

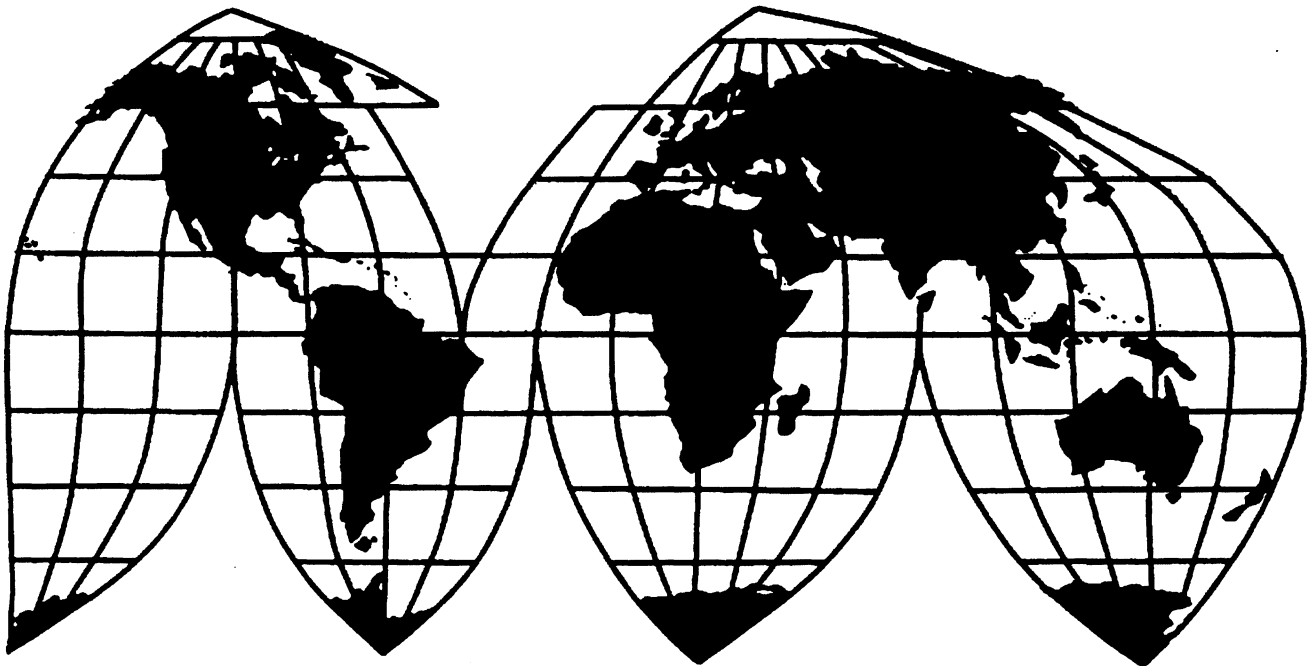
Tin- and Chromium-Coated Steel Sheet From Japan (Views on Remand)

Investigation No. 731-TA-860 (Final) (Second Remand)

Publication 3674

February 2004

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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Director of Operations

Staff assigned:

Laurent deWinter, Office of the General Counsel
Neal Reynolds, Office of the General Counsel
Catherine DeFilippo, Office of Economics
Douglas Corkran, Office of Investigations

Address all communications to
Secretary to the Commission
United States International Trade Commission
Washington, DC 20436

U.S. International Trade Commission

Washington, DC 20436

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Table number and title	Description of information contained in table
<i>DATA TABLES DISPLAYED IN TEXT OF DETERMINATION</i>	
Table Second Remand 1: Weighted average U.S. and Japanese prices and margins of underselling, 1997-2000	Table Second Remand 1 presents annual <i>weighted-average</i> unit price or <i>weighted-average</i> discount rate data for both subject imports and domestic merchandise. It also sets forth, for each purchaser, an annual weighted-average underselling or overselling margin. It is largely a consolidation of Tables TCCSS-2 and TCCSS-3, which were attached to the Commission's First Remand Determination. Second Remand Table 1 differs from those prior tables in that: (1) it consolidates data for *** into single lines for each of those purchasers; and (2) it uses revised and consolidated data for ***.
Table Second Remand 2: Simple average U.S. and Japanese prices and margin of underselling, 1997-2000	Table Second Remand 2 presents <i>simple average</i> unit prices or <i>simple average</i> discount rate data reported by each purchaser for subject and domestic merchandise. It also sets forth, for each purchaser, an annual corresponding underselling or overselling margin. It is largely the same as Table V-16, which was used in the original determination and was attached to the first remand determination. It differs from prior Table V-16 in that: (1) it consolidates data for *** into single lines for each of those purchasers; (2) it uses revised and consolidated data for ***; and (3) it corrects the margins reported for those purchasers that reported data on the basis of discount rates.
Table Second Remand 3: Bid Comparisons: Number of Japanese final bids and (total volume awarded in short tons), 1997-2000	Table Second Remand 3 shows the relative level of Japanese bids vis-a-vis U.S. bids. Each Japanese supplier's bid is compared to U.S. producers' bids; each bid is placed in the appropriate column (e.g., "Below all U.S. bids", "Within the range of all bids", etc.) along with the total quantity awarded based on the Japanese bid. This table is largely the same as the "Bid Comparisons" table that was on page 10 of the first remand determination. It differs in that: (1) it uses revised and consolidated data for ***; and (2) it consolidates data for *** into single lines for each of those purchasers.
Table Second Remand 4: Weighted-average non-subject and Japanese prices and margins of underselling, 1997-2000	Table Second Remand 4 shows the weighted average nonsubject and subject Japanese unit prices or discount rates. It also shows applicable margins of underselling or overselling. Table Second Remand 4 is largely a consolidation of the data in Tables TCCSS-5 and TCCSS-6, which were attached to the Commission's first remand determination. Table Second Remand 4 differs from those prior tables in that: (1) it uses revised and consolidated *** data; (2) it consolidates data for *** into single lines for each of those purchasers and (3) it reverses the order of the columns for nonsubject and subject imports. The latter change was made for presentation purposes only, so that Table Second Remand 4 corresponds to Table Second Remand 5.

Table number and title	Description of information contained in table
Table Second Remand 5: Bid Comparisons: Number of nonsubject final bids, 1997-2000	Table Second Remand 5 shows the relative level of nonsubject bids vis-a-vis Japanese bids. Each nonsubject supplier's bid is compared to Japanese producers' bids; each bid is placed in the appropriate column (e.g., "Below all Japanese bids", "Within the range of all bids", etc.). This table is largely the same as the "Bid Comparisons" table on page 46 of the first remand determination. It differs in that: (1) it uses revised and consolidated data for ***; and (2) it consolidates data for *** into single lines for each of those purchasers.
<i>DATA TABLES ATTACHED TO DETERMINATION:</i>	
Revised Table TCCSS-1: Firm-specific U.S. and Japanese final bid and volume data, 1997-2000	Revised Table TCCSS-1 displays for each responding purchaser the range of final bids submitted by U.S. and Japanese suppliers, and the volumes purchased from U.S. and Japanese suppliers, by year. It is identical to Table TCCSS-1 attached to the first remand determination, except that it uses revised *** data.
Revised Table V-9: TCCSS: ***'s purchasing history, 1997- 2000	Revised Table V-9 displays the bid pricing data submitted to the Commission by ***. It revises Table V-9 that was found at page V-19 of the staff report. It differs from the original Table V-9 in that it includes data for tin plate (drawn and ironed) and chromium coated steel.
Revised Tables II-1 and II-2 for ***: U.S. purchaser, quantities, and average unit values of tin-chromium-coated steel sheet, 1997-99	Revised Tables II-1 and II-2 display amended data regarding purchases by *** only. Regarding ***, the revision corrects the omission of ***'s purchase data from Table II-1 on page II-7 of the staff report. Regarding ***, the revision shifts its data ***, *** data were not previously shown on Tables II-1 or II-2. The data on Tables II-1 and II-2 for the remaining purchasers are unaffected by these changes.

VIEWS OF THE COMMISSION ON SECOND REMAND

By order dated December 4, 2003, the U.S. Court of International Trade directed the Commission to comply with the mandate of the U.S. Court of Appeals for the Federal Circuit set forth in the Federal Circuit's decision, *Nippon Steel Corporation v. International Trade Commission* ("Nippon III").¹ In that opinion, which issued on October 3, 2003, the Federal Circuit instructed the Court of International Trade to vacate its earlier decision in *Nippon Steel* ("Nippon II").² In *Nippon II*, the Court instructed the Commission to vacate its affirmative final antidumping determination in *Tin- and Chromium-Coated Steel Sheet from Japan*, Investigation No. 731-TA-860 (Final) (Remand) and to enter a negative final determination in its stead.³ The Federal Circuit also ordered the Court to remand the determination back to the Commission for further analysis and explanation.⁴ The Federal Circuit further instructed the Commission to "attend to all the points made by the Court of International Trade" in its decision in this proceeding, "especially those of the second opinion which the Commission has not yet had an opportunity to address."⁵

After consideration of the Federal Circuit's decision in *Nippon III* and the Court of International Trade's previous two decisions in this appeal, the Commission determines that an industry in the United States is materially injured by reason of subject imports of tin- and chromium-coated steel sheet (TCCSS) from Japan that the Department of Commerce found to be sold in the United States at less than fair value ("LTFV").^{6 7} As directed by the Federal Circuit, the Commission addresses below in detail the concerns of the Court of International Trade that were raised in its prior decisions in this appeal.

BACKGROUND

The procedural history of this case is complicated and the Commission's analyses of the issues arising in its prior determinations have been lengthy and complex. Accordingly, we briefly summarize below the procedural history of this appeal and provide a succinct discussion of the issues addressed in each Commission or Court opinion issued during this process.

¹ Ct. Nos. 03-1018 & 03-1019, October 3, 2003.

² Slip Op. 02-86 (August 9, 2002) ("*Nippon I*").

³ *Nippon II* at 43-44.

⁴ *Nippon III* at 2.

⁵ *Nippon III* at 5.

⁶ Chairman Deanna Tanner Okun, Vice Chairman Jennifer A. Hillman, Commissioner Marcia E. Miller, and Commissioner Charlotte R. Lane join in the majority views. Commissioner Lane adopts by reference the two prior determinations of the Commission.

⁷ Commissioners Stephen Koplan and Daniel Pearson dissenting. Commissioner Koplan reaffirms his original dissenting views, finding that an industry in the United States is not materially injured or threatened with material injury by reason of subject imports of tin- and chromium-coated steel sheet from Japan that the Department of Commerce found to be sold in the United States at less than fair value. See Dissenting Views of Chairman Stephen Koplan, *Tin- and Chromium-Coated Steel Sheet from Japan*, Investigation No. 731-TA-860 (Final), Publication 3337 (Aug. 2000) at 21. Commissioner Pearson dissents, finding that an industry in the United States is not materially injured or threatened with material injury. Commissioner Pearson did not participate in either the original vote or the vote on the first remand. He adopts as his own the views in Sections I and II of the Commission's Original Determination and also adopts as his own the dissenting Views of Commissioner Koplan.

A. The Commission's Original Determination.

In August 2000, the Commission determined that an industry in the United States was materially injured by reason of subject imports of tin- and chromium-coated steel sheet ("tin mill products" or "TCCSS") from Japan that were found to be sold in the United States at less than fair value.⁸ The Commission found that the volume of the subject tin mill products, and the increases in their volume, had grown rapidly over the period of investigation,⁹ that there had been significant underselling by the subject imports during the period, that subject imports depressed domestic prices and prevented domestic price increases during the period,¹⁰ and that the subject imports had a significant adverse impact on the domestic industry, whose condition deteriorated considerably during the period as import volumes grew.¹¹

In its determination, the Commission specifically took into account several conditions of competition when performing its analysis of pricing in the market. In particular, the Commission found that demand was stable in the market,¹² domestic and imported tin mill products were used interchangeably,¹³ the market was characterized by the annual negotiation of supply contracts that established price and target quantities for the upcoming year, there was a high degree of price sensitivity in the market,¹⁴ as well as a relatively small number of sellers and buyers in the market,¹⁵ and nonsubject imports of tin mill products were a "significant competitive factor in the market."¹⁶

With these considerations in mind, the Commission found that there was significant price underselling by the imported merchandise and that the subject imports depressed and suppressed prices to a significant degree during the period.¹⁷ Because the market was characterized by the negotiation of annual contracts setting prices for a year, the Commission analyzed detailed annual bid data provided by purchasers.¹⁸ On the basis of those data, the Commission found that purchasers generally paid declining prices to domestic producers during the period of investigation, that the frequency and the magnitude of underselling by subject merchandise increased dramatically over the period of investigation, and that the underselling correlated with the decline in domestic pricing during the period.¹⁹ The Commission also noted that documentary evidence on the record showed that aggressive pricing by importers of Japanese

⁸ *Tin- and Chromium-Coated Steel Sheet from Japan*, Investigation No. 731-TA-860 (Final), Publication 3337 (Aug. 2000) ("Original Determination"). Hereinafter all cites to our Original Determination are to the Confidential Views of the Commission.

⁹ Original Determination at 12-13.

¹⁰ Original Determination at 14-23.

¹¹ Original Determination at 23-27.

¹² Original Determination at 7-8.

¹³ Original Determination at 8.

¹⁴ Original Determination at 8 & 14.

¹⁵ Original Determination at 9.

¹⁶ Original Determination at 10.

¹⁷ Original Determination at 14-23.

¹⁸ Although the Commission noted that the annual U.S. Steel list price used as the basis for negotiations in the market increased slightly between 1997 and 1998, the Commission found that the list price did not increase in 1999 and the increased discounts offered by the suppliers in 1998 more than offset the increase in the list price in 1998. Original Determination at 15.

¹⁹ Original Determination at 15-16.

TCCSS had been used by some purchasers during price negotiations with the domestic suppliers and that Japanese supply was recognized as an important factor affecting U.S. prices.²⁰

B. The Court of International Trade's Decision in Nippon I

On September 26, 2000, the Japanese respondents appealed the Commission's affirmative determination to the Court of International Trade ("Court").²¹ After receiving extensive briefing and argument on the issues addressed by the Commission in its Original Determination, the Court issued its opinion on December 31, 2001. In that opinion, the Court affirmed the Commission's finding of significant volumes but remanded the Commission's pricing and impact analysis for a "more complete analysis."²² After identifying a number of aspects of the Commission's decision that required additional analysis, the Court directed the Commission to:

- reconsider its underselling analysis to account for discrepancies between the way in which the pricing data was reported;
- explain the Commission's methodology for making price comparisons for underselling;
- indicate the basis for calculating the yearly average margin of underselling and for concluding that such margins are significant;
- reassess its conclusions with respect to a correlation between subject import competition and domestic prices;
- reevaluate its price sensitivity finding in light of evidence in the record; and
- indicate the data and context upon which the Commission based its lost sales findings.²³

The Court also directed the Commission to reexamine its causation analysis by taking into account the role of non-price factors in purchasing decisions and the role of nonsubject imports in the market.²⁴

²⁰ Original Determination at 16.

²¹ See Summons filed in United States Court of International Trade by Plaintiffs (September 26, 2000).

²² *Nippon Steel Corp. v. United States*, 182 F. Supp 2d 1330 (Ct. Int'l Trade 2001). Throughout the remainder of this second remand determination, we cite to the confidential Slip Opinion of the Court (Slip Op 01-154, December 31, 2001) as "*Nippon I*".

²³ *Nippon I* at 48.

²⁴ *Nippon I* at 35-47.

C. The Commission's First Remand Determination

In March 2002, the Commission issued its First Remand Determination to the Court.²⁵ In its determination, the Commission reexamined the record in detail and provided an extensive discussion of the issues raised by the Court in *Nippon I*. In response to the Court's concerns, the Commission explained why it had used bid price data as the basis for its pricing analysis rather than quarterly pricing data.²⁶ The Commission also explained why it had been necessary to present purchaser pricing data using different reporting bases and why it was reasonable to rely on such data, as presented, for its underselling analysis.²⁷ The Commission also compiled a new series of price comparison charts to perform additional analysis of the pricing impact of the subject imports, again concluding that there was significant underselling and that subject import pricing had had a significant depressing and suppressing effect on domestic pricing.

The Commission also explained that subject underselling margins, though small, were all within the range that purchasers had reported as being likely to cause them to shift between suppliers,²⁸ and that this underselling was not explained by the existence of a delivery time price premium enjoyed by the domestic industry.²⁹ The Commission also reaffirmed its finding that the market was price sensitive, noting that the record indicated that purchase decisions were heavily focused on price and that purchasers appeared to place great weight on price differentials of as little as 1.07 percent.³⁰

In addition, the Commission found that the record evidence relating to purchaser pricing and purchase volumes did not indicate that there was not a causal link between the subject imports and the industry's declines.³¹ The Commission explained why it believed that pricing, rather than the industry's supposed quality and delivery problems, had been the primary cause of the increased volumes of subject merchandise in 1998 and 1999.³² Finally, the Commission re-examined the role of nonsubject imports in the market and found that they were not so significant a cause of injury to the industry that the subject imports could not be said to be materially injuring the industry.³³

D. The Court of International Trade's Decision in Nippon II

After further briefing by the parties, the Court issued its second decision on August 9, 2002.³⁴ In that decision, the Court vacated the Commission's affirmative injury determination and directed the Commission to enter a negative determination.³⁵ As grounds for the decision, the Court asserted that the Commission had failed to "cite any evidence that can sustain" its conclusion that the subject imports

²⁵ Views of the Commission on Remand, *Tin- and Chromium-Coated Steel Sheet from Japan*, Investigation No. 731-TA-860 (Final) (March 2002) ("First Remand Determination").

²⁶ First Remand Determination at 3-6.

²⁷ First Remand Determination at 7-8.

²⁸ First Remand Determination at 11-13.

²⁹ First Remand Determination at 13-14.

³⁰ First Remand Determination at 14-16.

³¹ First Remand Determination at 23-26.

³² First Remand Determination at 30-40.

³³ First Remand Determination at 40-46.

³⁴ *Nippon Steel Corp. v. United States*, 223 F. Supp 2d 1349 (Ct. Int'l Trade 2002). Throughout the remainder of this determination, we refer to the confidential Slip Opinion of the Court (Slip Op 02-86) as "*Nippon II*".

³⁵ *Nippon II* at 43-44.

caused material injury to the domestic tin mill industry.³⁶ In particular, the Court stated that the Commission failed to follow its instruction to compile its pricing data in a consistent manner,³⁷ failed to explain why it analyzed only a subset of the record pricing data, and failed to take into account explanatory information provided by purchasers suggesting that quality and service, rather than price, were their primary reasons for shifting sales to the subject imports.³⁸

The Court also stated that the Commission failed to address specific pricing patterns for individual purchasers that were inconsistent with its finding of subject price effects, and did not adequately address the extent to which there was a premium paid for the domestic merchandise because of its superior lead-time characteristics.³⁹ The Court also found that the Commission failed to take into account relevant factors, such as quality and service, when assessing the price sensitivity of the tin mill market⁴⁰ and did not address the fact that domestic and import price negotiations are conducted on separate tracks.⁴¹

Finally, the Court stated that the Commission failed to respond adequately to the Court's concerns that the predominant reason for the harm being suffered by the industry were the quality and service problems it experienced during the period of investigation, as well as the impact of nonsubject imports on domestic pricing.⁴²

E. The Court of Appeals for the Federal Circuit's Decision in Nippon III

On October 11, 2002, the Commission appealed the Court's decision in *Nippon II* to the Federal Circuit. On October 3, 2003, the Federal Circuit issued an opinion and order vacating the Court's decision in *Nippon II* and directing the Court to remand the determination to the Commission for further explanation and analysis.⁴³

The Federal Circuit noted that the case record includes "two long and detailed opinions by the four person Commission majority and two exceptionally thorough and incisive opinions by the Court of International Trade," each of which described and analyzed the "voluminous and complex evidence in the Commission record."⁴⁴ The Federal Circuit stated that the Commission and the Court disagree about the "degree to which the purchaser testimony on the reasons for increased imports of the subject imports was undercut by subsequently produced documents."⁴⁵ The Federal Circuit noted, however, that "it is ultimately irrelevant to our decision whether the Commission or the Court of International Trade did better at drawing the most reasonable inferences from the economic documents as compared to testimonial assertions."⁴⁶ Instead, the panel stated, "[u]nder the statute only the Commission may find

³⁶ *Nippon II* at 4.

³⁷ *Nippon II* at 4.

³⁸ *Nippon II* at 4.

³⁹ *Nippon II* at 5.

⁴⁰ *Nippon II* at 5.

⁴¹ *Nippon II* at 5.

⁴² *Nippon II* at 4.

⁴³ *Nippon III* at 5.

⁴⁴ *Nippon III* at 3.

⁴⁵ *Nippon III* at 3.

⁴⁶ *Nippon III* at 4.

the facts and ultimately determine injury – subject, of course, to Court of International Trade review under the substantial evidence standard.”⁴⁷

In the Federal Circuit’s view, the Court went “beyond its statutorily assigned role to ‘review’” to the extent that it engaged in finding facts, determined witness credibility, and interposed its own determinations on causation and material injury itself.⁴⁸ Because the Court abused its discretion in this regard, the Federal Circuit ordered it to remand the determination to the Commission for further proceedings. However, because of the “multiplicity, specificity, and cogency” of the Court’s critiques of the Commission’s First Remand Determination, the Federal Circuit stated that the Commission would on remand “attend to all the points made by the Court of International Trade, especially those of [*Nippon II*] which the Commission has not yet had the opportunity to address.”⁴⁹

THE COMMISSION’S ANALYSIS

In accordance with the orders of the Court and the Federal Circuit, we address below all the points made by the Court of International Trade, especially those of *Nippon II*, which we have not yet had the opportunity to address in this proceeding. We note that, in doing so, we have attempted, to the fullest extent possible, to provide additional explanation for each of the points raised by the Court in *Nippon II*, and have discussed each of these points in the order in which they occur in the Court’s opinion.

We incorporate in this Second Remand Determination our two prior opinions in this proceeding: our Original Determination and our First Remand Determination. As the Federal Circuit noted in *Nippon III*, those two determinations were “long and detailed” and were based on an extensive evidentiary record.⁵⁰ As a result, we have tried not to reiterate or incorporate below all of our findings on a particular issue or matter, except insofar as is necessary to address the Court’s concerns as they were outlined in *Nippon II*. However, we note that, on occasion, we have reiterated certain aspects of our prior analysis where we felt that it was necessary to fully articulate our thinking on a particular matter. Accordingly, we address below each of the issues raised by the Court in *Nippon II* concerning our compilation and analysis of pricing data, our findings on underselling and price suppression and depression, and our determination that subject imports caused material injury to the domestic industry.

We therefore turn first to the Court’s analysis relating to our assessment of the effects of subject imports on domestic prices, which is set forth at pages 7 through 32 of *Nippon II*.⁵¹

I. The Effect of Subject Imports on Domestic Prices

A. Methodology for Making Price Comparisons

1. *Selection and Compilation of Price Comparison Data*

In its original determination, the Commission performed its pricing analysis by relying on bid comparison tables for the individual purchasers in the tin mill market.⁵² These data had, however, been reported by purchasers on different methodological bases and were, therefore, difficult to reconcile in a

⁴⁷ *Nippon III* at 4.

⁴⁸ *Nippon III* at 5.

⁴⁹ *Nippon III* at 5.

⁵⁰ *Nippon III* at 3.

⁵¹ We note that, because of the length and detail of the Court’s discussion of various issues in *Nippon II*, we have used the same headings contained in the Court’s opinion in *Nippon II*.

⁵² Original Determination at 14-15.

meaningful manner.⁵³ In *Nippon I*, the Court therefore directed the Commission on remand to “present its pricing comparison data in a reasonably consistent manner with respect to purchaser and product grouping, as well as the expression of prices bid and paid.”⁵⁴ On remand, the Commission explained to the Court that it was unable to report the pricing data on a consolidated and uniform basis because of the inconsistency in reporting methodologies and because of possible product mix issues.⁵⁵

In *Nippon II*, the Court found the Commission had not complied with its instructions to “explain the selection and compilation of data on underselling” or to “indicate the criteria for its decision to limit its underselling analysis to particular data.”⁵⁶ The Court stated that the Commission did not adequately explain, or could not explain, its decision to keep a particular purchaser’s pricing in “disaggregated form” for its separate facilities and products.⁵⁷ The Court also criticized the Commission for not explaining why it limited its analysis to a “pool of comparisons” which included only “those instances in which sales were ultimately made from both Japanese and U.S. suppliers,” rather than using all bids, including those where “purchases were made only from suppliers from one of the countries.”⁵⁸ Finally, the Court stated that, on remand, the Commission inappropriately relied solely on underselling in one year, 1999, to support its findings of price suppression and depression.⁵⁹

In light of the Court’s concerns as expressed in *Nippon II*, we have again reviewed the record evidence on underselling, as well as the methodology we used to perform our underselling analysis in our original and remand determinations. We first note that, in our view, the underselling analysis in our prior two determinations did not focus solely on the incidence of underselling for one year, 1999, as the Court believes. On the contrary, in our determinations, we focused our examination of underselling on the manner in which the incidence, levels, and margins of underselling by the subject imports changed over the entire period of investigation.⁶⁰ For example, in our original determination, we noted that, in our view, the bid comparison data obtained in the investigation showed that “the frequency and magnitude of underselling by subject merchandise increased dramatically over the period of investigation,”⁶¹ and specifically described in our analysis the manner in which the number of Japanese bids and the margins of underselling increased from year to year during the period of investigation.⁶²

Similarly, when using recompiled underselling data in our First Remand Determination, our analysis focused on changes in the incidence and margins of underselling over the period of investigation as well, specifically noting that the recompiled bid data showed an increased level of Japanese underselling between 1997 and 1999 and that, when examined on a customer-specific level, the

⁵³ First Remand Determination at 7; CR at V-9, PR at V-6.

⁵⁴ *Nippon II* at 8.

⁵⁵ First Remand Determination at 7-9.

⁵⁶ *Nippon II* at 12.

⁵⁷ *Nippon II* at 11.

⁵⁸ *Nippon II* at 11.

⁵⁹ *Nippon II* at 12.

⁶⁰ See, e.g., Original Determination at 15-16; First Remand Determination at 9-12.

⁶¹ Original Determination at 15-16.

⁶² “Coinciding with this declining trend in pricing, the frequency and the magnitude of underselling by subject merchandise increased dramatically over the period of investigation. In 1997, four Japanese bids out of thirteen undersold the domestic producers’ bids. In 1998, seven out of sixteen bids undersold domestic bids. By 1999 that number had risen to 21 out of 25 bids. Compounding this trend was the significant increase in the magnitude of the underselling. In 1997 Japanese bids were generally not underselling domestic bids. In 1998 Japanese bids undersold domestic bids by 0.70 percent on average and by 1999, when subject import volume was greatest, the magnitude of underselling had risen to 5.77 percent on average.” Original Determination at 16.

underselling margins of the subject imports generally increased throughout the period.⁶³ While it may be true that the underselling analysis in our First Remand Determination did emphasize the significant increase in underselling patterns in 1999, the emphasis on that year does not mean that we failed to consider the underselling levels in 1997 and 1998.⁶⁴ In other words, when considered as a whole, the entire body of our underselling analysis in this proceeding was intended to indicate that the underselling levels that existed in 1997 and 1998 were a significant aspect of our finding that the subject imports pricing patterns during the period affected both the prices and volumes of the domestic industry during the period.

Second, we have considered the Court's concern expressed in *Nippon II* that the Commission "narrow[ed] the pool of comparisons to only those instances in which sales were ultimately made from both Japanese and U.S. suppliers" and did not include "instances in which bids were received from both U.S. and Japanese producers yet purchases ultimately were made only from suppliers from one of the countries." We would like to correct what is, in our view, a reasonable misunderstanding by the Court of the manner in which we analyzed underselling. In our previous determinations, we did, in fact, include in our underselling analysis all final bids in which there was a subject and domestic bid offered to a purchaser, even when a sale was not made to the subject or domestic bidder.⁶⁵ In this regard, we note that the Commission included the data for all these final bids in company-specific bid tabulations in part V of the Staff Report.⁶⁶ As a result, data for these bids were included in the Commission's tabulations of the pricing data in Table V-16 (which displays prices for all purchasers and underselling margins and was attached to our remand views) and on page V-22 of the Staff Report (which shows instances in which subject import bids were above, below, or within the range of U.S. bids).⁶⁷ Thus, the Commission did analyze price competition for subject and domestic bids even on those bids in which sales were not awarded to subject or domestic producers.

We believe this issue arises because, in conducting its remand, the Commission misunderstood the Court's instructions in *Nippon I*. To understand the issue, it is helpful to review the type of pricing data collected by the Commission. The vast majority of the pricing data collected from purchasers in our original investigation was final bid price data.⁶⁸ Nearly all of the final bid price data reported were instances in which the purchaser awarded the supplier some volume of sales. Of all of the final U.S. and Japanese bids, only about 7 percent were awarded no volume.⁶⁹ Only 3 purchasers – *** – reported

⁶³ First Remand Determination at 9-10.

⁶⁴ In this regard, for example, we note that we still believe that the underselling analysis set forth in our original First Remand Determination does show that there was an increase in the incidence and levels of underselling for both 1998 and 1999. We have not indicated that the analysis set forth in that determination was unreliable or that it was not one manner of appropriately assessing changes in underselling rates throughout the period, nor do we view the Court's decisions as indicating that the underselling data in that original determination was unreliable. *Nippon I* at 18-22.

⁶⁵ It is understandable that the Court believed that the Commission did not consider the unsuccessful bids, as it thought that counsel for the Commission, at oral argument during the *Nippon I* proceedings, had stated that the Commission had done so in its Original Determination. We regret any misunderstanding this may have caused on the part of the Court, and our failure to clarify the matter on remand.

⁶⁶ CR and PR at Table V-1 through V-13.

⁶⁷ For example, the tabulation (CR at V-22, PR at V-8) included two bids submitted by Japanese producer *** in 1998 and 1999 as instances of "bids within the range of the domestic producers," even though the Japanese producer did not win any sales volumes from *** as a result of those bids. CR and PR at Table V-1.

⁶⁸ See CR V-9 to V-22, PR at V-6 to V-8, and CR and PR at Tables V-1 to V-13.

⁶⁹ Calculated from CR and PR at Tables V-1 through V-13, including revisions to Table V-9 (out of 358 observations, 26 final bids resulted in no final volume during the period 1997-2000).

initial bids as well as final bids.⁷⁰ As discussed above, the Commission used data in its original determination that included *all* the final bid price data, including those bids that were not awarded volume.

On remand, the Commission sought to respond to the points raised by the Court in *Nippon I*. The Commission focused on the Court's reference to the Commission's failure to explain why it had "based its underselling calculations solely on the number of individual bids from purchasers that purchased from both Japanese and domestic suppliers in a particular year, irrespective of volume."⁷¹ In response to the Court's apparent criticism of the fact that the Commission's analysis was performed "irrespective of volume", the Commission revised its price tabulations on remand to include references to the volume of sales won by the various suppliers based on particular bids. The Commission calculated underselling margins that were weighted according to the volumes associated with particular bids.⁷² The Commission also produced a tabulation that included the volumes awarded to Japanese suppliers based on bids that were above, below, or within the range of U.S. bids.⁷³

While we believe that these volume-related tabulations are appropriate and meaningful, it is now clear from *Nippon II* that the Commission in its Remand Determination misunderstood the thrust of the Court's concerns with its use of the price data. The Court has made clear that its "principal concern" pertains to the Commission's decision "to narrow the pool of comparisons to only those instances in which sales were ultimately made from both Japanese and U.S. suppliers." As a result, in this determination we have considered (as we did in our original determination) price data that include all the final bids, including those few bids that did not result in a supplier being awarded volume. These data are set out in Table Second Remand 2, *infra*.

We have noted the Court's concern that the Commission's use only of bids that were awarded volume may be "unprecedented" in cases involving bid data. It is correct that in a bid context the Commission typically does consider losing bids.⁷⁴ However, the Commission does not generally seek to calculate an *underselling margin* using those bids. When the Commission calculates underselling margins it typically does so on a weighted-average basis.⁷⁵ Weight-averaging is a longstanding Commission practice that gives greater prominence to higher-volume sales in calculating margins. Weighted-average calculations require, however, that prices have some associated volume, and therefore could not include unsuccessful bids that were not awarded any volume. Thus, in assessing underselling margins, we have relied primarily on weighted average prices for domestic and subject imported products, which are set out in Table Second Remand 1, *infra*. We have also relied on data that show the number of Japanese bids that were higher, lower, or within the range of U.S. bids, and the volumes

⁷⁰ CR and PR at Tables V-1 through V-13.

⁷¹ *Nippon I* at 19.

⁷² Remand Determination, Tables TCCSS-2 and TCCSS-3.

⁷³ Remand Determination at 10.

⁷⁴ *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany and Japan*, Inv. Nos. 731-TA-736-737 (Final), USITC Pub. 2988 at 30-31 (Aug. 1996).

⁷⁵ See e.g., *Certain Hot-Rolled Steel Products from Japan*, Inv. No. 731-TA-807, USITC Pub. 3202 (June 1999) (Final), at 14-6; *Non-Malleable Cast Iron Pipe Fittings from China*, Inv. No. 731-TA-990, USITC Pub. No. 3586 (March 2003) (Final) at 12-13; *Ball Bearings from China*, Inv. No. 731-TA-989, USITC Pub. No. 3593 (April 2003) (Final) at 14-15; *Lawn and Garden Steel Fence Posts from China*, Inv. No. 731-TA-1010, USITC Pub. No. 3598 (June 2003) (Final) at 12-13.

associated with those bids. Those data include the unsuccessful bids, and are set out in Table Second Remand 3, *infra*.⁷⁶

Before discussing those data, we address several other issues pertaining to how those data are presented. The first is the Court's concern over the Commission's segregation of the pricing data provided by ***. We believe that we did try to provide the Court with a detailed, accurate, and reasonable explanation of the reasons why we kept this company's data in dis-aggregated form in our underselling compilations.⁷⁷ As the Court itself notes in *Nippon II*⁷⁸ and as we noted above, the Commission explained on remand that it was reluctant to aggregate the pricing data reported by *** because the "company's data were based on average unit values . . . , rather than discount rates," thus indicating that consolidation of this data into single annual price figures might risk masking price differences based on product mix or geographical considerations." The Commission also noted that the company reported its data on the basis of a different fiscal year than other purchasers.⁷⁹ Thus, while the Court may believe that our decision not to consolidate ***'s data "is not adequately explained or cannot be explained," we would simply note that the Commission was, in good faith, trying to provide the Court with a full explanation of its reasons for not consolidating the data.

However, after reviewing the Court's discussion of this issue in both *Nippon I* and *Nippon II* more closely, we now recognize that the Court asked us to provide the aggregated *** data to help the Court facilitate its review process, rather than because the Court necessarily felt that the aggregated data would provide better or more specific insight into the role of subject imports in the bidding process for ***.⁸⁰ Therefore, in this proceeding we have attempted to comply with the Court's wishes by calculating a single aggregated unit price for all of ***'s facilities and products. We then included that data in the two tables set forth below which show price comparisons for all purchasers during the period of investigation.⁸¹

The first table, Table Second Remand 1, sets forth annual weighted-average unit price or discount rate data for both subject imports and domestic merchandise during each year of the period of investigation. It also sets forth, for each purchaser, an annual weighted-average underselling or

⁷⁶ Unlike the final bid data, we believe that the initial bid data should be given little weight, because they pertain to only 3 purchasers and even for those purchasers were superseded by the final bids. For the sake of completeness, we have also considered these initial bids. For ***, the data show the following: ***. For ***, the data show ***. *** only purchased ***. Calculated from CR and PR Tables V-4a-4c, V-5, and V-10. We do not find that these data materially alter the overall picture on underselling revealed by the final bids.

⁷⁷ First Remand Determination at 9.

⁷⁸ *Nippon II* at 10-11.

⁷⁹ First Remand Determination at 9. In this regard, we would add that, in our view, aggregating ***'s data might lose the specificity of that sales data, which aided our examination of the specifics of the bidding process in detail for that purchaser. We would also note that in the remand determination we observed that the *** data, considered separately, revealed a pattern of increased instances of underselling over the period examined. This was similar to the pattern shown by the data pertinent to the rest of the purchasers. Remand Determination at 9-10. Thus it is not clear that the issue of whether the *** data are treated separately or as part of aggregate industry data has any substantive effect. Remand Determination at 9-10.

⁸⁰ See *Nippon I* at 22; *Nippon II* at 8 & 10-11.

⁸¹ We note that, in *Nippon I*, the Court also expressed a desire that the Commission prepare its pricing and underselling data by converting all discount rates or unit prices reported by purchasers to a single consistent basis (that is, to present all pricing data on a unit price or discount rate basis.) *Nippon I* at 18, n.18; see also *Nippon II* at 9 (section on standardization of pricing data). In *Nippon II*, the Court noted that Nippon had not challenged the Commission's decision not to standardize the pricing data in this way in the remand determination and the Court accordingly chose not to find that the Commission erred in this regard on remand. *Nippon II* at 9. Accordingly, the Commission has not attempted to standardize the data in this remand for purposes of its underselling analysis.

overselling margin. Table Second Remand 1 is largely a consolidation of Tables TCCSS-2 and TCCSS-3, which were used in, and attached to, the Commission's first remand determination.⁸²

Table Second Remand 1: Weighted-average U.S. and Japanese prices, by year and purchaser												
Purchaser	1997			1998			1999			2000		
	U.S. price	Japan price	Margin	U.S. price	Japan price	Margin	U.S. price	Japan price	Margin	U.S. price	Japan price	Margin
***	***	***	***	***	***	***	***	***	***	***	***	***
* * * * *												

The second table, Table Second Remand 2, sets forth simple averages of the unit price or discount rate data reported by each purchaser for subject and domestic merchandise for each year of the period. It also sets forth, for each purchaser, an annual corresponding underselling or overselling margin. Table Second Remand 2 is largely the same as Table V-16, which was used in our original determination and was attached to our first remand determination.⁸³

Table Second Remand 2: Average prices (based on simple averages) and margins of underselling, by year and purchaser												
Purchaser	1997			1998			1999			2000		
	U.S. price	Japan price	Margin	U.S. price	Japan price	Margin	U.S. price	Japan price	Margin	U.S. price	Japan price	Margin
***	***	***	***	***	***	***	***	***	***	***	***	***
* * * * *												

With regard to the foregoing tables, we would like to bring to the Court's attention a data issue pertaining to one purchaser. Specifically, when preparing this remand determination, we discovered an omission in the pricing data reported in the Staff Report for purchaser ***. The data displayed in Table V-9 of the Staff Report represent only a portion of the pricing data supplied by *** to the Commission (and released to the parties under the administrative protective order). It is not clear from the record why the full set of *** data were not included in Table V-9; no party brought this omission to the attention of the Commission. We apologize for the error. We have attached at the end of this determination a Revised Table V-9 that includes all of the *** price data, and have used the revised *** data in constructing Tables Second Remand 1, Second Remand 2, and Second Remand 3, and in revising tables V-9 and TCCSS-1 (which also are attached to the end of this Second Remand Determination). In

⁸² Table Second Remand 1 differs from those prior tables in that: (1) it consolidates data for *** into single lines for each of those purchasers; and (2) it uses revised and consolidated data for ***. A purchaser's data were consolidated by using a weighted average of the prices reported by that purchaser in a given year.

⁸³ Table Second Remand 2 differs from prior Table V-16 in that: (1) it consolidates data for *** into single lines for each of those purchasers; (2) it uses revised and consolidated data for ***; and (3) it corrects the margins reported for those purchasers that reported data on the basis of discount rates.

general, the revised data add additional volume to ***'s total purchases, but do not substantially alter the general underselling pattern shown for *** in the original Table V-9.⁸⁴

As can be seen, the underselling data in Table Second Remand 1 generally show increasing levels of underselling by the subject imports over the course of the period of investigation. For example, the record shows that subject imports first bid on ***'s sales in 1999 and immediately underbid the domestic merchandise at a level of *** percent, despite ***.⁸⁵ Moreover, the record data show that this bid resulted in the award of ***.⁸⁶ This pattern *** and resulted in the award of additional sales volumes ***.⁸⁷

Similarly, *** increased its purchases of subject imports substantially over the period in response to consistent underselling by imports.⁸⁸ For sales to ***, the subject imports undersold the domestic merchandise by *** percent in 1997, *** percent in 1998, *** percent in 1999, and *** percent in interim 2000.⁸⁹ These consistent underselling margins were correlated with the trend in ***'s purchases of subject merchandise during the period, as its contract volumes for these years ***.⁹⁰ ***'s purchases of subject imports ***, but only after the filing of the antidumping petition in October 1999.⁹¹

*** increased its bid awards for subject merchandise overall during the period as subject imports increased their underselling margins throughout the period. For ***, the underselling margins increased from *** percent in 1997 to *** percent in 1998 and then to *** percent in 1999.⁹² Although the level of the company's bid awards for subject imports ***, the company increased its bid awards for subject merchandise in 1999 by *** short tons over its 1998 levels.⁹³ This increase occurred when ***. In sum, an analysis of the underselling data reported in Table Second Remand 1 shows a general pattern of increasing instances of underselling for significant individual purchasers during the period, which was accompanied by significant increases in the volumes of the subject imports.⁹⁴ We would add that, although the specific numbers differ slightly, these same underselling and volume correlations are shown in Table Second Remand 2, which we also included above.⁹⁵

We also note that, in our remand determination, we presented information on the number of subject import bids that were above, below, or within the range of all U.S. bids, and the sales volume awarded pursuant to those bids. There, we observed that

⁸⁴ Moreover, we note that a final data issue concerns Tables II-1 and II-2 of the Staff Report which set out annual purchase volumes of the various purchasers. Specifically, the data for one purchaser (***) were not fully included in these tables in the original report, and the data for another purchaser (***) were included in the wrong years. Therefore, along with revised Table V-9, we have attached at the end of this determination Revised Tables II-1 and II-2 for those two purchasers only. The data in original Tables II-1 and II-2 is accurate for the other purchasers.

⁸⁵ Table Second Remand 1.

⁸⁶ Table Second Remand 1 (weighted average margin of underselling); Revised Table TCCSS-1 (***)

⁸⁷ Table Second Remand 1.

⁸⁸ Revised Table V-9.

⁸⁹ Table Second Remand 1.

⁹⁰ Revised Table TCCSS-1.

⁹¹ Revised Table TCCSS-1.

⁹² Table Second Remand 1.

⁹³ Revised Table TCCSS-1.

⁹⁴ Revised Table TCCSS-1.

⁹⁵ See Table Second Remand 2, which uses simple average prices to calculate underselling based on all final bids regardless of whether volume was awarded. Based on these calculations, subject imports ***.

Japanese bids were often within the range of or higher than U.S. bids in 1997 and 1998, but were generally lower than U.S. bids in 1999. The instances of lower Japanese bids in 1999 represent higher volumes of subject imports than in previous years. Particularly noteworthy are the volumes . . . associated with Japanese bids that were below all U.S. bids for 1999 for all purchasers other than *** and for 1999/2000 for ***.⁹⁶

In light of the Court's concerns over the segregation of ***'s data, we present below Table Second Remand 3, which corresponds to the table on page 10 of our remand determination, except that it: (1) incorporates the *** data into the data for the rest of the industry; and (2) reflects the corrected *** data. We have consolidated the *** data to avoid its possible over-representation in the aggregate data.⁹⁷

Table Second Remand 3: Bid Comparisons-Number of Japanese final bids and (total volume of final bids in short tons), 1997-2000					
Year	Below all U.S. bids	Within the range of all U.S. bids	Above all U.S. bids	No comparable final U.S. bid	Initial Japanese bid but no final Japanese bid
All purchasers					
1997	2 (17,552)	6 (79,788)	0 (0)	2 (13,535)	1 (0)
1998	4 (99,950)	5 (33,635)	0 (0)	2 (12,510)	4 (0)
1999	12 (224,068)	3 (6,385)	0 (0)	2 (10,800)	1 (0)
2000	3 (97,258)	2 (12,125)	0 (0)	0 (0)	2 (0)
Total	21 (438,828)	16 (131,933)	0 (0)	6 (36,845)	8 (0)
Source: Compiled from CR and PR at Tables V-1 through V-13; comparable to tabulation appearing at CR at V-22. Data do not include two final Japanese bids for which volume was "not available."					

Table Second Remand 3 shows a pattern regarding the number of bids and sales volume that is generally consistent with the table on page 10 of our first remand determination. In 1997, most Japanese bids were within the range of the U.S. bids. In 1998, the Japanese bids for which there were competing U.S. bids are fairly evenly split between instances in which the Japanese bids (a) are below all U.S. bids and (b) within the range of all U.S. bids, with a smaller number of bids for which there were no comparable final U.S. bids. For 1999, approximately 70 percent of the Japanese bids (12 of 17) were below all U.S. bids.

In terms of the sales volume awarded to Japanese suppliers (in parentheses in Table 3), in 1997, over 70 percent of the Japanese volume was awarded to Japanese bids that were within the range of all U.S. bids. In 1998, this ratio shifted so that over 2/3 of the overall volume awarded to Japanese suppliers

⁹⁶ Remand Determination at 9-10.

⁹⁷ For each supplier (U.S. or Japanese), we have taken a simple average of its bids to *** in a given year. We have used this average as if it were that producer's single "bid" in that year. We then compared the "bid" of each Japanese supplier to the "bid" of each domestic producer and determined whether the Japanese bid was above, below, or within the range of the domestic bids. We believe that this type of consolidation is somewhat artificial but have done so in light of the Court's concern that ***'s data not be over-represented or segregated from the industry-wide data. We note that concerns over over-representation arise only with respect to the number of bids, and not with respect to the volume of sales won by Japanese suppliers.

resulted from Japanese bids that were below all U.S. bids. In 1999, over 90 percent of Japanese volume was the result of bids that were below all U.S. bids.⁹⁸

Thus, for 1997 to 1999 as a whole, Table 3 shows that a substantial majority of the volume won by Japanese producers was the result of Japanese bids that were below all comparable U.S. bids. It also shows that, in 1999, there was a large increase in the volume awarded to Japanese suppliers, and a corresponding large increase in the share of that volume that resulted from lowest-priced Japanese bids. We find that this information supports the conclusion that the frequency of Japanese underbidding was significant, and that the underbidding had a significant effect on sales volumes in the market.

Finally, we note that the record indicates this increased underselling by the subject merchandise had serious adverse effects on domestic pricing during the period. The record shows, and Nippon has not contested, that prices for the domestic merchandise and the subject imports have declined over the period of investigation, on an aggregate level, as well as with respect to the data reported by the individual purchasers, as set forth above. While there are variations from these trends,⁹⁹ the general downward trends in both subject and domestic pricing during the period and the increase in the incidence of underselling by imports indicates that the subject imports have played a significant role in the declines in the industry's overall pricing level during the period.

Moreover, we note that the record indicates that the subject imports have also suppressed domestic prices to a significant degree during the period of investigation. In this regard, we note that the industry's overall cost of goods sold increased significantly in relation to its net sales values throughout the period, growing from 96.4 percent of its sales revenues in 1997 to 97.8 percent in 1998 and then to 101.3 percent in 1999.¹⁰⁰ This trend was consistent across the industry, with six of the seven domestic producers reporting that their cost of goods sold increased as a percentage of net sales during the period.¹⁰¹ The increase in this ratio was caused primarily by the fact that the unit prices of the industry's net sales declined by \$31 per short ton during the period, at a rate that outstripped changes in the industry's unit costs.¹⁰² Moreover, the record shows that the industry's profitability levels declined consistently during this period, falling from an operating loss margin of 0.9 percent in 1997, to 3.0 percent in 1998, and to 6.5 percent in 1999.¹⁰³ Although the industry's operating margin improved to a loss of 1.9 percent in interim 2000, this occurred after the filing of the antidumping petition in October 1999, and continued to represent greater losses relative to sales than in 1997.¹⁰⁴

Given the foregoing, it is clear that the industry was experiencing substantial declines in its overall profitability levels because of this cost-price squeeze, which was in turn due to competitive price

⁹⁸ For 2000, 3 of the 5 bids were below all U.S. bids, and just under 90 percent of the Japanese volume was awarded based on those lowest-priced bids. We give the 2000 data less weight in our analysis. The number of bids and volume reported for 2000 were below the figures for every year but 1997. Several purchasers did not report volume data for 2000. Only first quarter 2000 is included in the period of investigation.

⁹⁹ For example, ***'s weighted average unit price for domestic merchandise ***, despite the fact that subject import pricing ***. Table Second Remand 1. However, ***'s prices ***, as subject imports continue to undersell the purchaser's domestic merchandise. Similarly, the price paid by the purchaser *** for domestic merchandise declined by *** per ton in 1998, despite the fact that its subject import prices increased by *** per ton in that year, overselling the domestic merchandise by *** percent. However, the domestic and subject prices both exhibit significant declines in 1999, as subject imports resumed underselling the domestic merchandise by *** percent. Table Second Remand 1.

¹⁰⁰ CR and PR Table VI-1.

¹⁰¹ CR and PR Table VI-3.

¹⁰² CR and PR Table VI-1.

¹⁰³ CR and PR Table VI-3.

¹⁰⁴ CR and PR Table VI-1.

pressures in the market, including those from subject imports.¹⁰⁵ We also add that, to the extent Nippon alleges that members of the domestic industry were able to increase their prices during the period in the face of subject import underselling for certain purchasers (such as *** or ***), the record data relating to the existence of a cost-price squeeze indicates that any such price increases were not sufficient to offset any corresponding changes in the industry's costs of goods sold.

In sum, we again find that the increased frequency of underselling by the subject imports over the period of investigation was significant. As noted above, the record suggests that this increased frequency of underselling was correlated with increases in the volumes of subject imports purchased during the period and that price competition from imports caused, in significant part, the depression and suppression of domestic prices.

2. Margins of Underselling

In *Nippon I*, the Court directed the Commission to examine whether the margins of underselling were significant in light of comments made by purchasers during the investigation indicating that the margins were the consequence of non-price considerations, including such factors as the domestic industry's lead-time advantage.¹⁰⁶ On remand, the Commission assessed the importance of non-price factors to purchasers in light of information showing that individual purchasers shifted volumes from domestic to Japanese sources, particularly in 1999, as the frequency and magnitude of underselling increased.¹⁰⁷ The Commission noted that the margins of underselling exhibited by the subject imports were generally "near or at the ranges" reported by producers as being "likely to influence the purchasers to change suppliers," indicating that it was the margin of underselling, rather than non-price factors that caused the increases in subject volumes during the period.¹⁰⁸

In *Nippon II*, the Court found that the Commission failed to discuss adequately whether the record data indicated that the underselling margins were significant.¹⁰⁹ The Court stated that, when assessing the significance of these margins, the Commission "ignored explanatory information provided by purchasers that indicated why these underselling margins were not significant, such as ***'s statement that it selected suppliers based on quality, service, and price."¹¹⁰ The Court also found that the Commission had not assessed whether "purchaser measurements of determinative price differentials are actually borne out by the purchasing history" of certain purchasers.¹¹¹ Finally, the Court stated that the record data showing that purchasers were likely to shift volumes to domestic products due to relatively small changes in subject prices was "likely" the result of the wording of the purchaser questionnaire,

¹⁰⁵ The Commission staff conducted a variance analysis for the seven U.S. producers during the original investigation. A variance analysis provides an assessment of changes in profitability as related to changes in pricing, costs, and volume. Between 1997 and 1999, negative operating results worsened significantly for the domestic industry. The domestic industry's 1997 operating loss of approximately \$21 million increased to an operating loss of approximately \$132 million in 1999. The variance analysis indicates that the largest portion of this increased operating loss was an unfavorable price variance of nearly \$112 million between 1997 and 1999. CR and PR at Table VI-1 (operating income) and Table VI-4 (variance analysis).

¹⁰⁶ *Nippon I* at 21.

¹⁰⁷ First Remand Determination at 11.

¹⁰⁸ On remand, the Commission specifically compared the actual underselling margins for the six largest purchasers to the margins they reported would be likely to cause them to shift away from the subject to the domestic merchandise. First Remand Determination at 12.

¹⁰⁹ *Nippon II* at 14.

¹¹⁰ *Nippon II* at 14.

¹¹¹ *Nippon II* at 15.

because the question at issue was not designed to elicit information on how much lower subject pricing would need to be to cause a shift away from the domestic merchandise.¹¹²

We have taken into account the Court's comments and again assess whether the record data indicates that purchasers shifted volumes between domestic and subject suppliers as a result of non-price factors such as quality and delivery rather than as a result of changes in subject import underselling margins.

Before analyzing the purchasing patterns and comments of individual purchasers, however, we consider the Court's concern that the Commission used an improperly worded question to obtain information about the price changes likely to induce suppliers to shift between domestic and subject import suppliers. We note that the purchaser question cited by the Court -- Question IV-8 of the Commission's questionnaire -- has been a standard question in the Commission's purchaser questionnaires. The question asks purchasers to state how much higher subject prices would need to be before the purchaser switched to another source of merchandise, including domestic merchandise.¹¹³ The Court found that, in responding to this question, purchasers would not necessarily be indicating what price changes would cause purchasers to switch from domestic merchandise to the subject merchandise, which the Court felt was the real purpose of the underselling inquiry.¹¹⁴ According to the Court, a question that asked purchasers to report how much lower import prices would have to be before the purchaser switched from the domestic product to the subject imports was a better way of eliciting this information, because it "would necessarily take into account purchasers' non-price considerations" in the purchase decision.¹¹⁵

We believe that it was reasonable for us to place some reliance on purchaser responses to Question IV-8 as a means of assessing what price changes would cause purchasers to switch between domestic and subject merchandise. We first note that the Court itself indicated in *Nippon I* that the purchaser responses to Question IV-8 would provide the Commission with a reasonable means of assessing whether the margins of underselling for particular purchasers were significant during the period.¹¹⁶ In its decision, the Court indicated that, on remand, the Commission would need to "evaluate purchaser responses regarding the amount of a price increase necessary to induce them to switch suppliers" and specifically directed us to Question IV-8 as one way of assessing this issue.¹¹⁷ Thus, we were complying with the Court's instructions when we used purchaser responses to this question to help assess the significance of the margins of subject import underselling on remand.

To address the Court's concerns in *Nippon II* over the wording of Question IV-8, we re-opened the record to obtain additional information.¹¹⁸ We asked major purchasers of tin mill products to provide us with information as to whether the purchaser was willing to pay more for one source of tin mill products than the other, the reasons for any such willingness, and the specific premium the purchaser was

¹¹² *Nippon II* at 15.

¹¹³ *Nippon II* at 15-16.

¹¹⁴ *Nippon II* at 15-16.

¹¹⁵ *Nippon II* at 15-16.

¹¹⁶ *Nippon I* at 22.

¹¹⁷ *Nippon II* at 27. Moreover, we note that in *Acciai Speciali Terni v. United States*, 19 CIT 1051 (1995) the Court held for the Commission to use a question that was nearly identical to Question IV-8 in its analysis as a means of assessing the importance of price differentials between subject and domestic merchandise on purchase decisions in the market. In *Acciai* the Court found that purchaser responses indicating that a five percent differential was likely to cause them to shift from the subject imports to domestic merchandise was a reasonable means of assessing the importance of price on this decision. *Id.*

¹¹⁸ 69 Fed. Reg. 2361 (January 15, 2004).

willing to pay.¹¹⁹ None of the purchasers provided any useful information in response to this request and staff inquiries.¹²⁰ Given this lack of any substantive purchaser responses to these questions, we believe that it is reasonable for us to use the purchasers' responses to Question IV-8 as one means of assessing the margin at which purchasers are willing to switch between the domestic and subject merchandise.

We recognize that Question IV-8 could be worded more precisely. Nevertheless, we believe that it does provide us with a useful means of assessing the relative importance of price and non-price considerations in a purchaser's sourcing decision. As indicated previously, Question IV-8 asks purchasers to state how much higher subject import prices would have to be for them to switch to domestic merchandise. To answer this question properly, purchasers must take into account all of the existing factors that might distinguish domestic and subject merchandise (including quality, service and delivery differentials) that might affect their decision to source subject and domestic merchandise in the market. To put it another way, the question does, in fact, require a purchaser to assess all of the non-price factors that differentiate the subject and domestic merchandise when assessing the relative pricing levels that would affect a decision to switch from the subject merchandise to the domestic product. In our view, the factors that go into this decision are the same factors that would affect the purchaser's decision to switch from the domestic merchandise to the subject merchandise. Given this, in our view, the question does elicit information that would help the Commission assess what price differentials affect sourcing decisions in a particular market.¹²¹

With the foregoing in mind, we address below the Court's concerns that the Commission failed to address purchaser comments indicating that underselling margins were not an important part of their decision to purchase subject imports.¹²² Moreover, as the Court indicated was necessary in *Nippon II*, we also analyze "the extent to which purchaser measurements of determinative price differentials are actually borne out by the purchasing history." In this regard, we discuss below the purchasers specifically mentioned by the Court in this context in *Nippon II*.¹²³

a. ***

In its questionnaire response, *** did not provide the Commission with an estimate of the price differential that would cause it to shift purchases from the subject imports to the domestic product as a response to Question IV-8. Nonetheless, the record of this company's purchasing patterns suggest that price was an important part of its decision to source merchandise from Japan in ***. First, the record shows that ***'s first purchase of subject merchandise in *** was made at a price, *** per short ton, that

¹¹⁹ EC-BB-002 at 2. The Commission asked for contemporaneous documentary evidence regarding price premiums rather than statements by company officials based on their current recollections. This case concerns the facts pertaining to the original period of investigation, which covered the period January 1997 through March 2000. Given the passage of so much time since that original period, the Commission was concerned over the reliability of the current recollections of company purchasing officials regarding their companies' prior views on the issue of price premiums, as well as the extent to which officials with knowledge of the prior period were even still employed by these companies. We note that similar issues regarding the passage of time were raised by respondent Nippon in comments on the Commission's decision to re-open its record. See Nippon's Request for Reconsideration of Commission's Decision to Add New Facts to Record, January 20, 2004, at 2 ("It is one thing to reopen the record to gather 'hard data' from parties; it is another thing entirely to ask parties about their impressions of market conditions as they existed four years ago.") We note that respondent's request was filed before it was made aware of the Commission's decision to seek contemporaneous documentary evidence only.

¹²⁰ EC-BB-002 at 2.

¹²¹ *Nippon I* at 27.

¹²² *Nippon II* at 14.

¹²³ *Nippon II* at 15.

was *** per short ton lower than the lowest domestic final bid reported in that year by ***.¹²⁴ Moreover, *** continued to source ***.¹²⁵ Therefore, although domestic producers were able to *** , *** . In our view, the magnitude of the underselling margins supports our finding that the low price of subject imports was a significant factor in ***.

In *Nippon II*, the Court draws the Commission’s attention to ***’s comment that it selected the subject imports based on “quality performance,” not price, when assessing the importance of underselling to ***’s purchase decisions.¹²⁶ We note that, in its questionnaire response, ***.¹²⁷

However, the record also shows that *** stated in its preliminary phase questionnaire that *** officials repeatedly highlighted to *** the fact that ***.¹²⁸ Accordingly, the record contains evidence indicating that price may have been the reason for *** decision to shift volume away from *** to subject imports in 1999 and 2000, rather than ***’s or ***’s quality issues.

Moreover, the record shows that, during the period, *** qualified a domestic producer, *** , as a new supplier of tin mill products because of ***.¹²⁹ and that it sourced ***.¹³⁰ *** had ample capacity to provide *** with the volumes of merchandise *** sourced from Japan in ***.¹³¹ Given that ***,¹³² it is clear that it could supply ***.

Moreover, *** -- whose facilities are primarily in *** -- also sourced very substantial volumes of merchandise from ***.¹³³ All of these companies reported shipping tin mill products *** and each had excess capacity during ***.¹³⁴ In addition, *** did not report in its questionnaire response that any of these companies had exhibited quality, delivery, or service problems during the period.¹³⁵ We discuss these issues at greater length below in section II.A. of this determination.

Given the foregoing, we find that, even assuming that ***’s decision to reduce purchases from *** was the result of quality and delivery issues, the record does not support ***’s claim that it was necessary for the company to turn to imports of the subject merchandise to replace the products it was no longer sourcing from ***. In other words, the record suggests that *** began sourcing merchandise from Japan in *** based, in significant part, on the low pricing of subject merchandise.

b. ***

In *Nippon II*, the Court stated that the Commission failed to address Nippon’s argument that there was no correlation between subject import pricing and ***’s increased purchases of subject imports during the period, citing the fact that *** increased its purchases of domestic tin mill merchandise

¹²⁴ CR at Table V-2.

¹²⁵ CR at Table V-2.

¹²⁶ *Nippon II* at 15.

¹²⁷ See, e.g., *** Purchaser Questionnaire, Questions II-2, III-27 & III-29(b).

¹²⁸ *** Producer Questionnaire (preliminary phase), at IV-D.

¹²⁹ *** Purchaser Questionnaire, Questions III-15.

¹³⁰ CR and PR at Table V-2.

¹³¹ The record shows that *** had approximately *** short tons of available capacity in 1999 and 2000. *** Producer Questionnaire at II-11.

¹³² CR and PR at III-2, n.2.

¹³³ CR and PR at Table V-2.

¹³⁴ CR and PR at III-2, n.2; *** Producer Questionnaires at II-11.

¹³⁵ *** Purchaser Questionnaire, Questions III-15.

between 1998 and 1999, even though its underselling margins increased substantially between 1998 and 1999.¹³⁶ The Court noted that *** increased its domestic purchases, even though *** had reported that an increase of only *** percent in subject import pricing would cause it to shift purchases to the domestic merchandise.¹³⁷

We examined the evidence relating to ***'s purchasing patterns in light of the Court's conclusion. ***'s purchasing patterns are fully consistent with its statement that percentage changes of *** would cause it to shift purchases between the subject and domestic merchandise.¹³⁸ The record evidence shows that ***'s weighted average underselling margin for subject imports went from a *** percent overselling margin in FY1997¹³⁹ to an underselling margin of *** percent in FY1998.¹⁴⁰ In response to this *** percentage point change in the margin, *** purchased *** tons of tin mill steel from the domestic producers and *** tons of tin mill steel from the subject producers than in FY1997.¹⁴¹ Moreover, between FY1998 and FY1999 -- the period focused on by Nippon -- the weighted average underselling margin for *** narrowed slightly, improving from *** percent in FY1999.¹⁴² Coinciding with this *** in the underselling margin, *** changed its purchasing pattern in FY1999, buying *** more tons of steel from the domestic industry than it bought in FY1998 and *** tons less of Japanese merchandise in that year.¹⁴³ That is, *** sourced a greater percentage of its overall increase in purchases in FY1999 from the domestic industry than from the subject producers when the domestic producers closed the pricing gap in that year.

Moreover, the record shows that ***'s domestic and subject prices ***, but that its subject import prices *** at a faster rate than the domestic prices, resulting in a *** underselling margin of *** percent.¹⁴⁴ Indeed this was the *** underselling margin of the period for ***.¹⁴⁵ In addition to correlating with continued domestic price declines, these underselling margins resulted in the *** increase in subject import purchases by *** of the entire period.¹⁴⁶ *** data reported for FY2000 is especially relevant because it encompasses ***. In this respect, ***'s FY2000 data is unlike the 2000 data reported by other purchasers, which used calendar year periods.

In other words, the record evidence indicates that *** did in fact change the volumes of merchandise it was sourcing based on changes in the underselling margins of the subject imports. When there was a substantial change in the margin of underselling in FY1998, *** shifted a substantial volume of merchandise to the subject producers. However, when the domestic industry dropped its prices in FY1999 *** awarded a greater share of its business to the domestic industry. When the margins grew again in FY2000 *** again gave a greater share of its business to subject imports. In our view, the record

¹³⁶ *Nippon II* at 15, n.11

¹³⁷ *Nippon II* at 15, n.11.

¹³⁸ *** Purchaser Questionnaire, Question IV-8.

¹³⁹ ***.

¹⁴⁰ Table Second Remand 1.

¹⁴¹ Revised Table TCCSS-1.

¹⁴² Table Second Remand 1.

¹⁴³ Revised Table TCCSS-1.

¹⁴⁴ Table Second Remand 1

¹⁴⁵ Table Second Remand 1.

¹⁴⁶ Revised Table TCCSS-1. *** purchased *** tons more subject material in FY2000 than in 1999.

does therefore show a correlation between changes in the size of the subject imports' underselling margins and volumes purchased by ***, despite Nippon's arguments to the contrary.¹⁴⁷

c. ***

During the period of investigation, *** did not source any merchandise from Japan until 1999, when it purchased ***, an amount which made *** in that year.¹⁴⁸ The bid submitted by *** in that year was *** percent lower than the domestic price in that year¹⁴⁹ -- comparable to the *** margin identified by *** as the price differential that would cause it to shift sales between the subject and domestic merchandise. Moreover, until 1999, the only bid submitted by a Japanese company was a bid submitted by ***,¹⁵⁰ however, this bid was not lower than all of the domestic producers and was awarded no sales volumes.¹⁵¹ Given these purchasing patterns on the part of ***, we believe that the record indicates that ***'s decision to purchase substantial volumes of subject merchandise in 1999 was the result, in significant part, of the pricing differential between the subject and domestic merchandise.¹⁵²

However, in keeping with the Court's comments in *Nippon II*,¹⁵³ we have also considered whether the record indicates that ***'s decision to purchase subject volumes in 1999 was due to non-price factors. In this regard, we note that *** asserted that it began purchasing subject merchandise in 1999 because of a "series of delivery and quality disappointments with certain U.S. mills" in 1998 and 1999.¹⁵⁴ However, the documentary evidence on the record of this proceeding indicates that price formed an important aspect of ***'s sourcing decisions during the period, and that *** itself stated in its purchaser questionnaire that its began purchasing *** volumes of merchandise from the subject producers because it was able to obtain ***.¹⁵⁵ The record also shows that *** would have been able to source the tin mill merchandise it purchased from Japan in 1999 from a number of other domestic sources who were otherwise supplying *** with a reliable supply of quality merchandise in a timely fashion. We discuss these issues at greater length below in section II.A. of this determination. As we note there, we do not find that quality and delivery issues were the primary reasons that *** began sourcing tin mill merchandise from Japan in 1999.

d. ***

In its questionnaire, *** did not include an estimate of the price differential that would cause it to shift purchases from the subject imports to the domestic product. However, ***'s purchasing patterns were consistent with a supplier that was responding to persistent and increasing underselling by the subject imports.¹⁵⁶ In 1997, *** purchased *** tons of tin mill merchandise at a weighted-average

¹⁴⁷ We note that ***.

¹⁴⁸ CR and PR at Table V-1.

¹⁴⁹ Table Second Remand 1.

¹⁵⁰ CR and PR at Table V-1.

¹⁵¹ CR and PR at Table V-1.

¹⁵² CR and PR at Table V-1.

¹⁵³ *Nippon II* at 15.

¹⁵⁴ Hearing Tr. at 198.

¹⁵⁵ *** Purchaser Questionnaire, Response to Question II-2.

¹⁵⁶ Table Second Remand 1.

underselling margin of *** percent.¹⁵⁷ In 1998, ***'s purchases of subject imports increased to *** tons, as its weighted-average underselling margin increased *** percent.¹⁵⁸ In 1999, ***'s purchases of subject merchandise again increased, to *** tons, as the weighted-average underselling margin grew to *** percent.¹⁵⁹ Weighted average underselling margins steadily grew from *** in 1997 to *** percent in 1998, to *** percent in 1999.¹⁶⁰ Given the correlations between the persistent underselling and increasing purchases of subject imports by *** during the period, we find that ***'s purchasing history indicates that there is a correlation between these margins of underselling and its sourcing decisions.

Nonetheless, in *Nippon II*, the Court questioned the Commission's analysis of the relationship between these volume increases and import underselling because the Commission did not take into account ***'s statements that non-price factors had the most significant impact on its sourcing decisions during the period.¹⁶¹ In particular, the Court suggested that the Commission should have specifically addressed ***'s statement that the three most important factors with respect to choosing suppliers were "1) quality, 2) service, and 3) price, in that order of importance."¹⁶² We have taken ***'s statement into account, as well as other non-price factors that *** cited in its testimony before the Commission. However, as we discuss below, we do not think that ***'s statements about the role of these factors in its purchasing decisions undermine our finding that ***'s purchasing patterns suggest that underselling by imports played a role in its choice of suppliers during the period.

In this regard, we note that *** itself has admitted that price is one of the three most important factors in its purchase decision.¹⁶³ In our view, this statement by *** indicates that *** would consider subject import pricing, particularly subject import underselling, to be an important factor in its purchasing decision. Indeed, *** indicated elsewhere in its questionnaire that it made pricing an important part of its purchasing decision, noting, for example, the amount of sales awarded to individual domestic producers in any year would "increase and decrease based on quality, service and price."¹⁶⁴ Given this, we find that the record suggests that ***'s subject import purchasing decisions were based in significant part on price, despite ***'s assertions to the contrary.

Moreover, we also note that *** asserted during the investigation it increased its purchases from Japan, in part, because it chose to "drop" *** as a supplier in 1998 for "quality" reasons.¹⁶⁵ However, the record shows that *** continued to source substantial, though declining, volumes of merchandise from *** during 1999, after *** had supposedly been ***.¹⁶⁶ Thus, ***'s quality issues were not so significant that *** dropped the company as an important source of merchandise in 1999. Further, the record shows that *** reported having no quality problems with other domestic producers other than *** (who had capacity available to supply *** with its tin mill requirements).¹⁶⁷ Given this, we find that ***'s assertion that it chose to source more merchandise from Japanese producers because of their superior "quality" is not fully consistent with its other statements on the record.

¹⁵⁷ Table Second Remand 1.

¹⁵⁸ Table Second Remand 1.

¹⁵⁹ Table Second Remand 1.

¹⁶⁰ Table Second Remand 1.

¹⁶¹ *Nippon II* at 14.

¹⁶² *Nippon II* at 14.

¹⁶³ *** Purchaser Questionnaire at Question II-2.

¹⁶⁴ *** Purchaser Questionnaire at II-2; *see also Id.* at III-18 and IV-7.

¹⁶⁵ *** Purchaser Questionnaire at Question III-15.

¹⁶⁶ CR and PR at Table V-9.

¹⁶⁷ *** Questionnaire Response, Question III-15.

Moreover, *** also asserted during the investigation that the increase in its subject purchases was the result of its ***, which had a historical supply relationship with ***.¹⁶⁸ However, the record shows that *** purchased ***, which was before the ***.¹⁶⁹ Moreover, the record shows that *** increased its purchases of material from ***, which indicate the increase in its purchases was not simply the result of the acquisition, which had occurred in the prior year.¹⁷⁰ Given this, we believe that the record evidence is not fully consistent with ***'s assertions that the increase in ***'s purchases of subject imports was due to this historical relationship.

Finally, we note that *** stated that its decision to increase its purchases of subject imports during the period was also due, in part, to its inability to source certain specifications from domestic suppliers.¹⁷¹ However, as we noted in our remand determination, the record shows that the domestic producers supplied nearly ***.¹⁷² Moreover, the record indicates that, while the domestic producers did not produce certain wider products sourced by *** from the Japanese producers, *** was able to, and did, use the domestic product in place of the wider product supplied by the Japanese during the period but chose not to do so because of increased costs resulting from the use of the narrower domestic product.¹⁷³

In sum, we believe that ***'s statements about the non-price reasons for its increased purchases of subject imports during the period do not undermine our finding that the record indicates that ***'s decision to purchase increased volumes of subject merchandise was due, at least in part, to the aggressive pricing of the subject producers. We discuss these issues in more detail below in section II.A.

3. *Correlation between Subject Imports and Domestic Prices*

In *Nippon I*, the Court also found that the Commission had not adequately examined record data on purchaser pricing trends that indicated, in its view, a lack of correlation between subject import purchases and domestic price suppression and depression.¹⁷⁴ Accordingly, the Court directed the Commission to examine purchaser pricing data for individual purchasers to assess whether there was a correlation between changes in subject import competition and domestic pricing.¹⁷⁵ On remand, the Commission examined the pricing and purchase data for the three purchasers identified by the Court and found that the trends in subject and import pricing for these purchasers did not detract from its findings that there was a correlation between subject and domestic pricing during the period.¹⁷⁶

In *Nippon II*, the Court found that the Commission's analysis of the correlation between subject import pricing and these purchasers' individual pricing data did not comply with the Court's instructions

¹⁶⁸ Hearing Tr. at 211 (Owen).

¹⁶⁹ Table V-9 (revised).

¹⁷⁰ To the extent that *** supplied *** with products from ***, we note that ***'s purchases from *** grew substantially over the period as well. Revised Table V-9. Overall, *** purchased *** tons of subject merchandise in 1997, *** tons in 1998, and *** tons in 1999. Revised Table V-9.

¹⁷¹ Hearing Tr. at 200 (Owen).

¹⁷² *** Purchaser Questionnaire Response at III-31.

¹⁷³ Hearing Tr. at 201 (Owen).

¹⁷⁴ *Nippon I* at 24.

¹⁷⁵ *Nippon I* at 24-25.

¹⁷⁶ First Remand Determination at 23-27.

in *Nippon I*.¹⁷⁷ In particular, the Court stated that the Commission had failed to address, as the Court had instructed it to do, whether the large purchaser *** had paid increasing prices for its domestic merchandise, even though it increased its purchases of the subject imports between 1997 to 1999.¹⁷⁸ Moreover, the Court stated that the Commission failed to adequately explain why one purchaser was able to “secure price decreases from its domestic suppliers” during the period, despite not making any purchases of Japanese product until 1999.¹⁷⁹ Further, the Court also stated that the Commission had entirely failed to assess the pricing trends of one purchaser *** in its analysis.¹⁸⁰ Finally, the Court noted that Commission had failed to analyze adequately pricing trends for the purchaser ***, even though the Court had “clearly instruct[ed]” the Commission to address them.

In light of the Court’s concerns, we have again examined the pricing data and trends for these purchasers and have assessed whether they indicate a lack of correlation between subject and domestic pricing during the period. For the reasons discussed below, we find that the record data for these purchasers shows a correlation between import price and volume trends and domestic pricing.

a. ***

With respect to ***, we first note that the record evidence does not show that *** was paying increasing prices for domestic merchandise throughout the entire period of investigation, as was asserted by *Nippon* before the Court. Although the record shows that ***’s weighted-average price ***,¹⁸¹ the price paid by ***,¹⁸² Given this, it is not true that ***’s pricing data generally showed increasing domestic prices throughout the period.

Moreover, as we previously discussed, the record indicates that there were clear correlations between the changes in subject import underselling margins for *** during the period and changes in its volume and pricing levels during the period. For example, while it is true that *** paid a higher price for domestic merchandise in FY1998 than in 1997, the record shows that subject import ***¹⁸³ *** took advantage of this change in the underselling margin by increasing its purchases of subject imports in that year by *** tons and decreasing its purchases from the domestic producers by *** tons.¹⁸⁴

Further, in FY1999, the record shows that the domestic producers chose to compete more closely on price with the subject imports, as ***’s domestic ***.¹⁸⁵ As a result, the underselling margin for the subject imports narrowed somewhat (to a level of *** percent) and *** again shifted volumes in response to the declining differential between subject and import pricing, buying *** more tons of steel from the domestic industry than it bought in FY1998 but *** less tons of Japanese merchandise in that year.¹⁸⁶

¹⁷⁷ *Nippon II* at 19-20.

¹⁷⁸ *Nippon II* at 18.

¹⁷⁹ *Nippon II* at 18. In this regard, we note that the Court questioned whether the Commission had reasonably relied on the fact that ***’s domestic prices had been affected by nonsubject imports, noting that there was an inconsistency between this finding and its finding that subject imports had significant adverse effects on domestic prices overall. *Nippon II* at 16-20.

¹⁸⁰ *Nippon II* at 19.

¹⁸¹ Table Second Remand 1.

¹⁸² Table Second Remand 1.

¹⁸³ Table Second Remand 1.

¹⁸⁴ Revised Table TCCSS-1.

¹⁸⁵ Table Second Remand 1.

¹⁸⁶ Revised Table TCCSS-1.

Finally, the record shows that ***'s domestic and subject prices continued to *** in FY2000, but that subject import prices *** at a faster rate than the domestic prices, resulting in the *** underselling margin of the period.¹⁸⁷ This underselling margin of *** percent resulted in the *** increase in subject import purchases by *** of the entire period.¹⁸⁸

In sum, the pricing and volume trends of ***'s domestic suppliers were consistently affected by the declining prices of subject imports throughout the period, although the particular impact (i.e., a volume-based versus price-based impact) of these changes varied from year to year. Given this, we do not find that the fact that the domestic prices *** for *** in FY1998 when subject import volumes were *** undermines our finding of a correlation between subject import trends and domestic price and volume levels. On the contrary, they are fully consistent with our finding of significant price and volume effects.

b. ***

With respect to ***, the Court correctly notes that ***'s pricing data do indicate that it was able to obtain increasing price discount levels from the domestic producers (i.e., lower domestic prices) between 1997 and 1998, even though it had no apparent competing bids from subject producers.¹⁸⁹

In reviewing the record in response to the Court's instructions, we identified a significant factor that we neglected to highlight in our First Remand Determination. Specifically, *** was in a purchasing alliance with *** (and several other purchasers) during the period of the investigation.¹⁹⁰ ***, unlike ***, did report a bid from one of the subject producers in 1998.¹⁹¹ *** and the several other companies in the alliance.¹⁹² Although *** testified at the hearing that the alliance did not negotiate with foreign suppliers (except one) on behalf of its members during the period,¹⁹³ ***'s own internal documents indicate that it was aware of the ***.¹⁹⁴ Although this statement specifically references a change in pricing strategy for *** in late 1998, the statement also indicates that ***¹⁹⁵ ***.

In light of the foregoing, we find it likely that *** would have shared this subject pricing information with the members of the alliance in its 1998 negotiations and that the members of the alliance would have been able to use this information during the course of their price negotiations with domestic suppliers in 1998 and 1999.¹⁹⁶ Moreover, we note that *** and subject import prices, stating in its preliminary-phase questionnaire that *** *** for a quote."¹⁹⁷

Given the foregoing, the fact that *** was able to obtain price declines from domestic suppliers in the absence of subject import bids in 1998 does not undermine our finding that there was a correlation between subject import pricing and the declines in the prices paid by *** for domestic merchandise

¹⁸⁷ Table Second Remand 1.

¹⁸⁸ Revised Table TCCSS-1. *** purchased ***.

¹⁸⁹ Revised Table TCCSS-6 (discount rate data).

¹⁹⁰ See, e.g., Hearing Tr. at 240-241. See also, *** U.S. Producer Questionnaire (Preliminary) at IV-D.

¹⁹¹ CR and PR at Table V-1.

¹⁹² Hearing Tr. at 240-241.

¹⁹³ Hearing Tr. at 251 (Seanor).

¹⁹⁴ *** Purchaser Questionnaire at Question II-2.

¹⁹⁵ *** Purchaser Questionnaire at Question II-2.

¹⁹⁶ See e.g., *** U.S. Producer Questionnaire Response (Preliminary) at IV-D.

¹⁹⁷ *** U.S. Producer Questionnaire (preliminary phase) IV-D. Purchasers told *** that they were increasing their purchase of Japanese merchandise at the expense of *** because Japanese prices were so low.

during the period. In this regard, we note that ***'s record pricing data show that the subject import bid accepted by *** in 1999 was at a discount rate that *** higher than the weighted average domestic discount rate, thus resulting in an underselling margin ***.¹⁹⁸ Moreover, the record indicates that ***'s average domestic discount rate *** in that same year, thus resulting in a decline in domestic prices from the previous year's level. Accordingly, we find that the record evidence suggests that the domestic price declines in 1999 for *** were due, at least in part, to subject import price competition.

c. ***

The Court correctly observes that the prices paid by *** to domestic producers remained stable between 1998 and 1999 but that prices increased in the year 2000, even though subject imports continued to undersell the domestic product ***.¹⁹⁹ However, we believe that the institution of this price increase in 2000 does not evidence a lack of correlation between domestic and subject price trends in that year.

In this regard, we note that the simple occurrence of a price increase in the face of subject underbidding does not indicate that there is an absence of a causal link between subject and domestic pricing. The statute permits the Commission to find evidence of price effects if the subject imports prevent domestic price increases that would otherwise have occurred in the absence of the subject imports.²⁰⁰ Here, the record indicates that the industry was experiencing a cost-price squeeze during the period, with the ratio of its cost of goods sold to its net sales value increasing from 96.4 percent in 1997 to 101.3 percent in 1999.²⁰¹ This cost price squeeze resulted in the industry's operating margins declining from a loss of 0.9 percent in 1997 to a increased loss of 6.5 percent in 1999.²⁰² Although these margins improved in 2000 due to an improvement in the ratio of the industry's costs of goods sold to net sales values after the filing of the antidumping petition in October 1998, the industry's operating loss margins were still larger in interim 2000 than in 1997, the beginning of the period.²⁰³

Thus, even though the industry was able to raise its prices after the filing of the antidumping petition for customers like ***, the domestic industry was still unable to raise its prices to a level that covered its costs, due in substantial part to the presence of underselling by imports. Accordingly, in our view, the record indicates that the industry was suffering price suppression at the level of certain individual purchasers, such as ***, even when it was able to institute price increases for these customers on occasion. In sum, we believe that the record evidence relating to this price increase in 2000 does not indicate a lack of correlation between import and domestic pricing or profitability declines.²⁰⁴

¹⁹⁸ CR and PR at Table V-6; Table Second Remand 1.

¹⁹⁹ *Nippon II* at 19.

²⁰⁰ 19 U.S.C. §1677(7)(I).

²⁰¹ CR and PR at Table VI-1.

²⁰² CR and PR at Table VI-1.

²⁰³ CR and PR at Table VI-1.

²⁰⁴ Moreover, we note that the statute directs the Commission to assess whether any change in the volume, price effects or impact of the subject imports since the filing of the petition is related to the pendency of the investigation. 19 U.S.C. §1677(7)(I). If so, the statute provides, the Commission may reduce the weight accorded to the data for the period after the filing of the petition in making its injury determination. *Id.* We note that, in addition to the slight improvements in the industry's condition noted above, several purchaser documents on file indicate that the filing of the petition affected the volume patterns of imports. *See* February 14, 2000 Memorandum ***, January 24, 2000, Memorandum ***, December 16, 1999 Memorandum ***. Given this, we believe that the filing of the petition did impact subject pricing and volume trends in interim 2000. Accordingly, we place less weight on these data in our analysis.

d. ***

Finally, we note that the Court expected the Commission to address on remand the arguments made by Nippon that there was not a correlation between the prices paid by *** for domestic merchandise and subject import pricing trends, but that we had failed to do so.²⁰⁵ To comply with the instructions of the Court, we respond to Nippon's arguments.

In its comments on our remand determination, Nippon stated that ***'s purchase data showed a lack of correlation between subject import purchases and domestic pricing, given that *** reduced its prices during each year of the period but increased its import purchases by a "mere" *** tons.²⁰⁶ We do not find Nippon's claim to be well founded. As we noted previously, the record of ***'s purchases shows a clear correlation between import purchases and pricing and domestic price declines during the period.²⁰⁷ The record shows that *** increased its purchases of the subject merchandise during the period prior to the filing of the petition, and that the purchases were made at prices that were increasingly lower than domestic producer prices.²⁰⁸

Accordingly, we find that the record evidence relating to ***'s purchasing patterns during the period show a strong and consistent correlation between subject import pricing and volume trends and domestic pricing trends.

4. *Domestic Producers' Price Premium Due to Lead-Time Advantage*

In *Nippon I*, the Court found that the Commission failed to analyze "whether the undisputed lead-time held by the domestic industry in fact translated into an ability to maintain a price premium over imports, which may or may not account for the margin of overselling."²⁰⁹ On remand, the Commission acknowledged that domestic producers did enjoy a lead-time advantage over their Japanese competitors, and that this might be expected to "translate into a price premium for domestic producers."²¹⁰ However, the Commission added that several factors mitigated the importance of this advantage on price, noting in particular that the annual supply agreements typical of this market allowed purchasers to arrange for delivery several quarters ahead of the time when the product was necessary, thus minimizing the impact of the advantage to some degree,²¹¹ and that any premium related to the lead-time advantage would be offset by the premium that would occur as a result of the Japanese product being considered to be of higher quality than domestic merchandise.²¹² Finally, the Commission noted the record data did not indicate the existence of a price premium at the beginning of the period, noting that subject imports were within the range of domestic prices in 1997.²¹³

²⁰⁵ *Nippon II*.

²⁰⁶ Plaintiffs' Objections to the ITC's Remand Determination, p. 5.

²⁰⁷ CR and PR at Table V-9, Revised Table V-9.

²⁰⁸ From 1997 to 1999, ***'s purchases of subject imports grew steadily from *** tons to *** tons, at the same time as the weighted-average margin of underselling by subject imports grew steadily from *** percent in 1997 to *** percent in 1999. Revised Table V-9.

²⁰⁹ *Nippon I* at 21-22.

²¹⁰ First Remand Determination at 13.

²¹¹ First Remand Determination at 13.

²¹² First Remand Determination at 13.

²¹³ See, e.g., CR at V-4, 6, PR at V-3, 5.

In *Nippon II*, the Court found that the Commission had failed to address adequately whether the industry's lead-time advantage did, in fact, translate into a price premium for domestic merchandise.²¹⁴ The Court stated that the Commission's explanation of this issue was inconsistent with its findings on price sensitivity because it found that the Japanese producers' quality and on-time delivery superiority would affect their pricing when compared to the domestic merchandise, but would not affect purchasers' decisions to switch to Japanese suppliers.²¹⁵ The Court also stated that, even if the price premium related to the industry's lead-time advantage were somewhat diminished by the offsetting quality premium attached to Japanese products, the Commission had also failed to assess whether the size of the premium associated with this advantage would "eclipse the underselling margin," thus indicating that the underselling was not the reason for the switch to subject imports during the period.²¹⁶

We have again examined the evidence relating to the nature of the industry's lead-time advantage during the period to assess whether there was such a premium and whether the size of any such premium would explain the increasing margins and incidence of underselling by the subject imports. We believe the record does not support the notion that the underselling margins exhibited by the subject imports during the period of investigation are explained by the existence of a lead-time price premium.

In this regard, we first note that the record of our original investigation contained little or no evidence providing us with a method for establishing that there was a set percentage or amount that attached to the domestic industry's lead-time advantage. It is true that respondents argued that the industry had a lead-time advantage during the period and that this advantage translated into a price premium for domestic merchandise.²¹⁷ It is also true that the record showed consistent and increasing underselling by the subject imports during the last two years of the period of investigation.²¹⁸ However, nothing in the record -- including the purchasers' questionnaire responses, their testimony at the hearing, or the large number of internal documents provided by the domestic and subject merchandise to the Commission during the investigation -- provided substantial proof of a specific percentage premium that domestic producers could consistently charge over imported merchandise.²¹⁹

Accordingly, since the Court specifically indicated in *Nippon II* that the Commission should have examined whether the size of a lead-time premium, to the extent it existed, explained the subject imports' increasing underselling margins during the period,²²⁰ we reopened the record in this remand proceeding in order to obtain information regarding the existence and size of any such premium.²²¹ As discussed above, we asked major purchasers of tin mill products to explain whether they were willing pay a premium for tin mill products sourced from any particular suppliers during the period and if so, what their reasons were for doing so.²²² Moreover, we also asked these purchasers to provide an estimate of

²¹⁴ *Nippon II* at 20-21.

²¹⁵ *Nippon II* at 20.

²¹⁶ *Nippon II* at 20-21.

²¹⁷ *E.g.*, Respondents' Posthearing Brief at 48 ("Given much longer lead-times and the lack of order flexibility imported TMP must be sold at a discount relative to domestic TMP.")

²¹⁸ *See. e.g.*, Second Remand Tables 1 and 2.

²¹⁹ *See* Respondents' Posthearing Brief at Ex.13, 17, and 27; Petitioners Posthearing Brief at Ex. 20; *see also* Purchaser Questionnaires of *** at Question IV-7.

²²⁰ *Nippon II* at 20.

²²¹ 69 Fed. Reg. 3361 (Jan.15, 2004); Commission Memorandum EC-BB-002 at 1.

²²² EC-BB-002.

the premium attached to these considerations, as well.²²³ None of the purchasers we contacted were able to provide us with an informative or useful response to these questions or with documentation establishing the existence of such a premium.²²⁴ Given this, we believe that there is no evidence now on the record that establishes the existence of a particular percentage mark-up (or even a range of such mark-ups) that relates primarily to the industry's lead-time advantage.²²⁵ In our view, this indicates -- as we have previously stated -- that either the premium does not exist, or that it was offset by other important considerations in the purchase decision, such as quality and service issues.²²⁶

Moreover, we would also reiterate that the record evidence on pricing does not support the notion that the underselling margins during the period were primarily the result of this premium. As the Commission indicated in its first remand determination, the record does not indicate that there was a consistent mark-up for domestic merchandise over the subject merchandise during the period of investigation.²²⁷ For example, the record pricing data for 1997 shows that, while the subject imports undersold the domestic producers for sales to the individual purchasers in that year, the subject imports were priced at or above the domestic producers for two purchasers,²²⁸ including ***, during the period.²²⁹ However, the bid pricing data we obtained in our original investigation also shows that there was not a consistent mark-up for the domestic merchandise over the subject merchandise across all suppliers or products during the first year of the period.²³⁰ Finally, as we noted earlier, the pricing data on record establishes that the underselling margins increased consistently during the period,²³¹ thus belying the notion that there was a consistent or readily ascertainable premium associated with the industry's lead-time advantage. In our view, all of the foregoing indicates that there was not a specific, expected mark-up relating to the domestic industry's lead-time advantage during the period, as Nippon asserted in our investigation and before this Court.

Finally, we would add that purchaser testimony also suggests that any price premium related to the industry's lead-time advantage was offset by premiums associated with the Japanese product when compared to the domestic product. For example, in its questionnaire, *** reported that, during its negotiations with foreign mills, the "foreign mills, realizing the value of their unique capabilities, would negotiate for premiums to U.S. prices."²³² However, *** added that it often used the industry's own advantages, including "longer lead-times, less flexibility and associated higher inventories" to negotiate

²²³ EC-BB-002.

²²⁴ We reopened the record on the price premium issue and asked purchasers: whether they were willing to pay more for TCCSS from one source versus the other during the period examined; if yes, how much more, and for what reasons, and we requested that they supply documentation to support any claims that a price premium existed in the TCCSS market during the period examined. EC-BB-002 (Jan. 23, 2004).

²²⁵ Further, we would add that, in the absence of such estimates of the amount of this premium on record, we cannot precisely identify how such a premium, if it existed, tracked through to the subject import underselling margins, which the Court suggested was a necessary aspect of our analysis in *Nippon II*.

²²⁶ See, e.g., First Remand Determination at 13-14.

²²⁷ See, e.g., Second Remand Tables 1 and 2.

²²⁸ Second Remand Tables 1 and 2.

²²⁹ Table Second Remand 1 (***).

²³⁰ See, e.g., CR and PR Table V-4a (***).

²³¹ Second Remand Tables 1 and 2.

²³² *** Purchaser Questionnaire at VI.

to minimize those premiums.”²³³ *** testified in a similar manner at the hearing in the investigation, stating that it pays a premium for some of its foreign merchandise because a price premium “works both ways, we do have a foreign supplier that gets a premium, because they know they’re worth more.”²³⁴ Similarly, *** reported that ***.²³⁵ In other words,***’s experience confirms that any premium due to a lead-time advantage was offset by the pricing impact of other considerations, such as quality.²³⁶

Given the foregoing, we do not believe that the record indicates that the consistent and increasing underselling margins exhibited by subject imports during the last years of the period were the result of a price premium associated with the industry’s lead-time advantage. Although several purchasers asserted that there was such a premium, there is no tangible evidence on record showing the nature or size of such a premium. Moreover, even if there were such a premium, it would not explain the increasing levels and incidence of underselling by imports during 1998 and 1999, the last years of the period of investigation that were not affected by the filing of the petition. Accordingly, we do not find that the industry’s lead-time advantage explains the underselling margins we have observed in this investigation.²³⁷

B. Conditions of Competition Relating to Price Effects

1. Price Sensitivity

In our Original Determination we found the TCCSS market to be price sensitive, i.e., that price was a key factor in purchasers’ buying decisions.²³⁸ The Court in *Nippon I* found that the Commission’s price sensitivity finding was not supported by substantial evidence where it rested solely on evidence of market concentration and on price specificity used in negotiations. The Court stated that, if the Commission chose to rely on price sensitivity in its analysis, it had to assess other aspects of the market that would vitiate the importance of price in the purchase decision, including such considerations as quality or delivery time differences between the subject and domestic merchandise.²³⁹ On remand, we found that, while factors such as quality and delivery time were important factors in the purchase decision, the record also showed that price was a very significant factor in the purchase decision and that

²³³ *** Purchaser Questionnaire at VI.

²³⁴ Hearing Tr. at 232 ***.

²³⁵ *** Purchaser Questionnaire at IV-4 - IV-7.

²³⁶ We also note that the lead-time advantage of the industry and its impact on domestic pricing can be overstated. While it is true, as we noted previously, that purchasers generally rate the domestic product as being superior to the Japanese with respect to delivery time, Mr. Yurco of U.S. Can testified at the conference during the preliminary phase of the investigation that on-time delivery of TCCSS from Japan was so good that it negated any advantage domestic suppliers may have had because of shorter lead-times: “[T]he Japanese found a way to overcome the lack of a very reliable performance given the lengthy lead-time. So they as a result have actually become for the items that we buy from them more reliable than some of the domestic mills, especially Weirton Steel.” Conference Tr. at 87-88 (Yurco).

²³⁷ In this regard, we do not believe our finding that the superior quality and on-time delivery of the Japanese product would offset the domestic industry’s lead-time advantage for the purpose of setting prices in this market is inconsistent with our finding that quality and on-time delivery issues were not the primary reason for purchasers’ decisions to switch sales to the Japanese merchandise. Our point on these issues is straightforward. Because the domestic industry’s lead-time advantage was offset to a degree by the Japanese suppliers’ quality, a purchaser would use these to negotiate better prices from the respective suppliers. Moreover, because these considerations offset each other, in our view this indicates that purchasers were more likely to base their sourcing decisions, in significant part, on price, one of the three most important factors in their purchase decision.

²³⁸ Original Determination at 8.

²³⁹ *Nippon I* at 28.

non-price factors did not serve to consistently distinguish potential suppliers.²⁴⁰ We also found that, since purchasers buy their TCCSS only from qualified suppliers, non-price factors such as on-time delivery and quality are assessed during the qualification process, and that, once a supplier is qualified, negotiations revolve around price and volume.²⁴¹

In *Nippon II*, the Court found that the Commission's conclusions about price sensitivity were unsupported by substantial evidence, noting that the record indicated that non-price factors outrank the importance of price in the purchase decision.²⁴² In this regard, the Court stated, the Commission's finding of price sensitivity was particularly important in a market where the margins of subject underselling were slight.²⁴³ Finally, the Court asserted that the Commission had failed to properly interpret the role of non-price factors in the purchasers' sourcing decision after qualification, since "questions III-18 and IV-11 of the purchaser questionnaires clearly ask purchasers to rank the importance of 'lowest price' and other considerations in choosing among qualified suppliers only."²⁴⁴ According to the Court, the purchasers' responses to these questions refuted the notion that non-price factors are more important than price in qualifying a supplier and that once a supplier is qualified price becomes the important factor in annual negotiations.²⁴⁵

We have re-examined the record in light of the concerns raised by the Court. We begin our discussion of price sensitivity by noting that it is a fundamental economic principle that a market is considered price sensitive if small changes in price will induce purchasers to shift purchases from one supplier to another. Given this definition, which focuses on movements in price and volumes for a particular market, it is not the case that a market cannot be considered price sensitive if there are product differentials between the competing sources. For example, the products offered by different suppliers may differ with respect to their quality or delivery characteristics but that does not mean that the differences cannot offset one another sufficiently to cause price to become of critical importance in the purchase decision. Thus, the fact that questionnaire responses indicate that factors other than price are important to purchasers does not necessarily indicate that a market is not price sensitive. The more price sensitive the market, the greater is the ability of low-priced subject imports to impact the domestic industry's sales and prices.

As we have stated previously, in our view, the record shows that this is a market in which purchasers are likely to shift volumes because of small changes in price. In this regard, as we have previously stated, the record shows that most purchasers reported that they were likely to shift purchases from the subject merchandise to the domestic product based on price differential ranging from 2 to 6 percent. Moreover, we pointed out in our First Remand Determination purchaser documents stressing the importance of small price changes. For example, *** highlighted a significant supplier's lowering of its bid by *** percent.²⁴⁶ A *** document contrasts *** discount rate of *** percent with other suppliers'

²⁴⁰ Remand Determination at 14-15.

²⁴¹ First Remand Determination at 14-16.

²⁴² *Nippon II* at 23.

²⁴³ *Nippon II* at 23.

²⁴⁴ *Nippon II* at 22-23 (emphasis added).

²⁴⁵ *Nippon II* at 22-23.

²⁴⁶ First Remand Opinion at 16. In this regard, the record contained a number of documents showing that purchasers negotiated discount rates to the hundredths percent. See (1) Letter from *** to *** (February 19, 2000), summarizing agreement on discount rates of *** percent and *** percent from 1999 and 2000 list prices, respectively. A1120-1122 (Petitioners' Posthearing Brief at Exhibit 27); and (2) Internal *** Memorandum (from ***, dated August 6, 1998), summarizing *** proposal to increase the discount rate from *** percent to *** percent (the equivalent of a price change of *** percent). (Respondents' Posthearing Brief at Vol. IV).

larger discount rates of *** percent and higher and states that ***.²⁴⁷ The *** percentage point difference in discount rate to which *** refers is equivalent to a price difference of *** percent.²⁴⁸ Thus, the record indicates that small changes in price will induce purchasers to shift volume, reflecting the price sensitive nature of the market.

Moreover, the record shows, in our view, that there is a moderate to high degree of substitutability between the domestic and subject merchandise. In this regard, the record shows that TCCSS products produced in the United States and Japan can be used interchangeably.²⁴⁹ All domestic producers and many purchasers stated that domestic TCCSS and Japanese TCCSS are interchangeable, except for sales of certain specialty products which comprise a very small portion of the market (after taking into account the products excluded from the scope of this investigation).²⁵⁰ Further, the staff report's elasticity of substitution estimate, which measures how easily purchasers switch from U.S. product to subject merchandise (or vice versa) when prices change, indicates that relatively small changes in price would cause purchasers to switch from domestic to imported merchandise or vice versa.²⁵¹ Thus, the elasticity of substitution estimate confirms that the TCCSS market is indeed price sensitive.

We also note that purchaser questionnaire responses also revealed that TCCSS is approximately *** percent of the total cost of production of many canning operations.²⁵² This fact alone reflects how important obtaining low TCCSS prices can be to the profitability of purchasers' business operations. For most canning operations, lowering the cost of TCCSS is the most effective way to increase profit margin. *** for instance, stated that it stood to gain ***.²⁵³

Furthermore, although the Court suggests that questionnaire responses indicate that "lowest price was ranked seventh of approximately ten factors in terms of importance in decision-making," the record shows that most purchasers reported that price was one of the three most important factors in the purchase decision.²⁵⁴ In particular, there were two separate questions in the questionnaire that asked purchasers for their assessment of the importance of particular factors to their purchase decisions. Question III-18 asks purchasers to list the "three major factors generally considered in deciding from whom to purchase tin- and chromium-coated steel sheet." "Price" was identified in the top three considerations by 11 out of 15 purchasers responding to the question, more than any other factor other than quality.²⁵⁵ Thus it is clear that price is a key consideration to purchasers.

²⁴⁷ Respondents' Posthearing Brief at Vol. IV.

²⁴⁸ "Well, the facts are that they [Weirton] significantly improved their on-time performance in the fourth quarter of 1999, into the year 2000, bringing them up to a very competitive level of plus 85 percent." Hearing Tr. at (Yurco).

²⁴⁹ CR at II-6, PR at II-5.

²⁵⁰ See Purchaser Questionnaire responses at IV-3; U.S. Producer Questionnaire at IV-A-14.

²⁵¹ CR at II-17-18. The elasticity of substitution is an estimate of the percentage change in the relative amount sourced from suppliers based on a one percent change in the relative prices of the two suppliers. In this case, staff estimated a substitution elasticity of 1 to 5, meaning that a one percent change in relative prices of U.S. and Japanese product would be expected to produce a 1 to 5 percent change in the relative amount of product purchased from U.S. versus Japanese suppliers. We believe that the elasticity of substitution is at the high end of this range.

²⁵² See Purchaser Questionnaire response III-3; CR at II-5.

²⁵³ Petitioner's Posthearing Brief at Exh. 20.

²⁵⁴ *Nippon I* at 27 n.31.

²⁵⁵ CR and PR Table II-3.

The Court cites question IV-11, the other question in the questionnaire concerning purchase factors.²⁵⁶ This question asked purchasers to rate specific factors in terms of three categories (very important, somewhat important, and not important). More than half of the responding purchasers (7 of 13) rated lowest price as “very important,” with five rating lowest price as “somewhat important.”²⁵⁷ Thus most purchasers consider lowest price as very important.

It is true, as the Court indicates, that several other factors were rated as very important by more purchasers than was lowest price. However, there is a key difference in wording that may help explain the difference between purchaser responses to question III-18 (in which purchasers listed price as a “top three” purchase factor more often than any other factor other than quality) and question IV-11 (in which purchasers listed 6 other factors as being “very important” more often than lowest price). Specifically, question III-18 refers to “price” whereas question IV-11 refers to “lowest price.” It is noteworthy that “price” is the only factor in question IV-11 to use a superlative modifier such as “lowest.” For a given purchaser, while price may be a key factor, buying the absolute “lowest” priced product may not be crucial in a given instance if other attributes of the product or sales conditions are not satisfactory.²⁵⁸ One can imagine a very different set of results if one were to attach superlative modifiers to the other factors listed in question IV-11 by, for example, asking purchasers about the importance of “widest availability,” “most favorable delivery terms,” “shortest delivery time,” “largest discounts offered,” rather than simply asking about the importance of “availability,” “delivery terms,” “delivery time,” “discounts offered,” and so on.²⁵⁹ Given the wording of question IV-11, we give somewhat greater weight to the responses of purchasers to question III-18, and find that the responses lend support to the conclusion that price is a key attribute to purchasers. The responses to both questions III-18 and IV-11, even when given equal weight, indicate that price is a somewhat more important factor to purchasers than the Court’s opinion in *Nippon II* would suggest.

Still, not only did the majority of purchasers rank lowest price as very important in purchasing decisions, but also other competitive conditions revealed the importance of price in the TCCSS market. As we noted in our First Remand Determination, all parties agreed that the TCCSS market is characterized by long-term relationships established through a stringent qualification process and qualified Japanese and domestic TCCSS are highly interchangeable.²⁶⁰ Only after the potential supplier has proven that it can deliver the desired quality and quantity in a steady and reliable manner does it become “qualified” to be part of a pool of suppliers. Therefore, when a “qualified” supplier enters negotiations with a purchaser, the general quality and reliability of that supplier’s product have already been established, leaving price and volume the essential factors to be negotiated. We recognize that quality and reliability remain as factors considered by purchasers even among qualified suppliers.

The Court also found that the Commission’s finding that, once a supplier is qualified, negotiations with purchasers primarily revolve around price and volume was not supported by the evidence. The Court relies on the assertion that “questions III-18 and IV-11 of the purchaser questionnaires clearly ask purchasers to rank the importance of ‘lowest price’ and other considerations

²⁵⁶ In its Remand Determination, the Commission clearly referenced the responses to both questionnaire questions. See Remand Determination at 14, notes 41 and 42 (citing Staff Report tables II-3 and II-4). It is not clear why the Court chose not to refer to the responses to question III-18, which are tabulated in Table II-3 of the Staff Report.

²⁵⁷ CR and PR at Table II-4.

²⁵⁸ See, e.g., CR at II-10, PR at II-5 (while firms’ purchasing decisions are “sometimes” (11 instances) or “usually” (4 instances) based mainly of price – or reportedly even (1 instance) “never” based mainly on price – no firm reported that its decisions were “always” based mainly on price).

²⁵⁹ Indeed, subsequent to the case at issue, the Commission has modified its standard purchaser questionnaire to change “lowest price” to “price” in question IV-11 to eliminate the discrepancy between how price is treated vis-a-vis the other factors.

²⁶⁰ CR at II-9 - II-10; PR at II-5 - II-6; Hearing Tr. at 186 (Seanor).

in choosing among qualified suppliers only.”²⁶¹ Questions III-18 and IV-11 of the purchaser questionnaires, however, do not ask purchasers to rank the importance of lowest price and other considerations in choosing among qualified suppliers only.²⁶² Instead question II-18 asks the purchaser to rank the three most important factors “in deciding from whom to purchase your tin- and chromium-coated steel sheet.”²⁶³ This question, thus, measures the importance of certain factors in selecting suppliers. Similarly, question IV-11 only asks that factors be ranked according to importance in purchasing decisions in general. It does not require or even contemplate the assumption that the suppliers in question be qualified.

Therefore, we continue to find that the domestic market for TCCSS is price sensitive, notwithstanding the number of purchaser questionnaire responses that rate quality and on-time delivery as very important factors in purchasing decisions. Our conclusion is confirmed by evidence that minimal changes in price, often down to the hundredths of one percent, mean the difference between suppliers winning or losing contracts.

2. *Negotiating Practices*

a. Contemporaneity versus Compartmentalization

During the original investigation respondents argued that there was no temporal overlap between domestic and foreign annual contract negotiations, and thus, no competition between them. Purchasers and respondents’ witnesses testified that negotiations between domestic mills and purchasers occurred in the fall and winter of each year and that only after those negotiations were completed would purchasers begin negotiating for the remainder of their requirements with foreign mills.²⁶⁴ The Commission found, however, that there was significant overlap in the timing of domestic and foreign contract negotiations, and that Japanese prices had been used in contract negotiations with domestic suppliers to leverage lower domestic prices.²⁶⁵

In *Nippon I*, the Court found that the time overlap was of little consequence in light of respondents’ claim that negotiations were otherwise compartmentalized.²⁶⁶ The Court found persuasive “the fact that a large purchaser delayed concluding negotiations with foreign producers until it had secured a certain level of volume from domestic producers,” and evidence that foreign prices “aren’t established until negotiations with domestic mills are concluded.”²⁶⁷ On remand the Commission noted that, while prices may be set during the annual contract negotiations, volumes are not, thus indicating that purchasers can re-allocate volume to non-domestic suppliers during the term of the contract.²⁶⁸ Because the domestic producers were not likely to sue on a breach of contract, the Commission stated, import prices were able to influence prices in upcoming negotiations.²⁶⁹

In *Nippon II*, the Court held that on remand the Commission failed to address the extent to which a division of major and minor tonnage and bifurcation of price negotiation was representative of the

²⁶¹ *Nippon II* at 22-23.

²⁶² See generally, Purchaser Questionnaires at III-8 and IV-11.

²⁶³ See Purchaser Questionnaire at III-18 (emphasis added).

²⁶⁴ Hearing Tr. at 202 (Yurco).

²⁶⁵ Remand Determination at 16-17.

²⁶⁶ *Nippon I* at 29 n.32

²⁶⁷ *Nippon I* at 29 n.32

²⁶⁸ First Remand Determination at 18.

²⁶⁹ First Remand Determination at 18.

TCCSS purchaser's practices.²⁷⁰ Also, the Court stated that "although the Commission theorizes that volume can be reallocated based on lower prices of imports, the Commission fails to cite to any evidence as to whether such reallocation in fact occurred."²⁷¹ According to the Court, "The issue here is likely price effects."²⁷²

We have re-examined the issues raised by the Court and reach the following conclusions. We continue to find significant the fact that there is significant overlap in the timing of purchasers' negotiations between domestic and foreign suppliers. In addition to the documentary evidence cited in our original and remand determination, we note that three purchasers avoided any pretense of claiming that there was a time separation by observing that negotiations with domestic and foreign suppliers generally start and end during the same time frame.²⁷³ Overlap in negotiating time frame increases the likelihood that the negotiations can impact each other.

The Court cites an example of a purchaser delaying completion of negotiations with foreign suppliers until negotiations with domestic producers were completed. The record does not indicate that this is typically the case in the TCCSS industry. In addition to the purchasers cited above who acknowledge that they start and end negotiations in similar time periods, there is other concrete evidence that agreements with foreign suppliers can be and are implemented well before domestic negotiations conclude. For example, in the first quarter of 1999 the volume of imports from Japan increased substantially compared to the 1998 average quarterly rate; the lead-times for Japanese product means that the products delivered in first-quarter 1999 must have been ordered in late 1998, well prior to completion of negotiations with domestic producers.²⁷⁴

More generally, the fact that negotiations with foreign producers in some (or even many) instances may conclude subsequent to negotiations with domestic producers does not mean that the former cannot affect the latter, especially if they take place during overlapping time periods.²⁷⁵ Some purchasers claimed that negotiations with domestic producers involve price competition only with other domestic producers.²⁷⁶ However, we find that there is a fairly significant body of evidence on the record to show that prices of foreign product (including Japanese product) are used to obtain lower prices from

²⁷⁰ *Nippon II* at 24-25.

²⁷¹ *Nippon II* at 25.

²⁷² *Nippon II* at 25.

²⁷³ Purchaser Questionnaires of ***.

²⁷⁴ CR and PR at Table C-1 (first-quarter 1999 imports of nearly 85,000 tons, compared to average quarterly 1998 imports of just over 60,000 tons; the average unit value of subject imports in the first quarter of 1999 (\$603.81) was well below the average unit value during 1998 (\$638.25)); Petitioner's Posthearing Brief at exhibit 24 (each of January, February, and March 1999 imports well above monthly fourth quarter 1998 imports).

²⁷⁵ We note that during the preliminary conference Richard Sessions, the Sales Manager for Itochu International, testified that prices negotiated in one year affect negotiations of prices in the following year:

If there is one thing that I can leave with you today it is the importance and the influence of the annual contract, which is typically used in the tin-plate market here in our country. Please keep in mind that when prices are negotiated in the final quarter of each year for the following calendar year, the effects of the preceding and current years play a significant and huge role in these negotiations. Conference Tr. at 68.

²⁷⁶ We note that there was little contemporaneous documentary evidence for the assertion of some purchasers that the price deals they negotiate for subject imports are based on the prices they obtained in negotiations with domestic suppliers.

domestic producers.²⁷⁷ First, three purchasers confirmed lost revenue allegations made by ***.²⁷⁸ In other words, these purchasers indicated that the domestic producer was forced to reduce its prices to avoid losing business to lower-priced imports from Japan. If these relatively small purchasers (successfully) used subject imports to leverage lower domestic prices, it would be reasonable to conclude that larger purchasers, who are presumably more sophisticated and able to command more market power would do so.

The record indicates that they did so. *** documents from *** indicate that in negotiations it informed domestic producer *** of aggressive pricing of Japanese producers.²⁷⁹ These documents corroborate the ***. *** stated that the same *** official informed him ***.²⁸⁰ *** also recounts how a *** official informed him of ***.

At the Commission's hearing officials from Silgan and U.S. Can both testified that they interjected Japanese prices into domestic negotiations.²⁸¹ They made these statements in the context of arguing that domestic mills automatically recognize foreign bids in negotiations and refuse to compete with them. However we find that these are admissions that foreign prices were used by purchasers in domestic negotiations (despite earlier denials of this).²⁸²

In addition, domestic producers *** all reported that during the period of investigation they were forced to lower their prices to avoid losing sales to Japanese TCCSS.²⁸³ In addition, domestic producer *** reported that several purchasers informed it of lower prices of Japanese product, and that it was forced to cut prices or forego sales opportunities in response.²⁸⁴

The Court asks the Commission to address "the extent to which such a division of major tonnage and minor tonnage and bifurcation of price negotiation was representative of TCCSS purchasers' practices."²⁸⁵ We have addressed above the issue of bifurcation of price negotiation. On the issue of major versus minor tonnage, it is the case that purchasers generally purchase significantly more product from domestic producers than subject imports. There is also some evidence that purchasers may enter negotiations with an allocation in mind for their purchases of domestic versus imported product. The record indicates that purchasers carefully consider historical industry-wide price data and develop negotiation strategies encompassing all of their suppliers, domestic and foreign, before entering into

²⁷⁷ We described much of this evidence in our remand determination. Remand Determination at 19-20. It is not clear why the Court chose not to refer to this information in *Nippon II*. The Court cites only the Commission's discussion of purchasers reallocating volume among suppliers during the pendency of a contract. We no longer rely on reallocation during a contract as a basis for our determination.

²⁷⁸ CR and PR at Table V-15.

²⁷⁹ Respondents' Posthearing Brief Vol. IV, "Customer A".

²⁸⁰ Petitioner's Posthearing Brief at Exh. 20.

²⁸¹ Hearing Tr. at 203 and 234.

²⁸² Since there is no consistent price margin and Japanese prices can at times oversell the domestic product, it would be difficult, as Messrs. Riederer and Scott of Weirton Steel testified, for domestic mills to consistently recognize foreign bids in the market.

²⁸³ U.S. Producer Questionnaire response at IV-D.

²⁸⁴ *** U.S. Producer Questionnaire Response (Preliminary) at IV-D. For example, the company described how ***. In addition, the company asserted that ***).

²⁸⁵ *Nippon II* at 25.

negotiations with domestic mills.²⁸⁶ For example, ***. In that memorandum ***.²⁸⁷ In an October 1998 follow-up memorandum, ***.²⁸⁸

The mere fact that purchasers buy more domestic product than subject imports, and may begin negotiations with particular allocations in mind, does not mean that negotiations with domestic producers are sealed off from any impact from imports. This is especially so where purchasers' intended allocations would shift volume from domestic to import sources. The record shows a steady increase in subject import volume over the period examined; U.S. imports of TCCSS from Japan increased by nearly 86 percent from 1997 to 1999, and steadily gained market share at the expense of the domestic industry.²⁸⁹ Increasing allocations to import sources can itself be expected to place downward pressure on domestic prices, as domestic TCCSS producers are left to compete for a shrinking pool of sales opportunities.

In sum, we do not find that there was "compartmentalization" of purchasers' negotiations between domestic and subject import suppliers that would prevent subject imports from having negative effects on domestic prices.

b. Supply Agreements

In *Nippon I*, the Court directed the Commission to address evidence of several supply agreements in the market that contained provisions indicating that domestic producers are only "obligated to match prices with . . . other domestic producers."²⁹⁰ The Court stated that the Commission should address whether these agreements supported Nippon's "fundamental" point that negotiations with subject and domestic producers run on separate tracks according to different procedures and criteria.²⁹¹ On remand, Commission examined the role of these supply agreements in the market and found that the agreements were older agreements that were concluded prior to the significant entry of imports into the market, thus potentially explaining why the contracts would only reference domestic pricing.²⁹² Moreover, the Commission found, the existence of such contractual language in these agreements would not preclude the subject imports from having an impact on price.²⁹³

In *Nippon II*, the Court found that the Commission failed to address the two main arguments made by Nippon relating to these agreements, including its assertion that they were prevalent in the industry and its contention that the "prevalence of these agreements" shows that Weirton has a practice of calculating its pricing allowance solely based on other domestic producers' pricing levels.²⁹⁴ Accordingly, the Court found, the Commission had conceded Nippon's points.

²⁸⁶ See e.g., Memorandum from ***, dated September 4, 1998, Respondents' Posthearing Brief, Volume IV, Customer C. See *** Questionnaire ***. See also, Memorandum from ***, dated October 3, 1998, Respondents' Posthearing Brief, Volume IV, Customer C.

²⁸⁷ Memorandum from ***, dated October 3, 1998. Respondents' Posthearing Brief, Volume IV, Customer C.

²⁸⁸ Respondents' Posthearing Brief, Volume IV, Customer C. (emphasis added).

²⁸⁹ CR at Table IV-2 (U.S. imports of TCCSS from Japan increased from 181,287 short tons in 1997 to 336,961 short tons in 1999); CR at Table IV-4 (subject import market share increased from *** percent in 1997 to *** percent in 1999).

²⁹⁰ *Nippon I* at 29.

²⁹¹ *Nippon I* at 29.

²⁹² First Remand Determination at 22-23.

²⁹³ First Remand Determination at 22-23.

²⁹⁴ *Nippon II* at 26.

In light of the Court's comments, we have re-examined the evidence on record relating to the prevalence of supply agreements and their impact on the domestic producer's negotiating process and pricing. In particular, we have examined the record evidence relating to the four supply documents that Nippon asserts contain contractual language requiring the domestic supplier to meet only other domestic supplier pricing, including ***.²⁹⁵ We have also examined the record evidence relating to other supply documents in the market, which include several documents supplied by *** in its producer questionnaire response.²⁹⁶

There are a number of aspects of these supply agreements that indicate that contracts containing language requiring the domestic producer to meet only the prices of other domestic producers are not prevalent throughout the industry; nor do all of these contractual provisions operate to preclude the supplier from using foreign prices in its annual negotiation process. In this regard, we first note that all of the agreements cited by Nippon as containing such language are used by producers for their supply arrangements with purchasers who are leasing a production facility at the site of the tin mill steel producer.²⁹⁷ For example, both of the supply agreements on record for *** indicate that the pricing and volume arrangements in the agreements relate to ***'s can-making facilities at ***.²⁹⁸ Similarly, all of the supply contracts provided by ***²⁹⁹ are directly related to ***'s supply arrangements with purchasers (such as ***) which ***.³⁰⁰ In other words, these contracts – only some of which contain the contractual language in question – are utilized solely in the context of ***.³⁰¹

Accordingly, the record evidence on this issue suggests that these sorts of contracts are prevalent only in the context of *** at certain domestic producers' production facilities; there is no evidence that these sorts of contractual agreements are used in the industry in non-*** arrangements.³⁰² Because the record indicates that the arrangements in question represent only *** of apparent U.S. consumption,³⁰³ we believe that the record indicates that these supply arrangements are not particularly prevalent in the tin mill market. Moreover, we believe that they provide, at most, limited insulation to *** from import competition, and no insulation whatsoever to the remainder of the industry.³⁰⁴

²⁹⁵ See *Nippon II* at 25 & n.17; Plaintiffs' Objections to the ITC's Remand Determination, at p. 9-10.

²⁹⁶ *** Producer Questionnaire at Attachments A-I (supply agreements for ***).

²⁹⁷ See, e.g., *** Producer Questionnaire at Attachments A-I (supply agreements for ***); *** Purchasers Questionnaire at Question II-30.

²⁹⁸ See Attachments to *** Purchaser Questionnaire at III-30 (Attachments C & D)(*** contract at 1-2; *** contract at 1).

²⁹⁹ As we discuss below, not all of these contracts contain provisions requiring *** to meet only other domestic producers pricing arrangements.

³⁰⁰ *** Producer Questionnaire at Attachments A-I (supply agreements for ***).

³⁰¹ For a discussion of these arrangements, see CR and PR at III-3.

³⁰² In this regard, we note that the record contains other contractual documents for supply agreements with purchasers that are not directly related to a lease/supply arrangement, and these documents do not contain language requiring the supplier to meet only domestic pricing. For example, petitioners provided a ***. *** Agreement at p. 1, Petitioners' Posthearing Brief, at Ex. 20; See also, Weirton's Proposal and Sales Plan for ***, dated November 29, 1999, Petitioners' Posthearing Brief, at Ex. 20 (containing no domestic competition provision).

³⁰³ Original Determination at 9.

³⁰⁴ Original Determination at 9. We note that *** do not comply with this purchase requirement, and purchase additional volumes, including Japanese TCCSS. CR at V-5, PR at V-4; *** Memorandum to file of October 2, 1998.

Moreover, the language of these agreements does not preclude the purchaser from using subject pricing to determine prices under the agreement.³⁰⁵ For example, ***'s agreement with *** states that ***.³⁰⁶ This provision does not, however, require ***.³⁰⁷ Similarly, while ***,³⁰⁸ the agreement does not preclude *** from *** nor does it preclude *** from using *** under the agreement.³⁰⁹

Moreover, even though several agreements do have a provision specifically stating that the pricing of the merchandise purchased under the agreement shall initially be set by reference to either ***'s published price or the price of another domestic producer, these agreements also allow the purchaser to obtain the benefit of any lower prices that are negotiated by other customers of *** who purchase comparable volumes of merchandise as the leasing customer.³¹⁰ Thus, even though these agreements do contain provisions referencing other domestic producers' pricing levels, they do not operate to prohibit the purchasers from getting the benefits of price negotiated by other customers not subject to the domestic pricing limitation. For instance, we note that the *** Chief Procurement Officer, states that ***.³¹¹ Thus, *** indicates that *** does affect the prices that *** negotiates with ***.

Finally, witnesses for petitioners testified at the hearing that these contractual terms do not prohibit purchasers like U.S. Can from attempting to renegotiate price during the course of the contract because the domestic producer does not effectively have the ability to enforce these provisions against the purchaser.³¹² Given the foregoing, it is clear that the use of these contractual provisions in supply agreements is not a prevalent form of pricing practice throughout the industry, because the record indicates that they are used almost exclusively in lease-supply arrangements. Moreover, even in that context, many of the contractual provisions on pricing do not specifically preclude the use of subject import pricing in annual contract negotiation nor do they prevent the purchaser from getting the benefit of price declines obtained by other purchasers.

We therefore conclude that the supply agreements on the record do not support the claim that domestic producers are insulated from foreign price competition. We continue to find that there is little basis to conclude that a domestic producer's prices are determined solely through competition with other domestic firms, and the other record evidence provides substantial evidence to conclude that subject import competition impacted domestic prices to a significant degree.

c. Lead-times

In *Nippon II*, the Court held that the Commission did not, in its First Remand Determination, adequately assess the significance of long import lead-times on the purchase negotiations.³¹³ The Court stated that it had not instructed the Commission to evaluate only whether subject imports were limited to a set percentage of the market as a result of lead-times.³¹⁴ Instead, the Court stated, it expected the Commission to "evaluate purchaser perceptions with respect to the domestic industry's lead-time

³⁰⁵ *** Purchaser Questionnaire at Question III-30 (***).

³⁰⁶ *** Purchaser Questionnaire at Question III-30 (Attachments C & D)(***).

³⁰⁷ *** Purchaser Questionnaire at Question III-30 (Attachment C)(***).

³⁰⁸ *** Purchaser Questionnaire at Question III-30 (Attachment C)(***).

³⁰⁹ *** Purchaser Questionnaire at Question III-30 (Attachment B)(***).

³¹⁰ Attachment A-1 to *** U.S. Producer Questionnaire (***).

³¹¹ *** at 7, attached to *** Purchaser Questionnaire (emphasis added).

³¹² Hearing Tr. at 85 (Mr. Scott); *see also* Hearing Tr. at 149-150 (Mr. Schagrin & Mr. Riederer).

³¹³ *Nippon II* at 24 & 26-27.

³¹⁴ *Nippon II* at 27.

advantage as a potential explanation for keeping negotiations on separate tracks with volume allocated among domestic versus foreign suppliers.”³¹⁵ “Naturally,” the Court stated, “this analysis would need to evaluate whether such a condition of competition, if it in fact existed, would have an effect on the ability of subject imports to have an effect on prices.”³¹⁶

We have re-examined the record on this issue and assessed whether purchasers believed that the domestic industry’s lead-time advantage leads to the compartmentalization of domestic and import negotiations, as the Court indicated in its opinion. As we previously noted, the record reflects that the proximity of domestic mills to their purchasers generally gives domestic mills a lead-time advantage over foreign mills and that purchasers are aware of the industry’s advantage in this regard.³¹⁷ However, the record suggests that the industry’s lead-time advantage is mitigated in a number of ways. The first and most basic is by buying from their foreign suppliers a core set specifications that they know their canning operations will require year after year in very large quantities. Mr. Rourke of BWAY testified to this point at the Commission hearing:

We also will mitigate the risk by choosing a finite number of specifications to give an off-shore source. And typically in our case it may be heavier runners, things that will supplement other specifications that we're getting from others. So you have to consider strategically how you're going to introduce some of the foreign product in there.³¹⁸

Domestic producer Weirton agreed on this point stating that “can makers buy normally lots of products that they know they're always making those can sizes on a regular basis, and that's what Weirton would inventory for them and what they [importers] would inventory.”³¹⁹ Thus, purchasers buy from their foreign suppliers core specifications that they also purchase from domestic suppliers and that they know months ahead of time they will definitely need in the following year. For this reason we find that lead-time advantage does not serve to keep domestic and foreign negotiations on separate tracks since long lead-times are mitigated for the basic “heavier runners,” as Mr. Rourke testified, leaving domestic and foreign mills on relatively equal footing.

Another way purchasers mitigate longer lead-times associated with purchasing TCCSS from foreign suppliers is by requiring foreign mills to carry the cost of larger consignment inventories at storage facilities in the United States. For example, an internal memorandum by one purchaser stated that ***.³²⁰ Consigning merchandise in the United States near purchasers’ facilities gives those purchasers the flexibility and short lead-times they require and makes foreign material competitive with domestic product on lead-time. A similar document showed that a purchaser was making its Japanese supplier, ***, keep ordered merchandise in inventory for *** days longer than its required date of release, thereby shifting the burden of mitigating long lead-times to its supplier.³²¹ This useful non-price solution to long lead-times was applied to ***. ***, for example, agreed to consignment of *** days,

³¹⁵ *Nippon II* at 27.

³¹⁶ *Nippon II* at 27.

³¹⁷ CR at II-6, PR at II-4.

³¹⁸ Hearing Tr. at 220 (Rourke) (emphasis added).

³¹⁹ Hearing Tr. at 165 (Schagrin highlighting testimony by Mr. Johnston and Mr. Hudok of Weirton) (emphasis added).

³²⁰ Respondents’ Posthearing Brief, *** Documents, memorandum *** dated September 4, 1998.

³²¹ Respondents’ Posthearing Brief, *** Documents, correspondence ***, dated November 9, 1998.

while *** agreed to *** days – or the equivalent of the *** lead-time.³²² This is entirely consistent with testimony that “the Japanese found a way to overcome the lack of a very reliable performance given the lengthy lead-time. So they as a result have actually become for the items that we buy from them more reliable than some of the domestic mills.”³²³

Moreover, as we noted earlier, each supplier, regardless of whether it is foreign or domestic, negotiates to maximize premiums based on its unique capabilities. For instance, *** reported in its purchaser questionnaire that ***.³²⁴ Supporting this description of contract negotiations, Silgan testified at the hearing that it pays a premium for some of its foreign merchandise because price premiums “works both ways, we do have a foreign supplier that gets a premium, because they know they're worth more.”³²⁵ Thus, lead-times do not serve to insulate domestic negotiations from subject import pricing.

Therefore, for these reasons, we do not find that negotiations are compartmentalized due to any domestic lead-time advantage. If anything, the record indicates that purchasers have found ways to mitigate imports’ longer lead-times through consigning merchandise.

d. Weirton Documentation Regarding Price Competition

In *Nippon II*, the Court also found it significant that Weirton was unable to submit any contemporaneous documents citing import price competition. The Court faulted the Commission for assigning little weight to the absence of such documents because, in the Court’s view, the lack of documentation supports the notion that import and domestic contract negotiations are compartmentalized.³²⁶

In response to the Court’s findings in *Nippon II*, we have reconsidered the lack of documentary evidence submitted by Weirton citing import price competition. First, the record reflects that purchasers do not specify the identity of suppliers with which they are negotiating, making it more difficult for a supplier to pinpoint its competition.³²⁷ Large purchasers such as Silgan testified that they keep the identity of suppliers bidding on contracts secret from each other. This is why Richard Riederer, chief executive officer of Weirton Steel, testified that his company never knows specific Japanese bids are being introduced into contract negotiations:

Do I get specific quotes from Japanese producers? No. Do I get specific quotes even from customers saying well this is the Japanese price of the product? No. I only know, just like I know that other competitors, domestic competitors, are quoting different kinds of prices. I don't know specifically who's doing it, so consequently, I could not identify that it was a specific Japanese product that was coming in and being competitive or pulling down prices. You only know that after the fact.³²⁸

³²² Posthearing Brief of Respondents, *** Documents, e-mail ***, dated January 15, 1999. *** also agreed to *** days consignment. Posthearing Brief of Respondents, *** Documents, e-mail ***, dated March 24, 1999.

³²³ Conference Tr. at 90 (Rourke).

³²⁴ *** Purchaser Questionnaire at VI.

³²⁵ Hearing Tr. at 232 (Owen).

³²⁶ *Nippon II* at 28.

³²⁷ Hearing Tr. at 207-208 (Owen).

³²⁸ Hearing Tr. at 156 (Riederer); *see also*, testimony of Michael Scott, Vice-President of Sales and Marketing for Weirton Steel:

If during the course of a contract they can purchase material of comparable quality delivered on time to
(continued...)

As the Riederer testimony indicates, domestic mills do not know the identity of the suppliers competing against them during contract negotiations. Nonetheless, although the origin of specific bids is not divulged during contract negotiations, the prospect of shifting volume away from domestic mills is regularly used to leverage lower prices. In other words, while the evidence indicates that purchasers do not divulge the identity of specific companies and their bids, the record indicates that purchasers do mention offshore suppliers generally and use the prospect of buying more from them to obtain lower price concessions from domestic mills.

We recognize that the documents submitted by Weirton contain references to price competition with other domestic firms but not subject imports. To some degree this is to be expected given that domestic producers account for a substantial majority of sales in the U.S. market. However, there is evidence that subject import pricing was a significant factor in the market.

*** submitted a sworn affidavit in which he stated that several purchasers informed him in negotiations of the intent to purchase low-priced product from Japan.³²⁹ He indicated that this led him to advise his superiors not to announce price increases for 1999. *** claims that purchasers cited low Japanese prices to him in negotiations were corroborated by ***'s own documents.³³⁰ In our view, the fact that this information is contained in an affidavit of a *** rather than in contemporaneous documents submitted by *** is not significant given that a purchaser's own contemporaneous documents effectively corroborate the affidavit.

The questionnaire response of domestic producer *** provides further evidence that producers are told by purchasers of their intent to purchase lower-priced Japanese product.³³¹ *** stated that it suffered price erosion because ***. *** provided another detailed description of direct import price competition stating:

***.³³²

We find, therefore, the lack of domestic producers' documentary evidence not particularly significant to the issue of whether import prices competed with domestic prices in contract negotiations. While domestic producers do not have access to information on specific Japanese prices that were introduced into negotiations, they did provide substantial testimonial evidence of direct import competition. This, combined with substantial record evidence of actual price competition by subject imports supports our decision not to give great weight to the apparent lack of specific documentary evidence supplied by domestic producers about import price competition.

3. *Lost Sales and Revenue*

In *Nippon I*, the Court found that the Commission had failed to consider whether a lost sale allegation involving a possible sale by *** to *** had been properly confirmed by the Commission staff because, in the Court's view, the lost sale in question was not consistent with the pricing and volume data

³²⁸ (...continued)

their production facilities at a lower price than their agreed to domestic contract price, some will do so and reduce their domestic purchases. Some will not hesitate to come back to the domestic producer and ask that an additional price decrease be granted to maintain volume. Hearing Tr. at 86 (Scott).

³²⁹ Affidavit of ***, Petitioner's Posthearing Brief at Exhibit 20.

³³⁰ February 9, 1998 Memoranda ***.

³³¹ *** Producer Questionnaire Response (preliminary) at IV-D.

³³² *** U.S. Producer Questionnaire Response (preliminary) at IV-D.

set forth ***'s purchasing history.³³³ On remand, the Commission re-examined this allegation and found that, in its view, the allegation was borne out by ***'s purchasing history and that its staff had properly confirmed the allegation, noting that the specific allegation was consistent with evidence of lost sales of comparable tonnage for *** in FY2000.³³⁴ Moreover, the Commission added, the sale represented a significant percentage of the tin mill market, when considered with the confirmed lost revenue allegations.³³⁵ The Commission, however, mistakenly described the lost sale as occurring in ***,³³⁶ when in fact *** had alleged that it occurred in ***.³³⁷

In *Nippon II*, the Court again found that the Commission had not adequately assessed whether the lost sale allegation was consistent with the record.³³⁸ Noting the Commission's mistake in describing the lost sale as occurring in *** rather than *** of ***, the Court stated that it was not clear that the allegation actually existed, given the disparity in dates.³³⁹ The Court also pointed out that the Commission failed to consider the fact that, for the alleged lost sale in question, the producer *** stated that it made a bid at a price of ***, even though *** never made a bid at a price lower than *** per ton for the *** referenced by the Commission in its first remand determination.³⁴⁰ Further, the Court noted, the Commission failed to acknowledge that *** stated that price was only one of several reasons for awarding the bid to the Japanese producer and that *** would have lost the sale to another domestic supplier in the absence of Japanese competition.³⁴¹

We reexamined all of the evidence regarding the *** lost sale questioned by the Court. As an initial matter, as we indicated above, a part of the Court's finding is based on a typographical error that the Commission made in its determination. As we indicated previously, the Commission analyzed and described a specific lost sale allegation made by *** that involved a lost sale of *** at a rejected price of *** per ton to purchaser *** made in ***, as set forth in the Commission's staff report at Table V-14.³⁴² In describing the lost sale in the remand determination, the Commission inadvertently described the sale as being made in ***.³⁴³ We regret the error and the fact that it caused inconvenience to the Court, given that it hindered the Court's ability to review our findings on the sale.

We believe, however, that the lost sales allegation is consistent with ***'s purchasing history. As we noted, in our prior determination, ***'s purchasing history for ***³⁴⁴ shows that *** purchased a total of more than *** short tons of Japanese TCCSS, of which more than *** tons were purchased ***.³⁴⁵ Clearly, the volume alleged to have been lost by *** on this sale is fully consistent with the ***

³³³ *Nippon I* at 34-45.

³³⁴ First Remand Determination at 28.

³³⁵ First Remand Determination at 28.

³³⁶ First Remand Determination at 28.

³³⁷ CR and PR at Table V-14.

³³⁸ *Nippon II* at 31.

³³⁹ *Nippon II* at 31.

³⁴⁰ *Nippon II* at 31.

³⁴¹ *Nippon II* at 31.

³⁴² CR and PR at Table V-14.

³⁴³ First Remand Determination at 28.

³⁴⁴ As noted in the First Remand Determination, we believe that ***.

³⁴⁵ CR and PR Table V-4a-c. For ***.

during this period. Moreover, the record of ***'s purchasing history shows that, while the ***.³⁴⁶ Given this, it is clear that the lost sales allegation confirmed by *** is within the range of the bids offered ***.³⁴⁷ In other words, both the volume and the price reported by *** were consistent with ***. Accordingly, we believe it is reasonable to conclude that the lost sale allegation was consistent with ***'s purchasing history.

Most importantly, the *** representative contacted by the Commission staff specifically confirmed the fact that *** was one of several domestic producers who could reasonably have be said to have lost the sale in question to the Japanese.³⁴⁸ There is, therefore, simply no question that Japanese suppliers were awarded a bid for ***.³⁴⁹ Given all the foregoing, we believe that it was appropriate for staff to confirm the lost sale allegation and for us to rely on that allegation in our analysis.³⁵⁰

Moreover, even if *** reported a different average bid price for the lost sale than *** reported in its purchasing history, that fact does not indicate that it would not be appropriate to rely on this allegation as an instance of a lost sale. There could be many explanations for such a discrepancy, including the very real possibility that the parties to the negotiation simply have different memories or documentation of the bid prices. The fact that our staff's investigation found some minor discrepancies in the data on the sale does not, in our view, outweigh the important fact that the allegation was confirmed in substance by ***.

The Court also asserts that the Commission failed to consider the fact that *** stated in its questionnaire that ***.³⁵¹ However, we would note that *** also indicated in its discussion of *** that its primary subject supplier, ***, became ***.³⁵² Moreover, while *** asserts that *** never bid "seriously" for ***,³⁵³ ***'s purchase history shows that *** bid consistently on most of ***.³⁵⁴ Given this, it may be the case that in ***'s view, a "serious" bid means a bid that is competitive with Japanese pricing.

Further, the Court asserts that, in its discussion with the Commission staff, ***'s representative stated that Weirton would have lost the sale to another domestic supplier in the absence of Japanese competition.³⁵⁵ We do not think that this is what the *** representative said. In our staff report, the *** representative is quoted as saying that "up to 6 domestic firms can claim this type of los[t sale], given that ***."³⁵⁶ This statement does not mean that *** would not have gotten the sale; in our view, it means that several other domestic producers also lost out on the sale made to the Japanese suppliers. Given this,

³⁴⁶ CR and PR Table V-4b.

³⁴⁷ CR and PR Table V-4a-c.

³⁴⁸ CR at V-25, PR at V-22.

³⁴⁹ CR and PR at Table V-4a-c.

³⁵⁰ We note that the Court questioned whether the Commission should have examined the consistency of the allegation with ***'s purchasing data for ***. In this regard, we note that the allegation would be consistent with ***. In ***, *** reported that *** offered its bid prices within a range of *** and the lost sales allegation price is within that range. CR and PR Tables V-4a-c. Moreover, in 1999 *** purchased *** short tons from Japan, largely from a single Japanese supplier, ***. *Id.* Thus, the lost sale allegation would be consistent with ***'s purchasing patterns in fiscal year 2000 as well.

³⁵¹ *Nippon II* at 31.

³⁵² Attachment to *** (cited in *Nippon II* at 31, n. 22).

³⁵³ *** Purchaser Questionnaire, Declaration of ***, at 5 (cited in *Nippon II* at 31, n. 22).

³⁵⁴ CR and PR at Table V-4a.

³⁵⁵ *Nippon II* at 31.

³⁵⁶ CR at V-25, PR at V-9.

we believe the statement strengthens our conclusion that the domestic industry as a whole lost sale volumes to the subject suppliers throughout the period of investigation.

Finally, the Court states that the Commission failed to take into account the fact that *** itself stated that the sale was lost for both price and non-price reasons.³⁵⁷ We would first note that the statute does not demand that a lost sale must be lost solely due to low pricing for it to be considered evidence of injury;³⁵⁸ if the contribution of price is significant to the overall purchase decision, then it is entirely appropriate for the Commission to take the lost sale into account as evidence of injury. Moreover, in our view the *** representative did not state that the sale itself was lost due to quality and delivery time issues as well as for price reasons; he stated that, as a general matter, ***.³⁵⁹ Given these multiple considerations, we believe that it was entirely appropriate to rely on evidence of this lost sale as support for our causation findings.

In sum, we believe that the lost sales allegation was properly confirmed by our staff, that it was generally consistent with ***'s purchase history, and that the loss of the sale was based, in significant part, on price. Given the fact that our staff also confirmed several lost revenue allegations – and that these have not been challenged by Nippon – we believe that these allegations provide additional evidence of the price and volume effects of the subject imports during the period.³⁶⁰

II. Causation

Finally, on the issue of causation, the Court found that the Commission had not adequately explained why quality and on time delivery problems as well as nonsubject imports were not the predominant cause of the industry's declines during the period of investigation.³⁶¹ In particular, the Court stated, the Commission did not adequately explain why it found that purchasers had shifted volumes to subject imports due to subject underselling, rather than purchasers' stated quality and on-time delivery concerns.³⁶² The Court also stated that the Commission did not adequately address the role played by nonsubject imports in the industry's declines,³⁶³ noting in particular that it failed to address adequately the regional distribution of domestic, subject, and nonsubject import shipments.³⁶⁴

We address each of the Court's concerns in detail below.

A. U.S. On-Time Performance and Quality

1. *The Court's Comments Concerning the Commission's Failure to Facilitate the Court's Review*

In its discussion of the Commission's analysis of the industry's quality and delivery time issues, the Court first criticized the Commission for not "analyz[ing] and present[ing] data in a manner that

³⁵⁷ *Nippon II* at 31-32.

³⁵⁸ See *Nippon III* at 4 (dumping need not be the "sole or principal cause of injury. As long as its effects are not merely incidental, tangential, or trivial, the foreign product sold at less than fair value meets the causation requirement").

³⁵⁹ CR at V-25; PR at V-9.

³⁶⁰ CR and PR Table V-15.

³⁶¹ *Nippon II* at 32-42.

³⁶² *Nippon II* at 33-39.

³⁶³ *Nippon II* at 39-42.

³⁶⁴ *Nippon II* at 40.

facilitate[d] the Court's review."³⁶⁵ The Court stated that the Commission's analysis improperly focused on "trends" over limited periods of data, thus ignoring the full set of data," when a "year-to year analysis" would indicate "there had been no clear trend at all."³⁶⁶ The Court also stated the Commission ignored volume and bid data for the year 2000 and focused, at times, only on volume and bid trends between 1998 and 1999.³⁶⁷ Finally, the Court noted, the Commission "inexplicably" cited one table (Table TCCSS-1) as the source for its description of the volume of bids accepted by the purchaser BWAY during the period, even though the Commission had cited different tables (Tables II-1 and II-2 from the original Staff Report) when describing the purchase volumes of the other purchasers discussed in the Commission's causation analysis.³⁶⁸ The Court noted, in this regard, that the purchase volume data set forth in Table TCCSS-1 were not in all cases consistent with purchase data in Tables II-1 and II-2.³⁶⁹

As an initial matter, we believe that the Court's concerns about these issues, while understandable, can be addressed through additional explanation. First, we believe that the Commission did not selectively focus on a limited portion of the period of investigation. In our analysis of the quality and delivery issues experienced by four purchasers, we focused on the parts of the period of investigation during which the purchasers claimed to have increased subject import purchases because of the industry's alleged quality and delivery problems.³⁷⁰ For example, when examining BWAY's purchasing patterns, the Commission focused on the company's purchases in 1998 and 1999, precisely because BWAY had stated, including during its hearing testimony, that it began shifting purchases to subject imports from the domestic producers in 1999.³⁷¹ Similarly, with respect to U.S. Can, the Commission concentrated on the company's purchase patterns between 1998 and 1999 because U.S. Can stated that it shifted purchase volumes to the subject imports in 1999 as a result of delivery problems on the part of Weirton and other domestic producers in 1998 and 1999.³⁷²

As for Crown, the Commission focused on the company's purchasing patterns for 1998 and 1999 for the simple reason that Crown's purchasing history was "incomplete"; that is, the company ***.³⁷³ Finally, the Commission analyzed Silgan's purchases throughout the period from 1997 to 1999 because

³⁶⁵ *Nippon II* at 34.

³⁶⁶ *Nippon II* at 34.

³⁶⁷ *Nippon II* at 34.

³⁶⁸ *Nippon II* at 34.

³⁶⁹ *Nippon II* at 34.

³⁷⁰ First Remand Determination at 30-40. Moreover, we would add, the Commission specifically examined in its analysis the bidding and purchasing patterns of three of these four purchasers throughout the three full years of the period of investigation, i.e., from 1997 to 1999, as the initial portion of its discussion of these issues. First Remand Determination at pp. 32 (discussion of BWAY's purchases during this period); 35 (discussion of Silgan's purchases during this period); 37 (discussion of U.S. Can's purchases during this period). The Commission only discussed purchasing data for Crown for 1998-1999 because Crown's data were "incomplete"; ***. See Crown Purchaser Questionnaire at Question II-1. Thus, while the Commission's analysis of the causal link aspects of these issues focused on the period during which the purchasers asserted they shifted their purchasing patterns because of quality and delivery time issues, it can hardly be said that the Commission ignored the data for the entire period of investigation in its analysis of these purchasers.

³⁷¹ See, e.g., BWAY Purchaser Questionnaire Response at Question II-2 ***; see also Hearing Tr. at 190 (Mr. Rourke of BWAY) ("BWAY made the strategic decision to diversify its sourcing including additional sourcing from abroad" because "Weirton's on-time delivery performance was ranked 10 out of 11 suppliers from January through August of 1999," among other things).

³⁷² Hearing Tr. at 196-199 (testimony of Mr. Yurco); U.S. Can Purchaser Questionnaire Response at Question II-2 ***.

³⁷³ See generally, Crown Purchaser Questionnaire; see also CR and PR at Tables II-1 & II-2 and Table V-2.

***.³⁷⁴ In other words, the Commission's analysis properly focused on the details of these companies' purchasing patterns during the period in which the purchasers claimed to have begun purchasing increased subject import volumes for non-price reasons. Indeed, in the Commission's view, this analysis was the approach best suited to addressing the Court's instruction in *Nippon I* to assess "whether purchasers actually switched for non-price reasons."³⁷⁵ To the extent that our ability to assess purchasing pattern "trends" was limited by the period examined for each of these purchasers, we believe that our focus on those "limited" periods was dictated by, and consistent with, the assertions made by the purchasers that they began shifting purchases to imports during specific periods in response to domestic quality and delivery time problems.

We also believe that it was proper for the Commission to focus its analysis on the period from 1997 through 1999, rather than on interim 2000, despite the Court's misgivings on this score.³⁷⁶ Again, we note that we focused our analysis of the purchasing patterns of these four purchasers on the periods during which the purchasers alleged that they had shifted purchases to subject imports as a result of the domestic industry's quality and delivery-related problems. In this regard, there was little record evidence or testimony during the investigation that the quality and performance problems reported by these purchasers with several members of the industry continued through the first quarter of 2000; indeed, the record indicates that the delivery performance of Weirton improved considerably in the first quarter of that year.³⁷⁷

Moreover, giving less attention to the purchasing activity of these companies in the first quarter of 2000 was appropriate because the record indicated that the filing of the antidumping petition in October 1999³⁷⁸ significantly impacted the purchasing patterns and pricing behavior of purchasers in the first quarter of 2000. In this regard, the record of the investigation contains a number of internal memoranda prepared by purchasing officers of such purchasers as *** and *** showing that industry participants believed the filing of the petition would affect the sales volumes and pricing of subject imports and domestic product in 2000.³⁷⁹ Given that the Congress has stated that we should give less weight to changes in market and industry data that occur after the filing of a petition where that data may have been affected by the petition,³⁸⁰ our focus on the data relating to shifts in import purchase patterns by these producers during the full three year period before the filing of the petition was appropriate. Moreover, the fact that the interim period at issue covered only one quarter further suggests that it should be given less weight than the other data, which cover full-year periods.

Finally, we note that the Court correctly stated that the purchase volume data set forth in Table TCCSS-1 of our remand determination was not fully consistent with the contract volume data set forth Tables II-1 and II-2 of the Staff Report.³⁸¹ There are two reasons for these inconsistencies. First, the data in the two tables should not be expected to be identical because the tables report different categories of volume data. Table TCCSS-1 -- which was prepared for the Commission's First Remand Determination -

³⁷⁴ First Remand Determination at 35-37.

³⁷⁵ *Nippon I* at 39.

³⁷⁶ *Nippon II* at 34.

³⁷⁷ "Well, the facts are that they [Weirton] significantly improved their on-time performance in the fourth quarter of 1999, into the year 2000, bringing them up to a very competitive level of plus 85 percent." Hearing Tr. at 235 (Yurco).

³⁷⁸ CR and PR at I-1; 64 Fed. Reg. 60225 (November 4, 1999).

³⁷⁹ See February 14, 2000 Memorandum ***; January 24, 2000, Memorandum ***; December 16, 1999 Memorandum ***.

³⁸⁰ 19 U.S.C. §1677(7).

³⁸¹ *Nippon II* at 34.

- is a compilation of the bid pricing and volume data contained in Tables V-1 through V-13 of the Commission's original Staff Report in this investigation.³⁸² The volumes and pricing data reported in Tables V-1 through V-13 of the Staff Report are the supply volumes and prices that were contractually agreed upon by the purchasers and their suppliers during the annual negotiation process in the tin mill market.³⁸³ In other words, the volumes reported in Tables V-1 through V-13 (and therefore Table TCCSS-1) tables reflect the contractually agreed on supply volumes for the purchasers that the parties expect to be delivered during the course of the contract; they do not necessarily represent the actual shipments of merchandise made by a supplier to a purchaser during the contract period.

In contrast, the volume data reported in Tables II-1 and II-2 of the Commission's original staff report reflect the actual shipments, i.e., the actual purchase volumes, made by tin mill purchasers under their annual contracts; that is, they reflect shipments of merchandise actually made to, and paid for by, a purchaser during the contract year. In sum, some of the inconsistencies between Table TCCSS-1 and Tables II-1 and II-2 reflect the fact that suppliers do not necessarily ship, nor do purchasers take, the same volumes during each contract year that were originally negotiated during the negotiation process.³⁸⁴

Secondly, some inconsistencies between the two sets of tables derive from the fact that the Commission misreported the purchase volume data for two purchasers, *** and ***, in Tables II-1 and II-2 of the Staff Report.³⁸⁵ In the case of ***, for example, the Commission failed to include any purchase volume or value data for the years 1997 and 1998 in these two tables, even though the company did in fact report tin mill purchases in both of those years in its purchaser questionnaire.³⁸⁶ The Commission made a similar mistake for ***.³⁸⁷ Accordingly, we have prepared, and attach to this second remand determination, revised entries to Tables II-1 and II-2 which sets forth the correct shipment volumes and value data for these two companies as they should have been reported in the original Tables II-1 and II-2. We apologize for any inconvenience this may have caused the Court on review, noting in particular that we fully appreciate the Court's statement that the inconsistencies between Tables II-1 and II-2 and Table TCCSS-1 hindered the Court's ability to review our first remand determination.³⁸⁸ Nonetheless, we would note that our use of the *** bid data contained in Table TCCSS-1 as the source for our discussion of its purchases during the period in our remand determination was intended to lay the relevant data before the Court in a straightforward and accessible manner, rather than as a means of confusing our analysis or the Court's appreciation of the record evidence.

In sum, we believe that the Commission attempted to respond in good faith to, and analyzed fully, the data in the record that related to the causation issues raised by the Court in *Nippon I*. To the extent that the Court's concerns arose because we failed to provide the discussions we have now set forth above, we regret the error. We proceed to a further discussion of the quality and delivery time issues

³⁸² See First Remand Determination at 10; see also CR and PR at Tables V-1 to V-12.

³⁸³ See CR at V-9, PR at V-6.

³⁸⁴ Or, as we have previously noted, the charts show that purchasers and suppliers may engage in informal volume re-allocations during the term of an annual or multi-year contract.

³⁸⁵ Compare ***'s Questionnaire Response, Question II-1 with CR and PR at Tables II-1 and II-2. ***.

³⁸⁶ CR and PR at Table II-1. We would note that the Commission stated, on remand, that it was relying on the volumes contained in Table TCCSS-1 to describe ***'s purchasing patterns because it believed at the time, based on the information in the staff report, that *** had not reported purchase volumes for that year. First Remand Determination at 32, n. 104.

³⁸⁷ Compare ***'s Response Questionnaire Response, Question II-1 with CR and PR at Tables II-1 and II-2.

³⁸⁸ In this regard, we would note that we believe the Commission did provide cites to the sources of the individual purchaser volume data used throughout this analysis, although the Court seems to assert in *Nippon II* that it did not. *Nippon II* at 34. The cites are set forth at footnotes 104, 114, 120, & 132 of the First Remand Determination.

experienced by the domestic industry during the period, and the substantive issues raised with respect to our analysis of these issues by the Court in *Nippon II*.

2. *The Court's Concerns Relating to Certain Domestic Producers' Quality and Delivery Problems*

The Court found the Commission's specific findings with respect to the quality and delivery issues experienced by these four purchasers to be deficient as well. In particular, the Court found that the Commission had not adequately explained why it found that the testimony offered by representatives of these four companies did not establish that the companies had shifted a portion of their volumes to the subject merchandise because of quality or delivery time issues during the course of the period.³⁸⁹ We address the Court's specific criticisms of the Commission's analysis for each purchaser below.

a. BWAY

At the public hearing in the Commission's investigation, an official for BWAY firmly and clearly testified that BWAY, one of the six largest purchasers of tin mill products during the period, made a "strategic decision to diversify its sourcing" of tin mill plate in 1999, which included a decision to seek "additional sourcing [of tin mill product] from abroad."³⁹⁰ The official, Mr. Patrick Rourke, testified that this decision was solely the result of a "series of delivery and quality disappointments with certain U.S. mills" that occurred in 1998 and 1999, and specifically identified in his testimony Weirton Steel as the sole example of the "delivery and quality" problems faced by BWAY in 1998 and 1999.³⁹¹

In its First Remand Determination, the Commission stated that it could not reconcile this official's testimony with other information on the record relating to BWAY's reasons for sourcing tin mill merchandise from Japan in 1999. In particular, the Commission explained that the official's testimony could not be reconciled with the fact that ***.³⁹² In *Nippon II*, however, the Court rejected the Commission's explanation of the reasons it found BWAY's public testimony to be inconsistent with the other record data, noting in particular that BWAY's testimony was not necessarily inconsistent with its purchasing patterns given that it had asserted that it ***.³⁹³

We have considered the Court's comments about our analysis, but again conclude that testimony offered by BWAY at the public hearing as to its reasons for sourcing increasing volumes of subject imports is inconsistent with other record evidence on the issue. In this regard, we again note that the BWAY official who testified at the hearing emphasized that BWAY's decision to begin purchasing the subject merchandise from Japan was not the result of price competition, but was rather due to a "series of delivery and quality disappointments with certain U.S. mills," and singled out Weirton as the prime example of a domestic mill who was having these sorts of performance-related issues.³⁹⁴

However, in our view, this testimony is difficult to reconcile with statements made by BWAY in its purchaser questionnaire response, which -- we note -- was executed and signed by the same BWAY official who testified at the Commission hearing in the investigation.³⁹⁵ In response to a question in the

³⁸⁹ *Nippon II* at 34-39.

³⁹⁰ Hearing Tr. at 192 (Mr. Rourke).

³⁹¹ Hearing Tr. at 190 (Mr. Rourke).

³⁹² First Remand Determination at 33.

³⁹³ *Nippon II* at 35.

³⁹⁴ Hearing Tr. at 190 and 192 (Mr. Rourke).

³⁹⁵ BWAY Purchaser Questionnaire, cover page.

questionnaire which asked whether BWAY had shifted purchases between domestic and foreign sources and the reasons for any such shift, BWAY stated clearly in response that:

***.³⁹⁶

Similarly, in response to a question in the purchaser questionnaire as to whether BWAY changed or dropped suppliers in the last three years and why, BWAY stated:

***.³⁹⁷

Moreover, as we noted in our First Remand Determination, the internal documents supplied by *** to the Commission during the investigation also showed that ***.³⁹⁸ Thus, although it is true that, in its questionnaire response, *** states that ***, its questionnaire response also unambiguously shows that, for ***.³⁹⁹ Given all of the foregoing, we again find that the other record data on this issue was inconsistent with the basic thrust of Mr. Rourke's testimony at the hearing, i.e., that ***.

Moreover, we again find that BWAY's purchasing patterns during 1998 and 1999 were inconsistent with its testimony at the hearing. In our view, Mr. Rourke's public testimony was clearly intended to suggest to the Commission that Weirton, the petitioner in this proceeding, was a primary example of the "delivery and quality disappointments" BWAY had with domestic producers that led to its decision to source merchandise from the subject producers in 1999.⁴⁰⁰ However, as we noted in our First Remand Determination, this testimony about the impact of Weirton's supposed "delivery and quality" problems on BWAY's purchasing decision was directly undermined by the fact that ***.⁴⁰¹ Further, Mr. Rourke's testimony as to the delivery and quality problems BWAY had with Weirton is further undermined by the fact that, in its questionnaire response, BWAY ***.⁴⁰² Given the foregoing, it is clear that BWAY's purchasing patterns during 1997, 1998, and 1999 were not consistent with its testimony at the hearing concerning Weirton's supposed delivery and quality problems in 1999.

Finally, BWAY's questionnaire response does support Nippon's assertions that ***.⁴⁰³ However, the record also shows that BWAY *** during the period of investigation⁴⁰⁴ and that BWAY did not report in its questionnaire response that it had experienced ***.⁴⁰⁵ Moreover, in its questionnaire

³⁹⁶ BWAY Purchaser Questionnaire, Response to Question II-2 (emphasis added).

³⁹⁷ BWAY Purchaser Questionnaire, Response to Question III-15 (emphasis added).

³⁹⁸ We note that we have previously described a number of internal BWAY memoranda that indicate that BWAY's purchasing decisions are driven ***. First Remand Determination at 33, fn. 111.

³⁹⁹ We would add that, in its questionnaire response, BWAY stated that ***. BWAY Purchaser Questionnaire, Response to Question IV-15.

⁴⁰⁰ Hearing Tr. at 190 (Mr. Rourke).

⁴⁰¹ In fact, ***. CR and PR at Table V-1. For the Commission's remand discussion of this, *see* First Remand Determination at 32-33.

⁴⁰² *See generally*, BWAY Purchaser Questionnaire, Response to Question III-15. We note that this is direct contrast with ***. BWAY Purchaser Questionnaire, Response to Question III-15.

⁴⁰³ BWAY Purchaser Questionnaire, Response to Question III-15 (confirming that ***).

⁴⁰⁴ CR and PR at Table V-1.

⁴⁰⁵ BWAY Purchaser Questionnaire, Response to Question III-27 (stating that ***).

response, BWAY ***.⁴⁰⁶ ***.⁴⁰⁷ In other words, in its questionnaire response as opposed to its hearing testimony, BWAY indicated that ***.⁴⁰⁸ Despite all of these statements, BWAY's Mr. Rourke nonetheless testified at the hearing that BWAY's shift of sales volumes to the subject merchandise in 1999 was due to the industry's quality and delivery problems in 1998 and 1999, rather than ***.⁴⁰⁹

Given all of the record data on this issue, we believe that ***'s testimony on the issue was not fully consistent with its other statements in the record and that the record evidence, as a whole, indicated that BWAY's purchasing decision with respect to tin mill products from Japan was made primarily on the basis of price rather than quality and delivery time issues.⁴¹⁰

b. Crown

In its purchaser questionnaire, Crown stated that ***.⁴¹¹ Moreover, Crown explained that this decision ***.⁴¹²

On remand, after reviewing the record evidence relating to Crown's decision to source material from *** in ***, the Commission found that price competition between TCCSS from Japan and the United States had influenced Crown's purchasing decisions to a significant degree, notwithstanding Crown's stated quality considerations.⁴¹³ To support this finding, the Commission noted that Crown ***.⁴¹⁴ Moreover, the Commission added, it would have expected ***.⁴¹⁵

In *Nippon II*, the Court found that the Commission did not provide substantial evidence to support its finding that quality and on-time considerations were not the dominant factors with respect to Crown's decision ***.⁴¹⁶ The Court stated that Crown's decision *** is not necessarily inconsistent with its stated concerns relating to the *** during the period.⁴¹⁷ Moreover, the Court added, it felt that there was no support for the Commission's finding that domestic purchasers would not be expected to pay lower prices if they switched from lower quality producers to higher quality producers during the period.⁴¹⁸ The Court did note, however, that the Commission could reasonably have found "evidence of inconsistency in Crown's testimony" if the Commission were able to show that there was an "adequate West Coast supply of quality TCCSS" or if it showed that there were "East Coast suppliers willing to fill the void" in Crown's West Coast supply.⁴¹⁹

⁴⁰⁶ BWAY Purchaser Questionnaire, Response to Question IV-27 (comparing U.S. and Japanese product).

⁴⁰⁷ BWAY Purchaser Questionnaire, Response to Question IV-27 (comparing U.S. and Japanese product).

⁴⁰⁸ In this regard, we note that each of these producers ***. See U.S. Producer Questionnaires at II-11.

⁴⁰⁹ Hearing Tr. at 198 (Rourke).

⁴¹⁰ In this regard, we would again note that BWAY specifically stated in its questionnaire response that ***. BWAY Purchaser Questionnaire, Response to Question III-15.

⁴¹¹ Crown Purchaser Questionnaire, Response to Question II-2.

⁴¹² Crown Purchaser Questionnaire, Response to Question II-2.

⁴¹³ First Remand Determination at 34-35.

⁴¹⁴ First Remand Determination at 34-35.

⁴¹⁵ First Remand Determination at 34-35.

⁴¹⁶ *Nippon II* at 36-37.

⁴¹⁷ *Nippon II* at 37.

⁴¹⁸ *Nippon II* at 37.

⁴¹⁹ *Nippon II* at 36.

We have reviewed the record evidence relating to Crown's purchasing decisions in light of the Court's decision in *Nippon II*. In response to the Court's comments, we first note that there is substantial evidence in the record that there was an adequate West Coast supply of quality tin mill products from domestic producers available to Crown during the period and that there were non-West Coast suppliers willing to fill the void left in Crown's supply chain because of its stated supply concerns relating to ***.⁴²⁰ In particular, as we indicated in our First Remand Determination, the record shows that Crown sourced ***,⁴²¹ a producer ***.⁴²² Moreover, in 1999, ***.⁴²³ In other words, Crown had available to it a willing and able domestic supplier of quality tin mill merchandise that ***.

Moreover, the record data also show that there were other domestic producers, aside from ***, who were willing and able to supply Crown with tin mill merchandise during the period. Although four of Crown's production facilities were located on the West Coast during the period of investigation,⁴²⁴ ***.⁴²⁵ Moreover, each of these producers reported that ***.⁴²⁶ Thus, while the domestic producers located in the Eastern half of the United States may prefer to limit their shipments to remote purchasers because of freight equalization issues,⁴²⁷ the record also reflects that all of the domestic producers located in the East are willing to, and do, ship their products to the Western half of the United States. Crown's assertions to the contrary are not consistent with the record data on this issue.

Moreover, we note that Crown stated in its questionnaire response that ***.⁴²⁸ Further, Crown did not state in its response that ***.⁴²⁹ In fact, Crown specifically identified *** as being added to its list of suppliers for quality reasons.⁴³⁰ In other words, in its questionnaire response, Crown appears to indicate that *** were likely to provide it with reliable and consistent supplies of all of its specifications in a timely fashion.⁴³¹ Nonetheless, it asserted in its purchaser questionnaire response that ***.⁴³²

Given the foregoing, we believe that Crown's statements equating the timing and the sources of its purchasing decisions with quality and delivery problems with its West Coast suppliers are not fully consistent with the other record data on this issue or with Crown's purchasing patterns during the period of investigation. Although Crown asserted that ***, the record indicates otherwise. Given this, we

⁴²⁰ CR and PR at Table V-2.

⁴²¹ CR and PR at Table V-2. In particular, ***. CR and PR at Table V-2.

⁴²² CR at III-1 & III-2 at n.2. ***. CR at Table III-1 & n.2.

⁴²³ *** had a capacity utilization rate of *** percent in 1999. *** Domestic Producer Questionnaire, Response to Question II-2. Thus, *** had significant available capacity to supply the merchandise shifted to the Japanese producer by Crown in that year.

⁴²⁴ Crown has facilities in Philadelphia, Pa, Anticoh, CA, Fremont Ca, Portland, OR, and La Mirada, CA. The record also indicates that Crown ***. CR at III-3, PR at III-2; Crown Purchaser Questionnaire, Response to Question I-2. However, the record indicates that ***. CR at III-3 and PR at III-2, n. 4 & 6.

⁴²⁵ CR and PR at Table V-2.

⁴²⁶ More specifically, the percentage of western shipments ***. CR and PR at III-2, n.2.

⁴²⁷ CR and PR at III-2, n. 1.

⁴²⁸ Crown Purchaser Questionnaire, Response to Question IV-10 (comparing US and Japanese product).

⁴²⁹ Crown Purchaser Questionnaire, Response to Question III-27 (identifying *** as having quality or delivery issues).

⁴³⁰ Crown Purchaser Questionnaire, Response to Question III-15 (comparing US and Japanese product).

⁴³¹ In this regard, we note that ***. See U.S. Producer Questionnaire at II-2.

⁴³² CR and PR at Table V-2.

conclude that the record suggests that Crown began purchasing the volumes at issue because of the

***.⁴³³

c. U.S. Can

In hearing testimony before the Commission and in its purchaser questionnaire, U.S. Can asserted that its increased purchases of subject merchandise during the period of investigation were due to the domestic industry's quality and on-time delivery problems during the period and to the company's desire to source tin mill products on a more global basis.⁴³⁴ According to U.S. Can's Thomas J. Yurco, U.S. Can sought to increase its sourcing from "globally oriented suppliers" to serve its increasingly global operations.⁴³⁵ Moreover, Mr. Yurco testified, U.S. Can began sourcing increased volumes from Japan in 1999 because it experienced reliability problems with several of its domestic suppliers in 1999, including Weirton, Bethlehem Steel, Ohio Coatings (Wheeling Pittsburgh) and ***.⁴³⁶ Mr. Yurco also observed, however, that during the months when the company reduced the tonnage it received from Weirton, it also reduced the tonnage it received from Japan, and thus the company "did not favor the Japanese mills and take tons away from Weirton Steel."⁴³⁷

On remand, the Commission examined the record evidence relating to U.S. Can's decision to source a *** larger volume of merchandise from Japan in 1999.⁴³⁸ The Commission found that the record did not support Mr. Yurco's assertion that U.S. Can increased its purchases of Japanese product in 1999 because of Weirton's poor on-time performance. The Commission noted that Weirton submitted documents showing that its on-time performance was not as poor as Mr. Yurco asserted at the hearing before the end of 1999.⁴³⁹ Moreover, the Commission found U.S. Can's allegation that it increased its purchases of subject imports because of domestic quality and delivery problems in 1999 was inconsistent with the pattern of U.S. Can's purchases in 1999, which showed among other things, ***.⁴⁴⁰

The Court found the Commission's reasoning flawed.⁴⁴¹ The Court stated that the Commission had erred in finding Mr. Yurco's testimony inconsistent with his prior statements during the investigation.⁴⁴² The Court also rejected the Commission's analysis of Weirton's quality and on-time performance, noting that it was reasonable for U.S. Can to have concerns about Weirton's declining performance in 1999, even if there were not yet grounds for sourcing from another producer. The Court added that the company's documents showed that U.S. Can's concerns about Weirton's quality had been evident "for a long period of time."⁴⁴³ Thus, the Court reasoned, the Commission's decision to discount

⁴³³ CR and PR at Table V-2. *** stated in its preliminary phase questionnaire that *** officials repeatedly highlighted to *** the fact that ***." *** U.S. Producer Questionnaire (preliminary phase) at IV-D.

⁴³⁴ Hearing Tr. at 196-199 (Yurco).

⁴³⁵ Hearing Tr. at 196-198 (Yurco).

⁴³⁶ Hearing Tr. at 197-198 (Yurco)(where Yurco only cites OCC, Weirton, and Bethlehem); *see also* Purchaser Questionnaire at Questions II-2, III-15 & III-29 (citing *** as well).

⁴³⁷ Hearing Tr. at 199 (Mr. Yurco).

⁴³⁸ First Remand Determination at 37-40.

⁴³⁹ First Remand Determination at 39.

⁴⁴⁰ First Remand Determination at 39-40.

⁴⁴¹ *Nippon II* at 39.

⁴⁴² *Nippon II* at 39

⁴⁴³ *Nippon II* at 39.

U.S. Can's testimony was not well-founded because the Court stated that the record showed that Weirton had a history of delivery and supply problems during the period.⁴⁴⁴

We have reviewed the Court's discussion of our analysis for U.S. Can and the record evidence relating to its decision to increase *** its purchases of Japanese merchandise in 1999. As an initial matter, we note that we did agree with the Court's statement that Mr. Yurco's testimony during the Commission's public hearing was not inconsistent with his testimony during the preliminary staff conference.⁴⁴⁵ However, Mr. Yurco's hearing testimony was not consistent with the documentary evidence placed on the record by U.S. Can. For example, as we noted in our First Remand Determination,⁴⁴⁶ at the public hearing in this investigation, Mr. Yurco's stated that, during the months in 1999 when the company reduced the tonnage it received from Weirton, it also reduced the tonnage it received from Japan, and that the company "did not favor the Japanese mills and take tons away from Weirton Steel."⁴⁴⁷ However, the record evidence indicates that, when ***, it ***.⁴⁴⁸ Similarly, in his testimony, Mr. Yurco assured the Commission that U.S. Can does "not use foreign quotes in pricing discussions with [its] domestic suppliers" during its annual contract negotiations.⁴⁴⁹ However, Mr. Yurco's testimony on this issue ***.⁴⁵⁰ Similarly, in a memorandum drafted by ***,⁴⁵¹ We view this evidence as undermining Mr. Yurco's assertions.

Moreover, U.S. Can's pricing patterns during the period of investigation indicate that its sourcing decisions with respect to the industry were not due to the delivery problems of certain domestic producers, as U.S. Can asserted at the hearing and in its purchaser questionnaire. In this regard, in its hearing testimony and purchaser questionnaire, U.S. Can stated that it had significant delivery problems with domestic producers, including Weirton, Bethlehem, Ohio Coatings (Wheeling Pittsburgh), and *** that led it to source increased volumes from Japan in 1999.⁴⁵² However, the record shows that ***.⁴⁵³ The company ***.⁴⁵⁴ Moreover, U.S. Can ***.⁴⁵⁵

⁴⁴⁴ *Nippon II* at 39.

⁴⁴⁵ First Remand Determination at 38.

⁴⁴⁶ First Remand Determination at 38.

⁴⁴⁷ Hearing Tr. at 208-09 (Yurco).

⁴⁴⁸ CR and PR at Table V-3. Data on U.S. Can's overall purchases show that ***. CR and PR at Table II-1. In this regard, we note that, at the public hearing, Mr. Yurco stated that he had data showing that the reduction in purchases from Weirton that occurred during certain months of 1999 were accompanied by "commensurate" reductions in Japanese receipts (i.e., shipments) during the same period. Hearing Tr. at 207-08. He also assured the Commission that he would submit the data showing this correlation in the respondents' posthearing brief. *Id.* The data were not submitted to the Commission, however. *See generally* Respondents' Posthearing Brief.

⁴⁴⁹ Hearing Tr. at 203. (Mr. Yurco).

⁴⁵⁰ February 9, 1998 Memorandum from *** to File (attached to Respondents' Posthearing Brief at Vol. IV).

⁴⁵¹ February 9, 1998 Memorandum from *** to File (attached to Respondents' Posthearing Brief at Vol. IV).

⁴⁵² Hearing Tr. at 197-198 (Yurco); Purchaser Questionnaire at Questions II-2, III-15 & III-29 (***).

⁴⁵³ CR and PR at Table V-3.

⁴⁵⁴ U.S. Can Purchaser Questionnaire, at Question III-29, ***.

⁴⁵⁵ CR and PR at Table V-3.

Indeed, U.S. Can's decision to change the volumes sourced from these four producers seems more directly linked to ***. In this regard, the record shows that ***.⁴⁵⁶ Similarly, ***.⁴⁵⁷

U.S. Can ***,⁴⁵⁸ even though U.S. Can provided no indication in its testimony or questionnaire that ***.⁴⁵⁹ While there is little evidence in U.S. Can's purchaser questionnaire or the documentary evidence submitted by respondents indicating why U.S. Can ***.⁴⁶⁰ *** is a simpler matter. In an internal U.S. Can memorandum dated May 29, 1998, ***.⁴⁶¹ In 1999, U.S. Can ***.⁴⁶²

Finally, we note that U.S. Can rated the domestic product as ***.⁴⁶³ Given these ratings of the domestic product's ***, it is not clear why the company would have chosen to ***. On the contrary, we would have expected that U.S. Can ***.⁴⁶⁴ ⁴⁶⁵

We have also reexamined the record with respect to U.S. Can's claims of Weirton's poor quality. As noted in our remand determination, one document submitted by U.S. Can references ***. As noted by the Court, the document references problems existing "for a long period of time", indicating that the quality concerns were more than a short-term issue. Nevertheless, there are notable limitations with respect to the significance of this document – *i.e.*, its reference ***. With respect to the overall quality of Weirton's shipments to U.S. Can, a document ***.⁴⁶⁶ Moreover, the *** document itself states that ***. Thus the document bolsters the conclusion that ***.

In sum, Mr. Yurco's testimony as to U.S. Can's reasons for increasing its imports of Japanese product in 1999 were not consistent with the other record evidence relating to U.S. Can's sourcing choices during the period. As indicated above, we believe that U.S. Can's decision regarding the volume of its purchases of merchandise from Japan in 1999 was due primarily to the prices offered by Japanese suppliers in 1999, rather than the delivery and on-time performance problems exhibited by some domestic producers with respect to U.S. Can's purchases in 1998 and 1999. In this regard, we note -- as we have in our previous determinations in this proceeding -- that the record contains significant documentary evidence of the fact that U.S. Can ***, despite U.S. Can's assertions to the contrary.⁴⁶⁷

⁴⁵⁶ CR and PR at Table V-3.

⁴⁵⁷ CR and PR at Table V-3.

⁴⁵⁸ CR and PR at Table V-3.

⁴⁵⁹ *See generally* Purchaser Questionnaire at Questions II-2, III-15 & III-29.

⁴⁶⁰ CR and PR at Table V-3.

⁴⁶¹ May 29, 1998 Memorandum drafted by *** (attached to Respondents' Posthearing Brief at Ex. 20.)

⁴⁶² CR and PR at Table V-3.

⁴⁶³ *** Purchaser Questionnaire, Question IV-10 (Japan-US comparison).

⁴⁶⁴ CR and PR at Table II-5 (showing that all seven purchasers responding stated that the domestic product was superior to the Japanese product with respect to delivery time and that seven of eight responding purchaser stated that the domestic product was comparable or superior to the Japanese product in terms of reliability of supply.).

⁴⁶⁵ We addressed the issue of U.S. Can's claims of a shift toward more "globally oriented suppliers" in our prior views. There we observed that: (1) Weirton exports TCCSS to five countries in Europe, including Germany, the United Kingdom and Italy, where U.S. Can facilities are located; (2) Weirton's exports to Europe in 1999 exceeded the combined tonnage of all Japanese producers; and (3) there was little or no reference to a company strategy to seek more globally-oriented suppliers in the U.S. Can documents submitted to the Commission. *See* Remand Determination at 40 n.146.

⁴⁶⁶ Petitioner's Posthearing Brief at Exhibit 8 (showing "usable" rate ***).

⁴⁶⁷ First Remand Determination at p. 19; Final Determination at 16.

d. Silgan

As we have previously discussed, Silgan also asserted that there were non-price reasons for its decision to purchase increased volumes of subject merchandise during the period. For example, at the hearing, Robert Owen, an employee of Silgan, testified that Silgan had purchased subject imports only because they were necessary for specialized applications at Silan and were not available from the domestic industry or because the imports were of a “quality level [Silgan] cannot obtain from U.S. producers.”⁴⁶⁸ Mr. Owen asserted that the increase in Silgan’s purchases of TCCSS from Japan between 1997 and 1999 was also due to Silgan’s acquisition of Campbell’s Soup, which uses “small quantities” of TCCSS produced by Nippon Steel because of its “superior quality.”⁴⁶⁹ Finally, Mr Owen stated that Silgan dropped Weirton as a supplier in 1998 for failing to meet Silgan’s quality and service requirements. He added that Weirton’s tonnage “(w)as not replaced by Japanese or other imports” but was shifted to other U.S. domestic suppliers.”⁴⁷⁰

On remand, the Commission weighed Silgan’s assertion that it needed to source certain specifications from Japan that were unavailable from the domestic producers against other record evidence, including Silgan’s questionnaire response that indicated that it purchased *** percent of its required TCCSS specifications from the domestic producers.⁴⁷¹ The Commission found that a portion of the increase in Silgan’s imports of subject merchandise may have stemmed from Silgan’s 1998 purchase of Campbell’s Soup but noted that Silgan did not allege that Campbell’s Soup required unique specifications.⁴⁷² Moreover, the Commission found, ***.⁴⁷³

In *Nippon II*, the Court found that the Commission failed to provide substantial evidence to support its conclusion that the predominant factors in Silgan’s purchase decision were not its quality and delivery concerns.⁴⁷⁴ In particular, the Court found that Silgan’s testimony was consistent with the evidence relating to the quality and delivery problems of the industry and stated that the Commission made no effort on remand to assess whether these concerns were the reason for Silgan’s subject import purchases.⁴⁷⁵ In this regard, the Court noted that, because Silgan’s stated purchasing concerns were ***, in that order, these concerns would explain why Silgan chose to source increasing amounts of material from subject producers.⁴⁷⁶

We have again examined the record evidence concerning Silgan’s purchasing decisions, taking particular account of the Court’s analysis in *Nippon II*. As an initial matter, we would note that, as we discussed previously, Silgan purchased ***,⁴⁷⁷ at the same time that the subject imports were ***.⁴⁷⁸ Moreover, although Silgan’s purchases *** in 2000, this ***. In essence, our view of the record data indicates a close correlation between *** during the first three full years of the period.

⁴⁶⁸ Hearing Tr. at 201-202 (Owen).

⁴⁶⁹ Hearing Tr. at 202 (Owen).

⁴⁷⁰ Hearing Tr. at 200-201 (Owen).

⁴⁷¹ Silgan Purchaser Questionnaire at III-15. *** purchases *** of its specifications from Japanese suppliers.

⁴⁷² First Remand Determination at 36.

⁴⁷³ First Remand Determination at 36.

⁴⁷⁴ *Nippon II* at p. 38.

⁴⁷⁵ *Nippon II* at p. 38.

⁴⁷⁶ *Nippon II* at p. 38.

⁴⁷⁷ Table V-9 (revised).

⁴⁷⁸ Table Second Remand-1.

In response to the Court's concerns about addressing Silgan's statements on quality and service, we continue to believe that the record evidence suggests that price was more than a minor factor in Silgan's decision to increase its purchases of subject imports. First, while Silgan highlighted quality and delivery problems in its testimony at the hearing and its questionnaire, Silgan also ***.⁴⁷⁹ Thus, as we also noted above, Silgan itself seems to believe that subject import pricing, particularly ***, would be an important factor in its purchasing decision.⁴⁸⁰

Moreover, Silgan's testimony about the specific non-prices it gave for purchasing imports is not fully consistent with the record evidence. For example, when Silgan's Mr. Owen testified before the Commission, his entire testimony on this issue consisted of the statement that Silgan decided to "terminate Weirton as a supplier" in 1998 because of "Weirton's inability to meet Silgan's quality and service requirements."⁴⁸¹ While it is true that Silgan made a similar statement in its questionnaire,⁴⁸² Silgan made no other comments on this issue in its questionnaire response, did not describe these failures in any detail, and provided no documents to the Commission showing what quality or delivery problems Weirton was having prior to 1998.⁴⁸³ Moreover, Silgan's claim at the hearing that it terminated Weirton as a supplier in 1998 was inconsistent with the record evidence showing that Silgan ***.⁴⁸⁴

Moreover, we note that Mr. Owen testified at the hearing that a significant portion of the increase in Silgan's imports of subject merchandise during the period were the "product of an historical relationship between Campbell's Soup and Nippon Steel."⁴⁸⁵ According to Mr. Owen, Campbell's Soup had historically bought merchandise from Nippon because of their quality levels.⁴⁸⁶ As a result, Mr. Owen stated, when Silgan acquired Campbell's in 1998, Silgan "agreed to continue using Nippon as a supplier" at Campbell's request. Mr. Owen's testimony on this issue implies that Silgan began purchasing merchandise from Nippon only because of its acquisition of Campbell's in 1998. However, this testimony, which forms a significant part of Silgan's argument that its import volumes were not significant during the investigation, is not consistent with the record data that show that ***, before the acquisition of Campbell's.⁴⁸⁷ Moreover, this testimony is not fully consistent with that fact that ***.⁴⁸⁸ This ***.⁴⁸⁹ Given this, we believe the record evidence is not fully consistent with Mr. Owen's explanation of the reasons for the increase in Silgan's subject import purchases in 1998 and 1999.

Moreover, we note that other record information is at odds with Silgan's testimony. For example, one Weirton official questioned Silgan's claims that it was disappointed with Weirton's quality

⁴⁷⁹ Silgan Purchaser Questionnaire at Question II-2.

⁴⁸⁰ As we noted previously as well, Silgan indicated in its questionnaire that it ***. Silgan Purchaser Questionnaire at II-2; *see also, Id.* at III-18 and IV-7.

⁴⁸¹ Hearing Tr. at 200 (Owen).

⁴⁸² In its questionnaire response, Silgan stated that it ***. Silgan Purchaser Questionnaire Response, Question III-15.

⁴⁸³ See Silgan Purchase Questionnaire, Questions II -2 , III-18, & IV- 7.

⁴⁸⁴ CR and PR at Table V-9 (showing ***). Further, as noted previously, Silgan also ***. Silgan Questionnaire Response, Question III-15.

⁴⁸⁵ Hearing Tr. at 202 (Owen).

⁴⁸⁶ Hearing Tr. at 202 (Owen).

⁴⁸⁷ Revised Table V-9.

⁴⁸⁸ Table V-9 (revised).

⁴⁸⁹ Table V-9 (revised).

and delivery performance in 1997 and 1998.⁴⁹⁰ According to ***,⁴⁹¹ *** stated that a Silgan official had ***.⁴⁹² Moreover, ***.⁴⁹³ Thus, Silgan's claim of quality and delivery problems is undermined by other evidence on the record such as Mr. ***'s statements on this matter.

Finally, we note that Silgan stated that its decision to increase its purchases of subject imports during the period was also due, in part, to ***.⁴⁹⁴ However, as we noted in our remand determination, the record shows that the ***.⁴⁹⁵ Moreover, the record indicates that, while the domestic producers did not produce certain wider products sourced by Silgan from the Japanese producers, Silgan was able to, and did, use the domestic product in place of the wider product supplied by the Japanese during the period but chose not to do so because of increased costs resulting from the use of the narrower domestic product.⁴⁹⁶

On balance, we find that Silgan's stated non-price reasons for buying subject imports were arguably less contradicted by other record evidence than the reasons given by other purchasers. We nevertheless conclude that the record as whole indicates that the low price of subject imports was more than a minor factor in Silgan's decision to increase its purchases of subject imports over the period of investigation.

B. Nonsubject Imports

Finally, in *Nippon II*, the Court found that the Commission had not adequately explained why nonsubject imports were not the predominant source of injury to the domestic industry, especially given the regional nature of their shipments to the United States.⁴⁹⁷ The Court also found that the Commission did not properly conclude that there was a marked reversal in the pattern of underbidding by the subject imports vis-a-vis nonsubject imports during the period of investigation, asserting that the underbidding charts prepared by the Commission showed no particular change in underbidding patterns.⁴⁹⁸

1. The Regional Volumes of Nonsubject Imports

In *Nippon II*, the Court noted that, in its First Remand Determination, the Commission had found that there was no indication that the impact of subject imports was more heavily concentrated on the West Coast of the United States, given that subject imports entered both the Eastern and Western United States at comparable rates, that there was aggressive subject pricing across the country, and that the financial performance of the sole domestic producer located in the West declined throughout the period, as did the shipments of all domestic producers.⁴⁹⁹ In finding this analysis flawed, the Court stated that the Commission "needed to determine whether there was a correlation between the supposedly declining U.S. mills' West Coast revenues, specific instances of underbidding by producers

⁴⁹⁰ July 5, 2000 Affidavit of *** at p.3 (attached to Petitioners' Posthearing Brief at ex. 20).

⁴⁹¹ July 5, 2000 Affidavit of *** at p.3 (attached to Petitioners' Posthearing Brief at ex. 20).

⁴⁹² July 5, 2000 Affidavit of *** at p.3 (attached to Petitioners' Posthearing Brief at ex. 20).

⁴⁹³ July 5, 2000 Affidavit of *** at p.3 (attached to Petitioners' Posthearing Brief at ex. 20).

⁴⁹⁴ Hearing Tr. at 201 (Owen).

⁴⁹⁵ Silgan Purchaser Questionnaire Response at III-31.

⁴⁹⁶ Hearing Tr. at 201-202 (Owen).

⁴⁹⁷ *Nippon II* at 39-40.

⁴⁹⁸ *Nippon II* at 40.

⁴⁹⁹ *Nippon II* at 40.

of subject imports, and a subsequent shift in volume to those subject imports.”⁵⁰⁰ According to the Court, the Commission needed to establish that there “was an increase in volume that correlates in some way to instances of underbidding” as a means of establishing that imports were a material cause of injury to the West Coast producers.⁵⁰¹

We have again examined the record data on this issue in light of the Court’s comments. As the Court suggested, we have examined the record evidence to assess whether there is pricing data showing a correlation between subject import underbidding and increases in subject import volume during the period. While the Commission did not specifically seek comprehensive price comparison data focusing on the Western market for most purchasers of tin mill products,⁵⁰² there is record evidence relating to West Coast price competition in the market.⁵⁰³ In its price comparison data, the Commission obtained price bid data for all bids at ***, which is located in California,⁵⁰⁴ as well as for *** located on the West Coast.⁵⁰⁵ In sum, the bid data for these companies indicate that, as the Japanese importers competed more aggressively throughout the period, the companies increased their purchases of subject imports.

For example, the pricing data for *** show the weighted average prices of the subject imports ***.⁵⁰⁶ At the same time, the subject import sales to this facility ***.⁵⁰⁷ In contrast, domestic sales to ***.⁵⁰⁸ The pricing data for ***, although limited, show a similar trend. In 1999, *** was able to obtain a sale of *** short tons of TCCSS for *** when it made an offer to *** that was at least *** per ton below any other producer in that year.⁵⁰⁹ In other words, although these price comparison data available for the West Coast are somewhat limited, the data do establish that there were substantial increases in subject import volume to West Coast facilities that correlated with increased underselling by the subject merchandise.

Moreover, we note that USS-Posco, the only U.S. producer of TCCSS in the western United States,⁵¹⁰ reported that it ***.⁵¹¹ USS-Posco’s net sales ***.⁵¹² Furthermore, USS-Posco ***.⁵¹³ Similarly, USS-Posco reported that ***.⁵¹⁴ USS-Posco observed that ***.⁵¹⁵

Finally, in its questionnaire response USS-Posco indicated ***, reporting that:

⁵⁰⁰ *Nippon II* at 40-41.

⁵⁰¹ *Nippon II* at 40-41.

⁵⁰² The Commission would simply note, in this regard, that it is required to assess the impact of subject import pricing on the industry as a whole, rather than on a sub-segment of it, under 19 U.S.C. §§1673d & 1677(7).

⁵⁰³ See CR and PR at Tables V-2 & V-4a.

⁵⁰⁴ *** Purchaser Questionnaire, Question I-2.

⁵⁰⁵ *** Purchaser Questionnaire, Question I-2.

⁵⁰⁶ Table TCCSS-2. The pattern *** was as follows: ***.

⁵⁰⁷ CR and PR at Table V-4a.

⁵⁰⁸ CR and PR at Table V-4a.

⁵⁰⁹ CR and PR at Tables V-2.

⁵¹⁰ CR and PR at Table III-1 (USS-Posco is located in California).

⁵¹¹ Final phase questionnaire response of USS-Posco at 2.

⁵¹² CR and PR at Table VI-3.

⁵¹³ CR and PR at D-3-4.

⁵¹⁴ Final phase questionnaire response of USS-Posco at 19-20. ***. We note that ***. CR at V-24 n.33, PR at V-9, n.33.

⁵¹⁵ Preliminary phase questionnaire response of USS-Posco at 19 and 20 (revised page 20). ***.

- ***⁵¹⁶
- ***
- ***
- ***
- ***⁵¹⁷

In sum, from ***.⁵¹⁸

Accordingly, there is substantial record evidence showing a correlation between subject import underselling during the period and increased import volumes in the West Coast market. As a result, the record shows that there is a correlation between the increased volumes of imports into the West Coast market during the period at LTFV prices and the apparent declines in the financial condition of the West Coast producers.

B. Nonsubject Import Pricing

In *Nippon II*, the Court also questioned the Commission’s analysis of the underselling patterns of subject imports vis-a-vis nonsubject imports in its First Remand Determination.⁵¹⁹ In its First Remand Determination, the Commission prepared, as requested by the Court in *Nippon I*, tables showing comparisons of subject import pricing bids to individual producers to all nonsubject bids during each year of the period.⁵²⁰ The Commission looked at both individual nonsubject supplier bids as well as weighted-average bid data. Although there were a limited number of observations, the Commission stated that the tables showed a “marked reversal” of nonsubject import underselling patterns during the period, with nonsubject imports underselling the subject imports in 1997-1998 but then underselling the subject imports only about half the time in 1999-2000.⁵²¹ In *Nippon II* the Court criticized this analysis as flawed, noting that the Commission’ use of two year increments to perform its analysis masked the fact that there was no evident change in the trends seen in the chart when examined on a year-to-year basis.

As an initial matter, we note that it was necessary to prepare new subject and nonsubject bid comparison charts because of the addition of the *** pricing data that was inadvertently left out of our first pricing charts. We present these new tables below.

We have examined the tables in question and the other record evidence on this issue, in light of the Court’s comments. We first re-present the relevant data in light of the revisions to the data pertaining to ***. Table Second Remand 4 below shows the weighted average nonsubject and subject Japanese prices. It also shows margins of underselling or overselling where there were both subject and nonsubject prices for a given purchaser in a given year. Table Second Remand 4 is largely a

⁵¹⁶ We note that ***. The discrepancy may result from the fact that *** to be the initially contracted-for prices. See *** Producer Questionnaire Response (preliminary) at exhibit IV-D-3, and CR and PR at Table V-2. In any event, we have no basis to conclude that one set of data is preferable to the other in this case. We note that in evaluating pricing to *** in this opinion, we have assumed the data submitted by *** is correct.

⁵¹⁷ Preliminary phase questionnaire response of *** at 20-21 (revised page 20).

⁵¹⁸ CR and PR Table VI-3.

⁵¹⁹ *Nippon II* at 41-42.

⁵²⁰ First Remand Determination at 44-45.

⁵²¹ First Remand Determination at 45, 46.

consolidation of the data in Tables TCCSS-5 and TCCSS-6, which were used in, and attached to, the Commission's first remand determination.⁵²²

Table Second Remand 4: Weighted-average nonsubject and Japanese prices and margins of underselling, 1997-2000												
Purchaser	1997			1998			1999			2000		
	Japan price	Non-subject price	Margin (%)	Japan price	Non-subject price	Margin (%)	Japan price	Non-subject price	Margin (%)	Japan price	Non-subject price	Margin (%)
***	***	***	***	***	***	***	***	***	***	***	***	***
* * * * *												

Table Second Remand 5 below shows the number of nonsubject import bids that were above, below, or within the range of Japanese import bids in each year of the period of investigation. It is similar to the table shown in page 46 of our first remand determination.⁵²³

Table Second Remand 5: Bid comparisons – number of bids by nonsubject imports, 1997-2000			
Year	Below all Japanese bids	Within the range of all Japanese bids	Above all Japanese bids
Nonsubject Imports			
1997	2	0	4
1998	4	1	3
1999	5	1	4
2000	0	1	2
Total	11	3	13
Source: Compiled from data submitted in response to Commission questionnaires.			

Tables Second Remand 4 and Second Remand 5 show that, when viewed on a year-to-year basis, the pattern of underselling and overselling by nonsubject imports as compared to subject imports is mixed. Both tables show substantial instances in which nonsubject imports were priced above subject imports. We acknowledge that there is not a clear change in the pattern over the course of the period of investigation. A mixed pattern of underselling and overselling is consistent with our finding that both the subject and nonsubject imports were significant factors in the market during the period. That the nonsubject imports may have had an adverse effect on the domestic industry during the period does not preclude a finding of material injury by reason of the subject imports. In our view, Tables Second Remand 4 and Second Remand 5 provide no basis to conclude that the pricing of nonsubject imports had such a predominant impact so as to sever the causal link between subject imports and injury.

⁵²² Table Second Remand 4 differs from those prior tables in that: (1) it uses revised *** data; and (2) it reverses the order of the columns for nonsubject and subject imports. The latter change was made for presentation purposes only, so that Table Second Remand 4 corresponds with Table Second Remand 5. As presented, both tables consider the degree to which nonsubject import prices or bids were below those of subject imports.

⁵²³ Table Second Remand 5 differs from the prior table in that it uses revised *** data. The additional *** data increases the number of observations in each year.

Whatever the effect of the nonsubject imports during the period, the record establishes that the subject imports competed aggressively with the nonsubject imports on price during this period, that their volume increased more rapidly than that of the nonsubject imports and that, by the end of the period examined, their share of the U.S. market had surpassed that of the nonsubject imports.⁵²⁴ Our findings in this regard are consistent with the average unit value (AUV) data for both the subject and nonsubject imports through the period, which show that the AUVs of the subject imports – although *** per ton higher than the nonsubject price in 1997 -- fell to *** the AUV of nonsubject imports in 1999.⁵²⁵ In sum, the record indicates that the subject imports aggressively and successfully competed on price in the market with the nonsubject imports, including those imports that were of lesser quality than the subject merchandise, as well as with the domestic product.

Our finding comports with the statutory requirements to examine whether the subject imports are a “substantial factor” in the injury being suffered by the domestic industry during the period, as the Federal Circuit points out in *Nippon III*.⁵²⁶ As the Federal Circuit stated, the dumped imports “need not be the sole or principal cause of injury” to the industry.⁵²⁷ Instead, “as long as [the] effects [of dumping] are not merely incidental, tangential or trivial, the foreign product sold at less than fair value meets the causation requirement.”⁵²⁸ Under this standard, the issue in this proceeding is not whether the subject imports are a cause of injury that is more important than, or even equal to any effect of nonsubject imports, but rather whether the subject imports have caused more than a minimal or tangential amount of injury.

In this case, the record shows that the subject imports made a significant material contribution to the injury suffered by the domestic industry. The record shows, as we have stated previously,⁵²⁹ that the subject imports increased their share of the tin mill market at a more rapid rate than the nonsubject imports during the period, that they occupied significant portions of the market in both the Eastern and Western sections of the United States, that they aggressively competed on price throughout the entire market and that the financial condition of producers in the West as well as in the rest of the United States were impacted by their competition. In sum, in response to the Court’s concerns, we again find that the nonsubject imports were not the predominant cause of injury to the domestic industry during the period and that the subject imports were a substantial factor in that injury.⁵³⁰

CONCLUSION

The record shows that the volume of imports grew rapidly over the period of investigation, with import volumes growing on an absolute level by 85.8 percent between 1997 and 1999 and continuing to grow between interim 1999 and interim 2000. The record shows that the market share of the subject imports grew significantly during this period as well, increasing from *** percent in 1997 to *** percent in 1999, and then to *** percent in the first quarter of 2000. The record further shows that price is an important part of the sales negotiation process in the tin mill market, that the subject imports generally undersold the domestic merchandise during the period at increasing margins, and that

⁵²⁴ CR and PR Table C-1.

⁵²⁵ CR and PR at Table IV-2.

⁵²⁶ *Nippon III* at 4.

⁵²⁷ *Nippon III* at 4.

⁵²⁸ *Nippon III* at 4 (citing *Gerald Metals v. United States*, 132 F.3d 716, 721-22 (Fed Cir. 1997)).

⁵²⁹ Original Determination at 10-11 & 22-23; First Remand Determination at 40-46.

⁵³⁰ As we emphasized in our First Remand Determination and as the Court seemed to recognize in *Nippon II*, there may be more than one sufficient cause of material injury to the domestic industry. *Nippon II* Slip Op. at 42 n.31.

domestic and subject prices fell during the period. Given these trends, we again find that the record shows that there was significant underselling by subject imports during the period and that the subject imports depressed and suppressed domestic prices during this period. We again find that these trends in subject import volume and pricing levels correlated with significant declines in the industry's condition during the period, as the industry saw its production, employment, domestic shipments, net sales revenue, and profitability levels all decline considerably during the period. Finally, we note that, as we have discussed at length in this remand determination and in our prior opinions in this investigation, we do not find that the material impact of these subject import pricing and volume trends was offset or outweighed by the impact of such other factors as the industry's quality and delivery issues during the period, its lead time advantage, or the pricing or volume effects of nonsubject imports.

For the reasons stated above, as well as the reasons set forth in our previous determinations in this investigation, we determine that an industry in the United States is materially injured by reason of imports of tin- and chromium-coated steel sheet from Japan that are sold in the United States at less than fair value.

Revised Table TCCSS-1

Firm-specific U.S. and Japanese final bid and volume data for Inv. No. 731-TA-860 (Final), Tin- and Chromium-Coated Steel Sheet from Japan, 1997-2000

* * * * *

Revised Table V-9

TCCSS: ***'s purchasing history, 1997-2000

* * * * *

Revised Tables II-1 and II-2 for ***: U.S. purchaser; quantities, values, and average unit values of tin- and chromium-coated steel sheet, 1997-99

* * * * *

Revised Tables II-1 and II-2 for ***: U.S. purchaser; quantities, values, and average unit values of tin- and chromium-coated steel sheet, 1997-99

* * * * *

