

UNITED STATES INTERNATIONAL TRADE COMMISSION

**LOW ENRICHED URANIUM FROM FRANCE, GERMANY,
THE NETHERLANDS, AND THE UNITED KINGDOM**

Investigations Nos. 701-TA-409-412 and 731-TA-909 (Final)

DETERMINATIONS AND VIEWS OF THE COMMISSION

(USITC Publication No. 3486, FEBRUARY 2002)

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Investigations Nos. 701-TA-409-412 and 731-TA-909 (Final)

**LOW ENRICHED URANIUM FROM FRANCE, GERMANY,
THE NETHERLANDS, AND THE UNITED KINGDOM****DETERMINATIONS**

On the basis of the record¹ developed in the subject investigations, the United States International Trade Commission (Commission) determines,² pursuant to section 705(b) of the Tariff Act of 1930 (the Act),³ that an industry in the United States is materially injured⁴ by reason of imports from France, Germany, the Netherlands, and the United Kingdom of low enriched uranium, provided for in subheadings 2844.20.00 or 2844.40.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce (Commerce) to be subsidized.

The Commission also determines,⁵ pursuant to section 735(b) of the Act,⁶ that an industry in the United States is materially injured⁷ by reason of imports from France of low enriched uranium that have been found by Commerce to be sold in the United States at less than fair value (LTFV).

BACKGROUND

The Commission instituted these investigations effective December 7, 2000, following receipt of a petition filed with the Commission and Commerce by USEC Inc. and its wholly owned subsidiary United States Enrichment Corp., Bethesda, MD. The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of low enriched uranium from France, Germany, the Netherlands, and the United Kingdom were being subsidized within the meaning of section 703(b) of the Act⁸ and were being sold at LTFV within the meaning of section 733(b) of the Act.⁹ Notice of the scheduling of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the

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

² Vice Chairman Deanna Tanner Okun not participating.

³ 19 U.S.C. § 1671d(b).

⁴ Commissioner Lynn M. Bragg determines that an industry in the United States is threatened with material injury.

⁵ Vice Chairman Deanna Tanner Okun not participating.

⁶ 19 U.S.C. § 1673d(b).

⁷ Commissioner Lynn M. Bragg determines that an industry in the United States is threatened with material injury.

⁸ 19 U.S.C. § 1671b(b).

⁹ 19 U.S.C. § 1673b(b). Following final determinations by Commerce of sales at not less than fair value for imports of low enriched uranium from Germany, the Netherlands, and the United Kingdom (66 FR 65886, December 21, 2001), the Commission terminated investigations Nos. 731-TA-910-912 (Final) effective December 21, 2001 (67 FR 344, January 3, 2002).

Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of September 5, 2001.¹⁰ The hearing was held in Washington, DC, on December 14, 2001, and all persons who requested the opportunity were permitted to appear in person or by counsel.

¹⁰ 66 FR 46467, September 5, 2001. Subsequently, the Commission published notice of a revised schedule for the investigations and public hearing (66 FR 57986, November 19, 2001).

VIEWS OF THE COMMISSION

Investigations Nos. 701-TA-409-412 and 731-TA-909 (Final)

LOW ENRICHED URANIUM FROM FRANCE, GERMANY, THE NETHERLANDS, AND THE UNITED KINGDOM

VIEWS OF THE COMMISSION

Based on the record in these investigations, we determine that an industry in the United States is materially injured by reason of imports of low enriched uranium (“LEU”) from France, Germany, the Netherlands, and the United Kingdom found to be subsidized, and by imports of LEU from France found to be sold in the United States at less than fair value (“LTFV”).¹

I. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. In General

In determining whether an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the Commission first defines the “domestic like product” and the “industry.”² Section 771(4)(A) of the Tariff Act of 1930, as amended (“the Act”), defines the relevant domestic industry as the “producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product.”³ In turn, the Act defines “domestic like product” as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation”⁴

The decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and the Commission has applied the statutory standard of “like” or “most similar in characteristics and uses” on a case-by-case basis.⁵ No single factor is dispositive, and the Commission

¹ Commissioner Bragg finds that an industry in the United States is threatened with material injury by reason of imports of LEU from France, Germany, the Netherlands, and the United Kingdom found to be subsidized, and by imports of LEU from France found to be sold in the United States at LTFV. She joins Parts I-III.A of these Views. See Separate Views of Commissioner Lynn M. Bragg Regarding Threat of Material Injury.

² 19 U.S.C. §1677(4)(A).

³ 19 U.S.C. § 1677(4)(A).

⁴ 19 U.S.C. § 1677(10).

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

may consider other factors it deems relevant based on the facts of a particular investigation.⁶ The Commission looks for clear dividing lines among possible like products and disregards minor variations.⁷ Although the Commission must accept the determination of the Department of Commerce (“Commerce”) as to the scope of the imported merchandise that has been found to be subsidized or sold at LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified.⁸

B. Product Description

Commerce’s final determinations define the imported merchandise within the scope of these investigations, LEU, as:

enriched uranium hexafluoride (UF₆) with a U²³⁵ product assay of less than 20 percent that has not been converted into another chemical form, such as UO₂, or fabricated into nuclear fuel assemblies, regardless of the means by which the LEU is produced (including LEU produced through the down-blending of highly enriched uranium).⁹

Commerce’s notices specify five types of merchandise that are outside the scope of its investigations: (i) enriched uranium hexafluoride with a U²³⁵ assay of 20 percent or greater (highly enriched uranium); (ii) fabricated LEU, defined as “enriched uranium dioxide (UO₂), whether or not contained in nuclear fuel rods or assemblies;” (iii) natural uranium concentrates (U₃O₈) with a U²³⁵ concentration of no greater than 0.711 percent; (iv) natural uranium concentrates converted into uranium hexafluoride with a U²³⁵ concentration of no greater than 0.711 percent; and (v) LEU owned by a foreign utility end-user and imported into the United States solely for purposes of conversion by a U.S. fabricator into uranium dioxide and/or fabrication into fuel assemblies, provided that the uranium dioxide and/or fuel assemblies: (a) remain in the possession and control of the fabricator, the foreign end-user, or their designated transporter; and (b) are re-exported within 18 months of their entry.¹⁰

C. Domestic Like Product

None of the parties to these investigations have contested the finding in the preliminary determinations of a single domestic like product consisting of all LEU corresponding to the scope of these investigations, and no new information has emerged in the final phase of these investigations that calls into

⁶ See, e.g., S. Rep. No. 96-249 at 90-91 (1979).

⁷ Nippon Steel, 19 CIT at 455; Torrington, 747 F. Supp. at 748-49. See also S. Rep. No. 96-249 at 90-91 (1979) (Congress has indicated that the like product standard should not be interpreted in “such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not ‘like’ each other, nor should the definition of ‘like product’ be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under consideration.”).

⁸ Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568 (Fed. Cir. 1996) (Commission may find single like product corresponding to several different classes or kinds defined by Commerce); Torrington, 747 F. Supp. at 748-752 (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

⁹ E.g., Notice of Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium From France, 66 Fed. Reg. 65877 (Dec. 21, 2001).

¹⁰ Id.

question our earlier decision. Accordingly, for the reasons stated in our preliminary determinations, we determine that there is one domestic like product consisting of all LEU corresponding to the scope of these investigations as amended by Commerce in its final determinations.

D. Domestic Industry

Section 771(4) of the Act defines the relevant industry as “the producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes the major proportion of that product.”¹¹ In defining the domestic industry, the Commission’s general practice has been to include in the industry all of the domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market.¹² Based on our like product determination, we determine that there is a single domestic industry consisting of the sole domestic producer of LEU, USEC.¹³

Most LEU is produced pursuant to arrangements in which utilities pay the enricher in cash for the enrichment component of the LEU (measured in “separative work units” or “SWUs”), and deliver a quantity of natural UF₆ to the enricher equal to the amount of converted uranium deemed to be contained in the LEU. These transactions are referred to hereinafter as “SWU transactions” or “SWU sales.” In addition, some LEU is sold in transactions where the customer pays an all-inclusive price for both natural UF₆ feedstock and the enrichment component.¹⁴ These transactions are referred to hereinafter as “EUP transactions” or “EUP sales.”

Respondents and AHUG argue that the Commission is precluded from conducting the analysis necessary for deciding whether to cumulate subject imports or for evaluating price effects, because foreign enrichers and USEC sell enrichment services and not LEU. We find these arguments unpersuasive. The statute instructs the Commission to cumulate “if such imports [of the subject merchandise] compete with each other and with domestic like products in the United States market.”¹⁵ In analyzing price effects, the Commission is instructed to “[evaluate] the effects of [the subject] merchandise on prices.”¹⁶ As noted above, Commerce has defined the subject merchandise to include all LEU entering the United States. Moreover, it is undisputed that LEU is a tangible product both when it is imported and when it is produced in the United States. Thus, contrary to Respondents’ assertions, the Commission is required to make the evaluations relating to underselling and cumulation specified in the statute, as part of its injury analysis.

Respondents and AHUG have not challenged the Commission’s conclusion from the preliminary phase of the investigations that USEC and not the utilities is the domestic producer of LEU. Where

¹¹ 19 U.S.C. § 1677(4)(A).

¹² See United States Steel Group v. United States, 873 F. Supp. 673, 681-84 (Ct. Int’l Trade 1994), aff’d, 96 F.3d 1352 (Fed. Cir.1996).

¹³ We note that there is no issue in these investigations as to whether USEC should be excluded from the domestic industry pursuant to 19 U.S.C. §1677(4)(B). USEC is neither related to an exporter or importer of subject merchandise nor is it an importer of the subject merchandise.

¹⁴ Confidential Report (“CR”) at I-13, Public Report (“PR”) at I-10.

¹⁵ 19 U.S.C. §1677(7)(G)(i).

¹⁶ 19 U.S.C. §1677(7)(C)(ii).

foreign producers win enrichment contracts, it results in subject imports of LEU that may injure the U.S. production operations of the domestic producer USEC. This situation is squarely within the antidumping and countervailing duty laws, whether or not enrichment contracts are formally considered service transactions in other contexts.

II. CUMULATION

A. In General

For purposes of evaluating the volume and price effects for a determination of material injury by reason of the subject imports, section 771(7)(G)(i) of the Act requires the Commission to assess cumulatively the volume and effect of imports of the subject merchandise from all countries as to which petitions were filed and/or investigations self-initiated by Commerce on the same day, if such imports compete with each other and with domestic like products in the U.S. market.¹⁷ In assessing whether subject imports compete with each other and with the domestic like product,¹⁸ the Commission has generally considered four factors, including:

- (1) the degree of fungibility between the subject imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;
- (2) the presence of sales or offers to sell in the same geographic markets of subject imports from different countries and the domestic like product;
- (3) the existence of common or similar channels of distribution for subject imports from different countries and the domestic like product; and
- (4) whether the subject imports are simultaneously present in the market.¹⁹

While no single factor is necessarily determinative, and the list of factors is not exclusive, these factors are intended to provide the Commission with a framework for determining whether the subject imports compete with each other and with the domestic like product.²⁰ Only a “reasonable overlap” of competition is required.²¹

¹⁷ 19 U.S.C. § 1677(7)(G)(i).

¹⁸ The SAA expressly states that “the new section will not affect current Commission practice under which the statutory requirement is satisfied if there is a reasonable overlap of competition.” SAA at 848, citing Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898, 902 (Ct. Int’l Trade 1988), aff’d, 859 F.2d 915 (Fed. Cir. 1988).

¹⁹ See Certain Cast-Iron Pipe Fittings from Brazil, the Republic of Korea, and Taiwan, Inv. Nos. 731-TA-278-280 (Final), USITC Pub. 1845 (May 1986), aff’d, Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898 (Ct. Int’l Trade), aff’d, 859 F.2d 915 (Fed. Cir. 1988).

²⁰ See, e.g., Wieland Werke, AG v. United States, 718 F. Supp. 50 (Ct. Int’l Trade 1989).

²¹ See Goss Graphic System, Inc. v. United States, 33 F. Supp. 2d 1082, 1087 (Ct. Int’l Trade 1998) (“cumulation does not require two products to be highly fungible”); Mukand Ltd. v. United States, 937 F. Supp. 910, 916 (Ct. Int’l Trade 1996); Wieland Werke, 718 F. Supp. at 52 (“Completely overlapping markets are not required.”).

B. Analysis

The petition was filed with respect to all subject imports on the same day, and, based on the record in the final phase of these investigations, we find that there is a reasonable overlap of competition among the subject imports and between the subject imports and the domestic like product. First, LEU from one manufacturer is highly interchangeable with LEU produced by other enrichers,²² as underscored by the fact that ***.²³ Second, the record indicates that the subject imports are sold or offered for sale in the same geographic markets as domestically-produced LEU.²⁴ Third, the channels of distribution for subject imports and domestically-produced LEU are similar, and the products are sold to the same customers.²⁵ Fourth, imports from each of the subject countries have been present in the U.S. market throughout the period of investigation.^{26 27}

In sum, we find that there is a reasonable overlap of competition among the subject imports from France, Germany, the Netherlands, and the United Kingdom, and between subject imports and the domestic like product. Consequently, we cumulate subject imports from France, Germany, the Netherlands, and the United Kingdom for purposes of these final determinations.²⁸

III. MATERIAL INJURY BY REASON OF LESS THAN FAIR VALUE AND SUBSIDIZED IMPORTS

In the final phase of antidumping and countervailing duty investigations, the Commission determines whether an industry in the United States is materially injured by reason of the imports under investigation.²⁹ In making this determination, the Commission must consider the volume of imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like

²² CR at I-12, PR at I-10.

²³ CR/PR at Appendix. E.

²⁴ See CR/PR at Appendix. E.

²⁵ CR at I-13, PR at I-10.

²⁶ CR/PR at Table IV-1.

²⁷ Commissioner Bragg finds that the same analysis which justifies cumulation for purposes of the Commission's majority's assessment of present material injury applies equally to her assessment of a threat of material injury.

²⁸ Respondents have argued that the Commission should not cumulate imports from the Netherlands and the United Kingdom with those from Germany and France because the countervailing duty rates for the Netherlands and the United Kingdom were attributed to those countries by Commerce based on a subsidy found in Germany pursuant to the "international consortium" provision in 19 U.S.C. §1671(d). Respondents' Resubmission of Comments on the Accuracy, Reliability, and Probative Value of New Information Released After the Submission of Respondents' Posthearing Brief, Jan. 18, 2002, at 16 n.52. We reject Respondents' arguments on two grounds. First, their argument would essentially require that the Commission supplant Commerce's final determinations of subsidization, a task reserved for Commerce by the statute. See generally, e.g., *Algoma Steel Corp. v. United States*, 865 F.2d 240, 242 (Fed. Cir. 1989). Second, the statute mandates cumulation of subject imports that were the subject of simultaneously filed petitions and that compete with each other and the domestic like product, with only four specifically enumerated exceptions. As the subject imports were the subject of simultaneously filed petitions and those imports compete with the each other and the domestic like product, and none of the four exceptions apply, we cumulate the imports from the four subject countries.

²⁹ 19 U.S.C. §§ 1671d(b) and 1673d(b).

product, but only in the context of U.S. production operations.³⁰ The statute defines “material injury” as “harm which is not inconsequential, immaterial, or unimportant.”³¹ In assessing whether the domestic industry is materially injured by reason of subject imports, we consider all relevant economic factors that bear on the state of the industry in the United States.³² No single factor is dispositive, and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”³³

For the reasons discussed below, we determine that the domestic industry is materially injured by reason of cumulated subject imports from France, Germany, the Netherlands, and the United Kingdom found to be subsidized, and by imports from France found to be sold in the United States at LTFV.³⁴

A Conditions of Competition

The following conditions of competition in the LEU industry inform our determinations.

LEU is a fungible, commodity product. LEU produced by one enricher is highly interchangeable with LEU produced by other enrichers.³⁵

LEU is one of several intermediate products in the production of nuclear reactor fuel. The processing of uranium ore into such fuel involves the following four successive stages of production, collectively known as the “nuclear fuel cycle:” (i) the mining of uranium ore and extraction of uranium in a concentrated form of U_3O_8 by “concentrators;” (ii) the transformation of the U_3O_8 into natural uranium hexafluoride (UF_6) by “converters;” (iii) the enrichment of natural UF_6 (in which the effort involved to increase the percentage of U^{235} is measured in SWUs) by “enrichers;” and (iv) the fabrication of enriched UF_6 into nuclear fuel assembly rods by “fabricators.”³⁶ LEU is produced in the third stage of the nuclear fuel cycle.

Traditionally, utilities have purchased concentrated U_3O_8 from converters, and have arranged for each intermediate product to be further processed along each stage of the nuclear fuel cycle. In most cases, utilities obtain LEU from enrichers by paying cash for the SWUs deemed to be contained in the LEU and provide the enrichers with a quantity of converted uranium feedstock equal to the amount of

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

³¹ 19 U.S.C. § 1677(7)(A).

³² 19 U.S.C. § 1677(7)(C)(iii).

³³ Id.

³⁴ Commissioner Bragg finds that an industry in the United States is threatened with material injury by reason of imports of LEU from France, Germany, the Netherlands, and the United Kingdom found to be subsidized, and by imports of LEU from France found to be sold in the United States at LTFV.

³⁵ CR at I-12, PR at I-10.

³⁶ CR at I-11-12, PR at I-9.

converted uranium deemed to be contained in the LEU (*i.e.*, in SWU transactions). Utilities may also purchase LEU entirely for cash (*i.e.*, in EUP transactions).³⁷

The global enrichment industry is highly concentrated. There are currently only four major enrichers in the world: USEC, the Urenco companies (with enrichment facilities in Germany, the Netherlands, and the United Kingdom), Eurodif (with enrichment facilities in France), and Tenex in Russia.³⁸ Entry into this industry is difficult because of its capital-intensive nature.³⁹

USEC is the only producer of LEU in the United States. The company supplies 40 percent of the world market for enriched uranium, and a substantial portion of its total sales are to export markets.⁴⁰ USEC was established by the U.S. Government in 1992 as the first step in the privatization of the Department of Energy's uranium enrichment activities. It became a publicly-held corporation in July 1998.⁴¹ At that time, USEC operated two uranium enrichment plants, one near Portsmouth, Ohio, and the other in Paducah, Kentucky. As part of its privatization, USEC entered into an agreement with the U.S. Treasury Department whereby it committed itself to continue operation of these two plants until at least January 2005, subject to several exceptions.⁴² One of these exceptions (a downgrade in the company's long-term corporate debt to below investment grade) was triggered in February 2000. As a result, in June 2000, the company announced that it would cease uranium enrichment operations at its Portsmouth plant in June 2001 and shift all enrichment operations to the Paducah plant.⁴³ USEC ceased production operations at the Portsmouth plant in May 2001.⁴⁴

Another significant condition of competition relating to the supply of LEU in the United States is the U.S.-Russian HEU Agreement executed in 1994. Under this agreement, the United States is committed to buying LEU that is produced in Russia by blending down weapons-grade, highly enriched uranium (HEU). USEC acts as the U.S. Government's Executive Agent under the Russian HEU Agreement. In this capacity, the company is required to purchase 5.5 million SWUs annually from Russia in the 1999-2014 period, which, in turn, represents a *** of USEC's annual enrichment sales. Most of the LEU obtained under the Russian HEU Agreement cannot be sold to USEC's export market customers

³⁷ CR at I-13, PR at I-10.

³⁸ CR/PR at II-1.

³⁹ CR at II-15-16, PR at II-11.

⁴⁰ CR/PR at III-1 and Table III-3.

⁴¹ CR at III-2; PR at III-1.

⁴² These exceptions included: (1) events beyond the company's reasonable control, such as natural disasters; (2) a decrease in annual worldwide demand to less than 28 million SWUs; (3) a decline in the average price for all SWUs under USEC's long-term firm contracts to less than \$80 per SWU (in 1998 dollars); (4) a decline in the operating margin to below 10 percent in a consecutive 12-month period; or (5) a downgrade of USEC's long-term corporate credit rating to below an investment grade, or the reasonable anticipation of such a downgrade. CR/PR at III-2.

⁴³ CR at III-2-3, PR at III-2

⁴⁴ CR at II-1 n.6 and III-6 n.15, PR at II-1 n.6 and III-4 n.15.

and thus must be sold in the United States.⁴⁵ The Russian LEU thus supplies a significant percentage of U.S. demand.⁴⁶

Under the Russian HEU Agreement, *** and pays in cash for the value of enrichment (SWUs).⁴⁷ As SWU prices have declined over the period of investigation, the price terms of the Russian HEU Agreement have become unfavorable to USEC. These price terms expired on December 31, 2001, and USEC currently is engaged in negotiations with the Russian Executive Agent to adjust the price for the SWU component of future deliveries under the agreement. These imports and sales of Russian LEU have led to a diminished use of USEC's enrichment facilities in the United States and have contributed to increased unit costs.⁴⁸

U.S. consumption of LEU rose between 1998 and 2000.⁴⁹ Demand in 2001-2003 is expected to be relatively flat.⁵⁰ The market for LEU has been affected by the deregulation of electrical utilities in the United States. As nuclear power plants have been forced to compete with other sources of electricity, utilities operating nuclear plants have faced increasing pressure to cut costs by obtaining uranium at the lowest possible price.⁵¹ There also has been a certain amount of consolidation among nuclear electric utilities, and this has given the utilities a greater degree of purchasing power.⁵²

Price is the first or second most important factor in nuclear utilities' purchasing decisions.⁵³ While price is a major factor, nuclear utilities' LEU purchasing decisions also may be affected by considerations of diversity and reliability of supply; that is, utilities may seek to avoid dependence on any

⁴⁵ CR at III-4 n.13, PR at III-3 n.13.

⁴⁶ Total Russian LEU – most of it obtained pursuant to the Russian HEU Agreement – shipped to U.S. nuclear electric utilities averaged *** percent of total U.S. apparent consumption in the period of investigation. CR/PR at II-2 n.12.

⁴⁷ CR at II-7, PR at II-5.

⁴⁸ CR at VI-11, PR at VI-5; See also, CR/PR at Table VI-4.

⁴⁹ Apparent U.S. consumption of LEU measured by SWUs increased from *** SWUs in 1998, to *** SWUs in 1999, and *** SWUs in 2000. CR/PR at Table IV-4. We do not place much weight on the data for the interim periods in these investigations, given that LEU consumption can vary considerably in the short term, based on variations in nuclear utilities' reload cycles. CR at II-25 and IV-8 n.10, PR at II-15 and IV-3 n.10, Transcript of Hearing at 88 (Testimony of Dan Collier).

⁵⁰ U.S. nuclear reactor requirements are forecast at 10.8 million SWUs in 2001, 11.0 million SWUs in 2002, and 10.9 million SWUs in 2003. CR at II-26, PR at II-17.

⁵¹ CR at II-31-33, PR at II-20-21.

⁵² CR at II-11-12, PR at II-8.

⁵³ Purchasers were asked to describe the importance of various factors affecting purchasing decisions in two ways. First, they were asked to list, in order of importance, the three major factors that they generally consider when making purchasing decisions. The responses to this request showed the three major factors to be, in order of importance: (i) price, (ii) reliability/stability/security of supply, and (iii) flexibility of contract terms. CR at II-37-38, PR at II-24. The second way in which purchasers were asked to rank factors affecting purchasing decisions was by ranking 23 preselected factors as “very important,” “somewhat important,” or “not important.” For SWU transactions, “reliable supply” was ranked the highest, followed closely by “lowest price” and “availability of supply.” For EUP transactions “lowest price” was ranked highest, followed closely by “reliable supply” and “availability of supply.” CR/PR at Tables II-3a, II-3b and II-3c.

single enricher.⁵⁴ In making purchasing decisions, nuclear utilities may evaluate a number of factors in addition to bid price to arrive at an “evaluated price” for a particular bid. Such factors may include discounts on pre-existing supply commitments, extended payment terms, the timing of the provision by the utilities of the converted uranium feedstock, and packaging and handling terms.⁵⁵ However, not all utilities use evaluated prices, and among those that do, the methodologies for determining the evaluated price often vary.

Most LEU is sold pursuant to long-term contracts between enrichers and utilities ranging in duration from three to seven years, with prices that are fixed or subject to escalator clauses.⁵⁶ The quantity in contracts often is expressed as a percentage of a utility’s requirements. The bidding for these contracts often is very competitive.⁵⁷ It is not uncommon for long-term contracts to be renegotiated at some point during their term.⁵⁸ A relatively small amount of LEU is also sold in the spot market.⁵⁹ Even though the amount of LEU sold in the spot market is small relative to the amount sold pursuant to long-term contracts, it appears that prices in the spot market have some effect on the pricing of long-term contracts.^{60 61}

B. Volume of Subject Imports

Section 771(7)(C)(i) of the Act provides that the “Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.”⁶²

The volume of the cumulated subject imports increased by *** from 1998 to 2000.⁶³ The market penetration of subject imports also rose substantially, while the market share of the domestic industry declined sharply overall.⁶⁴

⁵⁴ CR at II-37-43 and V-11 n.27, PR at II-24-28 and V-9 n.27.

⁵⁵ CR at V-1 and n.3, V-2, V-7-8, V-15, PR at V-1 and n.3, V-5-6, V-10-11.

⁵⁶ CR at V-7; PR at V-5-6. There is some evidence that the terms of these contracts have more recently tended to become shorter, ranging from three to five years. CR at II-12 and V-7 n.12, PR at II-8 and V-5 n.12.

⁵⁷ See CR/PR at Appendix E. This intense competition effectively refutes the argument of AHUG that competition in this case is blunted by a form of “captive consumption.” AHUG Prehearing Brief at 17-22 and Posthearing Brief at 2-7.

⁵⁸ See CR/PR at Table V-9b.

⁵⁹ Nuclear utilities tend to buy more in the spot market when LEU prices are low. CR at II-8, PR at II-6. U.S. nuclear utilities’ purchases in the spot market accounted for 4.4 percent of total LEU purchases in 1998, and 6.8 percent of total purchases in 2000. CR at II-8 n.32, PR at II-6 n.32.

⁶⁰ CR at V-7 n.13, PR at V-6 n.13, and Transcript of Hearing at 133 (Testimony of Robert Van Namen).

⁶¹ Commissioner Bragg does not join the remainder of this opinion.

⁶² 19 U.S.C. § 1677(7)(C)(i).

⁶³ CR/PR at IV-3. Subject imports rose from *** SWUs in 1998, to *** SWUs in 1999, and to *** SWUs in 2000. CR/PR at Table IV-1.

⁶⁴ The market share of subject imports measured by quantity on a SWU basis was *** percent in 1998, *** percent in 1999, and *** percent in 2000. The domestic industry’s market share declined from *** percent in 1998, to *** percent in 1999, before recovering somewhat to *** percent in 2000. CR/PR at Table IV-5.

We recognize that, because most LEU is sold pursuant to multi-year long-term contracts, imports during the period of investigation reflect to some degree sales made in earlier years. Thus, we have looked also to the volume of shipments pursuant to new and re-negotiated contracts that were awarded to enrichers in the subject countries during the period of investigation, and the market share represented by these shipments. The volume of subject imports involved in such contracts increased by *** percent from 1998 to 2000.⁶⁵ The market share of subject imports, measured on this basis, also increased, at the same time as the domestic industry's market share declined.^{66 67}

We recognize also that non-subject imports from Russia played a significant role in the U.S. market during the period of investigation. The level of such imports was higher than that of the subject imports in each year of the period of investigation, and the rate of the increase in such imports was comparable to that of the subject imports.⁶⁸ However, the domestic industry's loss of market share from 1998 to 2000 (a decline from *** percent to *** percent of apparent consumption) cannot be attributed, for the most part, to an increase in imports from Russia (which increased from *** percent to *** percent of domestic consumption, or by *** percentage points, in this period), but rather primarily to the subject

⁶⁵ The cumulative volume shipped by enrichers in the subject countries pursuant to such contracts was *** SWUs in 1998, *** SWUs in 1999, and *** SWUs in 2000. See Staff Worksheet #1, Table 2. (The "Staff Worksheets" referred to in these views are tabulations of data which are derived from data in the Staff Report and the record which have been prepared to assist the Commission in its analysis.)

⁶⁶ The market share of subject imports, measured on this basis, rose from *** percent in 1998, to *** percent in 1999, and *** percent in 2000. The domestic industry's market share fell from *** percent in 1998, to *** percent in 1999, before recovering *** , to *** percent in 2000. See Staff Worksheet #1, Table 2.

⁶⁷ While one would expect to see increasing volume, when measuring shipments in each year pursuant to contracts entered into during the period of investigation (because each year's shipments reflects shipments pursuant to contracts in that year and any preceding years of the period of investigation), the increase in subject imports' market share represented by these shipments shows the significant gains made by subject imports in the U.S. market in this period.

⁶⁸ Imports from Russia rose from *** SWUs in 1998, to *** SWUs in 1999, and to *** SWUs in 2000. The market share of the Russian imports (in terms of U.S. shipments) was *** percent in 1998, *** percent in 1999, and *** percent in 2000. CR/PR at Tables IV-5 and C-1.

imports (which increased from *** percent to *** percent in this period, or by *** percentage points).^{69 70} Thus, notwithstanding the significant levels of non-subject imports, in light of the increase in the volume of subject imports between 1998 and 2000, the increase in their market share in the same period, and the overall decline in the domestic producer's market share, we find the volume of subject imports of LEU to be significant.^{71 72}

C. Price Effects of the Subject Imports

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

- (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
- (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.⁷³

As discussed above, LEU produced by the domestic industry is highly substitutable with the subject imports, and price is among the most important factors in purchasing decisions.

⁶⁹ CR/PR at Tables IV-5 and C-1. The domestic industry's loss of market share can also be explained, to a lesser extent, by the increase in the category of imports from "All other sources" (which consists of nonsubject LEU imports from the subject countries), which increased from *** percent of the market in 1998 to *** percent in 2000. These non-subject imports consist mainly of LEU delivered to U.S. firms for fabrication and subsequent re-export. As these imports are never consumed by U.S. utilities, USEC consented to the exclusion of these imports from the scope of the investigations. See Commerce's "Issues and Decision Memorandum for the Antidumping Duty Investigation of Low Enriched Uranium from France" (Decision Memorandum) at Comment 2.

⁷⁰ An inter-year analysis of the market share data shows that the industry's decline in market share from 1998 to 1999 was entirely attributable to an increase in imports from Russia in that period, but that subject imports gained market share at the expense of the domestic industry and the Russian imports from 1999 to 2000. CR/PR at Table IV-5.

This case presents the unusual situation in which the U.S. industry (USEC) was, by virtue of its status as the sole Executive Agent under the Russian HEU Agreement, essentially the only importer of the non-subject Russian LEU and controlled the sale of the Russian product in the U.S. market. Nevertheless, from 1998 to 2000, USEC's combined market share of U.S.-produced and Russian LEU fell from *** percent to *** percent, mainly because of the subject imports. Calculated from CR/PR at Table IV-4.

⁷¹ We also note that, based on contracts currently in effect (*i.e.*, contracts entered into before the period of investigation and during that period, and those re-negotiated in that period) subject imports are projected to capture increasing market share over the next several years. It is estimated that the market share of subject imports will be *** percent in 2001 and *** percent in 2002. See Staff Worksheet #1, Table 1. We recognize that these data are only estimates, and that a certain portion of demand in 2002 is still "open."

⁷² We note that two-year and three-year moving averages from 1998 to 2004 show steady increases in subject imports' market share. Thus, the increase in subject imports' market share from 1998 to 2000 does not appear to have been simply the result of variations in demand in any single year due to the 18-24 month nuclear fuel reload cycle. See Staff Worksheet #15.

⁷³ 19 U.S.C. § 1677(7)(C)(ii).

The contracting process for LEU makes evaluating the price effects of subject imports in these investigations a challenging exercise. The prices for LEU sold during the period of investigation include prices from contracts negotiated prior to the period of investigation as well as prices from contracts negotiated (or renegotiated) during the period of investigation. Also, because of the nature of the bid terms, it was difficult in some cases to ascertain the lowest bidder. To understand LEU pricing, the Commission collected several types of price data in the final phase of these investigations.

First, the Commission obtained bid-price information for SWU transaction contracts and EUP transaction contracts from nuclear utility purchasers for each contract entered into in the January 1998-June 2001 period of investigation, including information on evaluated prices where applicable.⁷⁴

Second, the Commission obtained quarterly selling price and quantity data from USEC and importers of the subject merchandise for SWU sales during January 1998-June 2001, broken down into four categories of contracts (spot sales and long-term contracts with three different types of pricing). The bulk of LEU sold during the period of investigation was pursuant to long-term SWU contracts with price terms that were fixed or subject to escalator clauses specified in the contracts (sales category 4).⁷⁵ Quarterly pricing data for sales category 4 contracts were compiled by the Commission staff into weighted-average prices for each contract year, because the quarterly data were considered to be too variable to show reliable trends and pricing comparisons.⁷⁶

Third, the Commission obtained data from USEC and importers of the subject merchandise on annual shipments pursuant to SWU and EUP transactions from 1998-2004, broken down into three contract categories: contracts newly negotiated during the period of investigation, pre-existing contracts that were renegotiated during the period of investigation, and pre-existing contracts that were not renegotiated during that period.⁷⁷

Finally, the Commission also gathered publicly reported spot prices for enrichment services during the period of investigation.⁷⁸

The weighted-average price data for SWU transaction deliveries by contract year show that prices generally declined. This was true for U.S. sales made by USEC and enrichers from each of the

⁷⁴ CR at V-15-19 and Appendix E, PR at V-11-13 and Appendix E. In comparing bid price information, we have used evaluated prices where purchasers have provided them. While we understand that purchasers do not apply a uniform methodology for determining evaluated prices, evaluated prices reflect factors that are sufficiently quantitative that the purchaser could adjust the suppliers' bid prices based on them. For example, evaluated prices may factor in aspects of a supplier's bid such as discounts on pre-existing supply commitments, extended payment terms, packing and handling terms, and other aspects. Considering the basic price only would fail to take into account important aspects of suppliers' offers that directly affect price competition in the LEU market. It is not unusual for the Commission to look beyond the base price where other price aspects are significant. In any event, we do not believe that considering basic versus evaluated prices is determinative of our conclusions regarding the price effects of subject imports.

⁷⁵ CR at V-15, PR at V-10-11.

⁷⁶ CR at V-20-37, PR at V-13-19.

⁷⁷ CR at V-37-48, PR at V-19-22. The data for 2001-2004 were based on estimates by USEC and the subject importers.

⁷⁸ CR at V-9-14, PR at V-6-10.

subject countries.⁷⁹ For example, the weighted-average annual selling price for sales by USEC declined from \$*** per SWU for contracts entered into in ***, to \$*** per SWU for contracts entered into in ***.⁸⁰ The data on annual shipments during the period of investigation pursuant to newly-negotiated contracts also show a decline in prices. For example, the weighted-average unit value of deliveries by USEC (of LEU produced in the United States and LEU sourced from Russia combined) declined from \$*** per SWU in 1998, to \$*** per SWU in 1999, to \$*** per SWU in 2000.⁸¹ Spot prices confirm this declining price trend over most of the period of investigation. The average spot price for enrichment service fell from \$88.17 per SWU in the first quarter of 1998 to \$78.50 per SWU in the second quarter of 2000, before recovering in the second half of 2000 and reaching \$94.33 per SWU in the third quarter of 2001.⁸²

We believe that the nature of price competition between subject imports and domestic LEU is best examined on the basis of the bid data supplied by LEU purchasers, which are generally utilities that operate U.S. nuclear plants. These data paint an overall picture of fairly intense price competition. Contracts awarded during the period of investigation that were competitively bid represented the majority of the SWUs and EUP awarded during the period of investigation.⁸³ The vast majority of the competitively bid contracts were awarded to the low bidder.⁸⁴ USEC and brokers /traders selling U.S. and Russian product won the majority of the contracts awarded to the low bidder, although many of these contracts were lower volume spot contracts.⁸⁵ Imports from the subject countries won contracts as the lowest bidder accounting for a significant percentage of SWUs awarded during the period of

⁷⁹ CR/PR at Table V-6.

⁸⁰ Id.

⁸¹ CR/PR at Table V-9a.

⁸² CR at V-9 and Figure V-5, PR at V-6-8 and Figure V-5.

⁸³ See Staff Worksheets # 12 and 13 (approximately 64 percent competitively bid). Of the 92 contracts awarded during the period of investigation, 54 were competitively bid. In some cases in which a contract was not awarded through competitive bid, the purchaser indicated that it had recently held a bid competition and therefore was aware of the relative prices of the various suppliers (thus rendering a new bid process unnecessary). See CR at Appendix E, pp. E-20, E-33, E-65, E-69, and E-76; PR at Appendix E, p. E-3. Therefore, the absence of a new competitive bid process does not necessarily mean that price was an unimportant factor to the purchaser or that competition did not occur.

⁸⁴ Of the 54 contracts awarded through a competitive bid process, 46 were awarded to the lowest bidder. CR at V-16, PR at V-11-12. In cases in which the award was made to a bidder other than the low bidder, the awardee's price was often not substantially above the low bidder's price. See CR at Appendix E, pp. E-13, E-19, E-22, E-46, and E-57; PR at Appendix E, p. E-3.

⁸⁵ Of the 46 contracts awarded based on the lowest bid, USEC (using SWUs and EUP produced in the United States and Russia) won 20 contracts that accounted for approximately 40 percent of the total of such SWUs and EUP contracted for during the period of investigation for delivery during 1998-2004 from these 46 contracts. (A further 8 contracts awarded based on the lowest bid were won by brokers/traders of SWUs and EUP produced in the United States and Russia. These contracts accounted for approximately 3.5 percent of the total SWUs and EUP contracted for during the period of investigation for delivery during 1998-2004 from the 46 contracts.) Of the 20 contracts won by USEC, 9 contracts appear to have been spot contracts. See CR/PR at Appendix E, Table E-1, and Staff Worksheet No. 14.

investigation.⁸⁶ In sum, USEC may have won a larger number of contracts, but enrichers in the subject countries won a larger volume of SWUs and EUP.

We note that the issue of whether there was actual competition for some contracts, and the assessment of which supplier was the lowest bidder for some contracts, is the subject of some dispute among the parties.⁸⁷ Regardless of how certain individual contracts are classified, we are satisfied that the record demonstrates that USEC and subject producers engaged in vigorous price competition and that subject producers were low bidders on a significant percentage of the SWUs awarded during the period of investigation.

In describing the basis for the awards, some purchasers indicated that there were also non-price reasons for purchasing from a subject producer, most often relating to diversity or reliability of supply. We have taken these statements into account in our analysis. We do not find mention of other factors to mean that price was not an important or even decisive element, particularly in those cases in which the subject producer submitted the lowest price bid. As noted above, purchasers ranked price as the first or second most important purchasing factor overall. On balance, we conclude that subject imports have significantly undersold the domestic like product.^{88 89}

⁸⁶ Of the 46 contracts awarded based on the lowest bid, imports from subject countries won 16 contracts that accounted for approximately 54 percent of the total of such SWUs and EUP contracted for during the period of investigation for delivery during 1998-2004 from these 46 contracts. Of these 16 contracts, there was a competing offer conforming to bid specifications by USEC for the sale of U.S./Russian product with respect to 12 of the contracts, accounting for approximately 51 percent of the total SWUs and EUP contracted for during the period of investigation for delivery during 1998-2004 from the 46 contracts. See CR/PR at Appendix E and Staff Worksheet No. 14.

The amount of SWUs awarded includes estimated deliveries for future years. We note, however, that nearly half of the subject LEU imported during the period of investigation was pursuant to contracts awarded during the period of investigation. See CR/PR at Tables V-2-V-5 (***) of (***) SWUs).

⁸⁷ See, e.g., USEC's Final Comments (January 14, 2002) at 1-9 and Respondents' Final Comments (January 18, 2002) at 12-14.

⁸⁸ We have given less weight to annual weighted-average pricing and unit value data for price comparisons because they may include sales not subject to head-to-head competition between domestic and subject imported LEU. Such data are mixed but arguably would confirm our finding of underselling by subject imports. The annual weighted-average pricing data by contract year show that prices of SWUs sold by USEC and by respondents generally declined, and that prices of subject imports were lower than those for SWUs sold by USEC in most possible comparisons. The imported SWUs were priced below USEC's sales in 14 of 19 possible comparisons based on contract years. CR at V-33 and Table V-6, PR at V-17-18 and Table V-6. The data on annual shipments during the period of investigation pursuant to newly-negotiated contracts also show declining prices between 1998 and 2000, and that the prices of subject imports were lower than those of USEC in all possible comparisons. CR/PR at Table V-9a. On the other hand, the data on annual shipments during the period of investigation pursuant to pre-existing contracts that were renegotiated during the period of investigation indicate price trends that are more mixed, and shows that the prices of subject imports were higher than those of USEC in all possible comparisons. CR/PR at Table V-9b.

⁸⁹ We note that purchasers were not able to distinguish between those bids that would be supplied with domestically-produced LEU and those supplied with Russian-origin LEU. Thus, the record shows that respondents were underselling both USEC's domestic production and LEU from Russia being resold by USEC.

As noted above, domestic prices for LEU fell substantially over the period of investigation. The high degree of price competition and the significant underselling by subject imports undoubtedly played a significant role in helping to bring about the lowering of domestic prices. At the same time, we are aware of USEC's own responsibility for falling prices. Most purchasers identified USEC as the price leader in the U.S. market during the period of investigation.⁹⁰ USEC's aggressive pricing activities in the spot market from about mid-1998 until mid-2000 were likely a factor in the declining prices of long-term contracts. Nonetheless, the detailed bid information obtained from purchasers, summarized above, makes it very clear that respondents were engaged in intense price competition with USEC and not merely following USEC's price leadership. The large share of bids won by subject imports, often on the basis of lowest price, and subject imports' increasing market share, are likewise inconsistent with a finding that subject imports did not put downward pressure on domestic LEU prices during the period of investigation. Accordingly, we conclude that subject imports have depressed domestic prices for LEU to a significant degree.

D. Impact of the Subject Imports

In examining the impact of the subject imports on the domestic industry, we consider all relevant economic factors that bear on the state of the industry in the United States.⁹¹ These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."^{92 93}

Many of the indicators of USEC's condition deteriorated during the period of investigation. Production levels declined *** from 1998 to 2000,⁹⁴ and USEC's sales of U.S.-produced LEU fell ***, especially at the end of the period of investigation.⁹⁵ The company's capacity utilization rates were low

⁹⁰ CR at V-12-13, PR at V-9-10.

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

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

⁹³ The statute instructs the Commission to consider the "magnitude of the dumping margin" in an antidumping proceeding as part of its consideration of the impact of imports. 19 U.S.C. § 1677(7)(C)(iii) (V). In its final antidumping determination for imports from France (the only remaining antidumping investigation in this group of investigations), Commerce assigned a margin of 19.57 percent to all respondents. Notice of Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium From France, 66 Fed. Reg. 65877 (Dec. 21, 2001).

⁹⁴ USEC's production was *** SWUs in 1998, *** SWUs in 1999, and *** SWUs in 2000. There was *** of a noticeable decline over the interim periods, with production falling from *** SWUs in interim 2000, to *** SWUs in interim 2001. CR/PR at Table III-2.

⁹⁵ USEC's total enrichment sales (in domestic and export markets) of domestically-produced LEU were *** SWUs in fiscal 1999, *** SWUs in fiscal 2000, and *** SWUs in fiscal 2001. CR/PR at Table VI-3.

throughout the period of investigation, and declined towards the end of the period.⁹⁶ As detailed above, USEC's market share fell ***, at the same time as the subject imports gained market share. Employment in the LEU industry also declined.⁹⁷ The significant increase in volume and market share of subject imports materially contributed to the declines in USEC's sales and employment.⁹⁸

Further, we note that the sales lost by the domestic industry to subject imports during the period of investigation go beyond those for which deliveries took place during the period of investigation, and include sales won by subject imports during the period of investigation for future delivery. Although production, delivery and payment will not occur until a later date, these sales represent business effectively foreclosed to the domestic industry by virtue of transactions in the period of investigation. Subject imports won on average about half of the SWUs in contracts that were newly negotiated or renegotiated during the period of investigation. As a result, estimated market share for subject imports is estimated to climb to over 40 percent by 2002.⁹⁹ Thus, the state of USEC's current "order book" for future deliveries was substantially impacted by subject producers' sales activities during the period of investigation.

USEC's financial condition also deteriorated over the period under investigation. Its operating income before other charges, on the basis of its U.S. production operations, declined from *** percent in fiscal 1999 to *** percent in fiscal 2000, and to *** percent in fiscal 2001.¹⁰⁰ USEC's falling profits were mainly the result of a combination of lower domestic sales volumes and lower unit values on those domestic sales.¹⁰¹ By taking market share and depressing prices, subject imports contributed to USEC's worsening financial performance over the period of investigation.¹⁰²

It is undisputed that imports from Russia have displaced a certain amount of USEC's domestic production and sales, and that this has negatively impacted USEC's domestic operations, for example, by increasing the company's average unit production costs. However, the presence of this large volume of imports from Russia does not detract from the fact that underpriced subject imports increased significantly over the period of investigation, to the point where they captured almost *** of the domestic market by the end of the period. Thus, USEC's lower U.S. sales and production were, in significant part, also due to the subject imports.

⁹⁶ USEC's capacity utilization rates were *** percent in 1998, *** percent in 2000, *** percent in 2001, *** percent in interim 2000, and *** percent in interim 2001. CR/PR at Table III-2.

⁹⁷ The number of USEC's production related workers declined from *** in 1998, to *** in 1999, and to *** in 2000. There was also a decline from *** in interim 2000 to *** in interim 2001. CR/PR at Table III-5.

⁹⁸ USEC announced the decision to close its Portsmouth plant in June 2000. The plant ceased production operations in May 2001. The shutting of the Portsmouth plant occurred too late in the period of investigation to have much effect on our data.

⁹⁹ See Staff Worksheet #1, Table 2.

¹⁰⁰ CR/PR at Table VI-3.

¹⁰¹ CR/PR at Tables VI-3 and VI-4.

¹⁰² The company's spending on research and development fell sharply, from \$106 million in 1999, to \$11 million in both 2000 and 2001. CR/PR at Table VI-7. This decline in R&D spending was mainly due to the cessation of spending on AVLIS, an alternative enrichment process being developed by USEC. USEC's decision to stop research on AVLIS appears to have been more for technical reasons than for reasons relating to the effects of subject imports. Respondents' Prehearing Brief at Exh. B, pp. 1-2.

During the period of investigation, *** of USEC's shipments of its U.S. production were exported.¹⁰³ This fact attenuates the impact of subject imports on USEC's overall domestic operations, since the imports can have no effect on USEC's (domestically-produced) exports. Nevertheless, we find that enough of USEC's production has been directed to the U.S. market to enable us to conclude that subject imports had a significant negative impact on the company's U.S. production operations. Despite the strength of USEC's export sales, which grew in volume over the period of investigation and fell *** in unit value, the harm to USEC's domestic sales was severe enough to cut by *** USEC's operating profits on its U.S. production operations (export and domestic sales combined).¹⁰⁴

In sum, the record shows there have been significant increases in the volume and market share of the subject imports, and that the subject imports undersold the domestic merchandise and have had a significant depressing effect on domestic prices. The domestic industry's declining market share and lower prices in the U.S. market led to financial declines and a deterioration in the overall condition of the domestic industry during the period of investigation. Accordingly, we find that the subject imports are having a significant adverse impact on the domestic industry.

CONCLUSION

For the foregoing reasons, we determine that an industry in the United States is materially injured by reason of imports of low enriched uranium from France, Germany, the Netherlands, and the United Kingdom that are subsidized and imports of low enriched uranium from France that are sold in the United States at less than fair value.

¹⁰³ See CR/PR at Table III-3 (*** percent on average from 1998 to 2000).

¹⁰⁴ See CR/PR at Tables III-3 and VI-3. Moreover, by depressing USEC's domestic sales, imports played a role in reducing the ratio of U.S. shipments to total shipments.

**SEPARATE VIEWS OF COMMISSIONER LYNN M. BRAGG
REGARDING THREAT OF MATERIAL INJURY**

Investigations Nos. 701-TA-409-412 and 731-TA-909 (Final)

**LOW ENRICHED URANIUM FROM FRANCE, GERMANY,
THE NETHERLANDS, AND THE UNITED KINGDOM**

For the reasons set forth below, I determine that the domestic low enriched uranium (“LEU”) industry is threatened with material injury by reason of subject imports from France, Germany, the Netherlands, and the United Kingdom that have been found by Commerce to be subsidized and/or sold in the United States at less than fair value.¹

I note that I join my colleagues’ discussion with respect to the definitions of the domestic like product and domestic industry, cumulation, and the conditions of competition that are distinctive to the domestic industry.

I. No Material Injury by Reason of Subject Imports

For the reasons discussed below, I determine that the domestic industry is not materially injured by reason of subject imports from France, Germany, the Netherlands, and the United Kingdom that have been found by Commerce to be subsidized and/or sold in the United States at less than fair value.

The record in these final phase investigations indicates that from 1998 through interim (January-June) 2001 subject imports increased their share of apparent U.S. consumption while unit values for enrichment and EUP transactions in the U.S. market (including subject imports and the domestic like product) declined and domestic industry performance deteriorated.² The record also indicates that during this period the volume and market share of non-subject imports increased while unit values for these products declined.³ Importantly, the importer of record for most of these non-subject imports was USEC, the sole domestic producer of LEU.⁴ This is a particularly important factor in my injury analysis because, as discussed below, the record indicates that the domestic industry’s declining performance over the period of investigation was, in part, attributable to USEC’s increasing reliance on non-subject Russian imports to supply USEC’s LEU sales in the U.S. market. Given the prominent role of non-subject Russian imports in the U.S. market during the period of investigation and the influence of such imports on LEU prices, as well as USEC’s pricing behavior in the spot market, I am unable to conclude that the domestic industry is materially injured by reason of subject imports. I do find, however, that the record indicates that subject imports are beginning to cause performance problems for the domestic industry and that such adverse influences will grow in the imminent future. Accordingly, I find that the domestic industry is threatened with material injury by reason of subject imports.

¹ Subject imports from France, Germany, the Netherlands, and the United Kingdom have been found by Commerce to be subsidized. Subject imports from France have been found by Commerce to be sold at less than fair value.

² CR and PR at Table C-1.

³ CR and PR at Table C-1.

⁴ CR and PR at IV-2.

A. Volume

The volume data indicate that subject imports' share of apparent U.S. consumption increased from *** percent in 1998 to *** percent in 2000, and from *** percent in interim 2000 to *** percent in interim 2001. In contrast, domestic producers' share fell from *** percent in 1998 to *** percent in 2000, and fell even further between the interim periods to *** percent in interim 2001. In this context, it must be recognized that non-subject Russian imports increased from *** percent in 1998 to *** percent in 2000, and then to *** percent in interim 2001. The record therefore indicates that the domestic producer lost market share to both subject and non-subject imports and that non-subject imports (mostly Russian) accounted for a large percentage of that lost market share.⁵

Viewed in isolation, the increase in the volume of subject imports would appear to be significant. However, given the prominent and increasing role of non-subject Russian imports in the U.S. market over the period of investigation as well as my conclusions below regarding negative price effects and adverse impact by reason of subject imports, I find that the volume of subject imports is not now significant.

B. Price

Although the price data were reported in several formats, in my view, the most probative price data on the record are those data reported for long-term contracts newly negotiated during the period of investigation and USEC's data reported for renegotiated contracts during the period of investigation.⁶ I also found the evidence regarding spot market sales to be useful in performing my assessment of negative price effects.

With respect to the reported bid data, I did not find such data particularly useful given the subjective, company-specific nature of how most LEU purchasers select suppliers.⁷ I also found the quarterly weighted average price data for subject imports of limited probative value.⁸ As noted in the Commission Report, the existence of long-term contracts of differing contract periods, differences in

⁵ CR and PR at Table C-1.

⁶ I find USEC's data reported for renegotiated contracts probative because, in my view, the record indicates that USEC's pricing for renegotiated contracts was influenced by prevailing market prices and conditions (including the growing volume of subject and non-subject imports). Hearing Tr. at 260-264 (Cunningham). In this context, the record indicates that the prices USEC received for contracts renegotiated during the period of investigation *** below the prices it received for contracts newly negotiated during the period and often lower than prices received by subject foreign producers for their newly negotiated contracts--corroborating purchasers' view that USEC's pricing behavior was partly to blame for declining LEU prices during the period of investigation. CR at V-12-14, PR at V-9-10, CR and PR at Tables V-9a and V-9b.

⁷ Although not all LEU purchasers use evaluated pricing to select LEU suppliers, most LEU purchasers do rely upon subjective, company-specific pricing factors in selecting LEU suppliers. CR and PR at App. E. I find that the bid data, although not probative for price comparisons, do indicate that price is an important factor in purchasing decisions. CR and PR at App. E.

⁸ CR at V-21, PR at V-14. Such data are, however, probative for price trends of the domestic like product. See supra n.6.

contract volumes, and a myriad of contract terms/considerations make it difficult to draw reliable conclusions regarding price trends and comparisons from such data.⁹

Nonetheless, the data regarding long-term contracts newly negotiated during the period of investigation do evidence some underselling by subject imports during the period of investigation.¹⁰ However, given that the domestic like product is priced in-line with USEC's non-subject Russian imports, it is unclear from the record as to whether subject imports are underselling the domestic like product, non-subject imports, or both.¹¹ The price analysis is further clouded by the fact that aggressive LEU sales by USEC in the spot market during the period mid-1998 to mid-2000 resulted in falling spot market prices and, in turn, influenced long-term contract prices negotiated or renegotiated during this period.¹²

Accordingly, although there is some evidence that subject imports were adversely impacting prices for the domestic like product during the period of investigation, the record does not sufficiently establish that such price effects are, at present, significant. Importantly, there is a sufficient basis to conclude that subject imports nonetheless garnered a growing number of long-term contracts by underselling the domestic like product. As deliveries under these contracts grow, so too will the adverse effects on USEC's prices and performance.

C. Impact

Nearly every indicia of the performance of the domestic industry trended lower over the period of investigation.¹³ Upon review of the record in these proceedings, I find that these declines are primarily attributable to USEC's increasing reliance on non-subject imports rather than reflecting the adverse impact of subject imports. As a result of having to sell increasing volumes of Russian non-subject imports under the Russian HEU agreement, USEC was forced to close one of its two U.S. production facilities, thereby reducing domestic production.¹⁴ In addition, the record indicates that USEC increasingly utilized non-subject Russian imports to fill orders in the U.S. market as it shifted sales of the domestic like product to export markets.¹⁵ Although the record also suggests that USEC's domestic production was adversely impacted by increasing volumes of subject imports, given the predominant role of non-subject imports in USEC's domestic performance I am unable to conclude that during the period of investigation subject imports had a significant adverse impact on USEC, particularly given my above discussion regarding negative price effects and volume trends for both subject and non-subject imports.

Accordingly, I find that there is an insufficient basis on the record to conclude that the domestic industry is presently materially injured by reason of subject imports.

⁹ CR at V-20, PR at V-13-14.

¹⁰ CR and PR at Table 9a.

¹¹ I recognize that the weighted average quarterly data would appear to indicate that subject imports undersold the domestic like product. CR and PR at Tables V-1-5. However, as noted earlier, I find such data to be of limited probative value.

¹² CR at V-7 n.13, V-9 n.15, V-11 n.26, and V-12-15; PR at V-6 nn.13 and 15, V-8 n.26, and V-9-11.

¹³ CR and PR at Table C-1.

¹⁴ Lower domestic production, in turn, resulted in higher unit operating costs for USEC. See CR and PR at Tables C-1 and C-4.

¹⁵ CR and PR at Table C-1.

II. Threat of Material Injury by Reason of Subject Imports

I find that the same analysis which justifies cumulation of all subject imports for purposes of the Commission's assessment of present material injury applies equally to the assessment of a threat of material injury. In this regard, I place particular importance on the significant degree of fungibility among imports from all subject countries and between subject imports and the domestic like product.¹⁶ In addition, upon review of the entire period of investigation, I found similar volume and pricing trends among all subject countries.¹⁷ Accordingly, I exercise my discretion to cumulate all subject imports in analyzing whether there is a threat of material injury.

In considering the statutory threat factors, I have taken into account the current state of the industry and conditions of competition distinctive to the domestic LEU industry. Based upon an evaluation of these relevant statutory factors, I find that an industry in the United States is threatened with material injury by reason of subject imports from France, Germany, the Netherlands, and the United Kingdom that have been found by Commerce to be subsidized and/or sold in the United States at less than fair value.

The record indicates that the volume of subject imports will continue to increase steadily in the short-term as subject imports enter the United States under long-term contracts negotiated during the period of investigation.¹⁸ In addition, the record indicates that subject foreign producers possess some inventory which could be directed to the United States in the imminent future.¹⁹ With respect to product shifting, given that subject foreign producers' LEU facilities are solely devoted to the production of LEU, these producers have no ability to shift from the production of other products to the production of LEU. However, the record does indicate that subject foreign producers currently retain some excess capacity as well as the ability to incrementally expand production capacity.²⁰

As discussed earlier, the record provides some indication that subject imports undersold the domestic like product during the period of investigation and that this underselling resulted in subject import market share gains at the expense of the domestic like product.²¹ In many instances, prices for subject foreign producers' long-term contracts negotiated during the period of investigation are scheduled to decline in the future as subject import volumes grow.²² Therefore, subject imports will have significant negative price effects in the imminent future as additional long-term contracts are either renegotiated or newly negotiated.²³ As a result of these negative price effects, the domestic industry's operating

¹⁶ CR at II-34, PR at II-21-23.

¹⁷ CR and PR at Tables IV-1, V-2-5, and V-9a.

¹⁸ CR and PR at Tables V-9a, VII-1-5.

¹⁹ CR and PR at Tables VII-1-4.

²⁰ CR and PR at VII-1-9, PR at VII-1-5.

²¹ Diversity of supply is one reasonable explanation for subject imports' increasing share of the U.S. market both during the period of investigation and in the near term. However, diversity of supply does not completely explain the expected continued growth in subject imports' share of the U.S. market in the imminent future.

²² I note respondents' arguments that the volume of non-subject Russian imports will grow in the future. Although the volume of non-subject imports ***. Letter from William H. Timbers, Jr. (Jan. 15, 2001). In contrast, the volume of subject imports is ***. CR and PR at Tables VII-1-4.

²³ Although I find that prices for contracts negotiated during the period of investigation were affected by USEC's
(continued...)

performance will continue to decline and the industry's ability to invest in facility maintenance and the development of new technologies, an essential component of industry health, will be significantly impaired. Accordingly, I find that the domestic industry is threatened with material injury by reason of subject imports from France, Germany, the Netherlands, and the United Kingdom that have been found by Commerce to be subsidized and/or sold in the United States at less than fair value.²⁴

III. Conclusion

Given the uncertainties regarding negative price effects and adverse impact by reason of subject imports, I find that the record does not provide a sufficient basis to conclude that the domestic industry is presently materially injured by reason of subject imports. However, based primarily upon an expected continued increase in the volume of subject imports priced below the domestic like product, current excess capacity and inventories of subject merchandise in the subject countries, and the current performance difficulties of the domestic industry, I find that the domestic industry is threatened with material injury by reason of subject imports from France, Germany, the Netherlands, and the United Kingdom that have been found by Commerce to be subsidized and/or sold in the United States at less than fair value.

²³ (...continued)

own sales into the spot market, subject imports nonetheless gained some market share in a price competitive environment. In this context, while the extent of subject imports' adverse price effects on the domestic like product during the period of investigation is unclear, the record does indicate that prices for a substantial volume of subject imports will be below prices for the domestic like product in the near term and result in significant negative price effects on the domestic like product and a significant adverse impact on the domestic industry's performance. CR and PR at Table 9a (focusing on price comparisons for years 2003 and 2004).

²⁴ I note that I considered both the evidence and parties' arguments regarding the nature of the subsidies at issue in performing my analysis in these investigations.