# UNITED STATES INTERNATIONAL TRADE COMMISSION

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

Investigations Nos. 701-TA-409-412 (Preliminary) and 731-TA-909-912 (Preliminary)

DETERMINATION AND VIEWS OF THE COMMISSION
(USITC Publication No. 3388, January 2001)

## DETERMINATIONS

On the basis of the record[1] developed in the subject investigations, the United States International Trade Commission determines, pursuant to sections 703(a) and 733 (a) of the Tariff Act of 1930 (19 U.S.C. § 1671b(a) and 1673 (b)(a)),[2] that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports from France, Germany, the Netherlands, and the United Kingdom of low enriched uranium, that are alleged to be subsidized by the Governments of France, Germany, the Netherlands, and the United Kingdom and that are alleged to be sold in the United States at less than fair value (LTFV).

## COMMENCEMENT OF FINAL PHASE INVESTIGATIONS

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling which will be published in the *Federal Register* as provided in section 207.21 of the Commission's rules upon notice from the Department of Commerce (Commerce) of affirmative preliminary determinations in the investigations under section 703(b) and 733 (b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in these investigations under section 705(a) and 735 (a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

## BACKGROUND

On December 7, 2000, a petition was filed with the Commission and Commerce by USEC Inc., and its wholly owned subsidiary United States Enrichment Corp., Bethesda, MD, alleging that an industry in the United States is materially injured and threatened with material injury by reason of subsidized and LTFV imports of low enriched uranium from France, Germany, the Netherlands, and the United Kingdom.

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

[2] Vice Chairman Okun and Commissioner Devaney not participating.

Accordingly, effective December 7, 2000, the Commission instituted countervailing duty and antidumping investigations Nos. 701-TA-409-412 (Preliminary) and 731-TA-909-912 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of December 14, 2000 (65 F.R. 78187). The conference was held in Washington, DC, on December 28, 2000, and all persons who requested the opportunity were permitted to appear in person or by counsel.

# VIEWS OF THE COMMISSION

Based on the record in these investigations, we find that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of low enriched uranium ("LEU") from France, Germany, the Netherlands, and the United Kingdom that are allegedly subsidized and/or sold in the United States at less than fair value ("LTFV").

## I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS

The legal standard for preliminary antidumping and countervailing duty determinations requires the Commission to determine, based upon the information available at the time of the preliminary determination, whether there is a reasonable indication that a domestic industry is materially injured, threatened with material injury, or whether the establishment of an industry is materially retarded, by reason of the allegedly unfairly traded imports.[1] In applying this standard, the Commission weighs the evidence before it and determines whether "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation."[2]

## II. DOMESTIC LIKE PRODUCT AND INDUSTRY

### A. In General

In determining whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the Commission first defines the "domestic like product" and the "industry."[3] Section 771(4)(A) of the Tariff Act of 1930, as amended ("the Act"), defines the relevant domestic industry as the "producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."[4] In turn, the Act defines "domestic like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation . . . ."[5]

The decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and the Commission has applied the statutory standard of "like" or "most similar in characteristics and uses" on a case-by-case basis.[6] No single factor is dispositive, and the Commission

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[1] 19 U.S.C. §1671b(a), 19 U.S.C. §1673b(a); see also American Lamb Co. v. United States, 785 F.2d 994, 1001-1004 (Fed. Cir. 1986); Ranchers-Cattlemen Action Legal Foundation v. United States, 74 F. Supp.2d 1353, 1368-69 (Ct. Int'l Trade 1999).

[2] American Lamb, 785 F.2d at 1001 (Fed. Cir. 1986); see also Texas Crushed Stone Co. v. United States, 35 F.3d 1535, 1543 (Fed. Cir. 1994).

[3] 19 U.S.C. §1677(4)(A).

[4] 19 U.S.C. § 1677(4)(A).

[5] 19 U.S.C. § 1677(10).

[6] See, e.g., NEC Corp. v. Department of Commerce, 36 F. Supp.2d 380, 383 (Ct. Int'l Trade 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Torrington Co. v. United States, 747 F. Supp. 744, 749 n.3 (Ct. Int'l Trade 1990), aff'd, 938 F.2d 1278 (Fed. Cir. 1991) ("every like product determination 'must be made on the particular record at issue' and the 'unique facts of each case'"). The Commission generally considers a number

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may consider other factors it deems relevant based on the facts of a particular investigation.[7] The Commission looks for clear dividing lines among possible like products and disregards minor variations.[8] Although the Commission must accept the determination of the Department of Commerce ("Commerce") as to the scope of the imported merchandise allegedly subsidized or sold at LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified.[9]

### B. Product Description

In its notices of initiation, Commerce defined the scope of these investigations as follows: enriched uranium hexafluoride ($UF_6$) with a $U^{235}$ product assay of less than 20 percent that has not been converted into another chemical form, such as $UO_2$, or fabricated into nuclear fuel assemblies, regardless of the means by which the LEU is produced (including LEU produced through the down-blending of highly-enriched uranium).

Certain merchandise is outside the scope of these investigations. Specifically, these investigations do not cover enriched uranium hexaflouride with a $U^{235}$ assay of 20 percent or greater, also known as highly enriched uranium. In addition, fabricated LEU is not covered by the scope of these investigations. For purposes of these investigations, fabricated uranium is defined as enriched uranium dioxide ($UO_2$), whether or not contained in nuclear fuel rods or assemblies. Natural uranium concentrates ($U_3O_8$) with a $U^{235}$ concentration of no greater than 0.711 percent and natural uranium concentrates converted into uranium hexaflouride with a $U^{235}$ concentration of no greater than 0.711 percent are not covered by the scope of these investigations.[10]

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[6] (...continued)
of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes and production employees; and, where appropriate, (6) price. See Nippon, 19 CIT at 455 n.4; Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int'l Trade 1996).

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

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

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

[10] Notice of Initiation of Antidumping Duty Investigations: Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom, 66 Fed. Reg. 1080 (Jan. 5, 2001); Notice of Initiation of Countervailing Duty Investigations: Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom, 66 Fed. Reg. 1085 (Jan. 5, 2001).

### C. Domestic Like Product

Petitioner USEC Inc. and its wholly-owned subsidiary United States Enrichment Corporation (hereinafter referred to collectively as "USEC") argues that there is a single domestic like product consisting of all domestically-produced low enriched uranium hexaflouride.[11] No respondent party has argued differently.

The statutory definition of "domestic like product" (a "product which is like, or in the absence of like, most similar in characteristics and uses with the article subject to an investigation") makes clear that the definition of the subject merchandise is the starting point for defining the domestic like product. Normally, the domestic like product will be the domestic product which is "like" the subject merchandise. In this case, domestically-produced LEU is identical to the subject imports.[12]

The Commission may, however, define the like product to include a broader range of products than the subject merchandise, and is not bound by previous injury determinations even if they involve the identical product.[13] Although the Commission has in its earlier decisions, in which it applied its five-factor semifinished product analysis, found all forms of uranium along the nuclear fuel cycle (as described below) to constitute a single like product, these decisions reflected in part the broader scope of those proceedings, and these previous decisions do not suggest that the domestic like product should be expanded here beyond the scope of these investigations to encompass upstream products (uranium concentrate or natural uranium hexaflouride) or downstream products (uranium dioxide and fuel rods).

In previous decisions involving LEU and other uranium products, the results of the five-factor semifinished product analysis were mixed.[14] Although the Commission concluded, on balance, that the five factors weighed in favor of finding one like product covering the spectrum of uranium products along the fuel cycle, some of the factors did tend to distinguish LEU from other uranium products. Specifically, LEU is set off from upstream uranium products both by the significance of the enrichment process and the substantial costs involved.[15] In addition, although the Commission has in the past found that LEU and upstream products share common physical characteristics and functions (all of these products contain $U^{235}$ and are dedicated to the production of $UO_2$ for use in nuclear power plants), there are also significant differences in physical characteristics (with the $U^{235}$ isotope occurring in higher proportions in LEU than upstream uranium products).[16] In sum, there does not appear to be a compelling factual basis for expanding the like product in these investigations to encompass upstream products.

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[11] Petition, Volume V, at V-4-V-5; Petitioner's Postconference Brief, Attachment B.

[12] CR at I-7, PR at I-5.

[13] See, e.g., Hosiden, 85 F. 3d at 1567-1568; Torrington, 747 F. Supp. at 749.

[14] E.g., Uranium from Kazakhstan, Inv. No. 731-TA-539-A (Final), USITC Pub. 3213 (July 1999) at 6, n.23. In a semi-finished product analysis, the Commission currently examines: (1) whether the upstream article is dedicated to the production of the downstream article or has independent uses; (2) whether there are perceived to be separate markets for the upstream and downstream articles; (3) differences in the physical characteristics and functions of the upstream and downstream articles; (4) differences in the costs or value of the vertically differentiated articles; and (5) significance and extent of the processes used to transform the upstream into the downstream articles. At the time of the Commission's first two uranium decisions, this test was articulated somewhat differently. It did not include the third factor listed above, and included two factors that are no longer considered: the interchangeability of articles at different stages of production; and whether the article at an earlier stage of production embodies or imparts to the finished article an essential characteristic or function. E.g., Uranium from the U.S.S.R., Inv. No. 731-TA-539 (Preliminary), USITC Pub. 2471 (Dec. 1991) at 5, n.14.

[15] CR at I-6 and I-8, PR at I-4 and I-6.

[16] Id.

With regard to a like product expansion in the other direction along the nuclear fuel cycle, the Commission generally does not expand the like product to include downstream domestic articles, such as uranium dioxide or fuel assemblies in this case, when the scope does not encompass a corresponding downstream imported product.[17]

Based on the record in the preliminary phase of these investigations, we determine that there is one domestic like product consisting of all low enriched uranium hexaflouride corresponding to the scope of these investigations.

### D. Domestic Industry

In defining the domestic industry, the Commission's general practice has been to include in the industry all of the domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market.[18] Based on our like product determination, we determine that there is a single domestic industry consisting of the sole domestic producer of low enriched uranium hexaflouride, USEC.[19] [20]

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[17] See, e.g., Beryllium Metal and High-Beryllium Alloys from Kazakstan, Inv. No. 731-TA-746 (Final), USITC Pub. 3019 at 5 (Feb. 1997); Manganese Metal from the People's Republic of China, Inv. No. 731-TA-724 (Preliminary), USITC Pub. 2844 at 9 (Dec. 1994); Fresh Garlic from the People's Republic of China, Inv. No. 731-TA-683 (Final), USITC Pub. 2825 at I-14 & n. 65 (Nov. 1994).

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

[19] Respondents in these investigations and the Ad Hoc Utilities Group have argued that enrichers, including USEC, sell a service and not a good, and that the Commission cannot base an injury determination on the sale of a service. Urenco/Eurodif Postconference Brief at 6-10; Ad Hoc Utilities Group Postconference Brief at 18-23. When the Commission previously considered this issue in Uranium from the U.S.S.R., Inv. No. 731-TA-539 (Preliminary), USITC Pub. 2471 (Dec. 1991) at 10-11, the Commission found that enriched uranium is a "product" that some entity produced. Since enrichment constitutes an integral part of the production process of enriched uranium, the Commission found that USEC's predecessor, the Department of Energy, must be deemed to be a "producer" of the domestic like product.

In deciding whether a firm qualifies as a domestic producer, the Commission generally analyzes the overall nature of a firm's production-related activities in the United States by examining six factors: (1) source and extent of the firm's capital investment; (2) technical expertise involved in U.S. production activities; (3) value added to the product in the United States; (4) employment levels; (5) quantity and type of parts sourced in the United States; and (6) any other costs and activities in the United States directly leading to production of the like product.

In these investigations, the record is clear, based on the six-factor test described above, that USEC is the producer of the domestic like product. First, USEC is responsible for raising its own capital, and enrichment is capital-intensive. CR at I–9 and App. E, E-3, PR at I-6 and App. E. Second, enrichment operations require considerable technical expertise. Third, the enrichment process accounts for a very substantial part of the total cost of LEU. CR at I-6, PR at I-4. Fourth, employment involved in enrichment activities is substantial. CR/PR at Table III-5. The fifth factor is not applicable because LEU does not have parts. Finally, the other costs and activities involved in the production of LEU (mining, concentration, and conversion) do not diminish the significant costs of enrichment. CR at I-6, PR at I-4. In comparison to USEC's role in producing LEU, the role played by the utilities in the production of LEU is minor. Utilities merely furnish the $UH_6$ feedstock, hold title to the feedstock before it is enriched, and specify the required assay of the finished product.

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

## III. CUMULATION[21]

### A. In General

For purposes of evaluating the volume and price effects for a determination of reasonable indication of material injury by reason of the subject imports, section 771(7)(G)(i) of the Act requires the Commission to assess cumulatively the volume and effect of imports of the subject merchandise from all countries as to which petitions were filed and/or investigations self-initiated by Commerce on the same day, if such imports compete with each other and with domestic like products in the U.S. market.[22] In assessing whether subject imports compete with each other and with the domestic like product,[23] the Commission has generally considered four factors, including:

(1) the degree of fungibility between the subject imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;

(2) the presence of sales or offers to sell in the same geographic markets of subject imports from different countries and the domestic like product;

(3) the existence of common or similar channels of distribution for subject imports from different countries and the domestic like product; and

(4) whether the subject imports are simultaneously present in the market.[24]

While no single factor is necessarily determinative, and the list of factors is not exclusive, these factors are intended to provide the Commission with a framework for determining whether the subject imports compete with each other and with the domestic like product.[25] Only a "reasonable overlap" of competition is required.[26]

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[21] Commissioner Bragg notes that the record indicates that import quantities (whether measured in separative work units or "SWU," the units of effort involved in enriching natural $UF_6$, or kilograms of LEU) for each of the subject countries exceeded the 3 percent statutory negligibility threshold during the pertinent period. CR/PR at Table IV-1. The most recent 12-month period for which data are available in this case is calendar year 1999. Therefore, negligibility is not an issue in these investigations.

[22] 19 U.S.C. § 1677(7)(G)(i).

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

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

[25] See, e.g., Wieland Werke, AG v. United States, 718 F. Supp. 50 (Ct. Int'l Trade 1989).

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

In assessing whether a domestic industry is threatened with material injury by reason of imports from two or more countries, the Commission has discretion to cumulate the volume and price effects of such imports if they meet the requirements for cumulation in the context of present material injury.[27] In deciding whether to cumulate for purposes of making our threat determinations, we have in the past also considered whether the subject imports are increasing at similar rates and have similar pricing patterns.[28]

### B. Analysis

Based on the record in the preliminary phase of these investigations, we find that there is a reasonable overlap of competition among the subject imports and between the subject imports and the domestic like product. First, prior to fabrication, LEU from one manufacturer is highly interchangeable with LEU produced by other enrichers; domestically-produced LEU and the subject merchandise are chemically and physically identical.[29] Thus, we find that there is a high degree of fungibility among the subject imports and between the subject imports and the domestic like product. Second, the record indicates that the subject imports are sold or offered for sale in the same geographic markets as domestically-produced LEU.[30] Accordingly, we find that there is a geographic overlap in sales among the subject imports and the domestic like product. Third, the channels of distribution for subject imports and domestically-produced LEU are similar, and the products are sold to the same customers, namely to U.S. utilities for fabrication into fuel assemblies by fabricators.[31] Fourth, imports from each of the subject countries were sold in the U.S. market throughout the period of investigation, and thus the subject imports were simultaneously present in the U.S. market.[32]

In the context of a threat of material injury analysis, the record in these investigations evidences similar volume and price trends among imports from the subject countries. The volume of imports from each of the subject countries increased substantially between 1997 and 1999,[33] and the U.S. market share of each subject country, except the Netherlands, also increased over this period.[34] As discussed below, our ability to discern price trends among the subject countries from the available data is limited. Nevertheless, based on the limited data on the record, it appears that the prices of imports from the subject countries measured by contract year mostly tended to decline over the period of investigation.[35]

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[27] 19 U.S.C. § 1677(7)(H).

[28] See Torrington Co. v. United States, 790 F. Supp. 1161 (Ct. Int'l Trade 1992); Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 741-42 (Ct. Int'l Trade 1989); Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp. 1068, 1072 (Ct. Int'l Trade 1988).

[29] CR at I-7 and II-6-7, PR at I-5 and II-4-5.

[30] CR/PR at Table V-8.

[31] CR at I-7, PR at I-5.

[32] CR/PR at Table IV-2.

[33] Between 1997 and 1999, imports from France rose from *** SWU to *** SWU, imports from Germany rose from *** SWU to *** SWU, imports from the Netherlands rose from *** SWU to *** SWU, and imports from the United Kingdom rose from *** SWU to *** SWU. CR/PR at Table IV-1.

[34] CR/PR at Table IV-3. The market share of imports from the Netherlands *** when comparing interim (January-September) 2000 with interim 1999.

[35] The weighted-average toll fees by contract year for imports from Germany were $*** for contract year 1997 and $*** for contract year 1999. For imports from the Netherlands they were $*** for contract year 1997 and $*** for contract year 2000. For imports from the United Kingdom they were $*** for contract year 1997 and

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Consequently, we exercise our discretion to cumulate subject imports from France, Germany, the Netherlands, and the United Kingdom for purposes of our preliminary determinations.

## IV. CONDITIONS OF COMPETITION

The following conditions of competition in the LEU industry are relevant to our determinations. First, as noted above, LEU is a fungible, commodity product.[36] LEU produced by one enricher is highly interchangeable with LEU produced by other enrichers.[37] There are, however, no substitutes for LEU in powering electrical utilities' nuclear reactors.

LEU is one of several intermediate products in the production of nuclear reactor fuel. The processing of uranium ore into such fuel involves the following four successive stages of production, collectively known as the "nuclear fuel cycle:" (i) the mining of uranium ore and extraction of uranium in a concentrated form of $U_3O_8$ by "concentrators;" (ii) the transformation of the $U_3O_8$ into natural uranium hexafluoride ($UF_6$) by "converters;" (iii) the enrichment of natural $UF_6$ (in which the effort involved to increase the percentage of $U^{235}$ is measured in SWU) by "enrichers;" and (iv) the fabrication of enriched $UF_6$ into nuclear fuel assembly rods by "fabricators."[38] LEU is produced in the third stage of the nuclear fuel cycle.

Traditionally, utilities have purchased concentrated $U_3O_8$ from converters, and have arranged for each intermediate product to be further processed along each stage of the nuclear fuel cycle. In most cases, utilities obtain LEU from enrichers by paying cash for the SWU deemed to be contained in the LEU and provide the enrichers with a quantity of converted uranium feedstock as compensation for the amount of converted uranium deemed to be contained in the LEU. Utilities may also purchase LEU entirely for cash.[39] Most LEU is sold pursuant to long-term contracts between enrichers and utilities ranging in duration from two to ten years, with prices that are fixed or subject to escalator clauses.[40]

The global enrichment industry is highly concentrated. There are currently only four major enrichers in the world: USEC, the Urenco companies, Eurodif, and Tenex in Russia.[41] New entry into this industry is difficult because of its capital-intensive nature.

USEC is the only producer of LEU in the United States. USEC was established by the U.S. Government in 1992 as the first step in the privatization of the Department of Energy's uranium enrichment activities. USEC became a publicly-held corporation in July 1998.[42] The company supplies *** percent of the world market for enriched uranium, and a substantial portion of its total sales are to export markets.[43] USEC enriches uranium at two plants, one near Piketon, Ohio (the Portsmouth plant) and the other in Paducah, Kentucky. As part of its privatization, USEC entered into an agreement with the U.S. Treasury

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[35] (...continued)
$*** for contract year 2000. For imports from France, they were $*** for contract year 1995 and $*** for contract year 1999. CR/PR at Tables V-2 through V-5.

[36] CR at I-13 and II-37; PR at I-9 and II-24.

[37] CR at II-7, PR at II-5. USEC, the foreign producers of the subject merchandise, and importers reported in ***.

[38] CR at I-6, PR at I-4.

[39] CR at I-7, PR at I-5.

[40] CR at V-4-5; PR at V-4.

[41] CR at I-9, PR at I-6.

[42] CR at I-12; PR at I-8.

[43] CR/PR at Table III-3.

Department whereby it committed itself to continue operation of these two plants until at least January 2005, subject to several exceptions.[44] One of these exceptions (a downgrade in the company's long-term corporate debt to below investment grade) was triggered in February 2000, and in June 2000, the company announced that it will close its Portsmouth plant in June 2001.[45]

U.S. demand for LEU rose throughout the period of investigation. Apparent U.S. consumption of LEU measured by SWU increased by 20 percent from 1997 to 1999, and by 21 percent comparing the interim periods.[46] The parties to these investigations disagree over the prognosis for future demand. Petitioner expects that domestic demand will remain relatively flat through 2005.[47] Respondents, on the other hand, contend that worldwide demand is expected to increase.[48] We will examine the outlook for LEU demand more closely in any final phase of these investigations.

Demand for LEU has been affected by the deregulation of electrical utilities in the United States. As nuclear power plants have been forced to compete with other sources of electricity, utilities operating nuclear plants have faced increasing pressure to cut costs by obtaining uranium at the lowest possible price. In making purchasing decisions, utilities may evaluate a number of factors in addition to price (such as discounts on pre-existing supply commitments, extended payment terms, the timing of the provision by the utilities of the converted uranium feedstock, and packaging and handling terms) to arrive at an "evaluated price" for a particular bid.[49]

Another significant condition of competition relating to the supply of LEU is the Russian HEU Agreement. Under this Agreement, the United States is committed to buying LEU that is produced in Russia by blending down weapons-grade, high enriched uranium. USEC acts as the U.S. Government's Executive Agent under the Russian HEU Agreement. In this capacity, the company is required to purchase 5.5 million SWU annually from Russia in the 1999-2014 period. This represents a *** of USEC's annual enrichment sales. Under this Agreement, USEC pays Russia in kind for the natural uranium contained in the enriched $UF_6$ (by crediting Russia an equivalent quantity of natural $UF_6$) and pays in cash for the value of enrichment (SWU).[50] These imports and sales of Russian LEU have led to a diminished use of USEC's enrichment facilities in the United States and have contributed to increased unit costs. [51]

USEC also maintains *** inventories of LEU. For example, the company's 1999 ending inventories of *** SWU amounted to approximately *** percent of domestic consumption in that year.[52]

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

[45] CR at III-6, PR at III-4

[46] CR/PR at Table IV-3.

[47] Petition at V-12.

[48] Urenco/Eurodif Postconference Brief at 11.

[49] CR at II-6-7, V-15, PR at II-4-5, V-7.

[50] CR at III-3, PR at III-2.

[51] CR at VI-10, PR at VI-5.

[52] CR/PR at Table III-4.

Finally, we note that there is a certain degree of competition among different forms of uranium as utilities have the option of purchasing uranium at several points in the nuclear fuel cycle.[53]

## V. REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF ALLEGEDLY SUBSIDIZED AND/OR LTFV IMPORTS

Section 771(7)(F) of the Act directs the Commission to determine whether the U.S. industry is threatened with material injury by reason of the subject imports by analyzing whether "further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted."[54] The Commission may not make such a determination "on the basis of mere conjecture or supposition," and considers the threat factors "as a whole" in making its determination whether dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued.[55] In making our determination, we have considered all statutory factors that are relevant to these investigations,[56] including the rate of the increase in the volume and market penetration of subject imports, unused production capacity, and the substantial inventories of subject merchandise.

For the reasons discussed below, we determine that there is a reasonable indication that the domestic industry is threatened with material injury by reason of subject imports.

The volume of the cumulated subject imports *** from 1997 to 1999.[57][58] The *** when comparing the interim periods, with interim 2000 import levels approximately *** percent higher than interim 1999 levels.[59] The market penetration of subject imports ***, and again ***[60]***.[61] We recognize that a substantial proportion of the subject imports during the period of investigation occurred pursuant to long-

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[53] Uranium From Russia, Ukraine and Uzbekistan, Invs. Nos. 731-TA-539-C, E and F (Review), USITC Pub. 3334 (Aug. 2000) at II-16

[54] 19 U.S.C. § 1673d(b) and 1677(7)(F)(ii).

[55] 19 U.S.C. § 1677(7)(F)(ii).

[56] 19 U.S.C. § 1677(7)(F)(i). Factor VI regarding product-shifting is not an issue in this investigation. Factor VII also is inapplicable because this investigation does not involve imports of a raw agricultural product.

[57] Subject imports rose from *** million SWU in 1997, to *** million SWU in 1998, and to *** million SWU in 1999. CR/PR at Table IV-1.

[58] We are mindful of the argument raised by Global Nuclear Fuel – Americas LLC ("GNF"), a fabricator of nuclear fuel rods, that the LEU that it imports does not compete with domestic production because these imports are owned by foreign utilities who provide the LEU to GNF for fabrication and subsequent reexport. Petitioner appears to agree that GNF's imports do not compete with domestic production. Conference Transcript at 125 (testimony of Richard Cunningham). We intend to examine this issue further in any final phase of these investigations.

[59] Subject imports were *** million SWU in the first nine months of 1999, and *** million SWU in the first nine months of 2000. CR/PR at Table IV-1.

[60] On the basis of quantity, subject imports accounted for *** percent of domestic consumption in 1997, *** percent in 1998, and *** percent in 1999. In interim 1999, subject imports accounted for *** percent of domestic consumption, compared to *** percent in the same time period in 2000. CR/PR at Table IV-3.

[61] The domestic industry's market share measured by quantity *** in 1997, to *** percent in 1998, and to *** percent in 1999. In interim 1999, its market share was *** percent, compared to *** percent in interim 2000. CR/PR at Table IV-3.

term contracts that had been entered into before the POI.[62] Nonetheless, the record also indicates that the *** of the large enrichment contracts awarded during the POI went to enrichers in the subject countries, indicating that the trend of increasing volume and market share for subject imports is likely to continue.[63] Moreover, the enrichers in the subject countries are export-oriented,[64] and, on a cumulative basis, have some excess production capacity, with further capacity increases planned.[65] Further, exports to the United States were projected ***.[66] In addition, producers in the subject countries maintain some inventories of LEU.[67] All of these factors indicate the likelihood of substantially increased imports of the subject merchandise in the imminent future.[68]

We are unable to analyze fully at this stage of the proceedings the price effects of subject imports because of the limited record and complexity of pricing practices in the LEU industry.[69] For example, some of the prices reported to us were "evaluated prices" (*i.e.*, prices that have been adjusted to account for the value to the purchaser of certain non-price terms in the contract), while others were not.[70] Comparisons between evaluated and non-evaluated prices would appear to lead to inaccurate results. It is also unclear whether current imports during the POI or bids for future deliveries are the better measure of any price effects.[71] We also note that there may be a recent trend towards shorter terms in LEU contracts, which would exacerbate adverse price effects of increasing subject imports. We intend to examine these issues further in any final phase of these investigations.

The record shows that prices by contract year generally declined over the POI.[72] In addition, the prices in the contracts negotiated during the POI were generally lower than those negotiated prior to the

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[62] See CR/PR at tables V-1 through V-5.

[63] The Commission asked USEC and the producers in the subject countries for information regarding their top 10 contract awards during the POI. The information provided in response to these requests, and purchaser responses to lost sales and lost revenue allegations, show that out of a total of 60 reported contracts, involving a total of 27.5 million SWU and $2.4 billion, only *** percent by quantity and *** percent by value were awarded to USEC. CR at V-13-14, PR at V-__.

[64] The producer in the Netherlands ***. For the producers in Germany and the United Kingdom, export sales *** sales to their home markets. The French producer's export sales represent between *** and *** percent of total sales. CR/PR at Tables VII-3, -4, -5, and -6.

[65] Id.

[66] CR/PR at Tables VII-3 through VII-6.

[67] CR/PR at Table VII-1.

[68] We note that non-subject imports, namely imports of Russian LEU entered under the Russian HEU Agreement, play a very significant role in the U.S. market. Imports of Russian product had a *** of the U.S. market than the cumulative total of all subject imports throughout the POI, ***. CR/PR at Table IV-3. The information on the record in these preliminary phase investigations is not sufficient for us to analyze fully the effects of these Russian imports on USEC. We intend to examine this issue further in any final phase of these investigations including the extent to which USEC treats U.S. and Russian product interchangeably for purposes of selling LEU to the U.S. market.

[69] Commissioner Bragg notes that based upon the outcome determinative nature of these unresolved price issues and the apparent limited factual record at this stage of the proceedings, final phase investigations will provide the Commission with the opportunity to hear first-hand from the parties and purchasers, resulting in the development of a more complete factual record.

[70] CR at V-15, n.12, PR at V-7, n.12.

[71] We also intend to examine the extent to which existing contract prices between a given LEU producer and purchaser may influence prices in subsequent contracts between the same parties.

[72] CR/PR at figure V-2.

POI. [73] However, the examination in these preliminary investigations of bidding on contracts during the POI does not show any significant evidence of underselling or underbidding by the foreign producers in the subject countries.[74] Of *** possible comparisons in which USEC or a supplier from a subject country had the lowest bid, USEC made the lowest bid in *** cases.[75] As noted above, however, there are some uncertainties regarding the comparability of the pricing data, which we will attempt to address in any final phase of these investigations. Nonetheless, on balance, we find that the cumulated subject imports are likely to enter the United States at prices that would have a significant depressing or suppressing effect on domestic prices for LEU.

In addition, a number of adverse trends in the domestic industry's performance suggest that material injury by reason of the subject imports is imminent. USEC's total sales *** million SWU in 1999, but *** SWU in 2000.[76] The share of U.S. consumption accounted for by USEC's domestic production *** over the POI, *** percent in 1997 to *** percent in 1999. Although there was an *** over the interim periods, with the domestic producer's share of the U.S. market at *** percent in interim 1999 compared to *** percent in interim 2000, this latter figure was *** the domestic industry's annual market share in 1997.[77] USEC's financial condition also deteriorated over the period under investigation. Its net income, on the basis of its overall establishment operations, *** percent in 1998 to *** percent in 2000.[78] We recognize that these results were likely to have been substantially affected by USEC's operations as an importer of Russian LEU, but we note that the profitability of the company's U.S. production operations *** over the period examined, ***.[79] Employment in the LEU industry also has declined.[80] Finally, USEC faces the need to invest in developing alternative uranium enrichment technologies, which may require significant research and development costs, and which could be jeopardized by increased imports from the subject countries.[81] Based on the limited record in these preliminary phase investigations, we find it likely these declines in domestic industry performance will continue and result in material injury to the domestic industry if the industry is forced to continue competing with increased volumes of the subject imports.

## CONCLUSION

For the foregoing reasons, we determine there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of low enriched uranium from France, Germany, the Netherlands, and the United Kingdom that are allegedly subsidized and/or sold in the United States at less than fair value.

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[73] CR/PR at Tables D-1 though D-4.

[74] We also note that few lost sales or lost revenue allegations appear to have been confirmed by Staff. CR at V-16-V-30, PR at V-8.

[75] CR/PR at TableV-7.

[76] CR/PR at Table III-3.

[77] We recognize that imports from Russia under the HEU Agreement may have played a significant role in this *** in the domestic industry's market share. We intend to analyze this issue more fully in any final phase of these investigations. We will also examine the question of the impact of the subject imports on USEC's domestic production, in light of the fact that ***.

[78] CR/PR at Table VI-1.

[79] USEC's gross profits as a ratio to net sales on its domestic production operations ***. CR/PR at Table VI-2.

[80] CR/PR at Table III-5.

[81] CR at VI-15 and App. E, E-3, PR at VI-8, App. E.