⁸⁴ CR at II-20; PR at II-10.

¹⁸⁵ CR at II-20; PR at II-10, CR/PR Table C-6, and Japan Cement, USITC Pub. 2376 at Table 6.

¹⁸⁶ CR at II-20; PR at II-10, CR/PR at Table C-6, and Japan Cement, USITC Pub. 2376 at Table 6.

¹⁸⁷ CR at II-1 and II-19; PR at II-1 and II-10.

¹⁸⁸ CR at II-25; PR at II-13 - II-14.

volatile than any individual construction markets since cement is used in nearly every type of construction. Moreover, increased government expenditures for public infrastructure work, including expenditures pursuant to laws such as the Transportation Equity Act for the 21st Century (“TEA-21”) and the Aviation Investment and Reform Act for the 21st Century (“AIR-21”), may lessen the magnitude of any cyclical downturns for the cement industry resulting from declines in residential and commercial building in the reasonably foreseeable future.¹⁸⁹ Demand for cement also tends to be seasonal, with peaks in consumption occurring in the summer months when the level of construction is highest.¹⁹⁰

Parties disagreed on whether the sharp increases in demand for cement from 1997 to 1999 will continue or whether demand for cement reached a peak in 1999 and will remain relatively constant at that level through 2003.¹⁹¹ A number of industry forecasts provided to the Commission suggest that demand for cement in the Southern Tier region will continue to increase, although at a slower rate or will remain relatively constant in 2000, 2001, and 2002, and will increase at relatively moderate levels in California in 2001, 2002, 2003.¹⁹² ¹⁹³ Moreover, responses to Commission questionnaires tend to support the proposition that the growth in demand is slowing or softening in the Southern Tier region.¹⁹⁴

Increases in regional production capacity have not kept pace with increases in demand since the original investigations and particularly during the period of review.¹⁹⁵ Constraints in production capacity

¹⁸⁹ CR at II-22, II-23, and n.35; PR at II-11, II-12, and n.35.

¹⁹⁰ CR at II-19; PR at II-10.

¹⁹¹ Domestic Producers’ Posthearing Brief, Response to Commission Questions at 5-6; Tr. at 70; Mexican Respondents’ Posthearing Brief at 4 and 13.

¹⁹² Domestic Producers’ Posthearing Brief, Response to Commission Questions at Attachment 3. For the Southern Tier region, Portland Cement Association (“PCA”) (Aug. 2000) forecasts cement consumption to increase by 10.6 percent in 1999, 1.2 percent in 2000, 0.7 percent in 2001, 1.5 percent in 2002, and 1.2 percent in 2003; Greystone Insider (Spring 2000) forecasts cement consumption to increase by 11.4 percent in 1999, and decline by 0.2 percent in 2000, 0.8 percent in 2001, and 0.6 percent in 2002, and increase by 1.6 percent in 2003; International Cement Review (May 2000) forecasts cement consumption to increase by 9.4 percent in 1999, 3.6 percent in 2000, and decline by 3.7 percent in 2001, 0.7 percent in 2002, and increase by 6.9 percent in 2003. For the California region, PCA (Aug. 2000) forecasts cement consumption to increase by 13.9 percent in 1999, 5.6 percent in 2000, 4.0 percent in 2001, 2.6 percent in 2002, and 2.2 percent in 2003; Greystone Insider (Spring 2000) forecasts cement consumption to increase by 15.4 percent in 1999, 4.5 percent in 2000, 7.3 percent in 2001, and 4.9 percent in 2002, and decline by 0.7 percent in 2003; International Cement Review (May 2000) forecasts cement consumption to increase by 14.6 percent in 1999, 5.1 percent in 2000, and decline by 4.2 percent in 2001, 1.2 percent in 2002, and increase by 6.3 percent in 2003. *Id.*

¹⁹³ Mexican respondents provided statements by industry analysts such as Deutsche Bank, Value-Line and PCA, and domestic producers Southdown and Lafarge that predict slower growth, but not a decline, in demand over the next few years. We placed less weight on the state-to-state forecasts provided by Mexican respondents and generated for these reviews that rely heavily on forecasts pertaining to only a single variable, construction employment. CR at II-23, II-24, and nn. 30 and 35. Mexican Respondent’s -- CEMEX -- Prehearing Brief at 12-24; Mexican Respondent’s -- CEMEX -- Final Comments at 12.

¹⁹⁴ CR at I-38, n.52; PR at I-31, n.52. In response to the Commission’s questionnaires, producers operating 30 of the 37 plants in the Southern Tier region indicated that demand in this region was slowing or softening; 12 of 20 Southern Tier importers and 21 of 34 Southern Tier purchasers made similar observations. *Id.*

¹⁹⁵ Apparent consumption in the Southern Tier region exceeded regional production capacity by 777,000 short tons in 1997, 3.6 million short tons in 1998, and 7.3 million short tons in 1999. CR/PR at Table I-1A. Production capacity in the Southern Tier region remained relatively constant during the period of review, while capacity utilization increased from 91.4 percent in 1997 to 92.6 percent in 1999. *Id.* Apparent consumption in the California region was less than regional production capacity by 1.6 million short tons in 1997 and 67,000 short tons in 1998, but exceeded production capacity by 1.2 million short tons in 1999. CR/PR at Table C-6. Production

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have resulted in the need for substantial and increasing volumes of subject and non-subject imports to meet regional market demand during the period of review.¹⁹⁶ In 1999, imports from all sources held 30.0 percent of the Southern Tier regional market and 26.1 percent of the California regional market.¹⁹⁷ U.S. producers and their foreign affiliates have been and continue to be responsible for virtually all imports of nonsubject cement.¹⁹⁸ Producers in both regions are in the process of increasing, or have plans to increase, production capacity in both regions. Expansions generally take from three to five years from planning to production.¹⁹⁹ We recognize that all announced expansion plans will not necessarily be completed and have considered that those in the construction phase, generally two years in duration, are more certain of completion than those in the planning or permitting phases. In the next two years alone, over 5 million short tons in production capacity is expected to come into service in the Southern Tier region and about *** short tons in the California region.²⁰⁰

The gray portland cement and cement clinker industry is highly capital intensive. Because of the industry's high fixed costs, production facilities must operate at high capacity utilization rates in order to maximize return on investment. The Southern Tier regional producers' capacity utilization for cement grew from 75.1 percent in 1989 to 92.6 percent in 1999.²⁰¹ The California regional producers' capacity utilization for cement grew from 84.1 percent in 1990 to 95.5 percent in 1999.²⁰² Gray portland cement facilities generally cannot be used to produce other products.²⁰³

A substantial amount of the cement industry in both regions is owned by large international corporations. About half of the regional operations have changed ownership since the original investigations, with the share of foreign ownership increasing substantially.²⁰⁴ During the period of review, foreign ownership accounted for 63 percent of Southern Tier production capacity and 65 percent of California production capacity as opposed to roughly 50 percent in each region during the original

¹⁹⁵ (...continued)

capacity in the California region remained relatively constant during the period of review, while capacity utilization increased from 94.5 percent in 1997 to 95.5 percent in 1999. Id.

¹⁹⁶ Imports of gray portland cement held an increasing share of the Southern Tier regional market, ranging from 17.6 percent in 1997 to 30 percent in 1999. While the share of the Southern Tier market held by imports from Mexico was 2.7 percent in 1997, 3.2 percent in 1998, and 2.8 percent in 1999, the share of this market held by non-subject imports was 12.5 percent in 1997, 19.7 percent in 1998, and 24.8 percent in 1999. CR/PR at Table I-1A. Imports of gray portland cement held an increasing share of the California regional market, ranging from 11.1 percent in 1997 to 26.1 percent in 1999. While the share of the California market held by imports from Japan was 0.0 percent in 1997, 0.1 percent in 1998, and 0.2 percent in 1999, the share of this market held by non-subject imports was 10.9 percent in 1997, 20.6 percent in 1998, and 25.5 percent in 1999. CR/PR at Table C-6.

¹⁹⁷ CR/PR at Tables C-1 and C-6. In 1999, non-subject imports accounted for 24.8 percent of Southern Tier apparent consumption, up from 12.5 percent in 1997, and for 25.5 percent of California apparent consumption. Id. and Table I-1A.

¹⁹⁸ CR at I-53.

¹⁹⁹ CR at I-35; PR at I-29, and Tr. at 73-74 and 98-99. The permitting process can take as long as two and a half years for approvals and the construction phase takes two years, with construction for some projects completed in separate phases. Id.

²⁰⁰ CR at I-35 and Table I-7; PR at I-29 and Table I-7. Additional production capacity announced by Southern Tier regional producers by year are: *** in 2004. Additional production capacity announced by California regional producers by year are: *** short tons in 2003. CR/PR at Table I-7.

²⁰¹ CR/PR at Table I-1A.

²⁰² CR/PR at Table C-6 and Japan Cement, USITC Pub. 2376 at A-36, Table 7.

²⁰³ CR at II-7; PR at II-4.

²⁰⁴ CR at I-39; PR at I-32.

investigations.²⁰⁵ Similar to the original investigations, most imports of gray portland cement and cement clinker are controlled by U.S. producers and their affiliated foreign producers.²⁰⁶ Overall, 13 of the 23 Southern Tier producers reported imports of cement and cement clinker, mostly from non-subject sources, during the period of review.²⁰⁷ Southern Tier regional producers with foreign affiliations owned or controlled 38 of the total 44 import terminals in the region; 19 of these terminals were owned by producers affiliated with Mexican producers and one import terminal was affiliated with a Japanese producer.²⁰⁸ Finally, there is a significant degree of vertical integration between regional cement producers and the downstream ready-mix concrete operations. The share of regional producers' gray portland cement shipments that went to affiliated customers was 21 percent in the Southern Tier region and 13 percent in the California region in 1999.²⁰⁹

We find that the foregoing conditions of competition are likely to remain unchanged for the reasonably foreseeable future and thus provide an adequate basis by which to assess the likely effects of revocation within the reasonably foreseeable future.²¹⁰

D. Revocation of the Antidumping Duty Order on Imports of Gray Portland Cement and Cement Clinker from Mexico Is Likely to Lead to Continuation or Recurrence of Material Injury to the Southern Tier Regional Industry Within a Reasonably Foreseeable Time

1. Likely Volume of Subject Imports

During the period of the original investigation, subject imports from Mexico entering the Southern Tier region increased significantly in both volume and value.²¹¹ Moreover, the Commission found that the market penetration by subject imports from Mexico was significant.²¹²

The quantity of U.S. imports of gray portland cement from Mexico into the Southern Tier region increased from 1997 to 1999.²¹³ Subject imports of cement from Mexico into the Southern Tier region

²⁰⁵ CR at I-34; PR at I-28-29, and Questionnaire responses. By comparison, in 1989, foreign ownership accounted for approximately 47 percent of Southern Tier production capacity and 53 percent of California production capacity. CR at I-34; PR at I-28-29 and Table I-1A, Questionnaire responses, and USITC Pub. 2376 at Table 7.

²⁰⁶ CR at I-46; PR at I-38.

²⁰⁷ CR at I-53; PR at I-42.

²⁰⁸ CR/PR at Table I-9. Of the 19 import terminals affiliated with Mexican producers, 14 terminals were considered active. California regional producers with foreign affiliations owned or controlled 6 of the total 7 import terminals in the region; 4 of these terminals were owned by producers affiliated with Mexican producers and one import terminal was affiliated with a Japanese producer. *Id.*

²⁰⁹ CR at II-4; PR at II-2, and Questionnaire responses. Since 1989, the degree of vertical integration increased slightly in the Southern Tier. The degree of vertical integration in the California region remained a constant level from 1997 to 1999, although it fluctuated between years. *Id.*

²¹⁰ Commissioner Askey does not join the remainder of this opinion. *See* Concurring and Dissenting Views of Commissioner Thelma J. Askey.

²¹¹ From 1986 to 1989, subject imports of cement from Mexico into the Southern Tier region increased by 20 percent by quantity and 13 percent by value. CR/PR at Table I-1A.

²¹² *Mexico Cement*, USITC Pub. 2305 at 33 and 60.

²¹³ CR/PR at Table I-1A. Subject imports of cement from Mexico into the Southern Tier region increased from 978,000 tons in 1997 to 1.2 million tons in 1999. *Id.* During the original investigation, subject imports of cement from Mexico into the Southern Tier region were 3.0 million tons in 1986, 3.5 million tons in 1987, 4.1 million

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accounted for 2.8 percent of U.S. apparent consumption in this region by quantity in 1999.²¹⁴ Mexican producer CEMEX has publicly indicated that if the antidumping duty order was revoked, imports of cement to the United States could reach four million tons per year.²¹⁵ Thus, if the order is revoked, CEMEX believes it could triple the current level of subject imports from Mexico entering the U.S. market.

Mexican producers have significant excess production capacity and thus have the ability to significantly increase shipments of cement to the Southern Tier region.²¹⁶ Mexico had an average production capacity for gray portland cement of *** in 1999.²¹⁷ Its capacity utilization for cement was *** in 1999.²¹⁸ Thus, Mexico had excess capacity of *** of cement in 1999, a level equal to *** of current regional apparent.²¹⁹

While Mexico's home market accounted for *** of its producers' total shipments in 1999, the Southern Tier region is a natural market for Mexican imports. Even with the order in place, the Southern Tier region was Mexico's main export market, accounting for over half of its export shipments of cement in 1999.²²⁰ Moreover, Mexican producers have more export infrastructure and control substantially more import infrastructure in the Southern Tier region today than during the original investigation.²²¹ Mexico's

²¹³ (...continued)

tons in 1988, and 3.6 million tons in 1989. Id.

²¹⁴ CR/PR at Table I-1A. Subject imports from Mexico accounted for 12.6 percent of Southern Tier regional consumption in 1989 and 10.7 percent in 1990. Id.

²¹⁵ El Financiero, July 20, 2000 (Domestic Producers' Prehearing Brief, Exhibit 71) and El Financiero, August 4, 2000 (Domestic Producers' Response to Commission Questions at Attachment 23); Tr. at 173. CEMEX has indicated that the El Financiero statements reflect "the outside limit of what would be theoretically possible." Mexican Respondents' -- CEMEX and GCCC-- Response to Commission Questions at 2 and Attachment 3 (Affidavit of Javier Prieto de la Fuente).

²¹⁶ While the parties disagreed on the exact level of Mexican capacity, the Commission verified Mexican producer CEMEX's capacity records and reconciled any discrepancies. CR at IV-21 - IV-24; PR at IV-14 - IV-16.

²¹⁷ CR/PR at Tables IV-4 and IV-5. *** provided production data that is estimated to account for *** of Mexican cement production. CEMEX and GCCC exported cement to the Southern Tier region during the period of review and all of these Mexican producers exported cement to the region during the original investigation. Id. at IV-14 and IV-27, n.38; PR at IV-11 and IV-17, n.38.

²¹⁸ CR/PR at Tables IV-4 and IV-5.

²¹⁹ CR/PR at Tables IV-4 and C-1.

²²⁰ CR/PR at Table IV-4.

²²¹ Tr. at 173 and 178-180 (CEMEX official acknowledged that "we do have more [import terminal] capacity than we had ten years ago.") CEMEX exported from six plants to the Southern Tier during the original investigation, but only exported from two of these plants during the period of review; CEMEX indicated that seven of its plants have the capability to export. CR at IV-25 and n.32. CEMEX USA has 12 active and 5 inactive terminals located in California, Arizona, Texas, and Florida; the active terminals reportedly have an annual throughput capacity of *** of unused capacity. Rio Grande has 2 terminals located in New Mexico and Texas, which have an annual throughput capacity of ***. CR at I-49-50; PR at I-38 -41. The record indicates that Apasco, which could only export to the Florida and the Gulf Coast of the United States by sea from its Veracruz terminal on the Gulf Coast of Mexico prior to the order, could now export to California by sea from its new plant in Tecoman and its associated marine terminal at Manzanillo on the Pacific Coast of Mexico. While Cruz Azul did not export to the U.S. market during the original investigation or the period of review, it has a marine terminal at Salina Cruz in southern Mexico that has been used to export to South America in recent years and may be used to export to California by sea. The record also indicates that CEMEX can export by rail from its plants at Ensenada, Campana, Yaqui, Torreon, Hidalgo, and Monterrey; Apasco can export to by rail from its new 1.4 million ton capacity plant at Ramos Arizpe; and GCCC can export by rail from its plants in Ciudad Juarez, Samalayuca, and Chihuahua. CR at I-49, I-50, II-11, II-16, II-17, IV-25 -IV-29, and Table I-9; PR at I-38, I-41,

(continued...)

largest producer, CEMEX, has transformed into a large global concern since the original investigation, with an increased export-oriented focus.²²² In fact, CEMEX imported significant volumes of non-subject imports into the United States during the period of review, which CEMEX likely would substitute with imports from Mexico, with their lower transportation costs, if the order is revoked.²²³

Mexican producers have acquired Southern Tier production facilities since the original investigation.²²⁴ We do not believe, however, that Mexican producers' ownership of these facilities would impede the increase of subject imports to a significant level if the discipline of the antidumping duty order is removed. These facilities are operating at *** and there are no plans to expand their capacity in the reasonably foreseeable future.²²⁵ In fact, free of the restraining effects of the order, firms with a global presence would have more flexibility to supply the Southern Tier market through a combination of production and importation. Moreover, the established customer base and distribution system of their subsidiaries in the Southern Tier region would facilitate the Mexican producers' ability to increase sales of imported subject merchandise if the order was revoked.²²⁶

Inventories, which generally are not a significant factor in the cement industry, were increasing but relatively small.²²⁷ In addition, the record indicates that Mexican producers face tariff barriers to gray portland cement and cement clinker importation into several third country markets.²²⁸

The evidence shows that Mexican producers have the ability and incentive to increase exports to the Southern Tier region, notwithstanding their regional operations. Consequently, based on the record in this review, we conclude that the volume of subject imports entering the Southern Tier region likely would be significant in the reasonably foreseeable future if the antidumping duty order is revoked.

2. Likely Price Effects

²²¹ (...continued)

II-6, II-7, II-8, IV-16 -IV-19, and Table I-9. Domestic Producers' Posthearing Brief at 14-15; Domestic Producers' Prehearing Brief at 92-94, 101-105, and Exhibits 49 and 66; Domestic Producers' Final Comments at 15-17; Tr. at 32.

²²² Tr. at 150 and 180-181 (Clyburn).

²²³ CR at I-49, nn. 64 and 66; PR at I-38, nn. 64 and 66, and Tr. at 154.

²²⁴ CR at I-49 - I-50 and IV-28; PR at I-38 - I-41 and IV-18.

²²⁵ CR/PR at Tables I-7 and E-1.

²²⁶ Tr. at 151 and 153 (CEMEX official acknowledged that CEMEX's import terminals "have the ability to take in another 1.5 million tons per year . . . [consisting of] roughly 650,000 excess tones of rail through-put capacity in Arizona, and 850,000 excess tons of rail and marine terminal capacity in California."). While we have given it limited consideration in our analysis as discussed above, we note that if CEMEX's announced plans to acquire U.S. producer Southdown are realized, CEMEX would increase its Southern Tier distribution network. In 2000, Southdown has more than 10 inland and import distribution terminals in the Southern Tier region. CR/PR at Table I-9 and Figures I-2, I-3, and I-4; ***; Domestic Producers' Comments on Announced Acquisition Plans at 4.

²²⁷ Inventories of cement as a share of production remained less than *** during the period of review, with inventories of cement clinker as a share of production increasing from *** in 1999. CR/PR at Table IV-4.

²²⁸ CR at IV-29 and IV-30; PR at IV-19. On July 12, 2000, the Government of Brazil imposed antidumping duties of 22.5 percent on exports of Mexican cement to certain Brazilian states. On January 17, 2000, the Government of Guatemala imposed antidumping duties of 89.54 percent on exports of cement by Mexican producer Cruz Azul. On January 14, 2000, the Government of Ecuador imposed antidumping duties of 20 percent for a period of six months on imports of cement from Mexico; this order should have expired on July 14, 2000. Id.

In the original investigation, the Commission found that dumped imports depressed prices for the domestic product.²²⁹ The evidence showed that underselling predominated in 9 of the 10 market areas in which price comparisons were possible.²³⁰ Moreover, although prices trends differed between markets, average unit values in the region declined.²³¹

We find that the significantly increased volumes of subject imports of gray portland cement and cement clinker from Mexico that would be likely to enter the Southern Tier region if the antidumping duty order was revoked likely would have significant negative price effects for the U.S. product. As discussed above, cement is a commodity product for which price is an important purchasing factor.²³² Moreover, there is a relatively high degree of substitutability between subject imports and the domestic product.²³³

The pricing data collected in this review do not give clear evidence of patterns of underselling or overselling, though the data do indicate that some underselling occurred, even with the orders in place and the substantial increases in demand during the period of review.²³⁴ While prices generally increased slightly during the period of review, an increase in prices, and possibly even a substantial one, would have been likely due to the substantial increases in demand from 1997-1999.²³⁵

We find that without the discipline of the antidumping duty order, there is a substantial likelihood that Mexican cement would be priced aggressively in the Southern Tier market in order to gain market share. The likelihood of price depression or suppression in this market is accentuated by the substantial excess capacity in Mexico. The high fixed costs faced by cement producers provide significant incentive to the Mexican producers to sell their additional excess product even at low costs in order to meet their fixed costs. Moreover, increasing Mexican imports have been subject to high cash deposit rates under the order; in their absence Mexican imports could be priced significantly lower in the United States, including the

²²⁹ Mexico Cement, USITC Pub. 2305 at 46 and 64.

²³⁰ Mexico Cement, USITC Pub. 2305 at A-77 - A-84 and Tables 31-40. Underselling predominated in Tampa, FL (33 of 51 months), West Palm Beach, FL (5 of 8 months), New Orleans, LA (24 of 24 months), Houston, TX (23 of 36 months), San Antonio, TX (29 of 38 months), Phoenix, AZ (41 of 48 months), San Diego, CA (36 of 44 months), Orange County, CA (31 of 47 months), and San Francisco (38 of 38 months) markets. Overselling was predominant in one market, Albuquerque, NM (37 of 40 months), and no price comparisons were possible for two markets, Mobile, AL, and Tucson, AZ. Id.

²³¹ Mexico Cement, USITC Pub. 2305 at Tables 8 and 14.

²³² CR at I-26 - I-27, I-33, and II-26; PR at I-23, I-28, and II-14. Prices, which are negotiated with customers, tend to fall in a small range and are essentially set by meeting the competition's prices. Tr. at 58.

²³³ CR at II-27 - II-28; PR at II-14.

²³⁴ Subject imports from Mexico undersold domestic product in 71 months and oversold domestic product in 85 months. Price comparisons of Mexican and domestic product were only possible in four markets -- Phoenix, AZ, Tuscon, AZ, Albuquerque, NM, and San Diego, CA. Subject imports from Mexico predominately undersold the domestic product in the Phoenix, AZ market (36 of 39 months), with consistent underselling from August 1998 to March 2000, and had mixed underselling in the Tuscon, AZ market (20 of 39 months). The predominant underselling in the Arizona market where subject imports from Mexico face competition with two domestic producers, California Portland and Phoenix Cement, even with the order in place, provides an indication of the likely pricing patterns for subject imports from Mexico if the order is revoked. Tr. at 177 (CEMEX official acknowledged excess capacity at CEMEX's Hermosillo plant, which supplies customers in Arizona). Moreover, in Albuquerque, NM, where the subject imports compete with a regional producer owned by a Mexican producer, subject imports undersold the domestic product in 15 of 39 months. Subject imports from Mexico consistently oversold the domestic product in the San Diego market. CR/PR at V-8 and Tables V-4, F-15, F-16, F-17, and F-18.

²³⁵ CR at V-7; PR at V-5.

Southern Tier region.²³⁶ Mexican producer CEMEX has indicated that it likely would substitute Mexican imports for the large volumes of non-subject imports that it has imported into the Southern Tier region with the order in place.²³⁷ Such a substitution would allow CEMEX to lower its prices in the Southern Tier region to reflect decreases in transportation costs for Mexican imports compared to those for more distant non-subject sources.²³⁸ Conversely, the regional domestic industry's capacity expansion projects, and the resultant increase in supply, is likely to increase price sensitivity in the market.

For the foregoing reasons, we find that revocation of the antidumping duty order on gray portland cement and cement clinker would be likely to lead to significant underselling by the subject imports of the domestic like product in the Southern Tier region, as well as significant price depression and suppression, within a reasonably foreseeable time.

3. Likely Impact

In the original investigation, the Commission found material injury by reason of subject imports due to the volume of imports, the relatively high market penetration, and the effect of the dumped imports on prices.²³⁹ The Commission particularly noted the effects of the dumped imports on the condition of the regional industry and that it examined the record pertaining to individual producers in the region.²⁴⁰

We find that the likely significant volume of subject imports would adversely impact the regional industry if the antidumping duty order is revoked. The order appears to have had a beneficial effect on the regional industry's performance. The condition of the regional industry has improved since imposition of the order. While production capacity in the Southern Tier region increased by less than five percent from 1989 to 1999, regional production increased by almost 30 percent for the same period.²⁴¹ Thus, the regional producers' capacity utilization has increased from 75.1 percent in 1989 to 92.6 percent in 1999.²⁴² However, while regional producers' shipments in absolute terms have increased since the original investigation, the increases for these shipments during the period of review have not been at the same rate

²³⁶ In reaching our conclusion on likely price effects, we have weighed all the pertinent evidence on price and taken into account Commerce's duty absorption finding on Mexico, although we note respondents' argument that a recent CIT decision calls into question the validity of Commerce's duty absorption findings with respect to transition orders. 65 Fed. Reg. 13943 (March 15, 2000); see also Issues and Decisions Memo for the Administrative Review of Gray Portland Cement and Clinker from Mexico -- August 31, 1997 through July 31, 1998 from Richard W. Moreland to Robert S. LaRussa, Assistant Secretary for Import Administration, dated March 15, 2000 at 47 and 48; 65 Fed. Reg. at 41050 (July 3, 2000); see also Issues and Decisions Memo for the Sunset Review of Gray Portland Cement and Cement Clinker from Mexico; Final Results from Jeffrey A. May to Troy H. Cribb, Acting Assistant Secretary for Import Administration, dated June 27 at 8-15; SKF USA, Inc. v. United States, 94 F. Supp.2d 1351 (CIT 2000), remand aff'd, Slip Op. 00-101 (CIT, Aug. 18, 2000). However, we do not rely on the duty absorption findings in making our determination that significant effects are likely upon revocation of the order.

²³⁷ Tr. at 154 (Clyburn).

²³⁸ Tr. at 172 and 175. CEMEX stated that it would realize a cost savings of \$3 per ton if it were to replace the cement imports from China that it is currently selling in the United States with cement from Mexico if the antidumping duty order were removed. *Id.* The difference of \$3 per ton is substantial, particularly for a highly-substitutable, price-sensitive product, such as cement. These reduced transportation costs provide CEMEX with the flexibility to lower its price for cement imports from Mexico in the U.S. market without reducing its profit margins.

²³⁹ USITC Pub. 2305 at 46-51 and 65-67.

²⁴⁰ USITC Pub. 2305 at 47-51 and 67.

²⁴¹ CR/PR at Table I-1A.

²⁴² CR/PR at Table I-1A.

as the substantial growth in apparent consumption in the Southern Tier region.²⁴³ Therefore, the regional industry's share of apparent consumption in the Southern Tier declined, from 75.6 percent in 1997 to 65.1 percent in 1999.²⁴⁴ The regional industry's market share in 1999 was lower than its market share of 69.7 percent in 1989.²⁴⁵ The strong demand for gray portland cement during the period of review has contributed to the regional industry's positive financial performance. The regional industry's operating income margin was 5.6 percent in 1989 as compared to 29.0 percent in 1997, 30.5 percent in 1998, and 32.4 percent in 1999.²⁴⁶ Based on the industry's recent overall performance, we do not find that the regional industry is currently in a vulnerable state.

As discussed above, revocation of the antidumping duty order would likely lead to a significant increase in the volume of subject imports into the Southern Tier region, and these shipments would likely undersell the domestic product and significantly depress or suppress the regional industry's prices. With demand in the Southern Tier region projected to increase at slower rates or remain flat in a price-sensitive market, the increase in subject imports is likely to cause decreases in both the prices and volume of regional producers' shipments. In addition, the volume and price effects of subject imports would likely cause the regional industry to lose further market share. This loss in market share and subsequent decrease in capacity utilization would be particularly harmful in this capital intensive industry -- producers require high capacity utilization levels and operating margins to meet fixed costs and to justify capital expenditures.

The Southern Tier regional producers have undertaken, or have announced plans to begin, a number of production capacity expansion projects in order to meet increased demand.²⁴⁷ As discussed above, the process of expanding production capacity takes three to five years for planning, permitting, and construction. Thus, these extremely capital intensive projects were begun as demand accelerated and have begun to be placed on line, or will be placed on line in the reasonably foreseeable future.²⁴⁸ The evidence shows that capital expenditures by Southern Tier regional producers have increased substantially from 1997 to 1999.²⁴⁹ Moreover, the demand cycle appears to have reached a peak with slower growth or constant demand expected in the Southern Tier region in the reasonably foreseeable future. Thus, the regional producers' investments in additional capacity will be particularly susceptible to the likely significant increases in subject imports if the order is revoked, and the result likely would be an adverse impact on the regional industry's capacity utilization levels and profitability due to high fixed costs.

We do not find that the regional industry's current level of operating income indicates that it likely would not be materially injured upon revocation of the order. Due to the cyclicity of the cement industry, high profits at the peak of a cycle are typical and do not indicate that the industry is immune from material

²⁴³ CR/PR at Table I-1A. Regional producers' shipments within the Southern Tier region and to the entire U.S. market increased by 2.8 percent and 4.2 percent, respectively, from 1997 to 1999. By comparison, apparent consumption in the Southern Tier region increased by 19.3 percent from 1997 to 1999. Id.

²⁴⁴ CR/PR at Table I-1A.

²⁴⁵ CR/PR at Table I-1A.

²⁴⁶ CR/PR at Tables I-1A and III-6A, III-7A, and III-8A.

²⁴⁷ CR/PR at Table I-7; Domestic Producers' Final Comments at 4-7; Domestic Producers' Prehearing Brief at 78-83.

²⁴⁸ As noted earlier, we recognize that all announced expansion plans will not necessarily be completed and have considered that those in the construction phase, generally two years in duration, are more certain of completion than those in the planning or permitting phases. In the next two years alone, over 5 million short tons in production capacity is expected to come into service in the Southern Tier region. CR/PR at Table I-7.

²⁴⁹ CR/PR at Table III-10A. Capital expenditures reported by Southern Tier regional producers were: \$159.1 million in 1997, \$277.9 million in 1998, \$620.8 million in 1999, \$93.5 million in interim period (Jan.-Mar.) 1999, and \$145.6 million in interim period (Jan.-Mar.) 2000. Id.

injury. Moreover, due to the high fixed costs in this industry, relatively high levels of profitability are needed to justify investments and capital expenditures.²⁵⁰

While we analyzed the statutory factors regarding the aggregate data for the regional industry, we also examined the performance of individual regional producers to look for anomalies as a safeguard “to assure that the ‘all or almost all’ standard [was] met.”²⁵¹ Mexican respondents have argued that the regional producers representing all or almost all of the production in the Southern Tier region would not experience continuation or recurrence of material injury if the order is revoked.²⁵² First, we are not convinced that the Mexican producers would refrain from using their excess capacity to ship cement to the Southern Tier region at volumes or price levels that would injure regional producers including their regional subsidiaries. As discussed above, the large capacity of the Mexican cement industry with its low capacity utilization levels and need to meet high fixed costs would provide necessary incentive for the Mexican producers to increase shipments to the Southern Tier region if the order is revoked. Without the discipline of the order, the interests of the Mexican operations likely would not be secondary to those of their smaller Southern Tier subsidiaries, which are running ***.

Second, we also are not convinced by respondents’ arguments that, due to the regional nature of the cement industry, certain markets are insulated from competition with subject imports from Mexico and thus producers of all or almost all regional production would not be materially injured. While transportation costs tend to limit the distances that cement is shipped, we note that 20 percent of regionally-produced cement in the Southern Tier region is shipped more than 200 miles²⁵³ (imports into the Southern Tier region primarily are shipped within 100 miles of an import terminal).²⁵⁴ However, the distance cement can be economically shipped is expanded if rail transport rather than truck transport is used.²⁵⁵ Moreover, regional producers operate an extensive network of rail-served distribution terminals in the Southern Tier region that extends their marketing range.²⁵⁶ When the distribution terminals are taken into account, there are only limited areas in the Southern Tier region that may be somewhat insulated from direct competition with subject imports.²⁵⁷ Finally, we note that California Portland’s announced expansion of its Rillito, Arizona facilities would enable it to serve the New Mexico market, which Mexican respondents argued was

²⁵⁰ Tr. at 49

²⁵¹ Cemex, 790 F. Supp. at 296. CR/PR at Tables E-1 - E-8.

²⁵² Mexican Respondents’ Posthearing Brief at 16-21.

²⁵³ CR/PR at Table I-2.

²⁵⁴ CR/PR at Table I-2. Imports shipped within 100 miles of the import terminal accounted for 89 percent of total imports with another 10 percent shipped within 200 miles of such a terminal. Id.

²⁵⁵ Domestic Producers’ Response to Commission Questions at 70.

²⁵⁶ Tr. at 179 (CEMEX official recognized the regional industry’s rail-fed inland distribution network); Domestic Producers’ Response to Commission Questions at 71. There are almost twice as many distribution terminals in the Southern Tier region as plants. Tr. at 128 (Dorn).

²⁵⁷ CR/PR at Figure II-1; Domestic Producers’ Response to Commission Questions at Exhibit 38. Compare Mexican Respondent’s -- GCCC -- Final Comments at 3. There are four plants in Northern Alabama and two plants in central Texas that may be somewhat more insulated from direct competition with subject imports than other regional producers. These regional producers combined, however, accounted for only *** of regional production in 1999. Calculated from CR/PR at Table E-1. While we have not relied on a “ripple effects” analysis to reach our conclusion, we recognize, as Commissioner Lodwick did in the original investigation, that producers throughout the region may be affected due to the transporting of shipments from the area of direct competition to surrounding areas, where, in turn, others shipments may be displaced. USITC Pub. 2305 at 66, n.52, aff’d, Cemex, 790 F. Supp. at 296.

insulated from domestic producers other than its subsidiary, Rio Grande.²⁵⁸ Based on the record in this review, we therefore conclude that the “all or almost” requirement is likely to be met.

We have concluded that revocation of the antidumping duty order would likely lead to a significant increase in the volume of subject imports that would undersell the domestic like product and significantly suppress or depress U.S. prices. We also find that the volume and price effects of the subject imports would likely have a significant adverse impact on the production, shipments, sales, market share, and revenues of the regional industry. This reduction in the industry’s production, shipments, sales, market share, and revenues 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 record in this review, we conclude that, if the antidumping duty order is revoked, subject imports from Mexico would be likely to have a significant adverse impact on the regional industry within a reasonably foreseeable time.

²⁵⁸ GCCC argued that its imports will not affect the profitability or operations of domestic producers other than its subsidiary Rio Grande. Mexican Respondent - GCCC’s Prehearing Brief at 34-35.

E. Revocation of the Antidumping Duty Order on Imports of Gray Portland Cement and Cement Clinker from Japan Is Likely to Lead to Continuation or Recurrence of Material Injury to the California Regional Industry Within a Reasonably Foreseeable Time

1. Likely Volume of Subject Imports

During the period of the original investigation, substantial and increasing volumes of Japanese cement imports entered the California region.²⁵⁹ After imposition of the antidumping duty order, subject imports from Japan ceased and there were virtually no imports of gray portland cement from Japan into the California region during the period of review.²⁶⁰ Subject imports of cement from Japan into the California region accounted for 0.2 percent of U.S. apparent consumption in this region by quantity in 1999.²⁶¹

Several factors support our conclusion that subject import volume is likely to be significant if the order is revoked. Japanese producers' production capacity is substantial. In 1999, Japan's average production capacity for gray portland cement clinker was 90.0 million short tons, and for cement, 83.8 million short tons.²⁶² Its capacity utilization for cement clinker was 78.2 percent, and for cement, 88.7 percent.²⁶³ Thus, Japanese producers had excess capacity for cement clinker of 19.6 million short tons and for cement of 9.4 million short tons in 1999.²⁶⁴ If the order is revoked, Japanese producers have the ability to supply the entire demand in the State of California with additional production using their excess capacity.

Similar to the original investigation, Japanese producers owned or controlled California production facilities during the period of review.²⁶⁵ Ownership of such facilities did not prevent Japanese producers from shipping significant quantities of subject merchandise to the California market during the original investigation. Thus, it is not likely that ownership of these California subsidiaries would impede the increase of subject imports to a significant level if the discipline of the antidumping duty order is removed. In fact, free of the restraining effects of the order, producers in Japan, many of which are global companies, would have the flexibility to supply the California market through a combination of production and importation. Moreover, the established customer base and distribution system of the California subsidiaries would facilitate the Japanese producers' ability to increase sales of imported subject

²⁵⁹ During the original investigation, subject imports of cement from Japan into the California region were 349,000 tons in 1986, 486,000 tons in 1987, 1.2 million tons in 1988, 1.7 million tons in 1989, and 1.3 million tons in 1990. Japan Cement, USITC Pub. 2376 at A-21.

²⁶⁰ CR/PR at Table C-6. Subject imports of cement from Japan into the California region were 16,000 tons in 1998, 32,000 tons in 1999 and interim period (Jan.-Mar.) 1999, and 36,000 tons in interim period (Jan.-Mar.) 2000.

²⁶¹ CR/PR at Table C-6 and Japan Cement, USITC Pub. 2376 at Table 6. Subject imports from Japan accounted for 13.1 percent of regional consumption in 1989 and 10.7 percent in 1990.

²⁶² CR/PR at Tables IV-6 and IV-7. The Japanese respondents indicated that Japanese producers track clinker but not cement capacity. Thus, according to these respondents, "[c]linker capacity, for the Japanese producers, is the most accurate and reliable measure of capacity in this industry as well as the meaningful measure of any excess capacity. Japanese Respondents' Posthearing Brief, Appendix A (Responses to Commission Questions) at 1-2. Therefore, our analysis of Japanese production capabilities and excess capacity has focused on cement clinker rather than cement.

²⁶³ CR/PR at Tables IV-6 and IV-7.

²⁶⁴ CR/PR at Tables IV-6 and IV-7.

²⁶⁵ CR at I-51 - I-52 and IV-38- IV-40; PR at I-41 - I-42 and IV-26- IV-27.

merchandise if the order was revoked.²⁶⁶ Further, these U.S. production facilities are operating ***.²⁶⁷ While there is no indication that these subsidiaries have significantly increased production capacity since the original investigation, Japanese producer Taiheiyo is in the process of building a \$35 million permanent import terminal in Northern California with an annual throughput capacity of about 700,000 to 800,000 short tons to replace its floating import terminal.²⁶⁸

While Japan's substantial home market demand accounted for 89.0 percent of its total shipments of cement in 1999, the California market is closer than existing alternative markets such as the Middle East.²⁶⁹ Moreover, due to the extremely large capacity of the Japanese cement industry, the 1989 peak level of Japanese imports of cement into the California region would be reached if only about 2 percent of total 1999 shipments of cement by Japanese producers was exported to the region.²⁷⁰ Inventories of cement, which generally are not a significant factor in the cement industry, were less than five percent of production during the period of review, with inventories of cement clinker as a share of production remaining about 1.0 percent for the same period.²⁷¹

The evidence shows that the Japanese producers have the ability and incentive to increase exports to the California region, notwithstanding their regional operations. Consequently, based on the record in this review, we conclude that the volume of subject imports entering the California region likely would increase significantly within a reasonably foreseeable time if the antidumping duty order is revoked.

2. Likely Price Effects

In the original investigation, the evidence showed that subject imports from Japan consistently undersold the domestic product in all four market areas in which price comparisons were possible.²⁷²

The record in this review contains no evidence about the prices of the subject imports in the California region because such imports have virtually ceased to enter the market subsequent to imposition of the order. However, as discussed above, the record indicates that there would be a high degree of substitutability between domestic and Japanese cement, if the Japanese producer were to enter the California region in commercial quantities.²⁷³ Price is an important determinant in purchasing decisions in the cement industry.²⁷⁴

We find that without the discipline of the antidumping duty order, there is a substantial likelihood that the Japanese cement would be priced aggressively in the California market in order to gain market

²⁶⁶ CR at I-51; PR at I-41. In addition to the Southern California production facility, Japanese producer Mitsubishi is a general partner with Lucky Cement Corporation in the operation of an import terminal (MCC-Lucky) in Long Beach, California, which has an annual throughput capacity of ***. California Portland, which is owned by Japanese producer Taiheiyo, has two production facilities and is affiliated with Allied Cement, an importing operation in Wilmington, CA with an annual throughput capacity of ***. Id. Taiheiyo also is in the process of building a deep water terminal at Stockton, CA that reportedly will replace its "Golden Arrow" floating silo at Stockton. Id. at I-52; PR at I-42, and Tr. at 229-231.

²⁶⁷ CR/PR at Table E-1.

²⁶⁸ CR at I-52, n.78; PR at I-42, n.78.

²⁶⁹ CR/PR at Table IV-6.

²⁷⁰ CR/PR at Table IV-6 and USITC Pub. 2376 at Table 6.

²⁷¹ CR/PR at Tables IV-6 and IV-7.

²⁷² Japan Cement, USITC Pub. 2376 at A-66 - A-68 and Tables 31-34. During the original investigation, subject imports from Japan predominantly undersold the domestic product in the Los Angeles, CA market (60 of 60 months); the Orange County, CA market (57 of 60 months); the Riverside County, CA market (59 of 59 months); and the San Diego, CA market (12 of 12 months). Id.

²⁷³ CR at I-26 - I-27, I-33, and II-27 - II-28; PR at I-23, I-28, and II-14.

²⁷⁴ CR at II-26; PR at II-14.

share. The likelihood of price depression or suppression in this market is accentuated by the substantial excess capacity in Japan. The high fixed costs faced by cement producers provide significant incentive to the Japanese producers to sell their additional excess product even at low costs in order to meet their fixed costs. Conversely, the regional industry's capacity expansion projects and the resultant increase in supply is likely to increase price sensitivity in this market.

For the foregoing reasons, we find that revocation of the antidumping duty order on gray portland cement and cement clinker would be likely to lead to significant underselling by the subject imports of the domestic like product in the California region, as well as significant price depression and suppression, within a reasonably foreseeable time.

3. Likely Impact

We find that the likely significant volume of subject imports would adversely impact the regional industry if the antidumping duty order is revoked. The order appears to have had a beneficial effect on the regional industry's performance. The condition of the regional industry has improved since imposition of the order. While production capacity in the California region increased by less than two percent from 1990 to 1999, regional production increased by almost 16 percent for the same period.²⁷⁵ Thus, the regional producers' capacity utilization has increased from 84.1 percent in 1990 to 95.5 percent in 1999.²⁷⁶ However, while regional producers' shipments in absolute terms have increased since the original investigation, the increases for these shipments during the period of review have not been at the same rate as the substantial growth in apparent consumption in the California region.²⁷⁷ Therefore, the regional industry's share of apparent consumption in the California region declined from 88.9 percent in 1997 to 73.9 percent in 1999.²⁷⁸ The regional industry's market share in 1999 was the same as its market share of 73.9 percent in 1990.²⁷⁹ The strong demand for gray portland cement during the period of review has contributed to the regional industry's positive financial performance. The regional industry's operating income margin was 18.6 percent in 1990 as compared to 23.1 percent in 1997, 26.9 percent in 1998, and 28.2 percent in 1999.²⁸⁰ Based on the industry's recent overall performance, we do not find that the regional industry is currently in a vulnerable state.

As discussed above, revocation of the antidumping duty order would likely lead to a significant increase in the volume of subject imports into the California region, and these shipments would likely undersell the domestic product and significantly depress or suppress the regional industry's prices. With demand in the California region projected to increase at slower rates or remain flat in this price-sensitive market, the increase in subject imports is likely to cause decreases in both the prices and volume of regional producers' shipments. In addition, the volume and price effects of subject imports would likely cause the regional industry to lose further market share. This loss in market share and subsequent decrease in capacity utilization would be particularly harmful in this capital intensive industry -- producers require high capacity utilization levels and operating margins to meet fixed costs and to justify capital expenditures.

²⁷⁵ CR/PR at Table C-6 and USITC Pub. 2376 at Table 7.

²⁷⁶ CR/PR at Table C-6 and USITC Pub. 2376 at Table 7.

²⁷⁷ CR/PR at Table C-6. Regional producers' shipments within the California region and to the entire U.S. market increased by 8.6 percent and 1.1 percent, respectively, from 1997 to 1999. By comparison, apparent consumption in the California region increased by 30.6 percent from 1997 to 1999. Id.

²⁷⁸ CR/PR at Table C-6.

²⁷⁹ CR/PR at Table C-6 and USITC Pub. 2376 at Table 6.

²⁸⁰ CR/PR at Tables C-6 and USITC Pub. 2376 at Table 17.

The California regional producers have undertaken, or have announced plans to begin, a number of production capacity expansion projects in order to meet increased demand.²⁸¹ As discussed above, the process of expanding production capacity takes three to five years for planning, permitting, and construction. Thus, these extremely capital intensive projects were begun as demand accelerated and have begun to be placed on line, or will be placed on line in the reasonably foreseeable future.²⁸² The evidence shows that capital expenditures by California regional producers have increased substantially from 1997 to 1999.²⁸³ Moreover, the demand cycle appears to have reached a peak, with slower growth expected in the California region in the reasonably foreseeable future. Thus, the regional producers' investments in additional capacity will be particularly susceptible to the likely significant increases in subject imports if the order is revoked, and the result likely would be an adverse impact on the regional industry's capacity utilization levels and profitability due to high fixed costs.

We do not find that the regional industry's current level of operating income indicates that it likely would not be materially injured upon revocation of the order. Due to the cyclicity of the cement industry, high profits at the peak of a cycle are typical and do not indicate that the industry is immune from material injury. Moreover, due to the high fixed costs in this industry, relatively high levels of profitability are needed to justify investments and capital expenditures.²⁸⁴

While we analyzed the statutory factors regarding the aggregate data for the regional industry, we also examined the performance of individual regional producers to look for anomalies as a safeguard "to assure that the 'all or almost all' standard [was] met."²⁸⁵ Japanese respondents have argued that the regional producers representing all or almost all of the production in the California region would not experience continuation or recurrence of material injury if the order is revoked.²⁸⁶ First, we are not convinced that the Japanese producers would refrain from using their excess capacity to ship cement to the California region at volumes or price levels that would injure regional producers including their regional subsidiaries.²⁸⁷ As discussed above, the extremely large capacity of the Japanese cement industry, with its low capacity utilization levels and need to meet high fixed costs, would provide necessary incentive for the Japanese producers to increase shipments to the California region if the order is revoked. Without the discipline of the order, the interests of the Japanese operations likely would not be secondary to those of their small California subsidiaries, which are running at ***. Ownership of California facilities did not prevent Japanese producers from shipping significant quantities of cement at low prices to the California region in the original investigation. Moreover, Taiheiyo has invested \$35 million in a new permanent import terminal.

²⁸¹ CR/PR at Table I-7; Domestic Producers' Final Comments at 4-7; Domestic Producers' Prehearing Brief at 78-83.

²⁸² We recognize that all announced expansion plans will not be undertaken and have considered that those in the construction phase, generally two years in duration, are more certain of completion than those in the planning or permitting phases. In the next two years alone, over *** in production capacity is expected to come into service in the California region. CR/PR at Table I-7.

²⁸³ CR/PR at Table III-10B and Questionnaire responses. Capital expenditures reported by California regional producers were: \$59.9 million in 1997, \$51.8 million in 1998, \$103.9 million in 1999, \$21.4 million in interim period (Jan.-Mar.) 1999, and \$37.0 million in interim period (Jan.-Mar.) 2000. *Id.*

²⁸⁴ Tr. at 49

²⁸⁵ *Cemex*, 790 F. Supp. at 296. CR/PR at Tables E-1 - E-9.

²⁸⁶ Japanese Respondents' Prehearing Briefs at 30-34; Japanese Respondents' Final Comments at 1-5 and 11-12. The Japanese respondents contended that Japanese producers would not ship excessive volumes of imports at price levels that would injure their regional investments and production, and that "the 'all or almost all' standard is not met here because ***." *Id.* at 2 and 11.

²⁸⁷ Japanese Respondents' Final Comments at 11-12.

Second, we do not find that respondents' arguments regarding some regional producers' neutral position on revocation of the order provides an adequate basis for determining whether a regional producer is likely to experience material injury if the order is revoked.²⁸⁸ Moreover, we note that statements made by regional producers in response to Commission questionnaires indicate that producers accounting for all or almost all of regional production believe they would be adversely affected by revocation of the order.²⁸⁹ Based on the record in this review, we therefore conclude that the "all or almost" requirement is likely to be met.

We have concluded that revocation of the antidumping duty order would likely lead to a significant increase in the volume of subject imports that would undersell the domestic like product and significantly suppress or depress U.S. prices. We also find that the volume and price effects of the subject imports would likely have a significant adverse impact on the production, shipments, sales, market share, and revenue levels of the regional industry. This reduction in the industry's production, shipments, sales, market share, and revenues 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 record in this review, we conclude that, if the antidumping duty order is revoked, subject imports from Japan would be likely to have a significant adverse impact on the regional industry within a reasonably foreseeable time.

CONCLUSION

For the foregoing reasons, we determine that revocation of the antidumping duty orders on gray portland cement and cement clinker from Mexico and Japan would be likely to lead to continuation or recurrence of material injury to the Southern Tier regional industry and California regional industry, respectively, within a reasonably foreseeable time.

²⁸⁸ Mitsubishi Materials, 820 F. Supp at 617, n.2 (producer's position on petition "does not, ipso facto, signify that the producer was not injured.").

²⁸⁹ See INV-X-167 dated July 26, 2000. *** Response to the Domestic Producers' Questionnaire, Question II-4. *** Response to the Domestic Producers' Questionnaire, Question II-4.

CONCURRING AND DISSENTING VIEWS OF COMMISSIONER THELMA J. ASKEY

Section 751(d) of the Tariff Act of 1930, as amended, requires the Department of Commerce to revoke an antidumping duty or countervailing duty order 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.¹ Based on the record in these five-year reviews, I determine that revocation of the antidumping duty orders on gray portland cement and cement clinker (“cement”) from Japan and Mexico would not be likely to lead to continuation or recurrence of material injury to regional industries in the United States within a reasonably foreseeable time. I also determine that the suspended investigations of gray portland cement and cement clinker from Venezuela should be terminated.

I write separately to explain my determinations with respect to the orders on cement from Japan and Mexico. I concur with my colleagues’ findings concerning the domestic like product, the domestic regional industries and related parties, the termination of the suspended investigations of cement from Venezuela, no discernible adverse impact, conditions of competition and the legal standards governing the Commission’s cumulation and causation analysis in sunset reviews. Accordingly, I join the Commission’s joint views discussing these issues.

A. CUMULATION

1. *General*

In sunset reviews, the Commission has the discretion to assess cumulatively the volume and effect of imports of the subject merchandise from all countries with respect to which reviews were initiated on the same day if those imports would be likely to compete with each other and with the domestic like product within a reasonably foreseeable time if the orders are revoked.² Thus, in five-year reviews, the relevant inquiry is whether there would likely be competition among the domestic and subject merchandise within the reasonably foreseeable future, even if none currently exists. Because of the prospective nature of five-year reviews and the discretionary nature of the cumulation decision, the Commission has also examined other conditions of competition that are likely to prevail upon revocation when deciding whether to cumulate in sunset reviews.

Although cumulation is discretionary in sunset reviews, the statute unambiguously states that the Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise if those imports are “likely to have no discernible adverse impact on the domestic industry” upon revocation of the order covering those imports.³ As can be seen, the statute does not direct the Commission to focus its discernability analysis solely on the likely volume levels of the imports; instead, the statute expressly directs the Commission to assess whether the subject imports will have a discernible adverse “impact” on the industry upon revocation. Accordingly, when I assess whether I am permitted to cumulate the subject imports in sunset reviews, I first focus on whether the imports will impact the condition of the industry in a discernible way as a result of revocation, and not solely on whether there will be a small -- i.e., negligible -- volume of imports after revocation.⁴

¹ 19 U.S.C. §§ 1675(d)(2), 1675a(a)(1).

² 19 U.S.C. § 1675a(a)(7).

³ 19 U.S.C. § 1675a(a)(7).

⁴ I discussed the rationale for my approach in more detail in my Additional Views in [Potassium Permanganate](#)
(continued...)

In this case, the reviews of the orders covering cement from Japan and Mexico were initiated on the same day. Accordingly, I have considered first whether the subject imports from the subject countries are likely to have a “discernible adverse impact” on the domestic industry upon revocation of the orders. If I find that imports from any one of these countries are not likely to have a discernible adverse impact on the domestic industry upon revocation of the order, then I am precluded from cumulating the imports from that country with those of any other subject country. If I find that they are likely to have a discernible adverse impact on the industry upon revocation of the order, I must then consider whether it is appropriate to exercise my discretion to cumulate the subject countries.

2. *Discernible Adverse Impact*

a. The Subject Imports from Japan and Mexico Are Not Likely to Have No Discernible Adverse Impact on the Domestic Regional Industries Within The Reasonably Foreseeable Future If Those Orders are Revoked

For the reasons discussed in Section V.B. of the Commission’s views, I do not find that subject imports from either Japan or Mexico would have no discernible adverse impact on the respective domestic regional industries within the reasonably foreseeable future if those orders are revoked.

3. *Likelihood of a Reasonable Overlap of Competition and Discretion to Cumulate*

a. Likely Overlap of Competition Among Subject Imports from Japan and Mexico and Exercise of Discretion to Cumulate Subject Imports for Purposes of the Japanese Order

I have chosen to exercise my discretion to cumulate the subject imports of cement from Japan and Mexico that are likely to enter the California region for purposes of my analysis with respect to the review concerning the order on imports from Japan. The record indicates that there is likely to be a reasonable overlap of competition among the Japanese and Mexican imports into the California region upon revocation of the orders. In particular, the record indicates that the Japanese, Mexican and domestic merchandise are viewed by market participants as interchangeable in their end uses and that most purchasers find the subject imports to be similar to the domestic product with regard to their specific requirements.⁵ Thus, there appears to be a high degree of fungibility between and among subject imports and the domestic product. Imports from both countries have been simultaneously present in the California market, with import volumes from both having been more substantial during the original investigation periods and less so during the review period.⁶ Moreover, the record shows that the Japanese, Mexican and domestic merchandise is sold primarily to end users throughout the California market.⁷ Accordingly, the record indicates a sufficient likelihood of product fungibility, presence and competition in the same geographic

⁴ (...continued)

from China and Spain, Inv. Nos. 731-TA-125-126 (Review), USITC Pub. 3245, at 31 (Oct. 1999). I also further explained my views in Brass Sheet and Strip from Brazil, Canada, France, Germany, Italy, Japan, Korea, the Netherlands, and Sweden, Invs. Nos. 701-TA-269 & 270 (Review) and 731-TA-311-317 & 379-380 (Review), USITC Pub. 3290, at 36-37 (Apr. 2000).

⁵ CR at I-26, I-33, II-27 and Tables II-3 and II-4, PR at I-23, I-28, II-14.

⁶ See CR and PR at Table C-6; Gray Portland Cement and Cement Clinker from Japan, Inv. No. 731-TA-461 (Final) USITC Pub. 2376 (Apr. 1991) (“Japan Cement”) at Table 6.

⁷ CR at I-33, PR at I-24-25; CR and PR at Table I-6.

market, and sales through the same channels of distribution that show a likely competitive overlap between and among the domestic and subject merchandise, which warrants cumulating subject imports from both countries.

b. Likely Overlap of Competition Among Subject Imports from Japan and Mexico and Exercise of Discretion to Cumulate Subject Imports for Purposes of the Japanese Order

As discussed above, imports from Japan and Mexico and the U.S. product are likely to compete with each other in California, which represents a substantial portion of Southern Tier consumption.⁸ Accordingly, for the reasons discussed above, I exercise my discretion to cumulate subject imports from Japan with imports from Mexico for purposes of my analysis concerning imports from Mexico that enter the Southern Tier region.⁹

B. REVOCATION OF THE ANTIDUMPING DUTY ORDERS COVERING IMPORTS OF CEMENT FROM JAPAN AND MEXICO ARE NOT LIKELY TO LEAD TO CONTINUATION OR RECURRENCE OF MATERIAL INJURY TO ALL OR ALMOST ALL OF A REGIONAL INDUSTRY WITHIN A REASONABLY FORESEEABLE TIME

1. *Conditions of Competition*

In addition to the conditions of competition discussed in the Views of the Commission I have taken the following conditions of competition into account in my analysis in this review.

First, supply and demand for cement are often imbalanced within a particular region, primarily because producers in one portion of a region generally will not supply purchasers in another portion due to the high transportation costs involved with the shipment of cement.¹⁰ As a result, supply and demand conditions can vary significantly from state to state, and even within states in some cases.¹¹ This imbalance is particularly true in the Southern Tier region, which reaches from Florida to Northern California. At any given point in time, cement consumers in one state within the Southern-tier region may be facing supply shortages, while consumers in another state within that region have ready access to sufficient supplies of cement.

Second, some domestic production is insulated from import competition due to transportation costs in that domestic producers that are located inland, particularly those more than 200 miles from import and inland terminals and rail lines, will face a more limited degree of import competition than producers located closer to such import supply sources.¹² Similarly, 21 percent of Southern Tier cement

⁸ California consumption makes up roughly 30 percent of Southern Tier consumption. See CR and PR at Tables C-1 and C-6.

⁹ With respect to the Southern Tier region, in the original investigation concerning Mexico, the Commission cumulated subject imports from Japan and Mexico. Gray Portland Cement and Cement Clinker from Mexico, Inv. No. 731-TA-451 (Final) USITC Pub. 2305 (Aug. 1990) (“Mexico Cement”) at 25-26 and 53.

¹⁰ CR and PR at II-1 and Table I-2.

¹¹ CR at II-1, PR at II-1; CR and PR at Figure II-1.

¹² CR at II-1, PR at II-1; CR and PR at Figure II-1.

production goes to affiliated ready-mix producers as does 13 percent of California cement production, which diminishes the effect of import competition on that portion of the market.¹³

Third, Southern Tier regional demand has increased substantially in recent years, with apparent consumption increasing from 33 million short tons in 1989 to 36.2 million short tons in 1997 and to 43.1 million short tons in 1999.¹⁴ Domestic production capacity has remained essentially unchanged throughout that time, increasing from 34.2 million short tons in 1989 to 35.8 million short tons in 1999.¹⁵ As a result of these trends, demand has substantially outstripped available domestic supply in the region. In fact, 10 of 24 responding Southern Tier producers reported that they either put customers on allocation, were unable to serve all of these customers' needs, or observed spot shortages in their market areas since 1990.¹⁶ Accordingly, because of regional producers' inability to meet increased demand, nonsubject imports have entered the market in substantial quantities. While nonsubject market share declined during the original review period, from 10.7 percent in 1986 to 6.5 percent in 1989, it increased substantially during the period reviewed, to 12.5 percent in 1997 and to 24.8 percent in 1999.¹⁷ Nonsubject imports' absolute import volumes, in short tons, were 3.7 million in 1986, 2.2 million in 1989, 4.5 million in 1997 and 10.7 million in 1999.¹⁸ Domestic producers, through their relationships with subject and nonsubject producers, are responsible for the large majority of these nonsubject imports; the record indicates that these producers have imported nonsubject cement both to supplement their own production to meet local market demand and to participate in local markets within the region(s) where they do not maintain cement production facilities.¹⁹ Thus, the record shows the importance of imports to the region in meeting increased demand.

Fourth, demand in the California region increased substantially, outstripping regional producer capacity. During the original regional investigation period, California apparent consumption increased from 10.6 million short tons in 1986 to 13.2 million tons in 1989 before declining to 12.2 million short tons in 1990, for an overall increase of 1.6 million short tons.²⁰ Regional capacity remained relatively stable, at between 11.5 and 11.7 million short tons, but capacity utilization increased as production increased, to 84-90 percent in 1988-90.²¹ Nonsubject import volumes were low and decreasing at that time.²² Accordingly, because demand increased substantially to levels exceeding regional industry capacity and regional producers were operating at high capacity utilization levels, subject imports entered the market to fill regional demand that was not being met by regional producers. During the period reviewed, California apparent consumption increased by 30 percent, from 10.0 million short tons in 1997 to 13.0 million short tons in 1999, while regional producer capacity increased only slightly, from 11.6 million short tons in 1997 to 11.8 million short tons in 1999, with domestic producer capacity utilization running at above 93 percent in each year.²³ Thus, with demand exceeding domestic supply, nonsubject imports entered the California regional market to satisfy unmet demand, having increased their share of apparent consumption from 10.9 percent in 1997 to 25.5 percent in 1999.²⁴ As with the Southern Tier as a whole, domestic producers are

¹³ CR at II-4, PR at II-2. See also Domestic Producer Questionnaire Responses.

¹⁴ CR and PR at Table I-1A.

¹⁵ CR and PR at Table I-1A.

¹⁶ CR at II-6, PR at II-4.

¹⁷ CR and PR at Table I-1A.

¹⁸ CR and PR at Table I-1A.

¹⁹ CR at I-46, PR at I-38.

²⁰ Japan Cement at A-21.

²¹ Japan Cement at A-36.

²² Japan Cement at A-21.

²³ CR and PR at Table C-6.

²⁴ CR and PR at Table C-6.

responsible for the large majority of nonsubject imports. Accordingly, the record shows the importance of imports to the region in meeting increased domestic demand.

Finally, California regional producers reported projects that are expected to lead to additional production capacity of about *** short tons by 2001 and additional projected increases of almost *** short tons by 2003.²⁵ Southern Tier producers reporting projects expected to lead to additional production capacity of more than *** short tons by 2001 and additional projected increases of roughly *** short tons by 2004.²⁶

2. Revocation of the Japanese Order Is Not Likely to Cause a Continuation or Recurrence of Material Injury

a. *Likely Volume of Cumulated Subject Imports*

In evaluating the likely volume of imports of subject merchandise if an antidumping duty order is revoked, the statute directs the Commission 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.²⁷ 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 if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.²⁸

As directed by the statute, I have considered the Commission’s previous findings and record. The record shows that in the original investigation concerning Japan, the volume of cumulated subject imports from Japan and Mexico in California increased from 1.0 million short tons in 1986 to 2.6 million short tons in 1989 before declining to 2.3 million short tons in 1990.²⁹ Japanese imports represented roughly 20-50 percent of total subject imports during that period.³⁰ Cumulated subject imports represented 9.8 percent of California regional consumption in 1986 and 18.9 percent in 1990.³¹ Currently, import volumes from Japan and Mexico into the California region have been low. Together, the subject imports from Japan and Mexico represented between 0.2 and 0.6 percent of domestic regional consumption in each of the three years reviewed.³²

I have also considered whether there is sufficient current unused available capacity in the subject countries that is likely to be used to increase their import volumes within a reasonably foreseeable time. Production capacity in Japan declined over the original POI and has continued to decline in recent years.³³ Japanese cement production capacity declined from 85.5 million short tons in 1997 to 83.8 million short

²⁵ See CR and PR at Table I-7.

²⁶ See CR and PR at Table I-7.

²⁷ 19 U.S.C. § 1675a(a)(2).

²⁸ 19 U.S.C. § 1675a(a)(2)(A)-(D).

²⁹ Japan Cement at A-21.

³⁰ See Japan Cement at A-21.

³¹ See Japan Cement at A-21.

³² CR and PR at Table C-6. Japanese import volumes were less than 35,000 short tons in each year and Mexican import volumes were less than 50,000 in each year. Id.

³³ Japan Cement at A-71; CR and PR at Table IV-6.

tons in 1999,³⁴ with no indication on the record that capacity is likely to increase in the reasonably foreseeable future. Although capacity utilization declined from 98.8 percent in 1997 to 88.7 percent in 1999, these levels remain very high.³⁵ Moreover, as was the case during the original POI, the Japanese industry remains highly focused on its domestic market, with 89-92 percent of Japanese producers' shipments during the period reviewed being sent to domestic consumers, with the rest sent to third country markets or captively consumed.³⁶ While Japanese producers have excess capacity that could be directed to the California market should the order be revoked, I find it unlikely that they will do so to a significant degree given their high capacity utilization rates, their historical focus upon the Japanese domestic market, existing third country markets, the lack of barriers for Japanese exports to other countries,³⁷ and the lack of any potential for product shifting in this market.³⁸

With respect to Mexico, the record evidence indicates that current Mexican capacity is *** short tons and production has ranged between *** and *** tons during the past three years; current Mexican capacity utilization is higher than it was during the original investigation period, ranging from *** percent in the last three years³⁹ while it was at 60-68 percent in 1986-88.⁴⁰ Thus, based upon 1997-99 data, the record shows up to *** short tons of excess total Mexican capacity.⁴¹ However, not all of this excess capacity will be directed at the United States. Just as U.S. domestic producers are divided into regions and do not ship to all parts of the United States, so too are Mexican producers limited in their range of markets given transportation costs and infrastructure constraints.⁴² Based on export data from the original investigation and data gathered during these reviews, it appears that roughly *** short tons of Mexican capacity is in plants that are both capable of and likely to export to the United States, which represents roughly *** of overall Mexican capacity.⁴³ Accordingly, of the current available excess capacity, it is reasonable to consider at most *** short tons as being at least potentially available for shipment to the Southern Tier of the United States. Moreover, not all of this excess capacity is likely to be directed to California because only a limited number of Mexican production facilities are likely to ship cement to California; at best, only 5-6 Mexican facilities are likely to ship cement to California,⁴⁴ leaving only a relatively small portion of available excess capacity that could be directed to California. During the review period, Mexican imports into the Southern Tier overall have been relatively low and have been negligible into California.⁴⁵ The record does not indicate that there have been any major changes in the market to suggest that likely export patterns in the event of revocation would be significantly different than before. Only roughly 15-25 percent of Mexican exports to the Southern Tier were sent to California during the

³⁴ CR and PR at Table IV-6. See also CR and PR at Table IV-7 (regarding Japanese cement clinker production data).

³⁵ CR and PR at Table IV-6.

³⁶ CR and PR at Table IV-6.

³⁷ CR at IV-41, PR at IV-28.

³⁸ CR at II-8, PR at II-5.

³⁹ CR and PR at Table IV-4.

⁴⁰ Mexico Cement at A-79.

⁴¹ CR and PR at Table IV-4.

⁴² See, e.g. CR and PR at Figure IV-1; Petitioners' Hearing Exhibit 1.

⁴³ Current CEMEX capacity in plants that are capable of and likely to export to the United States is *** short tons; current Apasco capacity is *** short tons; current GCCC capacity is *** short tons. See GCCC, Apasco and CEMEX Producer Questionnaires.

⁴⁴ See CR and PR at II-3.

⁴⁵ CR and PR at Table C-1 and C-6.

original investigation period.⁴⁶ As a result, while Mexican producers have excess capacity that could be directed to the California region should the order be revoked, I find it unlikely that they will do so to a significant degree given their somewhat high capacity utilization rates, their historical import patterns, the lack of substantial barriers for Mexican exports to other countries,⁴⁷ and the lack of any potential for product shifting in this market.⁴⁸

Moreover, there are a number of significant constraints that limit the importation of cement from subject countries, including high transportation costs for shipping cement from the producing countries to the United States.⁴⁹ Japanese supply response is limited by high U.S. inland transportation costs from import terminals to California customers and infrastructure constraints in both Japan and California, relatively low inventory levels and the lack of significant production alternatives.⁵⁰ The record also indicates some Japanese producers may have limited access to deep water ports and to domestic import terminals.⁵¹ Likewise, while Mexican transportation infrastructure appears to have improved since the time of the original investigation period,⁵² Mexican supply response is limited by significant infrastructure constraints in Mexico and the United States, relatively low inventory levels and the lack of significant production alternatives.⁵³ Accordingly, while some portion of available excess capacity would likely be shipped into the California region, current and historical data suggests that cumulated subject imports are likely to increase to only a limited degree given prior export patterns in each country and current infrastructure constraints on the transportation of cement. Finally, because demand is expected to continue to increase in the region, the market will be able to continue to absorb increased imports, further diluting possible volume effects of the subject imports.

In sum, I find it likely that, in the absence of the orders, the cumulated volume of the subject imports from Japan and Mexico would not be likely to increase significantly. Accordingly, based on the record in this review, I conclude that the cumulated volume of subject cement imports would not be likely to be significant within a reasonably foreseeable time if the order is revoked.⁵⁴

b. *Likely Price Effects of Cumulated Subject Imports*

In evaluating the likely price effects of subject imports if the antidumping duty order is revoked, the Commission is directed to consider whether there is likely to be significant underselling by the subject

⁴⁶ Compare CR and PR at Table I-1A with Japan Cement at A-21. For example, in 1989, imports into the Southern Tier were 3.6 million short tons while imports into California were 0.9 million short tons. Id.

⁴⁷ The record indicates that Mexican imports are subject to antidumping investigations in two other countries, Brazil and Guatemala, but it also indicates that these two do not appear to be substantial markets for Mexican producers, CR at IV-29-30, PR at IV-19-20, making it unlikely that these orders would substantially affect import levels to the United States.

⁴⁸ CR at II-12, PR at II-7.

⁴⁹ Transportation to the United States can account for as much as 32.1 percent of the total cost of Mexican cement and 26.8 percent of Japanese cement. CR and PR at V-1.

⁵⁰ CR at II-8, PR at II-5.

⁵¹ CR at II-9, PR at II-5-6.

⁵² See, e.g., Transcript at 173 and 178-80.

⁵³ CR at II-9-10, PR at II-27.

⁵⁴ While the lack of Japanese imports during the period reviewed made it unfeasible to conduct a COMPAS analysis of the likely effects of revocation, CR at II-45, n. 62, PR at II-26, I note that COMPAS results for Mexico, which historically has been a much larger source of imports, yielded relatively low likely volume effects on the domestic industry in the event of revocation. CR at II-47, PR at II-27.

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 the domestic like product.⁵⁵

As directed by the statute, I have considered the Commission's previous findings and record concerning price competition. The record in the original investigation concerning Japan showed Japanese imports undersold the domestic product in the large majority of price comparisons.⁵⁶ Japanese imports essentially exited the market following the imposition of the order in 1991 and there is no current data concerning Japanese import pricing. While Japanese imports undersold the domestic product during the original investigation period, underselling margins were relatively low, prices actually increased in some submarkets⁵⁷ and domestic producers were operating at high capacity.⁵⁸ With respect to Mexico, the record showed during the original POI that although there was an overselling trend later in the investigation period, Mexican imports undersold the domestic product in a large majority of available comparisons in the California region.⁵⁹ Nevertheless, I find that the cumulated subject imports from Japan and Mexico are not likely to have significant adverse effects on regional prices if the orders are revoked. As I discussed above, the record indicates that it is unlikely that there will be a significant increase in the volumes of the cumulated subject imports upon revocation of the orders. Nothing in the record suggests that the subject producers would change their pricing practices in a way that would have a significant negative impact on the regional industry's prices. In fact, current price comparison data shows Mexican imports *** domestic cement in the San Diego market.⁶⁰ Moreover, high current and likely increases in demand, high domestic capacity utilization, and domestic producer control of excess supply through control of nonsubject imports are all likely to contribute to continued high prices in the region and to dilute any possible price effects of revocation.

In sum, I find that revocation of the order on imports from Japan likely would not have significant depressing or suppressing effects on the prices of the domestic like product within a reasonably foreseeable time.⁶¹

⁵⁵ 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.

⁵⁶ Japan Cement at 66-68 and Tables 31-34.

⁵⁷ See Mexico Cement at A-121-22, 126-27.

⁵⁸ Southern California producers, which were the regional producers in the original Japanese investigation, were operating at up to 86.5 percent capacity for their cement operations and up to 101 percent for their clinker operations. Japan Cement at A-36.

⁵⁹ See Mexico Cement at A-120,125.

⁶⁰ CR and PR at Table V-4.

⁶¹ As discussed previously, supra note 54, while COMPAS results are not available with respect to revocation of the Japanese order, COMPAS results for revocation of the Mexican order shows low price effects, in the range of a decline of 0.6 to 1.9 percent. CR at II-47, PR at II-27.

c. *Likely Impact of Cumulated Subject Imports*

In evaluating the likely impact of imports of subject merchandise if the antidumping duty order 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.⁶² 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.⁶³

Moreover, because these are regional industry reviews, the Commission is faced with a more stringent injury standard than in national cases, namely, the Commission must find that “the producers of all, or almost all, of the production within that market are being materially injured”⁶⁴ In these investigations I have evaluated the financial condition of each of those producers to determine whether their condition satisfies the regional industry injury standard.

As directed by the statute, I have considered the Commission’s previous findings and record. The record shows that in the original investigation, the California regional industry’s performance indicators were largely positive. Between 1986 and 1990, production increased from 9.2 million short tons to 9.8 million short tons as capacity utilization increased from 78.6 percent to 84.1 percent.⁶⁵ In that same period, the industry’s operating income increased from \$74.7 million to \$101.9 million as its operating income margin increased from 13.7 to 18.6 percent, and its gross profits increased from \$114.8 million to \$133.0 million.⁶⁶

Currently, the California regional industry is in even better financial condition than it was during the original investigation period. While there has been a slight decline in some indicators during the review period, the industry shows itself to be in a very positive financial situation. First, while regional producers’ market share has declined between 1997 and 1999, its shipments within the region have increased and its capacity utilization rates have been very high.⁶⁷ Between 1997 and 1999, the industry’s gross profits have increased substantially, from \$213 million to \$288, as has its operating income, which increased from \$163 million to \$230 million, and its operating income margin, which increased from 23.1 percent to 28.2 percent.⁶⁸ Looking at individual regional producers, in each year, producers accounting for more than two-thirds of total regional sales producers showed operating returns of greater than *** percent.⁶⁹ In 1999, producers accounting for more than 60 percent of regional sales had returns of greater than *** percent.⁷⁰ Accordingly, I find the regional industry to be in strong financial condition, both objectively and relative to potential increases in subject imports. Thus, I find that the regional industry is not vulnerable. Moreover,

⁶² 19 U.S.C. § 1675a(a)(4).

⁶³ 19 U.S.C. § 1675a(a)(4).

⁶⁴ 19 U.S.C. § 1677(4)(C).

⁶⁵ *Japan Cement* at A-36.

⁶⁶ *Japan Cement* at A-59.

⁶⁷ The industry’s market share declined from 88.9 percent in 1997 to 73.9 percent in 1999; its within region shipments increased from 8.9 million short tons to 9.6 million short tons; and its capacity utilization rate has been between 93.4 percent and 95.5 percent throughout the period. CR and PR at Table C-6.

⁶⁸ CR and PR at Table C-6.

⁶⁹ CR and PR at Tables E-5 and E-9.

⁷⁰ CR and PR at Tables E-5 and E-9.

because demand is projected to continue to increase in the California region it is likely that domestic producers will continue to enjoy strong returns, irrespective of whether or not subject import volumes increase.

As I discussed above, the record of these reviews indicates that the subject imports from Mexico and Japan are not likely to have significant adverse volume and price effects on the regional industry within a reasonably foreseeable time if the orders were revoked. Accordingly, I also find that the cumulated subject imports would not be likely to have a significant impact on the regional industry's cash flow, inventories, employment, wages, growth, ability to raise capital, investment or development efforts within a reasonably foreseeable time if the orders were revoked. Further, I find that revocation of the orders would not be likely to lead to a significant reduction in regional producers' output, sales, market share, profits, productivity, ability to raise capital, or return on investments within a reasonably foreseeable time. In other words, given that subject import volumes are not likely to be significant in the future should the orders be revoked, that the current high level of demand is projected to remain steady or increase and that the regional industry has been experiencing extremely strong financial performance, it is likely that the California regional industry as a whole will continue to enjoy strong financial performance. It is possible that increased imports may lead to some declines in the industry's financial performance, but given the industry's strong current financial health, high capacity utilization rates, control of nonsubject imports, increased projected demand, I find that such declines would likely be limited.

Likewise, while increased imports may have a more substantial effect on some individual domestic producers, it is unlikely that "all or almost all" of the regional producers will experience a continuation or recurrence material injury, as is required for an affirmative determination in a regional industry case. With more than half of regional producers experiencing operating returns of greater than *** percent in a market of high and increasing demand, where overall import levels are already at high volumes, it is unlikely that all or almost all of those producers will experience a significant impact should revocation result in some increase in subject imports. Accordingly, I find that revocation is unlikely to have a significant impact on all or almost all of the regional industry in a reasonably foreseeable time.⁷¹

In sum, I conclude that revocation of the order on the subject imports from Japan would not be likely to lead to continuation or recurrence of material injury to all or almost all of the California regional industry within a reasonably foreseeable time.

3. Revocation of the Mexican Order Is Not Likely to Cause a Continuation or Recurrence of Material Injury

a. *Likely Volume of Cumulated Subject Imports*

As directed by the statute, I have considered the Commission's previous findings and record with respect to the Mexican order. The record shows that in the original investigation concerning Mexico, the volume of cumulated imports into the Southern Tier region increased between 1986 and 1988, from 3.3 million short tons to 5.4 million tons, before declining in 1989 to 5.3 million tons.⁷² The cumulated

⁷¹ As noted above, *supra* note 54, no COMPAS model results are available for the impact of revocation of the Japanese order. However, COMPAS results for revocation of the Mexican order, which involved higher volumes during the original investigations, shows only a relatively small likely revenue effect, of 2.0 to 7.1 percent. CR at II-47, PR at II-27.

⁷² CR and PR at Table I-1A.

imports' share of regional apparent consumption increased from 9.7 percent to 16.4 percent.⁷³ During the period reviewed, cumulated subject imports represented between 2.7 and 3.2 percent of domestic consumption in the Southern Tier region, with Mexican imports representing the majority of those imports.⁷⁴

I have also considered whether there is sufficient current unused available capacity in the subject countries that is likely to be used to increase their import volumes within a reasonably foreseeable time. Current Mexican capacity is *** short tons and production has ranged between *** and *** tons during the past three years, leaving up to *** short tons of excess total Mexican capacity.⁷⁵ However, it appears that roughly *** short tons of Mexican capacity is in plants that are both capable of and likely to export to the United States, which represents roughly *** of total Mexican capacity.⁷⁶ Accordingly, of the total available excess capacity, it is reasonable to consider at most up to *** short tons as at least potentially being available for shipment to the Southern Tier of the United States, which represents a market of 43.1 million short tons of apparent consumption in 1999.⁷⁷

However, as discussed above as a condition of competition, there is limited competition between separate markets within the region because any given producer is limited in terms of how far away its cement can economically be shipped. Just as in the United States, even where a given Mexican producer has available excess capacity that it could ship to one part of the Southern Tier, transportation costs and infrastructure limitations limit the range of other parts of the Southern Tier to which it can ship its cement. For example, given the location of its Mexican production facilities, imports from Mexican producer GCCC appear to be limited to a relatively small portion of the Southern Tier, made up of New Mexico and a portion of Texas.⁷⁸ GCCC imports' primary competition appears to be the GCCC-owned Rio Grande plant at Tijeras, New Mexico.⁷⁹ Therefore, imports by GCCC primarily enter into an area that includes limited amounts of cement from non-affiliated domestic producers, leading to limited competition with non-affiliated producers' cement. Accordingly, GCCC cannot ship widely throughout the Southern Tier region and has little if any incentive to substantially increase its imports into the New Mexico/Texas area absent a substantial increase in demand, given that such increases would be most harmful to its own subsidiary.⁸⁰

Since the time of the original investigation, the world's cement producers have become more globalized. Like other producers, CEMEX has increased its worldwide presence, becoming one of the world's largest cement producers, with facilities across the globe.⁸¹ Therefore, although CEMEX has been the largest Mexican exporter to the United States and is likely to continue to be so in the future, the company is less exclusively focused on the Americas than it was during the original POI. While nonsubject imports, both those controlled by domestic producers and by subject producers such as CEMEX, have increased substantially over the review period, they have done so at volumes commensurate with high demand increases, when reported domestic supply shortages were reported and as domestic producers

⁷³ CR and PR at Table I-1A.

⁷⁴ CR and PR at Table I-1A and Table C-6.

⁷⁵ CR and PR at Table IV-4.

⁷⁶ Current CEMEX capacity in plants that are capable of and likely to export to the United States is *** short tons; current Apasco capacity is *** short tons; current GCCC capacity is *** short tons. See CEMEX, Apasco and GCCC Producer Questionnaire responses.

⁷⁷ CR and PR at Table C-1.

⁷⁸ CR at IV-28-29, PR at IV-18-15; Mexican Respondent GCCC's Final Comments at 8.

⁷⁹ See CR and PR at Table I-8.

⁸⁰ CR at IV-29, PR at IV-19.

⁸¹ CR at IV-24, PR at IV-16.

operated at high domestic capacity utilization rates.⁸² Thus, despite an absence of import constraints on imports from other sources, there has been no oversupply of imports overall, making it unlikely that the overall supply of imports, both subject and nonsubject, would change significantly should the orders be revoked.⁸³ Moreover, as discussed above, Mexican producers face constraints on their ability to import cement into the United States, including high inland transportation costs and Mexican and U.S. infrastructure limitations. Accordingly, only a limited proportion of available excess capacity in Mexico is likely to be directed to the Southern Tier region should the order be revoked.⁸⁴

As discussed more fully above, production capacity in Japan declined over the original POI as its shipments and capacity utilization rates increased. Current Japanese capacity has continued to decline and the industry is operating at high capacity utilization rates. The vast majority of Japanese production went to its home market, and even as its exports to California increased, its exports to third countries decreased, resulting in only a slight overall increase in exports over the POI, indicating that the industry was indeed strongly focused on its domestic market at that time. These historical patterns and current conditions lead me to conclude that Japanese imports are unlikely to increase significantly if the order is removed.

In sum, I find that the volume of subject imports might increase somewhat should the orders be revoked. However, I find that such volume increases would not be significant within a reasonably foreseeable time, given continuing high demand in the region and constraints on import volumes.⁸⁵

b. *Likely Price Effects of Cumulated Subject Imports*

As directed by the statute, I have considered the Commission's previous findings and record. The record shows that in the original investigation concerning Japan, U.S. prices in the California region were generally in the \$60-70 range, with Japanese prices running slightly below the U.S. prices.⁸⁶ In the original investigation concerning Mexico, Mexican imports undersold the domestic product in a large majority of available comparisons in the California region, although there was an overselling trend later in the investigation period.⁸⁷ In other parts of the Southern Tier region, Mexican prices fluctuated over the POI. The record shows Mexican imports consistently underselling U.S. producers' cement in the New Orleans,

⁸² CR at II-6, PR at II-4.

⁸³ Imports could increase from its Venezuelan affiliate, Vencemos, CR at IV-42, IV-45, PR at IV-28-29, given the revocation of the Venezuelan order. However, as discussed in Section III.C.2.c. of the Views of the Commission, Venezuelan import volumes are unlikely to increase significantly into the Southern Tier given that the suspension agreements do not appear to have had a substantial effect on Venezuelan import volumes. Additionally, CEMEX USA's ownership of a plant in New Braunfels, Texas has and continues to provide a disincentive to CEMEX to ship excessive quantities of cement into that area given that it would harm its own subsidiary. Should the pending purchase by CEMEX of Southdown be completed, such disincentive will grow given CEMEX's substantially increased domestic presence in the Southern Tier, particularly Florida, Alabama and Texas. See INV-X-211 (Oct. 2, 2000); CR and PR at Table I-8 and Figures I-2, I-4.

⁸⁴ I also note that the record shows that Mexican producers do not have the potential to shift production from other products. CR at II-12, PR at II-7. Additionally, the record indicates that Mexican imports are subject to antidumping investigations in two other countries, Brazil and Guatemala, but it also indicates that these two do not appear to be substantial markets for Mexican producers, CR at IV-29-30, PR at IV-19-20, making it unlikely that these orders would substantially affect import levels to the United States.

⁸⁵ COMPAS results support my conclusion, given that they show only a 1.0 to 5.7 percent volume effect should the Mexican order be revoked. CR at II-47, PR at II-27.

⁸⁶ See Japan Cement at A-94-95 and 97-98.

⁸⁷ See Mexico Cement at A-120, 125.

Louisiana market⁸⁸ but it shows a wide mix of under- and over-selling in other markets.⁸⁹ For example, in the Tampa, Florida market, domestic producer prices were generally in the \$40-50 range, with Mexican prices being slightly lower;⁹⁰ in the Houston Texas market domestic producer prices ranged roughly \$38-50, with Mexican prices being slightly lower;⁹¹ in the Albuquerque, New Mexico market, domestic producer prices ranged from \$50-75, with Mexican imports overselling the domestic product in virtually all comparisons;⁹² finally, in the San Diego, California market, domestic producer prices ranged from \$60-70, with Mexican prices being slightly lower.⁹³ The record shows prices having actually increased in some markets during that period.⁹⁴

Current data shows Mexican imports having oversold domestic cement in 85 comparisons, by margins of up to 10.8 percent, while underselling domestic cement in 71 comparisons, by margins of up to 7.0 percent.⁹⁵ As noted above, no current pricing data is available for Japanese imports. Nevertheless, I find that the cumulated subject imports from Japan and Mexico are not likely to have significant adverse effects on regional prices if the orders are revoked. As I discussed above, the record indicates that it is unlikely that there will be a significant increase in the volumes of the cumulated subject imports upon revocation of the orders. Nothing in the record suggests that the subjects would change their pricing practices in a way that would have a significant negative impact on the regional industry's prices. Moreover, in the last three years, domestic prices have been strong as demand increased substantially. With high domestic capacity utilization rates and increased subject imports -- which are largely controlled by domestic producers through their relationships with nonsubject producers -- filling the gap in supply, producers have been able to maintain high prices. Demand is projected to either stay at its current high levels or to continue to increase, although at lesser levels than in the previous three years.⁹⁶ Accordingly, current market conditions make it likely that prices will continue to be strong in the region.

In sum, I find that revocation of the order on imports from Mexico likely would not have significant depressing or suppressing effects on the prices of the domestic like product within a reasonably foreseeable time.^{97 98}

⁸⁸ See Mexico Cement at A-109.

⁸⁹ See Mexico Cement at A-103-06, 111-14.

⁹⁰ See Mexico Cement at A-103-04.

⁹¹ See Mexico Cement at A-111-12.

⁹² See Mexico Cement at A-116-17.

⁹³ See Mexico Cement at A-121-22.

⁹⁴ See Mexico Cement at A-121-22, 126-27.

⁹⁵ See CR and PR at Table V-4.

⁹⁶ See CR at II-20-24, PR at II-10-13; Transcript at 70.

⁹⁷ Commerce found it its eight administrative review, covering the period of 1997-98, of the 1990 finding on Mexico, that CEMEX and CDC (collectively "CEMEX") absorbed antidumping duties on 99.96 percent of sales that this firm made through its affiliated parties during the instant review period. 65 Fed. Reg. 13943 (Mar. 15, 2000); see also Issues and Decisions Memo from the Administrative Review of Gray Portland Cement and Clinker from Mexico -- August 31, 1997 through July 31, 1998, from Richard W. Moreland to Robert S. LaRussa, Assistant Secretary for Import Administration, dated March 15, 2000 at 47-48. The SAA explains that "[d]uty absorption may indicate that the producer or exporter would be able to market more aggressively should the order be revoked as a result of a sunset review." SAA at 885.

As instructed by the statute, 19 U.S.C. § 1675a(a)(1)(D), I considered Commerce's finding that CEMEX and CDC absorbed duties on imports of Mexican cement. That finding is reflected in the 53.6 percent dumping margin for CEMEX that Commerce determined is likely to prevail if the order were removed. See 65 Fed. Reg. at 41050 (July 3, 2000); see also Issues and Decisions Memo for the Sunset Review of Gray Portland Cement and

(continued...)

c. Impact

As directed by the statute, I have considered the Commission's previous findings and record. The record shows that in the original investigation period, Southern Tier region producers' financial indicators were declining. Gross profits declined between 1986 and 1988 from \$200 million to \$155 million, before turning upward in 1989 to \$164 million.⁹⁹ Operating income declined from \$105.6 million in 1986 to \$65 million in 1988, before inching up to \$67 million in 1989; the industry's operating income likewise declined, from 8.5 percent in 1986 to 5.6 percent in 1989.¹⁰⁰ Capacity utilization rates fluctuated, dipping to 68.3 percent in 1987 from 70.1 percent in 1986 before rising to 72.2 percent in 1988 and further to 75.1 percent in 1989.¹⁰¹ In-region shipments remained relatively stable throughout the period¹⁰² while net sales declined slightly.¹⁰³

By contrast to their condition during the original investigation, Southern Tier regional producers currently report very positive financial indicators, with operating income margins increasing from 29.0 percent in 1997 to 32.4 percent in 1999, and increasing further comparing interim periods.¹⁰⁴ Regional producers' capacity utilization was high, above 90 percent throughout the period reviewed.¹⁰⁵ The industry's gross profits increased substantially over the period, by 25 percent, increasing from \$742 million in 1997 to \$930 million in 1999.¹⁰⁶ In sum, the regional industry's overall financial condition has been very strong, with an increasingly positive trend throughout the period reviewed. Accordingly, I do not find the regional industry to be vulnerable.

⁹⁷ (...continued)

Cement Clinker from Mexico; Final Results from Jeffrey A. May to Troy H. Cribb, Acting Assistant Secretary for Import Administration, dated June 27 at 8-15; SKF USA, Inc. v. United States, 94 F. Supp.2d 1351(CIT 2000) remand aff'd Slip Op. 00-101 (CIT, Aug. 18, 2000). While the duty absorption finding may suggest that Mexican producers could engage in aggressive marketing efforts should the orders be revoked, I do not consider this finding alone to be sufficient to overcome the other evidence that leads me to conclude that subject imports would not be likely to have a significant adverse impact on domestic prices.

⁹⁸ COMPAS results support my conclusion, given that they show revocation of the Mexican order as having only limited price effects, in the order of 0.6 to 1.9 percent. CR at II-47, PR at II-27.

⁹⁹ Mexico Cement at A-53.

¹⁰⁰ Mexico Cement at A-53.

¹⁰¹ Mexico Cement at A-39.

¹⁰² Mexico Cement at A-53.

¹⁰³ Mexico Cement at A-53.

¹⁰⁴ CR and PR at Table C-1. The operating income margin was 23.8 percent in first-quarter 1999 and 24.8 percent in first-quarter 2000. Id.

Petitioners argue that their industry is significantly different from other industries the Commission has considered in previous investigations and that, consequently, the Commission should not view the cement industry's financial data in the same manner that it considers the financial data of other industries. Petitioners' Posthearing Brief at 28-30 and Final Comments at 2-4. However, the record does not include compelling evidence showing why the Commission should refrain from applying its usual approach to analyzing domestic industry data. Every industry that comes before the Commission exhibits unique characteristics, and the Commission applies a consistent analytical framework that takes such unique characteristics into account. This record contains insufficient evidence to indicate that the cement industry is sufficiently different from other capital intensive industries that have come before the Commission to warrant substantially varying the Commission's analysis.

¹⁰⁵ CR and PR at Table C-1.

¹⁰⁶ CR and PR at Table C-1. Profits increased by a further 4.3 percent, comparing interim periods. Id.

Moreover, while the industry's current financial indicators show improved performance since the original investigation period, such improvement cannot simply be attributed to the existence of the orders. In the past several years, there has been a dramatic increase in demand in the region, which has outstripped domestic capacity and led to supply shortages. As a result, total import volumes, both absolutely and as a percentage of domestic consumption have increased substantially since the time of the original investigation period; the domestic industry has benefitted greatly from this demand increase, despite the presence of substantial volumes of nonsubject imports.

Nonsubject imports have increased dramatically, to levels above those of subject imports during the original period, as domestic producers have operated at high capacity utilization levels and reported supply shortages. Thus, despite the presence of substantial levels of nonsubject imports, the domestic regional industry has been operating at virtually peak capacity, which is likely to continue given projections of continued strong demand. Domestic producers are in the process of adding new capacity at this time, with Southern Tier producers reporting projects expected to lead to additional production capacity of more than *** short tons by 2001 and additional projected increases of roughly *** short tons by 2004.¹⁰⁷ While these increases will contribute to the domestic producers' ability to respond to high demand, it should also create an incentive to decrease the amount of nonsubject imports that they have brought into the market to supplement their own production.¹⁰⁸

As I discussed above, the record of these reviews indicates that the subject imports from Mexico and Japan are not likely to have significant adverse volume and price effects on the regional industry within the reasonably foreseeable future if the orders were revoked. Accordingly, I also find that the cumulated subject imports would not be likely to have a significant impact on the regional industry's cash flow, inventories, employment, wages, growth, ability to raise capital, investment or development efforts within a reasonably foreseeable time if the orders were revoked. Further, I find that revocation of the orders would not be likely to lead to a significant reduction in regional producers' output, sales, market share, profits, productivity, ability to raise capital, or return on investments within a reasonably foreseeable time.

Further, because this is a regional industry case, to maintain the orders, I am required to find that "all or almost all" of the regional industry would be likely to experience a continuation or recurrence of material injury. An examination of individual producer financial returns in the region shows that almost all of the regional industry is in quite solid current financial condition. For example, in 1999, 70.0 percent of the regional industry showed operating margins of *** percent or higher, more than 85.0 percent experienced returns of greater than *** and more than 90.0 percent showed returns of *** percent or higher.¹⁰⁹ In fact, almost one quarter of the regional producers showed very high operating returns of between *** and *** percent.¹¹⁰ If the order were revoked, increased imports may have some effect on some producers within the region. However, given that the large majority of the individual producers are experiencing such strong financial performance and high production levels despite the presence of large quantities of nonsubject imports, the limited likely increases in subject import volumes and price effects in the event of revocation, and the much more stringent injury standard of a regional industry case, I cannot conclude that "all or almost all" of the regional industry is likely to experience a continuation or recurrence of material injury if the order is revoked.

¹⁰⁷ See CR and PR at Table I-7.

¹⁰⁸ See, e.g., CR at I-46, nn. 61 and 62, PR at I-38, and Tr. at 34.

¹⁰⁹ See CR and PR at Table E-8.

¹¹⁰ See CR and PR at Table E-8.

Accordingly, I find that revocation of the order on Mexican cement is unlikely to have a significant impact on the regional industry within a reasonably foreseeable time.¹¹¹

C. CONCLUSION

In sum, I conclude that revocation of the orders on Japanese and Mexican cement imports are unlikely to cause a continuation or recurrence of material injury to all or almost all of the regional industries in the California and Southern Tier regions, respectively, within a reasonably foreseeable time.

¹¹¹ COMPAS model results further support my conclusion, showing revenue effects in the event of revocation of the Mexican order of between 2.0 to 7.1 percent. CR at II-47, PR at II-27.

SEPARATE VIEWS OF COMMISSIONER MARCIA E. MILLER ON GRAY PORTLAND CEMENT AND CEMENT CLINKER FROM VENEZUELA

Based on the record in these five-year reviews, I determine under section 751(c) of the Tariff Act of 1930, as amended, that termination of the suspended antidumping and countervailing duty investigations on gray portland cement and cement clinker from Venezuela, would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. Because I reach this determination through a regional industry analysis, I write separately to express my views.

I. Regional Industry Analysis

In the original investigations regarding Venezuelan cement, the Commission defined the State of Florida as the appropriate region to consider regarding subject imports from Venezuela. I do not find sufficient evidence in these reviews to warrant revisiting the original regional industry determination.

With respect to the market isolation criteria set forth in the statute, data for the current period of review indicates that, as they did at the time of the original investigations, Florida producers ship over 95 percent of their production within the State of Florida.¹ U.S. cement producers located elsewhere in the United States supplied between 9 and 11 percent of Florida's cement consumption during the current review period, a level again comparable to that found during the original investigations.²

In examining whether there is a concentration of subject imports into the State of Florida, the record of the current reviews shows that, during the 1997-1999 period, the proportion of total U.S. imports of Venezuelan cement that entered Florida ranged from 64 to 45 percent. During the original investigations, this proportion was higher, ranging from 64 to 98 percent.³ With respect to the other criteria generally considered by the Commission in determining import concentration, the ratio of subject imports to consumption both in and outside of the region, the current data is consistent with the original period of investigation. In both periods, Venezuelan cement accounted for a much higher percentage of consumption in the State of Florida than it did outside of Florida.⁴

Considering this record as a whole, I conclude that a regional industry analysis, based on the State of Florida, is appropriate for these reviews. While the proportion of total U.S. imports of Venezuelan cement entering Florida has declined, Florida continues to be the primary U.S. market for Venezuelan cement as its U.S. shipments outside Florida are widely dispersed across a number of States, particularly along the east coast. The port of entry with the next highest concentration of imports from Venezuela is Baltimore, Maryland, accounting for only 11.4 percent of total subject imports.⁵ In addition, the absolute level of Venezuelan cement entering Florida remained within the range of that during the original period of investigation.⁶ Moreover, the Commission in original investigations has found import concentration to exist at such levels, although generally the criteria are satisfied at higher levels.⁷

¹ CR/PR at Table I-3C.

² CR/PR at Table I-3C.

³ CR/PR at Table I-3C.

⁴ During 1997-1999, Venezuelan cement in Florida accounted for 10-12 percent of apparent consumption, while outside the region, this share was one percent or lower. CR/PR at Table I-3C.

⁵ CR at I-53; PR at I-42.

⁶ CR/PR at Table I-1C.

⁷ See, Footnote 74 in the Majority Views.

Accordingly, based on current market isolation and import concentration levels and the lack of evidence that these levels will decline in the absence of the suspension agreements, I find that the criteria for conducting a regional industry analysis, based on the State of Florida, are likely to be satisfied if the suspended investigations are terminated.

II. Related Parties

In the State of Florida, three producers (Rinker, Lafarge, and Southdown) imported subject product from Venezuela into the region.⁸ Rinker, Lafarge, and Southdown accounted for ***, respectively, of the Florida regional production in 1999.⁹ These U.S. producers stated that they imported Venezuelan cement into the Florida region to meet market demand and did not have sufficient volume due to the lack of Florida production facilities (non-regional producers).¹⁰ While Southdown-Brooksville's financial position has *** that of the other regional producers, Rinker and Lafarge's financial positions have consistently been *** those of the other regional producers.¹¹ I find that appropriate circumstances do not exist to exclude these companies from the domestic industry. Given that the three producers together account for *** of production within the region, excluding them would likely distort the industry data. The record does not indicate that they currently are benefitting significantly from their importing Venezuelan cement or are substantially shielded from the effects of import competition. Also, given the likely conditions of competition in the cement industry, I do not find that they are likely to be significantly insulated from import competition if the orders are revoked. Accordingly, inclusion of these companies would not present a distorted picture of the effects of revocation on the domestic industry as a whole.

III. Cumulation

In these reviews, I consider whether the likely volume and effect of subject imports from Venezuela and Mexico into the Florida region should be cumulated.¹² The statutory requirement for cumulation that these reviews be initiated on the same day is satisfied.

A. No Discernible Adverse Impact

I do not find that subject imports from Venezuela and Mexico are likely to have no discernible adverse impact on the domestic industry if the suspended investigations are terminated and the order is revoked. During the original investigation, imports of Mexican cement into Florida ranged up to 1.6 million short tons, but left the market after the order was imposed. Based on excess Mexican capacity and the general fungibility of cement, as discussed in the Majority Views at Section V.B., I do not find that

⁸ ***

⁹ Calculated from Table E-1.

¹⁰ CR at I-52, n. 80; PR at I-42.

¹¹ CR/PR at Table E-10. For example, Southdown-Brooksville was ranked *** Florida regional producers by its operating income margin in 1999, which at ***. Rinker and Lafarge were ranked *** Florida regional producers by their operating income margins in 1999, which at ***. Id.

¹² I do not analyze cumulation on the Venezuela reviews with respect to Japan because Japanese cement has never entered the Florida market.

subject imports from Mexico are likely to have no discernible adverse impact in the reasonably foreseeable future.¹³

Given the continued presence of imports from Venezuela into the region since the original investigations and the likely volume of subject imports from Venezuela in the reasonably foreseeable future, as discussed below, I do not find that the subject imports are likely to have no discernible adverse impact on the domestic industry in the Florida region if the suspended investigations are terminated. However, for the reasons set forth below, I do not exercise my discretion to cumulate subject imports from Venezuela and Mexico.

B. Reasonable Overlap of Competition

In these reviews, the domestic parties in favor of continuation of the orders argue that there is a reasonable overlap of competition among cement from Venezuela, Mexico, and the United States, given that cement is a fungible product, is sold in similar channels of distribution, and is likely to be simultaneously present and compete in the Florida and Southern Tier regions.¹⁴

However, there are important differences between the Venezuelan and Mexican cement that limit competition. First, Venezuelan cement has been subject to suspension agreements that have set benchmark floor prices and no cash deposit requirements, while Mexican cement has been subject to an antidumping duty order. While the volume of U.S. imports from Venezuela entering Florida during the review period was at levels similar to those during the original period of investigation, no imports from Mexico that entered Florida during the review period. Since the original period of investigation, imports from Venezuela have increased their presence in markets outside of Florida; however, these imports entered along the eastern coast of the United States, with only a limited amount entering ports in the Southern Tier region outside Florida, despite Venezuela's greater proximity to this area.¹⁵ Finally, cement production capacity in Venezuela, at *** short tons in 1999 is substantially smaller than that in Mexico, at ***.¹⁶ Thus, I find that, if the suspended investigations are terminated and the order is revoked, subject imports from Venezuela and Mexico would likely not compete under similar conditions of competition and therefore I do not exercise my discretion to cumulate subject imports in this review.

IV. Conditions of Competition

I find that the conditions of competition discussed in the Majority Views on Japan and Mexico are relevant to the Venezuela review. With respect to Florida, during the review period, demand for gray portland cement increased substantially, by 17.5 percent from 1997 to 1999.¹⁷ Current consumption is well above that during the original period as well.¹⁸

¹³ CR/PR at Table I-1C.

¹⁴ Prehearing Brief of Petitioners, pp. 56-67.

¹⁵ CR at I-6, n. 14 and I-53; PR at I-42.

¹⁶ CR/PR at Tables IV-4 and IV-8, I-1C.

¹⁷ CR/PR at Table C-3 or I-1C.

¹⁸ CR/PR at Table I-1C.

V. Whether Termination of the Suspended Investigations on Subject Imports is Likely to Lead to Continuation or Recurrence of Material Injury Within A Reasonably Foreseeable Time

I determine that termination of the suspended investigations on cement and cement clinker from Venezuela would not be likely to lead to continuation or recurrence of material injury to the regional domestic industry in Florida within a reasonably foreseeable time.

Although the absolute volume of subject imports is significant, I do not find that the volume would likely increase considerably should the suspended investigations be terminated. Since 1991, Venezuelan cement has been subject to suspension agreements that have required Vencemos and Caribe, the primary Venezuelan producers during the original investigation period, to adjust prices to eliminate any amount by which the foreign market value of their product exceeded the U.S. price.¹⁹ Thus, the agreements set floor prices, but did not limit the quantity of subject imports that could enter the Florida region. During the review period, subject imports from Venezuela into Florida have been at levels similar to those in 1991, the year of the original investigation just prior to the Venezuelan acceptance of the suspension agreements. In contrast, outside of the Florida region, such imports have increased sharply.²⁰ In Florida, apparent consumption followed national trends, increasing during the review period by 17.5 percent. Venezuelan cement has accounted for a decreasing share of this consumption, falling to 10.3 percent in 1999 from 12.0 percent in 1997 and 18.2 percent in 1991. Thus, despite strong growth in the market during the review period and since the original investigation,²¹ Venezuela has not shipped increasing volumes to Florida, while its shipments to U.S. markets outside the Florida region have increased sharply.

Current reported cement production capacity in Venezuela is within the range found during the original investigations.²² Current capacity utilization has been moderate, although cement clinker capacity has been operating ***²³***. Finally, although Brazil has imposed an antidumping duty order on Venezuelan cement, the volumes that had been shipped to the Brazilian market are small in relation to its other export markets, and would result in only a small shift to the U.S. market, if at all.²⁴

With respect to price effects, I do not find a substantial likelihood of price depression or suppression in the Florida market absent the discipline of the suspension agreements. Pricing data in these reviews indicate that Venezuelan cement undersold its Florida counterpart in most comparisons, as the Commission found during the original investigations, despite the fact that Venezuelan prices were required to be at or above the benchmark floor price set by the suspension agreements.²⁵ However, in the three Florida market areas for which data were collected domestic price movements did not appear to have responded to movements in Venezuelan cement prices.²⁶ This lack of effect of the Venezuelan cement prices is likely tied to the strong demand in the market during the review period along with the high level of capacity utilization of the domestic producers. Market prices have exceeded the floor price, even though some underselling has occurred. Nevertheless, given the continuing strong demand in that market and the likely limited increase in Venezuelan cement entering the region, I do not find it likely that Venezuelan

¹⁹ 57 Fed. Reg. 6706 (Feb. 27, 1992). Commerce has periodically reviewed and adjusted the floor price.

²⁰ CR/PR at Tables I-1C and I-1D.

²¹ Since 1991, the Florida market has grown by 62 percent. CR at II-20; PR at II-10.

²² Production capacity for cement in Venezuela *** short tons in 1991. In 1999, Venezuelan cement capacity was *** short tons, while cement clinker capacity was *** short tons. *Venezuelan Cement*, USITC Pub. 2400 at Table 20 and CR/PR at Tables IV-8 and IV-9.

²³ CR/PR at Tables IV-8 and IV-9.

²⁴ CR at IV-50; PR at IV-30-31.

²⁵ *Venezuelan Cement*, pp. 20-21 and CR/PR at Tables V-5 and V-6.

²⁶ CR/PR at Tables F-1, F-3 - F-5; Figures F-1 - F-5.

cement will enter the Florida regional market at prices that would have a significant adverse effect on prices for the domestic like product.

The regional industry in Florida shows significant improvement since the original preliminary investigations when the Commission found a reasonable indication of material injury by reason of subject Venezuelan imports due to increasing volumes and market penetration, and likely negative price effects. The performance of the domestic industry has improved significantly since the original investigations. Regional production capacity is essentially the same as 1991, while production has increased by more than 50 percent, resulting in capacity utilization of about 86 percent in 1999, compared to 61.3 percent in 1991. The domestic industry's share of the regional market has not grown since the original investigations, however, since the industry has been operating at near full capacity. This growth in consumption during the review period has benefitted the industry, resulting in strong financial returns in each of the three years. The industry's operating margin increased from 24.9 percent in 1997 to 31.4 percent in 1999.²⁷ Based on the industry's performance in the Florida region, I do not find that the regional industry is currently in a vulnerable state.²⁸

As discussed above, I do not find that termination of the suspended investigations would likely lead to a significant increase in the volume of subject imports from Venezuela into the Florida region or that domestic prices would be significantly depressed or suppressed. While there are numerous demand projections for the Florida market, in general, downturns have been forecast for 2001, although beyond that, demand is expected to grow modestly.²⁹ Petitioners noted generally, however, that the precise timing and extent of the next downturn, which is expected in a cyclical industry such as cement, is difficult to predict.³⁰ Florida producers have increased capital expenditures sharply during the review period, from \$16.4 million in 1997 to \$94.4 million in 1999,³¹ in an effort to meet increased demand. New and expanded domestic capacity totaling *** million short tons is expected to come on line in 2001-2002.³² Despite the current volume of subject imports, in the absence of significant changes in volume and price effects, I find that it is not likely that termination of the suspended investigations will result in a significant adverse impact on the domestic industry.

I find that termination of the suspended investigations on cement and cement clinker from Venezuela is not likely to lead to continuation or recurrence of material injury to the U.S. cement industry in the Florida region within a reasonably foreseeable time.

²⁷ CR/PR at Table I-1C.

²⁸ In order to consider the "all or almost all" standard in regional industry analysis, I have also examined the performance of individual regional producers.

²⁹ CR at II-21, n. 28 and Transcript of the Hearing, pp. 42-43. See also, Domestic Industry Response to Questions and Requests at the August 15, 2000 Hearing, Attachment 3.

³⁰ CR at II-21; PR at II-11.

³¹ CR/PR at Table III-10C.

³² CR/PR at Table I-7.

