NEW STEEL RAILS FROM CANADA

Determination of the Commission in Investigation No. 701-TA-297 (Final) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigation

Determination of the Commission in Investigation No. 731-TA-422 (Final) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigation

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UNITED STATES INTERNATIONAL TRADE COMMISSION

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United States International Trade Commission

New steel rails from Canada (Final)

Determinations and Views of the Commission

Public Report

Determinations

On the basis of the record [1] developed in the subject investigations, the Commission determines, [2] pursuant to section 705(b) of the Tariff Act of 1930 (19 U.S.C. § 1671d(b)), that an industry in the United States is threatened with material injury [3] by reason of imports from Canada of new steel rails, [4] provided for in subheadings 7302.10.1020, 7302.10.1040, 7302.10.5000, and 8548.00.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce to be subsidized by the Government of Canada.

The Commission also determines, [5] pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)), that an industry in the United States is threatened with

[1] The record is defined in sec. 207.2(h) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(h), as amended, 53 F.R. 33041 (Aug. 29, 1988)).

[2] Chairman Brunsdale, Vice Chairman Cass, and Commissioner Lodwick dissenting.

[3] Commissioners Eckes, Rohr, and Newquist further determine that, pursuant to section 705(b)(4)(B), they would not have found material injury by reason of the imports subject to the investigation but for the suspension of liquidation of the entries of the subject merchandise.

[4] For the purposes of these investigations, "new steel rails" include rails, whether or not of alloy steel, provided for in subheadings 7302.10.10 (statistical reporting numbers 7302.10.1020 and 7302.10.1040), 7302.10.50, and 8548.00.00 of the Harmonized Tariff Schedule of the United States (previously in items 610.2010, 610.2025, 610.2100, and 688.4280 of the Tariff Schedules of the United States Annotated). Specifically excluded from the scope of these investigations are imports of "light rails," which are less than 30 kilograms per meter (60 pounds per yard), such as are used in amusement park rides. "Relay rails," which are used rails that have been taken up from a primary railroad track and are suitable to be reused as rails (such as on a secondary rail line or in a rail yard), are also excluded.

[5] Chairman Brunsdale, Vice Chairman Cass, and Commissioner Lodwick dissenting.

material injury [6] by reason of imports from Canada of new steel rails, that have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

Background

The Commission instituted these final investigations effective April 18, 1989, following preliminary determinations by the Department of Commerce that certain benefits which constitute subsidies within the meaning of section 701 of the Tariff Act of 1930, as amended, are being provided to manufacturers, producers, or exporters of new steel rails in Canada, and that new steel rails from Canada are being, or are likely to be, sold in the United States at LTFV, as provided for in section 735 of the Tariff Act of 1930, as amended.

Notice of the institution of the Commission's final investigations, and of a public hearing to be held in connection therewith, was given by posting copies of the notices in the Office of the Secretary, U.S. International Trade Commission, Washington, D.C., and by publishing the notice in the Federal Register of April 27, 1989 (54 F.R. 18168). The public hearing was held in Washington, D.C., on July 27, 1989, and all persons who requested the opportunity were permitted to appear in person or by counsel.

[6] Commissioners Eckes, Rohr, and Newquist further determine that, pursuant to section 735(b)(4)(B), they would not have found material injury by reason of the imports subject to the investigation but for the suspension of liquidation of the entries of the subject merchandise.

Views of Commissioners Eckes, Rohr and Newquist[1] [2]

We determine that the domestic industry producing new steel rails is threatened with material injury by reason of imports of new steel rails from Canada that have been found by the Department of Commerce ("Commerce") to be subsidized and/or sold at less than fair value (LTFV).[3] We find, based on the record, that the domestic industry is currently experiencing material injury, but that the record does not support a finding that the articles subject to this investigation are a cause of material injury at the present time. However, having considered the factors set forth in the statute relevant to threat of material injury, we conclude that both the subsidized and the LTFV imports pose a real and imminent threat of material injury to the domestic industry.[4]

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[1] See the Additional Views of Commissioner Eckes.

[2] See the Additional views of Commissioner Rohr.

[3] In accordance with 19 U.S.C. § 1677(11), the Commission being evenly divided as to whether the determination should be affirmative or negative, our affirmative threat determination is deemed to be an affirmative determination of the Commission. Material retardation is not an issue in this investigation.

[4] We note that both of the Canadian producers are subject to the antidumping duty investigation, but that one was excluded from the subsidy investigation because it was found by Commerce to be benefiting from de minimis subsidies. 54 Fed. Reg. 31991 (Aug. 3, 1989).

Like Product/Domestic Industry

In order to determine whether there is material injury, or threat thereof, to a domestic industry by reason of subject imports, we must first define that domestic industry. The statute defines the term "industry" as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion the domestic production of that product . . ."[5] "Like product" is statutorily defined as "[a] product which is like, or in the absence of like, most similar in characteristics and uses with" the articles subject to investigation.[6]

The like product definition is based on the facts of each investigation.[7] In determining the appropriate like product(s), we typically consider a number of factors relating to characteristics and uses of the articles subject to investigation, including: (1) physical appearance, (2) interchangeability, (3) channels of distribution, (4) customer perception, (5) common manufacturing facilities and production employees, and (6) where appropriate, price.[8] In making this determination, we note that we follow three

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[5] 19 U.S.C. § 1677(4)(A).

[6] 19 U.S.C. § 1677(10).

[7] See, e.g., Asociacion Colombiana de Exportadores de Flores v. United States, ("Asocoflores"), 693 F. Supp. 1165, 1169 (CIT 1988).

[8] See, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, Inv. Nos. 303-TA-19 and 20 (Final) and 731-TA-391-399

additional guiding principles:

1) No single factor that we consider is necessarily dispositive;[9]

2) We may consider any other factors that we find relevant in the particular circumstances of a particular investigation;[10] and

3) Minor variations among products provide an insufficient basis for finding separate like products, and we look for clear dividing lines among like products.[11]

The starting point for the definition of the like product must always be the articles included in the scope of the investigation as defined by Commerce. The imported merchandise covered by these investigations consists of new steel rails.[12]

(Final), Views of Commissioners Eckes, Lodwick, Rohr and Newquist, USITC Publication 2185 (May 1989) ("Antifriction Bearings") at 11.

[9] See, e.g., 19 U.S.C. § 1677(7)(E)(ii).

[10] See, e.g., 19 U.S.C. § 1677(7)(B)(ii).

[11] Antifriction Bearings, USITC Pub. 2185 at 11; Operators for Jalousie and Awning Windows from El Salvador, Inv. Nos. 701-TA-272 and 731-TA-319 (Final), USITC Pub. 1934 (Jan. 1987) at 4 n.4; S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979); Sony Corporation of America v. United States, 712 F. Supp. 978, 981 (CIT 1989).

[12] Specifically, the product subject to investigation is:

> new steel rails, whether of carbon, high carbon, alloy, or other quality steel, and includes, but is not limited to standard rails, all main line sections (at least 30 kg. per meter or 60 pounds per yard), heat-treated or head-hardened (premium) rails, transit rails, contact rail (or "third rail"), and crane rails. Rails are used by the railroad industry, by rapid transit lines, by subways, in mines and in industrial applications.
>
> Specifically excluded from the scope of these investigations are light rails (rails less than 30 kg. per meter or 60 pounds per yard). Also excluded are relay rails which are used rails taken up from a primary railroad track and relaid in a railroad yard or on a secondary track.

In order to make our determination of what domestic products are "like" such new steel rails, we must begin with an understanding of the product itself. Steel rail comes in an assortment of shapes, hardness, and weights per yard.[13] In general, the use of any rail is to allow for the movement of locomotives and rolling stock. The differences in these characteristics make particular rails more or less useful for particular applications. Indeed, there are a number of characteristics that arguably provide a basis on which various types of rail may be distinguished from one another.[14] Under "new" rail, tee, crane, girder, and contact rails all have distinctive shapes and are used for specific applications such that they cannot be interchanged or substituted. Within the category of tee rails, "premium" rail is arguably distinguishable from "standard" rail,[15] and "prime" rail is arguably

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54 Fed. Reg. 31,934, 31,992 (August 3, 1989), Report at Appendix B. The Commission accepts the determination by Commerce as to the class or kind of imported merchandise that is "subject to investigation." The Commission, however, determines what domestic products are "like" the imports under investigation. The domestic like product may or may not be identical to the imported articles specified in Commerce's determination. See, Algoma Steel Corp. v. United States, 688 F. Supp. 639, 644 (CIT 1988), aff'd 865 F.2d 240 (Fed. Cir. 1989); Asocoflores, 693 F. Supp. at 1168 n.4.

[13] Report at A-5-A-10, A-9 n.12.

[14] Id.

[15] Standard rail meets AREA specifications and can be used in any prime rail application. Premium rail is made of special alloys or is tempered (through-hardened or head-hardened) to provide superior strength and wear and commands a higher price.

distinguishable from "industrial" rail.[16] Within the "premium" rail category, "tempered" rail is arguably distinguishable from "alloyed" rail, and "tempered" premium rail can be yet further subdivided into through-hardened and head-hardened rail. Head-hardened rail can be further broken down into rail produced using on-line and off-line processes.[17]

The diverse grounds for drawing distinctions among types of rail thus highlight the difficulties in defining the domestic rail that is like the imported articles under investigation.

The record does not support the finding of clear dividing lines among these products. Further, the arguments of the parties have not accounted for some of these distinctions.[18] The principal issue raised by the parties is whether prime tee rail should be considered a separate like product from industrial tee rail. Parties opposing the petition argue that differences in characteristics (that industrial rails do not meet the specifications for prime rail), customer perceptions, channels of distribution, and price justify the separation of the two

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[16] Prime rail meets American Railway Engineering Association (AREA) specification for use by Class I railroads. Industrial rail is off-specification rail, i.e. rail which has a defect causing it to fail to meet the AREA specifications. Industrial rail is produced as a by-product of the production of prime rail, and can be used in applications not requiring AREA specification rail.

[17] E.g., Report at A-9.

[18] We note that no party has argued that alloy rail is unlike tempered premium rail, that premium rail is unlike standard rail, or that girder, crane and contact rail should be separate like products because of differences in physical characteristics, uses, customer perceptions, etc.

categories of rail into two like products. Petitioner argues that these distinctions do not warrant treatment of the two rails as separate like products.

First, we note that prime and industrial tee rail share the same basic characteristics. Prime and industrial rail have similar shapes, dimensions and composition -- indeed, industrial rail results from a process intended to produce only prime rail. There are of course, some differences, as by definition, industrial rail has failed to meet AREA specifications. However, also by definition, industrial rail is usable in nonprime applications, so the physical characteristics of the two types of rail are more alike than they are dissimilar.

We further note that prime and industrial rail share the same essential function, that is the carrying of locomotives and rolling stock. On the other hand, industrial rail cannot, or should not, be put to the same specific use, i.e., use on the mainlines of Class I railroads, as prime rail. There is no evidence that Class I railroads, by far the largest users of prime rails, purchase industrial rail. Nevertheless, while industrial rail may not be completely interchangeable with prime rails for some uses, prime rail certainly can be used in those applications for which industrial rail is used.

With respect to the alleged differences in price between industrial and prime rail, there is clearly a significant price difference between the prime and industrial rails. However, there are also significant price differences among other different types

of rail.[19] Price differences would accordingly support further subdivision of the like product beyond the single division proposed by respondents.

Channels of distribution differ to some extent, because prime rail is primarily sold directly to Class I railroads by producers. Channels of distribution overlap, however, because distributors sell both prime and industrial rail.[20] In fact, distributors made a number of quotes to Class I railroads and were a substantial factor in the domestic prime rail market. Thus, notwithstanding the fact that prime rail is also sold directly to end users, we find a significant overlap in the distribution of prime and industrial rails.

Finally, it is clear that the production processes, facilities, and employees involved in production of the two types of rails are identical. There is no dispute that the same producers make both types of rail at the same time, on the same lines, using the same equipment and the same workers. There is generally no way to distinguish prime from industrial rail until after production and testing. Further, it is clear that industrial rail is not a product that producers set out to produce. While it can be predicted that a certain volume of rails will fail to meet appropriate specifications, we find in these investigations that

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[19] E.g., Report at A-9.

[20] Indeed, during the period of investigation, Sydney Steel sold virtually all of its rail in the U.S. through distributors. Conference Transcript at 119.

such factory "seconds" do not qualify as a separate like product.

We conclude that while there are certain distinctions between prime and industrial rail, these distinctions are not, on balance, sufficient to warrant finding separate like products. Congress has indicated that minor differences in characteristics and uses should not lead to the conclusion that products are not like one another.[21] Our reviewing court has stated that it the Commission's task to objectively define a "minor" difference.[22] The common characteristics, overall similar use, overlapping distribution and identical manufacturing processes, facilities and employees, outweigh the narrow differences in specific uses, lack of interchangeability, and differences in pricing and distribution. We therefore find that the like product consists of all new rail, excluding light rail.[23]

In light of the above like product definition, we find that the domestic industry consists of the U.S. producers of that product. This includes Bethlehem Steel and CF&I Steel, as well as Wheeling-Pittsburgh.[24]

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[21] S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979).

[22] Asocoflores, 693 F. Supp. at 1169.

[23] "Light" rail, less than 60 pounds per yard, was excluded from the class of imports subject to investigation. Likewise, we exclude it from our consideration of like product in these investigations because it is not manufactured by the same domestic producers that manufacture heavier rail. E.g., Conference Transcript at 49-50.

[24] Wheeling-Pittsburgh stopped shipping rail in April, 1987. Report at A-27.

Condition of the Domestic Industry

To assess the condition of the domestic industry, the Commission is directed to examine, among other factors, apparent consumption of the like product, domestic shipments and production, capacity, capacity utilization, inventories, employment, and financial performance.[25] Examination of these factors reveals that the condition of the new steel rails industry, despite improvement in some areas, remains weak.

Data received through questionnaires indicate that from 1986 to 1987 apparent domestic consumption of new steel rails declined 8.4 percent. In 1988, domestic consumption increased, but remained below the 1986 level. During interim (January-March) 1989, apparent domestic consumption increased over interim 1988.[26]

Both domestic production and shipments of U.S. rail mills also declined from 1986 to 1987, and increased in 1988 to a level above the 1986 level. In interim 1989, production and shipments both increased further over the corresponding period in 1988.

Capacity utilization increased from 1986 to 1987, and increased further in 1988. The rapid increase in capacity utilization reported in 1988 is attributable principally to the

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[25] 19 U.S.C. § 1677(7)(C)(iii).

[26] Report at A-19.

1987 closure of Wheeling-Pittsburgh's plant in Monessen, PA.[27]

Domestic rail mills generally produce rails to order and consequently maintain few or no inventories.[28]

The number of U.S. production employees assigned to the production of new steel rails declined from 1986 to 1987, and, despite some improvement in 1988, remained below the level reported in 1986.[29] Wages paid to production workers of new steel rails declined from 1986 to 1987. In 1988, wages showed some improvement, but still remained lower than the wages paid in 1986.

The poor condition of the industry is most evident in its financial performance. During the entire period of this investigation, U.S. producers of new steel rails sustained significant gross losses, net income losses, and operating

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[27] Report at A-42. The reopening of the Monessen mill by Bethlehem in 1989 is reflected in increased capacity and decreased capacity utilization figures in interim 1989.

[28] Report at A-45.

[29] Report at Table 4.

losses.[30] [31] Moreover, the domestic industry suffered a negative return on assets throughout the period of investigation[32] and negative cash flow until 1988.[33] Capital expenditures in rail operations declined from 1986 to 1988, but recovered somewhat in the interim period; research and development expenditures followed a similar trend.[34]

The domestic new steel rails industry, while showing improvement in some areas, overall has continued to perform negatively. Therefore, we find that the domestic industry is

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[30] Report at Table 6. Factors affecting the negative performance of the industry included increased raw material, energy and depreciation costs, and a high level of health and pension costs, including those costs for workers who were terminated during the restructuring of the steel industry during the early 1980s. Both CF&I and Bethlehem continued to report operating losses, however, even after past service expenses were eliminated. Id. at A-50.

[31] Respondents have raised questions concerning the allocations by domestic producers of financial data. Even with the benefit of respondents' comments, however, it appears that the domestic industry performed negatively in many respects. The Commission has no reason to dismiss the data submitted by the domestic producers, and in any event finds that it is the best information available in accordance with 19 U.S.C. § 1677e(c).

[32] Report at Table 9.

[33] Report at Table 6.

[34] Report at Tables 10 and 11. In this industry, with a marked trend indicating increasing demand for higher technology, premium rail products, capital expenditures and research and development expenditures are an important indicator of whether domestic producers are keeping pace with competitive conditions in a mature market. S. Rep. No. 71, 100th Cong. 1st Sess. 116 (1987) (temporary trends can mask real harm by imports). Domestic producers have made sufficient investments to demonstrate a commitment to the industry, but have had to put significant projects aside until improved profitability enables them to devote resources to capital improvements. E.g., Report at A-58; Appendix F.

presently suffering material injury, but not by reason of the subject imports. We conclude, however, that the present condition of the domestic industry makes it extremely vulnerable to threatened material injury by reason of such imports.

No Material Injury by Reason of the Unfair Imports

We find that, although the domestic industry is experiencing material injury, we cannot conclude that, at the present time, the imports subject to these investigations are a cause of this injury. All imports from Canada come from two producers. One of these producers has been excluded from the countervailing duty investigation, while both are subject to the dumping investigation. Only those imports subject to investigation were considered in making our determinations in these investigations.[35]

We note that there were substantial increases in imports, in both volume and value terms, from both producers. The same is true of their respective market shares; however, particularly in the countervailing duty investigation, the relevant market penetration was not currently significant.

The pricing information of record does not support a finding of underselling. We note that in most instances in which a Canadian producer was awarded an entire contract, it was the only responsible bidder. In most of the other instances in which

[35] However, any discussion of imports in either investigation raises the possibility of release of confidential information. Thus, our discussion is limited to the most general terms.

Canadian product was offered in competition with domestic product, the Canadian product was initially offered at a price between the high and low domestic bids.

Finally, we note that in several instances sales of Canadian rail were made in "trial lot" sizes, purchased by railroads seeking to qualify the Canadian producer for future sales. The sales themselves were in small lots and the sale price was of little importance. Such sales do not themselves cause injury, but are a factor in our consideration of whether Canadian imports pose a threat of material injury to the domestic industry.

Threat of Material Injury

The Commission is directed by statute[36] to consider a number of factors in deciding whether a threat of material injury exists; the presence or absence of any threat factor shall not necessarily give the Commission decisive guidance.[37] The Commission is directed to consider:

> (I) if a subsidy is involved, such information as may be presented to it by [Commerce] as to the nature of the subsidy (particularly as to whether the subsidy is an export subsidy inconsistent with the [Agreement on Subsidies and Countervailing Measures]),
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> (II) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the

[36] 19 U.S.C. § 1677(7)(F). We note that this provision applies in both the subsidy and LTFV contexts.

[37] E.g., Rhone Poulenc, S.A. v. United States, 592 F. Supp. 1318, 1324 n.18 (CIT 1984).

United States,

(III) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level,

(IV) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise,

(V) any substantial increase in inventories of the merchandise in the United States,

(VI) the presence of underutilized capacity for producing the merchandise in the exporting country,

(VII) any other demonstrable adverse trends that indicate the probability that the importation (or sale for importation) of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury,

(VIII) the potential for product-shifting if production facilities owned or controlled by the foreign manufacturers, which can be used to produce products subject to investigation(s) under section 1671e or 1673e of this title, are also used to produce the merchandise under investigation,

(IX) [provisions relating to raw and processed agricultural products], and

(X) the actual and negative potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.[38]

The statute also directs the Commission to consider the effect of dumping findings or remedies in other GATT member markets

[38] 19 U.S.C. § 1677(7)(F)(i).

against the same class or kind of merchandise manufactured or exported by the same party as under investigation.[39]

By necessity, the Commission's analysis of the statutory threat factors involves projection of future events and is inherently "less amenable to quantification" than the material injury analysis.[40] Based on our analysis of the record and these statutory factors, we find that, in light of its vulnerable condition, the domestic industry is threatened with material injury by reason of the subject imports.[41] In making our determination, we are mindful of the statutory directive to analyze the threat of material injury not on the basis of supposition, speculation or conjecture, but "on the basis of evidence that the threat of

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[39] 19 U.S.C. § 1677(7)(F)(iii).

[40] E.g., Hannibal Industries Inc. v. United States, 712 F. Supp. 332, 338 (CIT 1989)(citation omitted).

[41] We note that under the statute, our analysis of material injury or threat thereof by reason of the subject imports is not based on either dumping or subsidies, but on the imports under investigation. "Congress has not simply directed ITC to determine directly if dumping itself is causing injury." Algoma Steel Corp., 688 F. Supp. at 645; see also, Alberta Pork Producers' Marketing Board v. United States, 669 F. Supp. 445, 465 (CIT 1987) (rejecting the argument that the Commission "is required to determine whether there is a causal relationship between the Canadian subsidies found by Commerce and the material injury suffered" by the U.S. industry). Indeed, as noted above the statute indicates that the nature of the subsidy is only one of many factors to be considered by the Commission in making its analysis of threat. Moreover, with this one statutory exception, consideration of the existence of dumping or subsidization is at most a discretionary "other factor" which need not be considered by the Commission. See, Hyundai Pipe Co. v. United States, 670 F. Supp. 357, 360-61 (CIT 1987); Copperweld Corp. v. United States, 682 F. Supp. 552, 559-64 (CIT 1988); Maine Potato Council v. United States, 613 F. Supp. 1237, 1243 (CIT 1985).

material injury is real and that actual injury is imminent."[42]

In these investigations, we made separate affirmative determinations of threat of material injury by reason of dumped and subsidized imports from Canada. Our determination in the dumping investigation is based on our assessment of all imports subject to the LTFV finding by Commerce, that is, the imports of both Algoma and Sydney. As noted above, however, our determination in the subsidy investigation does not include the imports of Algoma, which were excluded from Commerce's affirmative final countervailing duty determination.[43]

Our analysis in the countervailing duty investigation is based on the threatened impact of the subsidized imports from Sydney. We note, however, that in our countervailing duty analysis, we considered the simultaneous importation of LTFV rails produced by Algoma as part of the relevant conditions of trade.

This framework is consistent with the notion of required cross-cumulation as determined by the Federal Circuit in Bingham & Taylor v. United States, 815 F.2d 1482, 1487 (Fed. Cir. 1987). We find that while the statute only requires cross-cumulation of

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[42] 19 U.S.C. 1677(7)(F)(ii); S. Rep. No. 249, 96th Cong., 1st Sess. 88-89 (1979); Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1095 (CIT 1988). In this connection, we note the limitations concerning application of economic models to our analysis under the statute, and in particular note that models cannot supplant the statutory analysis required of the Commission. See, e.g., Alberta Pork Producer's Council v. United States, 683 F. Supp. 1398, 1402 (CIT 1988); Avesta AB v. United States, 689 F. Supp. 1173, 1182 (CIT 1988).

[43] See, supra note 4.

LTFV and subsidized imports from "two or more countries," it is appropriate to consider in the countervailing duty investigation simultaneous LTFV imports from Algoma along with subsidized imports from Sydney even though both producers are located in the same country. This type of "cross-consideration" is not appropriate in the dumping investigation, however, because the entire volume of Canadian imports is already subject to the dumping analysis.[44]

Concerning the nature of the subsidy,[45] we note that Commerce found several programs conferring countervailable subsidies to Canadian producers or exporters other than Algoma which amount to an estimated net subsidy of 113.56 percent.[46] While the subsidies found to be countervailable are not specifically export subsidies, we note that Sydney, the Canadian producer subject to the affirmative determination, is primarily an exporter of new steel

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[44] Commissioner Rohr notes that he agrees that the reasons behind "cross-cumulation" provide the basis for his consideration of the dumped imports as a relevant factor in the subsidy investigation. He does not mean to imply that the cumulation provisions of the statute are directly applicable to these investigations. To the contrary, Commissioner Rohr does not consider the cumulation provision as applicable in these investigations.

[45] Commissioner Eckes notes with agreement the views of the petitioner regarding the impropriety of the so-called "net-back" analysis, that is, adjusting or "correcting" the dumping margin or the delivered price as determined by the Commerce Department. See "Response to questions of the Commission and Staff dated Aug. 3, 1989" at 48-55. See generally, Algoma Steel Corp., 688 F. Supp. at 644 (the division of labor between the Commerce Department and the Commission "cannot be ignored").

[46] 54 Fed. Reg. 31991 (Aug. 3, 1989). For Algoma, Commerce found that the estimated net subsidy was 0.24 percent, which Commerce deemed de minimis. Id.

rail.[47] During the period covered by this investigation, Sydney directed an increasing share of its exports to the U.S. market.[48] Although the volume of its exports to the U.S. is not large, Sydney has significant excess capacity, and has demonstrated its intent to increase U.S. sales by making bids to Class I railroads and sales of trial-sized quantities in an effort to further qualify as a participant in the dominant U.S. Class I railroad market.[49] Further, the Commerce finding that Sydney was "uncreditworthy" and "unequityworthy" at the time it received subsidies indicates that the countervailable domestic subsidies granted in such circumstances must be considered an important factor in the ability of Sydney to continue to produce for export.[50] This information suggests the commitment of Sydney's sponsors to preserve Sydney as a railmaker, and underscores Sydney's urgent need to seek out export markets in the face of operational problems coupled with a sharply declining domestic market.

With respect to the ability and likelihood of the Canadian producers to increase the level of exports to the United States, we note that over the period of investigation, Canadian home market

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[47] Report at A-69-A-71, A-73 n.1.

[48] INV-M-88 (Aug. 23, 1989) at Table 13b.

[49] Id.; Report at A-97. See, Citrosuco, 704 F. Supp. at 1096-97 (rejecting argument that exports would be sent to markets outside the U.S.).

[50] 54 Fed. Reg. 31991-97 (Aug. 3, 1989).

shipments have significantly decreased,[51] while Canadian unused capacity has increased substantially.[52] Because of the need for rail producers to cover high fixed costs in this industry, Canadian producers have a strong incentive to sustain and increase capacity utilization.[53] At the same time as Canadian home market shipments significantly decreased (a decline of almost one-third from 1986-1988), the proportion of Canadian production exported increased accordingly, with an increasing share of those exports being marketed in the U.S. In 1988, for example, the share of Canadian production exported to the U.S. was significant (well in excess of 15 percent), and was almost six times that exported in 1986. Thus, market conditions in Canada are likely to continue to exert pressure on Canadian producers to sustain capacity utilization by increasing exports to the U.S.[54]

The share of apparent U.S. consumption held by Canadian imports increased dramatically in both volume and value terms over the period of investigation. The quantity of imports from Canada, which represented 1.5 percent of apparent U.S. consumption of new steel rails in 1986, rose to 4.9 percent in 1987, and increased

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[51] Report at Table 13.

[52] Report at Table 13.

[53] E.g., EC-M-313 (August 22, 1989) at 5.

[54] We note that Sydney's unused capacity [increased substantially] in 1988, although it apparently [declined somewhat] in interim 1989. INV-M-088 at Table 13b.

further in 1988.[55] Value trends were similar. Market penetration in the first three months of 1989 remained constant in volume terms when compared to the comparable period of 1988, and declined slightly in value from 1988 to the comparable period of 1989.[56] We discount any apparent decline in import penetration, due to the fact that the decline is only for an interim period and due to the fact that import levels may have been affected by the filing of these petitions in September, 1988.[57]

The parties opposing the petition contend that they have received no recent orders from U.S. customers, and thus, it is not likely that importations will increase. This assertion alone is not persuasive that continued increases in imports are not imminent. First, the normal rail-buy period for 1989 in which the majority of tonnage is purchased in the U.S. market is not over.[58] Second, as noted above, we are entitled to note the pendency of this investigation since September, 1988, in discounting any recent

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[55] We note that the imports in the countervailing duty case, while at lower levels, [also] show significant [increases] in 1988. INV-M-088 at Table 13b.

[56] Report at Table 15a. We also note a change in the product-mix of Canadian imports over the period of investigation, away from lower value-added industrial rail, toward the higher value-added prime rail, including premium rail. Report at Table 13.

[57] See, USX Corp. v. United States, 655 F. Supp. 487, 492 (CIT 1987); Phillips Bros. v. United States, 640 F. Supp. 1340, 1346 (CIT 1986); Rhone Poulenc, 592 F. Supp. at 1324.

[58] We also note that the spot market sales are becoming increasingly important in the domestic market. Report at A-31. The recent build-up of Canadian inventories in the U.S. may suggest a shift to a larger Canadian presence in that market, rather than the bid market.

decline in orders from U.S. customers, whether such a decline can be attributed to tactical maneuvering by foreign producers or U.S. importers or to increased uncertainty on the part of U.S. purchasers. Finally, we note that from 1986-88, both Canadian producers steadily increased the number of quotes to Class I railroads year by year, and both have made recent sales to Class I railroads of rail samples for on-track testing, for the purpose of further qualifying for future sales.[59] We are thus not persuaded by respondents' assertion that sales of Canadian product into the U.S. are likely to decline.

In this market, as in all bid-negotiation markets, once initial quotes are submitted, high quoters are negotiated down, and additional quotes supplied. Thus, the presence of LTFV and subsidized Canadian imports can cause price suppression and depression without actual underselling.[60] [61] Information on bids

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[59] Report at A-97.

[60] See, Florex v. United States, 705 F. Supp. 582, 593 (CIT 1989)(injury need not be based on a finding of specific price underselling).

[61] With respect to pricing Commissioner Rohr notes that the effect on the domestic market of unfairly traded Canadian imports is unclear. In the period of investigation, due, at least in part, to their small volume and the particular circumstances of the bidding in which the Canadian producers participated, Commissioner Rohr could not conclude that Canadian imports had resulted in present price suppression or depression. With the increase in the presence of Canadian imports likely as a result of the efforts of both Canadian producers to qualify themselves for future sales to Class I railroads, Commissioner Rohr does not believe that the conclusion that there is no price suppressive or depressive effect can be extended to the future. Accordingly, Commissioner Rohr finds this particular factor to be essentially neutral in his determination.

sought by Class I railroads during the period of investigation reveals that on several initial quotes, the Canadian product was at least lower than one domestic producer, and thus, may have been instrumental in lowering subsequent price quotations by other bidders. In information supplied on final quotes, in some instances the Canadian bid, although not successful, was lower than some domestic bids. Purchasers explained that the producer with the lowest quote does not necessarily receive a contract if it cannot deliver the steel rails at the times required. Also, railroads often choose several producers to supply rails as a sourcing policy. However, these practices do not diminish the likelihood that initial low bids are used by purchasers to depress subsequent quotations.[62]

Inventories of steel rails from Canada in the U.S. have increased dramatically during the period covered by this investigation. These inventories nearly tripled from 1986 to 1988. In March, 1989, inventories were more than three times the interim 1988 level. Inventories of Canadian rails increased to represent 40 percent of shipments of Canadian rails during 1988. While the volume and value figures are relatively small compared to the overall market, rising inventories of Canadian rail, especially prime rail, are indicative of continued Canadian participation in

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[62] We also note that while unit values for domestic rail products have increased slightly over the period of investigation, domestic producers have been unable to recoup their costs of production, Report at A-53, which is an indication of price suppression and depression.

the U.S. market.[63]

Finally,[64] the steel rails industry is mature, with development and production efforts especially important to servicing end-user needs. There is an increasing preference among Class I railroads for premium rail.[65] The technology for producing this high-quality, longer-wearing rail continues to evolve. Over the period of investigation, domestic producers have been unable to make specific investments to improve the technology for premium rail production.[66] At the same time, Sydney is in the process of a C$250 million modernization program, which will include installation of a head-hardening process essential for premium rail production. Algoma has developed a patented prototype for on-line head-hardening.[67] Capital expenditures in 1988 for domestic producers remained well below the 1986 level. One major domestic producer reported no research and development expenditures during the entire period of investigation. With the industry reporting negative cash flow in 1986 and 1987, and marginal positive cash

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[63] Report at Table 12.

[64] The other statutory factors pertaining to the potential for product shifting, product shifting of raw agricultural products, and the existence of dumping in third-country markets are not pertinent in these investigations.

[65] E.g., Report at A-10 n.13; A-29.

[66] E.g., Report at Appendix F.

[67] Report at A-9, A-69. In this context, we find it significant that Canadian imports are increasingly of prime rail, as opposed to industrial rail, and that Canadian premium rail exports to the U.S. have increased steadily from 1986-88. Report at Table 13.

flow in 1988, the potential adverse effect of the subject imports on domestic sales and the industry's ability to fund research and development is apparent.

As we found earlier in these views, the domestic industry is experiencing material injury. The condition of the industry makes it particularly vulnerable to any additional increase in imports from Canada, particularly in light of increasing imports of prime rail. It is clear from past import trends and conditions in the Canadian market that the incentive for Canadian producers to export to the U.S. market will continue to be strong. Based on our analysis of the statutory factors, we therefore have concluded that the domestic industry is threatened with material injury by reason of LTFV and subsidized imports from Canada.

In accordance with 19 U.S.C. §§ 1671d(b)(4)(B) and 1673d(b)(4)(B), we must make an additional finding as to whether material injury by reason of subject imports would have been found "but for" suspension of liquidation of entries of such imports. The "but for" finding is required so that Commerce may impose dumping duties as of the appropriate date. Suspension of liquidation occurred in the subsidy case as of March 2, 1989, the date of Commerce's preliminary affirmative determination.[68] Suspension of liquidation occurred in the LTFV investigation as of March 13, 1989, the date of Commerce's preliminary affirmative

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[68] 54 Fed. Reg. 8784, 8791 (March 2, 1989).

determination.[69] We note that while Canadian imports increased from interim 1988 to interim 1989, suspension of liquidation did not occur until the end of the interim 1989 period -- well after those imports were ordered. In any event, we do not find that "but for" suspension of liquidation, the domestic industry would have been materially injured by reason of subject imports in both the subsidy and LTFV investigations.[70]

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[69] 54 Fed. Reg. 10393, 10394-95 (March 13, 1989).

[70] We note that our determinations were not affected by the recently implemented U.S.-Canada Free Trade Agreement (FTA). The FTA did not purport to change U.S. antidumping or countervailing duty law, and indeed, Article 1902 of the FTA allows both the U.S. and Canada to the right to apply such existing laws to imports from the other country. See, U.S.-Canada Free Trade Agreement, Implementing Act, H.R. Doc. No. 216, 100th Cong., 2d Sess. 512 (1988). See also, id. at 47 ("No provision of the [Free Trade] Agreement, nor the application of any such provision to any person or circumstance, which is in conflict with any law of the United States shall have effect.").

ADDITIONAL VIEWS OF COMMISSIONER ECKES

In making this determination, I have employed an analytical method familiar to long-time observers of this Commission. It is the dual-requirement, or bifurcated, method for injury analysis.

When this approach is applied faithfully, an affirmative injury determination can result only if two conditions are satisfied. First, the domestic industry producing the like or directly competitive product must be materially injured.[1] Second, less-than-fair value imports must be a cause ["by reason of"] of that material injury; in other words, the decisionmaker must find a causal nexus between unfairly traded imports and injury. And, if the evidence of record fails to satisfy both of these threshold conditions, a Commissioner, using this method, shall make a negative determination.

Background

Bifurcated injury analysis is not an eccentric theory zealously promoted by one or two individuals. Rather, it is a pattern of analysis for administering the statute that emerged gradually more than 20 years ago and has been employed by almost

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[1] A domestic industry may also be threatened with material injury or materially retarded. At this point neither of these seems central to the debate between unitarian and traditional analyses. 19 U.S.C. sec. 1671(a)(2)(B), 1673(2)(B).

For verbal variety I use variations of the following terms interchangeably: bifurcated analysis, dual requirement, two-factor, twin-test.

all Commissioners over that period of time. The Commissioners who used this approach have widely divergent political affiliations, educations, work experiences, and trade philosophies. Some were Republicans, others Democrats, and a few were Independents. There were lawyers and non-lawyers, economists and non-economists. The group included doctrinaire free traders and protectionists. This is not to say that each and every Commission written opinion has made specific reference to the twin tests, or that each Commissioner has employed this method all of the time. Nor, does it mean that Commissioners have always addressed each of the conditions directly in their written opinions. Indeed, from time to time individual Commissioners and their staff assistants may have experimented, and occasionally expressed the essence of their analysis imprecisely or inelegantly. Especially in the early years of injury analysis, before the Commission became accustomed to preparing written views for Court review and before the Commission began to utilize lengthy questionnaires to collect information, written opinions often were short and succinct.

But, on the basis of having reviewed carefully anti-dumping and countervailing duty injury investigations made by the Commission since 1954, it is clear to me that over the last twenty years almost all Commissioners believed that effective and consistent administration of the law required use of the two-factor test. As a result, this method has acquired legitimacy, being approved by our reviewing courts and Congress. And, in deference to these authorities, most Commissioners confirmed in the last

decade have continued to employ this method. Possibly, some other method may be found compatible with the statute in the future, but it is fair to say that no alternative analytical method has been used extensively, and has been tested in so many different circumstances over the course of business cycles and changing economic conditions, as has the two-factor. Despite imperfections, its continued use is testament enough to its adaptability and utility.

Unitarian Critique

Why then is it necessary to discuss the evolution of bifurcated analysis? Over the last year, one of the new Commissioners has expressed persistent criticism of this method.[2] Commissioner Cass says: "My colleagues read the unitary phrase 'materially injured ... by reason of' the imports allegedly sold at LTFV as if it created two entirely separate requirements. I cannot accept that reading." Commissioner Cass perceives that something he considers "unitary analysis" is more compatible with the statute, the intent of Congress, and pre-existing Commission practice. In effect, my colleague combines his discussion of injury and causation, so that the dispositive issue is whether subsidized or less-than-fair value imports have a "material" impact

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[2] Commissioner Ronald A. Cass is a Democrat and former law professor at Boston University.

on the domestic industry, regardless of its economic condition.[3]

According to Commissioner Cass, he "routinely analyze[s] the question of material injury by comparing the conditions experienced by the domestic industry to ... those that would have existed had there been no unfairly traded imports." At length in Microdisks from Japan he argues his view that the unitary approach is more appropriate than the traditional bifurcated approach.[4]

My colleague offers several criticisms of the twin-test approach. For one thing, he believes that "it is inappropriate for us to employ a standard that not only makes the 'health' of the industry the first subject of inquiry, but also systematically requires negative determinations where the threshold requirement of 'ill health' is not met."[5] Furthermore, he states elsewhere

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[3] See generally 12-Volt Motorcycle Batteries from Taiwan, Inv. No. 731-TA-238 (Final), USITC Pub. 2213 (August 1989), at 28, 40 [hereinafter "Batteries"].

[4] Quote from Digital Readout Systems and Subassemblies Therefor from Japan, Inv. No. 731-TA-390 (Final), USITC Pub. 390 (January 1989), at 96 [hereinafter "Digital Readout Systems"]. 3.5" Microdisks and Media Therefor from Japan, Inv. No. 731-TA-389 (Final), USITC Pub. 2170 (March 1989), at 52-57 [hereinafter "Microdisks"].

My own criticisms appear in Sewn Cloth Headwear from the People's Republic of China, Inv. No. 731-TA-405 (Preliminary), USITC Pub. 2096 (July 1988), at 17-37; Digital Readout Systems and Subassemblies Therefor from Japan, Inv. No. 731-TA 390 (Preliminary), USITC Pub. 2081 (May 1988), (Additional Views of Commissioners Eckes and Rohr) at 49-60; and Certain Brass Sheet and Strip from Japan and the Netherlands, Inv. Nos. 731-TA-379 and 380 (Final), USITC Pub. 2099 (July 1988), at 23-28.

[5] See Digital Readout Systems, supra, at 105, and Batteries, supra, at 30, 32.

that "the statute under which the Commission conducts title VII investigations does not contemplate any decision based solely on the condition of the domestic industry."[6] He asserts that "denial of relief to industries based on the satisfactory level of industry performance at the present time or on positive industry trends over the period selected by the Commission (without statutory basis) for examination cannot easily be squared with the recently added statutory directive that the Commission take into account business cycles and other effects on industry performance." Also, he claims that "the bifurcated approach is not consistent with, and certainly is not the preferable interpretation of, Title VII."[7]

Not only does my colleague criticize the method, but he also questions the legitimacy of the approach. He asserts that it is "only relatively recently that a majority of the Commission has established a consistent pattern of adherence to the bifurcated approach."[8] But, when in a recent anti-dumping case learned counsel for respondent informed him that use of the bifurcated approach "has been anything but recent and ... the practice of the Commission in this regard can fairly be described as a long history

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[6] Generic Cephalexin from Canada, Inv. No. 731-TA-423 (Final), USITC Pub. 2211 (August 1989), at 20, n. 68 [hereinafter "Cephalexin"].

[7] Batteries, supra, at 28-29; Cephalexin, supra, at 63-64. In Batteries, supra, at 29-30, he lists "five reasons to believe that statute [19 U.S.C. Sec. 1677(C)(iii)] does not permit, and surely does not command, the use of a threshold test for industry health."

[8] Digital Readout Systems, supra, at 112.

of adherence to the traditional [bifurcated] approach," my colleague made a potentially damaging concession: "If this were, in fact, the case, this might be significant. Although statutory text and history must provide the most important bases for statutory construction, I would not lightly disregard consistent, longstanding Commission practice." [emphasis added] However, he added: "A persuasive case can not be made that there has in fact been such a practice with respect to bifurcation of the statutory Title VII inquiry." [emphasis added] [9]

My research in primary sources suggests my colleague is wrong. Obviously, Commissioners can, and do, disagree vigorously with one another. Such debate is often healthy and invigorating, because it compels colleagues to reassess their positions and to review records of the past. Nonetheless, while acknowledging that there may be alternative ways to satisfy statutory requirements, my own review of the record suggests that my colleague's captious critique

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[9] Digital Readout Systems, supra, at 108-109. An excellent discussion of this issue is found in a pre-hearing brief filed November 25, 1988, by N. David Palmeter, counsel for Futaba Corporation, in Digital Readout Systems, at 4.

In 3.5" Microdisks and Media Therefor from Japan, Inv. No. 731-TA-389 (Preliminary), USITC Pub. 2076 (April 1988), at 64, Commissioner Cass says:

> I would not lightly disregard Commission practice if the Commission had a long history of consistent adherence to such an approach, if there were judicial precedent binding the Commission to such an approach, or if the legislative history of congressional enactments subsequent to Commission decisions taking this approach indicated a congressional intent that subsequent legislation, although silent on this matter, be construed as confirmation of the bifurcated approach to decisions under Title VII.

of past Commission votes may rest on incomplete research and inadequate understanding of the historical record. In the interests of clarity, and balance, I offer my own discussion of the Commission's use of dual-condition analysis.

Commission Injury Analysis

The Customs Simplification Act of 1954 transferred the injury-finding function under the Antidumping Act from Treasury to the Tariff Commission, the predecessor of the International Trade Commission, effective October 1, 1954. Transfer of these responsibilities was partly attributable to dissatisfaction with Treasury's practice of not providing explanations for its decisions, but in making the transfer of responsibilities Congress provided no specific instructions to the Commission to provide explanation of its findings. Consequently, during the early years Commission opinions offered very little explanation. Usually, the Commission released to the public a copy of a letter to the Secretary of Treasury reporting the Commission's findings, but not its rationale. For example, in two of the earliest cases involving muriate of potash from Germany and France, the Commission wrote the Secretary of the Treasury a skimpy two sentence letter:

> Dear Mr. Secretary:
>
> Reference is made to the letter from the Acting Secretary of Treasury dated December 14, 1954, which was received by the Tariff Commission on December 15, 1954, advising that Muriate of Potash from the Federal Republic of Germany and from France is being, or is likely to be, sold in the United States at less than fair value as that term is used in the Antidumping Act, 1921, as amended.

> After investigation in accordance with the provisions of section 201(a) of the said Antidumping Act, the Commission by unanimous opinion has determined that the domestic potash industry is not being, and is not likely to be, injured by reason of the importation of muriate of potash from the Federal Republic of Germany or from France at less than fair value.
>
> Sincerely yours,
> E. B. Brossard, Chairman[10]

Despite the brevity of its initial reports, the Commission was sensitive to the desire of Congress that it administer the law in conformity with previous Treasury practice. The Tariff Commission learned that Treasury had employed its administrative discretion to consider "many facets of the injury problem."[11]

These included such factors as import trends, the relationship of delivered prices for domestic and imported goods, and evidence whether dumped imports were responsible for price declines. Also, "consideration was given to the operating efficiency of the domestic industry and the degree of competition present in the domestic industry. The trend of production, volume of sales, volume of exports, the share of the domestic industry in the domestic market and the trend of profit margins as well as the

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[10] Muriate of Potash from the Federal Republic of Germany and France, Inv. No. 1921-AA-2, [no TC Pub. number] (March 1955), at 1.

[11] Indeed, in the Antidumping Act, 1921, the term "injury" was not defined. Treasury adopted the practice of interpreting this word as "material injury," and the Tariff Commission continued this interpretation in the absence of different instruction from Congress. Quote from General Counsel Memorandum to Tariff Commission, October 11, 1954.

rate of return on invested capital and the state of employment...."[12] [13] Commissioners usually considered a variety of factors but did not articulate standards for analyzing the problem and weighing the appropriate factors. In some of the early opinions, nonetheless, there are indications the Commission was moving toward the bifurcated approach.

Early Use of Bifurcated Analysis

My review of the record indicates that Commissioners have employed the dual-requirement approach for more than twenty years. The basic language, indicating separate analyses of injury and causation, appears first in a September 1964 case: Carbon Steel Bars and Shapes from Canada. There the Commission majority asserted:

> "For the Commission to find injury to a domestic industry in a dumping case, it must be satisfied that there is material injury and that it is being caused by the sales-below-fair-value aspect of the goods in question rather than by their mere importation. In this case both conditions are fulfilled."[14] [emphasis added]

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[12] Ibid.

[13] During the first five years, 1955 to 1959, the Tariff Commission made only eleven findings (1 affirmative; 10 negative), and its reports provided little clue as to the bases for its decision. By 1963, however, the Commission was beginning to write longer opinions and to discuss publicly the factors taken into account in its decisions. See, e.g., Hot-Rolled Carbon Steel Wire Rods from Belgium, Inv. No. AA1921-27, TC Pub. 93 (June 1963), at 4, where the Commission considered such items as import penetration ratios, dumping margins, price trends, and trends in production, sales and capacity utilization.

[14] Carbon Steel Bars and Shapes from Canada, Inv. No. AA1921-39, TC Pub. 135 (September 1, 1964), at 2. This majority statement of reasons was signed by: Glenn W. Sutton (Democrat), James W. Culliton (Independent), and Dan H. Fenn (Democrat). Sutton was a Ph.D. and finance professor at the University of Georgia. Culliton

Nonetheless, while the Commission majority had asserted a bifurcated standard, more time would elapse before the new approach regularly became a part of opinions and Commission analysis.

Perhaps the first to formalize the two-factor approach was Commissioner Stanley Metzger.[15] In a September 1968 case, Pig Iron from East Germany, Czechoslovakia, Romania and the U.S.S.R., Metzger discussed in his dissenting negative views both injury and causation as separate factors. Metzger stated: "Evidence does not show injury to a domestic industry, however defined, and does not show that LTFV imports have been the cause of any dislocation falling far short of injury." He added: "Therefore, neither of the two elements required under the Act for affirmative determinations by the Commission is present."[emphasis added] In his analysis of the existence of material injury to the domestic industry, Metzger cited data from domestic producers showing net operating profit margins of 7.1 to 9.7 percent, as one of the factors directing a negative determination.[16]

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also held a doctorate and was a professor of business administration at the University of Notre Dame. Fenn, a faculty member at the Harvard Business School, later was director of the John F. Kennedy Library.

[15] Stanley Metzger is a Democrat and former international law professor at Georgetown University Law School.

[16] Pig Iron from East Germany, Czechoslovakia, Romania and the U.S.S.R., Inv. No. AA1921-52, 53, 54, 55, TC Pub. 265 (September 1968), at 34. Commissioner Metzger evidently took the position that bifurcated analysis was required.

In Pig Iron Commissioner Penelope H. Thunberg also exhibited sensitivity to the bifurcated process. She wrote: "The existence of injury, and the cause of such injury once its existence is established, are difficult to determine under the best of circumstances." [emphasis added][17] In Plastic Mattress Handles from Canada, Commissioner Bruce Clubb recognized that the Commission's consistent injury test could lead to negative determinations.[18]

Several other Commissioners began to assert openly the bifurcated method in January 1971. Commissioners Bill Leonard and Jefferson Banks Young set forth in dissenting negative views their own understanding of how the Antidumping Act should be administered. This required a bifurcated injury analysis by the Tariff Commission along with Treasury's dumping determination:

> "The Antidumping Act, 1921, as amended, requires that three conditions be satisfied before an affirmative determination can be made.
>
> First, there must be dumping. Unless the Secretary of the Treasury has determined 'that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value,' the Tariff Commission has no basis upon which to institute an investigation.
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> Second, there must be injury, or likelihood of injury, to an industry in the United States,

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[17] See id. at 43-45. Penelope H. Thunberg is an Independent and Ph.D. economist.

[18] Bruce Clubb is a Republican and a lawyer. See Plastic Mattress Handles from Canada, Inv. No. AA1921-57, TC Pub. 296 (October 1969), at 7.

> or an industry in the United States must be prevented from being established. The quantum or description of injury is not disclosed in the statute.
>
> And, third, there must be a connection between the first two conditions, that is, the injury (or likelihood of injury or prevention of establishment) must be 'by reason of' the importation into the United States of the class or kind of foreign merchandise the Secretary of the Treasury determines is being or is likely to be sold at less than fair value. Although few determinations in the past have dealt explicitly with this third condition, it is an integral part of the law which must be fulfilled before an affirmative determination can be made.[emphasis added]

In this case, involving Ferrite Cores from Japan, their negative determination rested on inadequate causation, a factor they believed had previously been given insufficient attention.[19] [20]

Several months later, in April 1971, Leonard, in a dissenting negative opinion, re-formulated the statutory requirements in the classic bifurcated form. In Ceramic Wall Tile from the United

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[19] Ferrite Cores from Japan, Inv. No. AA1921-65, TC Pub. 360 (January 1971), at 9-10. Bill Leonard is a Democrat, a lawyer, and former staff member of the Senate Finance Committee. Jefferson Banks Young was a Democrat and former representative of the National Cotton Council.

[20] During the 1970s Commissioners seemed reluctant to vote negative exclusively on the basis of no injury. They preferred in this type of situation to go negative on both criteria, or on causation. I speculate that the absence of a statutory definition for the term "injury" may have discouraged no injury determinations in all but clear-cut situations. Indeed, as Commissioner Clubb pointed out in Plastic Mattress Handles, supra, at 7, the Commission had adopted a de minimis test for material injury, "holding that the injury requirement is met by a showing of anything more than a trivial or inconsequential effect on the domestic industry."

Kingdom, he wrote:

> The antidumping Act, 1921, as amended, requires that the Tariff Commission find two conditions satisfied before an affirmative determination can be made.
>
> First, there must be injury, or likelihood of injury, to an industry in the United States, or an industry in the United States must be prevented from being established. The quantum or description of injury is not disclosed in the statute.
>
> And, second, such injury (or likelihood of injury or prevention of establishment) must be 'by reason of' the importation into the United States of the class or kind of foreign merchandise the Secretary of Treasury determined is being or is likely to be sold at less than fair value.

Leonard added that "if either condition is not satisfied, a negative determination must be made." [emphasis added] In the instant case Commissioner Leonard found the second condition - causation - not satisfied.[21] Commissioner Leonard, thus, in April 1971, was the first to articulate clearly the position that Commissioner Cass now questions: that a negative determination must result "where the threshold requirement of 'ill health' is not met."[22]

Although it is not easy to interpret the bases for all Commission opinions during this period, Leonard and Young began to repeat explicitly in written views the quintessential conditions

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[21] Ceramic Wall Tile from the United Kingdom, Inv. No. AA1921-68, TC Pub. 381 (April 1971), at 7.

[22] Digital Readout Systems, supra, at 105, and Batteries, supra, at 30.

for bifurcated analysis enunciated in Ceramic Wall Tile.[23]

By September 1972 the approach Leonard and Young had pioneered had gained widespread acceptance in the Commission. In Pentaerythritol from Japan, the majority negative opinion, signed by Commissioners Joseph Parker, Catherine Bedell and George Moore, repeated virtually word-for-word Leonard's language in Ceramic Wall Tile:

> The Antidumping Act, 1921, imposes two conditions which must be satisfied before an affirmative determination can be made. First, there must be injury or likelihood of injury to an industry in the United States, or an industry in the United States must be prevented from being established. Second, such injury (or likelihood of injury or prevention of establishment) must be 'by reason of' the importation into the United States of the class or kind of foreign merchandise the Secretary of the Treasury has determined is being, or is likely to be, sold at less than fair value. [emphasis added]

In this case the majority made a negative determination on the basis of an inadequate showing of causation "between the injury and the LTFV imports of pentaerythritol from Japan."[24]

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[23] E.g. Dissenting Opinion of Commissioners Leonard and Young in Fish Nets and Netting of Manmade Fibers from Japan, Inv. No. AA1921-85, TC Pub. 477 (April 1972), at 7. (Finding of no causation.) Asbestos Cement Pipe from Japan, Inv. No. AA1921-91, TC Pub. 483 (May 1972), at 3, where Leonard and Young composed the Commission's affirmative majority. They found both conditions satisfied. In another affirmative determination the two Commissioners repeated their analysis in Elemental Sulfur from Mexico, Inv. No. AA1921-92, TC Pub. 484 (May 1972), at 8.

[24] Pentaerythritol from Japan, Inv. No. AA1921-96, TC Pub. 508 (September 1972), at 2, 6. Commissioner Leonard concurred in the result of this majority statement of views. Three Republican members had now signed on to dual-requirement analysis. Joseph Parker is a Republican and a lawyer. Catherine Bedell is a Republican and a former member of Congress. George Moore is a Republican and a lawyer.

The Commission was also using the bifurcated approach in majority affirmative determinations at this point. In Bicycle Speedometers from Japan, Commissioners Bedell, Parker, Leonard and Moore all explicitly used the newly formulated method. In this case, they found both required conditions satisfied. In a separate section on injury they wrote:

> All of the pertinent information available to the Commission in the investigation indicates that the domestic industry producing bicycle speedometers is injured. The production and sales of bicycle speedometers by Stewart-Warner (the sole U.S. producer),the man-hours expended by its workers in the manufacture of such speedometers, the prices received for speedometers, and the company's earnings on the sales of speedometers have all deteriorated materially.[25]

From this point onward, the Commission frequently cited explicitly the bifurcated standard in its opinions.[26]

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[25] Bicycle Speedometers from Japan, Inv. No. AA1921-98, TC Pub. 513 (September 1972), at 3-5.

[26] Among the negative majority opinions are these: Cast-Iron Soil-Pipe Fittings from Poland, Inv. No. AA1921-100, TC Pub. 515 (September 1972), at 2, where neither required criterion was satisfied.

Perchlorethylene from Italy, Japan and France, Inv. Nos. AA1921-106/108, TC Pub. 531 (December 1972), at 3, where Commission concluded neither condition imposed by Antidumping Act, 1921, was satisfied.

Impression Fabric of Manmade Fiber from Japan, Inv. No. AA1921-116, TC Pub. 577 (May 1973), at 3, in which neither required condition was satisfied.

Ceramic Glazed Wall Tile from the Philippines, Inv. No. AA1921-120, TC Pub. 599 (August 1973) at 3, where required causation criterion not satisfied. In the latter case the unanimous majority included Commissioners Bedell, Parker, Leonard, Moore and Ablondi.

Cold-Rolled Stainless Steel Sheet and Strip from France, Inv. No. AA1921-126, TC Pub. 615 (October 1973), at 3, where required causation test not satisfied.

Metal Punching Machines, Single-End Type, Manually Operated, from Japan, Inv. No. AA1921-133, TC Pub. 640 (January 1974), at 3,

Interestingly, most of the negative determinations were based either on failure to satisfy the causation requirement, or to

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where required causation test not satisfied.

Hand Operated Plastic Pistol-Grip Liquid Sprayers from Japan, Inv. No. AA1921-138, TC Pub. 662 (April 1974), at 3, where Commission found neither required condition satisfied.

Commissioners Bedell, Parker, Leonard, Moore and Ablondi did not repeat explicitly the bifurcated test in Regenerative Blower/Pumps from West Germany, Inv. No. AA1921-140, TC Pub. 676 (April 1974), at 4. However, their reasoning tracks that standard, and the Commission found "no injury to U.S. producers of air-moving machines" and apparently no causation.

In Chisels, Punches, Hammers, Sledges, Vises, C-Clamps, and Battery Terminal Lifters from Japan, Inv. No. AA1921-149, USITC Pub. 748 (December 1975), at 3-6, there was a unanimous negative, which explicitly cites required two-factor test. Reasons for the outcome were not indicated but apparently rested more on the absence of "likelihood of injury." [threat]

Among the <u>affirmative</u> majority opinions specifically citing the <u>required</u> dual test were:

Northern Bleached Hardwood Kraft Pulp from Canada, Inv. No. AA1921-105, TC Pub. 530 (December 1972), at 3.

Canned Bartlett Pears from Australia, Inv. No. AA1921-110, TC Pub. 551 (March 1973), at 2.

Roller Chains from Japan, Inv. No. AA1921-111, TC Pub. 552 (March 1973), at 2.

Stainless Steel Plate from Sweden, Inv. No. AA1921-114, TC Pub. 573 (March 1973), at 3.

Synthetic Methionine from Japan, Inv. No. AA1921-115, TC Pub. 115 (May 1973), at 3.

Stainless Steel Wire Rods from France, Inv. No. AA 1921-119, TC Pub. 596 (July 1973), at 3.

Steel Wire Rope from Japan, Inv. No. AA1921-124, TC Pub. 608 (September 1973), at 3.

Calcium Pantothenate from Japan, Inv. No. AA1921-131, TC Pub. 630 (December 1973), at 3.

Racing Plates (Aluminum Horseshoes) from Canada, Inv. No. AA1921-137, TC Pub. 645 (January 1974), at 3.

Tapered Roller Bearings and Certain Components Thereof from Japan, Inv. No. AA1921-143], USITC Pub. 714 (January 1975), at 3.

Lock-In Amplifiers and Parts Thereof from the United Kingdom, Inv. No. AA1921-146, USITC Pub. 736 (July 1975) at 3.

Animal Glue and Inedible Gelatin from Yugoslavia, Sweden, the Netherlands, and West Germany, Inv. Nos. AA1921-169, 170, 171, and 172], USITC Pub. 840 (October 1977), at 3, 9.

Railway Track Maintenance Equipment from Austria, Inv. No. AA1921-173, USITC Pub. 844 (November 1977), at 3, 10.

satisfy both conditions. But, several investigations were terminated during this period solely because the Commission found inadequate evidence of material injury to the domestic industry. One of the first in August 1973 was Deformed Concrete Reinforcing Bars of Non-Alloy Steel from Mexico. In a unanimous negative determination, Commissioners Bedell, Leonard, Moore and Ablondi used bifurcated analysis and terminated the investigation for absence of injury. "In the Commission's judgment, the first of the aforementioned conditions [material injury] is not satisfied in the instant case." The written views indicated that domestic shipments and sales were up, and that "net profit (before taxes) remained at a healthy level."[27] [28]

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[27] Deformed Concrete Reinforcing Bars of Non-Alloy Steel from Mexico, Inv. No. AA1921-122, TC Pub. 605 (August 1973), at 3, 5. In its "Statement of Reasons," the Commission said: "The antidumping Act, 1921, as amended, requires [emphasis added] that the Tariff Commission find two conditions satisfied before an affirmative determination can be made."

[28] My colleague, Commissioner Cass seems to think, despite the explicit statement of the bifurcated standard in each of these cases, that in "the great majority of these decisions" in the early and mid-1970s "it is quite plain that the Commission in fact performed a unitary [sic] analysis rather than a bifurcated analysis." See Digital Readout Systems, supra, at 110.

I respectfully disagree. First, in case after case decided under the Antidumping Act of 1921 the Commission majority and individual Commissioners used unambiguous language in their "statement of reasons" such as the following:

> "The Antidumping Act, 1921, imposes two conditions which must be satisfied before an affirmative determination can be made. First, there must be injury or likelihood of injury to an industry in the United States, or an industry in the United States must be prevented from being established. Second, such injury (or likelihood of injury or prevention of establishment) must be 'by reason of' the importation into the United States of the class

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> or kind of foreign merchandise the Secretary of the Treasury has determined is being, or is likely to be, sold at less than fair value (LTFV)."

See Perchlorethylene from Italy, Japan, and France, supra, at 3. Very often the Commission stated that the Antidumping Act, 1921, as amended, "requires" use of the bifurcated approach before an affirmative determination can be made.

Second, in the absence of any other articulated standard, one must presume that the Commission applied the bifurcated standard in the same manner as it was stated in the Commission's "statement of reasons".

However, Commissioners clearly did make unitary determinations, something that has continued, and is required, under the Trade Agreements Act of 1979. In Perchlorethylene, supra, at 2, for instance, the Commission formally "determined that an industry in the United States is not being or is not likely to be injured, or is not prevented from being established, by reason of the importation of perchlorethylene ... from Italy, Japan, and France, sold at less than fair value within the meaning of the Antidumping Act, 1921, as amended." Similarly, in a recent case, Cephalexin , supra, at 1, where it is plain the Commission majority used traditional bifurcated analysis in making a negative determination on the basis of no material injury or threat of material injury to the domestic industry, the Commission also made a "unitary determination" that "an industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of imports from Canada of generic cephalexin capsules...."

However, this language merely repeats the statutory directive to the Commission to determine whether an industry is materially injured by reason of imports. See, 19 U.S.C. Sec 1671(a), 1673. Certainly it cannot be reasonably construed as the type of "unitary" analysis that Commissioner Cass has adopted.

As I read the record, it is apparent that previous Commissioners accepted the statute as written and simply sought to make a judgment on the basis of all facts on the record pertaining to whether unfairly traded imports were a cause of material injury to a domestic industry. Until 1984, no Commissioner used proxies, counterfactual type analysis, and mechanical models in an effort to determine what would have been the condition of the domestic industry in the absence of dumping. As I have indicated elsewhere, the latter question is not relevant to the Commission's statutory responsibility. See, Sewn Cloth Headwear from the People's Republic of China, Inv. No. 731-TA-405 (Preliminary), USITC Pub. 2096 (July 1988), at 17-37; Certain Brass Sheet and Strip from Japan and the Netherlands, Inv. Nos. 731-TA-379 and 380 (Final)], USITC Pub. 2099 (July 1988), at 23-28.

The following year, in October 1974, the Commission repeated the dual standard and unanimously held that there was no evidence of injury to the domestic industry in Wrenches, Pliers, Screwdrivers and Metal-Cutting Snips from Japan. The Commission opinion stated: "In the period of this investigation, the evidence indicates that the domestic industry has not been injured. Domestic shipments of the tools involved increased consistently, being about 39 percent greater in 1973 than in 1971." Although the Commission gave emphasis to no material injury, it may also have found no causation in this instance." [29]

Another negative based on no material injury occurred in June 1975, and it involved Welt Work Shoes from Romania. In a majority opinion written by Commissioners Bedell and Moore, the Commission repeated the twin criteria and then concluded there was no injury. "The U.S. industry producing work shoes is financially healthy, and for the past three years it has, for the most part, enjoyed increasing sales and profits...."[30]

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[29] Wrenches, Pliers, Screwdrivers and Metal-Cutting Snips from Japan, Inv. No. AA1921-141, TC Pub. 696 (October 1974), at 3-6. The majority's "Statement of Reasons" indicates: "The Antidumping Act, 1921, as amended, requires [emphasis added] that the Tariff Commission find two conditions satisfied before an affirmative determination can be made."

[30] Welt Work Shoes from Romania, Inv. No. AA1921-144, USITC Pub. 731 (June 1975), at 3-5. Commissioners Ablondi and Minchew concurred "in the result."

> The Antidumping Act, 1921, as amended, requires [emphasis added] that the U.S. International Trade Commission find two conditions satisfied before an affirmative determination can be made. First, there must be injury, or

In June 1975, the Commission majority, composed this time of Commissioners Leonard, Bedell and Parker, again cited the two-step requirement and made a negative determination in Portable Electric Typewriters from Japan. "Since we find that the first criterion [material injury] is not satisfied, we do not need to consider the second criterion [causation]." This clearly was another of the cases where the evidence against material injury was so compelling that the Commission did not consider any causation.[31]

In Vinyl Clad Fence Fabric from Canada, Commissioners Leonard and Bedell, writing for the majority, made a negative material injury finding, and they declined even to evaluate the causation standard. "We have made a negative determination because we do not find the first condition referred to above - an industry is being, or is likely to be, injured - satisfied by the evidence obtained in this investigation." Then in a footnote, they observed: "Failure of the first condition to be met makes consideration of

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> likelihood of injury, to an industry in the United States, or an industry in the United States must be prevented from being established. Second, such injury or likelihood of injury or prevention of establishment of an industry must be 'by reason of' the importation into the United States of the class or kind of foreign merchandise which the Secretary of the Treasury has determined is being, or is likely to be, sold at less than fair value (LTFV).

[31] Portable Electric Typewriters from Japan, Inv. No. AA1921-145, USITC Pub. 732 (June 1975), at 3. Again, the majority negative "Statement of Reasons" indicated "the Antidumping Act, 1921, as amended, requires [emphasis added] that the U.S. International Trade Commission find two conditions satisfied before an affirmative determination can be made."

the second condition unnecessary."[32]

In a unanimous negative in Saccharin from Japan and the Republic of Korea the views, signed by Commissioners Parker, Moore, Bedell and Ablondi, state the reason for a negative determination as no material injury. "In these cases we have found in the negative because we do not find injury or likelihood of injury to an industry in the United States. To the contrary, an examination of such indices of injury as trends in production, shipments, inventories, market share, employment, and profits, all clearly show that the domestic industry prospered during 1974-76 which included the period in which Treasury found sales at LTFV."[33] And, in Sorbates from Japan [AA 1921-183] the Commission unanimously voted negative, with two Commissioners not participating. The Commission concluded that the domestic industry, which did not begin operations until June 1977, is ahead of projections and gaining increasing market share. "Based on these factors we conclude that there is no injury to the domestic sorbates

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[32] Vinyl Clad Fence Fabric from Canada, Inv. No. AA1921-148, USITC Pub. 744 (October 1975), at 3. Commissioners Leonard and Bedell signed the majority opinion; Commissioner Minchew concurred in the result. Commissioner Parker did not participate.

"The Antidumping Act, 1921, as amended, requires [emphasis added] that the U.S. International Trade Commission find two conditions satisfied before an affirmative determination shall be made."

[33] Saccharin from Japan and the Republic of Korea, Inv. Nos. AA1921-174 and 175, USITC Pub. 846 (December 1977), at 3-5. "In order to find in the affirmative in these investigations, the Commission must find that two conditions are satisfied." [emphasis added]

industry."[34]

Newcomers to the Commission in the 1970s also adopted the two step approach. For instance, in Alpine Ski Bindings from Austria, Switzerland and Germany, Commissioners Minchew and Ablondi joined Commissioner Leonard in using the two-step approach. They also cited this approach in Railway Track Maintenance Equipment from Austria. Commissioner Bill Alberger also employed the two-condition approach. See his views with Commissioner Minchew in Impression Fabric of Manmade Fiber from Japan, and Carbon Steel Plate from Japan, as well as his separate views in Polyvinyl Chloride Sheet and Film from the Republic of Korea. He signed other opinions, including the two step: Ice Hockey Sticks from Finland; and Steel Wire Strand for Prestressed Concrete from India.[35] [36]

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[34] Sorbates from Japan, Inv. No. AA 1921-183, USITC Pub. 915 (September 1978), at 3, 6. "In order for a Commissioner to make an affirmative determination in an investigation under the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)) it is necessary to find that an industry in the United States is being or is likely to be injured, or is prevent from being established, and the injury or likelihood thereof, or the prevention of establishment must be by reason of imports at less than fair value (LTFV)." [emphasis added]

[35] Italo H. Ablondi, Daniel Minchew, and Bill Alberger are all Democrats. Ablondi and Alberger are lawyers. Minchew holds a graduate degree from Oxford University and served as a congressional staff aide.

[36] Alpine Ski Bindings from Austria, Switzerland and Germany, Inv. AA1921-156 to 158, USITC Pub. 786 (August 1976) at 3. "Before the Commission may find in the affirmative in these investigations, it is necessary that the following two conditions be met: ...." [emphasis added]

Railway Track Maintenance Equipment from Austria, Inv. No. AA1921-173, USITC Pub. 844 (November 1977), at 10.

Ice Hockey Sticks from Finland, Inv. No. AA1921-177, USITC

Interestingly, Commissioner Paula Stern, who late in her term at the ITC began to advocate unitary-type analysis, was initially, and indeed through the majority of her service on the Commission, an enthusiastic exponent of the bifurcated approach. For instance, February 1979 she stated in Certain Steel Wire Nails from Canada:

> In the present inquiry, I found, based upon my consideration of the relevant indicators described above, that the steel wire nail industry is not being injured or threatened with injury.... Having found no injury to exist, there is no need to consider the factors relevant to the second condition, dealing with causation. [emphasis added][37]

Pub. 871 (March 1978), at 3.

Impression Fabric of Manmade Fiber from Japan, Inv. No. AA1921-176, USITC Pub. 872 (March 1978), at 7.

Carbon Steel Plate from Japan, Inv. No. AA1921-179, USITC Pub. 882 (April 1978), at 3.

Steel Wire Strand for Prestressed Concrete from India, Inv. No. AA1921-182, USITC Pub. 906 (August 1978), at 3. In the last case Commissioners Alberger, Moore and Bedell, who composed the majority, said that it was not necessary to address both prongs of the two factor test. "In our opinion, it is unnecessary to determine whether or not the domestic industry is, in fact, being injured; for even if injury does exist, subject imports from India cannot be the cause of such injury."

[37] Stern is a Democrat and a Ph.D. in international relations from the Fletcher School of Law and Diplomacy. See her views in Certain Steel Wire Nails from Canada, Inv. No. AA1921-189, USITC Pub. 937 (February 1979), at 12, She employed an identical approach in Silicon Metal from Canada, Inv. No. AA1921-192, USITC Pub. 954 (March 1979) at 10-11, where finding no injury, she again did not address causation. "If the Commission finds that either condition has not been met, its determination must be negative, and it need not consider factors relevant to determining the other condition." [emphasis added].

In Sugars and Sirups from Canada, Inv. No. 731-TA-3(Final)(Remand), USITC Pub. 1189 (October 1981) at 25, 28, she found material injury but no causation:

> "Since the data gathered by the Commission show that the U.S. sugar industry was suffering injury, and such injury was worse for the sugar

In approaching injury determinations in countervailing duty investigations, she also made use of the bifurcated approach. In February 1979, Stern stated in her views on Certain Leather Wearing Apparel from Colombia and Brazil:

> As in Antidumping cases, the Commission has considerable discretion in making its determination, and two conditions must be met before an affirmative determination can be made. [emphasis added] First, the Commission must determine that an industry is being or is likely to be injured. This determination is based upon an analysis of certain economic indicators -- consumption, production, capacity changes and utilization, shipments, inventory levels, employment and profits.
>
> The second determination is based upon an analysis of such factors as market penetration by subsidized imports, documented lost sales of domestic manufacturers to subsidized imports, and price depression or suppression of the impacted products."[38]

In Fall-Harvested Round White Potatoes from Canada she, and Commissioner Eckes, made a negative determination, and they did so

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> industry as a whole than for the industry in the Northeastern States, I cannot reasonably conclude that U.S. imports of sugar from Canada sold at less than fair value, which constituted less than 2.2 percent of U.S. imports and 1.2 percent of U.S. consumption, were a cause of any material injury."

[38] Certain Leather Wearing Apparel from Colombia and Brazil, Inv. No. 303-TA-6 and -7, USITC Pub. 948 (February 1979), at 10. However, Commissioner Stern took the position that the Commission had a lawful responsibility to "trace, to whatever extent possible, the actual effects of the subsidies on the domestic industry." See her exchange with Commissioner Michael Calhoun on this point in Certain Steel Wire Nails from the Republic of Korea, Inv. No. 701-TA-145 (Preliminary), USITC Pub. 1223 (March 1982), 11-22.

using the bifurcated analysis. There was injury but not a causal connection.

> The regional domestic industry in this investigation is experiencing material injury, reflected primarily by irregular declines in acreage harvested, a decline in part-time employment, financial losses and difficulty in obtaining financial assistance. However, LTFV imports of all-harvested round white potatoes from Canada are not a ... cause of these problems.[39]

And, in October 1984 Stern joined a unanimous affirmative opinion in Barium Chloride from the People's Republic of China in which the Commission made a material injury finding. "...[N]otwithstanding the slight improvement in 1984, we find that the condition of the domestic industry has deteriorated throughout the period of investigation, and we determine that the domestic industry is being materially injured." However, in separate views in Cellular Mobile Telephones and Subassemblies Thereof from Japan Stern, without a full explanation, asserted a different point of view: "The entire statutory purpose of title VII is directed toward a unitary determination as to whether dumped or subsidized imports have caused material injury to the domestic industry."[40]

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[39] Fall-Harvested Round White Potatoes from Canada, Inv. No. 731-TA-124 (Final), USITC Pub. 1463 (December 1983), at 3. In Hot-Rolled Carbon Steel Sheet from France, Inv. No. 701-TA-85 (Preliminary), USITC Pub. 1206 (January 1982) at 22, she made separate material injury and causation findings.

[40] Barium Chloride from the People's Republic of China, Inv. No. 731-TA-149 (Final), USITC Pub. 1584 (October 1984), at 6. Cellular Mobile Telephones and Subassemblies Thereof from Japan, Inv. No. 731-TA-207 (Final), USITC Pub. 1786 (December 1985), at 14.

Except for Commissioner Ronald A. Cass, all other Commissioners confirmed during the 1980s used the bifurcated approach. Commissioner Michael J. Calhoun did not object to bifurcated analysis in countervailing duty or antidumping cases. In Plastic Animal Identification Tags from New Zealand, Calhoun joined a unanimous Commission in finding no material injury to the domestic industry, and in Certain Iron-Metal Castings from India he appears to have followed a bifurcated analysis. In Sugars and Sirups from Canada Calhoun apparently used bifurcated analysis, as he did in Tubeless-Tire Valves from the Federal Republic of Germany.[41] Commissioner Eugene Frank did not object to the dual-

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[41] Michael J. Calhoun is an Independent, a lawyer, and former staff member of the House Ways and Means Committee. Plastic Animal Identification Tags from New Zealand, Inv. No. 303-TA-14 (Final), USITC Pub. 1128 (February 1981), at 21. In dumping and countervailing duty cases Calhoun vigorously rejected the argument that the Commission should look at the size of the dumping margin or subsidy: "The plain language in the statute ... we are to find material injury by reason of the particular merchandise under investigation...." [emphasis added] Fireplace Mesh Panels from Taiwan, Inv. No. 701-TA-185 (Preliminary), USITC Pub. 1284 (September 1982), at 22-24. Calhoun notes that a "detailed tracking" of subsidy and dumping margins "would be a substantial investigative undertaking", and if Congress had intended such a process to be "the cornerstone of causality under Title VII, certainly Congress would have been equally explicit in delineating the standards for applying it." On this point, see his comments in Certain Steel Wire Nails From the Republic of Korea, Inv. No. 701-TA-145 (Preliminary), USITC Pub. 1223 (March 1982), at 18.

Certain Iron Metal Castings from India, Inv. 303-TA-13 (Final), USITC Pub. 1098 (September 1980), at 15-17.

Sugars and Sirups from Canada, Inv. No. 731-TA-3 (Final)(Remand), USITC Pub. 1189 (October 1981), at 12-13, offers further explanation for the original determination in Sugars and Sirups from Canada, Inv. No. 731-TA-3(Final)(Remand), USITC Pub. 1047 (March 1980), at 3-12.

Tubeless-Tire Valves from the Federal Republic of Germany, Inv. No. 731-TA-41(Preliminary), USITC Pub. 1147 (May 1981), at 13-16.

Interestingly, the Court of International Trade apparently

requirement approach, and appears to have relied upon it in his determinations. [42] Commissioner Veronica Haggart regularly made traditional, two-factor material injury findings.[43]

And, so, frequently, did Commissioner Susan Liebeler. In additional views in Fabric and Expanded Neoprene Laminate from

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shares Commissioner Calhoun's concern with the complexity of margins analysis. In Algoma Steel Corp., LTD. v. U.S., 688 F. Supp. 645, (Court of International Trade, 1988) the Court said:

> Given the complexities of determining if dumping is causing injury, it is difficult to say that an interpretation of the statute that directs ITC to focus on the effects of relevant imports from companies determined to have sold the subject merchandise at LTFV, rather than on the effects of a volume of sales deemed to be at LTFV, conflicts with GATT. Thus, the real question addressed to ITC by the statute is what effect imports in a class of merchandise sold at LTFV have on the domestic industry producing the 'like' product.

[42] Eugene J. Frank, Republican of Pennsylvania and businessman. See, for example, his discussion in Certain Steel Products from Belgium, Brazil, France, Italy, Luxembourg, the Netherlands, Romania, the United Kingdom, and West Germany, Inv. Nos. 701-TA-86 through 144, 701-TA-146, and 701-TA-147 (Preliminary), USITC Pub. 1221 (February 1982), at 122-124.

[43] Veronica Haggart, a Republican lawyer, from Nebraska made bifurcated findings in the following representative cases, among others:

With Commissioner Eckes in Nitrocellulose from France, Inv. No. 731-TA-96 (Final), USITC Pub. 1409 (July 1983), at 4;

with Commissioners Eckes and Stern in Bicycles from Taiwan, Inv. No. 731-TA-111 (Final), USITC Pub. 1417, at 7-8;

with Commissioners Eckes, Stern and Lodwick in Cotton Shop Towels from the People's Republic of China, Inv. No. 731-TA-103 (Final), USITC Pub. 1431 (September 1983), at 9;

with Commissioners Eckes, Stern, and Lodwick in Griege Polyester/Cotton Printcloth from the People's Republic of China, Inv. No. 731-TA-101 (Final), USITC Pub. 1421 (Sept 1983), at 12;

Portland Hydraulic Cement from Australia and Japan, Inv. No. 731-TA-108-109 (Final), USITC Pub. 1440 (Oct 1983), at 9, 22;

Carton-Closing Staples and Nonautomatic Carton-Closing Staple Machines from Sweden, Inv. No. 731-TA-116 and 117 (Final), USITC Pub. 1454 (December 1983).

Taiwan she stated: "The Commission must determine whether the domestic industry producing the like product is materially injured or is threatened with material injury, and whether any injury or threat thereof is by reason of the dumped imports. Only if the Commission finds a reasonable indication of both injury and causation, will it make an affirmative determination in the investigation."[44] [45]

Commissioner Anne E. Brunsdale has employed bifurcated analysis intermittently. For instance, in December 1986, she signed joint views with Commissioner Eckes, Lodwick and Rohr in Erasable Programmable Read Only Memories from Japan stating that

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[44] Susan Liebeler listed her political affiliation as Independent. She was previously a law professor at Loyola Law School, Los Angeles, California.

In Radial Ply Tires for Passenger Cars from the Republic of Korea, Inv. No. 731-TA-200 (Preliminary), USITC 1572 (September 1984), at 13, n. 42, she voted negatively on the basis of no material injury and then did not address causation. See, Fabric and Expanded Neoprene Laminate from Taiwan, Inv. No. 731-TA-371 (Final), USITC Pub. 2032 (November 1987), at 18. Virtually identical language appears in Stainless Steel Pipes and Tubes from Sweden, Inv. No. 731-TA-354 (Final), USITC Pub. 2033 (November 1987), at 21-22; Color Picture Tubes from Canada, Japan, the Republic of Korea, and Singapore, Inv. Nos. 731-TA-367 through 370 (Final), USITC Pub. 2046 (December 1987), at 60. For other representative views in which she embraced the bifurcated approach, see Certain Hot-Rolled Carbon Steel Plate from the Republic of Korea, Inv. No. 731-TA-151 (Final), USITC Pub. 1561 (August 1984). Barium Chloride from the People's Republic of China, Inv. No. 731-TA-149 (Final), USITC Pub. 1584 (October 1984), at 6.

[45] Commissioners Seeley Lodwick and David Rohr also have used the bifurcated analysis. Commissioner Lodwick is an Iowa Republican, former state legislator, and U.S. Department of Agriculture official.

Commissioner Rohr, a Democrat from Maryland, is an economist and former staff director of the U.S. House of Representatives, Ways and Means Subcommittee on Trade.

the "domestic industry producing EPROMs is currently experiencing material injury." Only Commissioner Stern dissented from the majority views while asserting that she did "not believe it necessary or desirable to make a determination on the question of material injury separate from the consideration of causation." [46]

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[46] Commissioner Anne E. Brunsdale listed her political affiliation as Republican. She is a former intelligence analyst and editor for the American Enterprise Institute. Erasable Programmable Read Only Memories from Japan, Inv. No. 731-TA-288 (Final), USITC Pub. 1927 (December 1986), at 17. In Butt-Weld Pipe Fittings from Brazil and Taiwan, Inv. Nos. 731-TA-308/310 (Final), USITC Pub. 1918 (December 1986) at 14, she made another material injury finding. And, in Certain Unfinished Mirrors from the Federal Republic of Germany, Italy, Japan, Portugal, and the United Kingdom, Inv. Nos. 731-TA-321 through 325 (Final), USITC Pub. 1938 (January 1987), at 9, she concluded "that the domestic industry is not currently experiencing material injury."

See also Stainless Steel Pipes and Tubes from Sweden, Inv. No. 731-TA-354 (Final), USITC Pub. 2033 (November 1987), at 13; Certain Silica Filament Fabric from Japan, Inv. No. 731-TA-355 (Final), USITC Pub. USITC Pub. 2015 (September 1987), at 7, note 22. "Vice Chairman Brunsdale notes that the industry was experiencing some difficulties during the period of investigation and concludes for purposes of this investigation that the industry was suffering material injury."

Also, Color Picture Tubes from Canada, Japan, the Republic of Korea, and Singapore, Inv. Nos. 731-TA-367 through 370 (Final), USITC Pub. 2046 (December 1987) at 6, 15-17. In Fabric and Expanded Neoprene Laminate from Taiwan, Inv. Nos. 731-TA-371 (Final), USITC Pub. 2032 (November 1987), at 9-10, Commissioner Brunsdale concluded with a unanimous Commission "that the industry is not experiencing material injury."

However, Brunsdale began to back away from bifurcated analysis in Internal Combustion Engine Forklift Trucks from Japan, Inv. No. 731-TA-377 (Final), USITC Pub. 2082 (May 1988), at 32-34. But, the next month she apparently used it in Thermostatically Controlled Appliance Plugs and Probe Thermostats Therefor from Canada, Hong Kong, Japan, Malaysia, and Taiwan, Inv. Nos. 701-TA-290-292 (Preliminary), USITC Pub. 2087 (June 1988), at 14. Also, apparently in Electrolytic Manganese Dioxide from Greece, Ireland, and Japan, Inv. Nos. 731-TA-406 through 408 (Preliminary), USITC Pub. 2097 (July 1988), at 13.

But, in Mechanical Transfer Presses from Japan, Inv. No. 731-TA-429 (Preliminary), USITC Pub. 2160, at 11, n. 29, she concluded that "there is a reasonable indication that imports of transfer presses from Japan have had a material negative impact on the

Finally, Commissioner Don E. Newquist has regularly employed the bifurcated approach. In Dry Aluminum Sulfate from Sweden and in 12-Volt Motorcycle Batteries from the Republic of Korea, Commissioner Newquist agreed with the Commission majority that there was no reasonable indication of material injury to the domestic industry.[47]

Bifurcated Approach Continued and Approved

From the previous discussion, it is evident that individual commissioners, and the Commission, have employed two-step injury and causation analysis frequently and regularly over a period of approximately twenty years. The Commission seems to have uniformly treated material injury and causation as two separate conditions precedent for an affirmative determination.

I have discussed at some length the evolution of this approach under the Anti-dumping Act of 1921[48]. Significantly, the Commission did not alter this pattern of analysis after the

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domestic industry." [emphasis added]

[47] Commissioner Don E. Newquist is a Texas Democrat and former businessman. Dry Aluminum Sulfate from Sweden, Inv. No. 731-TA-430 (Preliminary), USITC Pub. 2174 (March 1989), at 16; and 12-Volt Motorcycle Batteries from the Republic of Korea, Inv. No. 731-TA-434 (Preliminary), USITC Pub. 2203 (July 1989), at 7-8. In Light-Duty Integrated Hydrostatic Transmissions or Subassemblies Thereof, With or Without Attached Axles, from Japan, Inv. No. 731-TA-425 (Preliminary), USITC Pub. 2149 (January 1989) at 29, and Cephalexin, supra, at 14, 20, the Commission majority found no material injury or threat thereof and did not make a causation finding.

[48] Pub. L. 67-10, ch. 14, title II, 42 Stat. 9 (1921).

Antidumping Act of 1921 was amended in 1974. For example, in Steel Wire Strand for Prestressed Concrete from India, the Commission majority, composed of Commissioners Alberger, Moore and Bedell held:

> In order for the United States International Trade Commission to find in the affirmative in an investigation under the Antidumping Act, 1921, as amended, (19 U.S.C. 160(a)), it is necessary to find that an industry in the United States is being or is likely to be injured, or is prevented from being established ... and the injury or likelihood thereof must be by reason of imports at less than fair value (LTFV).[49]

It is apparent, then, that both before and after the passage of the Trade Act of 1974 the Commission adhered to the bifurcated standard in anti-dumping investigations.

Indeed, because the 1974 Act directed the Commission for the first time to conduct injury investigations in countervailing duty cases involving non-dutiable items, it is interesting to note that the Commission chose to adopt the same bifurcated standard employed under the Antidumping Act of 1921. In the first of these countervailing duty injury investigations, Certain Zoris from the Republic of China (Taiwan), the Commission stated:

> ... on July 6, 1976, the Commission instituted investigation No. 303-TA-1 under section 303(b) to determine whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States.

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[49] Steel Wire Strand for Prestressed Concrete from India, Inv. No. AA1921-182, USITC Pub. 906 (August 1978), at 3. As noted earlier in footnote 27, the Commission found no causation and thus found it unnecessary to determine whether the domestic industry is in fact materially injured.

This is the Commission's first investigation under the provisions of such section.

Before the Commission may find in the affirmative in this investigation, it is necessary that the following two conditions be met:

> (1) An industry in the United States is being or is likely to be injured, or is prevented from being established, and
>
> (2) The requisite injury or prevention of establishment must be by reason of the importation into the United States of the merchandise upon which Treasury has determined a bounty or grant is being paid within the meaning of section 303 of the Tariff Act of 1930, as amended.[50]

It is also significant that the International Trade Commission continued analyzing injury and causation separately after passage of the 1979 Trade Agreements Act. As noted in my discussion of the voting practices of individual Commissioners, there are many cases where the absence of a single factor, either material injury or causation, led to a negative determination.

Congress Approves Commission Practice

Periodically, Congress has reviewed Commission practice under the antidumping and countervailing duty laws, including analysis of injury and causation, and approved this practice. The Senate Committee on Finance examined this issue in its 1974 review and expressed no criticism of the Commission's traditional practice of

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[50] Certain Zoris from the Republic of China (Taiwan), Inv. No. 303-TA-1, USITC Pub. 787 (September 1976), at 3-4.

examining injury and causation separately.[51] In 1979, both the House Ways and Means Committee and the Senate Finance Committee expressed approval of the Commission's analytical approach under the 1974 law. The Finance Committee stated that "ITC determinations with respect to the injury criterion under existing law which have been made in antidumping investigations from January 3, 1975 to July 2, 1979, have been, on the whole, consistent with the material injury criterion of this bill and the Agreement. The material injury criterion of this bill should be interpreted in this manner."[52] The Ways and Means Committee used similar language.[53] Indeed, during the period under review, the U.S. International Trade Commission regularly invoked the two-factor approach, and it made several negative determinations on the basis of no material injury.[54] [55]

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[51] S. Rep. No. 93-1298, 93d Cong., 2d Sess., at 180-181 (1974).

[52] S. Rep. No. 96-249, 96th Cong., 1st Sess., at 87 (1979).

[53] H. R. Rep. No. 96-317, 96th Cong., 1st Sess., at 46 (1979).

[54] The Commission found no material injury to the domestic industry in Welt Work Shoes from Romania, supra [June 1975]; Portable Electric Typewriters from Japan, supra, [June 1975]; Vinyl Clad Fence Fabric from Canada, supra [October 1975]; Saccharin from Japan and the Republic of Korea, supra, [December 1977]; and Sorbates from Japan, supra, [September 1978]. It asserted the bifurcated standard in making negative determinations in Ice Hockey Sticks from Finland, supra, [March 1978], at 3; Steel Wire Strand for Prestressed Concrete from India, supra [August 1978]; by a majority of commissioners voting negatively in Portland Hydraulic Cement from Canada, Inv. No. AA1921-184, USITC Pub. 918 (September 1978), at 3, 12; Certain Nylon Yarn and Grouped Nylon Filaments from France, Inv. No. AA1921-185, USITC 922 (October 1978), at 3; Motorcycles from Japan, Inv. No. AA1921-187, USITC 923 (November 1978), at 3; Nails from Canada, supra, [February 1979]

Courts Approved Bifurcated Approach

It is important to note that the Commission's reviewing

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at 3; and Silicon Metal from Canada, supra, [March 1979] at 2.

[55] In Batteries, supra, at 36, my colleague Commissioner Cass holds that bifurcated analysis is incompatible with provisions added in the 1988 Omnibus Trade and Competitiveness Act, Pub. L. 100-418 (Aug. 23, 1988). That act adds a phrase "in each case" to 19 US.C. Sec 1677(7)(B) so that:

> "the Commission, in each case,
> (i) shall consider --
> (I) the volume of imports of the merchandise which is the subject of the investigation,
> (II) the effect of imports of that merchandise on prices in the United States for like products, and
> (III) the impact of imports of such merchandise on domestic producers of like products..."

In my view the new language is not inconsistent with bifurcated analysis. The Commission examined each of the above factors prior to 1988, while using bifurcated analysis. This phrase was inserted into the Act not because Congress sought to alter the Commission's traditional dual-factor approach to injury analysis, but because Congress perceived that some Commissioners were not applying existing law. According to the Senate Finance Committee in S. Rept., No. 100-71, 100th Cong., 1st sess., at 116 (1987): "The Committee disapproves of determinations by individual Commissioners that rely upon the mechanical application of factors or formulas that remain constant from case to case, but are not enumerated in section 717(7)." Similarly, the House Ways and Means Committee noted in H.R. Rept., No. 100-40, pt. 1, 100th Cong., 1st sess., at 128 (1987):

> "The changes which the Committee has approved to section 771(7)(B)-(C) are not dramatic - indeed most of them are clarifications of current law and of original intent with respect to current law. These changes have been approved, however, in light of concerns that certain Commissioners may not be applying the law in accordance with Congressional intent. Often it is difficult to ascertain, from reading a particular Commissioner's opinion, whether the commissioner in fact considered all factors required under the law, and based his or her decision on such factors."

courts, the Court of International Trade and the Court of Appeals for the Federal Circuit have reviewed use of the bifurcated practice and upheld this practice.

Perhaps the most important case is American Spring Wire Corporation v. United States, where the Court of International Trade upheld the Commission's existing practice. "The Commission must make an affirmative finding only when it finds both (1) present material injury (or threat to or retardation of the establishment of an industry) and (2) that the material injury is 'by reason of' the subject imports." Furthermore:

> Relief may not be granted when the domestic industry is suffering material injury but not by reason of unfairly traded imports. Nor may relief be granted when there is no material injury, regardless of the presence of dumped or subsidized imports of the product under investigation.

From my vantage point, the above language clearly and unambiguously upholds the traditional Commission practice of denying a healthy ["not materially injured"] industry an anti-dumping or countervailing duty remedy. Moreover, this holding was affirmed by the Court of Appeals for the Federal Circuit.[56]

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[56] American Spring Wire Corporation v. United States, 590 F. Supp. 1273 (CIT, 1984). Affirmed, 760 F. 2d 249 (CAFC, 1985). For a careful analysis of the ITC's interpretation of the injury standard, see brief of Appellee U.S. International Trade Commission in Appeal No. 84-1715 before the Court of Appeals for the Federal Circuit.

Our reviewing courts have consistently held to the proposition that the agency's statutory constructions "are to be sustained unless unreasonable and plainly inconsistent with the statute and are to be held valid unless weighty reasons require otherwise." Melamine Chemicals, Inc. v. United States, 732 F. 2d 924, 928 (CAFC, 1984). A court may reject an agency interpretation that clearly contravenes clearly discernible legislative intention, but its role when that intent is not contravened is to determine whether the agency's interpretation is "sufficiently reasonable".

Not surprisingly, my colleague, Commissioner Cass, has a different view of American Spring Wire. In Microdisks, he says: "... the posture in which the case was decided and a reading of the full opinion in that case suggest that the court did not read the Act as requiring a separate analysis of injury and causation issues."[emphasis added] He asserts in Digital Readout Systems: "... there is no basis at all for reading American Spring Wire as requiring [sic] a bifurcated approach." He avers in Cephalexin that the Court:

> manifestly was not asked to decide and did not hold [sic] that the law requires a determination, independent of the causal reasons, that the industry's condition was too good to allow relief against LTFV imports or that the industry's condition had over a given period (not related to evidence of LTFV sales) changed for the worse.

Then in Batteries , my colleague claims that American Spring Wire "... hardly can be characterized as clear support for a healthy industry test."[57]

I believe my colleague's interpretations seriously flawed. Perhaps, a contortionist could look at the above cited passage from American Spring Wire, which seems unambiguous to me, and conclude that it offers wiggle room for unitary analysis. If so, that

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Moreover, the agency's interpretation need not be the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding. American Lamb Co. v. United States, 785 F.2d 1001 (CAFC, 1986).

[57] Microdisks (Preliminary), supra, at 67; Digital Readout Systems, supra, at 113; Cephalexin, supra, at 69; Batteries, supra, at 32.

language still must be read together with a frequently overlooked footnote appearing later in the Court's opinion. There Judge Maletz stated: "As indicated previously, an affirmative injury finding requires [emphasis added] both [sic] (1) that the domestic industry be materially injured (or threatened with material injury), and (2) that such injury be by reason of the unfairly traded imports." I note that the Court elected to expand upon its initial discussion of the material injury standard, and to indicate in unmistakable terms that the bifurcated standard is required. To my knowledge, my colleague has never attempted in previous written views to address or to explain this key passage. I am doubtful that the Court's entire language can be reconciled with the requirements of unitary analysis.[58]

Subsequent to American Spring Wire, the use of dual-factor analysis has come up in several more cases before the Court of

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[58] There are two key passages in American Spring Wire on this issue. The first appears at 590 F. Supp. 1276; the second in footnote 9, at 590 F. Supp. 1281. Interestingly, the Court of International Trade used bifurcated analysis in its own views, affirming the Commission's negative determination (590 F. Supp. 1281):

> Since the court has concluded that there is substantial evidence to support the Commission's conclusion that the domestic industry was not materially injured or threatened with material injury, such findings are dispositive of this litigation. Hence, the court does not reach the other issues raised by plaintiffs, i.e., that the Commission (1) erred in failing to cumulate the injurious effects of imports from the four countries under investigation, and (2) erroneously determined that even assuming arguendo the existence of material injury, such injury was not caused by the subject imports.

International Trade. Each time the Court has invoked the precedent of American Spring Wire. In Mirror Manufacturers, the Court of International Trade dismissed an appeal contesting the International Trade Commission's determination that the mirror industry was not materially injured or threatened with material injury by reason. The Court said: "...when the statutory factors which the Commission considers indicate that the domestic industry is healthy, the Commission may indeed determine that the domestic industry is not experiencing or facing material injury."[59] Another recent Court decision in Roses Inc. v. United States also supports the traditional Commission view, discussed earlier in this paper, that bifurcated analysis is required. The Court stated: "An affirmative injury determination by the ITC pursuant to 19 U.S.C. 1673d(b)(1) requires both the existence of material injury, or threat thereof, to an industry in the United States and a causal connection between such injury or threat and imports determined to be sold at less than fair value." [emphasis added][60]

Conclusions:

Based on my review of the Commission's case history, several conclusions are in order. First, over the last twenty-one years

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[59] National Association of Mirror Manufacturers v. United States, 696 F. Supp. 642, 647 (CIT, 1988).
My colleague glosses over the significance of this case in Cephalexin, supra, at 66, n. 52. In my view Mirror Manufacturers clearly supports the proposition that a healthy industry test is lawful.

[60] 696 F. Supp. 647. Roses, Inc. v. United States, No. 89-115, slip op. at 9 (CIT, August 23, 1989).

twenty-two Commissioners regularly utilized bifurcated analysis and made separate findings of injury and causation. Except for Commissioner Cass, no member of the Commission since 1970, who served more than a few weeks, failed to employ this pattern of analysis.[61] The twenty-two Commissioners came from different backgrounds and represented different political philosophies. Eleven were Democrats, eight Republicans and three independents. Nine were lawyers [Metzger, Leonard, Moore, Parker, Ablondi, Alberger, Calhoun, Haggart and Liebeler], four held doctorates [Sutton, Culliton, Stern and Eckes]. The group also included several former staff members of congressional trade committees [Leonard, Rohr, Alberger, and Calhoun], as well as several former lawmakers [Bedell and Lodwick].

Second, it is clear from the historical record that by 1972 the Commission was routinely applying a bifurcated injury and causation analysis, and that practice has continued to recent times. Indeed, in twenty-nine of fifty-seven cases decided between May 1972 and December 1975, the bifurcated criteria were <u>explicitly</u> stated in the Commission's <u>majority</u> opinion. In the others the

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[61] My review of Commission findings indicates that the following Commissioners used the bifurcated approach: (1) Glenn W. Sutton; (2) James W. Culliton; (3) Dan H. Fenn, Jr.; (4) Stanley D. Metzger; (5) Will E. Leonard, Jr.; (6) George M. Moore; (7) J. Banks Young; (8) Catherine Bedell; (9) Joseph O. Parker; (10) Italo H. Ablondi; (11) Daniel Minchew; (12) Paula Stern; (13) William Ralph Alberger; (14) Michael Calhoun; (15) Alfred E. Eckes, Jr.; (16) Eugene Frank; (17) Veronica Haggart; (18) Seeley Lodwick; (19) Susan Liebeler; (20) David Rohr; (21) Anne Brunsdale; and (22) Don Newquist. The only other exception, in the last twenty years, is Chairman Chester L. Mize, who served less than three months, and did not participate in any antidumping investigation.

Commission apparently applied the two-factor test without bothering to repeat explicitly the standard. Certainly, no alternative approach was articulated. In no case did the Commission apparently adopt a unitary approach. It is also important to note that in twenty-four of the twenty-nine cases, the Commission said use of the bifurcated approach was required under terms of the Antidumping Act of 1921. In the remaining five cases, the Commission used similar language: "The Antidumping Act, 1921, as amended, imposes two conditions which must be satisfied before an affirmative determination can be made...."[62]

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[62] (1) Asbestos Cement Pipe from Japan, Inv. No. AA1921-91, TC Pub. 483 (May 1972), at 3;

(2) Pentaerythritol from Japan, Inv. No. AA1921-96, TC Pub. 508 (September 1972), at 2;

(3) Bicycle Speedometers from Japan, Inv. No. AA1921-98, TC Pub. 513 (September 1972), at 3;

(4) Cast-Iron Soil-Pipe Fittings from Poland, Inv. No. AA1921-100, TC Pub. 515 (September 29, 1972), at 2;

(5) Northern Bleached Hardwood Kraft Pulp from Canada, Inv. No. AA1921-105, TC Pub. 530 (December 1972), at 3;

(6)(7)(8) Perchlorethylene from Italy, Japan, and France, Inv. No. AA1921-106,-107,and -108, TC Pub. 531 (December 1972), at 3;

(9) Canned Bartlett Pears from Australia, Inv. No. AA1921-110, TC Pub. 551 (March 1973), at 3.

(10) Roller Chain from Japan, Inv. No. AA1921-111, TC Pub. 552 (March 1973), at 2;

(11) Stainless Steel Plate from Sweden, Inv. No. AA1921-114, TC PUb. 573 (May 1973), at 3;

(12) Synthetic Methionine from Japan, Inv. No. AA1921-115, TC Pub. 578 (May 1973), at 3;

(13) Impression Fabric of Manmade Fiber, Inv. No. AA1921-116, TC Pub. 577 (May 1973), at 3;

(14) Stainless Steel Wire Rods from France, Inv. No. AA1921-119, TC Pub. 596 (July 1973), at 3;

(15) Ceramic Glazed Wall Tile from the Philippines, Inv. No. AA1921-120, TC Pub. 599 (August 1973), at 3;

(16) Deformed Concrete Reinforcing Bars of Non-Alloy Steel from Mexico, Inv. No. AA1921-122, TC Pub. 605 (August 1973), at 3;

(17) Steel Wire Rope from Japan, Inv. No. AA1921-124, TC Pub. 608 (September 1973), at 3;

(18) Cold-Rolled Stainless Steel Sheet and Strip from France,

Third, the Commission has routinely terminated investigations when one of the twin elements of bifurcated analysis was absent. This practice has continued from the early 1970s to the present.

Fourth, the notion that the bifurcated approach "is not consistent with ... Title VII" is erroneous.[63] As noted earlier, both the Court of International Trade and the Court of Appeals for the Federal Circuit have decided that the twin-test approach is lawful. Indeed, in American Spring Wire and Roses the Court of International Trade has held that bifurcated analysis is

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Inv. No. AA1921-126, TC Pub. 615 (October 1973), at 3.

(19) Calcium Pantothenate from Japan, Inv. No. AA1921-131 (December 1973), at 3.

(20) Metal Punching Machines, Single-End Type, Manually Operated, from Japan, Inv. No. AA1921-133, TC Pub. 640 (January 1974), at 3;

(21) Racing Plates (Aluminum Horseshoes) from Canada, Inv. No. AA1921-137, TC Pub. 645 (January 1974), at 3;

(22) Hand-Operated Plastic Pistol-Grip Liquid Sprayers from Japan, Inv. No. AA1921-138, TC Pub. 662 (April 1974), at 3;

(23) Wrenches, Pliers, Screwdrivers, and Metal-Cutting Snips and Shears from Japan, Inv. No. AA1921-141, TC Pub. 696 (October 1974), at 3;

(24) Tapered Roller Bearings and Certain Components Thereof from Japan, Inv. No. AA1921-143, USITC Pub. 714 (January 1975), at 3;

(25) Welt Work Shoes from Romania, Inv. No. AA1921-144, USITC Pub. 731 (June 1975), at 3;

(26) Portable Electric Typewriters from Japan, Inv. No. AA1921-145, USITC Pub. 732 (June 1975), at 3;

(27) Lock-in Amplifiers and Parts Thereof from the United Kingdom, Inv. No. AA1921-146, USITC Pub. 736 (July 1975), at 3;

(28) Vinyl Clad Fence Fabric from Canada, Inv. No. AA1921-148, USITC Pub. 744 (October 1975), at 3;

(29) Chisels, Punches, Hammers, Sledges, Vises, C-Clamps, and Battery Terminal Lifters from Japan, Inv. No. AA1921-149, USITC Pub. 748 (December 1975), at 3.

In several other cases, there were separate views in which one or more Commissioners cited explicitly the bifurcated criteria. One case was terminated without Commission views.

[63] Cephalexin, supra, at 63.

"required." The Court of Appeals for the Federal Circuit has affirmed this approach. In light of the judicial precedents, the real question for trade law administrators is not whether the bifurcated method is lawful, but instead whether unitary analysis is in any way compatible with the required two-factor approach to material injury and causation.[64]

From my standpoint, this historical account demonstrates that the Commission has, indeed, utilized a uniform pattern of statutory analysis over a long period of time with reasonable consistency. Consequently, in employing the traditional bifurcated approach in the present determination, this Commissioner defers to the accumulated wisdom of the Commission and to its reviewing courts. I do not lightly disregard consistent, longstanding Commission practice and case law.

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[64] 590 F. Supp. 1281; Roses, at 9.

Additional Views of Commissioner David B. Rohr
Concerning
The Propriety of Bifurcated Analysis of Injury and Causation

Over the years, Commissioners of this agency have frequently used their additional views to set forth or engage in public debate about the appropriateness of various methods of analysis used to decide the investigations brought before the Commission. Margins analysis, trend analysis, elasticity analysis, computer modeling, cumulative analysis, and a host of other techniques have been advocated, employed, and criticized. On occasion, such methodologies have been approved of or rejected by the Commission's reviewing courts or by the Congress.[1] One of these methodological controversies, which has recently resurfaced after several years, is the debate between the so-called "bifurcated" and "unitary" modes of analysis. The bifurcated approach is a two-step analysis which looks first to whether an industry is experiencing material injury and second to whether that injury is to any degree "caused by" the imports under investigation. It is simply a method of organizing the consideration of the statutory factors in Title VII investigations into logical groupings which permit an efficient exposition of what is happening to an industry and the role of imports in these events.

Traditionally, the debate between advocates of each approach focussed on which of these methods was a "better" means of fulfilling the Commission's statutory mandate.[2] As long as the debate was carried out in such terms, I felt no need to involve myself in the controversy. In several recent opinions, however, certain of my

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[1] *See, e.g.*, USX Corp. v. United States, 682 F.Supp. 60, 64-68 (CIT, March 15, 1988) (rejecting the "five factor" test); *Id.* at 86-70 (criticizing use of certain types of elasticity estimates); S.R. 71, Report of the Committee on Finance, United States Senate 100th Cong. 1st Sess. 116 (1987) ("The Committee disapproves of determinations by individual Commissioners that rely on the mechanical application of factors or formulas that remain constant from case to case, but are not enumerated in section 717(7)." and "The Committee intends to disapprove of a narrow interpretation of the term 'price undercutting' to refer only to *predatory pricing behavior...*")

[2] *See* Cellular Mobile Telephones and Subassemblies Thereof from Japan, 731-TA-207, USITC Publication 1786 at 18 and 20 ((December 1985)(Additional Views of Chairwoman Stern and Additional Views of Commissioner Eckes).

colleagues have chosen to argue, not only that one method, a "unitary" method, is better, but also that it is the *only* method that the statute "contemplates" or that is "sufficient" to fulfill the Commission's statutory mandate.[3] With all due respect to my colleagues, I believe any such assertions are absurd.

I use the term "absurd" advisedly. If this criticism is aimed at the bifurcated approach *per se*, it is absurd, just as criticism aimed at the unitary approach *per se* would be absurd. On the other hand, if criticism is aimed at the elements that go into a particular use of either a bifurcated or unitary analysis, there is clearly room for saying that some of these elements may or may not be permissible. Even in such situations, I would be reluctant to call any methodology impermissible, unless the courts or Congress had directly spoken to the question.

Before turning to the history and basis for the bifurcated approach, it is useful to understand the criticisms leveled at it. The bifurcated approach is sometimes criticized for what is its strongest logical underpinning. That is, in cases in which no material injury is found to exist, the Commission does not consider causation.[4] However, if there is no material injury, there is nothing for the imports to "cause." Why should the Commission engage in an essentially academic exercise in such situations and consider causation?[5]

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[3] *See* 12-Volt Motorcycle Batteries from Taiwan, 731-TA-238 at notes 23 and 61 (August 1989) (But compare notes 24 and 62 of this same opinion).

[4] The Senate Report to the 1988 Omnibus Trade Act is sometimes cited by those who argue that it is improper to decide cases based upon a finding of no injury without also considering causation because it requires a discussion of all factors in every case. However, as anyone who is aware of the origin of those comments in the Report must know, they were directed specifically at certain Commissioners, who, in their causation analyses, were ignoring the explicit statutory factors and substituting their own factors or surrogates, which they felt were better explanatory variables than those Congress wished the Commission to consider. That this was not intended to have any negative impact on the use of bifurcated analysis is made clear when one considers the full history of the provision. *See* discussion p. 9-11, *infra*.

[5] American Spring Wire Corp. v. United States, 590 F.Supp 1273 (CIT 1984) (calling a discussion of causation in such circumstances "superfluous").

The bifurcated approach is also criticized, improperly as I understand it, for making an assumption that a healthy industry cannot be injured. The criticism is totally unfounded.[6] It reflects a woeful ignorance of how the Commission, at least in the five years I have served as a Commissioner, has employed the bifurcated approach. It confuses the terms "healthy" and "unhealthy" with the statutory term "material injury". In making my decisions I do not care whether an industry is healthy or unhealthy. My only concern is whether it is experiencing conditions (based upon my evaluation of the indicators of its performance) which the statute describes as "material injury". The concepts "health" and "material injury" are related only in the minds of those who choose to mischaracterize the Commission's decisions.

It has also been argued that injury in a bifurcated analysis merely means that indicators, *i.e.*, levels of production, employment, and financial performance, at the end of a period of investigation are below the levels of such indicators at the start of that period or below those of some other generalized "industry." Nothing could be further from the truth, as should be readily apparent to anyone who cares to examine the history of Commission opinions. Industries whose indicators have gone down over the period of investigation have been found to be uninjured, and those whose indicators have improved over the course of an investigation have been found to be injured.[7] It should also be kept in mind that there is absolutely nothing in the bifurcated analysis which would preclude an industry that might not currently be experiencing material injury from being threatened with material injury.

As an analytic tool of Commission analysis, bifurcated consideration of injury and

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[6] Even if someone wishes to level such criticism, they should direct it properly. It is a criticism not of the bifurcated approach itself but rather is how it is applied.

[7] Of course, one would be foolish not to acknowledge that it is certainly much more likely for an industry whose indicators exhibit downward trends to be experiencing material injury. However, it is only when an industry's indicators are evaluated in the particular context of that industry that a definitive judgement can be made. The question is not simply that the indicators are going down, nor is the question what is the reason why they are going down. The question is whether it is a bad sign for a particular industry that its indicators are going down.

causation has a venerable history. A very brief search of past Commission antidumping decisions reveals that the analysis was in regular use at least as early as 1972. In April of that year, Commissioners Leonard and Young wrote in their negative decision in *Fish Nets and Netting of Manmade Fibers from Japan*:

> The Antidumping Act, 1921, as amended, requires that the Tariff Commission find two conditions satisfied before an affirmative determination can be made.
>
> First, there must be injury or a likelihood of injury, to an industry in the United States, or an industry in the United States must be prevented from being established. The quantum or description of injury is not disclosed in the statute.
>
> And second. such injury (or likelihood of injury or prevention of establishment) must be "by reason of" the importation into the United States of the class or kind of foreign merchandise the Secretary of the Treasury determined is being or is likely to be sold at less than fair value.
>
> *If either condition is not satisfied, a negative determination must be made.*[8]

In *Fish Nets* this analysis was used in the explanation of a negative decision. It was also to be used in affirmative determinations. Shortly after the *Fish Nets* case, the same two Commissioners, speaking as a plurality of the Commission, stated in *Asbestos Cement Pipe from Japan*:

> The Antidumping Act, 1921, as amended, requires that the Tariff Commission find two conditions satisfied before an affirmative determination can be made.
>
> First, there must be injury, or likelihood of injury, to an industry in the United States, or an industry in the United States must be prevented from being established.
>
> And second, such injury (or likelihood of injury or prevention of establishment) must be "by reason of" the importation into the United States of the class or kind of foreign merchandise the Secretary of the Treasury determined is being, or is likely to be, sold at less than fair value.
>
> In the instant investigation we find that both conditions are met. We have, therefore, made an affirmative determination.[9]

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[8] Determinations in Investigation No. AA1921-85 Under the Antidumping Act, 1921, as amended, TC Publication 477 at 7 (April 1972)(Fish Nets).

[9] Determination of Injury in Investigation No. AA1921-91 Under the Antidumping Act, 1921, as amended, TC Publication 483 (May 1972) at 3.

Virtually identical language can be found in many of the opinions issued by the other Commissioners and by the Commission as a whole throughout the 1970's.[10]

By the late 1970's, explicit statements of the two elements of the Commission determinations in antidumping cases become less frequent, but continue on through the adoption of the 1979 Trade Agreements Act, amending the dumping law. The question to consider is what is the meaning of the Commission's failure to continually repeat the two-part standard. It is important to note, for example, that the form of the analysis used by the Commission in its opinions does not differ between the cases in which the two-part standard is formally enunciated and those in which it is not explicitly stated. Further, there is certainly no "repudiation" of the two step analysis set forth in these cases. It is quite reasonable therefore to surmise that the Commission simply became tired of repeating what must have seemed to have been an obvious truism, that there were two elements of the determination both of which must be satisfied for an affirmative decision.

Further, as I examine the opinions of the Commission in the early 1980's, I believe that it is clear that the bifurcated method of analysis remained in common use. For example, from the very first staff report included in the first decision under the 1979

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[10] See, eg. Elemental Sulfur from Mexico, Inv. No. AA1921-92, TC Publication 484, at 8 (May 1972)(Commissioners Leonard and Young); Pentaerythritol from Japan, Inv. No. AA1921-96, TC Publication 508 (September 1972)(Commission decision, Commissioners Young and Ablondi not participating and Commissioner Leonard concurring in the result); Bicycle Speedometers from Japan, Inv. No. AA1921-98, TC Publication 513 (September 1972)(Chairman Bedell, Vice Chairman Parker and Commissioners Leonard and Moore); Northern Bleached Hardwood Kraft Pulp from Canada, Inv. No. AA1921-105, TC Publication 530 (December 1972)(Chairman Bedell and Commissioners Leonard and Moore); Steel Wire Rope from Japan, Inv. No. AA1921-124, TC Publication 608 (September 1973)(Chairman Bedell and Commissioner Moore); Expanded Metal, of Base Metal, from Japan, Inv. No. AA1921-130, TC Publication 629 (November 1973)(Commissioner Leonard and Moore); Iron and Sponge Iron Powders from Canada, Inv. No. AA1921-136, TC Publication 642 (January 1974)(Commissioners Leonard and Ablondi); Chisels, Punches, Hammers, Sledges, Vises, C-Clamps, and Battery Terminal Lifters from Japan, Inv. No. AA1921-149, USITC Publication 748 (December 1975)(Chairman Leonard, Vice Chairman Minchew, and Commissioners Moore, Bedell, Parker, and Ablondi); Birch Three-Ply Door Skins from Japan, Inv. No. AA1921-150, USITC Publication 754 (January 1976)(Separate opinions of Chairman Leonard, Vice Chairman Minchew, and the joint opinion of Commissioners Parker and Ablondi), ; Tantalum Electrolytic Fixed Capacitors from Japan, Inv. No. AA1921-159, USITC Publication 789 (October 1976) (Chairman Leonard, Vice Chairman Minchew, and Commissioners Moore, Bedell, and Ablondi).

law, separate sections of the report discussed factors relating to injury and causation.[11]

This format for staff report has been consistent throughout the period during which the Commission has been making decisions under the 1979 Act. Similarly, many of the determinations by individual Commissioners reveal the use of bifurcated methods of analysis. For example, beginning with the *Spun Yarn* case, I see that Commissioners Stern and Calhoun state:

> [T]his case presented us with some difficulty because the question of the causal relationship between the LTFV imports and material injury to the domestic industry is an especially close one.

In *Sugar and Sirups from Canada*, Commissioners Moore and Stern explicitly divided their concurring opinion into separate sections dealing with injury and causation.[12] In this period it is clear that there is no real pattern discernable from the opinions issued by the Commission that identify any single method of analysis as particularly approved of. I believe, however, that the opinions suggest that, throughout the period, various Commissioners continued to employ both bifurcated and unitary analyses. For example, in *Precipitated Barium Carbonate from the Federal Republic of Germany*[13], I read:

> Several factors indicate that material injury is present in this case. The most significant are the declining sales and profitability of the domestic industry. The causal connection between dumped imports and material injury to the domestic industry is demonstrated by the increased market share of LTFV imports together with the substantial margins of underselling.

Later that year, in *Sorbitol from France*,[14] the basic elements or form for Commission opinions that was to be used for several years thereafter, and that, in modified form,

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[11] Spun Acrylic Yarn from Japan and Italy, Inv. Nos. 731-TA-1 and 2, USITC Publication 1046 (March 1980) ("Consideration of Material Injury or the Threat Thereof" at A-9 and "Consideration of the Causal Relationship between LTFV Imports and the Alleged Material Injury" at A-21).

[12] 731-TA-3 (Final), USITC Publication 1047 (March 1980).

[13] Inv. No. 731-TA-31 (Final), USITC Publication 1154 at 6 (June 1981).

[14] Inv. No. 731-TA-44, USITC Publication 1233 (March 1981).

is still used today, can be seen in the *Additional Views of Paula Stern and Alfred Eckes*, whose views included separate sections on condition of the industry and impact of LTFV imports.

In most of these cases, the explicit findings of "material injury" or "no material injury", which one can see in most post-1985 decisions of the Commission are lacking. The methods of analysis employed by the Commission are therefore mostly a matter of inference and conjecture. The only clear examples would be seen in negative decisions that explicitly were decided on material injury grounds and in which the Commission did not consider causation or explicitly did so only as an alternative finding. However, in this period negative decisions of the Commission were rather infrequent, and, even in the infrequent case, the facts may or may not have warranted a decision on "material injury" as opposed to "causation" grounds.

In this context, however, the Commission considered a series of countervailing duty and antidumping cases in 1982 and 1983 concerning prestressed concrete steel wire strand from various countries including Spain, France, the United Kingdom, and Brazil.[15] In these cases, the determinations of the Commission were explicitly made on "no material injury" grounds. In the cases, an additional set of causation findings were made:

> Assuming arguendo that the injury during the first 9 months of 1982 meets the statutory standard of "material injury," our analysis of the effects of imports of PC strand from the United Kingdom demonstrates that any such injury is not by reason of the subject imports.[16]

These findings are clearly made as alternative separate grounds for the decision.

Of this decision, the CIT, whose opinion on the matter was later adopted by the CAFC, stated:

> The Commission must make an affirmative finding only when it finds both (1) present material injury (or threat to or

[15] Inv. Nos. 701-TA-152, 153, and 164 and 731-TA-89.

[16] Prestressed Concrete Steel Wire Strand from the United Kingdom, 731-TA-89 (Final), USITC 1343 at 6 (February 1983).

> retardation of the establishment of an industry) and (2) that the material injury is "by reason of" the subject imports. Relief may not be granted when the domestic industry is suffering material injury but not by reason of unfairly traded imports. Nor may relief be granted when there is no material injury, regardless of the presence of dumped or subsidized imports of the product under investigation. In the latter circumstance, the presence of dumped or subsidized imports is irrelevant, because only one of the two necessary criteria has been met and any analysis of causation would be superfluous.[17]

The debate over unitary and bifurcated analysis was not, of course, put to rest by this decision. While I think it does clearly stand for the proposition that the bifurcated approach has been judicially approved as *a* method which the Commission can employ, I do not believe anyone would claim that it says that a unitary approach is impermissible. No unitary analysis was before the court, and so it did not speak to the issue.

The debate was resumed at the Commission in late 1985 in the separate additional views by Commissioners Stern and Eckes in *Cellular Mobile Telephones and Subassemblies Thereof from Japan.*[18] In her additional views, then Chairwoman Stern warned of an overly mechanistic approach to the bifurcated analysis which might lead to a finding of no injury when in fact an industry was experiencing injury.[19] It must, of course, be pointed out that the Commission did find material injury to exist in that case. In fact, the danger pointed out by Commissioner Stern, use of some concept of "normal" profits as a standard of injury without taking into consideration the particularities of the industry under investigation, would be a misapplication of the bifurcated approach, just as it would be if it were used in the context of a unitary

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[17] American Spring Wire Corp. v. United States, 590 F.Supp 1273 (CIT 1984), *aff'd sub nom* Armco, Inc. v. United States, 760 F2d 249 (CAFC 1985) ("The judgement appealed from is affirmed on the basis of the opinion filed by Senior Judge Maletz."). It is important to note that the requirement for the Commission to consider all the factors listed in the statute predates this decision. *See* discussion p. 10, *infra.*

[18] Inv. No.731-TA-207 (Final), USITC Publication 1786 (December 1985)(*Telephones*).

[19] *Id.* at 18.

approach.[20] Commissioner Eckes responded by stating that the "Commission should follow the interpretation of this agency's highest reviewing court" citing *American Spring Wire*, discussed above.[21]

Subsequently, in *National Ass'n of Mirror Manufactures v. U.S.*,[22] the Commission's reviewing court was faced with the a direct challenge to the Commission's ability to make determinations solely and explicitly based on a finding of "no material injury". In that case, the judge, possibly in response to the arguments raised by the appellant in that case, went so far as to state:

> Nonetheless, when the statutory factors which the Commission considers indicate that the domestic industry is healthy, the Commission may indeed determine that the domestic industry is not experiencing or facing material injury.

That the judge found it necessary to use the term "healthy", which again, I must repeat, the Commission does not use in its analysis, was unfortunate but the principle of the acceptability of "no material injury" findings should be, by this time, unexceptionable. As if this proposition needed any further support, the CIT again stated within the last month:

> An affirmative injury determination by the ITC pursuant to 19 U.S.C. §1967d(b)(1) requires *both* the existence of material injury, or threat thereof, to an industry in the United States and a causal connection between such injury or threat and imports determined to be sold at less than fair value.[23]

Recently, a curious argument has been made that Congress, in the 1988 Omnibus Trade and Competitiveness Act, implicitly rejected the Commission's traditional bifurcated analysis. The argument is that the legislative history of the Act makes clear

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[20] See USX Corp. v. United States, 682 F.Supp. 60, 69 (CIT 1989) (rejecting an analysis of elasticity that "the determination does not link to the specific facts of this case.").

[21] Telephones, *supra* n.18 at 20-21.

[22] 696 F.Supp. 642 (CIT 1988)

[23] Roses, Inc. v. United States, Slip op. 89-115 (CIT August 18, 1989) (Citing *American Spring Wire*)(emphasis added).

that in every case the Commission is to consider the three specified factors of the volume, price, and impact of imports.[24] The statements in the legislative history refer to these factors as being part of the "material injury" determination. These factors are those which, in the bifurcated approach are relevant to the issue of causation rather than whether the industry is currently experiencing material injury. If they must be discussed in each case, causation must obviously be discussed in each case. Hence, a methodology which allows a decision to be made without reference to causation, *i.e.*, a bifurcated approach that allows a decision based on "no material injury," cannot be permitted. While clever, this is a respectable argument only if one blinds oneself to the context in which the legislative history was written.

First, I note that Congress was well aware of the debate between unitary and bifurcated analysis but chose not to explicitly reject either approach or even refer to either approach by name. This suggests that perhaps Congress was concerned with some other issue when writing this history. Second, it must also be noted that the requirement for the Commission to consider the three elements of 19 U.S.C. §1677(7)(B) predates the 1988 Act. It has existed since the passage of the 1979 Act. Third, the legislative history relates to a provision which traditionally has been viewed as relating to the causation element of the Commission's determination, a determination generically referred to as an injury or material injury determination without any intent to distinguish between elements of that determination. This might lead one to surmise that the reference to "all cases" might mean all cases in which causation was an issue.

This interpretation is supported when one looks to the "problem" that Congress was addressing in adding this explanation in the legislative history. This problem was that certain Commissioners, in writing their analyses of causation were habitually employing "surrogates" for the statutorily enumerated factors and otherwise

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[24] Conf. Rep. 100-576, 100th Cong., 2d Sess. 616 (1988).

substituting their own analytic prejudices for a consideration of the factors listed in the statute.[25] While Congress recognized that, as Commissioners, we must have some latitude to employ whatever modes of analysis we see fit, Congress was also very clearly saying that any such analysis could only be in addition to, not a substitute for, the analysis explicitly mandated by the statute. The legislative history is a warning that the Commission should not create some abstract, *a priori* benchmark against which to makes its statutory determination, but rather, examine each industry according to its own individual facts. The statements in the legislative history, looked at in their proper context, thus has nothing whatsoever to do with the bifurcated versus unitary modes of analysis debate.

The debate, however, continues. I believe that the bifurcated approach remains the better, though not exclusive, method of analysis under title VII. My view is based on several reasons. I find that, at least in their current manifestations, unitary methods of analysis suffer from precisely the overly mechanistic, formulaic application that concerned Commissioner Stern in 1985 about the bifurcated approach and that result in a determination amounting to whether imports are a "material cause of injury," rather than "*a* cause of *material* injury." It is precisely the concern which led Congress to admonish the Commission against use of formulas which bear no relation to the facts of a specific case.[26]

Second, it is difficult in the context of unitary approaches to distinguish between material injury and a material causation standard. The history of the dumping and countervailing duty laws are filled with admonishments from Congress that imports need only be "a" cause, not the only cause, not an important cause, not a substantial

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[25] S.R. 71, Report of the Committee on Finance, United States Senate 100th Cong. 1st Sess. 116 (1987) ("The Committee disapproves of determinations by individual Commissioners that rely on the mechanical application of factors or formulas that remain constant from case to case, but are not enumerated in section 717(7).").

[26] *Id.*

cause, not even a material cause of injury.[27] A common failure of unitary analysis is to implicitly apply a materiality standard to causation in direct contravention of Congressional admonition.

Third, unitary analysis tends to blur the distinctions between present material injury and threat of injury, which I believe are to be kept separate under that statute as they have different statutory consequences. Over time, Congress has progressively specified the factors to be considered by the Commission in analyzing threat, factors which are separate and distinct from those it requires be looked at in the context of present material injury and causation.

This is not to say that a unitary analysis could not be developed which avoids these pitfalls that may be at least as good as the bifurcated approach I currently use. There may be times when a bifurcated explanation of a decision might not be clearer and more transparent than a unitary explanation. As long as I have considered what the statute requires me to consider, I believe I have wide discretion to explain that decision in any manner that seems best. The bifurcated approach is clear, transparent and avoids the pitfalls and dangers which the Commission has explicitly been warned against. Any other approach that does not avoid those pitfalls is not in compliance with Congressional intent.

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[27] *See, eg.*, Birch Three-Ply Door Skins from Japan, Inv. No. AA1921-150, USITC Publication 754 (January 1976) at 7-10 (Statement of Reasons for Affirmative Determination of Chairman Will E. Leonard discussing pre-1979 dumping law); S.R. 249, Committee on Finance, 96th Cong. 1st Sess 74 (1979) ("The current practice of the ITC with respect to causation will continue under section 735."; "Nor is the issue whether less-than-fair-value imports are the principal, a substantial, or a significant cause of material injury.").

DISSENTING VIEWS OF CHAIRMAN ANNE E. BRUNSDALE

New Steel Rails From Canada
Inv. Nos. 701-TA-297 and 731-TA-422 (Final)

Based on the information gathered in this investigation, I join Vice Chairman Cass and Commissioner Lodwick in dissenting from the Commission's affirmative determination that no industry in the United States is materially injured or threatened with material injury by reason of imports of steel rails from Canada that are subsidized or dumped.[1] My reasoning is outlined below.

Like Product and the Domestic Industry

As a threshold matter, the Commission is required to define the relevant domestic industry that is to be examined for the purpose of assessing whether material injury or threat of material injury by reason of the subsidized imports exists. The domestic industry is defined as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product".[2]

In the preliminary determination I joined in the Commission's unanimous finding that all new steel rails were a single like product, but flagged the issue for further attention in the final investigation. Based on the additional information

[1] 19 U.S.C. 1671d(b), 1673d(b). Material retardation is not an issue in this investigation and will not be discussed further.

[2] 19 U.S.C. 1677(4)(A).

now available, a strong case can be made for a finding that tee rails and other rails are separate like products and that prime and industrial tee rails are also separate like products. However, all rail subject to this investigation is manufactured in the same facilities by the same workers.[3] Thus, whether or not rails are viewed as a series of separate products or as part of a single aggregate, the analysis of material injury or threat thereof concerns a single domestic industry.

The Commission's like-product decision is a factual determination, and the Commission applies the statutory standard of "like" or "most similar in characteristics and uses" on a case-by-case basis. In analyzing like-product issues, the Commission generally considers a number of factors, including the use of common manufacturing facilities and production employees, physical appearance, interchangeability among the articles, channels of distribution, and customer perceptions of the articles. The Commission looks for clear dividing lines between products: "By focusing on the market for a product in a meaningful economic sense, the Commission can establish which divisions are of consequence and which are not."[4]

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[3] The inclusion of products not within the scope of the investigation in the domestic industry is usually a major drawback to adoption of a product-line analysis. This concern does not arise in the present context, since the relevant product line corresponds exactly to the scope of the investigation as defined by Commerce.

[4] Digital Readout Systems and Subassemblies Thereof from Japan, Inv. No. 731-TA-390 (Final), USITC Pub. 2150 (January 1989) at 27 (Views of Acting Chairman Anne E. Brunsdale).

In this investigation, there are two principal questions regarding the definition of the like product. The first is whether the tee rail used in railroad applications is a separate like product from crane, girder, and contact rail used in other applications. The second is whether prime and industrial tee rails constitute a single like product. My analysis of these issues, only the second of which has received the attention of parties, is outlined below.

Tee Rail and Other Rail. Most of the like-product criteria usually considered by the Commission favor a determination that the individual types of rail are separate like products. There is no interchangeability between tee rails and other new steel rails, or among crane, girder and contact rails. Moreover, this lack of interchangeability extends to the design stage of rail applications as well as to the use of rails in current applications. Customer perceptions and physical appearance of each type of rail are clearly different. In regard to the foregoing like-product criteria, the dividing lines between the major types of rail are clear and distinct. However, common production facilities and employees are used in the manufacture of all types of rails.[5]

Even if each type of rail is judged to be a distinct like product, there is a question as to whether separate industries

[5] Questionnaire responses show that a single producer of tee rail, Bethlehem, accounts for all reported domestic production of non-tee steel rails. Crane, girder, and contact rails are produced in the same facility as tee rails.

can be meaningfully identified. The market for tee rails, which are used as railroad track, accounts for over 98 percent of the overall market for rails.[6] It is physically possible to produce crane, girder, or contact rails without producing tee rails, but it would not be economically feasible to operate a rail mill to produce only these low volume products. Moreover, the record indicates that the costs of constructing a rail rolling mill or converting a universal structural mill to rail production and providing the dedicated equipment required for the finishing and inspection of rails are significant.[7] Since it would be impossible to amortize these costs solely over the production of small volumes of non-tee rails, potential competitors cannot enter one or more of these segments without also deciding to compete for tee rail sales. Thus, in terms of both current production and possible entry, the different types of rails are necessarily produced by the same domestic industry.

Prime and Industrial Rail. Prime rail is tee rail that meets AREA specifications. When the production process for prime rail goes awry, the resultant out-of-specification product may be either used as scrap or sold as industrial rail.[8] Industrial

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[6] Report at A-24 (Table 1).

[7] Economic Memorandum EC-M-313 at 5-6.

[8] The rejection rate for prime rail determines the potential supply of industrial rail. Rejection rates range from 2 to 6 percent for domestic producers and producers of the subject imports. A railmaking facility will sell industrial rail when the net receipts of a sale exceed the cost of freight and handling plus the scrap value of the rejects. The suitability of (continued...)

rail is a by-product produced exclusively in conjunction with prime tee rail.

Petitioner argues that prime and industrial rails are a single like product. Petitioner notes that at least some railroads view the two types of rail as interchangeable and that distributors sell both prime and industrial rail to users that purchase both kinds.[9] Petitioner also holds that prime and industrial rail have the same outward physical appearance and that the markets for prime and industrial rail are linked via their common use in certain applications.[10]

Respondents counter that the failure of industrial rail to meet AREA standards constitutes a clear distinction from prime rail. Rail that does not meet AREA standards is not bought by Class I railroads, which purchase 70 percent of all new steel rails. Relay rail, which is previously laid prime rail that is removed from the track network due to abandonment or routine replacement programs, is, unlike industrial rail, a substitute for prime rail in Class I applications. The presence of relay rail as a product falling between prime and industrial rails on the spectrum of steel rails as viewed from the rail consumers'

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[8](...continued)
rejects for industrial rail applications varies widely. See Report at A-12-13.

[9] Prehearing Brief of Petitioner Bethlehem Steel Corporation (hereinafter Petitioner's Prehearing Brief) at 5, 7, 16, 19-20 and 26.

[10] Id at 16-17 and 27 et seq.

perspective provides further evidence that the latter two products are clearly divided. Moreover, the lack of interchangeability is likely to apply in both directions: while it is physically possible for prime rail to be used in those applications where industrial rail would suffice, the large price gap between prime and industrial rail makes such an application economically infeasible.[11] In sum, there is no interchangeability, and customer perceptions clearly differ.

With regard to physical appearance, respondents note that industrial rails come in nonstandard lengths, are drilled to prevent inadvertent misuse in applications where prime rail is required, and do not carry the marking applied to rails meeting AREA standards. Thus, while an untrained observer might find the physical appearance of prime and industrial rail to be similar, rail market participants would instantly recognize physical differences. Respondents also assert that prime rails are distributed primarily through direct sales to class I railroads, while industrial rails are sold exclusively through distributors. The large price disparity between prime and industrial rails is another factor that supports a finding that prime and industrial rail are separate like products.[12] In respondents' view, these

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[11] The unit value of industrial rail as a proportion of prime rail unit value in domestic shipments ranged from 43.0 percent to 64.0 percent over the period of investigation. See Report at A-79 (Figure 11a). Canadian prime and industrial rail values revealed a similar large gap. Id. at A-80 (Figure 11b).

[12] Asocoflores 693 F. Supp. at 1170 n. 8. See also note 11 supra.

factors together outweigh the use of common production facilities and employees in the production of both prime and industrial rail.[13]

Summary Evaluation of the Like-Product/Domestic Industry Question. This is, to my knowledge, the first investigation before the Commission in which the issue of whether a product and a by-product of its production constitute one or more like products has arisen. A like-product analysis based exclusively on the commonality of production facilities and employees in this setting can lead to absurd results: the two outputs of a water treatment plant, clean water and sewage sludge, would be the same like product under a strict application of this approach!

Overall, I find Petitioners' appeal to the possibility of a market connection between prime and industrial rail is much less convincing than Respondents' evidence that no such connection exists in practice. If production of prime and industrial rail were separable, and if relative market sizes were sufficient to

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[13] The industrial rail like-product issue provides a counterpoint to my discussion in Generic Cephalexin Capsules from Canada, Inv. No. 731-TA-423 (Final), USITC Pub. 2211 (August 1989) at 33-35 (Additional Views of Chairman Anne E. Brunsdale), regarding the role of clear price breaks in dividing markets and hence like products. In that case, petitioner cited United States v. Archer-Daniels-Midland Co., 866 F.2d 242 (8th Cir. 1988), for the proposition that the de jure division of markets by legislative fiat (in that case a sugar quota) also divided like products. Petitioner contended that the existence of a patent on one drug formula required its segregation as a separate like product. I agreed with the reasoning, but disagreed with the conclusion because the patent at issue had expired. Id., USITC Pub. 2211 at 37 n. 18. In this case, the AREA specifications serve as a de jure division of the market between new rail and industrial, each with its own market and price structure.

allow for independent production of each type, I would not hesitate to evaluate the prime and industrial rail industries separately for purposes of reaching my material injury determination, even under circumstances where current production occurred using common facilities and employees. However, the definition of multiple industries in a case involving a pair of goods whose production is both physically and economically inseparable and that are both covered within the scope of the investigation poses many problems with no apparent offsetting benefit. The allocation of costs and returns to each product, which are manufactured by the same inputs and processing activity, but differ significantly in economic value, would be an insurmountable task.[14] The mixing of products within and outside the scope of the investigation, a major disadvantage of product-line analysis in other settings, does not arise here because of the exact match between the all new rails product line and the scope of the investigation. I therefore determine that prime and industrial rail are produced by the same domestic industry producing all other types of new steel rails.

Cumulation. Another preliminary issue that arises in this investigation involves cumulation across the antidumping and countervailing duty investigations. The Commission has clear

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[14] For example, since industrial rail is an inevitable result of prime rail production activity, the production cost of prime rail should, for planning purposes, include an allowance for the known incidence of out-of-specification product. To count these costs fully as costs of industrial rail production would necessarily involve double-counting.

statutory instructions that, in cases involving unfair imports from several different countries that compete with each other and with products of the domestic industry, it should cumulate effects rather than consider the question of material injury or threat of material injury by reason of each country's unfair imports separately for each country's imports.[15] Where dumping and subsidization are both alleged in multiple country investigations, cumulation across both types of cases is clearly required. While cumulation is not explicitly mandated over dumping and subsidy cases involving one country, the statute has defined a broader basis for cumulation that clearly encompasses this possibility. A failure to cumulate would be logically inconsistent, since dumped imports and subsidized imports from one country will almost certainly more fully satisfy the "competition" condition for cumulation set out in 19 U.S.C. 1677(7)(C)(iv) than would imports from any two countries. For this reason, I will cumulate across both types of unfairly traded imports in my injury analysis, taking care to assess each impact only for those imports for which each affirmative Commerce determination applies.

The Domestic Industry: Current Indicators and Background Information

[15] 19 U.S.C. 1677(7)(C)(iv).

A discussion of the domestic industry indicators and competitive conditions establishes the context within which the Commission determines whether a particular amount of impact that the subject imports may have had on the domestic industry constitutes material injury.[16] Such a review does not, however in itself, satisfy the requirement of 19 U.S.C. 1677(7)(B) that the Commission consider in each case the volume of imports, the effect of imports on like-product prices, and the impact of imports on domestic like-product producers, and also to explain the analysis of each of these factors in each determination issued by the Commission. Rather, it serves as a prelude to such an analysis, providing a convenient summary of pertinent information that can be drawn upon later in explaining causation.

The Period of Investigation. In conducting its impact analysis, the Commission is required to evaluate all relevant economic factors within the context of the business cycle and conditions of competition that are distinctive to the affected industry.[17] Petitioner argues that a "business cycle" for track replacement exists, and that it can be accounted for in the context of this case by including 1984 and 1985 in the period of investigation.

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[16] With respect to respondent Sysco, this issue arises, of course, only if one looks to the effect of the unfair trade practice and not the effect of the imports per se.

[17] 19 U.S.C 1677(7)(B)(i)(III).

My review of petitioners' data and that gathered by staff suggests that there are no distinct cycles affecting the market for new steel rails. Rather, the demand for new steel rails has experienced a long-run secular decline as total miles of track and miles of road owned by Class I railroads fell following the passage of the Staggers Act.[18] Tonnage of all rail laid by Class I railroads has fallen in every year since 1980 except for 1984.[19]

There appears to be no direct relationship between operating revenues or net railway operating income and miles of rail laid. Operating revenue and miles of new rails laid moved in opposite directions in four of the eight years after the Staggers Act took effect in 1980.[20] Net railway operating income rose sharply in 1987 and 1988, reaching a level exceeded since 1980 only in 1984, while miles of new rails laid continued to decline.[21]

The business cycle provision of 19 U.S.C. 1677(7)(B)(i)(III) should not be used as a pretext for adjusting the period of investigation to buttress the position of one of the opposing parties in a case. The period of investigation should be adjusted only when there is a regular cycle peculiar to the

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[18] Report at A-41. The Staggers Act deregulated railroad operations effective October 1, 1980, and resulted in a substantial decrease in the mileage of mainline Class I railroads.

[19] Id. at A-37 (Figure 5).

[20] Id. at A-34 (Figure 4).

[21] Id at A-33.

individual market being analyzed, or if that market is highly sensitive to economy-wide growth cycles. Because neither of these circumstances applies in this case, it is appropriate to follow standard Commission practice in setting a three-year period of investigation.

Industry Indicators. The Commission routinely collects data on domestic production, shipments, inventories, employment, profitability, and other factors that are descriptive of industry performance.[22] The data in hand reflect improving industry performance throughout the period of investigation. Domestic shipments of steel rails rose from 461,233 tons in 1986 to ******* tons in 1988, an increase of *** percent.[23] The value of domestic shipments rose by 6.9 percent between 1986 and 1988.[24] Because steel rails are a made-to-order product, production tracked shipments closely and inventories played no significant role in the market.[25] Domestic producers' capacity fell sharply in 1987 with the withdrawal of Wheeling-Pittsburgh from the steel rails market and the closure of its Monessen rail mill.[26]

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[22] 19 U.S.C. 1677(7)(c)(iii).

[23] Report at A-21 (Table 1). Shipments in interim 1989 increased *** percent over the corresponding 1988 period.

[24] Id. at A-43 (Table 3). The value of shipments in interim 1989 was **** percent higher than in the corresponding 1988 period.

[25] Id. at A-41 (Table 2). Inventory levels remained below 1 percent of shipment levels throughout the period of investigation. Id. at A-52.

[26] Id.

mill.[26] Following Bethlehem's purchase of this facility, reported industry capacity in 1989 rebounded to nearly its 1986 level.[27] Reflecting divergent production and capacity trends, capacity utilization rose from 39.5 percent in 1986 to **** percent in 1988. The inclusion of the Monessen mill in reported capacity for 1989 dropped the utilization rate to **** percent for interim 1989 despite an increase in production of new steel rails.[28]

Both domestic producers have invested capital in an effort to stay current in their product offerings. Bethlehem's recent investments include a new caster and facilities for double length rail production. In 1987 Bethlehem purchased the Monessen rail mill operated by Wheeling-Pittsburgh prior to the latter's bankruptcy filing in 1987. Since 1983, CF&I has modernized by adding capacity to its two electric arc furnaces, a ladle treatment center and argon stirring, and a continuous caster.[29]

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[26] Id.

[27] Id. at A-39. Current capacity is *** percent below the 1986 level.

[28] Id. at A-41 (Table 2). To date, there has been no production at Monessen in 1989. The purchaser, Bethlehem, has substantial excess capacity at its Steelton facility, raising the prospect that Monessen may not operate in the foreseeable future. Without Monessen, the interim 1989 capacity utilization rate was **** percent.

[29] Id. at A-26.

The number of production and related workers producing rails declined over the period of investigation, but hours worked in rail production and the number of workers employed producing all products at rail mills both increased.[30] Wages and total compensation grew by * percent and **** percent respectively between 1986 and 1988. Hourly wages, which are negotiated on a company-wide basis, fell between 1986 and 1987, but have been increasing since that time. A new contract calling for substantial wage increases was signed by one domestic producer in 1989.

Aggregate operating income in steel rail operations improved significantly between 1986 and 1988, although firms continued to suffer operating losses.[31] The improvement in 1987 and 1988 occurred despite the large impact of past service expenses on the reported cost of goods sold resulting from a Financial Accounting Standards Board ruling effective in 1987 that required companies to recognize their unfunded pension and health care liabilities on a more current basis.[32] Without this change, the improvement

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[30] Id. at A-46 (Table 4).

[31] Id. at A-51 (Table 6). Operating losses including past service costs fell from $25.5 million in 1986 to $**** million in 1988. Operating losses net of past service costs were $*** million in 1988. Id. at A-57.

[32] Id. at A-54-55. While we recognize the need to allocate unfunded past service costs to current production for accounting purposes, companies are liable for these costs whether or not they engage in current production of steel rails. Unlike current wage, benefit, and materials costs, past service costs should not affect the operating decisions of rails producers.

in accounting results would have been much sharper. Financial results for steel rail operations do not appear to differ significantly from those for other products manufactured in the same establishments.[33]

Framework for Causation Analysis

In making its final determination, the Commission must ascertain whether material injury or threat of material injury "by reason of" the imports under investigation exists.[34] The antidumping and countervailing duty laws require us to analyze and explain the causal link between imports and the state of the domestic industry in each and every case. As I have discussed in previous cases, a simple recounting of domestic industry and import trends does not provide a sufficient basis for establishing this causal relationship. I therefore take another approach, which is to organize the data on the record in a fashion that allows me to assess the relationship between imports and the condition of the industry according to basic principles of economics.

The Market for New Steel Rails. Approximately 70 percent of the market for new steel rails consists of Class I railroads;

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[33] Compare Report at A-48 (Table 5) with Report at A-51 (Table 6) using data at A-52 (Table 7) to remove Wheeling-Pittsburgh, which produced only rails at its establishment, from the comparison. New steel rails accounted for about 42 percent of sales and between 48 and ** percent of operating losses in 1987 and 1988. In interim 1989, steel rail operating losses were **** percent of overall establishment losses.

[34] 19 U.S.C. 1671d(b).

smaller railroads account for about 10 percent of the market, and transit authorities, distributors, and contractors account for the remainder. More than 95 percent of new steel rails are purchased through a quote or bid procedure.[35]

Although there are several distinct rail products, we have determined that all are produced by a single industry. By far the most important market served by this industry is the market for prime tee rail, which accounted for over 96 percent of domestic shipments in both value and quantity terms in 1988.[36] The industrial rail market, which accounts for about half of the remaining shipments by quantity involves external sales of factory rejects at prices related to the internal scrap value of these products.[37] These facts suggest an injury analysis that focuses on the prime rail market.

In looking at sales to Class I railroads, several institutional factors are important. Railroads contract directly with producers on an annual basis for nearly all of their prime rail requirements.[38] Procurement by privately owned Class I railroads often involves multiple rounds of quotations, with suppliers being encouraged to lower their bids to compete with

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[35] Report at A-86.

[36] Id. at A-43 (Table 3).

[37] Id. at A-12-13.

[38] They will buy from distributors to meet unanticipated needs, such as those caused by derailments or natural disasters.

actual or fictitious offers reported by railroads' purchasing agents.

In general, a railroad will not buy even AREA-approved rail from suppliers that have not been qualified by its own engineering department. Therefore, only a subset of all producers may be potential competitors for any particular contract. Since steel rails have a relatively low value to weight ratio, transportation expense is another factor tending to limit competition. Quoted prices include freight charges to a point on the buyer's rail system. The costs of shipping to the system of a distant buyer can be substantial -- for example, Bethlehem may pay $20 to $30 per ton to reach railroads with an eastern terminus in the Chicago area. For this reason, each supplier has a set of geographically determined "natural" customers. Timing is another consideration in the purchase decision. A supplier who is unable to meet the delivery needs of a potential buyer, perhaps because previous commitments to another railroad, may lose a contract even though it is the low bidder.

Prime tee rail, which we have heretofore considered as an aggregate, is itself a differentiated product. Premium rail, which is significantly more expensive but also more durable than standard rail, has captured a growing share of the prime rail market. Several distinct varieties of premium rail are made, with producers specializing in different types as dictated by their production facilities. A railroad's preference for a

particular type of premium rail will further limit the set of possible suppliers. Capacity constraints on production of premium rail are another important factor in the marketplace; one domestic producer reportedly allocates premium rail according to the volume of standard rail purchased.

All parties to this investigation agree that demand for premium rail, particularly head-hardened rail, is increasing relative to demand for standard rail. CF&I is considering expansion of a key facility for producing premium rail, its previously installed head-hardening facility. The company has noted that this investment decision may hinge on improved profitability.[39]

Bethlehem doubled its heat-treating capacity to produce through-hardened rails during the 1984-1989 period.[40] The company is currently examining different head-hardening technologies, and is also negotiating an arrangement to distribute foreign head-hardened rail.

Elasticities. I have often found it useful to frame my analysis in Title VII cases in terms of three key elasticities -- the elasticity of demand, the elasticity of domestic supply, and the elasticity of substitution between imports and the domestic

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[39] Tr. at 89.

[40] Report at A-19, A-25.

like product.[41] The discussion of markets in elasticity terms has a distinct advantage compared to the use of terms such as "highly responsive" and "somewhat sensitive" that have a different meaning for every user. Precise language is necessary to avoid having significant differences over interpretation of the record become hopelessly entangled with differences over the meaning of the terminology used to describe it. When, as is usually the case, the record does not provide a basis for making precise elasticity estimates, ITC staff presents estimates to the Commission in terms of wide ranges.[42]

Demand Elasticity. The availability of alternatives for a product is a key determinant of the responsiveness of demand to changes in price.[43] Railroads faced with higher prices for new

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[41] The definition of each of the three elasticities and its relevance to my analysis of causation is outlined in several of my opinions. Most recently, see Certain Light-Walled Rectangular Pipes and Tubes From Taiwan, Inv. No. 731-TA-409, USITC Pub. 2169 (April 1989) at 18-24 (Views of Acting Chairman Anne E. Brunsdale and Commissioner Ronald A. Cass).

[42] In my view, the inevitable imprecision of the record only increases the importance of using a precise language to discuss it. Prior to Commission action in each case, the initial elasticity estimates prepared by the Commission's Office of Economics are made available to parties for review and comment. The parties' comments are considered by staff in preparing the final Office of Economics memorandum for that case.

[43] Generally, the elasticity of demand will determine whether unfairly traded imports "created their own market." If the elasticity of demand is high, it reflects the fact that purchasers will increase consumption if the price of a product drops. This reduces the impact of the subject imports on the volume of domestic sales. Conversely, if demand for a product is inelastic, then unfair imports are not creating new sales, but taking existing sales from the domestic industry.

steel rails have several options. First, since rails are very durable, railroads may choose to delay or stretch out their track replacement programs. The high variability in observed track replacement rates over the past decade is evidence that railroads have considerable discretion in carrying out their maintenance programs. Second, railroads can apply technologies such as rail grinding and rail lubrication to extend the service life of previously installed rail.[44] Third, railroads may utilize a greater proportion of relay rail, used rail meeting AREA specifications, in their track maintenance programs. About 60 percent of the rail laid by Class I railroads during the period of investigation was relay rail.[45] While new rail is favored for trackage that is most heavily traveled, fully 34 percent of rail laid on the most heavily travelled areas was relay rail.[46] Together, these considerations led staff to conclude that the price elasticity of demand for new rails falls in the somewhat elastic range of -1.0 to -1.5.

Petitioner argues that this range overstates the true sensitivity of demand for new steel rails to changes in rail prices for several reasons.[47] Petitioner notes that relay rail

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[44] Petitioners Prehearing Brief at 48.

[45] Report at A-36.

[46] Petitioner's Prehearing Brief at p.46 (Table 1).

[47] Petitioner believes that the demand for new steel rails is inelastic, with an elasticity value of between -0.4 and -0.6. Petitioners' Prehearing Brief at Appendix 10 at 8. See also Appendix 11 at Attachment 2.

or reconditioned rail is not substitutable for new prime rail in all applications and also suggests that rail costs are so insignificant relative to industry revenues that demand will not be responsive to price changes.[48] Petitioner also supplies its own econometric estimates supporting a lower elasticity value.[49]

In my view, Petitioner's arguments are relatively unconvincing. First, relay or reconditioned rail need not be substitutable in all applications to affect the demand elasticity for new rails. Petitioner's own data show that there is considerable overlap in applications.[50]

Second, Petitioner's argument regarding the insignificance of rail costs relative to industry revenues misapplies the "derived demand" line of argument. It is generally true that the elasticity of demand for an input used in fixed proportions to produce a final product is inversely related to the share of that input in the cost of the final product. In a recent case, this argument suggested that the demand for car wheels by auto manufacturers was likely to be highly inelastic.[51] New steel rails are, however, unlike car wheels in a critical respect -- as detailed above, substitutes are readily available. Therefore,

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[48] Petitioner's Prehearing Brief at Appendix 10 at 6-7. Id. at Appendix 11 at 25-26.

[49] Id. at Appendix 11 at Attachments 4 and 5.

[50] Id. at 46 (Table 1).

[51] Inv. No. 701-TA-296 (Final), Certain Steel Wheels From Brazil, Pub. 2193 at 36 (May 1989) (Additional Views of Chairman Anne E. Brunsdale).

the demand for new rails is not coupled to the level of railroading activity in anything like the direct fashion necessary for derived demand arguments to apply.

Finally, Petitioners' econometric approach is, by their own admission, lacking in critical respects.[52] Proper isolation of the responsiveness of demand for new rails to prices requires specific controls for the effects of contemporaneous changes affecting rail demand, and the price of substitutes such as relay rail. The single equation cited as being "somewhat reliable" is estimated using spot market price and quantity data. Given that the spot market is used only in emergency situations by Class I railroads, price sensitivity in this market is likely to be much lower than price sensitivity in the contract market.[53]

After weighing the arguments and evidence carefully, I conclude that the actual elasticity of demand for new rails is most likely to fall within the upper end of the range identified by the Office of Economics.

Substitution Elasticity. Staff estimated that the elasticity of substitution between the subject imports and

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[52] Petitioners' Prehearing Brief at Appendix 11 at 23.

[53] Id at Appendix 11 at 24.

domestic steel rails falls in the range of 3 to 5.[54] Respondents and Petitioners generally agreed with this range.[55]

Several non-price factors influencing buyers and sellers were outlined in the discussion of the prime rail market above. Differences in the overall quality of standard domestic and imported products, both of which are made to the same AREA specifications, are not significant.[56] Reject rates for foreign and domestic rails are similar. Provisions made for delivery of prime rail to a point on the buyer's route system are apparently identical for both foreign and domestic producers. By themselves, the factors considered above would seem to suggest a high substitution elasticity.

Moreover, while buyers clearly consider non-price factors in their purchase decisions, the staff's extensive reporting of quotes to and contract awards by the major Class I railroads shows that price is a key factor in purchase decisions. However, some buyers routinely split their business among competing

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[54] The elasticity of substitution measures the degree to which purchasers are willing to substitute one product for another on the basis of a difference in their prices. Thus, this factor measures whether unfairly traded imports compete with the domestic like product on the basis of price or other factors such as product characteristics, quality, or terms of sale. In the former case, the impact of the unfairly traded imports on the domestic industry is more apparent.

[55] See Petitioner's Prehearing Brief at Appendix 10 at 11; Appendix 11 at 36. See also Respondents' Prehearing Submission by Litan (Litan Submission) at 24.

[56] However, Petitioner states that Algoma's premium rail is "widely recognized" as being inferior to domestically produced products. See Petitioners' Prehearing Brief at 53, 128.

suppliers, reflecting their interest in maintaining relationships with several producers.[57]

Finally, a significant share of subject imports consists of industrial rail, which is substitutable only for domestic industrial rail. The key factor insuring substitutability of prime rail -- conformance with AREA specifications -- is lacking in the industrial rail market. Industrial rail is an inherently non-standardized product, varying in such important respects as the nature of defects and available weights, lengths, and quantities. Therefore, substitutability within the industrial rail category will be much lower than substitutability among prime rails.

Because only one domestic industry exists, however, I must reach a conclusion as to the substitutability of all imports with all of the domestic like products. Taking account of all relevant factors, I believe that the substitution elasticity is likely to fall in the lower end of the range suggested by the Office of Economics.

Domestic Supply Elasticity. The Office of Economics suggests that the domestic supply elasticity is relatively high, falling in the range of 5 to 10.[58] Respondents and Petitioners

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[57] Report at A-94.

[58] The elasticity of supply relates specifically to the price effects of the unfairly traded imports on the domestic industry. Industries that are unable to vary the volume of their output because of their cost structure or technological constraints are more likely to face suppressed or depressed prices by reason of unfairly traded imports.

both agree with this range, with the former favoring the low end and the latter the high end.[59] The primary basis for this high elasticity range is the substantial amount of unused capacity available to domestic steel rail producers and the difficulty of switching rail capacity to other products.

The Margins of Dumping and Subsidization. The size of the dumping and subsidy margins is a final factor relevant to my determination. Holding all else equal, the impact of unfairly traded imports on the domestic producers will be positively correlated with the size of the dumping margins. The dumping margin applicable to all Canadian producers of new steel rails is 38.79 percent.[60] The subsidy margin for Sydney Steel alone is 113.56 percent; subsidies for Algoma were determined to be de minimis.[61]

Assessment of Material Injury Factors by Reason of the Subject Imports

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[59] Respondents Prehearing Economic Submission at 25-26. Petitioner's Prehearing Brief at Appendix 10 at 14.

[60] 54 FR 31934-31987, U.S. Department of Commerce, Final Determination of Sales at Less Than Fair Value: New Steel Rail, Except Light Rail, From Canada. The dumping margin was calculated on a cost of production basis using "best available" information.

[61] 54 FR 31991-32001, U.S. Department of Commerce, Final Affirmative Countervailing Duty Determination: New Steel Rail, Except Light Rail, From Canada.

With respect to material injury, the statute directs the Commission to consider, among other factors, (1) the volume of imports of the merchandise that is the subject of the investigation, (2) the effect of those imports on prices in the United States for the like products, and (3) the impact of those imports on domestic producers of like products.[62] The Commission is required to explain its analysis of each of these factors in its determination.[63]

Volume of Imports. In value terms, imports of new steel rails from Canada rose from 1.2 percent of domestic consumption in 1986 to 5.0 percent of domestic consumption in 1988.[64] In quantity terms, the market share of Canadian imports increased from *** percent to *** percent over the same period.[65] The disparity between the quantity and value penetration of Canadian imports in the U.S. market reflects the large proportion of low-valued industrial rail in the Canadian export product mix, rather than discount pricing of prime rail. For prime rail alone, Canada's market share in value terms, which grew from *** percent

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[62] 19 U.S.C. 1677(7)-(8).

[63] Id.

[64] Report at A-82 (Table 15a). These figures reflect an increase in Canadian imports from $*** million in 1986 to $**** million in 1988.

[65] Canadian exports grew from ***** tons in 1986 to ****** tons in 1988.

in 1986 to *** percent in 1988, exceeds its market share in quantity terms.[66]

Given the significant margins of dumping and subsidization and the high degree of substitutability between subject imports and new steel rails produced outside of Canada, dumping and subsidization probably had a major impact on the domestic market share held by subject imports. The Commission, however, has no evidence as to the extent of dumping or subsidization outside of Commerce's period of investigation, so it is impossible to relate the growth of subject imports over the longer period of investigation considered by the Commission to any change in the extent of unfair trade practices. Indeed, Canadian import penetration reached its peak in 1988, the period during which Commerce determined that dumping and subsidization occurred.

Moreover, the growth in subject imports can be related to other developments. While the penetration of subject imports into the U.S. market increased, overall import penetration of the U.S. market decreased due to a sharp decline in imports from other countries. Nearly all such imports are limited under voluntary restraint agreements negotiated since 1984. Furthermore, the depreciation of the U.S. dollar relative to the currencies of the major countries supplying non-subject imports since 1985 has significantly improved the cost competitiveness of domestic producers relative to suppliers in most VRA countries.

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[66] Report at A-83 (Table 15b).

The Commission, in its recent studies of steel VRAs, cited this factor as an important determinant of import levels.[67] In 1988, imports of rails and other steel products subject to VRAs fell far below the levels negotiated in the voluntary restraints. Since 1987, the U.S. dollar has also depreciated relative to the Canadian dollar, but through the middle of 1988 this depreciation occurred at a slow rate relative to that observed for the currencies of other major rails supplying countries.[68] Holding other factors constant, these currency developments suggest an increase in the competitiveness of Canadian suppliers relative to other foreign suppliers, and a decrease in overall competitiveness of imports relative to domestic production. The observed pattern of market penetration by the subject imports appears to directly reflect these influences.

Effect on Domestic Prices. The price for prime steel rails supplied to Class I railroads is determined pursuant to contracts awarded to suppliers following the solicitation of quotations.[69] Data collected in the preliminary investigation showed that quotations for subject imports were not generally lower than

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[67] Inv. No. 332-270, The Effects of the Steel Voluntary Restrant Agreements on U.S. Steel Consuming Industries, USITC Pub. 2182, May 1989 at 10-11. See also Inv. No. 332-256, The Western U.S. Steel Market: Analysis of Market COnditions and Assessment of the Effects of Voluntary Restraint Agreements on Steel-Producing and Steel-Consuming Industries, USITC Pub. 2165, March 1989 at at 7-14 through 7-18.

[68] Report at A-121 (Figure 13).

[69] Id. at A-52.

domestic bids, and that contracts were sometimes awarded to producers other than the low bidder.[70] In the final investigation, Commission staff worked diligently to assemble information on contracts and quotations from both producers and buyers. Staff also made a thorough inquiry into the dynamics of the bidding process.

According to Petitioner, the present record provides stronger support for the primary role of prices in determining most rail-sourcing decisions. Petitioners argue that the subject imports have suppressed or depressed prices in the U.S. rails market.[71]

A thorough examination of quote and award data in the Class I railroad market fails to support this contention. In the vast majority of cases, the bids submitted by producers of subject imports were higher than those of the domestic competitors.[72] Domestic producers regularly revised their initial quotes downward, but producers of subject imports did not.[73] This bid revision appeared to be unaffected by the presence or absence of

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[70] New Steel Rails from Canada, Inv. No. 701-TA-297 and 73-TA-422, (Preliminary) USITC Pub. 2135, at A-33-40 (Tables 16 through 22), and at 73 (Views of Acting Chairman Brunsdale).

[71] Petitioners Prehearing Brief at 142-143 and 157-160.

[72] Report at A-99-108 (Tables 19 through 25).

[73] Id.

subject producers as bidders.[74] Indeed, domestic producers who were sole bidders sometimes reduced their bids.[75]

The size of the discount from the initial quote does not appear to be larger in cases where subject imports were competing. Moreover, the size of the discount from an initial bid bears no apparent relation to the fixed quotes offered on subject imports, which in almost all cases were higher than the initial quotations of at least one of the domestic competitors.

The observed pattern of discounting indicates that privately owned Class I railroads are shrewd buyers skilled at using the specter of actual or fictitious competition to secure advantageous prices. In this environment, the statements of purchasing agents regarding the quotes of competing sellers, which conflict with actual quote and award data collected in the course of the investigation, cannot be taken as an accurate characterization of market conditions.[76] Such statements are an unconvincing basis for Petitioners' argument that the subject imports suppressed or depressed domestic rail prices.

In fact, it is difficult to see how domestic producers' bidding strategies and price realizations could have been influenced by subject imports that are so small a factor in the

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[74] Id. at A-93 and A-95, recounting examples of bid revision with no competition from imports.

[75] Id. at A-95, A-101, A-106.

[76] For testimony as to the lack of information regarding actual competing bids see Tr. at 32-33 and at 37-38.

domestic market. Both of the domestic producers carry extensive excess capacity and are fierce head-to-head competitors even in the absence of import competition.[77] Domestic capacity utilization rates are sufficiently low that they would not be changed appreciably by a change in subject imports. The pricing of the subject imports and the absence of any discernible effect of those imports on the bidding behavior of domestic producers convincingly belies the contention that the subject imports suppressed or depressed domestic prices of new steel rails.

The Spot Market. Spot market sales of prime rail have no effect on quote competition to Class I railroads. These sales are made to smaller railroads, industrial sites, distributors, and in order to meet the unanticipated rail needs of Class I railroads. The spot market is, moreover, the primary channel through which industrial rail is sold. However, industrial rails vary greatly in the character of their defects and also in segment length due to the removal of defective sections. Without accounting for such factors, any examination of prices would have little meaning. It would also have little purpose, since the industrial rail market is almost irrelevant to the fortunes of the domestic industry for reasons outlined in my discussion of like-product issues.

Impact on the Domestic Industry. By using the elasticity estimates developed from the record of the investigation in

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[77] Report at A-89-A-109 details many cases of competition in the absence of subject imports.

conjunction with information on the size of the subsidy and dumping margins provided by the Department of Commerce, I can consistently assess the impact of unfairly traded imports on producers of the domestic like product. Consideration of this impact, as opposed to a consideration of the present state of the industry, is necessary under the provisions of Title VII.

Since this case involves cost-based dumping margins, the dumping margin itself provides the best available measure of the effect of dumping on the pricing of subject imports in the U.S. market. Respondents have argued that the nature of the subsidies in this case is such that the effect of subsidization on pricing is only a fraction of the overall subsidy margin. Basically, respondents distinguish between subsidies that reduce marginal production cost and those that do not, and assert that only the former type affect the pricing of subsidized imports in the U.S. market. I am generally sympathetic to the notion that the price effect of subsidies may vary according to the type of subsidy provided.

However, the subsidies in this case are so large as to raise a serious doubt that the subsidized producer would be in the market at all absent the large infusions of non-marginal subsidies it has received over the past fifteen years. Respondents' proposal to consider non-marginal subsidies as having had no bearing on the provision of unfairly traded imports to the domestic market would, if adopted, appear to seriously bias the results of our inquiry. Pending development of an

analytical approach that provides us with a generally acceptable method of integrating the treatment of different types of subsidies into a comprehensive framework, we must necessarily use cruder tools. In this case, I believe we can come closer to capturing the true impact of subsidies in the U.S. market by considering the total subsidy margin rather than some part of it.

Due to the high domestic supply elasticity, application of an elasticities approach to the data in this case shows that any impact of imports on the domestic industry will be concentrated on volumes rather than prices.[78] This is consistent with the results of our direct examination of bidding behavior, which revealed that domestic pricing is driven almost exclusively by domestic producers' virulent competitiveness in an environment of abundant excess capacity. Indeed, the level of excess capacity and the volume of subject imports are such that even the complete displacement of subject imports with domestic production would leave the competitive situation in the industry virtually unchanged. Under these conditions, the presence of subject imports in the domestic market could not have adversely affected domestic producers' price realizations.

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[78] EC-M-311, Office of Economics Memorandum presenting estimates of the effects of dumping and subsidization on the price and volume of the domestic like product. Estimated price effects range from 0.22 to 1.1 percent across the extremes of the elasticity ranges.

The impact of unfairly traded imports on domestic sales volume may also be estimated using the elasticities approach. Given the sensitivity of overall demand to pricing and the availability of imports not under investigation, domestic products would replace subject imports on a less than one-for-one basis.[79] The impact of unfairly traded imports on domestic volume would certainly be less than the volume of domestic consumption currently supplied by Canadian producers.[80]

In addition to absence of price impact and the small size of any quantity impact, I also consider impacts of unfair imports on other factors. Many of the other statutory factors hinge directly on price and volume effects. For example, return on investments and ability to raise capital are directly related to price effects. Capacity utilization and market share reflect volume effects.

Any impact on employment would be related to the domestic volume effect of imports. However, hours worked in this industry apparently change somewhat less than proportionately with changes

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[79] The Voluntary Restraint Agreements generally have not been filled, allowing for substitution for other imports for Canadian imports following qualification by the railroads. See Inv. No. 332-256, The Western U.S. Steel Market, USITC Pub. 2165 (March 1989) at Appendix I at 7 and 9 (Table I-2).

[80] The Canadian share of the U.S. market for prime rails was below 5 percent throughout the period of investigation. See Report at Table 15b. As noted in my examination of the demand elasticity evidence, I find it unlikely that the demand elasticity for new steel rails would be as low as -1.0.

in output.[81] Therefore employment effects would be smaller than volume effects. On the other side of the coin, average productivity would slightly improve with an increase in volume.[82] In terms of investment and research and development, no impact is apparent: firms have invested as necessary to provide customers with products meeting their changing needs. Expansion investment is simply not a possibility for this industry under current conditions.

My assessment of the impact of unfairly traded imports on these relevant factors leads directly to my determination that the domestic industry producing new steel rails has not been materially injured by reason of unfairly traded imports from Canada.

Threat of Material Injury

My views on threat determinations are fully outlined in my recent opinion on Fresh, Chilled, or Frozen Pork From Canada.[83] My basic approach to threat determinations is captured in three propositions. First, Congress has explicitly indicated in the

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[81] Report at A-43, A-46 (Tables 3 and 4). For example total shipments in interim 1989 were more than 9 percent above interim 1988 levels, while hours worked were only 3 percent higher. Shipments fell 9 percent from 1986 to 1987 but hours worked fell only 7 percent. Only between 1987 and 1988 were changes in shipments and hours worked roughly proportional.

[82] However, this improvement would be insignificant relative to industry-wide productivity improvements that have recently occurred in the steel industry.

[83] 701-TA-298, USITC Pub. 2218 (September 1989).

statutory language and the legislative history that "threat analysis" should not be used to avoid difficult judgments on actual injury. Second, the statutory standard for an affirmative threat determination is high. That is, an affirmative determination must be based on evidence that "the threat of injury is real and actual injury is imminent," and may not be based on supposition or conjecture.[84] Our reviewing courts have ruled that the mere possibility of future injury does not meet this standard.[85] Finally, the threat factors listed in 19 U.S.C. 1677(7)(F), together with information obtained from the inquiry into actual injury, are to form the basis of our threat inquiry. These factors focus on two issues: the likelihood that the foreign industry will sustain or increase its penetration of the U.S. market to levels that would produce material injury in the relatively near future and the sensitivity of the domestic industry to imports. I would also note that threat analysis, which necessarily involves prognostication, is a very difficult task.

The Nature of the Subsidies. Information on the nature of the subsidies in this case shows that they are not export subsidies inconsistent with the terms of the Agreement on Subsidies. However, the subsidized producer exports the majority

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[84] 19 U.S.C. 1677(F)(7).

[85] Alberta Gas Chemicals, Inc. v. United States, 515 F. Supp. 780, 791 (Ct. Int'l Trade 1981).

of its production to markets outside North America.[86] The subsidies in this case are large, and are unusual insofar as they benefit only one supplier of subject imports. The subsidized producer has been a minor player in the U.S. market, supplying only 1 percent of new steel rails supplied in the U.S. market over the period of investigation.[87]

The Likelihood of Increased or Sustained Market Penetration by Subject Imports

Foreign Production Capacity and Product Shifting. Data collected by the Commission show that there has been no increase in production capacity overseas. Sysco is presently shut down pending replacement of its open hearth furnace with an electric furnace for the production of raw steel. However, when it reopens, railmaking capacity will remain unchanged. Any start-up problems arising when the new furnace is activated would delay the return of this producer to the market. Algoma, the other subject producer, has broken ground for a facility for tubular products that are now made using some of the same facilities used to manufacture rails. Upon completion, the new facility would tend to relax any possible contention for common capacity between

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[86] Petitioner argues that subsidies should be viewed "in essence" as export subsidies. Petitioner's Prehearing Brief at 174-178. However, the subsidized company has a commitment to supply 80 percent of Canadian National's new rail needs, which are estimated to run up to 125,000 tons per year.

[87] Report at A-21 (Table 1) and Investigations Memorandum INV-M-088 at 3 (Table 13b).

tubular and rail products. However, completion will not occur for at least a year.[88]

The rate of capacity utilization of the current facility used for rail, structural, and tubular products was 95 percent in the first and second quarters of 1989.[89] It would be physically possible to reallocate capacity from other products to rails. However, while the possibility for product shifting exists, the potential for product shifting is low. There appears to be no economic or other rationale for making such a switch, which would reduce output of profitable structural products in order to increase output of a product that Algoma, facing two locked-in competitors with significant amounts of dedicated excess capacity, would have to discount heavily in order to sell.

Likelihood of Increased Shipments. Because railroads contract directly with producers on an annual basis for nearly all of their prime rail requirements, information from the current order books and outstanding quotations of subject producers is an excellent predictor of prime rail shipments over the coming quarters. Respondents indicated that they have no orders for shipment to Class I railroads to be filled during the remainder of 1989.

Available data on quotations for 1990 requirements indicate that subject prime rail imports are likely fall from present

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[88] Staff communication with industry analyst.

[89] Algoma's Posthearing Brief at 9 and ATTACHMENT 4.

levels. To date, Algoma, the major producer of subject imports, has received no 1990 orders from the five Class I railroads to which it sold rails between 1986 and 1988. Algoma's advantage in contracting with Soo Line, a Class I railroad owned by Canadian Pacific, ended with Canadian Pacific's divestiture of Algoma in 1988.[90] Burlington Northern, another former customer, has adopted a specification for its future requirements that cannot be met by Algoma. Due to both technological and pricing considerations Algoma does not expect to make any shipments of rail to Class I customers in 1990.[91]

Sysco's past activity in the U.S. prime rail market has mostly involved industrial rail and transactions involving nonstandard lengths and mixtures of different grades, sections, and lengths. These irregular transactions would not appear to lay a foundation for a future market presence. Sysco did supply a trial order of rail to a Class I customer. However, this rail did not meet customer specifications and was subsequently returned to the vendor.[92] Such an experience is unlikely to be a

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[90] Algoma received a small share of Soo Line's 1989 business indirectly via a spot sale supplied through a minority-owned distributor. Domestic producers did not quote the distributor on this contract. See Letter From Hutchinson Group.

[91] Tr. at 111. Two of the five railroads have not yet requested quotations for their 1990 programs. However, Algoma's pricing to these customers has not been competitive with that of domestic producers.

[92] Id. at 114-115.

precursor to future sales. In fact, Sysco has no orders booked for U.S. sales in either 1989 or 1990.[93]

Sysco's position in other markets is apparently strong. Unlike other producers, Sysco has considerable experience in producing rail to European, African, and Asian specifications and maintains long-term relationships with many foreign buyers. Sysco's coastal location and Canadian tied-aid programs for less developed countries are significant advantages in the competition for overseas contracts. At home, the Canadian National Railway is committed to buying 80 percent of its requirements from Sysco.[94] Sysco's overseas and domestic order book suggests that the company is not hurting for orders.[95] Again, while market-shifting is possible, there is no apparent reason for Sysco to abandon established customers to seek U.S. business. Even if such a strategy were pursued, the procurement cycle for rails is such that any adverse impact could not be felt before 1991 at the earliest.

Industrial Rails. Industrial rails are sold exclusively to distributors, who are not restricted to a particular procurement cycle. Industrial rail imports are therefore more difficult to predict than prime rail imports. One factor mitigating against large swings in industrial rail imports is the inadvertent nature

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[93] Id.

[94] Sysco Prehearing Brief at 33.

[95] Tr. at 116.

of industrial rail production. In any event, since industrial rails are priced in relation to the scrap value of out-of-specification rails, any displacement of domestic industrial rails by imported industrial rails will have much less impact on the domestic industry than a similarly sized displacement in the prime rail market.

Considering data for industrial and prime rails together, the Canadian producers' impact on domestic producers seems more likely to decrease than increase through the end of 1990.

The Sensitivity of the Domestic Industry to Increased Imports

Given that imports are not likely to increase, the sensitivity issue is not central to my threat determination. Qualitatively, the industry is already operating in a state of extreme excess capacity brought about by the secular fall in demand for rails. The market is already a buyer's market and will remain so for the foreseeable future regardless of import developments. One issue worthy of special note is that of investment and development plans. In an environment where both domestic producers have considerable excess capacity, the primary spur to product improvement efforts for each firm is the desire to gain a competitive edge over its rival. There appears to be no basis for tying research, development and investment plans to the levels of subject imports, which are less technologically advanced than non-subject imports, such as superrail from Japan produced using an on-line head-hardening process.

In the absence of any indication of the real and imminent likelihood of increased imports that would adversely impact the domestic industry, and given clear evidence to the contrary, a negative threat determination is clearly indicated.

DISSENTING VIEWS OF VICE CHAIRMAN RONALD A. CASS

New Steel Rails from Canada
Inv. Nos. 701-TA-297 and 731-TA-422
(Final)

I dissent from the Commission's affirmative determination in these investigations. I find that no domestic industry is materially injured by reason of the unfairly traded imports subject to these investigations, or is threatened with material injury by those imports.1/ In succeeding sections of these Views, I will explain in detail how I have reached this conclusion. Before doing so, however, I believe that it is important to place my views in the proper context by explaining my understanding of the law that governs these and other Title VII investigations, and contrasting it with the manner in which I believe that some or all of the Commissioners who voted in the affirmative in these investigations interpret the relevant law. Accordingly, I turn first to that issue.

I. MATERIAL INJURY BY REASON OF UNFAIRLY TRADED IMPORTS: DEFINING THE ESSENTIAL ELEMENTS OF THE INQUIRY

In these investigations, as in many others, I believe that Commissioners have reached disparate conclusions respecting the appropriate disposition of the Petition because we have very different understandings of the meaning of U.S. trade law and of this country's obligations under the General Agreement on Tariffs

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1/ Material retardation is not an issue in these investigations.

and Trade ("GATT"). As I will explain in detail below, I believe that our mandate under U.S. law is to determine whether dumping or subsidization of imports has caused material injury to domestic industry. At first blush, this may seem to be an uncontroversial point of view. Nevertheless, a number of cases decided by the Commission over the past few years make it quite apparent that certain of my colleagues have a radically different understanding of the task that the Commission is to perform. In my view, these Commissioners have misinterpreted the law in important respects, and are, as a consequence, contributing to an overall understanding of U.S. trade law that is contrary to Congressional intent as embodied in that law and contrary to our international obligations under the GATT.2/ My fundamental differences with these Commissioners are outlined below.

2/ Given the non-transparent manner in which Commission opinions are often written, it is not possible to identify with certainty all Commissioners who share this view of the law with which I take issue. However, Commissioner Eckes is clearly included among that group (see Sewn Cloth Headwear from the People's Republic of China, USITC Pub. 2096, Inv. No. 731-TA-405 (Preliminary) (July 1988) (Additional Views of Commissioner Eckes) ("Sewn Cloth Headwear")), and it appears that Commissioner Newquist shares his views (see Martial Arts Uniforms from Taiwan, USITC Pub. ____, Inv. No. 731-TA-242 (Final) (Dissenting Views of Commissioners Eckes and Newquist)). It is less clear whether Commissioners Rohr and Lodwick subscribe to this view of the law. Certainly in some cases Commissioner Lodwick has distanced himself from this view (see, e.g., his Dissenting Views in these investigations), and at times both he and Commissioner Rohr have reached conclusions that seem incompatible with it. See, e.g., Martial Arts Uniforms from Taiwan, USITC Pub. ____, Inv. No. 731-TA-242 (Final) (Views of Commissioners Rohr and Lodwick); but see Nitrile Rubber from Japan, USITC Pub. 2090, Inv. No. 731-TA-384 (Final) (June 1988) ("Nitrile Rubber").

A. Effects of Unfair Trade Practices or Effects of Imports?

First, certain of my colleagues have expressed the view that it is not the Commission's job to determine whether unfair trade practices, such as dumping or subsidization, have materially injured the domestic industry. Rather, according to these Commissioners, the Commission's task is to ascertain whether the imports that were the subject of the Commerce Department's investigation -- whether or not fairly traded -- caused material injury.3/ In other words, in this view, the Commission need not make any effort to assess the effects of the unfair trade practices themselves.

Such an interpretation of our trade law is, on its face, wholly inconsistent with the GATT. The parties to the GATT have undertaken to impose antidumping duties only when it is demonstrated that "dumped imports, are through the effects of dumping, causing injury".4/ Similarly, in cases where subsidization is at issue, the GATT provides that countervailing duties may be imposed only where "the effect of the . . . subsidization is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry".5/ As other nations implementing these provisions (including Canada) have

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3/ See Sewn Cloth Headwear, supra, at 23, n. 10; 26.

4/ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, art. 3, § 4 (emphasis added).

5/ Article VI of the GATT.

recognized, there is no doubt that these undertakings require an analysis of the effects of the unfair trade practice(s) at issue and not of imports whether or not dumped or subsidized.6/

An interpretation of our trade law that dispenses with any effort to assess the effects of unfair trade practices on domestic industry is no less inconsistent with U.S. law than it is inconsistent with the GATT. The antidumping and countervailing duty laws are intended to implement and be consistent with the GATT and the GATT antidumping code.7/ Of course, in any instance where GATT and Title VII of the Tariff Act of 1930 diverge, it is the U.S. law that controls our decisions.8/ In general, however, Title VII is to be construed as being consistent with GATT, for the intention of Congress to alter such international agreements to which the United States is

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6/ See, e.g., Special Import Measures Act, Can. Stat. ch. 25, §42(1) (1984): On Protection Against Dumped or Subsidized Imports from Countries Not Members of the European Economic Community, Council Reg. (EEC) No. 2176/84. See also Subsidized Grain Corn Originating in or Exported from the United States of America, Inquiry No. CIT-7-86 (Canadian Import Tribunal 1987); Colour Television Receiving Sets Originating in or Exported from Korea, Inquiry No. CIT-13-85 (Canadian Import Tribunal 1986); Certain Rail-Car Axles Originating in or Exported from Japan and the United States, Inquiry No. CIT-5-85 (Canadian Import Tribunal 1985).

7/ See S. Rep. No. 249, 96th Cong., 1st Sess. 57, 87 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 49 (1979); Statement of Administrative Action for the Trade Agreements Act of 1979, H.R. Doc. No. 153, Part II, 96th Cong., 1st Sess. 388, 389-393 (1979); Algoma Steel Corp. v. United States, 688 F. Supp. 639, note 6 (Ct. Int'l Trade 1988), aff'd, 865 F.2d 240 (Fed. Cir. 1989).

8/ 19 U.S.C. § 2504(a).

a party "is not to be lightly attributed to Congress".9/ And there is no basis to suppose that Congress intended that Title VII would have the GATT-inconsistent meaning that certain of my colleagues have ascribed to it.

Apparently, the argument that no attention need be given to the effects of dumping or subsidization is based on the fact that Title VII directs the Commission to examine the effects of the class of merchandise that the Department of Commerce has determined to be dumped or subsidized, rather than to examine directly the effects of the unfair trade practice at issue.10/ However, the structure and legislative history of the statute indicate that, in so providing, Congress did not intend anything substantively different from GATT.

The evidence that Congress intended the Commission to examine the effects of the unfair trade practice at issue, rather than the effects of "imports", whether or not dumped or subsidized, is unambiguous. In the Report that the Senate Finance Committee issued in conjunction with the Trade Agreements Act of 1979, legislation that implemented the GATT, the Committee stated:

> Article 1 of the [Subsidies Code] requires countervailing duties to be imposed on the products of any country signing the [Subsidies Code] "in accordance with the provisions of Article VI" of the GATT and the provisions of the [Subsidies Code]. Article VI of the GATT prohibits the imposition of

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9/ See United States v. Payne, 264, U.S. 446, 448 (1924); United States v. White, 508 F.2d 453, 456 (8th Cir. 1974).

10/ See 19 U.S.C. §§ 1671, 1673.

> a countervailing duty on the product of any country which is a party to the GATT unless "the effect of the subsidization . . . is such as to cause or threaten material injury to an established domestic industry, or is such as to retard the establishment of a domestic industry". Section 705 implements the requirements of Article 1 of the [Subsidies Code] for the United States".11/

The same Report contained additional language indicating that Congress understood that the Commission's material injury analysis was to focus on the effects of unfair trade practices, and not the effects of imports whether or not dumped or subsidized. The Committee noted that:

> In determining whether injury is "by reason" of subsidized imports, the ITC now looks at the effects of such imports on the domestic industry. The ITC investigates the conditions of trade and competition and the general condition and structure of the relevant industry. It also considers, among other things, the quantity, nature, and rate of importation of the imports subject to investigation, and how the effects of the net bounty or grant relate to the injury, if any, to the domestic industry. Current ITC practice with respect to which imports will be considered in determining the impact on the U.S. industry is continued under the bill.12/

Virtually the same language was also used by the Committee to describe its understanding of the manner in which the Commission was to perform its material injury analysis in antidumping cases. The only difference relevant for present

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11/ S. Rep. No. 249, 96th Cong., 1st Sess. 57 (1979) (emphasis added).

Section 705 of the Act was the provision that set out how the Commission is to make final determinations in countervailing duty investigations. There have been no changes to that provision that are relevant for the purposes of this discussion.

12/ S. Rep. No. 249, 96th Cong., 1st Sess. 57 (1979) (emphasis added).

purposes is that the phrase "effects of the margin of dumping" was used instead of the phrase "effects of the net bounty or grant".13/

Of course, the legislative history is replete with references to ITC examination of the effect of dumped imports or subsidized imports as well as to examination of the effects of dumping or subsidization. As the very language of the GATT's Antidumping Code recognizes, these trade practices can only affect U.S. industry through imports. That an industry sells at a higher price in its home market than it charges for sales to the U.S. market is significant to U.S. businesses only insofar as they must compete with lower-priced imports. It is not a matter of legitimate U.S. interest whether Canadians pay more for certain products than they otherwise might. So, too, the Subsidies Code plainly sets outside any contracting party's purview the effects of another country's subsidies on its own citizens; our only

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13/ S. Rep. No. 249, 96th Cong., 1st Sess. 74 (1979).

The operative paragraph reads as follows:

> In determining whether injury is "by reason of" less than fair value imports, the ITC now looks at the effects of such imports on the domestic industry. The ITC investigates the conditions of trade and competition and the general condition and structure of the relevant industry. It also considers, among other factors, the quantity, nature and rate of importation of the imports subject to investigation, and how the effects of the margin of dumping relate to the injury, if any, to the domestic industry. Current ITC practice with respect to which imports will be considered in determining the impact on the U.S. industry is continued under the bill. Id. (emphasis added)

legitimate concern with subsidies under GATT agreements and under U.S. law is their effect on our markets. Those effects can only be transmitted by imports.

The difference in approaches, thus, is not between looking for effects of imports and looking for effects of unfair trade practices without regard to the role played by imports. Rather, the difference is between two approaches that look at imports. One examines the way unfairly traded imports affect the U.S. industry, in contrast to the effects that would be felt if the unfair practice did not exist. The other approach examines the effects of imports, regardless of the degree to which they are unfairly traded. On this latter view, the effect of a .05% subsidy to imported widgets is not distinguishable from that of a 50% subsidy. The critical fact for this view is the total number of widgets imported, whether the subsidy affected that number by a trivial or a massive amount. It is this view that Congress disapproved in stressing the inquiry into effects, not of imports, but of unfairly traded imports.

Beyond the material noted above, other material contained in the legislative history provides additional evidence that Congress understood that the Commission's material injury analysis would focus on the effects of dumping or subsidization of imports, rather than on the effects of imports generally. Specifically, the Senate Finance Committee emphasized that fairly traded imports were to be treated as an "other factor", the

effects of which were not to be compared with the effects of dumped imports:

> Section 735(b) contains the same causation terms as in current law, i.e., an industry must be materially injured "by reason of" less-than-fair-value imports. The current practice by the ITC with respect to causation will continue under section 735.
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> Current law does not, nor will Section 735, contemplate that the effects from less-than-fair-value the [sic] imports be weighed against the effects associated with other factors (e.g., the volume and prices of imports sold at fair value, contraction in demand or changes in patterns of consumption . . . .).14/

The Report that the House Ways and Means Committee issued in connection with the 1979 legislation contained the following comparable language:

> The bill contains the same causation element as present law, i.e., material injury must be "by reason of" the subsidized or less than fair value imports. In determining whether such injury is "by reason of" such imports, the ITC looks at the effects of such imports on the domestic industry. The law does not, however, contemplate that injury from such imports be weighed against other factors (e.g., the volume and prices of nonsubsidized imports sold at fair value, contraction in demand, or changed patterns in consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry) which may be contributing to overall injury to an industry.15/

14/ Id. (emphasis added).

Section 735 of the Act was the provision that set out how the Commission is to make final determinations in antidumping investigations. There have been no changes to that provision that are relevant for the purposes of this discussion.

15/ H.R. Rep. No. 317, 96th Cong., 1st Sess. 47 (1979) (emphasis added).

The inescapable inference is that Congress did not intend that the Commission seek to determine the effects of imports that were not dumped or subsidized, and did not intend to substitute some other standard for the basic GATT requirement that antidumping and countervailing duties be imposed only when there is evidence that the effects of unfair trade practices have caused material injury to a domestic industry.

The statutory language requiring the Commission to examine the effects of the class of merchandise that the Commerce Department has found to be dumped or subsidized must be understood in that context. It must also be understood in light of the fact that antidumping and countervailing duty proceedings are a bifurcated process in this country. Title VII divides authority over such proceedings between the Commission and the Commerce Department. Title VII sensibly directs that the proceedings before both agencies concern the same products. Rather than direct each agency to make determinations in each case as to which imports have been dumped or subsidized -- which would leave unclear which agency has the jurisdiction to determine which imports are dumped or subsidized -- the statute instructs Commerce to ascertain whether, and by how much, a class of imports is being dumped or subsidized and directs the Commission in final investigations to use Commerce's definition

of dumped or subsidized imports.16/ Our reviewing courts have concluded that Congress did not limit the Commission to examining only the particular imports specifically determined by Commerce to have been unfairly traded, but in allowing the Commission to examine other imports that may be swept into the class or kind or merchandise that Commerce found to have been unfairly traded, the Court of International Trade cast this decision as consistent with examination of the effects of the unfair trade practice.17/ The Court noted that Commerce in calculating its dumping and subsidy margins reduced the margins to account for sales made at fair value. Taking the margins together with the volume of the "class or kind or merchandise" that was considered by Commerce in arriving at those margins, the Court said, should give the Commission a suitable basis for assessing the effects of the unfair trade practice. Although one may question whether Commerce properly accounts for fairly traded goods, the Court surely is correct that to assess the effects of unfair trade practices both the magnitude of the practice and the volume of imports over which that magnitude was distributed are relevant data. Put another way, it would, for example, be impossible to evaluate the significance of large dumping or subsidy margins

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16/ In a preliminary investigation, of course, the Commission is instead instructed to determine, inter alia, whether there is a reasonable indication that the merchandise subject to investigation by Commerce has materially injured a domestic industry, or threatens domestic industry with such injury.

17/ See Algoma Steel Corp. v. United States, 688 F. Supp. 639 (Ct. Int'l Trade 1988).

without knowing whether dumped or subsidized imports (the class of imports for which the particular margins were determined) have occurred in sufficient volume to affect domestic prices, sales, profits, employment and so on.

Finally, it should be noted that, when Congress amended Title VII in 1979 and crafted the particular language that, with minor amendments, governs our determinations in Title VII proceedings today, Congress indicated that it did not intend to make any change in the way the Commission previously interpreted the antidumping and countervailing duty laws.18/ The Commission's approach to antidumping and countervailing duty investigations prior to that time, while not absolutely uniform, plainly sought to address the effects of dumping or subsidization, not the effects of imports without regard to dumping or subsidization. To that end, the Commission explicitly asked what injury was caused by dumping or subsidization, as reflected in the margins set by Commerce, and what injury instead was caused by other attributes of the imports.19/ The abandonment of concern with the effects of unfair trade practices that is evident in the determinations of certain of my colleagues in these and other investigations therefore represents a

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18/ See, e.g., S. Rep. No. 249, 96th Cong., 1st Sess. 57, 74 (1979) (quoted above).

19/ See, e.g., Metal-Walled Above-Ground Swimming Pools from Japan, USITC Pub. 821, Inv. No. AA 1921-165 (June 1977); Welded Stainless Steel Pipe and Tube from Japan, USITC Pub. 899, Inv. No. AA 1921-180 (July 1978).

significant departure from the types of Commission practice approved by Congress.20/

B. Mimimal Impact of Imports As a Predicate For An Injury Finding?

Those Commissioners who believe that the Commission must examine the effects of imports, rather than the effects of dumping or subsidization, also appear to believe that "even a slight contribution" to material injury from the imports subject to investigation is a sufficient basis for an affirmative determination.21/ In other words, if the condition of the industry is such that it is deemed "materially injured" by these Commissioners,22/ the causation requirement is considered met as long as imports subject to investigation made a "slight contribution" to that condition -- even if that "contribution" was made by fairly traded imports subject to investigation. Applied literally, this standard would require an affirmative determination if the domestic industry lost any sale to the

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20/ Our reviewing courts have stated that the Commission may choose to rely explicitly on dumping and subsidy margins or to eschew reliance on margins. See Hyundai Pipe Co., Ltd. v. United States Int'l Trade Commission, 670 F. Supp. 357, 360 (Ct. Int'l Trade 1987). This judicial authority does not, however, suggest that we are free to abandon altogether any effort to determine whether dumping or subsidization has in fact injured domestic industry.

21/ See, e.g., Certain Brass Sheet and Strip from Japan and the Netherlands, USITC Pub. 2099, Inv. Nos. 731-TA-379 and 380 (Final) 17 & note 45 (July 1988) (Views of Commissioners Eckes and Lodwick).

22/ The next section of these Views discusses what the concept of "material injury" means to these Commissioners.

subject imports, irrespective of whether that sale was lost to imports that were fairly traded. The inconsistency between this standard and the GATT requirement that antidumping or countervailing duties be imposed only when the effects of dumping or subsidization have caused material injury to a domestic industry is so patent as to obviate the need for further discussion of that issue.

There is also no basis to suppose that the standard in question is consistent with U.S. trade law. It has been asserted that the standard derives from certain language in the Senate Finance Committee Report accompanying the Trade Agreements Act of 1979, which reads as follows:

> Current law does not, nor will Section 735, contemplate that the effects from less-than-fair-value the [sic] imports be weighed against the effects associated with other factors (e.g., the volume and prices of imports sold at fair value, contraction in demand or changes in patterns of consumption, trade, restrictive practices of and competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry) which may be contributing to overall injury to an industry. Nor is the issue whether less-than-fair-value imports are the principal, a substantial, or a a significant cause of material injury. Any such requirement has the undesirable result of making relief more difficult to obtain for industries facing difficulties from a variety of sources; such industries are often the most vulnerable to less-than-fair-value imports.23/

23/ S. Rep. No. 249, 96th Cong., 1st Sess. 74-75 (1979) (emphasis added) cited in Martial Arts Uniforms from Taiwan, USITC Pub. ____, Inv. No. 731-TA-424 (Final) note 3 (Dissenting Views of Commissioners Eckes and Newquist).

Virtually identical language elsewhere in the Report makes the same point respecting the issue of subsidization.24/

Several opinions by our reviewing courts contain dicta suggesting that this language may stand for the proposition for which it has been cited by certain of my colleagues -- that is, that an affirmative determination is mandated whenever dumped or subsidized imports make a minimal contribution to adverse conditions experienced by the domestic industry. The following quote from the decision of the Court of International Trade in British Steel Corp. v. United States is representative:

> The statute's causation prerequisite to an affirmative injury determination is satisfied even if the subsidized imports contribute, even minimally, to the conditions of the domestic industry, and the Commission is precluded from weighing the causes of injury.25/

The first point that must be emphasized about this language is that it does not quite say what it is cited as declaring. The court does not say that any harm from imports, however trivial, satisfies the causation standard of Title VII, much less that only harm from imports, subsidized or not, meets that standard. What the court does say is that this standard may be met even if the overall condition of the industry is much more affected by other factors. Neither the magnitude of the subsidized imports' contribution to the overall industry conditions nor the size of

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24/ Id. at 57.

25/ 593 F. Supp. 405, 413 (Ct. Int'l Trade 1984). See also Citrosuco Paulista, S.A. v. United States, Court No. 87-06-00703, slip op. 88-176 (Ct. Int'l Trade, December 30, 1988).

that contribution relative to other effects is dispositive under Title VII. The court's actual words, thus, merely restate the statutory directive that the Commission determine if the domestic industry is materially injured by the dumped or subsidized imports. Given that material injury is defined as "harm which is not inconsequential, immaterial or unimportant",26/ it surely is possible that imports could cause such harm and still have only slight effect -- in both absolute and relative terms -- on overall industry condition. Read carefully, the court has not re-written the law to allow any contribution of imports to an industry's declining fortunes to be the basis for an affirmative decision without regard for whether the subsidized imports themselves cause (or imminently threaten) material injury.

Second, if a less cabined reading of the language quoted above is what was intended by the court in British Steel, or in other cases that cite British Steel, it is noteworthy that this reading would clearly make the court's statement dictum -- that is, in those cases in which it appears, the quoted language was in no way essential to the court's ultimate disposition of the case, and therefore does not constitute a binding statement respecting the meaning of the law. In British Steel, for example, the court ultimately found that there was sufficient evidence suggesting that increased volumes of subsidized imports

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26/ 19 U.S.C. § 1677(7)(A).

had depressed prices of the domestic like product.27/ The court did not decide the case based on a finding that subsidized imports contributed "minimally" to depressed prices or other industry problems. The fact that these cases rest on evidence of material harm from dumped or subsidized imports strongly suggests that a broad reading of British Steel misconstrues that court's statement.

The third and perhaps most important point is that the British Steel language quoted above, if read broadly as eliminating the requirement of a showing of material harm from the subsidized or dumped imports and replacing it with a requirement of any harm from any imports assimilable to those found dumped or subsidized, simply is not an accurate characterization of the meaning of the legislative history in question. Read in the context of the entire paragraph in which it appears, it is apparent that the Committee's statement that it is irrelevant "whether less-than-fair-value imports are the principal, a substantial, or a significant cause of material injury" was intended to emphasize that the Commission should not weigh causes of injury, and should not decline to rule in favor of the domestic industry merely because unfairly traded imports appear to have been a relatively minor cause of injury when compared to other problems experienced by the industry. Other decisions by the Court of International Trade appear to recognize

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27/ 593 F. Supp. at 413-14.

that this is the essential guidance to be gleaned from the legislative history in question.28/

Admittedly, the reported U.S. case law discussing the relevant legislative history is less than a model of clarity. Nevertheless, one thing is clear: there is no persuasive authority supporting the contention of certain of my colleagues that, whatever GATT may require, U.S. trade law requires an affirmative injury determination in any case where it can be shown that the domestic industry is experiencing difficulties to which the subject imports may have contributed minimally.

C. Can Material Injury Be Defined in a Vacuum?

The third important respect in which my view of the law is fundamentally different from that of certain of my colleagues concerns the meaning of the term "material injury". In these investigations, as in a number of other investigations over the past several years, certain of my colleagues divide the question posed by Title VII into two independent inquiries.29/ This bifurcated approach asks first whether the domestic industry's financial health is poor. In some investigations, this may be

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28/ See, e.g., Hercules, Inc. v. United States, 673 F. Supp. 454, 481 (Ct. Int'l Trade 1987), wherein the court stated:

> If the ITC finds material injury exists due to an even slight contribution from imports, the ITC may not weigh this contribution against the effects of other factors that are not used in the determination.

29/ On this issue, Commissioner Rohr is clearly of the same view as Commissioners Eckes and Newquist. See, e.g., Generic Cephalexin Capsules from Canada, USITC Pub. 2211, Inv. No. 731-TA-423 (Final) (Aug. 1989).

assessed in relation to the financial performance of other industries in the United States, although the Commission has not, to my knowledge, ever gathered, much less carefully evaluated, information on other industries with which systematically to compare the particular domestic industry before us.30/ I can find no such evidence in the record of these investigations. In other investigations, this first inquiry refers not to the absolute state of an industry's financial health but to that health relative to some earlier period.31/ The question, in other words, is whether the industry has suffered some adversity over the period examined in our proceeding. If the industry's health is deemed to be poor or declining, the adherents to this approach conclude that "material injury" exists. In such cases, they then attempt to ascertain whether unfairly traded imports contributed to that "injury." Where the industry is deemed to be in good health, the bifurcated approach does not address the effect of imports on the domestic industry.32/

By contrast, I believe that Title VII plainly contemplates a unitary approach to the analysis of causation of material injury.

30/ See Generic Cephalexin Capsules from Canada, USITC Pub. 2211, Inv. No. 731-TA-423 (Final) (Aug. 1989) (Additional Views of Vice Chairman Cass).

31/ See Nitrile Rubber, supra.

32/ Digital Readout Systems and Subassemblies Thereof from Japan, USITC Pub. 2150, Inv. No. 731-TA-390 (Final) (Jan. 1989) (Views of Commissioners Eckes, Rohr, Lodwick and Newquist); Light Duty Integrated Hydrostatic Transmissions and Subassemblies Thereof, With or Without Attached Axles, from Japan, USITC Pub. 2149, Inv. No. 731-TA-425 (Preliminary) (Jan. 1989).

Such a unitary approach asks only the question that is put to us by the statute: "Has a domestic industry been materially injured by reason of dumped or subsidized imports?"

In other opinions, I have spelled out at length my reasons for concluding that the bifurcated approach is not consistent with, and certainly is not the preferable interpretation of, Title VII.33/ Nevertheless, given that this issue is important to an understanding of how certain of my colleagues analyze Title VII cases, a brief reprise of my views on this issue would perhaps be useful here.

1. The Text and Structure of the Statute

First, the text and structure of our trade laws strongly suggest that Congress intended that a unitary approach be used in analyzing the question of causation of material injury in Title VII cases. The simplest and most important argument is that the text of the statute cannot be made consistent with the threshold "health" test so long as the text is read in accordance with basic precepts of the English language. The statute instructs the Commission to determine whether "an industry in the United States is materially injured, or is threatened with material

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33/ See Certain All-Terrain Vehicles from Japan, USITC Pub. 2163, Inv. No. 731-TA-388 (Final) 388 (Mar. 1989) (Additional Views of Commissioner Cass); 3.5" Microdisks and Media Therefor from Japan, USITC Pub. 2076, Inv. No. 731-TA-389 (Preliminary), 59-70 (April 1988) (Additional Views of Commissioner Cass) ("Microdisks"); Digital Readout Systems and Subassemblies Thereof from Japan, USITC Pub. 2150, Inv. No. 731-TA-390 (Final) 98-108 (Jan. 1989) (Concurring and Dissenting Views of Commissioner Cass) ("Digital Readout Systems").

injury, or the establishment of an industry in the United States is materially retarded, by reason of imports" determined by the Department of Commerce to have been sold at less than fair value or subsidized.34/ The statute sets out clearly numerous factors that are to guide the Commission in determining what effects less than fair value ("LTFV") or subsidized imports had on the domestic industry, but it does not attempt to describe separately the factors that are relevant to "injury" and the factors that are relevant to "causation."35/ This is significant because it suggests that Congress did not intend for the Commission to conduct independent inquiries into "injury" and "causation."

The textual argument for a unitary approach is particularly strong if one credits statutory draftsmen with basic command of the English language. The statute instructs the Commission to determine whether "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of" imports determined by the Department of Commerce to have been sold at less than fair value or subsidized.36/ In order to read this statutory instruction as mandating a bifurcated analysis, one would have to interpret

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34/ 19 U.S.C. § 1673d(b)(1).

35/ In Microdisks, cited supra, I noted that the fact that these factors are set forth under a heading labelled simply "Material Injury" appears plainly to be a sensible convenience only. See Microdisks, supra, at 62-63.

36/ 19 U.S.C. §§ 1671b, 1671d, 1673b, 1673d.

"injury" to mean "poor health" (rather than "harm from some given action") and treat the phrase "by reason of" the relevant class of LTFV or subsidized imports as though it were introducing a concept separate from injury. The instruction, however, is a single sentence asking us to determine if there was material injury by reason of the subject imports, not two sentences asking for disjunctive determinations. As I pointed out in another investigation,37/ injury appears to be used in the statute in its normal sense, as the nominative form of a transitive verb, connoting a change in condition consequent to some action. The dictionary definition of injury clearly frames its meaning in these terms, as "an act that damages, harms, or hurts; a violation of another's rights . . . compare TORT."38/ The law's provision of both a subject (the imports found or alleged to have been sold at LTFV or subsidized) and an object (an industry in the United States) for "injury" appears to provide ample evidence of congressional understanding that the term was used here in accord with its plain meaning.

It is an accepted rule of statutory interpretation that, at least in the absence of compelling evidence to the contrary, statutes should be accorded their plain meaning when one can be derived from the text. Here, there is no compelling basis for

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37/ Light Duty Integrated Hydrostatic Transmissions and Subassemblies Thereof, With or Without Attached Axles, from Japan, USITC Pub. 2149, Inv. No. 731-TA-425 (Preliminary) (Jan. 1989) (Dissenting Views of Commissioner Cass).

38/ Merriam Webster's Third Unabridged Dictionary 1164 (1961).

doing otherwise. Indeed, far from qualifying the initial textual instruction in a manner that raises doubt about its meaning, other relevant provisions support the construction offered above.

As noted earlier, the definitions section of Title VII does not separately define meanings for "material injury" and "by reason of" the LTFV imports but instead, under the title of "Material Injury," details factors that might be relevant to determining the connection between industry performance and the imports subject to investigation. These provisions clearly evidence an understanding of the term "injury" as comprehending something other than an absolute decline in industry performance and also as necessarily the product of some particular source of injury. For example, the statute does not direct the Commission to consider absolute changes in prices but instead directs the Commission to consider "the effect of imports of such merchandise [the unfairly traded imports] on prices in the United States for like products."39/ More pointedly, the statute instructs the Commission to consider whether sale of LTFV or subsidized imports "prevents price increases which otherwise would have occurred."40/

Such language is very difficult to square with a notion of injury as incorporating a freestanding requirement that industry trends decline in absolute terms. Instead, it appears fully to

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39/ 19 U.S.C. § 1677(7)(b)(ii).

40/ 19 U.S.C. § 1677(7)(C)(ii)(II).

support a reading of the statute as comprehending a single inquiry into the effect of the LTFV or subsidized imports on the domestic industry.

Additional support for this conclusion is provided by contrasting Title VII of the Tariff Act with Section 201 of the Trade Act of 1974.41/ That statute, unlike Title VII, separately describes elements relevant to the determination of injury and elements relevant to the causation determination. The statute first lists various specific factors, in addition to any other relevant economic factors, that are to be taken into account in determining whether serious injury has occurred or is threatened.42/ After describing these factors, the statute then proceeds to discuss separately certain factors that should be considered in determining whether imports are a substantial cause of serious injury.43/ For that reason, among others, a bifurcated analysis of injury and causation is appropriate in

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41/ Pub. L. No. 93-618, § 201, 88 Stat 1978, 2011 (1975) (codified at 19 U.S.C. § 2251).

42/ See 19 U.S.C. § 2251(b)(2)(A)-(B). These factors include, with respect to actual serious injury, the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or underemployment within the industry.

43/ 19 U.S.C. § 2251(b)(2)(C). These factors include an increase in imports, either actual or relative to domestic production, and a decline in the proportion of the market supplied by domestic producers.

Section 201 cases.44/ The fact that Title VII, unlike Section 201, does not categorize separately the factors deemed relevant to injury and those considered relevant to causation suggests precisely the opposite inference for Title VII -- namely, that a unitary, rather than a bifurcated, approach is the one intended by Congress.

There are two other aspects of Title VII that also argue strongly in favor of the unitary approach and against the bifurcated approach. First, the bifurcated approach -- which mandates a negative determination whenever the domestic industry appears to be, in absolute or relative terms, "healthy" -- is inconsistent with the express statutory direction that

> "the Commission, in each case,
>
> (i) shall consider --
>
> (I) the volume of imports of the merchandise which is the subject of the investigation,
> (II) the effect of imports of that merchandise on prices in the United States for like products, and
> (III) the impact of imports of such merchandise on domestic producers of like products . . .45/

The statute further directs that the Commission in each case also explain its analysis of each of these factors in the notification to the parties to our investigation and the Commerce Department that the Commission is required to provide under the

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44/ See Certain Knives, USITC Pub. 2107, Inv. No. TA-201-61, at 53-54 (Sept. 1988) (Additional Views of Commissioner Cass).

45/ 19 U.S.C. § 1677(7)(B) (emphasis added). The emphasized phrase "in each case" was added by the 1988 Omnibus Trade and Competitiveness Act, Pub. L. 100-418 (Aug. 23, 1988).

statute.46/ The Commission cannot credibly claim to have considered or analyzed the effect of unfairly traded imports on the prices in the United States for like products when it disposes of a Petition after deciding simply that an industry's financial performance has improved sufficiently that it cannot be deemed "materially injured." And only by a considerable stretch of ordinary language can the Commission claim in such cases to have considered or analyzed the impact of the unfairly traded imports on domestic producers of the like products.

Second, under Title VII, we can, and indeed must, reach an affirmative determination in cases where we determine that the establishment of an industry in the United States has been "materially retarded" by reason of unfairly traded imports.47/ This is wholly inconsistent with any claim that Congress wanted us to provide relief only in circumstances where we are able to identify an industry that is considered to be in "bad health" or in imminent danger of falling into such a condition. What it instead suggests is the insight that lies at the heart of a unitary approach: Congress intended that relief be afforded in any situation where we determine that unfairly traded imports have caused material harm to domestic investment or employment, irrespective of whether, in our view, the relevant domestic investors or employees are, in some sense, unhealthy.

46/ Id.

47/ See 19 U.S.C. §§ 1671b, 1671d, 1673b, 1673b.

2. Legislative History

The bifurcated approach is also fundamentally at odds with the legislative history of Title VII. In 1967, when Congress was considering changes in the international obligations of the United States that might conflict with U.S. antidumping law, the Senate Finance Committee issued a report that explicitly stated:

> An industry which is prospering can be injured by dumped imports just as surely as one which is foundering although the same degree of dumping would have relatively different impacts depending upon the economic health of the industry.48/

Subsequently, in revising the antidumping law under the Trade Agreements Act of 1979, the Senate reaffirmed its commitment to this approach.49/ As I have stated elsewhere, these expressions of Congressional intent clearly indicate that Congress did not intend that Title VII relief be denied to an industry that is improving relative to some other period or is "healthy" (by whatever measure) compared to other domestic industries.50/ Such an interpretation of the law is flatly inconsistent with the bifurcated approach. Plainly, if we may not deny relief to a domestic industry solely because the industry is "healthy," it is

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48/ S. Rep. No. 1835, 90th Cong., 2d Sess. pt. 2, at 11, reprinted in 1968 U.S. Code Cong. & Admin. News 4548-49.

49/ See, e.g., S. Rep. No. 249, 96th Cong., 1st Sess. 87 (1979).

50/ They also suggest, however, that the Commission may take the "health" of the industry into account in some other fashion. As I have explained in other opinions, I believe that Congress intended that we consider the health of an industry in determining what constitutes "material" injury in a particular case. See, e.g., Digital Readout Systems, supra, at 117-119.

inappropriate for us to employ a standard that not only requires negative determinations where the threshold requirement of "ill health" is not met, but also, given the virtually non-existent causal requirement followed by at least some of the Commissioners who use a bifurcated analysis, makes the "health" of the industry the one critical factor in affirmative determinations.

3. Judicial Precedent

The final point respecting the bifurcated approach that should be noted concerns judicial authority. The Court of International Trade recently accepted the Commission's argument that the "healthy industry" test that this approach incorporates is consistent with the statute,51/ relying on its earlier decision in American Spring Wire Corp. v. United States.52/ Although the recent decision is authority for the proposition that not all judges would find the test inconsistent with the dictates of Title VII, American Spring Wire itself is not such authority. To the contrary, the decision contains language that has been read out of context often over the past several years.

In that decision, the Court stated that the "Commission must make an affirmative finding only when it finds both (1) present material injury . . . and (2) that the material injury is 'by

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51/ Nat'l Ass'n of Mirror Mfrs. v. United States, 696 F. Supp. 642 (Ct. Int'l Trade 1988).

52/ 590 F. Supp. 1273 (Ct. Int'l Trade 1984), aff'd sub nom., Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985).

reason of' the subject imports".53/ While, standing alone, this statement's meaning is open to differing interpretation, viewed in the particular factual and legal context in which American Spring Wire was decided, that statement hardly can be characterized as clear support for a healthy industry test.

In the determinations that were reviewed in that case, the Commission declared that "[e]ven assuming that [the posited] injury meets the standard of 'material injury', our analysis of the effects of [the subject] imports...from France during that six month period demonstrates that any such injury is not by reason of the subject imports".54/ On appeal of these determinations to the Court of International Trade, petitioners argued that the Commission's decision was not supported by substantial evidence because the Commission had suggested that "material injury" had been shown on the record; petitioners therefore urged that an affirmative determination was required. Counsel for the Commission, on the other hand, argued that the statute required, in addition to a showing of "injury," evidence of a causal link between that injury and the unfairly traded imports. Counsel for the Commission also argued that the Commission implicitly determined that no material injury existed; accordingly, there was no need to consider causation other than

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53/ Id. at 1276.

54/ Prestressed Concrete Steel Wire Strand from France, USITC Pub. 1325, Inv. No. 701-TA-153 (Final) 6 (Dec. 1982) (footnote omitted).

in the alternative. Counsel further argued that causation was, in any event, lacking.

The court accepted the argument that both material injury and causation must be present to support an affirmative determination, but it did not suggest that these two elements need be considered in the disjunctive. The court agreed that the statute requires a causal connection between the injury to the domestic industry and the subject imports, and it found that the Commission had, as counsel for the Commission suggested, implicitly found that the domestic industry was not materially injured.55/

The court thus simply pointed out that the statutory requirement of injury by reason of less-than-fair value imports means not only that an industry must be suffering some harm, such as might be claimed by any declining industry, but also that there must be a showing that LTFV imports were a cause of that harm. Just as the commonplace notion of injury requires the infliction of harm to someone by something or someone, so the statutory injury requirement mandates something more than an independent evaluation of the condition of a domestic industry.

Hence, the essential insight that underlies American Spring Wire's affirmance of the Commission's determination rested on the conclusion that whatever fate had befallen the domestic industry could not have constituted injury by reason of the unfairly

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55/ 590 F. Supp. at 277.

traded imports because that concept necessarily requires a nexus between the imports and the domestic industry's change condition. The court held that a change in the condition of the domestic industry cannot satisfy the statutory standard independent of such a nexus. It manifestly was not asked to decide and did not hold that the law requires a determination, independent of the causal reasons, that the industry's condition is too good to allow relief against unfairly traded imports or that the industry's condition had over a given period (not related to evidence of LTFV or subsidized sales) changed for the worse. The court surely did not decide that such an independent determination of good or bad industry health could be of itself the basis for a Commission decision.

The Spring Wire case, thus, more readily supports a unitary test, which explicitly examines the relation between the dumped or subsidized imports and the industry's condition, than a bifurcated approach, which separates those inquiries. Of course, the bifurcated approach could be structured so that the appropriate nexus was always required; that appears to be the approach understood by the court in American Spring Wire. As used by a majority of commissioners in some recent cases, however, that has not been the type of bifurcation that has been employed.

It should also be noted that, while the reading of American Spring Wire challenged here has been accepted by one judge of the Court of International Trade, another judge of the same court has

taken a position strongly at odds with the requirement of a healthy industry test. In Republic Steel Corp. v. United States,56/ the Court stated that:

> [T]he ITC should not be engaged in a determination of whether an industry is 'healthy'. A 'healthy' industry can be experiencing injury from importations and an 'unhealthy' industry can be unaffected by importations. The purpose of the ITC's investigation is to determine whether imports are a cause of any effect on an industry which amount to "material injury."

The case was later voluntarily dismissed pursuant to a motion filed by petitioners, and certain aspects of the Court's decision in Republic Steel not relevant here may properly be questioned in light of the Federal Circuit's subsequent opinion in American Lamb Co. v. United States.57/ However, to date, the Federal Circuit has not squarely addressed the particular issue discussed by the court in the portion of its opinion that is quoted above.58/

56/ 591 F. Supp. 640, 649 (Ct. Int'l Trade 1985), reh'g denied, 9 Ct. Int'l Trade 100 (1985), dismissed (Order of August 13, 1985).

57/ 785 F.2d 994 (Fed Cir. 1986).

58/ The fact that the decision in American Spring Wire was affirmed on the basis of the opinion filed by the Court of International Trade in that case does not, in my view, by any means constitute acceptance of a healthy industry test for either affirmative or negative decisions under Title VII. The reasons given above apply equally to the lower court and the Federal Circuit. If the opinion in Spring Wire is not rightly understood to accept a separate health test for Title VII investigations, affirmance of that judgment on the basis of the opinion plainly cannot serve as authority for that proposition.

D. Summing Up: When Is Relief Appropriate?

For the reasons discussed in the preceding sections of these Views, I take strong issue with several aspects of the analysis that is employed by certain of my colleagues. My objection to this mode of analysis cannot be fully appreciated, however, by looking only at the particular parts of the analysis that may appear questionable. It is necessary also to consider these parts as an integrated whole in order to understand exactly what they mean. In essence, what they mean is this: some or all of the Commissioners who voted in the affirmative in these investigations believe that an affirmative injury determination is appropriate whenever a domestic industry is, in their view, unhealthy in some sense, and it can be argued that imports from the country whose goods are subject to investigation, whether the particular imports were fairly traded or not, made some contribution, however minimal, to the industry's condition. Where threatened injury is in issue, rather than past injury, presumably their analytical structure remains constant while the time frame for its application changes.59/ Accordingly, their view would be that a threatened change in the domestic industry's

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59/ This is at times unclear, as discussion of threatened material injury takes the forms of separate commentary on various factors Title VII identifies as useful indicators of likely changes either in the effect of the unfair trade practice on import prices or in the effect of those imports on the domestic industry. The problem with the separate factor approach is described in 12-Volt Motorcycle Batteries from the Republic of Korea, USITC Pub. 2203, Inv. No. 731-TA-434 (Preliminary) 55-57 (July 1989) (Additional Views of Vice Chairman Cass).

condition that will make the industry unhealthy, to which imports from the country whose goods are under investigation, whether fairly traded or not, threaten to contribute, in however modest amount, suffices as a basis for imposition of antidumping or countervailing duties under Title VII.60/ Thus, for example, in this view, antidumping or countervailing duties might be seen as called for in certain sectors of the domestic economy whenever it is feared that the economy is heading into a recession. This is not a reasonable interpretation of the statutory requirement that relief be granted only when it is shown that the domestic industry is materially injured by reason of imports that have been determined to be dumped or subsidized, or is clearly threatened with imminent material injury by reason of such imports. This approach even more certainly is not a reasonable interpretation of the GATT requirement that there be evidence that the effects of dumping or subsidization, as relevant, have materially injured the domestic industry.

In addressing the instant investigations, I have followed a very different approach from that criticized above. I turn now to the approach that comports with my understanding of the law

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60/ See, e.g., Certain Light-Walled Rectangular Pipes and Tubes from Taiwan, USITC Pub. 2169, Inv. No. 731-TA-410 (Final) (March 1989) (Views of Commissioners Eckes and Newquist); Industrial Belts from Israel, Italy, Japan, Singapore, South Korea, Taiwan, The United Kingdom, and West Germany, USITC Pub. 2194, Inv. Nos. 701-TA-293 and 731-TA-412-419 (Final) (May 1989) (Views of Commissioner Rohr).

and the application of that approach to the record in these investigations.

II. DOMESTIC LIKE PRODUCTS AND DOMESTIC INDUSTRIES

Our task in evaluating the existence of material injury (or the threat thereof) in final investigations under the antidumping laws and countervailing duty laws 61/ is to assess the effects of LTFV or subsidized imports on the industry in the United States comprised of "the domestic producers as a whole of a like product or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."62/ Accordingly, in these as in other Title VII investigations, our initial objective is to identify the domestic producers that are affected by the subject imports. In turn, in order to identify those producers, we must first define the domestic product or products that are "like" the imports that are subject to investigation. The term "like product" is defined by the statute 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."63/

In these investigations, I do not believe that our choice among the alternative like product definitions proposed by the

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61/ 19 U.S.C. §§ 1671d(b), 1673d(b).

62/ 19 U.S.C. § 1677(4).

63/ 19 U.S.C. § 1677(10).

parties has any effect on the disposition of this case. I would have reached a negative determination in these investigations even if I chosen the same like product definition that I believe has been adopted by my colleagues who have voted in the affirmative -- that is, a single like product consisting of all new steel rails. However, because the parties devoted so much time to the like product question, and because this question raises a number of issues, many of them novel, that may be of some relevance in future Title VII proceedings before the Commission, I believe that it is appropriate to discuss the like product and domestic industry issues in this case.

Determining just which imported products are sufficiently similar to constitute a single product category and, concomitantly, which domestic products compete so closely with imports under investigation as to constitute a single like product category are tasks that have bedeviled the Commission for years. The Senate Report accompanying the Trade Agreements Act of 1979 illustrates the problem, delphically instructing the Commission neither to include within a like product definition products that do not compete closely nor to exclude from such definitions products that, while distinguishable, do compete closely with imports.64/ Not surprisingly, the Commission has

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64/ As stated in the report of the Senate Finance Committee, S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979):

> The requirement that a product be "like" the imported article should not be interpreted in such a narrow fashion as to permit minor differences in physical characteristics or uses

had difficulty implementing this charge, and like product definitions are frequently sources of dispute. Consequently, commentary has been less than flattering in describing the consistency of various Commission like product determinations.65/

Notwithstanding the criticism directed at our results, I believe that the Commission traditionally has articulated criteria to guide like product determinations that fully reflect the factors apposite to the statutory task. The Commission considers several factors in making its like product determinations:66/ (1) product characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer or producer perceptions of the relevant articles; (5) common manufacturing equipment, facilities, and production employees; and (6) the similarity (or disparity) of prices for imports and potential like domestic products.67/

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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 investigation.

65/ Palmeter, Injury Determinations in Antidumping and Countervailing Duty Cases -- A Commentary on U.S. Practice, 21 J. World Trade L. 7 (1987); Note, Economically Meaningful Markets: An Alternative Approach to Defining "Like Product" and "Domestic Industry" Under the Trade Agreements Act of 1979, 73 Va. L. Rev. 1459 (1987).

66/ See, e.g., Fabric and Expanded Neoprene Laminate from Taiwan, USITC Pub. 2032, Inv. No. 731-TA-371 (Final) 4 & note 5 (Nov. 1987).

67/ Although the Commission did not include prices in its traditional list of like product determinants, this factor has increasingly been used along with the other five factors to

These factors furnish information about two different aspects of our industry definition.68/ Five of the factors provide information about the domestic market for the imported products and for closely competing domestic products. This information is contained in descriptions of product characteristics and uses, interchangeability, channels of distribution, prices, and other indicia of customer perceptions of their similarity or dissimilarity. The remaining factor, assessment of the nature of the manufacturing facilities and employees for the various products potentially assimilable into a single category, informs us about the degree to which firms are integrated into the production of particular, identified end-products and also informs us about the degree to which differentiated end-products are produced by firms that compete with one another in a single market for productive inputs.

Evaluation of these factors should allow us to circumscribe our inquiry into imports' effects in the manner dictated by Title VII, isolating a coherent set of producers of highly similar products that compete closely with a narrowly defined group of imports under investigation. Congress, in adopting amendments to

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decide among competing like product and industry definitions. See, e.g., 3.5" Microdisks and Media Therefor from Japan, USITC Pub. 2076, Inv. No. 371-TA-389 (Preliminary) 41 (April 1988) (Additional Views of Commissioner Cass). See also Asociacion Columbiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1170 & note 8 (Ct. Int'l Trade 1988) (citing use of comparative pricing data as a suitable factor in determining like product issues).

68/ See, e.g., Digital Readout Systems, supra, at 64-65.

Title VII, has indicated approval of this approach to defining the domestic industry.69/ This approach also has received judicial assent.70/

The traditional criteria, however, do not provide a basis for unified analysis of the industry definition. The Commission never has adopted any explicit basis for integrating these six criteria. The Commission has not required that all six factors support a given like product definition, nor has it provided a determinate basis for decision when the factors suggest divergent like product definitions. The six factors are not lexically ordered (so that higher-ordered factors "trump" lower-ordered factors), and there is no rule that a simple majority of factors inclined in one direction will suffice for a like product determination. For reasons that become apparent in the consideration of the instant investigations, I believe that the factors relevant to output markets must be accorded greater weight than evidence respecting production. That will not avoid hard decisions on like product issues, but it does provide some additional guidance to our inquiry.

In these investigations, Petitioner argued for a single like product consisting of all new steel rails.71/ In so doing,

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69/ S. Rep. No. 249, 96th Cong., 1st Sess. 83 (1979).

70/ See, e.g., Badger-Powhatan v. United States, 633 F. Supp. 1364 (Ct. Int'l Trade 1986).

71/ See Prehearing Brief of the Petitioner Bethlehem Steel Corporation ("Petitioner's Prehearing Brief").

Petitioner spent most of its time discussing an issue that was addressed at length in the preliminary investigation -- that is, whether industrial rail should be considered part of the same like product as new prime rail. The basic distinction between prime rail and industrial rail is that prime rail meets the specifications of the American Railway Engineer Association ("AREA") and is suitable for use on the mainline track of Class I railroads,72/ whereas industrial rail is new rail that fails quality inspections for chemical or metallurgical specifications, size, surface imperfections, cosmetic or other reasons, but is otherwise usable for non-mainline applications.73/

According to Petitioner, prime rail and industrial rail should be treated as part of a single like product under the Commission's traditional like product criteria. According to Petitioner, industrial rail generally has the same appearance as prime rail, is made in the same facilities with the same equipment that is used to make prime rail, and is sold by distributors who also sell prime rail.74/ Petitioner also contends that there is some degree of actual or potential interchangeability between prime rail and industrial rail. Petitioner asserts that Class II and III railroads view the two types of rail as interchangeable because they often do not

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72/ Report at A-5-7, A-12-13.

73/ Id. at A-14.

74/ See Petitioner's Prehearing Brief at 25 et seq.

require rail that meets AREA specifications, and also states that one Class I railroad has informally advised Petitioner that it might consider purchasing industrial rail rather than prime rail for mainline track uses under certain circumstances.75/ Petitioner further asserts that there is some relationship between prices of industrial rail and prices of prime rail. Specifically, Petitioner argues that increases in prime rail prices generally result in increases in industrial rail prices.76/ Petitioner also argues that prices of industrial rail may affect prime rail prices because sales of industrial rail at low prices may displace relay rail, which will, in turn, then be available for sale in the markets in which prime rail is sold, thereby causing a decrease in the price commanded by prime rail.77/

Respondents, on the other hand, assert that the record evidence proves conclusively that prime rail and industrial rail are separate like products. Respondents note, among other things, that one of Petitioner's economic consultants acknowledged explicitly in his prehearing submission that prime rail and industrial rail cannot realistically be viewed as substitutable.78/ Respondents also note that Petitioner, by

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75/ Id. at 5, 26.

76/ Id. at 5-6, 9-10.

77/ Id. at 11-12, 16-17.

78/ Post-Hearing Brief of Sydney Steel Corporation ("Sydney Posthearing Brief") at 1.

arguing that one Class I railroad might consider the purchase of industrial rail for use in mainline track applications, has implicitly conceded that Class I railroads, the major domestic purchasers of new steel rails, basically do not perceive industrial rail as a potential substitute for prime rail.79/

Respondents contend that most of the other major criteria traditionally considered by the Commission in its like product determinations likewise argue in favor of treating prime rail and industrial rail as separate like products. Respondents emphasize the distinct uses of prime rail and industrial; Respondents note that prime rail is used principally on the mainline track of Class I railroads, and industrial rail is used in less demanding applications, such as on side tracks or as factory rail.80/ Respondents assert that there is effectively no substitutability between the two types of rail. Respondents contend that Class I railroads would never use industrial rail on mainline tracks, because such rail would create a high risk of derailments, consequent threats to safety, and attendant exposure to legal liability.81/ Respondents also argue that prime rail is not used in industrial rail applications, even though it theoretically

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79/ Id. at 1-2.

80/ Prehearing Brief on Behalf of Sydney Steel Corporation ("Sydney Prehearing Brief") at 7; Pre-Hearing Brief Submitted on Behalf of The Algoma Steel Corporation ("Algoma Prehearing Brief") at 3-8.

81/ Sydney Prehearing Brief at 7-9: Algoma Prehearing Brief at 4-5.

could be, because prime rail is much more expensive than industrial rail and the use of prime rail for such purposes when cheaper industrial rail is available would not make economic sense.82/

Respondents contend that the channels of distribution for prime rail and industrial rail are quite different in that prime rail is sold directly to Class I railroads by the producer, while industrial rail is generally sold through distributors.83/ Finally, Respondents point out that, although some industrial rail has the same superficial appearance as prime rail, the size, shape and surface appearance of industrial rail are often quite different from that of prime rail; indeed, frequently, such differences may prevent industrial rail from meeting AREA specifications.84/ Respondents contend that all of the foregoing evidence respecting consumer demand for the two types of rail outweighs the undeniable fact that the same equipment and

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82/ Sydney Prehearing Brief at 7-9: Algoma Prehearing Brief at 6.

83/ Sydney Prehearing Brief at 10-11: Algoma Prehearing Brief at 8-9.

84/ See Sydney Prehearing Brief at 6-7. The different metallurgical content of industrial rail, which usually will not be apparent from visual inspection, is also a common imperfection preventing new rail from qualifying as prime rail. See Sydney Prehearing Brief at 6.

Respondent Algoma also notes that its industrial rail is drilled at the ends in order to prevent it from being used as prime rail. Algoma Prehearing Brief at 4.

personnel are used to produce prime rail and industrial rail.85/

On this issue, I believe that Respondents plainly have the better of the argument. Petitioner's effort to demonstrate that there is some measure of substitutability between industrial rail and prime rail has, if anything, highlighted the critical facts on the record: the similarity between prime and industrial rail derives entirely from the fact that both are products of the effort to produce a single good, but the two are very different products with very different uses. When the production process succeeds, prime rail meeting AREA specifications is the output. When an error occurs in the attempted production of prime rail, industrial rail is the output; it is "seconds" prime rail.

Thus, it is not surprising that industrial rail simply is not used to any significant extent in those applications to which most prime rail is put, i.e., mainline track uses. Petitioner identified only one representative of a single Class I railroad that indicated that his railroad might even consider the use of industrial rail for such purposes; the Commission has been unable to identify any instance where industrial rail has in fact been used for such purposes.86/ It also appears relatively clear that, while prime rail could be used in place of industrial rail,

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85/ Sydney Prehearing Brief at 13. Indeed, as previously indicated, the two types of rail are, in fact, produced simultaneously through the same production process. The significance of this fact for our definition of the domestic industry is discussed, infra.

86/ See Report at A-13.

the disparities in the price of industrial rail and prime rail are so great as to preclude the possibility that prime rail will be used to any significant extent in uses where industrial rail will suffice.87/ Accordingly, for good reason, Petitioner's own economic consultant, Dr. Eckard, concluded that prime rail and industrial rail are not substitutable.

In these investigations, I believe that the evidence that prime rail and industrial rail are not interchangeable to any significant extent is compelling. For the purpose of like product definition, this evidence -- which is confirmed by other evidence before us respecting the existence of separate distribution channels, etc. -- outweighs the fact that prime rail and industrial rail are produced as part of the same production process. The existence of a common production process does not change the fact that domestically produced industrial rail is simply not "like" imported Canadian prime rail and domestically produced prime rail is not "like" imported Canadian industrial rail. After all, many byproducts, including waste, are produced by the same process that yields the principal, intended product. Surely, that does not make byproducts "like" the intended product. While we can derive from examination of production processes some information useful to distinguishing related products and industry members, that information cannot supplant

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87/ During the period covered by our investigation, prices of prime rail were, on average, about double the prices of industrial rail. See Report at A-113, Table 28; A-116-117, Tables 30-31.

information respecting the products and markets for them. If we are to render meaningful judgments on imports' effects, we must look first to factors that focus on the similarity of products in the markets where they compete and where imports' effects necessarily will be felt. The evidence that establishes that there are clearly separate consumer markets for prime rail and industrial rail is, therefore, sufficient in my view to establish that industrial rail and prime rail are separate like products.88/

This is by no means the end of our inquiry respecting the appropriate definition of the like product and domestic industry, however. There are three other related questions that must be considered, none of which received the attention they deserve from the parties to these investigations. First, even if industrial rail and prime rail are separate like products, must we conclude that they are produced by separate domestic industries? Second, should relay rail be viewed as part of the same like product as prime rail? Third, what is the appropriate treatment of certain distinct types of rail that are quite unlike the "tee" rail used by freight railroads -- crane rail, girder rail, and contact rail -- that are also subject to these investigations? These questions are considered in turn.

88/ This does not mean that the existence of a common production process is irrelevant, however. To the contrary, as discussed *infra*, I believe that this fact indicates that, although prime rail and industrial rail are separate like products, they are produced by a single domestic industry.

The first of these questions is a novel and difficult one. I do not believe that the Commission has ever had occasion to consider how the domestic industry(s) should be defined in a case where a single group of domestic firms produces two clearly distinct products, one of which is an unintended, lesser quality byproduct of a common production process. Moreover, I have been unable to identify anything in the statute or its legislative history revealing the intent of Congress on this subject. Accordingly, I believe that our assessment of this issue must be guided by consideration of the fundamental purpose served by the like product and domestic industry definitions. As indicated above, I believe that Congress contemplated that these definitions would assist us in circumscribing our inquiry into the effects of subject imports by isolating a coherent set of producers of highly similar products that compete closely with a narrowly defined group of imports under investigation. In these investigations, I do not believe that it is appropriate for the Commission to treat the domestic firms producing industrial rail as if they were a coherent set of producers separate from those producing prime rail. As previously discussed, not only are the producers of industrial rail and prime rail one and the same, but the products themselves are actually produced as part of the very same production process. Furthermore, the firms in question do not actually wish to produce one of the products, industrial rail; industrial rail is, instead, an essentially unwanted byproduct of the prime rail production process. This is not a

case of two products with common costs of production. All costs are common here; only the quality of the output varies.

Notwithstanding the normal coincidence between like product and industry definitions, in this context we cannot sensibly evaluate the impact of the subject imports of industrial rail on the "domestic industry" producing industrial rail, for no such industry in fact exists separate from the industry producing prime rail. The effects of imported "seconds" will be felt by the producers of first-quality merchandise even though the seconds sell in different markets for different uses at different prices because the only producers are in the business of trying to produce and sell first-quality merchandise. The effects will not be the same as would follow from imports of the first-quality merchandise. Instead, they would be more akin to increased costs for waste disposal. But the business at issue is not the waste-generation business; it is the business of producing first-quality merchandise, one aspect of which is minimizing the cost of mistakes by recouping whatever one can for units that do not satisfy quality standards. The same is true with respect to prime and industrial rail. Accordingly, although I believe that industrial rail and prime rail are separate like products, I believe that they are produced by a single domestic industry, and I have evaluated the possible existence of material injury by reason of the subject imports by examining the effects of the subject imports of both industrial rail and prime rail on that single industry.

The second question is whether relay rail should be considered part of the same like product as prime rail. Relay rail is used rail, generally rail that was previously laid on mainline tracks, and that was, therefore, produced to meet AREA specifications.89/ As Petitioner acknowledges, the chemical composition and hardness of relay rail is generally the same as prime rail.90/

It is not clear from the record how the parties propose that the Commission treat relay rail. Petitioner takes the position that relay rail should not be treated as a like product separate from prime rail.91/ In that context, Petitioner states that rail mills do not sell relay rail,92/ and notes that relay rail is worn.93/ As previously noted, however, Petitioner acknowledges that the physical characteristics of relay rail and prime rail are essentially the same,94/ and further acknowledges that the Class I railroads consider both types of rail for mainline applications.95/ Petitioner does not explicitly address the question whether relay rail should be considered part of the same

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89/ See Petitioner's Prehearing Brief at 43-44; Algoma Prehearing Brief at 10-11.

90/ Petitioner's Prehearing Brief at 43-44.

91/ Id.

92/ Id. at 22.

93/ Id. at 44.

94/ Id. at 43-44.

95/ Id. at 50.

like product as prime rail, although the thrust of Petitioner's position, as expressed in its submissions to the Commission, appears to be that it should not be so considered.

Respondents' position respecting relay rail is also somewhat ambiguous. Respondent Algoma argues that relay rail and prime rail have more in common than prime rail and industrial rail, noting, inter alia, that relay rail originally met AREA specifications; that relay rail, like prime rail, is used on main lines; and that the price of relay rail is closer to that of prime rail than to that of industrial rail.96/ However, Algoma appears to make these assertions primarily for the purposes of arguing that industrial rail and prime rail are not like products; Algoma does not argue explicitly that relay rail is part of the same like product as prime rail. Respondent Sydney likewise does not take any clear position on this question. Sydney notes, however, that all of the parties to these investigations agree that relay rail and prime rail are close substitutes.97/ Sydney also asserts that there is a stable relationship between relay rail prices and prime rail prices.98/

In these investigations, it is, therefore, not clear that Respondents have proposed that the Commission treat relay rail as part of the same like product as prime rail. In a recent

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96/ Algoma Prehearing Brief at 10-11.

97/ Sydney Posthearing Brief at Appendix 1 at 3.

98/ Id. at Appendix 1 at 1; Appendix 3.

investigation, I expressed the view that the Commission ought not to choose broad product definitions when no party has urged us to do so; when the choice of such a definition would require us to reach difficult factual or legal issues; and when the adoption of such a definition does not affect the disposition of the investigation.99/ As I previously indicated, in these investigations, I believe that any reasonable product definition will produce the same outcome under any interpretation of Title VII. I also note that there is at least some question whether "used" products, such as relay rail, should be considered part of a domestic like product in Title VII investigations, although it seems to me that a more useful question than whether the product is "used" would be whether there is investment or employment committed to taking the product from its prior use and making it suitable for a new use and, if so, whether the investment or employment is of an order comparable to that characteristic of an "industry" for Title VII purposes.100/ Given the various reasons

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99/ See Generic Cephalexin Capsules from Canada, USITC Pub. 2211. Inv. No. 731-TA-423 (Final) (Additional Views of Vice Chairman Cass).

100/ I suspect that my colleagues who have voted in the affirmative have noted that there is no Commission precedent for such treatment of used products, and may have found this a basis for excluding relay rail from the like product in these investigations. (I do not know for certain what views my colleagues have expressed on this issue because they have refused to share their written views with dissenting Commissioners despite the clear indication by our reviewing court that it is inappropriate for Commissioners to do so. See Borlem S.A. v. United States, Ct. No. 87-06-00693, slip op. 89-93, at 24, note 4 (Ct. Int'l Trade, June 29, 1989).) For me, the absence of Commission precedent on this issue neither provides support for

for proceeding cautiously on these issues, I do not reach the question whether relay rail should be included in the same like product as prime rail. In so doing, I note, however, that the record evidence in these investigations contains more than a colorable basis to support a like product determination that included relay rail with prime rail.

The third and final question is how the Commission ought to treat rail products whose shape or composition differs significantly from tee rail, the rail that is used on freight railroads. These other rail products include crane rail, girder rail and contact rail. The information available to us respecting such rail is exceedingly sparse. Indeed, even though these other types of rail are formally subject to these investigations, the parties to these investigation spent literally no time discussing the possible effects of imports of these products. Largely for this reason, we know little about these products; we have available to us only some information about the purposes for which they are used, and the volume of imports of the three types of rails on an aggregated basis.101/

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inclusion nor for exclusion of relay rail.

101/ Crane rails are similar in shape to tee rails, and are used to carry heavy concentrated loads at slow speeds, principally on crane runways. Report at A-7. They are produced to the specifications of individual customers. Id.

Girder rails, unlike tee rails and crane rails, are non-symmetrical, are generally embedded in pavement and contain a "lip" that guards against pavement encroachment. Id. at A-6.

Contact rails have an "I" shape that is quite unlike the

Based on the utter silence of the parties about these other types of rails, it is evident that no party to these investigations seriously believes that crane rails, girder rails or contact rails are a real source of controversy. Yet the consequence of the Commission's affirmative determinations in these investigations is that these other types of rail are also subject to antidumping and countervailing duty orders.

For the purposes of our like product determination, I have determined that crane rails, girder rails, and contact rails are each like products separate from industrial and prime tee rails. The record evidence relating to these products is, as previously noted, quite thin. However, the limited evidence that is available to us indicates clearly that each of these types of rails is used for a quite different purpose, and that there is little, if any, degree of interchangeability between any of these types of rails. In the absence of other evidence, I believe that these facts are sufficient to support a finding that crane rails, girder rails and contact rails are separate like products.

Accordingly, in these investigations, I have determined that there are five like products: (1) prime tee rails; (2) industrial tee rails; (3) crane rails; (4) girder rails; and (5) contact rails. For the reasons previously stated, I have concluded, however, that prime tee rails and industrial tee rails are both

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general "T" shape of tee, crane and girder rails. They are used to conduct electricity, generally on public transportation systems, such as subway lines. Id. at A-5-7.

produced by the same domestic industry. In addition to that industry, I have found that three other domestic industries exist, producing, respectively, crane rails, girder rails and contact rails.

III. INJURY BY REASON OF UNFAIRLY TRADED IMPORTS: NEW STEEL RAILS FROM CANADA

In analyzing the question of causation of material injury in these investigations, I have conducted the three-part inquiry suggested by the governing statute. Title VII directs the Commission, in assessing the causation of injury by unfairly traded imports, to

> consider, among other factors --
> (i) the volume of imports of the merchandise which is the subject of the investigation,
> (ii) the effect of imports of that merchandise on prices in the United States for like products, and
> (iii) the impact of imports of such merchandise on domestic producers of like products....102/

The statute goes on to spell out these three factors with greater particularity.

The statutory text does not identify all of the factors relevant to an assessment of whether unfairly traded imports have materially injured a domestic industry. Indeed, the statute explicitly contemplates that the Commission will consider relevant economic factors in addition to those identified in the

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102/ See 19 U.S.C. § 1677(7)(B).

statute.103/ The factors that are listed in the statute and the order in which they are listed nevertheless provide us with important guidance respecting the essential elements of the inquiry to be performed. Three related questions are identified as critical to an assessment of the possible existence of material injury by reason of dumped or subsidized imports.

First, we are to examine the volumes of imports of the merchandise under investigation. The absolute volumes of imports and their magnitude relative to domestic sales of the competing like product are both relevant to this question. So, too, is the effect of LTFV sales on the prices of the imports, as the change in import volumes brought about by dumping or subsidization will be closely related to changes in the prices of the imports that occurred as a result of those practices.

103/ See 19 U.S.C. § 1677(7)(C).

Under Title VII, as amended by the Omnibus Trade and Competitiveness Act of 1988, we are also required to explain the relevance of other economic factors that we consider in addition those specifically identified in the statute. See Pub. L. No. 100-418, § 1328(1), 102 Stat. 1107, 1205 (to be codified as 19 U.S.C. § 1677(7)(B)(ii)). I have explained in detail in other opinions how the three-part inquiry that I employ considers certain other economic factors relevant to an assessment of the impact of unfairly traded imports on the domestic industry producing the like product -- e.g., dumping margins -- in addition to the specific factors listed in the statute as well as See, e.g, New Steel Rails from Canada, USITC Pub. 2135, Inv. Nos. 731-TA-422 and 701-TA-297 (Preliminary) 35-37 (Nov. 1988) (Additional Views of Commissioner Cass); Generic Cephalexin Capsules from Canada, USITC Pub. 2142, Inv. No. 731-TA-423 (Preliminary) 56-58 (Dec. 1988) (Dissenting Views of Commissioner Cass).

Second, we must attempt to determine how the subject imports affected prices, and concomitantly sales, of the domestic like product. Beyond examining evidence of the prices at which imports and domestic like products are sold,104/ evidence bearing on three issues is central to an analysis of this question: the share of the domestic market held by the subject imports; the degree to which consumers see the imported and domestic like products as similar (the substitutability of the subject imports and the domestic like product); and the degree to which domestic consumers change their purchasing decisions for these products based on variations in the prices of those products.

Finally, we must evaluate the extent to which these changes in demand for the domestic like product caused by LTFV or subsidized imports affected the financial and employment performance of the domestic industry, and determine whether such effects are material.105/ Such factors as return on investment and the level of employment and employment compensation in the

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104/ Congress explicitly has asked us to look for the existence of significant price underselling. 19 U.S.C. § 1677(7)(C)(ii). The occurrence of price differences between imports and domestic products, however, cannot provide a basis for inference of effects of the unfair trade practice or of unfairly traded imports on domestic products' prices without analysis of various product features and sales terms that may differ across products and sales. See, e.g., Certain Granite from Italy and Spain, USITC Pub. 2110, Inv. Nos. 701-TA-289 and 731-TA-381 (Final) (Aug. 1988).

105/ The judgment as to whether these effects are "material" within the meaning of the statute may be assimilated to the third inquiry or may be seen as a fourth part of our inquiry. See Digital Readout Systems, supra, at 117-19.

domestic industry must be examined in considering that issue. In making each of these inquiries under the statute, we are to consider the particular dynamics of the industries and markets at issue.106/

In succeeding sections of these Views, the three inquiries outlined above are undertaken in light of these directions for each of the like products and corresponding domestic industries in these investigations. However, before my conclusions on these issues are discussed, it is necessary to resolve the threshold question whether we should assess cumulatively the volume and effects of the dumped imports from Canada and the volume and effects of the subsidized imports from that country.

A. Cumulation

Title VII requires the Commission to analyze cumulatively the volume and effect of imports subject to investigation from two or more countries if such imports "compete with each other and with like products of the domestic industry in the United States market."107/ In these investigations, of course, we are not investigating imports from two or more countries, but are instead required to consider whether we should cumulatively assess the volume and effects of imports from the same country, Canada.

106/ See new Section 771(7)(C)(iii) of the statute (to be codified at 19 U.S.C. § 1677(7)(C)(iii)). See also S. Rep. No. 71, 100th Cong., 1st Sess. 117 (1987).

107/ 19 U.S.C. § 1677(7)(C)(iv).

I believe that it is quite clear under any fair reading of the statute that cumulation is appropriate in these investigations. Certain of my colleagues may have a contrary view, believing that the statute provides no legal basis for cumulating the volume and price effect of imports from a single country.108/ If so, this strikes me as nonsensical. It is simply inconceivable that Congress could have intended to require us to cumulate volume and price effects of imports subject to investigation when we are faced with imports from different countries which compete with each other and with the domestic like product, while depriving us of the authority to conduct a cumulative analysis under the same circumstances when the imports in question come from the same country. Such a construction of the law would constitute an exaltation of form over substance, and a wooden form at that. While the cumulation provisions of our law have been a source of not inconsiderable difficulty,109/ and may not fully comport with certain established principles of U.S. constitutional and administrative law,110/ those are not

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108/ Although I have, as previously indicated, not seen the opinion of those Commissioners who have voted in the affirmative in these investigations because they have declined to make it available to dissenting Commissioners, I believe that, in light of arguments recently advanced to the Commission, it is possible that views to this effect are contained in their opinion.

109/ See Certain Light-Walled Rectangular Pipes and Tubes from Taiwan, USITC Pub. 2169, Inv. No. 731-TA-410 (Final) (March 1989) (Views of Acting Chairman Brunsdale and Commissioner Cass).

110/ See, e.g., Mathews v. Eldridge, 424 U.S. 319 (1976); Memphis Light, Gas & Water Division, 436 U.S. 1 (1978).

bases on which Commissioners should predicate a statutory construction for which, so far as I know, no even arguably coherent rationale has been offered.

Accordingly, in these investigations, I believe that it is appropriate to assess cumulatively the volume and prices effects of the dumped imports produced by Respondent Algoma with the those of the subsidized imports produced by Respondent Sydney. In reaching that conclusion, I have employed the same criteria that Congress has explicitly directed us to use in the multi-country context. Those criteria both suggest unambiguously that cumulation is appropriate. Both groups of imports are "subject to investigation". The record evidence suggests -- and, indeed, no party has questioned -- that these imports compete with each other and with the domestic like product.

B. Prime Tee Rails

1. Volumes and Prices of Imports

The evidence adduced in these investigations respecting the volume of imports of prime tee rails from Canada (hereinafter "prime rails") indicates that the domestic market for these products is small, although it has increased somewhat in recent years. During 1988, which encompassed the six-month period during which Commerce determined that dumping was occurring as well as a portion of the period during which Respondent Sydney was found to have received countervailable subsidies, [* *]

short tons of prime rails were imported from Canada.111/ These imports accounted for only [*]% of domestic consumption.112/ By contrast, in 1986, prime rails imports from Canada amounted to only [* *] short tons, or [*]% of domestic consumption.113/ During the first three months of the current year, the flow of imports from Canada also increased slightly: imports during that period amounted to [* *] short tons, as compared to [* *] short tons during the comparable three-month period in 1988.114/ The value of these imports also is small relative to the domestic market, although it, too, has increased in recent years, rising to slightly over $[* *] in 1988 as compared to approximately $[* *] in 1986.115/ A slight decrease in the value of imports was reported during the first three months of this year.116/

The evidence in these investigations suggests that the prices of the subject imports decreased significantly as a result of the alleged unfair trade practices under investigation. The Commerce Department found that imports produced by Respondent

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111/ Report at A-83, Table 15b.

112/ Id.

113/ Id.

114/ Id.

115/ Id.

116/ Id. The value of the imports was $[* *] in the first three months of the current year, compared to $[* *] in the first three months of 1988.

Algoma and "all other" Canadian producers were sold at an average dumping margin of 38.79%.117/ Commerce also found that Respondent Sydney received a net subsidy equal to 113.56% ad valorem.118/ However, as I have explained elsewhere, the decline in the price of the subject imports that occurs as result of dumping or subsidization is often less than the full amount of the dumping or subsidy margin. The analytical issues involved in determining how subsidization affects the prices of subject imports are quite different from those involved where dumping is at issue. I turn first to the effects of dumping.

The implication of Commerce's calculated dumping margin for the associated change in imports prices and volumes depends on the type of calculation Commerce has made. If the dumping margins reflect a finding by Commerce that the subject foreign producers/exporters have charged a lower price for their product in the United States than the price that they have charged in their home market (or another foreign market used as the surrogate for the home market), the actual decrease in the U.S. price of the subject imports that occurred consequent to dumping

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117/ Report at A-18.

118/ Id. at A-17.

Commerce did not calculate separate dumping or subsidization margins for the different types of new steel rail subject to this investigation. Accordingly, in analyzing the effects of the subject prime rail imports on the domestic industry, I have used the dumping margins calculated by Commerce for all new steel rails as the best information available, in accordance with the direction of 19 U.S.C. § 1677e(b).

will be only a fractional percentage of the dumping margin. This percentage, in turn, will be in large measure a function of the proportion of the total sales of the subject foreign producer in the U.S. and the exporter's home market that is accounted for by sales in the producer's home market.119/

However, where, as here, the dumping margins do not reflect a finding that the subject foreign producers have charged higher prices in their home market than in the United States, a different mode of analysis is required. In these investigations, the dumping margin that Commerce calculated for Respondent Algoma was based on a determination by Commerce that Algoma charged a price for its product in the United States that was lower than the constructed value of that merchandise; the constructed value that Commerce used in making this determination was the value suggested by Petitioner, which Commerce used as best information available due to perceived deficiencies in the data that Algoma provided to Commerce.120/ In such cases, I have used the full

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119/ Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom, USITC Pub. 2185, Inv. Nos. 303-TA-19 and 20 and 731-TA-391-399 (Final) 142-144 (Mar. 1989) (Concurring and Dissenting Views of Vice Chairman Cass) and other opinions cited therein.

120/ Report at A-17-18; Appendix B.

Because the dumping margin was calculated on this basis, it is not necessary to discuss at length here the possible desirability of considering, for the purposes of evaluating the actual differences in prices charged for the Canadian product in the U.S. and Canadian market, certain "net backs" that the Commerce Department uses in arriving at ex-factory prices. I note, however, that Petitioner objected strenuously to

amount of the relevant dumping margin as the measure of the extent to which dumping affected price of the subject imports.121/ In doing so, however, I have kept in mind that this

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Respondents' proposed use of information relating to these net-backs as part of Respondents' presentation of estimates of the effects of dumping and subsidization on domestic industry that Respondent calculated by using the CADIC model. (The CADIC ("Comparative Analysis of the Domestic Industry's Condition") model generates estimates of changes in the prices and quantities sold of a domestic industry's like product that occurred, given various data relating to import volumes, dumping margins, and the markets for the imports and the domestic like product. The CADIC model has been fully described in publicly available documents, and copies of the computer program have been available for some time to interested members of the public.) I also note that I found Petitioner's arguments against considering such net-back information wholly unpersuasive. In essence, Petitioner, argued that in Title VII cases (1) the Commerce Department is responsible for calculating dumping margins, and has been instructed by Congress to do so on an ex-factory or net-back basis, and (2) the Commission is responsible only for determining whether unfair trade practices have materially injured domestic industry. See Petitioner's Posthearing Responses to Questions of the Commission and Staff ("Petitioner's Posthearing Qs & As") at 48-55. Both of these statements are undoubtedly correct, but they are just as clearly beside the point. The real question is whether there is any legal prohibition against the Commission using the dumping margins calculated by the Department of Commerce for the purposes of conducting its injury analysis and, in the course of so doing, assessing their meaning for issues such as actual changes in market prices of imports associated with the unfair trade practice or the effects of particular price movements on the prices of the competing domestic like product. If, as our reviewing courts have said, such information can be used, certainly it should be used as carefully as possible to identify actual effects in the markets we scrutinize. Where effects in consumer markets (in which the imports and like product compete) are at issue, it plainly is helpful for Commissioners to consider net-back or other information that was taken into account by Commerce in moving from actual market prices to a "sanitized" ex-factory price. Petitioner has cited no authority that even remotely suggests that such analysis is prohibited.

121/ See Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and

almost certainly overstated to some degree the extent to which dumping caused the prices of the subject imports to decline. I believe that such treatment is also appropriate here in the absence of other credible evidence on that issue.122/

It is important, however, to distinguish two related but different issues. In my view, we are constrained to accept the dumping margins that are provided to us by Commerce as the measure of the magnitude of dumping.123/ It is clear that the statutory scheme commits this determination to that agency, not to the Commission, and comity requires that we credit the decision by Commerce.

Second, the dumping margin calculated by Commerce is not, of course, a measure of actual price differences to consumers in the United States and the relevant foreign market, but merely one evidentiary datum. There may be cases where market conditions suggest that it is highly implausible to suppose that dumping

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the United Kingdom, USITC Pub. 2185, Inv. Nos. 303-TA-19 and 20 and 731-TA-391-399 (Final) (Concurring and Dissenting Views of Vice Chairman Cass) ("Antifriction Bearings").

122/ In that context, I note that Respondent Algoma has argued that "margins analysis" is "particularly inappropriate" in this case because Commerce allegedly acted improperly in disregarding Algoma's submissions to Commerce and using Petitioner's data as the best information available. See Algoma Posthearing Brief at 8. Standing alone, such naked allegations of illegality certainly do not constitute the kind of credible evidence that might warrant a different treatment of the margins.

123/ See New Steel Rails from Canada, USITC Pub. 2135, Inv. Nos. 701-TA-297 and 731-TA-422 (Preliminary) 39-40 (Nov. 1988) (Additional Views of Commissioner Cass); Digital Readout Systems, supra, at 38-41.

actually caused the price of subject imports to decline by a percentage corresponding to the full amount of a constructed-value based dumping margin. In these investigations, however, Respondents have presented us with no evidence to support such an inference.

As previously noted, where subsidy margins are at issue, the appropriate analysis is different than that required for dumping. The Commerce Department's subsidy calculation, while essential to determining the subsidies' effects on imports volumes and sales in the United States, cannot be taken uncritically as equivalent to a determination of the effect of the foreign subsidies on the U.S. price of the subject imports. As Congress recognized in directing the Commission to consider the type of subsidy at issue in evaluating the threat of material injury,124/ different types of subsidies will have different effects on the price and volume of the subsidized product. Some subsidies may be direct payments to exporters based on the amount of the subject product exported, while others may be payments for production regardless of the market for which the product is produced. Still other subsidies may be payments for the use of particular inputs to production, including subsidies based on the location of the production operation. In each case, a careful evaluation of the manner in which the subsidy operates is normally necessary to determine its price and volume effects.

124/ 19 U.S.C. § 1677(7)(E)(i).

In these investigations, however, a precise assessment of the degree to which each of the alleged subsidies affected import volumes and prices is unnecessary because the evidence discussed in the succeeding subsection of these Views suggests that the subsidies in question in these investigations could not have had a material effect on the domestic industry even if the full amount of the subsidy margin is used as the measure of the extent to which the subsidies affected prices of the subject imports and even if the volumes and effects of the subsidized imports are assessed cumulatively with those associated with the dumped imports. The record evidence suggests that such a precise assessment is also unnecessary in these investigations for a quite different reason suggested by Petitioner -- the record evidence clearly indicates that Respondent Sydney would not have continued to exist if it had not been for the subsidies at issue.

As Petitioner and Respondents both recognized, in the ordinary case, the central question in assessing the effects of a subsidy on subject import prices is whether, and to what extent, the subsidy affects the foreign producer's marginal cost of production.125/ Respondent's economic consultant, Dr. Litan, argued that the only subsidies at issue that could have had such an effect on Sydney's costs were the subsidies that were given to Sydney for the purpose of defraying Sydney's operating

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125/ See Petitioner's Posthearing Qs & As at Exhibit 10 at 1-2; Exhibit 11 at 4-5; Respondents' Prehearing Economics Submission by Dr. Litan ("Respondents' Prehearing Economics Submission") at 15-17.

expenses.126/ Dr. Litan therefore urged us essentially to ignore the numerous "lump sum" subsidies that were given to Sydney that affected only Sydney's fixed costs; such lump sum subsidies included, inter alia, equity infusions, loans and loan guarantees on concessional terms, and investment grants.127/

Petitioner, on the other hand, argued that the full amount of the subsidies should be taken into account in assessing the effects of subsidization on import prices and volumes. Petitioner contended that, without the subsidies (including the "lump sum" subsidies), Sydney would not have continued to exist, and therefore would have been exporting at all to the United States.128/ Petitioner argues that when the issue is whether subsidies have kept a firm in existence, it is not enough to look only at the effect of subsidies on that firm's marginal cost of production, narrowly defined; in that case, according to Petitioner, one must look at the effects of subsidies in the context of the firm's revenues and costs over the longer-term.129/ In short, Petitioner argues that it is necessary to examine the subsidies collectively with a view toward determining whether they have kept the exporter in existence; if they have,

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126/ Respondents' Prehearing Economics Submission at 16-19. By Dr. Litan's calculation, these subsidies amounted, at most, to a 29.6% ad valorem subsidy.

127/ Id. at 16.

128/ Petitioner's Posthearing Qs & As at Exhibit 10 at 1-2; Exhibit 11 at 3-4.

129/ Id. at Exhibit 10 at 2.

Petitioner argues that the full amount of the subsidy margin must be taken into account in determining the effect that subsidization had on import prices and volumes.130/

Petitioner also offers a number of other arguments for considering the full amount of the subsidy margin, rather than focusing only on operating expense subsidies, as suggested by Dr. Litan. Petitioner contends that all of the subsidies should be viewed as export subsidies because Sydney's production is predominantly for export.131/ Petitioner asserts that the "lump sum" subsidies have, contrary to Dr. Litan's argument, lowered Sydney's operating costs by enabling Sydney to invest in productive facilities that it would not have been able to purchase in the absence of the subsidies.132/ Finally, Petitioner argues there is no sharp dividing line in this case between lump sum subsidies and operating expense subsidies because the magnitude of Sydney's operating losses over an extended period of time was so great as to suggest that a substantial portion of the subsidies given for purposes not explicitly related to Sydney's operating expenses must, in fact, have been used to defray those expenses.133/

130/ Id.

131/ Id. at Exhibit 11 at 2-3.

132/ Id. at 4-5.

133/ Id. at 7-8.

In these investigations, it is not necessary to consider all of the arguments advanced by Petitioner, for I am persuaded that Petitioner is correct in its basic argument: that Sydney would not have continued to exist if not for the subsidies. The Commerce Department's final determination in its countervailing duty investigation is replete with evidence that Sydney has been uncreditworthy and unequityworthy for well over a decade.134/ The magnitude of Sydney's operating losses over that period -- approaching $500 million 135/ -- are so great as to clearly suggest that Sydney would not have continued to exist in the face of such dire conditions were it not for the subsidies at issue in these investigations. Respondents have suggested that, even if this is so, another firm would have purchased Sydney's assets and continued to use them in rail production in Canada.136/ Given the record evidence in these investigations -- which certainly shows clearly that rail production in North America has been a very unprofitable business -- I cannot consider that argument to be anything other than unsupported speculation. Respondents surely are correct that the effect of subsidies on operating costs and returns, rather than on fixed investment, is the predicate on which analysis of subsidies' impact on import volumes and prices should build. But where, as here, the

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134/ See Report at Appendix B.

135/ See Petitioner's Posthearing Qs & As at Exhibit 11 at 7-8.

136/ Respondents' Posthearing Economics Submission at 5.

subsidies also affect firms' decisions whether to continue or cease production of a given product, the margin on which the subsidies operate must be assessed differently.

For these reasons, I believe that Petitioner is correct in urging us to consider the full subsidy margin as the measure of the extent to which subsidization affected prices of the subject imports. In these investigations, as previously noted, the margin of subsidization is, in fact quite large.

Thus, the evidence indicates that dumping and subsidization caused prices of the subject imports to decline significantly. The record evidence also suggests that these relatively large decreases in the prices of the subject imports resulted in some increase in the volume of imports from Canada, but this increased level of imports nevertheless represented only a very modest percentage of the domestic market. The degree to which decreases in import prices result in increases in the volume of import sales depends, among other things, on the degree to which domestic consumers treat the imported goods in question as substitutable for the domestic like product. As discussed in the succeeding section of these Views, in these investigations, the record evidence indicates that there is a reasonably high degree of substitutability between the domestic and imported Canadian product. Nevertheless, for reasons discussed below, the evidence also establishes that the consequent increased volume of Canadian imports that accompanied dumping and subsidization did not

significantly affect either prices or sales of the domestic like product.

2. Prices and Sales of the Domestic Like Product

The second factor to which the governing statute directs our attention is the effect of the unfairly traded imports on prices of the U.S. like product. These effects, including depressing or suppressing prices of U.S. products, are integrally related to the imports' effects on sales of the like product. Congress, in directing our attention to evidence of price depression or price suppression from the subject imports as well as to sales that have been lost to dumped or subsidized imports, has identified the principal means by which dumping and subsidies affect competing American businesses. These effects, however, generally are not directly observable. Trends in product prices may provide some basis for inference, but what inference is properly drawn from such trends depends critically on other information in the record. Without attention to evidence that explains the relation of import volumes and prices to the domestic goods' prices, raw data on trends cannot be used intelligently. Nor is ad hoc speculation on what role might have been played by other factors that influence price trends likely to be of assistance in evaluating imports' effects, however useful such speculation is to rationalizing a conclusion.137/ So, too, anecdotal evidence

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137/ See, e.g., Certain Light-Walled Rectangular Pipes and Tubes from Taiwan, USITC Pub. 2169, Inv. No. 731-TA-410 (Final) (March 1989) (Additional and Dissenting Views of Commissioner Rohr).

of lost sales, which can be useful, generally should be evaluated only in the context of other information. It is common in many businesses for a certain degree of switching among suppliers to occur. The relevant question under Title VII is not whether any U.S. consumer switched from a domestic supplier to an imported product. The question is how much net sales of the imports increased as a result of subsidization or dumping. Put differently, it is the increased switching, rather than the ordinary level, that Title VII asks us to identify. To properly perform our statutory task, therefore, we must look behind the raw data and also consider evidence that will help us interpret the data.

An analysis of the impact of unfairly traded imports, through changes in volumes and prices of subject imports induced by dumping or subsidization, on prices and sales of the domestic like product depends on consideration of the relevant evidence bearing on three issues: the share of the domestic market held by the subject imports; the degree to which consumers see the imported and domestic like products as similar (the substitutability of the subject imports and the domestic like product); and the degree to which domestic consumers change their purchasing decisions for these products based on variations in the prices of those products. In these investigations, this evidence -- particularly the evidence respecting the small share of the domestic market held by Canadian imports and the evidence respecting the responsiveness of domestic demand for prime rail

to changes in rail prices -- demonstrates convincingly that dumping and subsidization did not produce significant increases in volumes, or decreases in prices, of the subject imports.

During the period covered by our investigation, the level of market penetration by the subject imports in the domestic market was quite low. In 1987 and 1988, which encompassed the periods during which the Commerce Department found that dumping and subsidization were occurring, the subject imports accounted, respectively, for only [*]% and [*]% of the total quantity of domestic consumption of prime rails.138/ During the first three months of this year, market penetration was somewhat higher than it was during the comparable three-month period in 1988, but was still less than[*]%.139/ Measured on the basis of value, the Canadian market share was essentially the same.140/

The second body of evidence indicating the limited impact that the subject unfairly traded imports had on prices and sales of the domestic like product concerns the degree to which domestic consumers change their purchasing decisions for prime

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138/ Report at A-83, Table 15b.

139/ During the first three months of the current year, the Canadian imports accounted for [*]% of domestic consumption of prime rails, compared to [*]% during the first three months of 1988. Id.

140/ In both 1987 and 1988, the Canadian value-measured market share was marginally higher that the quantity-measured market share: [*]% in 1987 and [*]% in 1988. Id. During the first three months of this year, however, the value-measured Canadian market share was slightly lower than the quantity-measured share: [*]% as compared to [*]%. Id.

rail based on changes in the prices of such rail. The evidence compiled by the Commission in these investigations shows that domestic consumer demand for prime rail is, in fact, quite responsive to changes in the price of that product.

This evidence is especially important in these investigations in light of the other evidence, previously discussed, that suggests that dumping and subsidization resulted in significant decreases in prices of the subject imports. When consumer demand for the product group in which subject imports are included is highly responsive to changes in price, the effects of dumping or subsidization on prices and sales of the domestic like product are attenuated, for in that case the lower prices accompanying dumping or subsidization of the unfairly traded imports will stimulate significantly increased domestic demand for the lower-priced product.141/

In these investigations, domestic consumer demand for new prime rails is quite responsive to changes in the price of that product for a number of reasons. The first and most important reason is the availability of relay rail as a substitute for new prime rails. As previously discussed, all of the parties to these investigations agree that relay rail is, in fact, a good

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141/ Conversely, much greater effects will be felt by U.S. producers when consumers perceive no difference between the imported and domestic product other than price but their overall purchases of these products are relatively unresponsive to price changes. In the latter case, consumers will simply switch their purchases from U.S.-made to lower-priced imported products, imposing a quite detrimental impact on both prices and sales of the domestic product.

substitute for new prime rails in the mainline track applications to which most such rail is put.142/ Relay rail in fact accounts for a substantial percentage of all mainline track laid in this country.143/ Moreover, the potential sources of supply of such rail are abundant -- theoretically, nearly all mainline track in the domestic railroad system could be available for such uses at some point.144/ Further, the supply of relay rail is constantly replenished; when new rail is laid, it becomes available for possible use later as relay rail.145/

New technology also plays an important role in increasing the alternatives available to potential purchasers of new steel rails. Rail can now be reconditioned so as nearly to double the life of a rail.146/

The fact that track maintenance and rehabilitation can be deferred to some extent is also a factor that operates to increase the responsiveness of domestic demand to changes in new prime rail prices.147/ Rail is an important element in the cost of installing new track, and rail installation costs are, in

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142/ See, e.g., Petitioner's Posthearing Brief at 3; Sydney Posthearing Brief at Appendix 1 at 3.

143/ See, e.g., USITC Memorandum EC-M-313 (August 22, 1989) from the Office of Economics ("OE Posthearing Memorandum") at 9-10.

144/ Id. at 13-14.

145/ Id. at 12.

146/ Id. at 13.

147/ Id. at 12.

turn, a major component of a railroad's operating expenses.148/ When rail prices go up, a railroad may elect to postpone a maintenance or rehabilitation program that it would have otherwise carried out in the near term.149/ Admittedly, such a decision may be infeasible under certain circumstances -- for example, when failure to replace track would result in a prohibitively high risk of derailment. However, there is certainly no basis in the record before us for belief that domestic railroads routinely wait until the risk of derailment is imminent before they begin consideration of track replacement programs.

The remaining evidence to be examined in evaluating the effect of the subject imports on prices and sales of the domestic like product concerns the substitutability of the subject imports for the domestic like product. Given the other evidence indicating that the subject imports did not have a significant effect on domestic prices and sales, this evidence is less important than it might be in other contexts. In these investigations, the parties agree, and the evidence otherwise suggests, that there is a moderate to high degree of substitutability between domestically produced prime rail and the imported Canadian product.150/ This is so because, inter alia,

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148/ Id. at 12-14.

149/ Id. at 12.

150/ See, e.g., OE Posthearing Memorandum at 8-11; Petitioner's Posthearing Qs & As at Exhibit 11 at 18-19.

all prime rail is produced to meet AREA specifications; there is minimal product differentiation; and all prime rail is made for the same general uses.151/ However, as Respondents point out, Petitioner has asserted that its "premium" prime rail is superior to the comparable Canadian product.152/ Accepting Petitioner's contention at face value, this would serve to limit the substitutability of the domestic and imported Canadian products. Additional evidence pointing in the same direction can be found in the fact that at least some domestic Class I railroads (e.g., CSX) have a policy of purchasing their rail requirements from several sources rather than a single source.153/

Finally, I note that, in these investigations, there is evidence suggesting that there is a high degree of substitutability between Canadian-produced prime rail, and prime rail produced overseas in countries subject to VRAs. This operated to further reduce the effects of the subject imports on domestic prices and sales. Over the period covered by our investigation, imports from Canada increased while imports from the VRA countries decreased dramatically, by an amount far in excess of the increase in the volume of Canadian imports.154/ Commissioner Lodwick has discussed at length in his Views the

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151/ See OE Posthearing Memorandum at 8-11.

152/ See Respondents' Posthearing Economics Submission at 3-4.

153/ See, e.g., Report at A-94.

154/ Report at A-83, Table 15b.

significance of this evidence and related evidence respecting the shifts in exchange rates that have taken place over the past several years. Rather than repeat what he has said on this subject, I will simply say that I share his belief that this evidence suggests that the Canadian imports did not have a significant adverse effect on prices and sales of the domestically produced product.

3. Investment and Employment

As in other investigations, it is difficult, if not impossible to draw any meaningful conclusions respecting the impact of the subject unfairly traded imports on the domestic industry by examining only the financial and employment data compiled by the Commission. The fortunes of the industry have been heavily influenced by a host of factors unrelated to the subject imports, ranging from an apparent secular decline in domestic demand for the industry's products to the presumably more salubrious effects of the VRAs. That said, however, it is apparent that the employment and financial data contain no evidence whatever that would support a finding of material injury by reason of the subject imports.155/

155/ The Commission has not obtained financial and employment data for the domestic industry that is broken down by type of rail. Accordingly, consistent with Congress' direction that we use data from the narrowest product line for which data are available when we do not have data on the like product per se (see 19 U.S.C. § 1677(4)(D)), in evaluating the impact of the subject imports on the domestic industry producing prime rail, I have used the data respecting all new steel rails that is available to us.

The industry was unprofitable throughout the period covered by our investigation, even disregarding the substantial pension expenses that the industry has incurred for past service workers and reported to the Commission as part of its cost of goods sold.156/ However, the industry was much less unprofitable in 1987 and 1988, which encompassed the periods during which Commerce determined that dumping and subsidization were occurring, than it was in 1986.157/ Capital expenditures and research and development expenses by the industry dropped from 1986 to 1987, but snapped back sharply in 1988.158/

The employment data compiled by the Commission is mixed and singularly inconclusive. By certain measures -- e.g., hours worked and total compensation earned by production and related workers -- the terms and conditions of employment in the industry improved over the period covered by our investigation.159/ However, measured by other criteria -- e.g., the total number of

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156/ See Report at A-57; A-51, Table 6.

This reference to the industry's pension expenses is in no way intended to question the manner in which the domestic industry has reported its financial data to the Commission, for it appears that the reported data are consistent with the accounting principles that the industry is required to follow. Id. at 64-65. However, I believe that a truer picture of the industry's current profitability (or lack thereof) is revealed by considering the industry's financial data without reference to those expenses.

157/ Report at A-57; A-51, Table 6.

158/ Id. at A-61, Table 10; A-63, Table 11.

159/ Report at A-46, Table 4

production workers and average hourly wages paid to such workers -- employment conditions worsened somewhat in 1987 before improving in 1988. Based on the record before us, however, there is simply no basis on which we might attribute these 1987 downturns in employment to the unfairly traded imports that are the subject of these investigations.

Accordingly, in these investigations, in concluding that the domestic industry has not been materially injured by reason of the subject LTFV and subsidized imports, I have not relied primarily on the financial and employment data collected by the Commission. That information is ambiguous and, to some extent, in conflict; there is, in my view, no basis on which meaningful inferences can be drawn from these data viewed in isolation. My negative determination on the issue of material injury is instead based in large measure on the other record evidence available to us, which demonstrates clearly that LTFV and subsidized sales of the subject imports did not significantly affect either prices or sales of domestically produced prime rails.

C. Industrial Tee Rails

Because I have concluded that prime rails and industrial tee rails (hereinafter "industrial rails") are produced by the same domestic industry, because the Commerce Department did not calculate separate dumping or subsidization margins for industrial rail, and because the previously-discussed evidence respecting consumers' markets for prime rail is also relevant in considering the effects of imported industrial rail on the

domestic industry, an extended, independent discussion of industrial rail is neither necessary nor appropriate here. I will therefore limit discussion of the effects of the subject imports of industrial rail on the domestic industry to the potential areas of difference between industrial rails and prime rails for the purposes of such an analysis.

1. Volumes and Prices of Imports

During the period covered by our investigation, a significant percentage of imports of new steel rails from Canada consisted of industrial tee rails (hereinafter "industrial rails"). During 1988, which encompassed the six-month period during which Commerce determined that dumping was occurring as well as a portion of the period during which Respondent Sydney was found to have received countervailable subsidies, [* *] short tons of industrial rail were imported from Canada.160/ Industrial rail therefore accounted for almost 32% of all new steel rail imports from Canada that year.161/ By contrast, in 1986, industrial rail imports from Canada amounted to only [* *] short tons.162/ During the first three months of the current year, however, no industrial rail was imported from Canada.163/ The value of the industrial rail imported from

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160/ Report at A-84, Table 15c.

161/ Information derived from Tables 15a through 15d.

162/ Id. at A-84, Table 15c.

163/ Id.

Canada during the period covered by our investigation was quite small, amounting, at most, to approximately $[* *] in 1988.164/

As previously noted, the Commerce Department did not calculate separate dumping or subsidization margins for industrial rail. Hence, the record evidence respecting the effects that dumping and subsidization had on volumes and prices of imports of industrial rail is essentially the same as that discussed above in connection with prime rail. However, because of the way in which industrial rail is produced and sold, it may well be the case that dumping did not cause the price of industrial rail produced by Algoma to decline by the amount suggested by its dumping margin. As previously noted, the dumping margin assigned to Algoma is a constructed value margin reflecting Commerce's determination that Algoma sold its new steel rail in the United States at a price below its cost of production. However, given the disparity between the price commanded for prime rail and the price at which industrial rail is sold, and given existing market price levels for those two products, it is evident that industrial rail will invariably be sold below its cost of production if its cost of production is determined by reference to the average cost of producing all tee

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164/ Id.

rails, including prime rails.165/ In the absence of such "dumping" of industrial rail, industrial rail would not, and could not, be sold at or above its cost of production (defined in the manner just described). Accordingly, such "dumping" of industrial rail almost certainly did not cause the prices of industrial rail produced by Algoma and exported to the United States to decline by the full amount of the dumping margin calculated by Commerce. However, because I believe, for the reasons previously stated, that we are generally constrained to use the dumping margins provided by the Department of Commerce, I have used these margins in assessing the effect that dumping had on prices of imported Canadian industrial rail with the recognition that this has the effect of overstating those effects to some extent.

2. Prices and Sales of the Domestic Like Product

The record evidence respecting consumer demand for prime rail discussed above is generally relevant here. There are, however, two issues respecting industrial rail in particular that are worth noting here.

First, by definition, industrial rail, unlike prime rail, is not produced to AREA specifications. Accordingly, there may be room for greater differences in the quality of imported and domestic industrial rail than there is in the case of prime rail.

165/ At current price levels, and given the current unprofitability of rail production generally, it is doubtful if prime rails are sold by domestic firms at prices in excess of their cost of production.

However, the record does not contain any evidence of actual quality differences. There is some indication that Canadian industrial rail may be sold largely in geographic markets to which shipment of domestic industrial rail would not be economically feasible, given the low value-to-cost ratio of this product. The evidence on this point, however, is not developed to a degree that would allow careful evaluation of the substitutability of Canadian for U.S.-produce industrial rails. On the record before us, I therefore conclude that Canadian industrial rail is generally quite substitutable for domestically produced industrial rail, even if it is not quite so substitutable as Canadian prime rail is for U.S.-made prime rail.

Notwithstanding the substitutability of imports for the domestic like product, the other relevant evidence -- respecting demand for industrial rail and relative consumption of imports -- indicates that the imports have had no significant effects on the like products' prices or sales and even less on those of prime rail, the intended output of rail production. The first of these factors is consumers' sensitivity to price changes. In evaluating the extent to which consumer demand for industrial rail is responsive to changes in the price of that product, attention must be paid to the availability of relay rail, as well as industrial rail. Relay rail is also used for the same purposes as industrial rail, and therefore can be substituted for

OFFICE OF THE SECRETARY

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

September 22, 1989

NOTICE OF ERRATA

All figures in the attached report containing the statement "data are confidential" should read "data are confidential and therefore are not shown in this figure." Any graphical representation of confidential data presented within a figure is not intended to show an actual value; the minimal value shown is intended to alert the reader that a value exists.

In figure 12 on page A-81, the statement "1988 data are confidential" should read "1986-88 data are confidential and are therefore not shown in these tables."

industrial rail in such uses.166/ There is a large stock of relay rail, dwarfing industrial rail, and this combined with the low-value uses for industrial rail makes demand quite sensitive to price. Further, although the reported market penetration data for industrial rail suggest at first blush that Canadian industrial rail has a substantially higher share of the U.S. market than does Canadian prime rail, this fact is of quite limited significance in the context of this particular product. In 1987 and 1988, which encompassed the periods during which Commerce determined that dumping and subsidization were occurring, imports of Canadian rail accounted, respectively, for [*]% and [*]% of all reported domestic consumption of industrial rail.167/ However, what is truly noteworthy about these figures is that reported consumption of industrial rail in the United states is such a small fraction of the market for rails 168/ as to strongly corroborate other record evidence that relay rail is used to a large extent for the same uses to which industrial rail is put. In consequence, sales of Canadian industrial rail are quite likely either to replace sales of relay rail or to be for uses that would not have been undertaken in the

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166/ Report at A-13.

167/ See Report at A-84, Table 15c. In the first three months of the current year, no imports of industrial rail were reported, however.

168/ In 1988, for example, reported consumption of industrial rail was only approximately [*]% of total reported domestic consumption of prime rails.

absence of the low-priced industrial rail. In neither case would there be substantial competition with U.S.-produced industrial rail.

The evidence as a whole therefore indicates that dumped and subsidized imported Canadian rail did not have a significant effect on either prices and sales of domestically produced industrial rail. Moreover, the very low volume of industrial rail produced domestically relative to prime rail, the smallness of the contribution of revenues from industrial rail to overall rail operations of U.S. rail producers, the evidence of some difference in geographic markets for Canadian and U.S. industrial rail, and the extraordinary limitations on substitution of industrial rail for prime rail, all indicate the absence of any even arguably significant effect of dumped and subsidized industrial rail imports on U.S.-produced prime rail prices or sales.

3. Investment and Employment

The Commission has not compiled separate investment and employment data for industrial rail. However, because I have concluded that prime rails and industrial rails are part of the same industry, the comments that I made above respecting the available investment and employment data in the context of discussing prime rail are equally relevant here.

Two additional points should be noted, however. First, it is simply implausible to suppose that unfairly traded imports of Canadian industrial rail had any effect on domestic employment.

Because industrial rail is an unintended, low volume by-product of prime rail production, it is evident that imported industrial rail did not have any effect on the volume of production of industrial rail. Second, unfairly traded imports of industrial rail did not have a significant effect on the financial performance of the domestic industry both because the record evidence suggests that such imports did not have any effect on prices and sales of the domestic like product and because sales of industrial rail represent only a de minimis percentage of the domestic industry's revenues.169/

Accordingly, even when the effects that unfairly traded imports of industrial rail and the effects of unfairly traded prime rail are considered together, it is evident that the domestic industry producing prime rail and industrial rail was not materially injured by reason of those imports.

D. Crane, Girder and Contact Rails

As previously discussed, there is a notable paucity of record evidence respecting many issues that would be important in assessing the effects of the subject imports of crane, girder and contact rails on the domestic industries producing those products. Among other things, we do not have investment and employment data relating to those products, nor do we have margins of dumping or subsidization (if any) applicable to those products. This is not surprising because, as I discussed earlier

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169/ See, e.g., Algoma Posthearing Brief at 35.

in these Views, it is evident that the parties to these investigations did not regard these other types of rail as truly at issue.

In any event, because of the lack of data, it is not possible to carry out an independent three-part assessment of the impact of the subject crane, girder and contact rail imports on the domestic industries producing those products comparable to that set forth above for prime rail and industrial rail. Accordingly, consistent with Congress' direction that we use data from the narrowest product line for which data are available when we do not have data on the like product *per se*, the only alternative left to us is to analyze the subject imports on the basis of the conclusions that we have reached respecting prime rail and industrial rail, supplemented by the very limited additional information that we have respecting crane rails, girder rails and contact rails.170/

As previously indicated, I have, in fact, made a negative injury determination respecting the subject imports of prime and industrial rail. I will not recapitulate my discussion of the effects of those imports here. There is at least some reason to believe that the effects of the subject imports of crane rails, girder rails and contact rails on the domestic industries producing those products were, if anything, even less significant than those evident for prime rail and industrial rail. This is

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170/ *See* 19 U.S.C. § 1677(4)(D).

so principally because the domestic market share of these imports in 1988, the year which most nearly corresponds to the periods during which the Commerce Department determined that dumping and subsidization were occurring, imports of new steel rails other than prime rail and industrial rail (i.e., crane rail, girder rail and contact rail) from Canada accounted for only .6% of the total quantity of such rail consumed in the United States and only .2% of the value of such rail consumed in this country.171/

IV. THREAT OF MATERIAL INJURY BY REASON OF LTFV IMPORTS

Having found that no domestic industry has been materially injured by reason of the unfairly traded imports subject to these investigations, we must now determine whether any of the industries for which I have found no material injury is faced with a threat of material injury.172/ In assessing the issue whether a threat of material injury by reason of the subject unfairly traded imports exists, we must keep in mind the statutory command that the Commission make an affirmative determination only "on the basis of evidence that the threat of

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171/ Report at A-84, Table 15c.

172/ See 19 U.S.C. §§ 1671d(b)(1)(A)(ii), 1673d(b)(1)(A)(ii). Petitioner has not argued that the establishment of any domestic industry has been materially retarded by reason of the subject imports, and no record evidence was developed in these investigations that would support such a finding by the Commission.

material injury is real and that actual injury is imminent."173/ Furthermore, such a determination may not be made on the basis of mere conjecture or supposition.174/

Under Title VII, the Commission is directed to consider a number of specifically enumerated factors in analyzing whether there is the requisite threat of material injury. Where, as here, both dumped and subsidized imports are under investigation, the statute directs us to assess the following factors:

> (1) information as to the nature of the subsidies, particularly whether they are export subsidies;
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> (2) the ability and likelihood of the foreign producers to increase the level of exports to the United States due to increased production capacity or unused capacity;
>
> (3) any rapid increase in penetration of the domestic market by imports, and the probability that the penetration will increase to injurious levels;
>
> (4) the likelihood that imports will enter this country at prices that will have a depressing or suppressing effect on domestic prices of the merchandise;
>
> (5) any substantial rise in inventories of the merchandise in the United States;
>
> (6) underutilized capacity for producing the merchandise in the exporting country;
>
> (7) "any other demonstrable adverse trends" that indicate that the unfairly traded imports will be the cause of actual injury;
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> (8) the potential, if any, for product-shifting to the products under investigation from other products subject to a separate antidumping or countervailing duty investigation or final order; and

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173/ 19 U.S.C. § 1677(7)(F)(ii).

174/ Id.

> (9) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop derivatives or more advanced versions of the like products.175/

Unlike my colleagues in the majority, I cannot discern in the record even a colorable basis -- other than speculation of the kind against which Congress specifically warned us -- on which we might find that any of these factors suggests the existence of a threat of material injury to the domestic industries producing the various types of rail that are subject to these investigations.176/

Before proceeding to a discussion of the record evidence bearing on the various statutory threat factors, a few preliminary comments respecting the essence of the inquiry that we are to perform appear to be in order. First, it is important to understand analysis of threat as a distinct inquiry, not merely an appendage to analysis of injury from allegedly LTFV imports. This ground for relief addresses a particular factual context, where a clear threat of imminent injury from LTFV

175/ 19 U.S.C. § 1677(7)(F)(i).

176/ I note that, to the extent possible and in accordance with the guidance of our reviewing court, I have exercised discretion and assessed cumulatively the effects of the subject dumped and subsidized imports for purposes of determining the existence of a threat of injury. See Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp. 1068 (1988), aff'g Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, Kenya, Mexico, the Netherlands, and Peru, USITC Pub. 2119, Inv. Nos. 303-TA-18, 701-TA-275-278 & 731-TA-327-333 (remand determinations) (Aug. 1988).

imports exists even though no significant effect has yet been felt.

Second, as threat analysis requires prediction, an even less precise process than divination of past effects, it is important to describe carefully the basis of our analysis, else this becomes a very slippery tool.177/ We must be cautious not to use threat analysis as an escape valve for difficult cases, finding threat where we cannot quite find injury. Even more, the Commission must be careful not to permit loose analysis of threat to generate affirmative findings where the evidence suggests the absence of injury from dumped or subsidized imports but where other concerns might militate in favor of relief to an industry in distress. The Commission's vote in these investigations, and in several other recent investigations, raises a question in my mind whether the Commission is sufficiently attentive to this need for caution.178/

Finally, I understand the threat factors contained in the statute to require the same sort of integrated analysis presented above with respect to actual injury from unfairly traded imports. The factors are not a checklist of criteria that should be

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177/ As previously noted, Congress has specifically cautioned the Commission against making affirmative determinations of threat based on conjecture or supposition. 19 U.S.C. § 1677(7)(F)(ii).

178/ See, e.g., Fresh, Chilled or Frozen Pork from Canada, USITC Pub. 2218, Inv. No. 701-TA-298 (Final) (Views of Commissioners Eckes, Rohr and Newquist); Industrial Belts from Israel, Italy, Japan, Singapore, South Korea, Taiwan, The United Kingdom, and West Germany, USITC Pub. 293, Inv. Nos. 701-TA-19 and 20 and 731-TA-412-419 (Final) (May 1989) (Views of Commissioner Rohr).

evaluated on a disaggregated basis, with a negative threat finding ensuing if a majority of statutory factors do not indicate a threat. Rather, the factors suggest where we should look to see whether probable events over the near term will produce the sorts of effects on the domestic industry's prices and sales, and ultimately on its financial returns and employment, that would constitute material injury.

In these investigations, I find nothing in the record that suggests the probability that imports of new steel rails of any type from Canada will cause near-term material injury to any domestic industry. The data obtained in these investigations with respect to the statutory criteria for determining whether a threat exists are sufficiently similar with respect to the four domestic industries that I have determined to exist in these investigations that it is unnecessary to recite the considerations separately for each industry.179/ Although the specific data differ, the general nature of those data concerning the factors critical to our disposition of the threat issue here are similar for each of the industries.

Over the period covered by our investigation, rail imports from Canada, particularly imports of prime rail and industrial rail, increased somewhat.180/ In percentage terms, this increase

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179/ However, where the relevant data for the various rail products differ significantly, this is noted below.

180/ For the other types of new steel rail, the level of imports fluctuated irregularly.

was significant, primarily because the base level of these imports was essentially de minimis. I do not believe that the record evidence suggests any probability of further increases of any significant magnitude. To the contrary, all of the evidence suggests that imports from Canada will, if anything, decrease. The major domestic purchasers of new steel rails, the Class I railroads, purchase their rail requirements by soliciting bids or quotes approximately six months before the actual date of anticipated purchase.181/ Accordingly, at any given time, the orders that have been placed with rail producers are a reliable indicator of those producers' future sales. Presently, neither of the Canadian producers has any outstanding orders from U.S. Class I railroads for the remainder of this year or for 1990.182/ Moreover, for various reasons, the record evidence indicates that certain domestic Class I railroads to whom Respondents Sydney and Algoma made sales in recent years are unlikely to purchase significant amounts of Canadian rail in the near future. Chairman Brunsdale has explained at length why this is so; I concur with her views on that subject and will not recapitulate that discussion here.

Another important reason why Canadian imports are likely to decrease, not increase, can be found in recent shifts in the exchange rate between the U.S. and Canadian dollars. Over the

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181/ Report at A-88.

182/ Sydney Posthearing Brief at 10; Algoma Posthearing Brief at 9-10.

period from January 1986 to December 1988, the Canadian dollar appreciated significantly in both nominal and real terms relative to the U.S. dollar.183/ As Commissioner Lodwick points out in his opinion, it is well-established, as a result of previous Commission studies and otherwise, that trade in steel products is quite sensitive to exchange rate movements.184/ This is especially true for the sorts of steel products under investigation here for which consumer demand is quite price-sensitive. Accordingly, there is good reason to believe that the appreciated Canadian dollar will have a significant depressing effect on the volume of imports of new steel rails from Canada.

Although there has been no increase in Canadian steel rail production capacity, there is some reported unused capacity in that country. During the first three months of this year, Canadian capacity utilization stood at 75.3%.185/ However, any suggestion that the Canadian producers will increase their capacity utilization by increased exports to the United States would not only be speculation; it would be speculation that is

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183/ See Report at A-119-121.

184/ Indeed, certain Commissioners who have voted in the affirmative in these investigations have recognized the relevance of the exchange rate issue for purposes of threat analysis in other contexts. See, e.g., Certain Light-Walled Rectangular Pipes and Tubes from Taiwan, USITC Pub. 2169, Inv. No. 731-TA-410 (Final) 69 (March 1989) (Additional and Dissenting Views of Commissioner Rohr).

185/ Id. at 86.

wholly at odds with the other evidence before us. As previously noted, at the moment, the Canadian producers do not have any pending orders for significant U.S. business for the foreseeable future. Further, there is substantial evidence that Sydney in particular is directing its business development efforts away from the U.S. market. Sydney has been a significant supplier of rail to various less developed countries, apparently due in large part to its location at a port and due to foreign aid programs of the Canadian government that are tied to purchase of Canadian products.186/ In various submissions to the Commission, Sydney has advised us that numerous less developed countries have plans to purchase rail from Sydney in amounts so substantial that they would effectively tie up a major portion of Sydney's capacity for some time to come.187/ Given Sydney's past activities in such markets, Sydney's testimony on this issue is entitled to considerable weight. Furthermore, Sydney has a contract to supply 80% of the rail requirements of one of the two major Canadian railroads, the Canadian National.188/ Together, these facts persuasively refute any perceived ground for augury of increased imports from Canada.

Other facts relevant to changes in imports present a similar picture. I do not believe that the record evidence reveals any

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186/ See Report at A-70.

187/ Sydney Posthearing Brief at 32-33, 35-36.

188/ See Petitioner's Posthearing Qs & As at Exhibit 11 at 3-4.

likelihood of product shifting from other Canadian steel products subject to outstanding antidumping or countervailing duty orders.189/ Because Algoma produces structural steel shapes, the theoretical potential for such product-shifting exists.190/ However, the Department of Commerce has found that Algoma in recent times has not been able to sell its rail in the United States at prices that even cover its cost of production. Under the circumstances, it is difficult to discern any economic motivation for Algoma to produce more rail for export to the United States at the expense of production of other, presumably more profitable steel products.

Further, I see no basis whatever in the record for a finding that there is a likelihood that Canadian rail imports will enter this country at prices that will have a depressing or suppressing effect on domestic prices new steel rails of any type. For the reasons previously indicated, I believe that it is quite clear that the subject imports have had no such effect to date. There is no reason to believe that this will change.191/

189/ No such products are currently under investigation.

190/ Sydney does not produce any steel products other than rail.

191/ Based on opinions that have been written by Commissioners in other investigations, I believe that one or more of my colleagues who have voted in the affirmative may have concluded that price suppression is likely because prices in the domestic market are not rising while the industry continues to experience a "high level of costs" (see Report at A-50). See, e.g., Certain Light-Walled Rectangular Pipes and Tubes from Taiwan, USITC Pub. 2169, Inv. No. 731-TA-410 (Final) 58 (March 1989) (Views of Commissioner Eckes and Newquist); see also id. Additional and Dissenting Views of Commissioner Rohr. However, it is

In addition, the type of subsidies at issue do not suggest a particular likelihood of future increased volumes or decreased prices of the Canadian imports. The subsidies in this case are not export subsidies. Petitioner has argued that we should nevertheless treat them as if they were for purposes of our threat analysis because a substantial portion of Sydney's production is for export.192/ As previously noted (and as Petitioner recognized in a different context) Sydney cannot be regarded solely as an exporting firm, given its requirements contract with Canadian National.193/ Furthermore, it should be noted that only a small portion of Sydney's exports are exports

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impossible to determine whether imports are causing price suppression simply by examining price movements in relation to the sum total of producers' costs. First, costs are only one determinant of price, as has often been observed by agricultural producers, at times to their audible chagrin. Anyone who believes that costs alone set prices should try to sell a product on that basis. Second, even if we limit our focus to costs, trends in overall costs are not useful in assessing price movements, much less in predicting further price movements. A firm's costs include many components, including fixed costs that are, in general, irrelevant to a firm's decision in setting prices at any particular time. Fixed costs are sunk; they are incurred when a firm decides whether to make an investment. They must, of course, be recovered, but only over the useful life of the asset to which they pertain. Fixed costs may rise or fall, but this often is purely a function of a firm's cost allocation system. Viewed in isolation, a rise in fixed costs tells us nothing at all about the price that a firm should realize for a product at any particular time. For a thorough discussion of this subject, see T. Nagle, The Strategy and Tactics of Pricing (1987).

192/ See Petitioner's Petitioner's Prehearing Brief at 174-178.

193/ See Petitioner's Posthearing Qs & As at Exhibit 11 at 3.

to the United States.194/ Under the circumstances, it seems clear that subsidies given to Sydney cannot fairly be viewed as export subsidies.

The record does not reveal special sensitivity of the domestic industry to any changes in Canadian imports. Inventories are not a significant factor in these investigations. Inventories of Canadian rail in the United States have risen somewhat in recent years,195/ but they remain quite small relative to domestic consumption.196/ Moreover, the increase in importer inventories in this country was more than offset by a substantial decrease in inventories of the Canadian product in Canada.197/

Finally, there is no evidence of any kind that the subject imports will have actual or potential negative effects on the existing development and production efforts of the domestic industry. To the contrary, the record is replete with evidence that Petitioner in particular has been proceeding apace on a variety of fronts with efforts to develop and implement the latest rail technology, and is devoid of any evidence that Canadian imports will interfere with those efforts.

CONCLUSION

194/ See Report at A-73, Table 13.

195/ See Report at A-67, Table 12.

196/ Compare id. with Report at A-82, Table 15a.

197/ See Report at A-73, Table 13.

For all of the foregoing reasons, I have concluded that no domestic industry has been materially injured by reason of the subject LTFV and subsidized imports of new steel rails from Canada, or is threatened with material injury by reason of such imports.

Dissenting Views of Commissioner Seeley G. Lodwick

Investigation Nos. 701-TA-297 and 731-TA-422 (Finals)
New Steel Rails from Canada

I find that there is no material injury or threat of material injury to a domestic industry by reason of less than fair value (LTFV) and subsidized imports of new steel rails from Canada. [1]

I. Like Product and Domestic Industry.

I define the like product to be all new rail, excluding light rail and the domestic industry to be the producers of all new rail, whether prime or industrial. This finding is based upon the same reasoning the Commission used at the preliminary stage of this investigation. [2]

II. The Business Cycle and Conditions of Competition.

The statute as recently amended by the Omnibus Trade and Competitiveness Act of 1988 requires the Commission to evaluate the relevant economic factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." [3] In regard to the new steel rails industry, I find some particular competitive conditions and cyclical elements

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[1] Material retardation is not an issue in this case.

[2] See New Steel Rails from Canada, Inv. Nos. 701-TA-297 and 731-TA-422 (Preliminary), USITC Pub. 2135, November 1988 at 4-8.

[3] 19 U.S.C. 1677 (7)(C)(iii).

worthy of discussion.

To put the factors we consider "in the context of this industry's business cycle," one must note that this industry supplies an industry, the railroads, that has been in decline for several decades. The steel rails industry does not appear to be subject to predictable up or downturns, affected by general economic activity. Though purchases of steel rails represent only a small portion of the costs to run a railroad, spending on steel rails is somewhat dependant on the condition of the railroads. That is, an industry's propensity to spend on maintenance is affected by its ability to invest. [4] However, by looking at new rail consumption data and examining the history of the railroad business in the U.S., one can infer that the domestic industry's recent fortunes are handicapped by the fact that it is supplying a declining, or in growth terms, an industry showing flat performance trends. [5]

The conditions of competition have been influenced by exchange rate movements and an important outside force: the domestic industry is protected by the steel Voluntary Restraint Agreements (VRAs). The VRA signatories' import levels are limited by market share arrangements, or quantity based

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[4] See Report of the Commission at A-28-33, for discussion of demand for the like product.

[5] I note a recent report by the Association of American Railroads cited in the Report at A-36 and in memo EC-M-264 at 11. See the 1988 edition of Railroad Facts. In particular, it is of interest that new rail laid by this industry in 1987 was approximately one sixth (in tons of rail) of 1929 levels and just over 35% of 1979 levels. Freight train-miles have declined steadily for decades and operating revenue has held steady in nominal terms but has decreased substantially in real terms since 1979.

ceilings. [6] The countries subject to the restrictions are importing below the allowed levels. The decline in a particular country's U.S. share may be heavily influenced by a decline in the value of the dollar relative to the foreign country's home currency. U.S. firms, and a non-VRA participant such as Canada, compete for the share that is represented by this remaining unused VRA allocation. This may in part explain both the increased domestic market share as well as the increased Canadian U.S. market share over the period of the investigation. [7] [8]

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[6] Regardless of whether the VRAs are currently binding, that is whether the quantity allocations are fully used up by the individual countries, the VRAs have the potential impact of limiting supply contributed by the non-subject countries.

[7] Report at A-82, Table 15a.

[8] See EC-M-312 at 3, regarding the shares of the export ceilings filled by each VRA country in 1988. For purposes of discussion, I note in particular the large remaining unused allocation for Japan. The large unused allocation for Japan may be explained to an extent by the appreciation of the yen, since its end of quarter peak at 258 yen/$ in the first quarter of 1985, to the 128 yen\$ level for the quarter representing the interim 1989 period. See International Financial Statistics, International Monetary Fund, March 1987 and August 1989. I also note the particularly large drop in Japanese share in the U.S. market from 1986 to 1988. Report at A-77, Table 14. Further, I note that over the period of investigation, both the yen and the Canadian dollar have appreciated in real terms against the U.S. dollar, but the yen has appreciated relative to the U.S. dollar by a larger amount than has the Canadian dollar. Id. at A-121, Figure 13.

Since the yen has appreciated relative to the U.S. dollar, a Japanese producer's variable or marginal costs in dollar terms are higher, making the U.S. market a less attractive export market. Or put another way, a weaker dollar buys less Japanese product. Since the Canadian dollar has appreciated in real terms relative to the U.S. dollar, by a lesser amount than the yen, Canadian imports have become marginally more affordable relative to Japanese imports since 1986 in the U.S. market. Given these exchange rate movements, one may expect both U.S. and Canadian share to increase relative to the Japanese share.

The record also indicates that rails are generally purchased on a contractual basis, with contracts covering a one year period, and with prices remaining fixed during the contract period. See EC-M-312 at 4. Given the rigidity of

(continued...)

III. Condition of the Domestic Industry.

In the conduct of its investigations, the Commission collects data regarding several economic factors and financial indices regarding the domestic industry under investigation. The economic factors include apparent consumption, domestic output, prices, capacity and capacity utilization, productivity, inventories, employment, wages and market share. The financial indices include net sales, profits, return on investments, and cash flow. [9]

Particularly troubling in this case in a determination of the condition of the industry, is the industry's persistent operating losses, yet greatly improving net profitability. There is no basis in the record from which to determine profitability levels showing signs of present material injury, because the industry has lost money for some time, [10] serves a declining industry, [11] faces competition from a substitute product (relay rails) that since 1980 is used in larger quantities than new rails; [12] spends large sums of money on pension liabilities incurred in previous years, [13] yet since before the investigation began, has been the beneficiary of voluntary import

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[8](...continued)
prices in the short term due to contracts, the exchange rate movements may not affect import levels on a proportionate basis as they occur.

[9] 19 U.S.C. 1677 (7)(C)(ii) & (iii).

[10] Report at A-51, Table 6.

[11] supra 5.

[12] Report at A-36.

[13] Id. at A-56-57.

restraints and a greatly devalued home currency in a commodity market. [14] [15]

Consistent with the trade bill's instruction to consider the factors in the "context of the business cycle," the petitioner asserts that this industry faces a predictable four year business cycle, which in these cases would have been from 1984 to 1988, with the predictable trough occurring in 1986. [16] Therefore, the argument suggests, the domestic industry may be injured although its condition has obviously improved over the investigation period. [17]

I consider the condition of the industry to be improving from a very weakened condition, given the reduced demand in this industry. I have examined the factors required by (7)(C)(iii)(I) and note that there are no

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[14] supra 8.

[15] I do not find a basis in the record to accept the petitioner's argument in response to a question of Commissioner Rohr, that the industry is injured because it had 1988 losses compared to profits of the four basic industries cited, namely primary metal, iron and steel, fabricated metal products, and machinery, except electrical. See Petitioner's Response to Questions of Commission and Staff at 37.

There is no suggestion that there is any correlation between these industries' net profits and the new steel rails business over any extended period of time. Further, the 1988 financials of the other industries cited, especially iron and steel and machinery, may have been more directly and positively influenced by the fact that at the end of 1988, the United States had experienced seventy five uninterrupted months of economic expansion. See The Federal Reserve Bank of St. Louis, Review, Vol. 71, No. 2, at 11.

[16] See Transcript of the Hearing at 62 and Petitioner's Post Hearing Brief at 3. At page 65, Mr. Stewart asserts:

> it is expected that there will be an upturn, some upturn in the business of the railroads because the data which we have submitted shows there is a definite cycle and we are moving into the upturn.

[17] There is no basis on the record to either dismiss or accept the petitioner's assertion without looking to the volume and price effects of the subject imports.

actual declines in output, sales, market share, net profits, or utilization of capacity. In fact, there are improvements in these categories from 1986 through 1988. [18] I also note the improved net cash flow position of the domestic industry, [19] and that the other economic factors set forth in section (7)(C)(iii)(III) - inventories, employment, wages, growth, and investment, do not show any substantial adverse trends. [20]

Despite improvements in these trends, I do not conclude that the domestic industry is not materially injured, although the trends may support this conclusion. Given the improved, yet still troubling, profitability data and the lack of basis on the record to make any conclusions in this regard of whether present material injury exists, and to address the petitioner's assertion that the improvements in this industry are merely driven by cyclical trends and thus mask the injury that exists, I find it particularly important in these cases not to make a determination of "no material injury," based solely on the performance trends. Instead, I go on to determine whether the subject imports have been a cause of material injury to a domestic industry, by analyzing the volume and price effects of the subject imports. My rationale is supported by the Court of International Trade and Congress. [21]

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[18] Report at A-41, Table 2 (regarding production - output, capacity utilization), at A-51, Table 6 (regarding sales and net profits), and at A-82, Table 15a (regarding market share).

[19] Id. at A-51, Table 6.

[20] Id. at A-45 (regarding inventories), at A-46, Table 4 (regarding employment and wages), at A-48, Table 5 (regarding growth, i.e. net sales), and at A-61, Table 10 (regarding investment, i.e. capital expenditures).

[21] See USX Corp. v. United States, 11 CIT ___, 655 F. Supp. 487, 490 (1987) ("[T]he fact that an industry has been lifted out of a recession does not automatically trigger a conclusion that foreign imports are not adversely affecting the domestic industry."); Mirrors, 12 CIT ____, 696 F. Supp. at 647

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IV. No Material Injury by Reason of the Subject Imports. [22] [23]

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[21](...continued)
Senate Report No. 1385, 90th Cong., 2d Sess., Pt. 2, 11 (1968) reprinted in 1968 U.S. Code Cong. & Admin. News 4539, 4548 ("An industry which is prospering can be injured by dumped imports..."); Senate Report No. 71, 100th Cong., 1st Sess. 116 (1987) (temporary trends can mask real harm caused by imports)."

[22] 19 U.S.C. 1677 (7)(B) provides:

> In making determinations under sections 1671(a), 1671(b), 1673b(a), and 1673d(b) of this title, the Commission, in each case-
>
> (i) shall consider--
> (I) the volume of imports of the merchandise, which is the subject of the investigation,
> (II) the effect of imports of that merchandise on prices in the United States for like products, and
> (III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production efforts in the United States; and
>
> (ii) may consider such other economic factors as a relevant to the determination regarding whether there is material injury by reason of imports.
>
> In the notification required under section 1671d(d) or 1673d(d) of this title, as the case may be, the Commission shall explain its analysis of each factor considered under clause (i), and identify each factor considered under clause (ii) and explain in full its relevance to the determination.

The Senate Report to the trade bill stated "Commissioners are required in every case to address the three factors covered by this section, and to identify and explain the relevance of other factors on which it has relied on a case-by-case basis." See S. Rep. No. 71 at 115. The House report indicates that at present "it is difficult to ascertain, from reading a particular Commissioner's opinion, whether the Commissioner in fact considered all factors required under law, and based his or her decision on such factors." See H.R. Rep. 40, Part 1 at 128.

[23] I concur with my colleagues Commissioners Eckes, Rohr and Newquist in considering the imports of Algoma along with the subsidized imports in investigation no. 701-TA-297.

A. The Volume of Imports.

The statute requires a consideration of the volume of the subject imports under investigation and whether such import volumes are significant. [24] From 1986 through 1988, the subject imports increased in volume substantially. [25] This increased volume represents an increase in penetration levels from 1.2% to what I would consider a modest level. [26] The volumes in these cases themselves may be significant, but may not be determinative of material injury by reason of the subject imports, absent other basis on the record that the imports are a cause of material injury to the domestic industry. [27]

B. The Effect of the Subject Imports on Prices.

The next statutory direction is for the Commission to consider and explain "the effect of imports of that merchandise on prices in the United States for the like products."

To accomplish this, our first task is to consider the issue of underselling. [28] The record regarding underselling is mixed. [29] The petitioner

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[24] 19 U.S.C. 1677 (7)(B)(i)(I).

[25] Report at A-77, Table 14.

[26] Id. at A-82, Table 15a.

[27] In a previous steel investigation, the Commission concluded:

> It is our view that, absent other significant evidence of causation, ... market penetration is insufficient to support a finding of material injury by reason of ... imports ...in the context of current conditions facing the domestic ... industry.

See Cold-rolled Carbon Steel Sheet from Brazil, Inv. No. 731-TA-154 (Final), USITC Pub. 1579, September 1984.

[28] 19 U.S.C. 1677 (7)(C)(ii)(I).

The statute has recently been amended so that the Commission consider "underselling" as opposed to "undercutting," in order to emphasize that the

(continued...)

contends that the domestic industry is being injured in the bidding process in that it often has to lower its price to meet a bid from Canadian sources. [30] However, the record does not support the contention that the Canadians are the consistent low bidders to whom the domestic producers must adjust their bids. Clearly, any aggressive buyer does what he can to make the bidding process

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[28](...continued)
Commission is not charged with looking to predatory intent. Underselling percentages provide two useful sources of information to determine the effects of imports on prices, as mandated under statute. First, it provides useful information regarding the actual pricing of the imports relative to the domestic products to provide inferences regarding the effects on prices. Second, significant underselling may also say something about the substitutability of the subject imports for the domestic like products, which is also quite useful in determining the effects of the imports on the prices the domestic producers receive. For instance, imports which are undersold may be of lesser quality or otherwise not identical. Given such product differences to the extent they are supported by the record, imports priced at a lower level than a domestic like product may not have a significant effect on prices received by the domestic producer.

[29] Mr. Stewart, representing the petitioner, confirmed the suggestion of Commissioner Eckes that Canadian actual prices may be higher than U.S. prices. See Transcript of the Hearing at 49.

[30] As Mr. Binder of CF&I contends:

> We believe that in the original quotation round, the Canadians are typically lower than the domestic producers. The railroads use this to renegotiate with the domestic suppliers."

Mr. Binder then confirms his firm's "ignorance of the actual Canadian quoted price."

Given the domestic industry's lack of knowledge as to whether Canadian initial bids are actually lower and by how much, and the fact that the subject imports are not the only source of bid competition to a domestic firm (another domestic firm and VRA countries are also present in the domestic market), the alleged competition in the bidding process is not determinative on the issue of underselling.

Id. at 33 and 37.

competitive. [31] Accordingly, I do not find merit in the contentions that either there is any significant underselling, or that the Canadian bids have a significant role in driving down prices in the bidding process.

Our second task is to consider "the effect of imports of such merchandise otherwise depresses prices or prevents price increases, which otherwise would have occurred, to a significant degree."

In these investigations, it is not clear whether prices have increased or decreased in any uniform manner. [32] It is, therefore, difficult to assess whether there is a basis for any claim of price depression or price suppression. Trends throughout the period of the bid values awarded divided by the quantities [33] and the domestic industry's sales figures divided by the industry's shipments [34], suggest that pricing has remained relatively flat over the period of investigation. However, such a conclusion is biased by the different composition of product specifications in each year. [35]

In order to consider whether price increases, which otherwise would have

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[31] The record points out that the purchasers generally solicit bids from one to five suppliers before contracting out an order. See EC-M-312 at 4. The record also notes the presence in the market of eleven manufacturers, including the two Canadian firms. Id. at 1.

[32] Report starting at A-86.

[33] Report, Table 18.

[34] Id. at A-48, Table 5 and A-43, Table 3.

[35] Both of the above comparisons, the dollar related figure (value awarded in the bids and net sales in the financial section) for each year was divided by the quantity figure (volume awarded in the bids and shipments), to arrive at an average price. This obviously is a rough estimate of an "average price," given the different quantity specifications in each period. New steel rail prices generally vary with weight requirements, with the quantity ordered, and whether the rail is standard carbon, alloy, through hardened, or head hardened.

occurred (in the absence of subject imports), were prevented, one may consider certain basic market relationships and variables. These economic factors include the subject import penetration levels, the excess capacity of the domestic industry, the substitutability of the subject imports for the like product and non-subject imports and other substitutes, the potential supply of non-subject imports and other substitutes, and the sensitivity of demand in this market.

In these investigations, the import penetration levels are modest. To determine "whether price increases had been prevented" by the subject imports, one would assume that lower subject import penetration levels would have a lesser effect on preventing price increases.

Another key variable is the capacity utilization level of the domestic industry. In an analysis of whether significant price increases had been prevented because of the subject imports, lower capacity utilization levels suggest that the presence of the subject imports has a lesser effect on domestic prices. That is, if an industry is operating close to full capacity, the lesser supply available in the absence of the subject imports would logically result in higher prices. Put another way, when a firm has substantial excess capacity it has an incentive to price at lower levels, closer to variable costs. [36] While the industry is experiencing higher capacity utilization levels than it did in 1986 [37], there is still substantial excess capacity.

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[36] The same argument is used in a threat of material injury analysis. That is, if a foreign firm has substantial excess capacity, it has an incentive to sell more product to the U.S. market at lower or "dumped" prices. The same incentive holds for a U.S. producer selling to the U.S. market.

[37] Id. at A-41, Table 2.

Another important element in evaluating the effect of the subject imports on prices is the substitutability of the subject imports for the like product. I believe the subject imports are highly substitutable for the like product. [38] High substitutability of the subject imports for the like product is necessary for there to be significant price effects caused by the subject imports.

Equally important to this evaluation is how substitutable and abundant the supply of non-subject imports and other products are for the subject imports and the domestic like products. In these investigations there is relatively high substitutability between non-subject imports and the subject imports and between non-subject imports and the domestic like product, but this is slightly less relevant than it would be in other contexts because the potential supply is restricted as a result of the VRAs. The record does not show any significant source of non-subject imports other than VRA countries.

As far as other substitutes for the domestic like product are concerned, in many applications relay rails are to a large extent substitutable for new rails. According to the Petitioner, on mainline track (over 20 million ton miles per year) prime rail was laid 66% of the time as replacement track, while relay rail was laid 34% of the time from 1984 to 1988. [39] [40] [41]

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[38] The issue of whether the subject imports are highly substitutable for the domestic like product was not a matter of controversy between the parties at the hearing. The notion of high substitutability was supported by the Petitioner in post hearing briefs and in testimony before the Commission. See Petitioner's Response to Questions from Commission and Staff exhibit 10, page 14, table 2. (recognition of high levels of substitutability) and Transcript of the Hearing, pages 31-2, where Mr. Stewart asks for and receives assurances from Mr. Lewis of Bethlehem that the products are "freely substitutable."

[39] See Pre hearing brief of the petitioner, p. 46.

The final consideration is how sensitive the U.S. market is to changes in prices. If demand was not sensitive to changes in prices, the presence of the lower priced imports would result in a greater impact on prices. That is, a greater supply from subject imports and an insensitive demand could contribute to lower prices. Demand for new steel rails appears to be very sensitive to changes in price. [42] Firms can meet many of their needs with relay rail. [43] Thus, they may avoid or limit purchases of new rail until its pricing is more competitive to relay rail. [44] Given the ability of firms to limit or put off purchases of the like product for many applications, unless it is favorably priced relative to relay rails, the subject imports most likely do not "prevent price increases, which otherwise would have occurred, to a significant degree."

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[40](...continued)
[40] In fact, the total amount of relay rail laid by Class I railroads during 1988 was greater than the total amount of new steel rail laid. Class I railroads have laid more relay rail than new rail since at least 1980. Report at A-36.

[41] It should be noted that the total potential supply of relay rail is the entire rail infrastructure in the United States. The supply of relay rail is replenished each time new rail is laid and then becomes part of the entire potential supply of used rail.

[42] See Post Hearing brief of the Petitioner at 3. The brief asserts that in this industry there is "extreme price sensitivity." Further, the record shows that with new technology, rail can be reconditioned to nearly double the useful life of rail, making the new rail market more sensitive to prices. See Office of Economics Memo EC-M-313 at 13.

[43] See arguments in the above paragraph.

[44] See Transcript of the Hearing at 69. Mr. Stewart, representing the petitioner, recognizes that the supply of relay rail reduces the demand for new rail:

> To the extent (the railroads) use Class I relay rail in their track replacement programs, they do not have a demand for new rail. So there is an impact on the sale of new rail effected by the quantity of Class I relay rail that is available.

Based upon the absence of evidence of any significant underselling or price depression and the presence of evidence suggesting that price increases have not been prevented to a significant degree (relatively low import penetration levels, that large excess capacity existed in the domestic industry, and that a large supply of substitute products have contributed to a high sensitivity of demand to changes in price), I believe that the subject imports have had an insignificant effect on the prices received by the domestic industry. [45]

C. Impact of the Subject Imports on the Domestic Industry.

The third factor to be considered is the impact of the imports on the domestic industry. The absolute changes in these factors were described in my discussion of the condition of the industry and I again note that this industry's condition is improving.

Because of the relatively low import penetration levels, and the moderately high substitutability and abundant supply of relay rails which contributes to the high sensitivity of demand in this market, I do not consider the subject imports to be a cause of material injury to any of the output related indicators, such as employment, shipments, production and capacity utilization. [46]

Given the lack of evidence that the subject imports are having a

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[45] 19 U.S.C. (7)(C)(ii)(I) & (II). The law requires a consideration of both significant underselling and whether price depression or "prevented increases, which otherwise would have occurred, to a significant degree," as a basis in evaluating "the effect of imports of such merchandise on prices."

[46] Since both relay rails and non-subject imports are substitutes for the subject imports, if the modest level of subject imports was removed from the market, much of the subject imports would be replaced by these substitutes. Thus, output of the domestic industry is not significantly affected by the subject imports.

significant effect on either prices or output, there is no basis that the imports are a cause of material injury to the income statement related indices, most notably profits. There is also no basis for believing that these imports have an effect on the domestic industry's ability to invest [47], or on its production and development efforts. Therefore, I conclude that there is no danger in these cases that "temporary trends (may) mask real harm caused by imports." [48]

Given that the domestic industry is showing continued signs of improvement - as measured by actual increases in output, sales, market share, net profits, utilization of capacity and net cash flows, during the period of increased import penetration of the subject imports and given that there is no reason to believe that the subject imports at their current modest level are a cause of material injury, since the subject imports are not having any significant effect on either prices or any of the statutory factors the Commission is required to consider, I conclude that this industry is not materially injured by reason of the subject LTFV and subsidized imports from Canada.

V. No Threat of Material Injury by Reason of the Subject Imports.

In assessing the threat of material injury, the Commission must consider whether a subsidy is involved; increases in capacity or unused capacity in the

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[47] The respondent notes that the petitioner spent $20 million in cash to acquire the "state of the art" Wheeling-Pitt facility, even though it concedes it has no use for this facility. Transcript at 66 and 81. The respondent argues, perhaps with some basis, that the petitioner could have used such funds in more productive areas, such as the head hardened rail market. See Post hearing brief of Algoma, at 9.

[48] supra 21.

exporting country; any rapid increase in import market penetration and likelihood that it will continue; the probability that imports will have a suppressive or depressive effect on domestic prices; any increase in inventories of the subject merchandise in the U.S.; and the potential for product shifting in the foreign country. [49] The Commission is also to consider any other adverse trends that indicate probable injury, and whether these future imports will adversely effect research and development. [50] The statute provides that the Commission must find that any "threat of material injury is real and that actual injury is imminent." The Commission's "determination may not be made on the basis of mere conjecture or supposition." [51]

In my discussion of whether material injury by reason of the subject imports exists, I examined the market penetration of the subject imports, whether the imports had a price suppressive or depressive effect and whether the imports are affecting research and development of derivatives of the like product. [52] There is no reason to repeat that discussion, other than to say that in these respects the subject imports are not a cause of material injury and there is no basis on the record to believe that in the future such imports will be a cause of material injury in these respects.

For the record, I do not consider the increased import penetration in these investigations to be "rapid." Given that the increased Canadian import penetration has to a large extent filled the void of unfilled VRA allocations,

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[49] 19 U.S.C. 1677(7)(F).

[50] Id.

[51] Id.

[52] See pages 231-239 of this opinion.

there is no reason to expect substantial increased subject import penetration. That is, there is no reason to expect the Canadian imports to now begin taking away share from the U.S. producers, who have been gaining share, or for that matter, more share from the countries subject to the quantity restrictions. [53]

The record supports a finding that the respondents did not increase their U.S. share by being the price leaders, or "undersellers," in this market. [54] It makes sense, then, that the subject imports logically benefitted by the relative withdrawal from the market of European and Japanese firms, brought about largely by adverse currency movements. [55] To say that there is a "likelihood" that a U.S. steel industry will be injured by future increased levels of subject imports in the aftermath of a decline of the U.S. dollar relative to the Canadian dollar and other currencies, would be speculative. [56] This Commission has well documented that market shares in steel trade have been heavily influenced by exchange rates for a long time. [57]

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[53] As far as market share is concerned, there are two trends to analyze. Both Canadian and the U.S. firms increased their U.S. market shares over the investigation period. Neither trend is "likely" to continue absent basis on the record.

[54] See supra 27.

[55] supra 8.

[56] In a previous steel case this year, I determined in minority views that a weaker dollar relative to the currency of the exporting country makes threat less likely. See Certain Light-Walled Rectangular Pipes and Tubes from Taiwan, Inv. No. 731-TA-410, USITC Pub. 2169, March 1989 at 65.

[57] The only trend to be analyzed regarding exchange rate movements is, that over the course of this investigation, the Canadian dollar has appreciated in real terms relative to the U.S. dollar (supra 9). This trend contradicts the notion of a threat of increased Canadian subject imports to injurious levels. There is also no basis on the record to predict how the Canadian dollar will fare relative to the U.S. dollar and the currencies of the non-subject countries on foreign exchange markets in the future. In addition, there is no basis in the record that there exists an imminent danger of material injury by

(continued...)

It could be argued from a threat standpoint, that the VRAs increase the likelihood of increased Canadian imports. That is, with potential supply from non-subject countries limited, there is a better chance that the Canadians will direct their efforts to the U.S. market. Based on the record in these cases and under current conditions, there is not an imminent danger that the VRAs will become binding or restrict supply from the non-subject countries in the foreseeable future. In 1988 the largest importer of new steel rails, Japan, filled only 65% of its ceiling and the European Community, which had a slightly smaller U.S. share than Japan, filled only 51% of its ceiling. [58]

I note that over the period of investigation, the ratio of U.S. exports to total shipments for the Canadian producer, Algoma, increased substantially

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[57](...continued)
reason of the subject imports from Canada, irrespective of potential exchange rate changes or even if in real terms, relative exchange rates between the countries participating in the U.S. market remain unchanged. In this decade the domestic steel industries' fortunes have been heavily influenced by both a substantial appreciation and a substantial depreciation of the U.S. dollar. The Commission has recognized this in several Section 332 of the Tariff Act of 1930 investigations.

See U.S. Global Competitiveness: Steel Sheet and Strip Industry, Inv. No. 332-231, USITC Pub. 2050, January 1988, pages 3-31 to 3-41, Annual Survey Concerning Competitive Conditions in the Steel Industry and Industry Efforts to Adjust and Modernize, Inv. No. 332-209, USITC Pub. 2115, September 1988, pages 36-7, The Effects of the Steel Voluntary Restraint Agreements on U.S. Steel-Consuming Industries, Inv. No. 332-270, USITC Pub. 2182, May 1989, pages 10-11, Conditions of Competition between Certain Domestic and Imported Fabricated Structural Steel Products, Inv. 332-181, USITC Pub. 1601, November 1984, page 47, The Effects of Semifinished Steel Imports on the U.S. Iron and Steel Scrap Industry, Inv. No. 332-195, USITC Pub. 1692, May 1985, pages 23-5, The Effects of Restraining U.S. Steel Imports on the Exports of Selected Steel-Consuming Industries, Inv. No. 332-214, USITC Pub. 1788, December 1985, pages 41-47, and The Western U.S. Steel Market: Analysis of Market Conditions and Assessment of the Effects of Voluntary Restraint Agreements on Steel-Producing and Steel Consuming Industries, Inv. No. 332-256, USITC Pub. 2165, March 1989, pages 7-14 to 7-18.

[58] Report at A-77, Table 14 and memo EC-M-312.

from 1986 1988, but decreased in the interim periods from 24.5% in interim 1988 to 18.6% in interim 1989. [59] This means that the U.S. market had become more important to Algoma, but is now of lesser importance.

The Commerce Department's LTFV finding was based on the period from April through September of 1988. Commerce relied upon best available information, supplied by the petitioner, to construct a fair market value in Canada based upon the costs of production. Based on the petitioner's contribution to the record, over the six month period in 1988 Algoma lost considerable money in the U.S. market. [60] It would be speculative to predict any increased imports from Algoma to the U.S. market under these conditions, without other evidence suggesting a business incentive for Algoma. [61] I note the declines in Algoma's imports to the U.S. in the interim 1989 period. [62]

I recognize that the Commerce Department did find countervailable subsidies regarding the Canadian producers other than Algoma. [63] However, in

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[59] See memo INV-M-088, Table 13a.

[60] Report at A-17-18. The Commerce Department relied upon a cost based dumping margin, based upon evidence supplied by the petitioner. The weighted average margins were determined at 38.79% for Algoma (the fair market value in Canada included a statutory 8% profit), meaning that the prices Algoma received in the U.S. during this period were estimated to be substantially below their costs of production, which included a statutory maximum of 10% for GS&A expenses (although the petitioner's estimates were higher), and adjusted for taxes, U.S. credit expenses, and packing. See Federal Register, Vol. 54 No. 148, Thursday August 3, 1989, page 31985.

[61] See Transcript at 111-8. The respondent provides compelling testimony that neither Algoma or Sysco have a logical business incentive or opportunity to expand, or perhaps even maintain current levels of U.S. sales through 1990.

[62] supra 59.

[63] Report at A-17 and appendix B.

1988, the dominant Canadian producer in the U.S. market was Algoma. [64]

Since 1986, Canadian capacity has remained constant. Capacity utilization decreased from 1986 to 1988, but is up considerably in the interim 1989 period from the interim 1988 period. There has also been a large reduction in inventories of the subject imports in Canada. [65] Inventories of the subject imports in the U.S. are up considerably, but represent a relatively small share of U.S. total consumption. [66] The record does not support that there is a potential for product shifting in Canada.

Given the relatively small import penetration levels, a lack of basis in the record from which to assume that they will increase to an injurious level (especially when one takes into account the weaker U.S. dollar relative to the Canadian dollar, the increased domestic market share in the U.S. market since the investigation began and the nonbinding VRAs), the lack of present price suppressive effects of the subject imports and no basis on the record for this to change in the foreseeable future, the relatively small inventories of the subject imports in the U.S. in relation to U.S. consumption, the reduced subject inventory levels in Canada, and the lack of a basis for potential product shifting, I find that the domestic industry is not threatened with material injury by LTFV and subsidized imports from Canada.

For the foregoing reasons, I find that the domestic industry producing new steel rails is not materially injured or threatened with material injury by less than fair value and subsidized imports from Canada.

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[64] Id. at A-82, Memo Table 1.

[65] Id. at A-73, Table 13.

[66] Id. at A-67, Table 12 and A-21, Table 1.

Introduction

Following preliminary determinations by the U.S. Department of Commerce (Commerce) that imports from Canada of new steel rails [1] are being subsidized by the Government of Canada and are being sold in the United States at less than fair value (LTFV), the U.S. International Trade Commission, effective April 18, 1989, instituted investigation No. 701-TA-297 (Final) under section 705(b) of the Tariff Act of 1930 (19 U.S.C. § 1671d(b)) and investigation No. 731-TA-422 (Final) under section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)). These investigations were instituted to determine whether an industry in the United States is materially injured, or threatened with material injury, or whether the establishment of an industry in the United States is materially retarded, by reason of imports of such merchandise.

Notice of the institution of the Commission's final investigations, and of a public hearing to be held in connection therewith, was given by posting copies of the notices in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the Federal Register of April 27, 1989 (54 F.R. 18168). [2] The public hearing was held in Washington, DC, on July 27, 1989; a list of witnesses appearing at the hearing is shown in appendix A. The Commission voted on these investigations on August 24, 1989, and transmitted its determination to the Department of Commerce on September 8, 1989.

[1] For the purposes of these investigations, "new steel rails" include rails, whether or not of alloy steel, provided for in subheadings 7302.10.1020, 7302.10.1040, 7302.10.5000, and 8548.00.00 of the Harmonized Tariff Schedule of the United States (previously classified in items 610.2010, 610.2025, 610.2100, and 688.4280 of the Tariff Schedules of the United States, annotated). Specifically excluded from the scope of these investigations are imports of "light rails," which weigh less than 30 kilograms per meter (60 pounds per yard), such as are used in amusement park rides. "Relay rails," which are used rails that have been taken up from a primary railroad track and are suitable to be reused as rails (such as on a secondary rail line or in a rail yard), are also excluded.

[2] A copy of the Commission's notice appears in app. A. Commerce's notices are presented in app. B.

Background

These investigations result from a petition filed by Bethlehem Steel Corporation, Bethlehem, PA, on September 26, 1988, alleging that an industry in the United States is materially injured or threatened with material injury by reason of subsidized imports and sales in the United States at LTFV of new steel rails from Canada. In response to that petition, the Commission instituted countervailing duty investigation No. 701-TA-297 (Preliminary) under section 703(a) of the Tariff Act of 1930 (19 U.S.C. § 1671b(a)) and antidumping investigation No. 731-TA-422 (Preliminary) under section 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1673b(a)) and, on November 14, 1989, unanimously determined that there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports from Canada of the subject new steel rails. [3]

[3] A copy of the Federal Register notice of the Commssion's preliminary determination appears in app. A.

Previous Commission Investigations Concerning Steel Rails

There have been seven previous Commission investigations concerning steel rails. In October 1982 the Commission determined, pursuant to section 703(a) of the Tariff Act of 1930 (19 U.S.C. § 1671b(a)), that there was a reasonable indication that an industry in the United States was materially injured or threatened with material injury by reason of imports of steel rails from the Federal Republic of Germany, France, the United Kingdom, and Luxembourg, upon which bounties or grants were alleged to be paid (investigations Nos. 701-TA-191-194 (Preliminary)). The Commission also determined, pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1673b(a)), that there was a reasonable indication that an industry in the United States was materially injured or threatened with material injury by reason of imports from the Federal Republic of Germany, France, and the United Kingdom of steel rails that were alleged to be sold in the United States at LTFV (investigations Nos. 731-TA-104-106 (Preliminary)). [4]

On October 21, 1982, representatives of the U.S. Government and the European Community (EC) concluded agreements with respect to imports into the United States of certain steel products from the EC (U.S.-EC Arrangement on Steel). The Arrangement was predicated upon the withdrawal of petitions and termination of all countervailing duty and antidumping investigations, and an undertaking from all petitioners not to file any petitions seeking import relief on the Arrangement products during the period in which the Arrangement was in effect. [5] Pursuant to the stipulations of the Arrangement the petitions were withdrawn and there were no final investigations.

[4] Steel Rails from the Federal Republic of Germany, France, the United Kingdom, and Luxembourg: Invs. Nos. 701-TA-191-194 (Preliminary) and 731-TA-104-106 (Preliminary), USITC Publication 1301, October 1982.

[5] Certain Steel Products from Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands and the United Kingdom; Termination of Countervailing Duty and Antidumping Investigations, Federal Register, Vol. 47, No. 210, Oct. 29, 1982.

The Product

Product description

The imported articles that are the subject of these investigations are new steel rails. The Explanatory Notes to heading 7302 of the Harmonized Tariff Schedule of the United States (HTS) indicate that rails are hot-rolled steel products of either narrow or normal gauge, in any lengths and cross-sectional shapes, for railway and tramway applications, overhead cranes, and similar uses. Standard rails are further distinguished by the applicable statistical reporting numbers as weighing over 30 kilograms per meter, and the latter are called relay rails or rails for re-rolling. There are separate breakouts for new and used rail. Relay rails and rails for re-rolling are excluded from the investigations. Rails having a nominal weight of 30 kilograms or less per meter are referred to as light rails and are also excluded from the investigations.

Rails in the American market are produced to American Railway Engineering Association (AREA) standards for chemical composition, hardness, and size/proportional tolerances. They are designed with a head for wheel treads and for guiding wheel flanges, a web for girder strength, and a base for fastening the rail to its support (**fig. 1**). They differ according to size and weight, metallurgical composition, and end use. Rails are characterized as "standard" or "premium" on the basis of alloy content and hardness. Standard rails are made of carbon steel. Premium rails are those that have been heat treated (tempered) for increased hardness or those made from alloy steel, which is inherently harder and stronger than carbon steel. For the purposes of this report, the term "prime rail" is used to distinguish AREA-specification tee rail (both premium and standard) from industrial, relay, and other (crane, girder, and contact) rail.

There are four common rail shapes: Tee, crane, girder, and contact (fig.1). Tee rails (so named because they resemble the letter "T") are the most common, and are used in opentrack construction; most mainline track sections are made with tee rails weighing between 115 and 140 pounds per yard. Mainline rails are now commonly produced in lengths of 78 to 82 feet (a recent change from the 39-foot length that was standard).

Crane rails are similar in shape to tee rails, with variations in the shape and dimensions of the head, web, and base. Crane rails are designed to carry heavy

Figure 1
Rail shapes by type

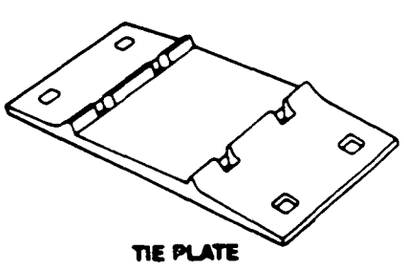
RAILS, JOINT BARS AND TIE PLATES

Bethlehem steel rails are used to form a continuous runway of track to carry moving wheel loads of railroad rolling stock, overhead and gantry cranes, transit vehicles, and miscellaneous mining and industrial equipment.

Rails are designed with a ***head*** for contact with wheel treads and for guiding wheel flanges, a ***web*** for girder strength, and a ***base*** for bearing and for fastening the rail to its support. For various loading conditions, the size and proportion of the head, web, and base will vary.

All Bethlehem rails are manufactured at Steelton, Pa., of superior quality continuous cast steel, and can be furnished control-cooled, end-hardened, or fully heat-treated.

For more information on steelmaking for railroad rails, see page 1-15.



TIE PLATE

The four general types of rail rolled by Bethlehem are:

Standard Tee Rails—Rails having a nominal weight greater than 60 lb per yard and having a tee shaped configuration.

Crane Rails—Rails with a shorter and thicker web, larger head, and thicker base than tee rails. Crane rails usually carry very heavy concentrated loads at slow speeds.

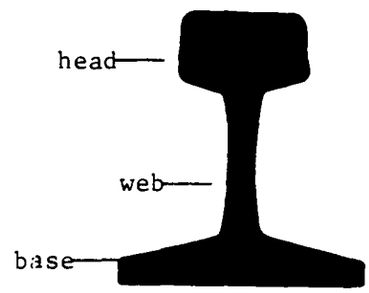
Girder Rails—Rails rolled with a raised lip which provides a channel for a moving wheel flange. Girder rails are generally imbedded in pavement and the lip guards against pavement encroachment.

Contact Rails—Rails used to conduct current for electric transit systems. It is important that contact rails have a low electrical resistance.

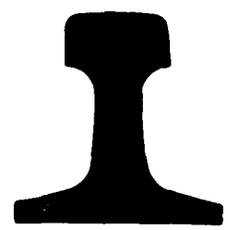
Joint bars (also known as splice bars or fish plates) are used in pairs to bolt together the ends of abutting rails. The bars are I- or L-shaped and are attached in the web area of each side of the rail.

Tie plates are placed under rails on wood ties to give the rails the desired cant, hold the rail to gauge, protect the tie, and distribute the wheel load to the tie.

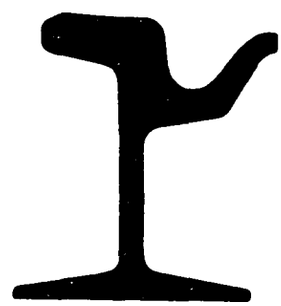
Details on rails, joint bars and tie plates are contained in this section.



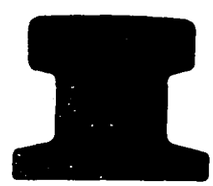
TEE RAIL



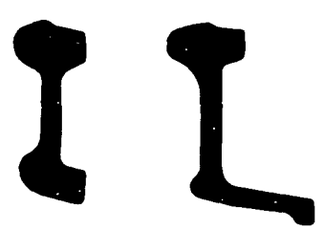
CRANE RAIL



GIRDER RAIL



CONTACT RAIL



JOINT BARS

Source: Bethlehem Steel Corporation

concentrated loads at slow speeds, and are produced to the specifications of individual rail customers. Their principal use is on crane runways.

Girder rails differ from standard and crane rails in that they are not symmetrical in section, having a beam-type base and a grooved head, together with a flange projecting off the grooved head to prevent encroachment by the pavement in which they are usually embedded. Tee and crane rails are produced to American Railway Engineer Association and Federal Railway Administration standards; girder rails are produced to American Society for Testing Materials (ASTM) standards. Their standard length is 60 to 62 feet.

Contact rails, classified as electrical apparatus used for carrying electricity, do not resemble tee, crane, or girder rails, in that contact rails resemble the letter "I" and their use is not for bearing loads or providing a wheel runway, but for conducting electricity. It is important for contact rails to have a low electrical resistance.

Rails are further classified by a number of quality criteria, including hardness, chemical composition, and metal cleanliness. Hardness is the principal criterion by which wear may be analyzed---the harder a rail or rail head is, the longer its service life. Hardness may be achieved through metallurgy (e.g., adhering to strict tolerance levels in carbon, molybdenum, chrome-vanadium, or silicon levels), or through a tempering treatment. Cleanliness is a measure of the nonferrous inclusions in the rail, such as silicon or aluminum. Weight, measured by the industry in pounds per linear yard, is a function of height and thicknesses of head, web, and base of a rail; an increase in section weight provides improved section properties such as greater strength and additional headwear. Hardness and cleanliness are to a great extent achieved in the basic steelmaking process, whereas weight and shape are achieved in rolling operations. [6]

[6] The AREA sets the standards for premium and standard grade rails based on the Brinell Hardness Number, a standard measure of hardness. The determination is made by driving a small tungsten ball with a known force into the surface of the rail and measuring the diameter of the imprint. The imprint is then converted to a Brinell Hardness Number. To be acceptable under AREA standards, carbon rails under 115 pounds per yard must measure 248 minimum on the Brinell Hardness scale; those over 115 pounds per yard, 285 minimum; and high-strength rails, 341-388. See app. C for an excerpt from the AREA "Specifications for Steel Rails," 1988 revision.

Manufacturing processes

Rails are manufactured in steelmaking plants by batch-refining cold iron, scrap, limestone, and other refining agents in a basic oxygen furnace (BOF) or an electric arc furnace (EAF) to a desired chemistry. [7] After refining, the molten steel is tapped from the furnace into a large refractory-lined ladle, where further refining and deoxidation of the steel occurs. The molten steel is also usually stirred with argon or nitrogen gas to promote homogeneous mixing of additives, to fine-tune the chemistry, and to float out additional nonmetallic inclusions. The ladle of steel is then processed through a continuous caster into blooms or poured into an ingot mold. Ladle metallurgy, vacuum degassing, and continuous casting improve yields and quality of the steel.

Rails can be made directly from continuous-cast blooms or ingot-rolled blooms. [8] In either case the rail section is hot formed by passing the product through a series of grooved rollers that progressively and gradually develop the rail into its desired contour and shape. In a typical mill, the bloom is roll-passed 10 to 15 times through a series of roughing, intermediate, and finishing stands (the total number of passes varies with the equipment used). After the rail exits the final pass, it is hot sawed to desired length, cambered, and allowed to cool to 750-1,000° F. It is then charged into an insulated cooling box and control cooled to 300° F. Control cooling helps eliminate hydrogen gas, which may cause internal fractures or ruptures in the rail. (The control-cooling process may be bypassed by eliminating hydrogen gas from the molten steel before casting the steel into blooms; the degassing process requires specialized equipment for maintaining molten steel in a vacuum.) After control cooling for about 10 hours, the rail is unloaded from the control-cooling box, inspected for surface defects, and straightened by either a roller straightener or a gag press. The rail is then sawed to length and inspected. [9]

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[7] There are four U.S. and Canadian steelmaking companies involved in these investigations. Until July 1989, one (Canadian) produced raw steel in an open-hearth furnace, but has since temporarily shut down and is moving to EAF-based production. One (Canadian) produces raw steel in a BOF, while the other two (U.S.) are EAF-based producers.

[8] One of the four producers in the investigations rolls blooms from cast ingots; the other three producers pour steel through continuous casters to produce blooms.

[9] During the entire railmaking process, various chemical, mechanical, and internal tests are performed to insure the quality of the product.

The rails may be heat treated (or tempered) to improve grain structure in the steel, increase head or overall hardness, and to improve wear capability. This also allows the substitution of less costly carbon rail for alloy rail. Heat treatment may involve heating the entire rail in a re-heat furnace, or the head only, by induction heating, followed by quenching (cooling by immersion in oil and/or water) of the heated portion. Head-hardened rails are believed to wear better than through-hardened rails because there is less stress on the web. A tempering process that is part of the production line ("on-line") is less costly than off-line tempering because of lower energy and process costs; head-hardening processes are said to be less costly than through-hardening for the same reasons.

The Japanese producers Nippon Steel and NKK have an on-line tempering process, and have sold their "superrail" in the United States for several years. U.S. producers currently use off-line processes for tempering. CF&I produces a head-hardened rail using an off-line induction heating process based on licensed technology; and Bethlehem uses a re-heat furnace and oil quench process to produce a through-hardened rail. One of the Canadian producers, Algoma, applied for patent protection for its accelerated-water-cooling (AWC) process used to produce on-line head-hardened carbon steel rail in August 1982 (patent granted in December 1984). At the same time the company developed a prototype of the process, but has not yet installed it for rail production. [10] [11] The other Canadian producer, Sydney Steel, expects to produce head-hardened rail using an off-line process when it restarts production in late 1989.

Uses and substitute products

The service demands of a particular installation dictate the type of rail to be used. The principal engineering considerations are the type and wheel loads of the locomotives and cars to be used; the density and speed of traffic; and the physical characteristics of the line (e.g., track alignment, including degree of curvature, track gradients, and subgrade and ballast conditions). American railroads have upgraded mainlines and sections of mainlines with heavier track [12] in response to the new longer and heavier cars coming into

[10] * * *.

[11] * * *.

[12] Since the steel from which any of the four rail types (as shown in fig. 1) would normally be produced is basically the same, the advantage of any one weight rail over another lies in the physical (continued...)

service (heavier axle loads and weights of cars and cargoes). In addition, U.S. railroads are using more heat-treated and alloy rail because of the longer useful life in comparison with standard carbon rail. [13] The railroads utilize various practices to prolong useful rail life as well, including the use of concrete ties, head grinding, rail and locomotive wheel lubrication, and the use of improved freight car trucks and suspension systems. [14]

The trend among the railroads is to purchase more heat-treated and alloy rail; however, given that heat-treated rail is less expensive than alloy rail, it dominates the trend among purchases of new rail. [15] There is also an emphasis on upgrading the quality of purchased rail, so that the specifications have become more restrictive with respect to hardness, steel cleanliness, and improved testing and inspection by the railmaking companies. [16] The railroads began demanding longer length (80-foot versus 39-foot lengths), straighter (less upward curve throughout the length, less sweep on ends), ultrasonically tested, and harder/heavier rails during 1982-84. Several of the rail producers encountered difficulties at one time or another in producing to the revised specifications,

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12(...continued)
differences in each respective section. Each increase in section weight provides an increase in section properties. For example, 132 RE rail is 34 percent stiffer and 25 percent stronger than 115 RE rail and offers 13 percent more head metal (permitting additional head wear); and 140 RE is 48 percent stiffer and 30 percent stronger than 115 RE rail, with 28 percent more head metal. See, "Railway Track Materials," Steel Products Manual, American Iron & Steel Institute (AISI), October 1975.

[13] According to industry sources, the current ratio of purchases of ordinary carbon rail to heat-treated/ alloy rail is about 7:3. These same sources project that the ratio will change to 3:7 within the next 10 years as the railroads continue along the trendline of consuming more heat-treated rail. Bethlehem was reportedly sold out in 1988 for high-wear, heat-treated rail, with orders running full into the first quarter of 1989. See "1989 Rail Use Seen Equal to '88," American Metal Market, Jan. 24, 1989.

[14] "The Market Gets Rolling," Railway Age, November 1988.

[15] According to the petitioner, alloy premium rail costs about the same to produce as on-line head-hardened rail, while fully heat-treated (or through-hardened) rail costs substantially more to produce than does in-line head-hardened rail. Since there are no producers in North America currently using an on-line process, alloy rail may be less expensive than off-line head-hardened rail to produce.

[16] Questionnaire responses. For example, the 1988 AREA specifications are more stringent than the 1986 specifications with respect to ultrasonic testing; both U.S. producers indicated that they have recalibrated or modernized the testing equipment used.

encountered difficulties at one time or another in producing to the revised specifications, or encountered startup problems following facility renovation or the installation of new equipment. [17]

Rails for domestic freight uses are customarily ordered to AREA specifications; several Class I railroads add their own modifications. The AREA specifications prescribe *inter alia* chemical composition, hardness, straightness and section tolerances, testing procedures, and rejectable conditions (see app. C). Specifications for export orders vary according to the purchasing railroad (and the country of importation), and may differ with regard to shape of the base, chemical composition, and weight (in general, railroads in South and Central America, Africa, and Asia purchase lighter-weight rails having bases that taper differently and whose chemical composition differs from AREA specifications).

Standard tee rails are generally considered to be the basic rail of the railroad industry, and are commonly used on main and secondary tangent rail lines. Premium rails (alloy composition rail and/or fully and partially heat-treated rails) are used for heavy service, such as on curves and heavy use lines, because they possess greater resistance to abrasion and limit stress-induced plastic flow (shelling) above that of ordinary carbon rails of the same weight. Mainline track consists of rail designated RE (railway engineer) in the weight categories 100 pounds per yard and higher (more than 40 percent of mainline track currently weighs more than 130 pounds). Rail weighing under 100 pounds per yard is

[17] Bethlehem testified as to that company's quality problems associated with the startup of the continuous rail bloom caster in 1984, and the long-length rail facility in 1986 (problems pertained to straightness and section tolerances, see, "Prepared Q&A Testimony of the Witnesses in Support of the Petition," Mr. Lewis, p. 8); the 1988 AREA specifications for ultrasonic testing have been suspended for about 1 year, allowing Bethlehem to comply. CF&I indicated a major process improvement caused the formation of hydrogen flakes in 1983 and 1984, affecting a minor amount of production (CF&I reportedly had the fewest problems). Although these problems may not have forced the railmakers to "requalify" *per se* with the railroads, both companies convinced the railroads that the problems had been solved, and accepted the return of shipped rail and responsibility for associated charges incurred by the railroads (see, "Prepared Q&A Testimony of the Witnesses in Support of the Petition," pp. 10-12.) Algoma has stated that when that company began producing the longer-length rails, it had to "requalify" for sales to the Class I railroads; the form taken was submission of trackrail samples for testing and technical seminars to convince the railroads of Algoma's product quality (see, "Oral Arguments Before the USITC," Oct. 19, 1988, p. 96.). Algoma experienced a drop in sales to railroads in the United States and Canada (see, "Official Transcript of Proceedings," July 27, 1989, p. 104, Mr. Alex Stewart indicated that Algoma's exports to the United States fell from 55,000 tons per year in 1979 to an average of 14,000 tons per year during 1982-85.).

used in secondary, spur, industrial, and municipal track systems. [18] Lighter rail sections are typically used in industrial yards. Spurs/side tracks may use 90 pounds/yard weight rails, but commonly use 100-115 pounds/yard weight rails.

Most track now laid is of continuous-welded rail, and the use of 80-foot continuous-welded rails has superseded the bolted 39-foot rail sections due to the former's lower installation costs. The railroads weld 80-foot rails together into quarter-mile-long sections of track at their own or contractors' weld plants and transport the strings to the job site on specially designed articulated trains. The use of continuously welded track has led to higher quality standards with regard to end straightness, butt-end angles, and metallurgical quality in the section.

New rails that meet AREA specifications are referred to as "prime rails;" new rails that fail quality inspections for chemical or metallurgical specifications, size, surface imperfections, cosmetic, or other reasons, but which are otherwise usable for non-mainline applications, may be downgraded and sold as "industrial-quality rails." Since steel producers manufacture rails to the specifications of a firm order, industrial rails are a by-product of that production and specific order, and generally constitute less than 5 percent of rail production. Production of industrial rail (and its relationship to prime rail, expressed as a percentage of total production) varies with production variables and/or with changing technology. [19] A railmaking facility will sell industrial rail when the net receipt exceeds the costs of freight and handling and the replacement costs of scrap used in steelmaking.

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[18] Municipalities purchase rail weighing between 90 and 115 pounds/yard, a weight range well below that used by the Class I railroads. A municipality would not purchase industrial rail because of liability concerns, and would tend not to purchase relay rail because its weight would make the rail unsuitable for light-rail transit systems.

[19] * * * has indicated that when the Class I railroads began specifying the longer rail lengths and higher Brinnell hardnesses in 1982-83, the company's product became uncompetitive vis-a-vis the Japanese "superrail" or * * * production * * *. After the company modified its production processes in 1984-85 to become competitive, it initially experienced a greater number of rejects than before the modification. Over time, the amount of industrial rail produced has declined. On the whole, * * * "production" of industrial quality rail has varied between *** and *** percent of total rail production, but is consistent with the experience of * * *, which reported *** to *** percent. Officials at * * *. CF&I's production of industrial quality rail has varied as well, but accounts for less than *** percent of total production. See, "Prepared Q&A Testimony of the Witnesses in Support of the Petition," July 27, 1989, Mr. Binder, p. 19.

Since most rail is produced to an order, and the steel producers do not stock inventories of rails, it is unlikely that standard rail would be intentionally downgraded and sold as industrial rail to dispose of "inventory." [20] On the other hand, a rail producer might accumulate an inventory of industrial quality rails, waiting to see if they might be sold (or judging the market for replacement scrap). There can be a situation when the off-specification rail is of a weight or section for which there is simply no secondary market demand. In those instances the industrial quality rail most likely will be sold as re-roll rail (the head is cut from the web and rolled as a bar product) or scrap. [21]

Industrial rail is generally purchased for applications where there normally is diminished rail traffic and speeds (e.g., track in the yards of industrial facilities and private sidings, and for limited use on Class II and III rail lines in their spurs and side tracks). Thus, to a limited extent, it competes with relay (used) rail. There are many instances where industrial rail would not be used to carry wheeled traffic because of the possible liability should a derailment occur (at least one major railroad will not allow its locomotives to haul freight over industrial rail).

The investigations found no single instance of a purchase by a Class I railroad of industrial-quality rail. Financial considerations tend to favor lighter rail (which is usually relay rail) in industrial applications (e.g., on an industrial site, siding, off-mainline railroad spurs, and side tracks where slow speeds and infrequent use allow lighter rail). Industrial rails can be used to supplement relay track where low volume and low speed characterize usage. Because its industrial base is larger than that of Canada, the United States represents a better market for industrial rail. There are other uses for industrial rail in non-rail applications, such as guide tracks, posts, and light structural shapes.

[20] It is even less likely given * * *, and Algoma's testimony that industrial quality rails are drilled, rendering them unsuitable for welding; moreover, Algoma's quality certificates for industrial quality rail are notated with stipulations regarding use and bolting. See, "Official Transcript of Proceedings," July 27, 1989, Mr. Stewart, p. 146.

[21] "Prepared Q&A Testimony of the Witnesses in Support of the Petition," Mr. Lewis, p. 18.

U.S. tariff treatment

At the legal (rate line) level, the U.S. tariff schedule does not distinguish new rails from used rails, or among types of rail, such as girder from standard tee, or crane from girder. It does differentiate between carbon and alloy steel rails and classifies contact rail differently from other types of rail. Industrial rails are not separately described. Imports of carbon steel rails are classified in HTS subheading 7302.10.10 and those of alloy steel are classified in HTS subheading 7302.10.50 [22]. The current column 1-general rate of duty for carbon steel rails is 0.3 percent *ad valorem*; for alloy steel rails it is 3.5 percent *ad valorem*. Contact rails fall under HTS subheading 8548.00.00 and are subject to a 3.9 percent *ad valorem* column 1-general rate of duty.

Imports from Caribbean Basin Economic Recovery Act countries and Israel (and from Generalized System of Preference-eligible countries under subheading 8548.00.00) are given preferential treatment, and are accorded a duty rate of free. The Canada-United States Free-Trade Agreement (FTA) provides for a staged reduction in duties to free within 10 years. Current FTA duty rates for goods originating in the territory of Canada are 0.2 percent *ad valorem* (HTS subheading 7302.10.10), 3.1 percent *ad valorem* (7302.10.50), and 3.5 percent *ad valorem* (8548.00.00).

Voluntary Restraint Agreements concerning new steel rails

Imports of rails have been subject to ex-tariff quantitative limitations under the voluntary restraint agreements (VRAs) negotiated with 19 countries and the EC (excluding Portugal and Spain, which negotiated separate agreements) since 1984. The VRAs succeeded the U.S.-EC Arrangement on Steel, expanding product and country coverage. All current suppliers of rails, except Canada, are subject to either a market share (in the case of the EC and Japan) or a quota agreement (in the case of Korea) limiting import quantities. The market share agreement with the EC provides for a category of rails separate from the more general category of structural products and limits imports to 8.9 percent of apparent domestic consumption. The Japanese VRA provides for a separate subcategory of rails and rail products (e.g., tie bars, plates) limiting imports to 10.25 percent of apparent domestic consumption. The VRA with Korea provides for a fixed quantity of 2,625 metric tons.

[22] An excerpt from the HTS is presented in app. D.

The VRAs do not distinguish between standard carbon steel rails and alloy steel rails. Overall, imports of carbon and alloy steel rails have declined, in part replaced by imports of heat-treated carbon steel rails. Imports from Japan of head-hardened carbon steel rails rose from zero to 20,000 tons during 1984-88; [23] imports from West Germany fell from 34,837 tons in 1986 to 15,502 tons in 1988; imports from France fell from 13,296 tons in 1986 to 308 tons in 1988; and imports from the United Kingdom rose in 1986-87 before falling to 3,707 tons (all head-hardened rail) in 1988.

[23] "USA seeks rail imports from Japan," Metal Bulletin, Aug. 4, 1988. The article notes that NKK and Nippon Steel registered sales of heat-treated rails totaling 20,000 metric tons (mt) to Union Pacific, 25,000 mt to Burlington Northern, 20,000 mt to Southern Railroad, 25,000 mt to Canadian Pacific, and 3,000 mt to Canadian National during 1988. Most of the Japanese exports are heat-treated rails.

The Nature and Extent of Subsidies and Sales at LTFV

Subsidies

On August 3, 1989, Commerce published in the Federal Register (54 F.R. 31991) its final countervailing duty determination that certain benefits which constitute subsidies within the meaning of section 701 of the Tariff Act of 1930, as amended, are being provided to producers, manufacturers, or exporters in Canada of new steel rail. [24] The estimated net subsidy was found to be **113.56 percent** *ad valorem* for all manufacturers, producers, or exporters in Canada, except Algoma Steel Corp., which was excluded from the determination. The estimated net subsidy for Algoma was **0.24 percent** *ad valorem*, which is *de minimis*. A separate estimated net subsidy was calculated for Algoma because its rate differed significantly from the country-wide rate. The period used by Commerce in its investigation was calendar year 1987 for Algoma and April 1, 1987 to March 31, 1988, for Sydney.

LTFV sales

Also on August 3, 1989, Commerce published in the Federal Register (54 F.R. 31934) its final determination that new steel rails from Canada are being, or are likely to be, sold in the United States at LTFV, as provided in section 733 of the Tariff Act of 1930, as amended. [25] The period of Commerce's LTFV investigation was April 1, 1988, through September 30, 1988.

In its final determination, Commerce compared the U.S. price with the foreign-market value. Furthermore, Commerce determined that the use of best information available was appropriate for foreign-market value. As best information available, Commerce used the constructed values for certain types of new steel rail. These constructed values were developed from costs presented in the Petitioner's allegations of sales below the cost of production.

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[24] A copy of this notice appears in app. B.

[25] A copy of this notice appears in app. B.

The estimated weighted-average margins were determined to be as follows:

Manufacturer/Producer/Exporter	Weighted-average margin (In percent)
Algoma Steel Corp. Ltd.	38.79
All others	38.79

Commerce directed the U.S. Customs Service to continue to suspend liquidation of all entries of new steel rail from Canada that are entered or withdrawn from warehouse for consumption on or after March 13, 1989, the date of publication of the preliminary determination in the Federal Register. Customs will continue to require a cash deposit or posting of a bond equal to the estimated amounts by which the foreign-market value of new steel rails from Canada exceeds the United States price.

The Domestic Market

U.S. consumption

Data on apparent U.S. consumption of new steel rails are presented in **figure 2 and table 1.** Both the figure and the table present consumption for prime rail, industrial rail, other rail (i.e., crane, girder, and contact rail), and total consumption of all new steel rail.

Total apparent consumption of new steel rails declined 8.4 percent from 1986 to 1987 and increased *** percent from 1987 to 1988 on the basis of data presented in the table. For the entire period, 1986 through 1988, apparent consumption decreased * * *, by *** percent, from 590,841 to *** tons. Prime rail consumption declined 10.2 percent from 1986 to 1987, but increased *** percent from 1987 to 1988. Industrial rail consumption declined by 4.2 percent from 1986 to 1987, but increased *** percent from 1987 to 1988.

Figures 3a, 3b, and 3c present market share data for U.S. producers, imports from Canada, and all other imports, by rail types. At the request of counsel for the Petitioner, U.S. steel rail producers' selected data for 1984 and 1985 are presented in appendix E.

U.S. producers

There are currently two U.S. producers, both publicly owned companies: Bethlehem Steel Corp. (Bethlehem), and CF&I Steel Corp. (CF&I). Their domestic railmaking operations in the United States are as follows: [26]

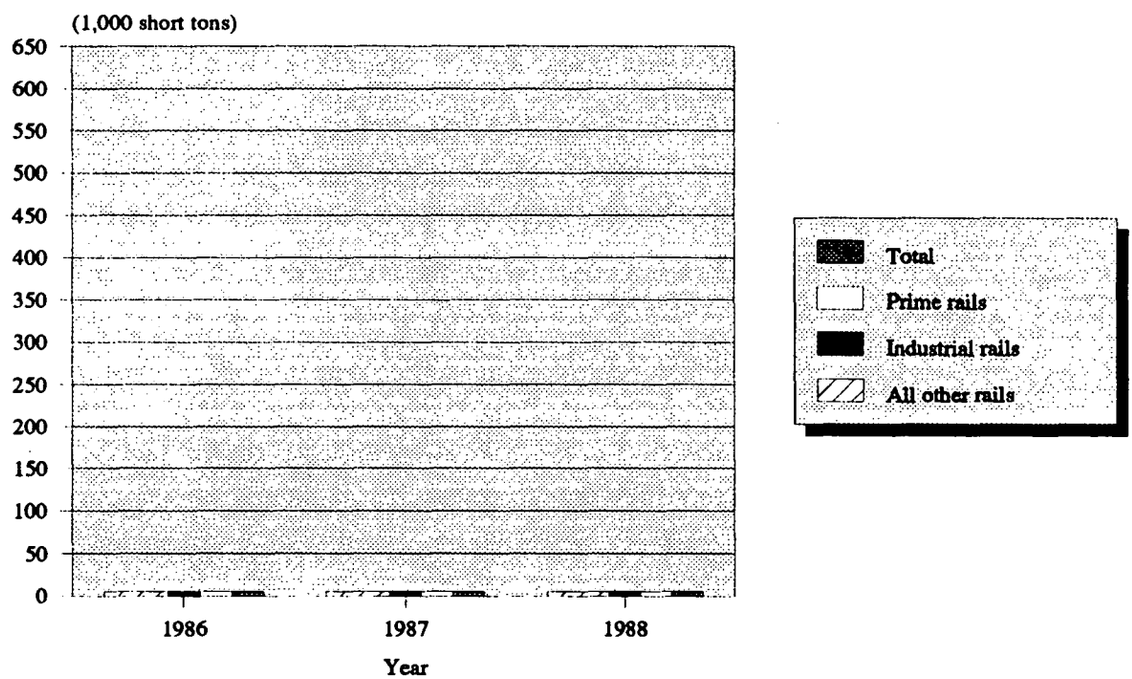
Bethlehem produces steel rails at its Steelton, PA, plant. [27] The company has modernized the plant several times. It eliminated the blast furnaces and coke ovens in

[26] Based on public documents, including Steel Industry Data Handbook, The US 1987, 33 Metal Producing; and Iron and Steel Works of the United States and Canada, 1984, American Iron and Steel Institute. Information is supplemented by questionnaire responses where noted.

[27] Bethlehem closed its rail mill at Lackawana, NY, in 1977, although it continues to melt raw steel and roll bar products at that location.

Figure 2

Apparent U.S. consumption of new steel rails, by rail types, 1986-88 *



Source: Table 1.

* These data are confidential.

Table 1
New steel rails: U.S. rail mills' shipments, U.S. imports, U.S. exports, and apparent U.S. consumption, by rail type, 1986-88, January-March 1988, and January-March 1989

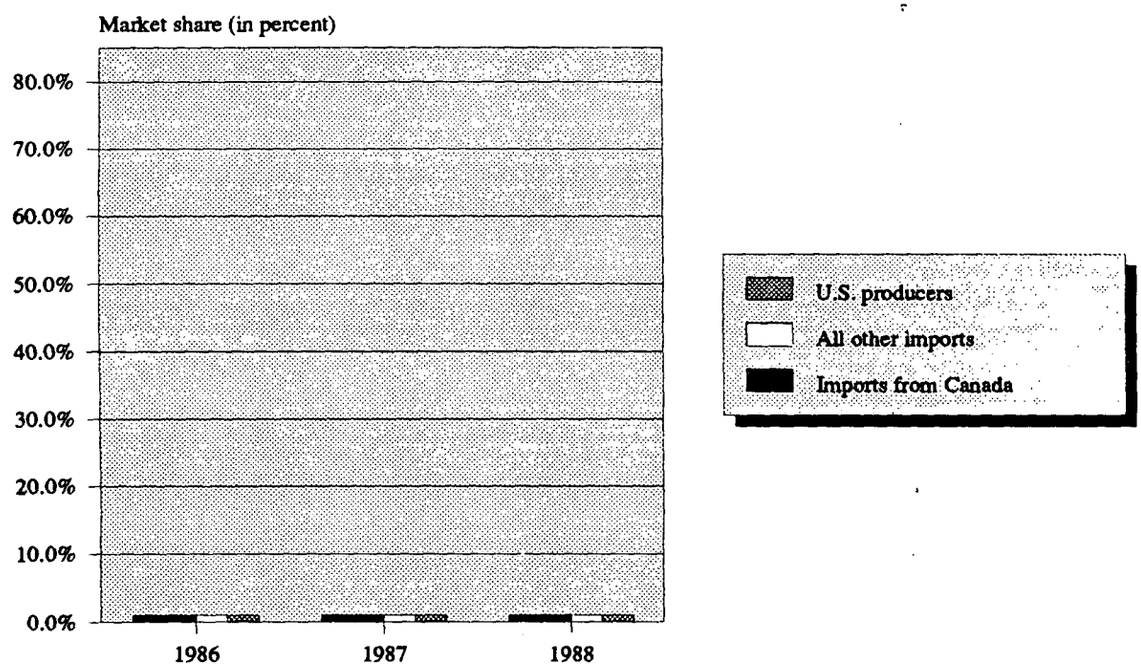
(In short tons)

Item	1986	1987	1988	January-March-- 1988	1989
U.S. rail mills' shipments: 1/					
Prime rail	425,586	385,630	***	***	***
Industrial rail	13,162	8,393	***	***	***
All other rail 2/	8,357	7,551	***	***	***
Company transfers	14,128	20,990	***	***	***
Total	461,233	422,564	***	***	***
U.S. imports from--					
Canada: 3/					
Prime rail	***	***	***	***	***
Industrial rail	***	***	***	***	***
All other rail	***	***	***	***	***
Total	***	***	***	***	***
All other countries: 4/	122,017	97,003	75,055	34,708	27,267
Total all imports:					
Prime rail	***	***	***	***	***
Industrial rail	***	***	***	***	***
All other rail	***	***	***	***	***
Total	***	***	***	***	***
U.S. exports 5/	1,563	5,189	***	***	***
Apparent U.S. consumption:					
Prime rail	***	***	***	***	***
Industrial rail	***	***	***	***	***
All other rail	***	***	***	***	***
Total 6/	***	***	***	***	***

1/ Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.
2/ Includes crane, girder, and electrical rail.
3/ Compiled from Canadian producers' export shipments to the United States based on data submitted by counsel for respondents.
4/ Compiled from official statistics of the U.S. Department of Commerce. Imports from all other countries, except Canada, are believed to be prime rails.
5/ Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission. All U.S. exports are believed to be prime rails.
6/ This total includes company transfers of the U.S. mills. Company transfer data were not distinguished by rail type, therefore these shipments could not be separated for this table.

Figure 3a

Market shares of the new rail market, 1986-88*

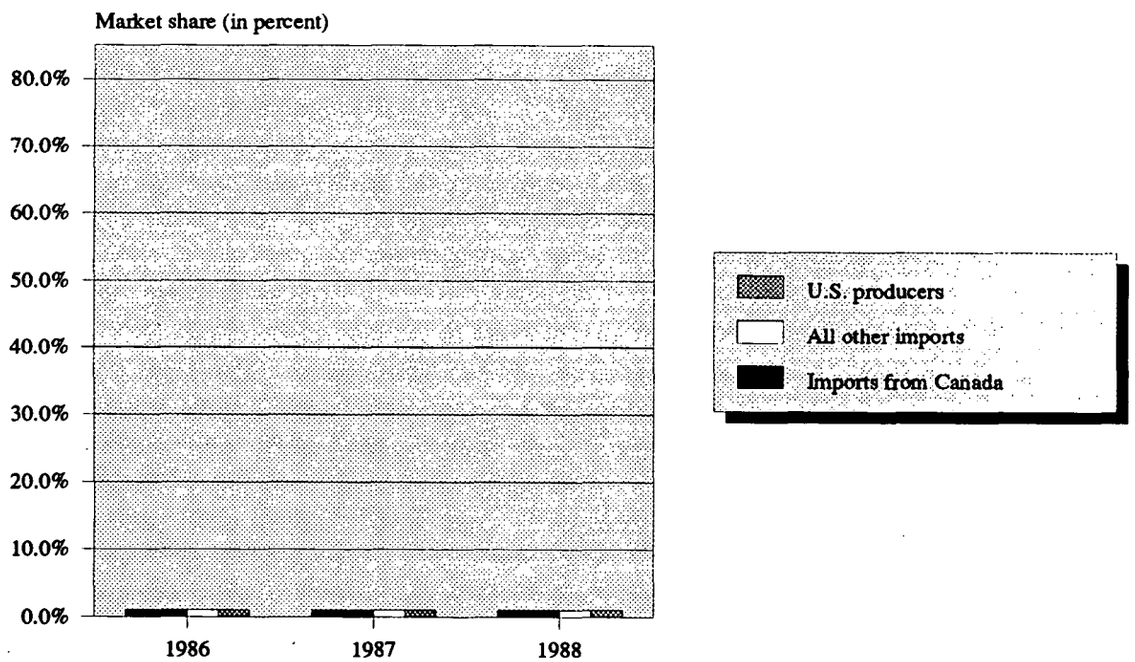


Source: Table 1

* These data are confidential.

Figure 3b

Market shares of the prime rail market, 1986-88*

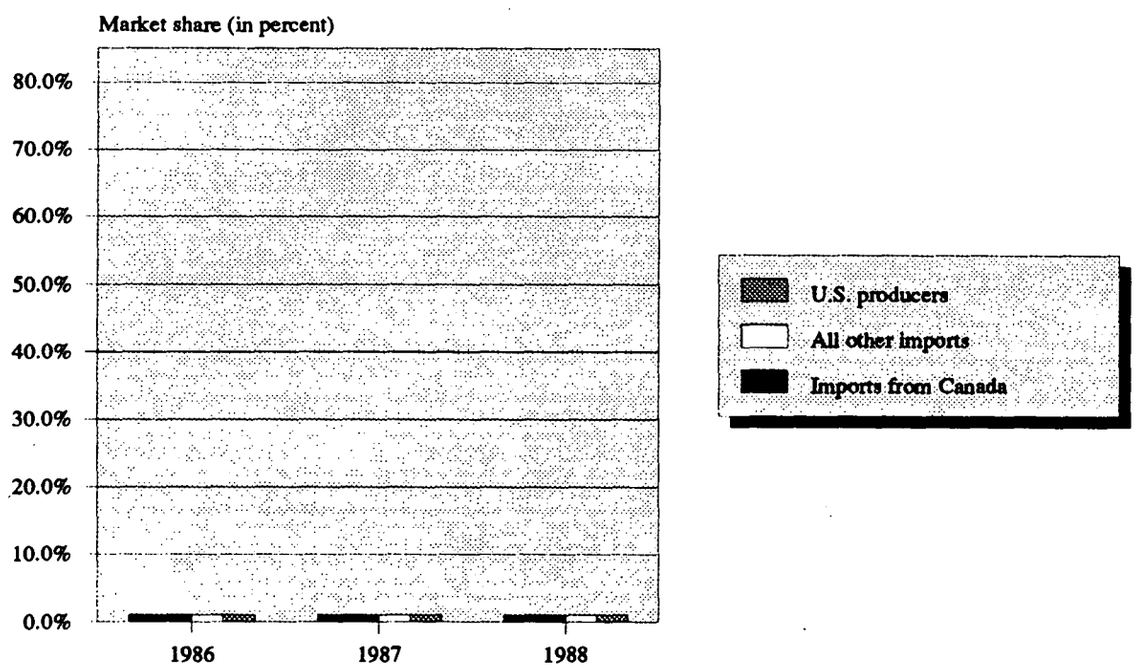


Source: Table 1

* These data are confidential.

Figure 3c

Market shares of the industrial rail market, 1986-88*



Source: Table 1

* These data are confidential.

1960 by moving to a cold-charge, scrap and iron open-hearth operation. [28] Three electric-arc furnaces were installed during 1968-69, eliminating the open hearth; ladle metallurgy capability, allowing improved temperature and alloy control and lance stirring, was added in 1982; and a three-strand continuous bloom caster was added in 1983. Various improvements have been made to the rail finishing equipment as well: Bethlehem installed a roller-straightener in 1978, ultrasonic testing (to confirm the internal quality of the rail in non-destructive ways), and other inspection equipment. The company started producing "double-length" rail (80 feet) in late 1986. During 1984-89, heat-treating capacity to produce a through-hardened rail was doubled. Planned investment projects total $40 million and include installing a ladle furnace, vacuum degassing, and in-line head hardening.

Bethlehem's annual continuous casting capacity is 1.329 million tons, its annual hot rolling capacity for blooms is 1.325 million tons, and its annual hot rolling capacity for rails is 1.16 million tons. [29] Actual capability is lower than these rated capacities, and depends upon raw steel output (which in turn is a function of how many of the EAFs are utilized), as well as rolling and finishing schedules. Not all three furnaces are being used at the present time, reducing melt capacity. The company allocates melt and rolling capacity roughly equally among blooms and billets for the merchant market, pipe, and rail. Thus, capacity is said to be about 400,000 tons per year for rails from cast blooms. [30]

The company produces an 80-foot (and shorter lengths) ordinary and through-hardened carbon steel rail. It is investigating several processes that would allow it to go to an on-line head-hardening process to supplement or replace the through-hardening process. It is the only facility in the country that rolls girder rails and girder guard rails; it makes contact rails and crane rails as well.

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[28] This involved melting cold iron and steel scrap in an open-hearth furnace. Since the Steelton facility was built in the 1860s, the open hearth was presumably already on the site and did not require construction. See "Prepared Q&A Testimony of the Witnesses in Support of the Petition," July 27, 1989, Mr. Lewis, p. 1.

[29] Iron and Steel Works of the United States and Canada, 1984, American Iron & Steel Institute, p. 44, based on 20 turns (or work shifts) per week.

[30] Steelton Blooms, Bethlehem Shape and Rail Products Div., product catalog. According to Bethlehem's questionnaire response, primary (raw steelmaking) capacity for all products at Steelton is * * *. Practical capacity for making new steel rails is * * *.

CF&I produces steel rails at its plant in Pueblo, CO. Its steelmaking is EAF-based, and rails are produced by continuous casting of ingots and rolling on a universal mill. The company has retrenched operations since 1983, decreasing melt capacity by more than 50 percent to 800,000 tons per year, while retiring 4 blast furnaces, a coke battery, and 2 BOFs. Peripheral holdings such as land, water, and coal mining rights were sold, and product lines outside the rail niche were reduced or discontinued. Employment dropped from 6,000 workers in 1983 to 2,100 workers in 1987.

At the same time, CF&I modernized by adding capacity to its two EAFs, a ladle treatment center and argon stirring (allowing fine-tuning of the quality of the raw steel), and a continuous caster. Previous improvements to the rolling and finishing equipment allowed the company to become one of the first in North America to produce long-length 80-foot rails; these included a computer-controlled 45-inch blooming mill, 36-inch breakdown mill, intermediate roller, controlled cooling boxes, roller straightener, and new enders and drills. The company completed the installation of a rail-hardening facility in 1986.

Annual rail rolling capacity on its universal mill is 1.25 million tons, [31] but is, of course, limited by melt capacity. [32] It produces a 78-foot, high-silicon carbon rail and a premium alloy rail of chromium-molybdenum. CF&I licensed a patented process from BHP, an Australian conglomerate, for off-line head hardening via induction heating and has produced a head-hardened standard AREA rail in 80-foot lengths since 1986. CF&I owns a weld facility adjacent to its steel rail making facility and has contracted welding services to the railroads. [33]

There were several other U.S. producers in recent years. Wheeling-Pittsburgh (W-P) broke ground in 1979 and began rail production on a new combination rail/structural mill

[31] Iron and Steel Works of the United States and Canada, 1988, AISI.

[32] According to the firm's questionnaire response, CF&I's raw steelmaking capacity is *** tons and its rail-making capacity is estimated to be *** tons.

[33] * * *.

at Monessen, PA, [34] in July-September 1981. It still is the newest rail rolling mill in the United States. [35] The company brought a 5-strand Mannesman-DeMag continuous bloom caster on line in the second quarter of 1983, with an annual casting capacity of 840,000 tons. [36] The rolling capacity of the mill was 400,000 tons annually for rails, tie-plates, and wide-flange beams [37] (the Economic Development Administration (EDA) projected full production in 1984-85 of 282,000 tons of rails and 64,000 tons of plates). [38] The company was capable of rolling "double-length" tee rails up to 82 feet in length, as well as producing an alloy premium rail.

When the EDA publicly announced W-P's application under section 702 of the Public Works and Economic Development Act, both of the other two competing rail manufacturers raised "strong objections," arguing *inter alia*, that the rail mill would increase the production of goods at a time when there was not sufficient demand for them, thereby violating section 702 provisions. [39]

The decision to cease production was made in December 1986; shipments stopped in April 1987, about 2 years after W-P entered bankruptcy proceedings (in addition, a labor strike caused production to cease between July and October of 1985, although the company covered sales from inventory). Of the existing inventory of rails (about 100,000 tons), approximately *** percent was sold directly to several Class I railroads for approximately

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[34] There were covenants imposed in the Guaranty Agreement that prohibited the conversion of the rail rolling mill to produce any other product such as wide-flange beams during the first 30 months after acceptance of the Guaranty Agreement. See, Section 702 Study on Wheeling-Pittsburgh Steel Corp., Rail and Tie Plate Production, Economic Development Administration, U.S. Dept. of Commerce, August 1979. Although the rolling mill is a universal mill, additional investment would have been entailed to achieve production capability outside of rails, and none was contemplated at the time.

[35] The rolling mill at Monessen is a state-of-the-art universal mill, and almost completely computer controlled. See, "Prepared Q&A Testimony of the Witnesses in Support of the Petition," July 27, 1989, Mr. Lewis, p. 3.

[36] Directory of Iron and Steel Works of the United States and Canada, 1984, AISI.

[37] Ibid.

[38] Section 702 Study on Wheeling-Pittsburgh Steel Corp., Rail and Tie Plate Production, U.S. Department of Commerce, August 1979.

[39] Section 702 Study, citing letters from counsel for CF&I and Bethlehem; U.S. Steel also opposed expansion of domestic capacity.

*** per ton; the remaining *** percent was sold to A&K Railway Materials. [40] [41] With regard to disposition of the Monessen facility following W-P's bankruptcy petition, ownership of the rail rolling mill was returned to the EDA, a part of Commerce, which had guaranteed construction bonds of about $100 million to build the mill. Bethlehem purchased this part of the facility for $20 million and assumed the environmental clean-up costs, about $600,000, at yearend 1988. Sharon Steel bought the steelmaking assets at the Monessen facility (the coke ovens, blast furnace, and caster), in the second quarter of 1988.

There are two other companies that produce or produced steel rails. One is Steel of West Virginia, which started up in the third quarter of 1982. This company only manufactures rails weighing under 60 pounds (and most commonly weighing between 15 and 25 pounds) per yard, for the mining and quarrying industries. It produces light rails on a bar mill and rolls assorted special shapes, and does not have the capability of producing standard rails at the present time.

The other company is U.S. Steel (USS), [42] which produced standard tee rails of 39 feet in length at its facility at Fairfield, AL, through the end of 1981. USS ceased production at Fairfield at that time, and, although the company planned to resume production at what were basically new facilities located at its Gary Works, South Chicago, IL, it never did. The company has stated that rail sales in 1984 were based on inventory. USS produced heat-treated and alloy premium rails. Part of the finishing equipment at Fairfield was sold to Algoma and the remainder of the rail rolling mill has been sold to Sydney; both purchasers are Canadian rail producers.

U.S. importers

The U.S. Customs Service identified about 30 significant importers of steel rails from Canada. * * * are believed to be the sole importers into the United States of new steel rails from Canada. All of the other importers of record brought in used rail and scrap rail.

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[40] "Prepared Q&A Testimony of the Witnesses in Support of the Petition," July 27, 1989, Mr. Lewis, p. 21.

[41] See U.S. importers' inventories section for a further discussion of this transaction.

[42] U.S. Steel changed its corporate name to USX Corp. on July 9, 1986, to reflect diversification into non-steel businesses (primarily the purchase of Marathon Oil).

Both importer and purchaser questionnaires were issued in these final investigations. Questionnaires were sent to the two Canadian producers of new steel rails, U.S. importers that were believed to sell new rails, and to the 16 U.S. Class I freight-hauling railroads [43] that were believed to be the principal end users of new steel rails. The Class I railroads reportedly account for more than 90 percent of total U.S. rail freight revenues. In addition to the Class I railroads, there are about 500 unregulated Class II and Class III railroads that may purchase some new rail. The Commission did not send questionnaires to Class II or Class III railroads in either the preliminary or final investigations.

Questionnaire responses were received from the Canadian producers, from the principal importers of new steel rails, and from many of the Class I railroads that are the principal end users of new steel rails.

Marketing considerations and channels of distribution

In the U.S. market, sales of new steel rails by domestic producers and importers or distributors are primarily made to end users. During 1985-88, over 95 percent of all domestically produced steel rails went to railroads for maintenance and construction, with the remainder going to service centers, distributors, and the export market. The largest end-user market was the rail transportation industry, which accounted for more than 93 percent of domestic shipments during this period. Most steel rails consumed domestically are for the replacement, or upgrading, of worn track. Rail consumers are increasing their demand for high-quality rail, consequently there is an increased use of head-hardened or through-hardened rail for mainline use. Several purchasers maintain that there is sufficient domestic capacity to supply domestic consumption of standard rail, but not enough to supply the market demands for head-hardened or premium rail.

Within the broad category of the rail transportation industry there are significant differences in customer perceptions of prime rail, relay rail, and industrial quality rail, as well as differences in the marketing and distribution channels between prime rails and

[43] The Association of American Railroads classifies those freight-hauling systems with annual operating revenues of at least $87.9 million as Class I railroads. The 16 Class I railroads are: Atchison, Topeka and Santa Fe Railway Co.; Burlington Northern Railroad Co.; Chicago and North Western Transportation Co.; Consolidated Rail Corp.; CSX Transportation, Inc.; Denver and Rio Grande Western Railroad; Florida East Coast Railway; Grand Trunk Corp.; Guilford Industries; Illinois Central Railroad; Kansas City Southern Railway; Missouri-Kansas-Texas Railroad; Norfolk Southern Corp.; Soo Line Railroad; Southern Pacific Transportation Co.; and Union Pacific Railroad Corp.

industrial rails. In general, prime rails are sold directly by the rail producers to the railroads (foreign producers tend to use agents in the United States), whereas industrial rails tend to be sold via distributors or other middleman merchants. [44] The Federal Railroad Administration's track records requirements act as a deterrent to the use of industrial quality rail anywhere in a railroad's track system, and inhibit the use of relay rail. [45] In addition, the Class I railroads prefer to maintain input into the production and quality control processes, which they can only do at a producer's facility.

The Class I railroads prefer to purchase directly from the producer for cost reasons as well. In addition, municipalities cannot purchase industrial rails, but may purchase relay rail depending upon the amount of wear and projected usage. Industrial rails compete on a price basis with steel scrap and relay rails, and are sold at a discount of 50 percent to 75 percent of the value of new prime rail. [46]

Sales are made via a bidding process in the case of both the railroads and the municipal transit authorities. Both systems utilize pre-qualification requirements in terms

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[44] The investigations did not discover a single instance of a sale of industrial quality rail to a Class I railroad. Relay rail tends to be cascaded (taken up and re-laid on lesser used sections) within the same railroad or sold to a distributor who merchants it onward. Sydney Steel uses a distributor for sales of all of its rail in the United States. However, the other three U.S. and Canadian producers tend (there are limited exceptions) to sell prime rail directly to the railroads; Algoma, Bethlehem, and CF&I sell all their industrial quality rail through distributors. Both U.S. producers prefer not to sell to distributors and to deal directly with the major railroad lines; they have, on occasion, sold prime rail to distributors, but these transactions are a negligible portion of their production and sales. European and Japanese producers sell prime rail to the railroad lines through their sales agents in the United States, and there do not seem to be any shipments of industrial quality rail from Japan or Europe. Reasons for using the services of a distributor are tied to quality and transaction sizes: the distributor is better suited to handle difficult transactions, where barter or countertrade is involved (e.g., exchanging relay for industrial rail) or track services are to be provided. Second, the lot sizes are smaller, individual rails must be sorted for quality and length, and the rail producer apparently is not willing to handle such operations. Third, there is a qualitative element in that the rail producer does not want to sell off-specification merchandise, so it would prefer to channel those sales through a third party.

[45] Although one Class I railroad engineering department might consider purchasing industrial quality rail, it has never done so * * *. Several other Class I railroads stated they would not purchase industrial quality rail for legal liability reasons; the lines do not want it on hand for fear it would find its way into mainline track (see, Prehearing Brief of the Petitioner, July 20, 1989, pp. 133-34; in particular, * * *).

[46] "Official Transcript of Proceedings," July 27, 1989, Mr. Lewis, p. 20.

of material specifications (including whether the rails may be new or used), origin of manufacture, and bidder; some distributors may be requested to bid. Each quote is made with a specific price for a specified quantity, quality, and shipment schedule on a delivered basis (or f.o.b. producer's/distributor's facility with a freight allowance factored into the quote). [47] The Class I railroads request written or verbal bids directly from qualified producers and some distributors, and negotiate directly with the most competitive following submission of the bids.

Purchases are usually negotiated in one or more rounds with the railroad splitting up the tonnages and bidding among several sellers between grades, and using one quotation to effect improvement in another. Railroads currently purchase more on the basis of spot quotations and smaller tonnages than previously, when the practice was to order rail up to 1 year in advance. Class II and III railroads purchase both new and used rail on the open market via negotiated bidding and through distributors. None of the rail producers sell relay rail. From the standpoint of a bid situation, although the rail producers may infer which other company may be submitting bids, the producer really does not know, and the purchaser uses his buying strength and rumor to drive the best bargain he can.

The majority of tonnage is negotiated and purchased during the second quarter through September for deliveries during the third, fourth, and first calendar year quarters (exact delivery times depending upon work schedules). Transit authorities normally conduct open bids with material specifications, service, price, prior history in manufacturing (or delivery performance) as determinants for pre-selection; suppliers that prequalify are then asked to submit a sealed bid. An additional pre-selection item is compliance with Federal "Buy American" criteria (in instances of Urban Mass Transit Authority (UMTA) funding), or State mandated "Buy American" criteria (when UMTA funds are not involved); these either eliminate foreign sourcing entirely, limit the amount to a specified figure, or specify that the foreign source must be at least 10 to 25 percent, or more, lower in cost than the lowest available bid by a domestic producer.

[47] The chief engineer informs the purchasing department of the amount and weight of rail needed, and whether the work to be accomplished would require new rail or relay rail. The purchasing department prepares a formal bid, requesting offers from approved vendors. According to several questionnaire responses, one of the most important factors in selecting a vendor is the ability to meet the work schedule, i.e., delivery on time, and if prices are equal, time of delivery may be the controlling factor. In spot purchase situations to replace derailment-damaged track, time of delivery may be the only criterion.

Another important consideration in comparing terms and prices is the cost of transportation from producing plant to the nearest point on the railroad's own line. Of the 16 Class I railroads, 7 purchase 65 to 70 percent of all new rails sold, with most purchases made for delivery west of the Mississippi River. Conversations with railroad officials indicate that delivery of the steel rail to their line is more important than where the railroad's weld facility is located. [48] Thus, a producer which has access to a major terminus or which is in proximity to several Class I railroads has a competitive advantage over another producer near only one line, or which must ship its rails further to reach the Class I railroads.

Bethlehem owns its own shorthaul line, with close proximity, under 10 miles, to Conrail; freight costs for Bethlehem are estimated to be negligible to Conrail, whereas it would have to deliver to points in Ohio, Detroit, or Chicago to reach other Class I lines, at a cost of *** per ton. CF&I benefits from its proximity to four of the five western Class I railroads: Atchison, Topeka and Santa Fe; Burlington Northern; Denver, Rio Grand and Great Western; and Union Pacific. (CF&I also owns a shorthaul line which transports rail to the lines at a cost of about *** per ton); Algoma's delivery costs are *** per ton for deliveries to Chicago and Detroit (where four of the Class I railroads terminate) by lake shipping, or *** per ton in the case of deliveries by rail through northern Michigan. Sydney's closest delivery point is in Maine on CSX's line, although the company could deliver by ship to one of the U.S. east coast ports.

Consumption of rail is dependent upon new track programs (or rail line expansion), maintenance, replacement or upgrading of existing roadbeds and lines, changes in track usage (e.g., transportation system changes), and funding for rehabilitation of track. The main considerations are the volume and tonnage of traffic on the lines, the revenues that the traffic generates, and maintenance of way and structures (which account for about 20 percent of operating expenses). With high capital costs limiting some track improvement programs, there is a tendency to re-use old rails rather than buy new ones. In the United States and Western Europe, railway investments have slowed substantially, and more efficient use is being made of new rails and any available higher-quality old rails. Capital expenditures, of which purchases of new rail are a part, encompass spending for all rail

[48] According to several purchasing agents, the cost to the railroad of transporting rail on its own line is only a theoretical concept since no cash is exchanged (i.e., the railroad does not pay itself rent for a transportation service it provides itself), and they do not really consider it when purchasing rails. See, "Official Transcript of Proceedings," July 27, 1989, p. 54, Mr. Binder (CF&I) and p. 147, Mr. Alex Stewart (Algoma).

programs, including purchases of locomotives and rail cars. The allocation of funds to purchase rails within the overall category fluctuates and there is evidence to indicate railroads' purchases of new rails will tend to be flat as more funds are spent on acquisitions of locomotives and cars. [49]

The following tabulation (also see fig. 4) shows revenues, income, retained funds, and capital expenditures for the 16 Class I railroads during 1980-88 (in billions of dollars):

Year	Operating revenue 1/	Net railway operating income 2/	Retained funds	Capital expenditures
1980	28.258	1.339	1.842	3.238
1981	30.899	1.361	3.137	2.751
1982	27.504	0.742	2.003	2.168
1983	26.729	1.838	3.645	2.985
1984	29.453	2.537	4.350	4.121
1985	27.586	1.746	3.067	4.485
1986	26.204	0.507	2.005	3.645
1987	26.622	1.756	3.388	3.076
1988	27.934	1.980	3.784	3.546

1/ Revenue from freight haulage accounts for about 97 percent of operating revenue, and shows similar fluctuations from year to year, and a slight general decline.

2/ Net railway operating income is the remainder of operating revenues after deducting operating expenses, current and deferred taxes, and rents for equipment and joint facilities, but before recording non-operating income and fixed charges.

The level of freight transportation demand in North America has been static. [50] The railroads are heavily dependent upon carriage of bulk commodities, such as coal, steel, and grains (grain shipments by railroads hit new highs in 1987 and 1988 because drought across the midwest hindered shipments by barge). Intermodal container loadings, a low margin business, is the only consistently increasing sector. [51] Increases in revenues have

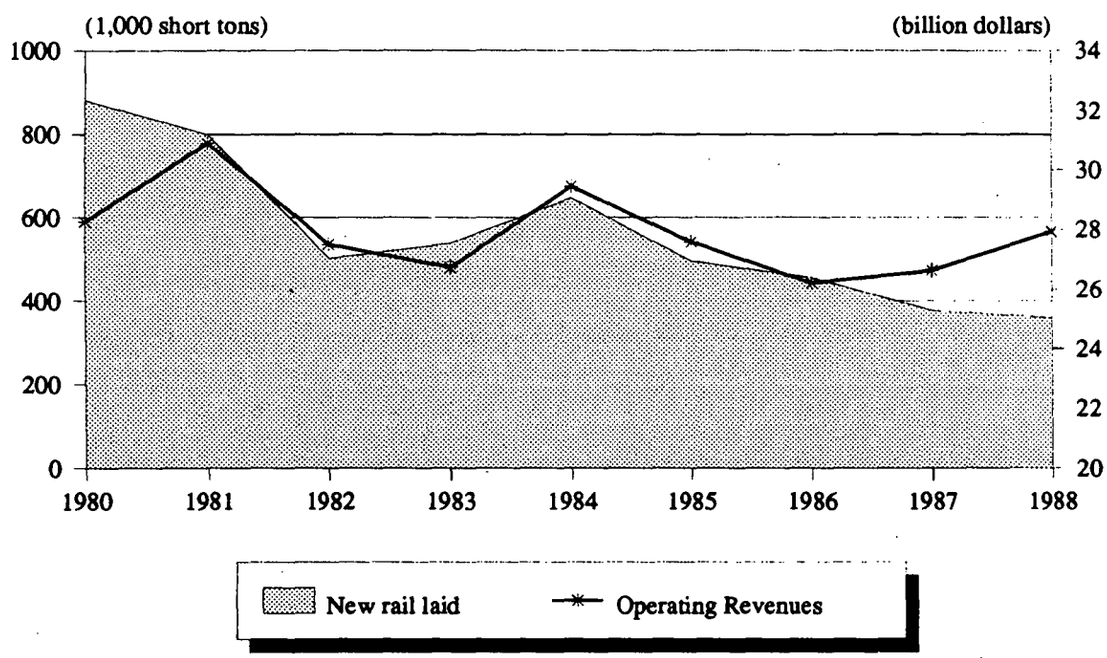
[49] "Comeback-Or Crisis," Railway Age, December 1988.

[50] Railway Age, October 1986, p. 41.

[51] "'89 Outlook--Comeback-or Crisis," Railway Age, December 1988; and "'88 Review: Winning the Numbers Game," Railway Age, December 1988.

Figure 4

Class I railroad operating revenues and miles of new rail laid, 1980-88



Source:
American Association of Railroads.

come from traffic innovations and heavier weights per car, and cost-cutting programs and lowered overheads have brought several railroads close to the Interstate Commerce Commission's definition of "revenue adequacy." [52] The railroad industry has spent more capital on expanding the locomotive and railcar/trailer fleets in the past several years.

Purchases of new rail (or usable relay rail) are made pursuant to capital expansion programs and/or track maintenance programs. The first arises when a railroad is "rich;" the second arises irrespective of whether a railroad is "rich" or "poor," and is tied to the amount of tonnage moving over the tracks (for conventional rail, that generally would be 500 to 600 million gross tons before rail defects, caused by headwear and fatigue, begin to require replacement). [53] Although traffic, measured in million-ton-miles per track, increased 50 percent during 1976-86, [54] it appears that today's rails are surviving more than twice the tonnage sustained during the last period of rebuilding in the 1940s, [55] mainly because of the longer service life of head-hardened rail and alloy rail. Railroad maintenance programs, particularly in-place head grinding and wheel flange and track lubrication also contribute to increased service life.

The Staggers Act deregulated the railroads on October 1, 1980, liberalizing processes for abandoning and selling rail lines, and accelerating the spin-off of branch lines and mainline segments of Class I railroads. [56] The reduction in Conrail's total track mileage from 35,370 miles at the end of 1977 to 25,792 miles at the end of 1985 [57] and the pruning of CSX's trackage from 27,500 miles to 15,000 miles [58] illustrate the trend, as

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[52] Revenue adequacy is a return on investment equal to the cost of capital, which is currently around 12 percent. For 1988, several railroads will approach the threshold--Burlington Northern, Kansas City Southern, Norfolk Southern, and Union Pacific. See, "'88 Review: Winning the Numbers Game," Railway Age, December 1988.

[53] Brief filed by Soo Line Railroad Co., p. 11.

[54] Railway Age, January 1986, p. 31.

[55] Railway Age, September 1984, p. 66.

[56] Railway Age, May 1986.

[57] Railway Age, March 1986, p. 33.

[58] "CSX: Making Tracks for Growth," Railway Age, January 1988.

does the reported intention of an eastern carrier to reduce line mileage by 8,000 to 9,000 miles between 1987 and 2000. [59]

The following tabulation (also see fig. 5) shows the road and track miles owned, and the tons of new rail and relay rail laid by Class I railroads (which accounted for approximately 83 percent of total railroad mileage in the United States) as of December 31, during 1980-88:

Year	Miles of track owned 1/	Miles of road owned 2/	Tons of new rail laid 3/	Tons of relay rail laid
1980	270,623	164,822	881,783	919,662
1981	267,589	162,160	800,340	972,199
1982	263,330	159,123	502,718	1,018,212
1983	258,703	155,879	538,597	778,240
1984	252,748	151,998	647,782	900,000
1985	242,320	145,764	496,039	781,304
1986	233,205	140,061	456,066	681,640
1987	220,518	132,220	377,282	661,248
1988	213,699	127,555	359,963	516,359
Net change (in percent) 1980-88:	-21.0	-22.6	-59.2	-43.9

1/ Miles of track owned includes main tracks, yard tracks, and sidings. The decline in miles of road and track owned in part reflects the sale of Class I road and track to non-Class I railroads, which do not report to the ICC.

2/ Miles of road owned represents the aggregate length of roadway, excluding yard tracks, sidings, and parallel lines of the Class I railroads.

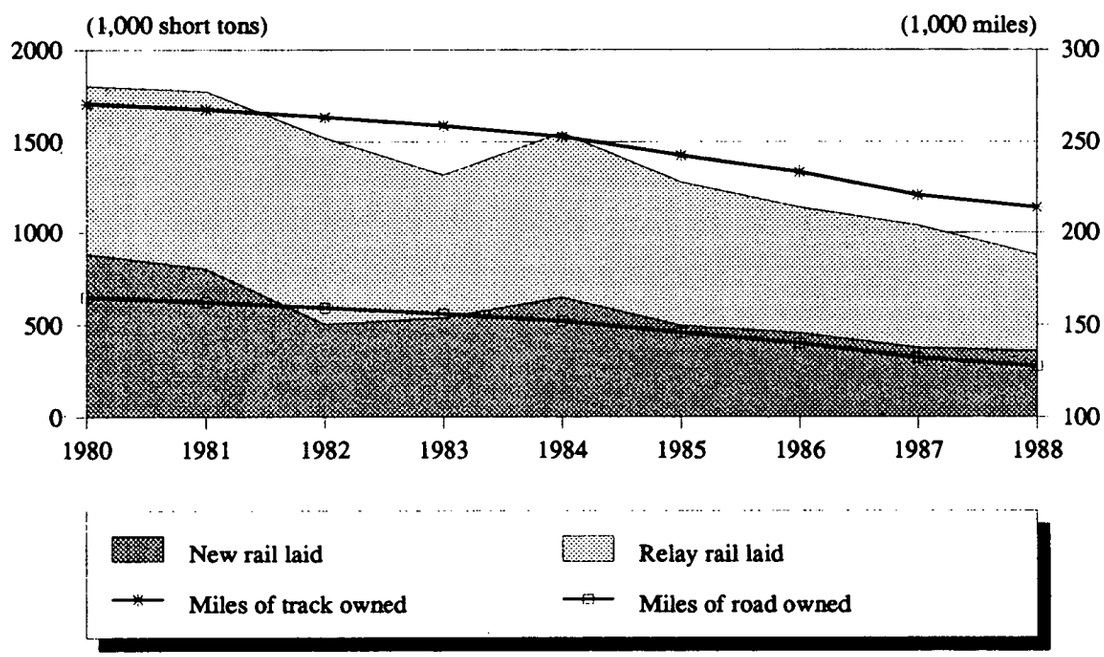
3/ Replacement and additional track. There are 202 tons of 115-pound-per-yard and 232 tons of 136-pound-per-yard rail per mile of tangent (straight) track.

Source: American Association of Railroads.

[59] Railway Age, April 1987, p. 48.

Figure 5

New rail & relay rail laid, and miles of Class I railroad track owned, 1980-88



Source:
American Association of Railroads.

The differences between the markets for new and relay (or used) rail is further illustrated by usage patterns. On mainline track (over 20 million ton-miles per year), prime rail was laid 66 percent of the time as replacement track, and relay rail was laid 34 percent of the time during 1984-88. [60] On less heavily traveled track (5 to 20 million ton-miles), prime rail accounted for only 25 percent, and on tracks where the usage is between 1 and 5 million ton miles, prime rail accounted for less than 8 percent.

[60] Prehearing brief of the petitioner, July 20, 1989, p. 46.

Consideration of Material Injury

In order to gather data on the question of material injury to the U.S. industry producing new steel rails, questionnaires were sent to the rail mills listed in the petition. The aggregate data appearing in this section of the report are for the three rail mills that responded to the Commission's questionnaires. These mills are believed to have been the only U.S. mills producing new steel rails, over 30 kilograms per meter, during January 1986 through March 1989. As indicated previously, additional data for 1984 and 1985 are shown in appendix E.

U.S. capacity, production, and capacity utilization

The Commission requested rail mills to provide data on their average-for-period practical capacity, [61] production, and capacity utilization for 1986-88, January-March 1988, and January-March 1989. These data are presented in **figure 6 and table 2.**

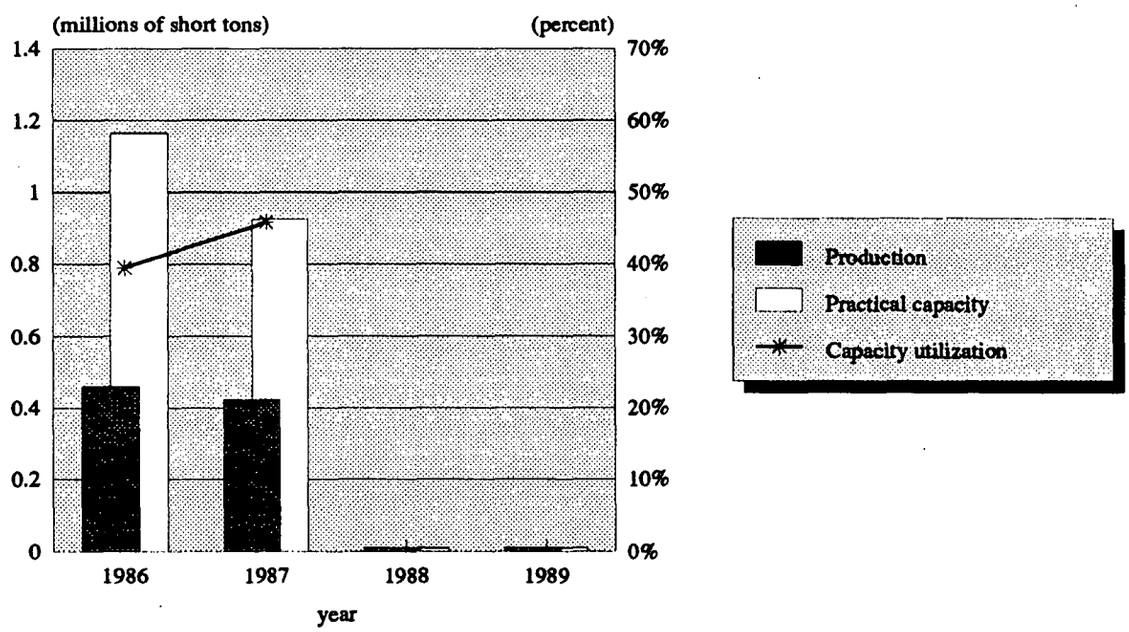
Reported capacity declined 20.6 percent from 1986 to 1987 and *** percent from 1987 to 1988. Capacity over the period 1986 through 1988 declined *** percent, from 1,165,000 to *** tons. The January-March interim figures show an increase in capacity of *** percent in 1989 over that in the corresponding period of 1988. At an annualized rate, the 1989 capacity would equal *** tons, compared with 1,165,000 tons in 1986, representing a decline of *** percent.

W-P halted steel production at its Monessen mill on April 30, 1987. Therefore, 1987 and 1988 capacity, capacity utilization, and production figures reflect the withdrawal of this mill. According to Bethlehem's questionnaire response, the Monessen mill was not placed back on-line until 1989. Bethlehem's 1989 interim figures reflect the addition of *** tons (on an annual basis) of the Monessen mill's capacity.

[61] Practical capacity was defined as the greatest level of output a plant can achieve within the framework of a realistic work pattern. Producers were asked to consider, among other factors, a normal product mix and an expansion of operations that could be reasonably attained in their industry and locality in setting capacity in terms of the number of shifts and hours of plant operations. Reported data are for "rolling" capacity, without allowance for any melt capacity limitations.

Figure 6

Practical capacity, production, and capacity utilization of U.S. rail mills*



Source: Table 2.
Note. -- 1989 data annualized based on January-March information

* 1988 and 1989 capacity, production, and capacity utilization data are confidential.

Table 2
New steel rails: Practical capacity, U.S. production, and capacity utilization of rail mills, 1986-88, January-March 1988, and January-March 1989

(In short tons)

Item	*1986*	*1987*	*1988*	*January-March-- 1988*	*January-March-- 1989*
Average-of-period practical capacity: 1/					
All products	1,884,733	1,915,009	***	***	***
New steel rails	1,165,000	925,000	***	***	***
Production:					
New steel rails	460,669	423,382	***	***	***
Capacity utilization (percent):					
New steel rails	39.5	45.8	***	***	***

1/ Practical capacity was defined as the greatest level of output a plant can achieve within the framework of a realistic work pattern. Producers were asked to consider, among other factors, a normal product mix and an expansion of operations that could be reasonably attained in their industry and locality in setting capacity in terms of the number of shifts and hours of plant operations. Rail producers were requested to supply capacity data based on rolling mill capacity, given a normal product mix.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Production of new steel rails by U.S rail mills declined 8.1 percent from 1986 to 1987, and increased *** percent from 1987 to 1988. Production increased *** percent from 1986 through 1988, from 460,669 to *** tons. The January-March interim figures indicate that production rose *** percent in 1989 over that in the corresponding period of 1988.

Capacity utilization increased from 39.5 percent in 1986 to 45.8 percent in 1987, and increased further to *** percent in 1988. From 1986 through 1988, capacity utilization increased by *** percent. The January-March interim figures indicate that capacity utilization decreased *** percent, from *** percent in 1988 to *** percent in the corresponding period of 1989. Again, both the increases and decreases from 1987 through interim 1989 were affected by the shutdown of Wheeling-Pittsburgh's Monessen plant in mid-1987 and its subsequent re-incorporation into Bethlehem's capacity beginning in 1989. Although Bethlehem incorporated the Monessen mill's capacity, the mill has had no production to date in 1989. Without the addition of the Monessen mill's *** tons of capacity, January-March capacity utilization would be *** percent.

U.S. producers' shipments

According to data collected from the Commission's questionnaires (presented in **table 3 and figure 7**), total shipments of U.S. rail mills declined 8.4 percent from 1986 to 1987, and increased *** percent from 1987 to 1988. During the period 1986 through 1988, total shipments increased *** percent, from 461,233 to *** tons. Shipments during the interim period January-March increased *** percent in 1989 over those in the corresponding period of 1988. The value of total shipments decreased 12.3 percent from 1986 to 1987, and increased *** percent from 1987 to 1988. From 1986 through 1988, the value of total shipments increased *** percent, from $201.6 million in 1986 to *** in 1988. During the interim periods, the value increased *** percent in 1989 over that in the corresponding period of the previous year.

Intracompany and intercompany transfers represented *** percent of aggregate U.S. producers' shipments in 1986, *** percent in 1987, *** percent in 1988, *** percent in interim 1988, and *** percent in interim 1989. Export shipments represented *** percent of total U.S. shipments in 1986, *** percent in 1987, *** percent in 1988, and *** percent in interim 1989; no exports were reported by U.S. producers in interim 1988.

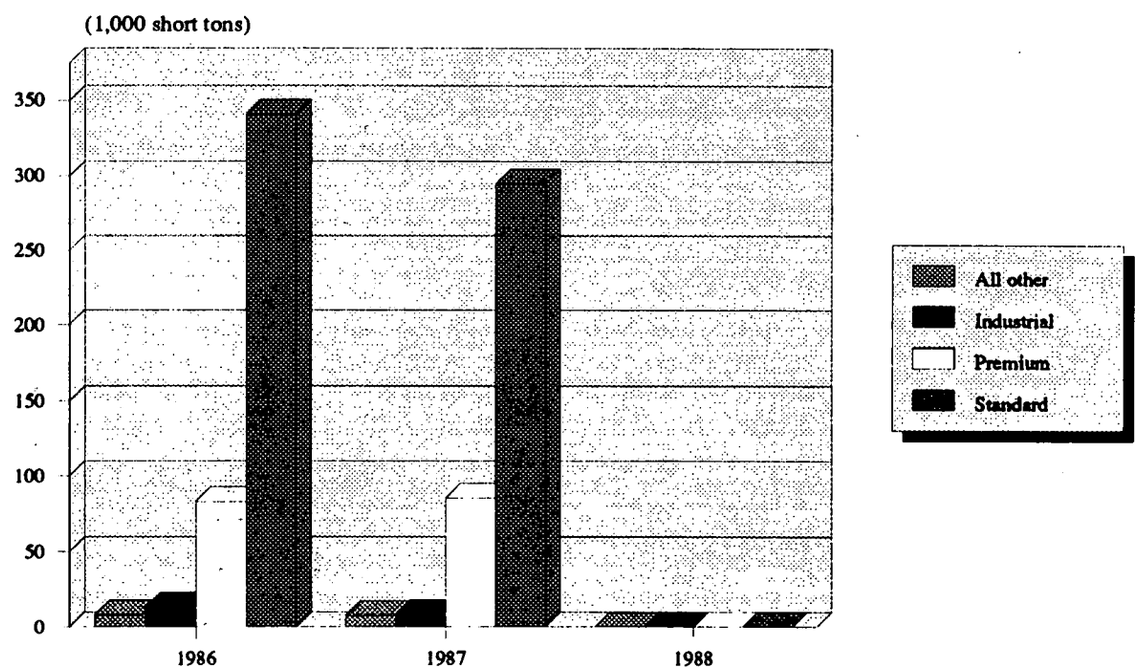
Table 3
New steel rails: Shipments of U.S. rail mills, by types, 1986-88, January-March 1988, and January-March 1989

Item	1986	1987	1988	January-March-- 1988	January-March-- 1989
	Quantity (short tons)				
Intracompany & intercompany transfers	14,128	20,990	***	***	***
Domestic market shipments:					
Standard tee	341,107	295,076	***	***	***
Premium	82,916	85,365	***	***	***
Industrial	13,162	8,393	***	***	***
All other	8,357	7,551	***	***	***
Subtotal	445,542	396,385	***	***	***
Export shipments	1,563	5,189	***	***	***
Total shipments	461,233	422,564	***	***	***
	Value (1,000 dollars)				
Intracompany & intercompany transfers	7,308	10,978	***	***	***
Domestic market shipments:					
Standard tee	144,521	113,748	***	***	***
Premium	41,707	42,956	***	***	***
Industrial	2,505	1,898	***	***	***
All other	4,659	4,586	***	***	***
Subtotal	193,392	163,188	***	***	***
Export shipments	920	2,648	***	***	***
Total shipments	201,620	176,814	***	***	***
	Unit Value (per short ton)				
Intracompany & intercompany transfers	$517.27	$523.01	***	***	***
Domestic market shipments:					
Standard tee	423.68	385.49	***	***	***
Premium	503.00	503.20	***	***	***
Industrial	190.32	226.14	***	***	***
All other	557.50	607.34	***	***	***
Subtotal	434.06	411.69	***	***	***
Export shipments	588.61	510.31	***	***	***
Total shipments	437.13	418.43	***	***	***

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Figure 7

Domestic market shipments of U.S. rail mills, by rail types, 1986-88 *



Source: Table 3

* 1988 data are confidential.

The unit value per ton of domestic market shipments (excluding transfers) declined 5.2 percent from 1986 to 1987, increased *** percent from 1987 to 1988, and increased between interim periods by *** percent.

U.S. producers' inventories

Rail mills produce rails upon receipt of an order and consequently maintain few or no inventories. Sometimes the mills produce small production overruns or accumulate industrial rails and then sell such rails to distributors or whenever a suitable direct offer is received. The following tabulation presents U.S. rail mill's inventories based on questionnaire responses.

Date	Inventories (short tons) 1/	Share of rail mills' domestic shipments during the preceding period (in percent)
As of:		
December 31--		
1985 2/	***	***
1986	4,165	1.0
1987	1,179	0.4
1988	***	***
March 31--		
1988	***	*** (annualized)
1989	***	*** (annualized)

1/ Includes only Bethlehem and Wheeling-Pittsburgh data. The "Post Hearing Economic Submission On Behalf of the Petitioner," Aug. 3, 1988, states (on p. 10) that "Rail producers do not generally service the spot market from inventories; rather, they fulfill spot requirements from their manufacturing lines. . . . For this reason, inventories generally do not have a substantial effect on the prices charged by a rail producer on the spot market."
2/ Only Bethlehem reporting for this period.

Employment and wages

According to data collected from the Commission's questionnaires (presented in table 4), the average number of workers producing new steel rails in the United States declined 15.5 percent from 1986 to 1987, increased *** percent from 1987 to 1988, and increased *** percent from January-March 1988 to January-March 1989.

The number of hours worked producing new steel rails declined 6.8 percent from 1986 to 1987, increased *** percent from 1987 to 1988, and increased *** percent from January-March 1988 to January-March 1989.

Table 4
Average number of employees in U.S. rail mills; total and production and related workers producing all products and those producing new steel rails; and hours worked by and wages, total compensation, and average hourly wages paid to such workers, 1986-88, January-March 1988, and January-March 1989

Item	*1986*	*1987*	*1988*	*January-March-- 1988*	*January-March-- 1989*
Average number of employees	2,573	2,630	***	***	***
Production and related workers producing:					
All products	2,169	2,279	***	***	***
New steel rails	989	836	***	***	***
Hours worked by production and related workers producing: (in 1,000 hours)					
All products	3,913	4,476	***	***	***
New steel rails	1,767	1,647	***	***	***
Wages paid to production and related workers producing: (in 1,000 dollars)					
All products	64,537	61,214	***	***	***
New steel rails	25,378	21,696	***	***	***
Total compensation paid to production and related workers producing: (in 1,000 dollars)					
All products	94,474	101,597	***	***	***
New steel rails	36,567	35,724	***	***	***
Average hourly wages paid to production and related workers producing:					
All products	$16.49	$13.68	***	***	***
New steel rails	$14.36	$13.17	***	***	***

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Wages paid to workers producing new steel rails declined 14.5 percent from 1986 to 1987, increased *** percent from 1987 to 1988, and increased *** percent from January-March 1988 to January-March 1989.

Total compensation paid to production and related workers producing new steel rails declined 2.3 percent from 1986 to 1987, increased *** percent from 1987 to 1988, and increased *** percent from January-March 1988 to January-March 1989.

Average hourly wages paid to such workers decreased 8.3 percent from 1986 to 1987, increased *** percent from 1987 to 1988, and increased *** percent during the interim periods January-March 1988 and January-March 1989.

Financial experience of U.S. producers

All three producers supplied income-and-loss data on the overall operations of their establishments in which new steel rails are produced and, separately, on their operations in producing such products. Both current producers (Bethlehem and CF&I) furnished financial data for all periods, whereas W-P supplied data for 1986 and 1987. [62]

Overall establishment operations.--Bethlehem manufactures semi-finished steel, rail accessories, bars, and pipes as well as steel rails in its Steelton, PA, plant. Bethlehem's sales of new steel rails accounted for *** percent of its overall establishment sales in 1988. [63] CF&I produces primarily steel rails and oil-country tubular goods in its Pueblo, CO, establishment. [64] New steel rails accounted for 42 percent of its overall establishment sales in 1988. Before its closure in 1987, W-P produced only steel rails in its Monessen, PA, plant. The overall establishment income-and-loss experience of these firms is presented in table 5.

[62] Wheeling-Pittsburgh terminated its operations during 1987. Therefore its data for that year do not represent a complete year.

[63] Bethlehem defined its establishment as those operations directly related to steel rail production. As a percentage of total plant sales, new steel rails accounted for *** percent in 1988.

[64] CF&I's establishment represents its only plant. These data are the same as the company reported in its annual reports.

Table 5
Income-and-loss experience of U.S. producers on the overall operations of their establishments within which new steel rails are produced, accounting years 1986-88 and interim periods ended March 31, 1988, and March 31, 1989

Item	*1986*	*1987*	*1988*	*Interim period ended March 31– 1988*	*Interim period ended March 31– 1989*
	Value (1,000 dollars)				
Net sales	***	***	***	***	***
Cost of goods sold	***	***	***	***	***
Gross profit or *(-)loss*	***	***	***	***	***
General, selling, and administrative expenses	***	***	***	***	***
Operating income or *(-)loss*	***	***	***	***	***
Startup or shutdown expense	***	***	***	***	***
Interest expense	***	***	***	***	***
Other income, net	***	***	***	***	***
Net income or *(-)loss* before income taxes	***	***	***	***	***
Depreciation and amortization included above	***	***	***	***	***
Cash-flow 1/	***	***	***	***	***
	Share of net sales (percent)				
Cost of goods sold	***	***	***	***	***
Gross profit or *(-)loss*	***	***	***	***	***
General, selling, and administrative expenses	***	***	***	***	***
Operating income or *(-)loss*	***	***	***	***	***
Net income or *(-)loss* before income taxes	***	***	***	***	***
	Number of firms reporting				
Operating losses	3	3	1	1	2
Net losses	3	3	1	1	2
Data	3	3	2	2	2

1/ Cash-flow is defined as net income or *(-)loss* plus depreciation and amortization.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Operations on new steel rails.--The questionnaire data for both Bethlehem and CF&I were verified by the staff (additional information on cost allocations for past-service costs are discussed in a subsequent section). CF&I's cost allocations on new steel rail were presented fairly in its questionnaire submission. [65] The staff took exception to some of the allocations utilized by Bethlehem in its response (particularly, allocations based on capacity). [66] Subsequently the data were revised, although two items are indicated separately upon request of Bethlehem as they may not be directly attributable to rail production, but the benefits are correctly allocated to rails. The items are * * *.

These items are indicated separately; however, they are correctly allocated and the adjusted * * * represent the actual * * * incurred by Bethlehem producing rails. A summary of Bethlehem's operating losses, as reported in its questionnaire submission and revisions (including the two adjustments plus the elimination of startup costs from operating losses) are shown in the following tabulation (in thousands of dollars): [67]

Item	1986	1987	1988	Interim period--- 1988	1989
*	*	*	*	*	*	*

1/ * * *.

[65] CF&I's cost allocation methodology, Exhibit 4, Stewart and Stewart submission, Aug. 3, 1989.

[66] Bethlehem Steel's cost allocation methodology, Exhibit 5, Stewart and Stewart submission, August 3, 1989.

[67] Revised income-and-loss data, Aug. 7, 1989, adjustments to the questionnaire. Attachment to Stewart and Stewart cover letter of Aug. 8, 1989.

Net industry sales of new steel rails declined 12.6 percent from $201.6 million in 1986 to $176.2 million in 1987 (table 6). In 1988, sales were *** million, representing an increase of *** percent over those in 1987. Operating losses were $25.5 million in 1986, $19.7 million in 1987, and *** million in 1988. [68] Operating (loss) margins, as a percent of sales, were (12.6) in 1986, (11.2) in 1987, and *** in 1988. Operating losses were sustained by all three firms in 1986 and 1987 and by * * * in 1988.

Interim 1989 sales were *** million, representing an increase of *** percent over 1988 interim sales of *** million. Operating losses were *** million and *** million in interim 1988 and interim 1989, respectively. Operating (loss) margins were *** in interim 1988 and *** in interim 1989. * * * sustained operating losses in interim 1988 but only * * * incurred such losses in interim 1989. A summary of income-and-loss data by firms is presented in table 7.

Factors affecting income-and-loss.--The industry experienced consistently high levels of gross losses and operating losses during the period of investigation. The primary factors contributing to the substantial losses were a sharp increase in raw material costs, high energy and depreciation expenses, and a high level of pension and health expenses, including charges for employees who were terminated during the restructuring of the steel industry during the early 1980s. The average selling price per ton rose slightly between 1986 and 1988, but this increase was insufficient to offset the higher level of costs. Bethlehem's sales revenues and costs per ton were * * * than CF&I's. These differences include factors such as distinctions in some of their productive capabilities (e.g., Bethlehem's heat-treated rails compared with CF&I's head-hardened rails), regional differences in scrap costs, productivity, and depreciation.

[68] Industry losses were not significantly affected by the inclusion of industrial rails.

Table 6
Income-and-loss experience of U.S. producers on their operations producing new steel rails, accounting years 1986-88 and interim periods ended March 31, 1988, and March 31, 1989 1/

Item	*1986*	*1987*	*1988*	*Interim period ended March 31-- 1988*	*1989*
	Value (1,000 dollars)				
Net sales	201,624	176,184	***	***	***
Cost of goods sold	220,245	192,564	***	***	***
Gross profit or *(-)loss*	*-18,621*	*-16,380*	***	***	***
General, selling, and administrative expenses	6,878	3,306	***	***	***
Operating income or *(-)loss*	*-25,499*	*-19,686*	***	***	***
Startup or shutdown expense 2/	1,419	13	***	***	***
Other expense, net	396	383	***	***	***
Net income or *(-)loss* before income taxes	*-26,522*	*-19,316*	***	***	***
Depreciation and amortization included above	18,187	13,152	***	***	***
Cash-flow 3/	*-8,335*	*-6,164*	***	***	***
	Share of net sales (percent)				
Cost of goods sold	109.2	109.3	***	***	***
Gross profit or *(-)loss*	*- 9.2*	*- 9.3*	***	***	***
General, selling, and administrative expenses	3.4	1.9	***	***	***
Operating income or *(-)loss*	*-12.6*	*-11.2*	***	***	***
Net income or *(-)loss* before income taxes	*-13.2*	*-11.0*	***	***	***
	Number of firms reporting				
Operating losses	3	3	2	2	1
Net losses	3	3	2	2	1
Data	3	3	2	2	2

1/ Includes ITC adjustments as shown in the tabulation on p. 49.
2/ Wheeling's questionnaire response in the preliminary investigations indicated that it wrote off *** million in 1986 that was not included in its income-and-loss data.
3/ Cash-flow is defined as net income or *(-)loss* plus depreciation and amortization.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Table 7
Income-and-loss experience of U.S. producers on their operations producing new steel rails, by firms, accounting years 1986-88 and interim periods ended March 31, 1988, and March 31, 1989 1/

Item	1986	1987	1988	Interim period ended March 31-- 1988	1989
	Value (1,000 dollars)				
Net sales:					
Bethlehem	***	***	***	***	***
CF&I	***	***	***	***	***
W-P	***	***	***	***	***
Total	201,624	176,184	***	***	***
Gross profit or *(-)loss*:					
Bethlehem	***	***	***	***	***
CF&I	***	***	***	***	***
W-P	***	***	***	***	***
Total	-18,621	-16,380	***	***	***
Operating income or *(-)loss*:					
Bethlehem	***	***	***	***	***
CF&I	***	***	***	***	***
W-P 2/	***	***	***	***	***
Total	-25,499	-19,686	***	***	***
	Share of net sales (percent)				
Gross profit or *(-)loss*:					
Bethlehem	***	***	***	***	***
CF&I	***	***	***	***	***
W-P	***	***	***	***	***
Total	- 9.2	- 9.3	***	***	***
Operating income or *(-)loss*:					
Bethlehem	***	***	***	***	***
CF&I	***	***	***	***	***
W-P	***	***	***	***	***
Total	-12.6	-11.2	***	***	***

1/ Includes ITC adjustments as shown in the tabulation on page 49.
2/ W-P's questionnaire response in the preliminary investigations indicated that it wrote off *** million in 1986 that was not included in its income-and-loss data. However, this would be included in shutdown expense and not at the operating income (loss) level.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

A comparison of the revenues and estimated costs per ton for the current producers is shown in the following tabulation (in dollars per ton, except as noted):

Item	1986	1987	1988

* * * * * * *

During the hearing, questions were raised concerning a level of "reasonable" profits for the industry. [69] The petitioner's response cited a projected operating income margin of *** percent after an affirmative determination. [70] Although, operating losses for the industry have been incurred since 1984, * * * was profitable during 1984 and 1985, whereas * * * were unprofitable. * * * operating income margins were *** and *** in 1984 and 1985, respectively.

Pension plans and social insurance programs.-- Bethlehem reported that it had "substantial financial obligations related to its pension plans and social insurance program. Those obligations materially affect the ability of Bethlehem to continue to improve and restructure its operations. Moreover, Bethlehem's annual pension costs are substantially higher on a per-ton basis than those of most other domestic steel producers and put Bethlehem at a competitive disadvantage with respect to such costs compared to such other producers." [71]

CF&I indicated that "The combined 1988 cost of active and retired employee pensions, health care and life insurance was $31.5 million. These costs are proportionately greater for CF&I than for the steel industry in general as [a] result of the relative significance of our 1983 restructuring. This downsizing left the Company with four retirees for every active employee which is dramatically higher than most of the steel industry. Since these pension, health and life insurance obligations are contractual, actions which can be taken to control these costs are limited." [72]

During the hearing, there was a discussion of past-service costs and their effect on operating income or (loss). Subsequently, several posthearing submissions further addressed this issue. Based on the hearing, the briefs, and a review of published financial data and accounting standards, the following is a summation of the available information on these issues:

[69] Transcript of hearing, pp. 62-63.

[70] Aug. 8, 1989, posthearing brief of Stewart and Stewart, p. 4.

[71] Bethlehem Steel's Form 10-K for the fiscal year ended Dec. 31, 1988, p. 7 (management analysis).

[72] CF&I 1988 Annual Report, p. 2 (management analysis).

1. The accounting provision (SFAS No. 87) for pension costs effective for accounting years beginning January 1, 1987, requires companies to recognize these pension expenditures on a more current basis. Before that date, companies utilized various methodologies for recording expenses and liabilities. As a result, many firms were not fully funded when the provision became effective. This was a particular problem in the steel industry because of large employee cutbacks. Heavy losses limited the amount of funds that were available to fund their pensions. Thus, companies that were behind were required to incur additional expenses and liabilities to cover both current and past service employees. In addition, health costs have been rising at rapid rates and these costs must be provided for past-service employees.

2. In the current investigations, pension and health costs for both current- and past-service employees are included in the cost of goods sold. According to CF&I's 1988 Annual Report, "Pension cost was $19 million in 1988 as compared to $18.2 million in 1987 and $5.5 million in 1986. The increases in 1988 and 1987 pension cost were a result of: (1) the increased accumulated benefit obligation resulting from early retirements, reduced interest rate assumptions and lower assumed average retirement age of active participants and (2) FASB No. 87 requiring amortization of the unrecognized transition obligation over a 15 year period on a straight-line basis. Under provisions of the previous accounting standards, the Company's 1986 unrecognized prior service costs were amortized over a 40 year period." [73]

3. The cost allocations for past-service costs appear reasonable based on the establishments from which the data were derived. Bethlehem's original data have been revised downward because of the elimination of the capacity allocation. [74] Bethlehem also provided an analysis of current pension costs. [75] CF&I provided an analysis of both its current and past-service costs. [76] There were two other submissions by CF&I involving operations on new steel rails reconstructed to exclude extraordinary pension costs (based on normal costs). These data involve theoretical assumptions about profitability, assuming there were no past-service costs for current employees. [77]

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[73] CF&I 1988 Annual Report, p. 8 (audited statement).

[74] Bethlehem's past-service employment cost methodology, Exhibit 6, Stewart and Stewart submission, Aug. 3, 1989

[75] Aug. 7, 1989, submission. Attachment to Stewart and Stewart cover letter of Aug. 8, 1989.

[76] CF&I exhibit of current and past-service pension, health costs and fringe benefits for new steel rails and the company, Aug. 8, 1989, attachment to Stewart and Stewart submission, Aug. 9, 1989, and Aug. 14, 1989, fax from Bethlehem and Aug. 15, 1989, letter from CF&I.

[77] Telephone conversation with * * * CF&I, Aug. 11, 1989. CF&I submissions of Aug. 3, 1989, and Aug. 9, 1989, attached to Stewart and Stewart letters of Aug. 3, 1989, and Aug. 10, 1989. Bethlehem 1988 Annual Report, p. 16, and CF&I 1988 Annual Report, p. 8.

4. The unfunded accumulated benefit obligation for each corporation at the end of 1988 was $1.0 billion for Bethlehem and $131 million for CF&I. The 1988 funding was $15 million for CF&I and $700 million for Bethlehem. [78]

5. Chairman Brunsdale requested information as to the costs of current employees that would not be saved in the event that operations ceased. Bethlehem's financial statements for 1988 indicate a termination cost of approximately $75,000 to $100,000 per employee. A base of approximately *** rail production workers would involve termination costs of *** million to *** million. These estimates exclude administrative personnel and the effect on other plant personnel which might be affected by the cessation of rail production. [79] In a letter to the Commission dated August 9, 1989, CF&I indicated that * * *. [80]

6. The past-service and current pension costs are dependent upon several factors including demographics, return on investment of pension funds, age of retirement, funding of past liabilities, and so on. These items vary from company to company and from period to period.

7. If past-service costs for both current (pensions) and retired employee (pensions plus health benefits) were excluded from operating losses, the industry still would have sustained losses in all periods.

[78] CF&I 1988 Annual Report, p. 8., and Bethlehem 1988 Annual Report, p. 16 (management analysis).

[79] Bethlehem Steel's estimated cost of $75,000 to $100,000 per employee. Bethlehem 1988 Form 10-K, p. 8 (management analysis).

[80] CF&I Aug. 9, 1989, letter. Attachment to Stewart and Stewart submission of Aug. 10, 1989.

A summary of the past-service costs and their effect on operating losses for the two firms is shown in the following tabulation (in thousands of dollars):

Item	1986	1987	1988	Interim period-- 1988	1989
*	*	*	*	*	*

1/ * * *.

A summary of the pension costs for current employees is shown in the following tabulation (in thousands of dollars):

Item	1986	1987	1988	Interim 1988	1989
*	*	*	*	*	*

In 1988, Bethlehem reported that its basic steel and structural products divisions were profitable but several of its other divisions--rail products and pipe (which includes the subject product); bar, rod and wire; BethForge; and Baltimore Marine--remained unprofitable. [81] CF&I reported that it was profitable in 1988 because of its oil-country tubular goods business. [82]

Investment in productive facilities.--The value of property, plant, and equipment for the U.S. producers of new steel rails is shown in **tables 8 and 9**. The return on assets for these producers is also included in the same tables.

Capital expenditures.--The capital expenditures for the U.S. producers are presented in **table 10**. Bethlehem's submission also included expenditures for technology.

Bethlehem's reported capital expenditures for new steel rails were *** million in 1984 and *** million in 1985. Of these amounts, *** million in 1984 and *** million in 1985 were for technology. * * *. CF&I indicated that its capital expenditures were *** in 1984 and *** million in 1985.

Research and development expenses.--Research and development expenses for the U.S. producers are presented in **table 11**. Bethlehem reported research and development costs of *** in 1984 and *** in 1985. CF&I * * * .

Capital and investment.--The Commission requested U.S. producers to describe any actual or potential negative effects of imports of new steel rails from Canada on their firm's growth, investment, and ability to raise capital (including efforts to develop a derivative or more advanced version of the like product). Their responses are shown in **appendix F**.

[81] Bethlehem Steel's 1988 Annual Report, p. 3 (management analysis).

[82] CF&I's 1988 Annual Report, p. 2 (management analysis).

Table 8
Value of U.S. producers' property, plant, and equipment for all products of establishments in which new steel rails are produced, accounting years 1986-88 and interim periods ended March 31, 1988, and March 31, 1989

(Value in thousands of dollars; return in percent)

Item	As of end of accounting year 1986	1987	1988	Interim period ended March 31-- 1988	1989
All products of establishments:					
Original cost:					
Bethlehem	***	***	***	***	***
CF&I	***	***	***	***	***
W-P	***	***	***	***	***
Total	***	***	***	***	***
Book value:					
Bethlehem	***	***	***	***	***
CF&I	***	***	***	***	***
W-P	***	***	***	***	***
Total	***	***	***	***	***
Total assets: 1/					
Bethlehem	***	***	***	***	***
CF&I	***	***	***	***	***
W-P	***	***	***	***	***
Total	***	***	***	***	***
Return on fixed assets: 2/					
Bethlehem	***	***	***	3/	3/
CF&I	***	***	***	3/	3/
W-P	***	***	***	***	***
Total	***	***	***	3/	3/
Return on total assets: 4/					
Bethlehem	***	***	***	3/	3/
CF&I	***	***	***	3/	3/
W-P	***	***	***	***	***
Total	***	***	***	3/	3/

1/ Defined as book value of fixed assets plus all other assets.
2/ Defined as operating income or *(-)loss* divided by book value of fixed assets.
3/ Submitted data for periods of less than 1 year prohibits annual rate of return calculations.
4/ Defined as operating income or *(-)loss* divided by total assets.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Table 9
New steel rails: Value of U.S. producers' property, plant, and equipment for producing new steel rails, accounting years 1986-88 and interim periods ended March 31, 1988, and March 31, 1989

(Value in thousands of dollars; return in percent)

Item	As of end of accounting year 1986	1987	1988	Interim period ended March 31-- 1988	1989
New steel rails:					
Original cost:					
Bethlehem	***	***	***	***	***
CF&I	***	***	***	***	***
W-P	***	***	***	***	***
Total	408,541	389,032	***	***	***
Book value:					
Bethlehem	***	***	***	***	***
CF&I	***	***	***	***	***
W-P	***	***	***	***	***
Total	285,961	261,415	***	***	***
Total assets: 1/					
Bethlehem	***	***	***	***	***
CF&I	***	***	***	***	***
W-P	2/	2/	***	***	***
Total	***	***	***	***	***
Return on fixed assets: 3/					
Bethlehem	***	***	***	4/	4/
CF&I	***	***	***	4/	4/
W-P	***	***	***	***	***
Total	-8.9	-7.5	***	4/	4/
Return on total assets: 5/					
Bethlehem	***	***	***	4/	4/
CF&I	***	***	***	4/	4/
W-P	2/	2/	***	***	***
Total	***	***	***	4/	4/

1/ Defined as total establishment assets multiplied by the ratio of the book value of the product's fixed assets to the book value of the establishment's fixed assets.
2/ Data not available.
3/ Defined as operating income or *(-)loss* divided by book value of fixed assets.
4/ Submitted data for periods of less than 1 year prohibits annual rate of return calculations.
5/ Defined as operating income or *(-)loss* divided by total assets.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Table 10

New steel rails: Capital expenditures by U.S. producers, accounting years 1986-88 and interim periods ended March 31, 1988, and March 31, 1989

(In thousands of dollars)

Item	*1986*	*1987*	*1988*	*Interim period ended March 31--* *1988*	*1989*
All products of establishments:					
Bethlehem 1/	***	***	***	***	***
CF&I 2/	***	***	***	***	***
W-P	***	***	***	***	***
Total	***	***	***	***	***
New steel rails:					
Bethlehem 1/	***	***	***	***	***
CF&I 2/	***	***	***	***	***
W-P	***	***	***	***	***
Total	8,185	2,697	***	***	***

1/ These amounts include technology expenditures of ***, ***, ***, *** and *** in 1986, 1987, 1988, interim 1988, and interim 1989, respectively.
2/ * * *.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Table 11
New steel rails: Research and development by U.S. producers, accounting years 1986-88 and interim periods ended March 31, 1988, and March 31, 1989

(In thousands of dollars)

Item	*1986*	*1987*	*1988*	*Interim period ended March 31–* *1988*	*1989*
All products of establishments:					
Bethlehem	***	***	***	***	***
CF&I	***	***	***	***	***
W-P	***	***	***	***	***
Total	***	***	***	***	***
New steel rails:					
Bethlehem	***	***	***	***	***
CF&I	***	***	***	***	***
W-P	***	***	***	***	***
Total	1,016	678	***	***	***

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Consideration of Threat of Material Injury

Section 771(7)(F)(i) of the Tariff Act of 1930 (19 U.S.C. § 1677(7)(F)(i)) provides that--

> In determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of any merchandise, the Commission shall consider, among other relevant factors: [83]
>
> *(I) If a subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the subsidy is an export subsidy inconsistent with the Agreement),*
>
> *(II) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States,*
>
> *(III) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level,*
>
> *(IV) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise,*
>
> *(V) any substantial increase in inventories of the merchandise in the United States,*

[83] Section 771(7)(F)(ii) of the act (19 U.S.C. § 1677(7)(F)(ii)) provides that "Any determination by the Commission under this title that an industry in the United States is threatened with material injury shall be made on the basis of evidence that the threat of material injury is real and that actual injury is imminent. Such a determination may not be made on the basis of mere conjecture or supposition."

(VI) the presence of underutilized capacity for producing the merchandise in the exporting country,

(VII) any other demonstrable adverse trends that indicate the probability that the importation (or sale for importation) of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury,

(VIII) the potential for product-shifting if production facilities owned or controlled by the foreign manufacturers, which can be used to produce products subject to investigation(s) under section 701 or 731 or to final orders under section 736, are also used to produce the merchandise under investigation,

(IX) in any investigation under this title which involves imports of both a raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission under section 705(b)(1) or 735(b)(1) with respect to either the raw agricultural product or the processed agricultural product (but not both), and

(X) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product. [84]

The available information on the nature of the subsidies found by Commerce in its final determination (item (I) above) is presented in the section of this report entitled "The nature and extent of subsidies and sales at LTFV;" information on the volume, U.S. market penetration, and pricing of imports of the subject merchandise (items (III) and (IV) above)

[84] Section 771(7)(F)(iii) of the act (19 U.S.C. § 1677(7)(F)(iii)) further provides that, in antidumping investigations, ". . . the Commission shall consider whether dumping in the markets of foreign countries (as evidenced by dumping findings or antidumping remedies in other GATT member markets against the same class or kind of merchandise manufactured or exported by the same party as under investigation) suggests a threat of material injury to the domestic industry."

is presented in the section entitled "Consideration of the causal relationship between imports of the subject merchandise and the alleged material injury;" and information on the effects of imports of the subject merchandise on U.S. producers' existing development and production efforts (item (X)) is presented in the section entitled "Consideration of material injury." Available information on U.S. inventories of the imported products (item (V)); foreign producers' operations, including the potential for "product-shifting" (items (II), (VI), and (VIII) above); any other threat indicators, if applicable (item (VII) above); and any dumping in third-country markets, follows.

U.S. importers' inventories

U.S. importers' inventory data are presented in **figure 8 and table 12.** * * * are believed to be the sole importers into the United States of new steel rails from Canada.

U.S. inventories of new steel rails imported from Canada represented approximately 43 percent of all imported new steel rail inventories in 1986, 40 percent in 1987, and 56 percent in 1988. Imported Canadian new steel rail inventories increased approximately 7 percent from 1986 to 1987, and rose by 136 percent from 1987 to 1988. Interim periods January-March 1988 and January-March 1989 indicate an increase in inventories of Canadian rails from 3,975 to 13,850 short tons.

Table 12 also presents separate data on importers' U.S. inventories of industrial rails. The share of total U.S. inventories of Canadian-produced new steel rails represented by industrial rails was approximately 84 percent in 1986, 76 percent in 1987, 62 percent in 1988, 75 percent in interim 1988, and 53 percent in interim 1989.

Sales of distributor inventories represent approximately 5 percent of prime rail sales. Most of these distributor inventories are sold through the spot market. [85] * * * , the largest stocking supplier, indicated that imports from Canada represented approximately *** percent of their inventory in 1988. [86] [87]

---

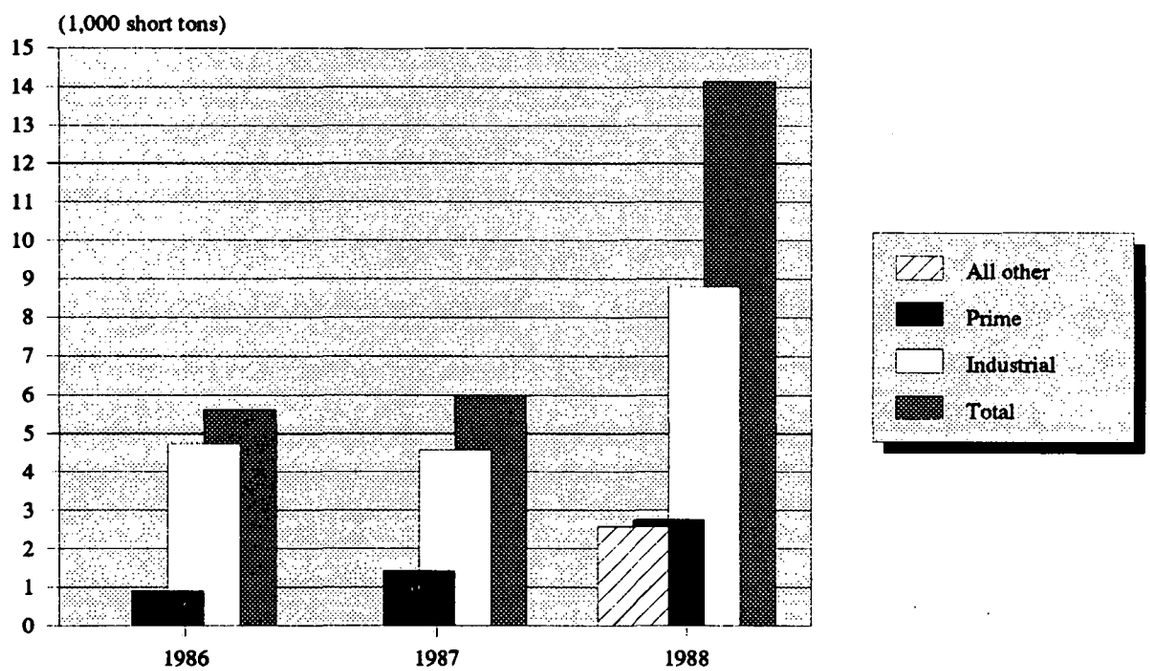
[85] There was one instance of a quote competition sale from a distributor not acting as the sales representative for a Canadian producer: * * * sold prime rail purchased from * * * to * * *. For a further discussion of this sale, see the pricing section.

[86] * * *.

[87] * * *.

Figure 8

U.S. importers' inventories of Canadian rails, by rail types, 1986-88



Source: Table 12.

Table 12
New steel rails: U.S. importers' end-of-period inventories, by types of rails, and by countries, December 31, 1986-88, March 31, 1988, and March 31, 1989

Type of rail/ Country of origin	*December 31--* 1986	1987	1988	*March 31--* 1988	1989
	Quantity (In short tons)				
New steel rails from:					
Canada:					
Prime rail	900	1,421	2,765	1,009	3,025
Industrial rail	729	4,576	8,798	2,966	7,400
All other rail 1/	0	0	2,577	0	3,425
Total	5,629	5,997	14,140	3,975	13,850
All other countries:					
Prime rail	2,095	4,062	6,234	2,933	5,172
Industrial rail	4,003	3,158	2,050	3,378	2,183
All other rail 1/	1,352	1,773	2,931	4,234	2,634
Total	7,450	8,993	11,135	10,545	9,989
	Value (In 1,000 dollars)				
New steel rails from:					
Canada:					
Prime rail	368	579	1,196	414	1,318
Industrial rail	827	811	1,459	609	1,259
All other rail 1/	0	0	837	0	272
Total	1,195	1,390	3,492	1,023	2,849
All other countries:					
Prime rail	106	1,844	3,058	1,588	2,728
Industrial rail	822	618	583	639	636
All other rail 1/	759	1,127	1,754	2,447	1,563
Total	1,687	3,589	5,395	4,674	4,927

1/ All other rail includes crane, girder, and electrical rail.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Capacity of foreign producers to increase exports

Canada.--There are two rail producers in Canada: Algoma Steel Corp., Ltd. (Algoma), Sault Ste. Marie, Ontario, and Sydney Steel Corp. (Sydney), Sydney, Nova Scotia. [88] Until August 19, 1988, Algoma was 54 percent owned by a holding company subsidiary of Canadian Pacific (CP), one of the two major Canadian railroads. At that time it was acquired by another Canadian steelmaking company, Dofasco, Inc. (Dofasco), located in Hamilton, Ontario. Until the acquisition, Algoma was affiliated through CP, with Soo Line Railroad, a Class I railroad in the United States. [89] Sydney is a Crown Corporation owned by the Government of the Province of Nova Scotia.

Algoma is an integrated steelmaker that produces railroad rails, sheet, plate, structural shapes, semi-finished products, and pipe and tube. Algoma operates four BOFs with an annual steelmaking capacity of 2.6 million short tons. The company produces both ingot-cast and continuous-cast steels (rails are only produced from continuous-cast steel), and intends to increase the proportion of continuously cast steels. Rails are produced on a rolling facility that, in the breakdown (roughing) stage, also processes structural shapes and tube; final rolling stages for rails are entirely separate from the other two lines. The overall rolling capacity of this mill, 606,000 short tons, acts as a constraint on the total output of the three product lines. However, Algoma is able to shift rolling capacity within the group, increasing the output of one at the expense of the others. The company has broken ground for the installation of a continuous caster designated for the production of tube rounds; part of the new installation would entail building a new tube-rolling line, thereby effectively increasing breakdown rolling capacity of structural shapes and rail.

Sydney is a company in the midst of downsizing. At the peak of the company's production, it operated 10 open-hearth furnaces and produced 1.1 million short tons of raw steel. During much of the 1980s it operated three open-hearth furnaces with oxygen lancing and a vacuum degassing unit with an annual steelmaking capacity via cast ingot of 750,000 tons. With only one open-hearth furnace operating in 1988-89, raw steelmaking capability dropped to 300,000 tons. Rail-finishing capability acts as a restraint on rail production since finishing capacity has remained relatively constant at 200,000 tons per

[88] The information that follows is from Metallurgical Works in Canada, Primary Iron and Steel, 1988, Mineral Bulletin MR 218, Energy, Mines and Resources Canada, Government of Canada.

[89] Canadian Pacific owned approximately 57 percent of the outstanding public shares of Soo Line. The relationship between Algoma and Soo was terminated by CP's sale of Algoma to Dofasco.

year. The company underwent a strike and shutdown from February 1 to March 16 in 1988 (the company effectively lost production for 2-1/2 months before resuming full operation), which reduced shipments by about 40,000 tons from 1987 levels. [90] Labor negotiations were successful and the threat of a strike was averted.

The Government of Canada and the Government of the Province of Nova Scotia are financing a C$250 million modernization program at Sydney. Sydney plans to close the remaining open-hearth furnace, dismantle its cross-country rolling mill, and install a 150-ton EAF, a universal mill, and an off-line head-hardening process (via induction heating). Shutdown took place in June 1989, with startup projected for November 1989, at which time Sydney will have a nominal 500,000 ton-per-year capacity for raw steel production. There may be delays in startup given the relative inexperience of Sydney personnel in EAF, continuous casting, and universal rolling mill operation, as well as the usual debugging of new systems that is required.

Both Canadian producers manufacture carbon and alloy steel rails in conventional lengths (39 feet) or long lengths (up to 82 feet); both offer end hardening in standard carbon rails; both offer rails drilled to customer specification; and both offer an alloy (chrome based) rail with a Brinnell hardness of 320 or better. Sydney is more experienced, because of the company's export orientation, in rolling rail to various international standards and to weights from 136 pounds to as low as 75 pounds per yard. Algoma rolls rail within the range of 100 to 136 pounds per yard and to U.S. and Canadian standards. * * *. Algoma has a patent and prototype process for an on-line head-hardening process, * * *. Additionally, the project would require approval from the company's Board of Directors, which has not been sought as yet, for a capital investment of approximately *** million. Along with other capital investments, Sydney is installing an off-line head-hardening unit, which is undergoing testing at the present time.

Both Canadian producers sell to the two major railways in Canada, CP and Canadian National (CN), as well as to regional Canadian railroads. There does not seem to be evidence that CP or Soo Lines gave preferential treatment to Algoma in the purchasing of rail. [91] Sydney has a contract to supply 80 percent of CN's requirements for standard,

[90] * * *.

[91] * * *.

intermediate grade, and alloy rail for the indefinite future. [92] These requirements totaled 40,000 short tons in 1987, [93] but CN has deferred most purchases of new rail because of lower revenues. Sydney estimates that CN should purchase about *** tons per year from all sources, that CP's purchases should run between *** tons and *** tons per year, and that British Columbia Rail's purchases should total about *** to *** tons per year. This is roughly in line with Algoma's indication that the Canadian rail market is capable of absorbing only about *** tons per year (roughly *** miles of new rail).

According to officials at Algoma, the Canadian railroads cost freight from the railmaker's plant to their weld facility. CP and CN both have their main weld facility in Hamilton, Ontario, which gives Algoma an advantage of approximately 1,000 miles for sales in the Canadian market over Sydney. CN also has a small weld facility near Montreal, which is closer to Sydney than to Algoma.

Sydney, located near deepwater port facilities, has an advantage in shipping location for export sales, and is export oriented. The company sold about *** tons into the export market during 1986-88, including sales to * * * . Export sales in 1988 represented *** percent of total sales. [94] Factors assisting those sales were the availability of financing through the World Bank, transportation grants and low interest tied-aid loans for infrastructure development to Third World countries by the Government of Canada, and Sydney's willingness to conclude countertrade transactions. Additionally, Sydney is more experienced than any of the three other North American producers in rolling rail to various differing international specifications. Much of the rail sold outside Canada or the United States is rolled to specifications based on European standards, including different profiles and lower sectional weights. [95]

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[92] * * * .

[93] Metal Bulletin, October 1987.

[94] Based on the company's marketing statistics provided to the Commission's staff. See also, World Trade Steel, U.K. Iron and Steel Statistics Bureau, annual reports, 1985-87, which show total Canadian exports to Mexico, India, and Africa for 1985 (53,000 tons), 1986 (55,600 tons), and 1987 (128,400 tons).

[95] According to * * *.

Foreign producer data requested by the Commission are presented in **table 13 and figure 9.** The table includes data for both Algoma and Sydney, and thus represents all Canadian capacity, production, shipments, and producer inventories.

Canadian producers' capacity * * * throughout the period of investigation. Production increased *** percent from 1986 to 1987, declined *** percent from 1987 to 1988, but increased *** percent between the interim periods January-March 1988 and January-March 1989. Because of the * * * capacity, capacity utilization figures increased and declined in proportion to changes in production. Unlike capacity utilization rates in the United States, Canadian utilization rates * * * from 1986 through 1988. Canadian capacity utilization was *** percent compared with *** percent in the United States during 1986, *** percent compared with *** percent in the United States during 1987, and *** percent compared with *** percent in the United States during 1988.

The Canadian producers' exports to the United States increased *** percent from 1986 to 1987, from *** to *** tons, and increased *** percent from 1987 to 1988. Industrial rail accounted for *** percent of their exports to the United States in 1986, *** percent in 1987, *** percent in 1988, and *** percent in the first quarter of 1988; * * *.

The United States accounted for a generally * * * share of Canada's exports over the period of investigation (fig. 9): *** percent of total Canadian exports in 1986, *** percent in 1987, *** percent in 1988, *** percent in the first quarter of 1988, and *** percent in the first quarter of 1989. Canadian exports to the United States represented *** percent of total Canadian shipments in 1986, *** percent in 1987, *** percent in 1988, *** percent in the first quarter of 1988, and *** percent in the first quarter of 1989.

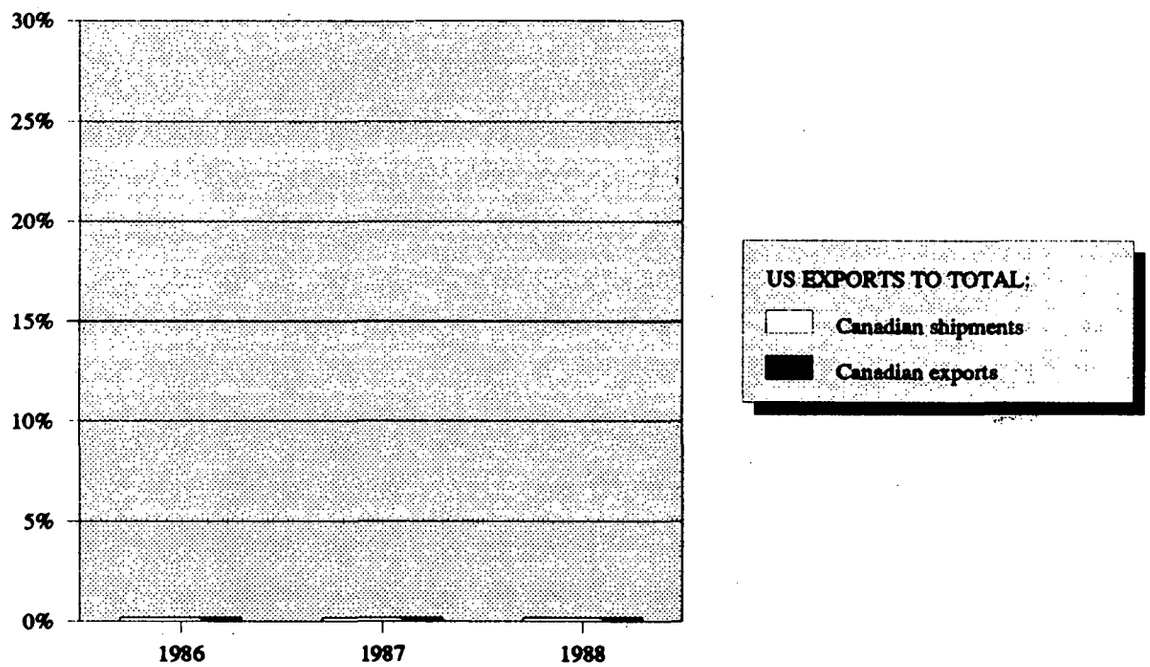
Canadian producers' end-of-period-inventories increased *** percent between 1986 and 1987, from *** to *** tons, and then fell *** percent between 1987 and 1988, to *** tons at the end of 1988. Inventories stood at *** tons at the end of March 1989.

Other foreign producers

Other rail producers have sold carbon and alloy, as well as hardened rail, into the U.S. market. Among the sellers are producers in West Germany, France, Austria, the United Kingdom, and Japan. The West German producer Thyssen, British Steel (BSC), and the Japanese producer Nippon Steel all have a hardening process; the Japanese possess an on-line head-hardening process, and are marketing a "super rail" in the United States.

Figure 9

Canadian exports to U.S.: Ratio of exports to shipments and total exports*



Source: Table 13

* These data are confidential.

Table 13
New steel rails: Canada's capacity, production, capacity utilization, shipments, and inventories, 1986-88, January-March 1988, and January-March 1989

(In short tons, except as noted)

Item	*1986*	*1987*	*1988*	*January-March-- 1988*	*January-March-- 1989*
Capacity	***	***	***	***	***
Production	***	***	***	***	***
Capacity utilization: (percent)	***	***	***	***	***
Home-market shipments	***	***	***	***	***
Exports to:					
United States:					
Standard tee	***	***	***	***	***
Premium	***	***	***	***	***
Industrial	***	***	***	***	***
Other	***	***	***	***	***
Total exports to the U.S.	***	***	***	***	***
All other countries 1/	***	***	***	***	***
Total Canadian shipments	***	***	***	***	***
Ratio of U.S. exports to total shipments (percent)	***	***	***	***	***
End-of-period inventories:					
Standard	***	***	***	***	***
Premium	***	***	***	***	***
Industrial	***	***	***	***	***
Total inventories	***	***	***	***	***

1/ Principally shipments by * * * to * * * in 1987-89.

Source: Based on data submitted by counsel for respondents.

Japanese sales of rail and accessories account for 59 percent of all such imports to the Western U.S. market. [96]

The markets in Western Europe and the United States are said to be flat with little improvement in sight; the national railways in Europe have halted new expansion, [97] and plan little new investment with the exception of Spain and Italy. [98] Italian consumption, about 250,000 metric tons per year, is entirely supplied by the domestic supplier, Ilva. [99] BSC and Thyssen/Krupp together export about 225,000 short tons of rail per year (or about 1,000 miles of tangent track). Rail consumption in the United States is predicted to remain the same in 1989 as it was in 1988, despite increased rail traffic. Despite several new track programs, only a small proportion actually consists of new rail. [100]

* * *. The major markets for exported rail are the Indian subcontinent (India and Bangladesh); Africa (Angola, Mozambique, Nigeria, Zimbabwe, Tanzania, and Botswana); Mexico, where new railroads are being built, and new rail for existing railroads is being purchased; China, where the existing system is being upgraded; and the Middle East (Iran, Iraq, Turkey, and Egypt). However, there is new rail production capacity coming onto the market from Brazil and India. It is anticipated that the Brazilian production will displace some imports, although Brazilian consumption should rise because the Government has approved the construction of two North-South lines (current systems run East-West), both several thousand miles long. Indian production, if it satisfies the domestic market, might be sold to east Africa and to the Middle East (particularly Egypt), as well as displace any imports into India.

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[96] The Western U.S. Steel Market: Analysis of Market Conditions and Assesment of the Effects of Voluntary Restraint Agreements on Steel-producing and Steel-consuming Industries, USITC Publication 2165, March 1989.

[97] Metal Bulletin, Mar. 21, 1988.

[98] "European rail sales improve," Metal Bulletin, Mar. 16, 1989.

[99] Ibid.

[100] "1989 rail use seen equal to '88," American Metal Market, Jan. 24, 1989.

Consideration of the Causal Relationship Between Imports of the Subject Merchandise and the Alleged Material Injury

U.S. imports

During the preliminary investigation, both the petitioner and respondents agreed that the exclusive use of official Commerce import statistics for import analysis could be misleading. Therefore, the Commission collected import data from two other sources: Statistics Canada (official statistics of the Government of Canada), and the Canadian producers.

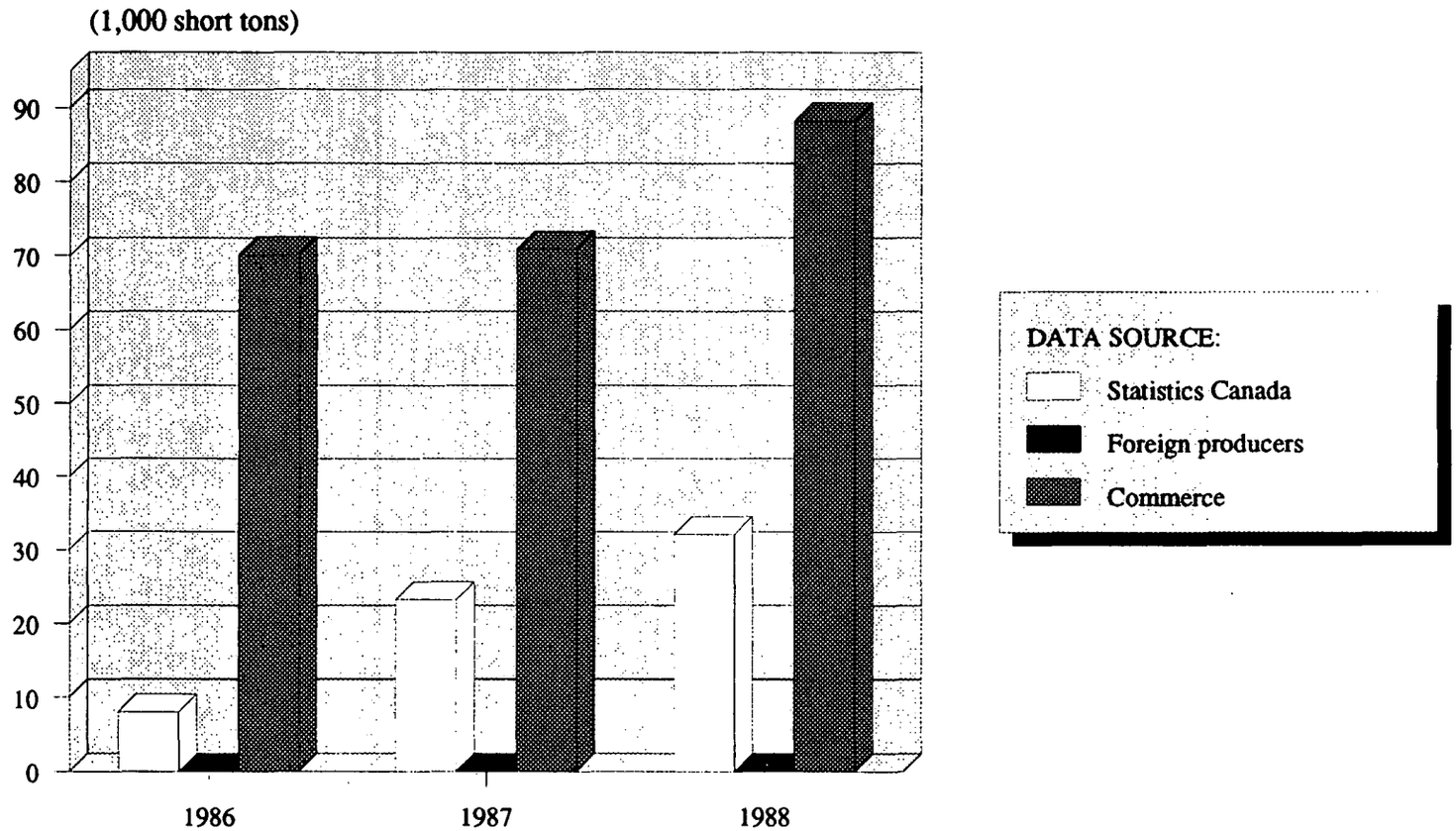
In looking at the data collected, it is apparent that a great disparity exists between the three sets of import data (see **fig. 10**). The principal reason for the disparities is that the different sources include different products in their data base. Official U.S. import statistics include the subject products (prime and industrial rails), but also include relay rails. They are therefore believed to significantly overstate imports of new steel rails from Canada.[101] Official Canadian export statistics include only prime rails, and therefore understate "U.S. imports" of subject products to the extent that industrial rails are being exported. U.S. export data provided to the Commission by the Canadian producers cover only subject products, but may still somewhat understate "U.S. imports" to the extent that any other Canadian firms (such as railroads) are exporting new steel rails to the United States (see further discussion in app. G).

For purposes of discussion in this report, U.S. imports are calculated from official Commerce statistics for imports from all countries other than Canada and from data provided by the two Canadian producers for imports from Canada (**table 14**). This basis is believed to provide the most accurate estimate of actual imports of new steel rails. For comparison, however, import and market share data are presented in appendixes G and H using only Commerce statistics and, separately, using official Canadian export statistics for "imports" from Canada and Commerce statistics for imports from all other sources.

[101] Commerce statistics are thought to accurately reflect U.S. imports of subject products from sources other than Canada, however, in that such imports are believed to be mostly, if not entirely, new rails (see transcript of the conference, pp. 138-40).

Figure 10

U.S. imports of new steel rails from Canada based on various sources, 1986-88



Source: Dept. of Commerce, Statistics Canada, and foreign producer data.

* Foreign producer data are confidential.

Table 14
New steel rails: U.S. imports for consumption, by principal sources, 1986-88, January-March 1988, and January-March 1989

Item	*1986*	*1987*	*1988*	*January-March– 1988*	*January-March– 1989*
	Quantity (short tons)				
Canada 1/	***	***	***	***	***
Japan	60,079	61,348	28,716	17,580	8,790
Belgium & Luxembourg	7,095	10,992	22,125	8,442	4,280
West Germany	34,837	10,333	15,502	7,216	4,786
United Kingdom	3,836	5,662	3,707	2/	2,909
Sweden	270	3,583	2,945	1,042	2/
France	13,296	2,569	308	2/	6,306
Republic of Korea	2,541	2,514	1,339	428	2/
All others	63	2	413	2/	197
Total	***	***	***	***	***
	Landed-duty paid (1,000 dollars)				
Canada 3/	***	***	***	***	***
Japan	27,937	27,273	14,259	8,192	4,957
Belgium & Luxembourg	3,391	5,829	11,929	4,069	2,027
West Germany	15,167	4,175	7,229	3,250	2,579
United Kingdom	1,623	1,954	1,555	2/	1,580
Sweden	57	1,417	907	215	2/
France	5,973	1,007	162	2/	3,065
Republic of Korea	1,013	756	579	174	2/
All others	37	9	207	2/	327
Total	***	***	***	***	***
	Unit value (per short ton)				
Canada	***	***	***	***	***
Japan	$465.00	$444.56	$496.55	$465.98	$564.00
Belgium & Luxembourg	477.94	530.29	543.86	481.99	473.60
West Germany	435.37	404.05	466.39	450.39	538.86
United Kingdom	423.10	345.11	419.48	4/	543.14
Sweden	211.11	395.48	307.98	206.33	4/
France	449.23	391.98	525.97	4/	486.05
Republic of Korea	398.66	300.72	432.41	406.54	4/
All others	587.30	450.00	501.21	4/	165.99
Average	***	***	***	***	***

1/ Compiled from Canadian producer data submitted by counsel for respondents. Includes prime and industrial rail.
2/ Negligible. Estimated to be zero.
3/ Canadian export value, converted to U.S. dollars; International Financial Statistics.
4/ Not applicable.
5/ Statistical aberration.

Source: Compiled from official statistics of the U.S. Department of Commerce, except as noted.

Aggregate U.S. imports of new steel rails declined steadily between 1986 and 1988, from *** tons in 1986 to *** tons in 1987 and *** tons in 1988. Similarly, the quantity of imports during January-March 1989 was *** percent less than imports during January-March 1988. The quantity of imports of new steel rails from Canada, as a share of total U.S. imports, rose from *** percent in 1986 to *** percent in 1987 and *** percent in 1988. During January-March 1988, imports from Canada represented *** percent of total imports, and during the corresponding period of 1989, they represented *** percent.

The value of imports of new steel rails from Canada, as a share of the total value of U.S. imports, was *** percent in 1986, rising to *** percent in 1987, and rising further to *** percent in 1988. During January-March 1988, the value of imports from Canada represented *** percent of total imports, while in the corresponding period of 1989 they represented *** percent.

The quantity of new steel rails imported from Canada increased *** percent from 1986 to 1987, from *** to *** tons, and increased a further *** percent in 1988 to *** tons. The value of new steel rails imported from Canada increased *** percent from 1986 to 1987, from *** million to *** million, and increased further by *** percent in 1988, to ***. The unit value (per short ton) of imports from Canada increased *** percent from 1986 to 1987, from *** to ***, and increased further by *** percent to *** in 1988 (see **figs. 11a and 11b**).

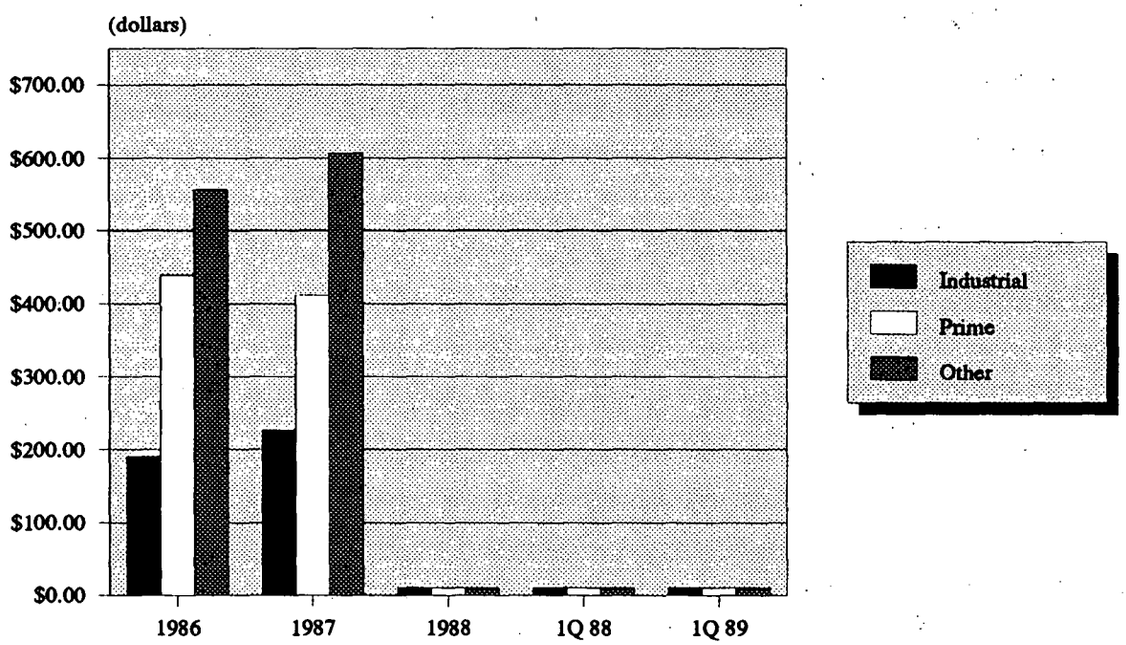
Market penetration of imports

Data on market penetration of imports are presented in **figure 12 and tables 15a-d.** Tables using Commerce and Statistics Canada data for market penetration of imports are presented in **appendix H.** The share of total imports in U.S. apparent consumption of new steel rails was 22.2 percent in 1986, increasing to 22.9 percent in 1987, but declining to 18.9 percent in 1988. A similar trend is evident in the value of total imports as a share of apparent U.S. consumption.

The quantity of imports from Canada, which represented *** percent of apparent U.S. consumption of new steel rails in 1986, rose to *** percent in 1987, and increased further to *** percent in 1988. In both the first quarter of 1988 and the first quarter 1989, imports from Canada accounted for *** percent of apparent U.S. consumption.

Figure 11a

Unit values of U.S. rail mills' domestic shipments, by rail types*

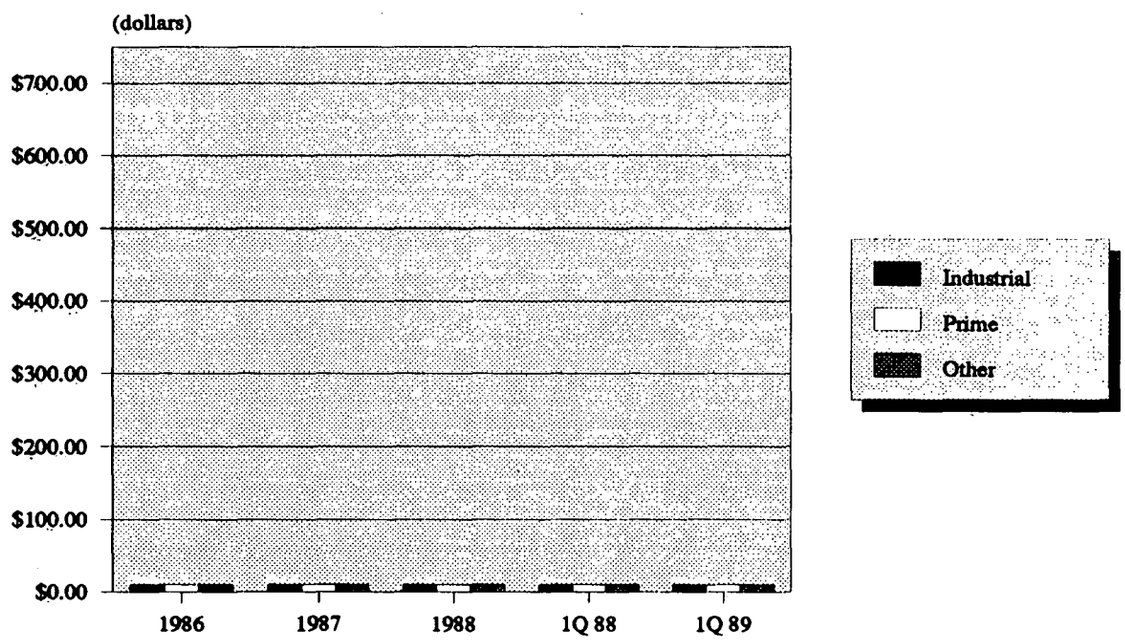


Source: Compiled from responses to Commission questionnaires.

* Data for 1988, 1Q 88, and 1Q 89 are confidential.

Figure 11b

Unit values of imports from Canada, by rail types *



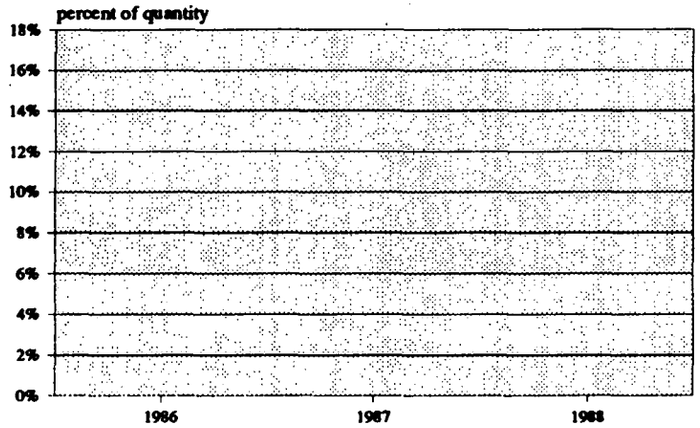
Source: Compiled from responses to Commission questionnaires.

* These data are confidential.

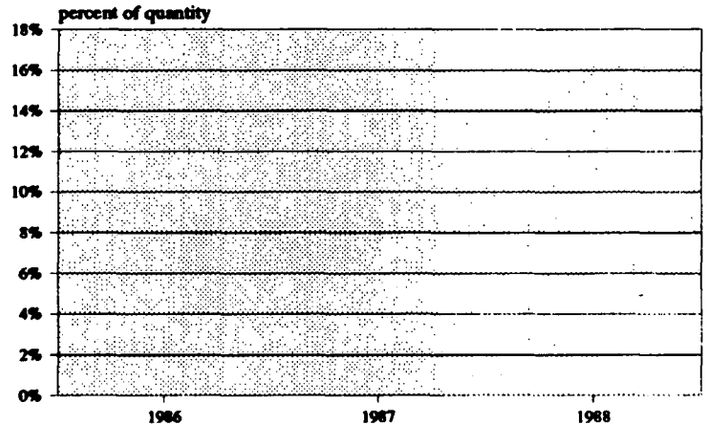
Figure 12
Ratios of imports from Canada to apparent U.S. consumption, by rail types*

* 1988 data are confidential.

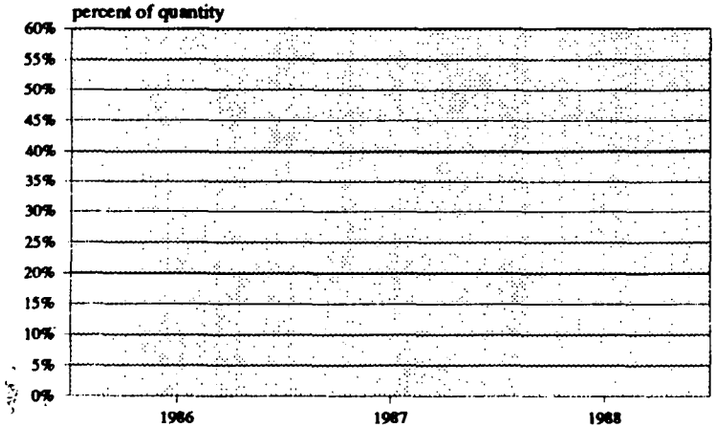
All new steel rails



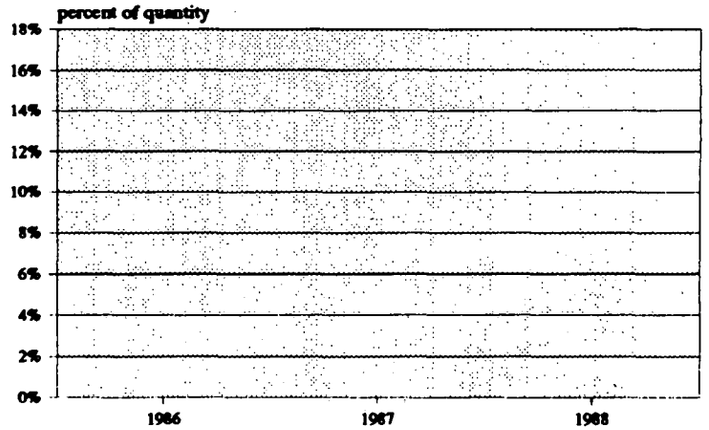
Prime rails



Industrial rails



All other rails



Source: Tables 15a-d

Table 15a
All new steel rails: Apparent U.S. consumption, U.S. imports, and ratios of imports to consumption, 1986-88, January-March 1988, and January-March 1989

Item	*1986*	*1987*	*1988*	*January-March-- 1988*	*January-March-- 1989*
	Quantity (short tons)				
Apparent U.S. consumption 1/	590,841	541,082	***	***	***
U.S. imports from:					
Canada 2/	***	***	***	***	***
All other countries	122,017	97,003	75,055	34,708	27,267
Total imports	***	***	***	***	***
	Ratios (percent of quantity)				
To apparent U.S. consumption of imports from:					
Canada	***	***	***	***	***
All other countries	20.7	17.9	***	***	***
Total	***	***	***	***	***
	Value (1,000 dollars)				
Apparent U.S. consumption 3/	258,887	226,800	***	***	***
U.S. imports from:					
Canada 4/	***	***	***	***	***
All other countries	55,198	42,420	36,827	15,900	14,535
Total imports	***	***	***	***	***
	Ratios (percent of value)				
To apparent U.S. consumption of imports from:					
Canada	***	***	***	***	***
All other countries	21.3	18.7	***	***	***
Total	***	***	***	***	***

1/ Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.
2/ Compiled from foreign producer data submitted by counsel for respondents.
3/ Includes value of domestic shipments and Canadian exports to the U.S. (F.O.B. producers' mill), plus imports from all other countries at U.S. CIF plus duties (landed-duty paid).
4/ Value (F.O.B. Canadian producers' mill) converted to U.S. dollars; International Financial Statistics.

Note.--Because of rounding, figures may not add to the totals shown.

Source: Compiled from official statistics of the U.S. Department of Commerce, except as noted.

Table 15b
Prime rails: Apparent U.S. consumption, U.S. imports, and ratios of imports to consumption, 1986-88, January-March 1988, and January-March 1989

Item	1986	1987	1988	January-March-- 1988	January-March-- 1989
	Quantity (short tons)				
Apparent U.S. consumption 1/	551,145	494,665	***	***	***
U.S. imports from:					
Canada 2/	***	***	***	***	***
All other countries	122,017	97,003	75,055	34,708	27,267
Total imports	***	***	***	***	***
	Ratios (percent of quantity)				
To apparent U.S. consumption of imports from:					
Canada	***	***	***	***	***
All other countries	22.1	19.6	***	***	***
Total	***	***	***	***	***
	Value (1,000 dollars)				
Apparent U.S. consumption 3/	243,570	207,185	***	***	***
U.S. imports from:					
Canada 4/	***	***	***	***	***
All other countries	55,198	42,420	36,827	15,900	14,535
Total imports	***	***	***	***	***
	Ratios (percent of value)				
To apparent U.S. consumption of imports from:					
Canada	***	***	***	***	***
All other countries	22.7	20.5	***	***	***
Total	***	***	***	***	***

1/ Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.
2/ Compiled from foreign producer data submitted by counsel for respondents.
3/ Includes value of domestic shipments and Canadian exports to the U.S. (F.O.B. producers' mill), plus imports from all other countries at U.S. CIF plus duties (landed-duty paid).
4/ Value (F.O.B. Canadian producers' mill) converted to U.S. dollars; International Financial Statistics.

Note.--Because of rounding, figures may not add to the totals shown.

Source: Compiled from official statistics of the U.S. Department of Commerce, except as noted.

Table 15c
Industrial rails: Apparent U.S. consumption, U.S. imports, and ratios of imports to consumption, 1986-88, January-March 1988, and January-March 1989

Item	*1986*	*1987*	*1988*	*January-March-- 1988*	*January-March-- 1989*
	Quantity (short tons)				
Apparent U.S. consumption 1/	17,211	16,485	***	***	***
U.S. imports from:					
Canada 2/	***	***	***	***	***
All other countries	0	0	0	0	0
Total imports	***	***	***	***	***
	Ratios (percent of quantity)				
To apparent U.S. consumption of imports from:					
Canada	***	***	***	***	***
All other countries	0	0	***	***	***
Total	***	***	***	***	***
	Value (1,000 dollars)				
Apparent U.S. consumption 3/	3,601	3,769	***	***	***
U.S. imports from:					
Canada 4/	***	***	***	***	***
All other countries . . .	0	0	0	0	0
Total imports	***	***	***	***	***
	Ratios (percent of value)				
To apparent U.S. consumption of imports from:					
Canada	***	***	***	***	***
All other countries . . .	0	0	***	***	***
Total	***	***	***	***	***

1/ Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.
2/ Compiled from foreign producer data submitted by counsel for respondents.
3/ Includes value of domestic shipments and Canadian exports to the U.S. (F.O.B. producers' mill), plus imports from all other countries at U.S. CIF plus duties (landed-duty paid).
4/ Value (F.O.B. Canadian producers' mill) converted to U.S. dollars; International Financial Statistics.

Note.--Because of rounding, figures may not add to the totals shown.

Source: Compiled from official statistics of the U.S. Department of Commerce, except as noted.

Table 15d
New steel rails other than prime and industrial: Apparent U.S. consumption, U.S. imports, and ratios of imports to consumption, 1986-88, January-March 1988, and January-March 1989

Item	*1986*	*1987*	*1988*	*January-March-- 1988*	*January-March-- 1989*
	Quantity (short tons)				
Apparent U.S. consumption 1/	8,357	8,942	***	***	***
U.S. imports from:					
Canada 2/	***	***	***	***	***
All other countries	0	0	0	0	0
Total imports	***	***	***	***	***
	Ratios (percent of quantity)				
To apparent U.S. consumption of imports from:					
Canada	***	***	***	***	***
All other countries	0	0	***	***	***
Total	***	***	***	***	***
	Value (1,000 dollars)				
Apparent U.S. consumption 3/	4,659	5,008	***	***	***
U.S. imports from:					
Canada 4/	***	***	***	***	***
All other countries	0	0	0	0	0
Total imports	***	***	***	***	***
	Ratios (percent of value)				
To apparent U.S. consumption of imports from:					
Canada	***	***	***	***	***
All other countries	0	0	***	***	***
Total	***	***	***	***	***

1/ Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.
2/ Compiled from foreign producer data submitted by counsel for respondents.
3/ Includes value of domestic shipments and Canadian exports to the U.S. (F.O.B. producers' mill), plus imports from all other countries at U.S. CIF plus duties (landed-duty paid).
4/ Value (F.O.B. Canadian producers' mill) converted to U.S. dollars; International Financial Statistics.

Note.--Because of rounding, figures may not add to the totals shown.

Source: Compiled from official statistics of the U.S. Department of Commerce, except as noted.

The value of imports from Canada, which represented *** percent of apparent U.S. consumption of new steel rails in 1986, rose to *** percent in 1987, and increased further to *** percent in 1988. In the first quarter of 1988, such imports accounted for *** percent of the value of apparent U.S. consumption, and in the first quarter of 1989 their share declined to *** percent.

Prices

Approximately 70 percent of the market for new steel rails consists of Class I railroads; smaller railroads account for 10 percent of the market, and transit authorities, distributors, and contractors account for the remainder. [102] More than 95 percent of new steel rails are purchased through a quote or bid procedure. Requests for quotes originate with the railroads and requests for bids originate with the transit authorities.

Demand for new steel rails is directly related to the replacement of primary track for a railroad or a transit authority. The railroads' civil engineers regularly inspect the track to determine how much track needs to be upgraded. In situations where track replacement does not require new rail, the decision to use new rail depends, in part, upon several factors, including the availability of good used rail, the revenues of a railroad, the budget allocated for rail maintenance, and the portion of the rail maintenance budget allocated for rail purchases. Relay (used) rails are the primary substitute for new rails. The railroads' track replacement program "cascades" relay rail from current locations to other locations. Before cascading the relay rail, they recondition the rail by grinding away imperfections and welding it into quarter-mile sections. Relay rail is graded to determine the highest freight density allowed--the higher the grade, the higher the freight density. Although relay rail is often placed on rail lines with lower freight densities, 34 percent of rail laid in 1988 on category A track (track with the highest freight density) was relay rail. [103] New steel rail is primarily sold by producers directly to railroads. Relay rail

[102] Conference transcript, p. 32. * * * states that the following seven railroads represent 70 to 80 percent of all Class I railroad revenues: Atchison, Topeka, and Santa Fe; Burlington Northern; Conrail; CSX; Norfolk Southern; Southern Pacific; and the Union Pacific.

[103] At the conference, both the petitioner and respondents stated that rail products, such as relay and industrial rails, may not be suitable in some applications because the capability of handling load-requirements is limited, or the rail does not meet AREA specifications. Conference transcript, pp. 64, 72, 106, and 111.

is mostly used internally by each railroad; when a railroad does not have enough of a particular weight relay rail (e.g., 132RE, 136RE, etc.) it purchases relay rail from other railroads and from distributors. [104]

The amount of maintenance a railroad performs during a year depends upon track condition and the revenues of the railroad. The budget that is allocated for rail maintenance is directly related to the revenues of the railroad; if revenues go down the budget for rail maintenance goes down. Within the budget for rail maintenance is an amount allocated for rail purchases. Thus when revenues are limited, maintenance can be curtailed, concentrating only on critical areas of track. [105]

New steel rail prices generally vary with weight requirements, with the quantity ordered, and whether the rail is standard carbon, alloy, through-hardened, or head-hardened. Premium rails such as alloy, through-hardened, and head-hardened rails are more expensive than standard carbon steel rails. [106] [107] Currently, CF&I is the only U.S. producer of head-hardened rails; Bethlehem's premium rail is through-hardened.

Although producers differ as to what constitutes a large-volume, medium-volume, or small-volume sale or quote, questionnaire responses indicate that in general, small volumes are less than 1,000 net tons (4 to 5 miles of track), medium volumes are between 3,000 and 10,000 net tons (13 to 50 miles of track), and large volumes are greater than 10,000 net tons (50 miles of track).

After a Class I railroad or a transit authority has determined the amount and types

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[104] Another potential substitute for new steel rails in certain applications is industrial rail. Industrial rail is new rail that has imperfections. It is used as track at industrial sites such as steel mills. Industrial rails are sold through distributors. None of the Class I railroads reported purchasing industrial rail.

[105] Conversations with representatives of * * *.

[106] Through-hardened rails are about 15 percent more expensive to produce than head-hardened rails. Conference transcript, p. 87.

[107] Bethlehem has stated that there are only two types of new steel rail, premium and standard. However, * * * , assistant sales manager for * * * , stated that some railroads (e.g., * * *) make a distinction between head-hardened and through-hardened rails in their rail applications. Telephone conversations with * * * confirmed that they make a distinction between head-hardened and through-hardened rail.

of rail needed, quotes or bids are solicited from several rail producers. Railroads often request quotes for two or three types of rail, and requests are made approximately 6 months prior to actual need. The rail producers estimate the likely production costs for the length and type of track and submit a quote, offering a quantity and price commitment to obtain all or a portion of the contract. Typically, a quote takes 1 to 2 months to prepare.

After reviewing the quotes, a railroad generally contacts the producer with the higher quote to see whether it wants to be more competitive. Further negotiations on aspects of the quote, such as changes in rail requirements and types of rail, may also occur before a final price is agreed upon. Generally, the railroad does not reveal the names of the competing firms to each other, but since there are so few suppliers, supplying firms usually know who their likely competitors are. The producer with the lowest quote does not necessarily receive a contract if it cannot deliver the steel rails at the times required. The railroads often choose several producers to supply the rails.

Transit authorities usually set a specific date by which sealed bids should be received from all competitors, and there are no second or revised bids. Selection is based upon price unless the delivery schedule cannot be met by the lowest bid producer. When the delivery schedule cannot be met, the firm that made the next lowest bid is offered the contract.

To be chosen to supply steel rails, a producer must first be an approved supplier who is qualified by the customer's purchasing and engineering departments. A customer purchases a small sample of rail product from a potential supplier, approximately 1,000 to 2,000 net tons, for testing on a major line. If the sample performs adequately, the supplier is qualified to achieve higher levels of business with the company.

Questionnaire request.-- The Commission requested Class I railroads and domestic producers and importers to report the details of bid competition for new steel rails to the railroads. It also requested detail of bid competition for transit authorities and for spot prices of new steel rails.

Quote competition for sales to Class I railroads. [108] [109]--Class I railroads were requested to provide all quotes received on their steel rail business awarded during the years 1986-88. Nine Class I railroads provided purchaser questionnaire responses. U.S. producers and importers of steel rails were requested to provide information on all their quotes to Class I railroads between January 1986 and December 1988. All three U.S. producers and both Canadian producers submitted information on the quote process and provided detailed information on specific projects. [110] [111]

The information provided by the Class I railroads is presented first because it provides the most direct comparison of quotes for specific contracts, whereas matching quotes provided by producers and importers is much less direct because of differences in bid or shipment dates, and variations in reported quantities. [112]

Railroads.-- Aggregate quote information for major contracts reported by the Class I railroads, for production of new steel rails during 1986-88 is presented in table 16.

* * * was reported to have quoted to *** Class I railroads in the United States during 1986, *** during 1987, *** during 1988 and *** during the first quarter of 1989. * * * received all of the business on *** quotes and a portion of the business on *** quotes to Class I railroads during 1986 through March 1989. The total volume awarded to * * * over this period was *** tons, valued at *** .

* * * was reported to have quoted to *** Class I railroads in the United States during 1986, *** during 1987, *** during 1988 and *** during the first quarter of 1989. *** received all of the business on *** quotes and a portion of the business on *** quotes to Class I railroads during 1986 through March 1989. The total volume awarded to

[108] Data were taken from preliminary and final questionnaires and additional information provided to the Commission.

[109] All but seven of Bethlehem's bid dates were estimated.

[110] Wheeling-Pitt no longer exists.

[111] No quotes to two of the Class I railroads were reported. They are * * * .

[112] In some instances producers and importers reported multiple quotes to a railroad for a single type of rail that the railroad reported as one contract. For example, * * * reported making *** quotes on 132 standard rail to * * * for the single 1988 contract that * * * reported.

Table 16
New steel rails: Aggregate quote information to Class I railroads submitted by Class I railroads, 1986-88

*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

* * * over this period was *** tons, valued at *** .

The two Canadian producers, Algoma and Sydney, were reported to have quoted to *** Class I railroad in the United States during 1986, *** during 1987, *** during 1988, and *** during the first quarter of 1989. They were awarded all of the business on *** quotes and a portion of the business on *** of the quotes. * * * received a portion of *** quotes and all of the business on *** quote to Class I railroads during 1986 through March 1989. The total volume awarded to * * * over this period was *** tons, valued at ***. * * * received a portion of *** quote to Class I railroads during 1986 through March 1989. The total volume awarded to * * * over this period was *** tons, valued at *** .

Details on the competition between U.S. and Canadian producers provided by Class I railroads is summarized in table 17. Because transactions are generally made with Class I railroads through quote competition and subsequent negotiations, the discussion of prices is organized according to the railroad requesting the quote.

* * * .-- * * * provided information only for 1988, reporting that it awarded *** tons, valued at *** including aggregate purchases of new steel rails from U.S. producers of *** tons. A Canadian rail supplier, * * *, was awarded * * * tons of new steel rails, valued at *** during 1988.

Information submitted by * * * indicates that the *** quote by a Canadian supplier was the same as the lowest initial quote by the *** but higher than * * * quote for the *** tons of standard rail. The lowest initial quote was submitted by a producer from * * *. Both * * * reduced the value of their second quote, whereas the Canadian quote was not reduced. * * * also bid and reduced the value of its initial quote on *** tons of premium rail. There were no Canadian quotes on the premium rail.

* * * , director of purchasing for * * * , reported that the purchases of Canadian product represented samples for on-track testing, the second stage of the railroad's qualification procedure.

Table 17
New steel rails: Quote information on contracts to Class I railroads, submitted by Class I railroads, for shipment from January 1986 through March 1989

*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

* * * .-- * * * provided information for 1987-88, reporting that it awarded *** tons, valued at *** during 1987 and *** tons, valued at *** during 1988. * * * purchased no U.S.-produced rail during the two years. It purchased *** tons of Canadian rail, valued at *** and *** tons of rail during 1988 from a supplier of rail produced in Luxembourg. The three factors that * * * considers in its purchasing decisions are quality, price, and delivery. * * * also reported that it uses relay rail for most purposes and that accounted for its small purchases of new steel rails over the period of investigation.

Quote information shows that the prices quoted by the Canadian supplier, * * * , were below the prices offered by the domestic producers. * * * offered a price quote for the standard rail that was *** per ton below * * * initial quote and *** per ton below * * * initial quote, although it was *** per ton higher than the lowest bidder, * * * . * * * was not selected because it could not meet * * * delivery schedule.

* * * .-- * * * reported that it awarded *** tons of new steel rails, valued at *** during 1986, *** tons, valued at *** during 1987, *** tons, valued at *** during 1988, and *** tons, valued at *** during 1989. * * * purchases of new steel rails from U.S. producers were ***, ***, ***, and *** tons during 1986, 1987, 1988, and 1989. Southern Pacific reported that it has traditionally purchased nearly all its requirements from U.S. suppliers. The information indicates that of the *** quotes by Canadian suppliers to * * * that compete with domestic rail, *** were higher than the lowest U.S. producers initial quote. * * * reduced its initial quote in one of six quotes. In this quote reduction, which occurred during 1986 involving 136 standard rail, the Canadian supplier quoted a range of prices with the lowest quote equaling * * * quote. * * * reduced its initial quote in three of six quotes. In one of * * * reduced quotes, involving 136 standard rail awarded during 1989, the Canadian initial quote was lower, however it was higher than * * * quote.

* * *, vice president of purchasing for * * *, stated that since 1986 * * * has purchased all of its rail from a single source, * * *, because it receives a better overall price by combining orders of standard and premium rail with one supplier. * * * also commented that in 1988 * * * had quality problems with rail produced by * * *.

* * *.-- * * * reported that it awarded *** tons of new steel rails, valued at *** during 1987, and another *** tons, valued at *** during 1988. All of the purchases by * * * were domestic rail. [113] The Canadian initial quote for the *** tons of 132 premium rail awarded during 1987 was lower than the two competing domestic quotes. The winning domestic quote was reduced from *** per ton to *** per ton.

* * *.-- * * * reported that it awarded *** tons of new steel rails, valued at *** during 1986, *** tons, valued at *** in 1987, and *** tons, valued at *** in 1988. * * * purchases of new steel rails from U.S. producers were ***, ***, and *** tons during 1986, 1987 and 1988, respectively. Neither * * * submitted quotes. * * * lowered its initial quote in two of six instances. * * * reduced the value of two of its three initial quotes.

* * *.-- * * * reported that it awarded *** tons of new steel rails, valued at *** during 1987, and *** tons, valued at *** during 1988. * * * purchases of new steel rails from U.S. producers were *** and *** tons during 1987 and 1988, respectively. During 1987, * * * was awarded one contract for *** tons, valued at ***. Neither Canadian producer was awarded business during 1988.

* * *, vice president for purchasing and materials for * * *, reported that * * * bases its purchasing decisions on quality, engineer preference, price, and the ability of the supplier to meet delivery schedules. * * * always purchases rail from several suppliers rather than from a single source. * * * stated that * * *. * * *. * * *.

* * *.-- * * * reported that it awarded *** tons of new steel rails, valued at *** during 1986, *** tons, valued at *** during 1987, *** tons, valued at *** during 1988, and *** tons, valued at *** during 1989. * * * purchases of new steel rails from U.S. producers were ***, ***, ***, and *** tons during 1986, 1987, 1988, and 1989, respectively. There were no Canadian quotes in 1986. * * * was the only Canadian firm to quote for contracts with * * *. During 1987, * * * was awarded one contract for *** tons, valued at ***. * * * final quote for this contract was higher than * * * final quote.

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[113] In footnotes 8 and 9 of page 8 of its "Response to Questions of the Commission and Staff, August 3, 1989, petitioner suggests that * * * railroad purchased rail from * * * . * * * , stated that the rail purchased from * * * was from * * * , and added that * * * has not purchased Canadian rail since * * * . * * * confirmed that the rails supplied was produced by * * * . * * * stated that * * * had purchased *** tons of * * * rail * * *. For a more complete discussion of this *** ton purchase, see the earlier section on inventories.

During 1988, * * * was awarded one contract for *** tons of 132 standard rail. For this contract, * * * initial and final quotes were below the domestics, however, * * * was awarded *** tons. [114] During 1989, * * * was awarded one contract for *** tons of 132 standard rail, valued at *** even though its price was $44 per ton higher than the closest domestic competitor. Neither * * * submitted quotes to * * *.

* * *, assistant vice president of purchasing for * * *, reported that * * * bases its purchasing decisions on quality, price, delivery, and longevity. It purchases premium head-hardened rail, which accounts for *** of its rail requirements, from domestic and foreign suppliers. * * * rail but, according to * * *, because of capacity constraints only sells an amount to * * * that depends on how much standard rail * * *. [115]

* * *.-- * * * reported that it awarded *** tons of new steel rails, valued at *** during 1986, *** tons, valued at *** during 1987, and *** tons, valued at *** during 1988. All of the purchases by * * * were domestic rail. Neither * * * submitted quotes to * * *. For each type of rail that * * * reported initial and final quotes each domestic producer reduced the value of its initial quotes. In one instances, * * * lowered its quote with no apparent competition. * * * reported that in one of its quote submissions it reduced the value of its initial quote.

* * *.-- * * * reported that it awarded *** tons of new steel rails, valued at *** during 1986, *** tons, valued at *** during 1987, and *** tons, valued at *** during 1988. All of the purchases by * * * were domestic rail. Neither * * * submitted quotes to * * *.

Producers and Importers.-- Aggregate quote information for major contracts reported by producers and importers for production of new steel rails during 1986-88 are presented in **table 18.**

* * * reported that it quoted to *** Class I railroads in the United States during 1986, *** during 1987, and *** different Class I railroads during 1988. Of its *** individual quotes to Class I railroads during 1986-88, * * * received all of the business

[114] * * * bid on *** tons, * * * bid on *** tons, and * * * bid on *** tons.

[115] * * *, assistant sales manager for * * *, reports that * * * has in the past pegged sales of * * * , but this system is no longer in effect.

Table 18
New steel rails: Aggregate quote information to Class I railroads submitted by U.S. and Canadian producers, 1986-88

*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

on *** quotes and a portion of *** quotes. The total volume awarded to * * * over this period was *** tons, valued at ***.

* * * reported that it quoted to *** Class I railroads in the United States during 1986, *** during 1987 and *** railroads during 1988. Of its *** individual quotes to Class I railroads during 1986-88, * * * received all of the business on *** quotes and a portion of *** quotes. The total volume awarded to * * * over this period was *** tons, valued at ***.

The two Canadian producers, Algoma and Sydney, reported that they quoted to *** Class I railroad in the United States during 1986, *** during 1987 and *** during 1988. Of its *** individual quotes to Class I railroads during 1986-88, * * * received all of the business on *** quotes and a portion of the business on *** quotes. The total volume awarded to * * * over this period was *** tons, valued at ***. Of this amount, *** tons consisted of trial purchases by the railroads for on-track testing. [116] Of the *** quotes made on behalf of * * * by its distributors to Class I railroads during 1986-88, * * * received a portion of the business on *** quotes, representing *** tons. [117] *** tons of this amount was for on-track testing, and * * *.

Information on the competition between U.S. and Canadian producers for rail sales to Class I railroads is summarized in tables 19-26. Because transactions are generally made with Class I railroads through quote competition and subsequent negotiations, the discussion of prices is organized according to the railroad requesting the quote. [118] Competing bids for the same contract are not always identifiable so caution must be exercised in making comparisons.

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[116] Algoma also received an award for * * * that was also used for on-track testing.

[117] The total value is not available.

[118] Lost sales and lost revenues in bid situations were alleged based on the quotes to the Class I railroads. Tables 19-26 indicate the winners of the contracts for production of new steel rails during the period of investigation, the value of the quotes, and the amount quotes were lowered in order to obtain a contract.

* * *.-- U.S. producers and importers of Canadian rails reported that during 1986 * * * awarded *** tons of new steel rails, valued at ***. During 1987 this railroad was reported to have awarded *** tons, valued at ***, [119] and during 1988 it was reported to have awarded *** tons, valued at ***. * * * aggregate purchases of new steel rails from U.S. producers were ***, ***, and *** tons during 1986, 1987, and 1988, respectively. Neither Canadian producer was awarded business by * * * during 1986 or 1987 although * * * bid on *** tons. A Canadian rail supplier, * * * was awarded *** tons of new steel rails, valued at *** during 1988. * * * was awarded *** tons, valued at *** on a total of *** tons bid during 1988.

Information submitted by U.S. and Canadian firms (**table 19**) indicates that of the *** quotes by Canadian suppliers to * * * during the period, all but one were higher than the lowest initial quote by a U.S. producer for the same type of rail for each year. * * * reported that in 7 of 10 instances it reduced its second quote. In the three instances in which Canadian initial quotes were lower than those of * * *, there were other domestic initial quotes that were even lower than those of the Canadians. In one instance, * * * reduced its quote without any apparent competition. * * * lowered its quote in *** instances. In one case a competing Canadian quote was the lowest initial quote. For the contract awarded to * * *, its initial and winning quotes were higher than most of the domestic quotes.

* * *.-- Producers and importers reported that * * * awarded *** tons of new steel rails, valued at *** during 1986. * * * was reported to have awarded *** tons, valued at *** during 1987, and *** tons, valued at *** during 1988. * * * purchases of new steel rails from U.S. producers were ***, ***, and *** tons during 1986, 1987, and 1988, respectively. Neither Canadian producer was awarded business by * * * during 1986 or 1988. During 1987, * * * was awarded one contract for *** tons, valued at ***. * * * was awarded a contract by * * * for *** tons during 1987. [120]

Information submitted by U.S. and Canadian firms (**table 20**) indicates that of the *** quotes by Canadian suppliers to * * * that appear to compete with domestic rail, all were higher than the lowest initial quote by a U.S. producer. * * * reported that in 24 of 26 instances it reduced its second quote. In the three instances where there were

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[119] The total value awarded by * * * in 1987 does not included a value for *** tons awarded to * * *. This value was not available.

[120] The value of this contract was not reported by * * * distributor, * * * .

Table 19
New steel rails: Quote information to * * * submitted by U.S. and Canadian producers, and U.S. importers of Canadian-produced new steel rails, for shipment during 1986-88

*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Table 20
New steel rails: Quote information to * * * submitted by U.S. and Canadian producers, and U.S. importers of Canadian-produced new steel rails, for shipment during 1986-88

*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

competing Canadian quotes, the Canadian initial quotes were higher than those of * * *. In a number of instances, * * * reduced its quote without any apparent competition. * * * lowered its quote in *** instances. For two of * * * lowered quotes there were no competing Canadian quotes, and for the third lowered * * * quote the Canadian initial quote was higher than other domestic competition. For the contract awarded to * * *, its initial and winning quotes were higher than some of the domestic quotes.

* * *.-- Producers and importers reported that * * * awarded *** tons of new steel rails, valued at *** during 1986, *** tons, valued at ***, and *** tons, valued at *** during 1988. * * * purchases of new steel rails from U.S. producers were ***, ***, and *** tons during 1986, 1987, and 1988, respectively. * * * did not report any quotes to * * * in 1986. During 1987, * * * was awarded *** tons, valued at ***. In 1988, * * * was awarded one contract for *** tons, valued at ***. Neither * * * submitted quotes to * * *.

Information submitted by U.S. and Canadian firms (**table 21**) indicates that of the *** quotes by Canadian suppliers to * * * that appear to compete with domestic rail, two were higher than the lowest initial quote by a U.S. producer. * * * reported that in seven of eight instances it reduced the value in it initial quote. In one instance * * * initial quote was lower than the quote of * * *. [121] * * * lowered its initial quote in *** of *** quotes, but in each quote where there was Canadian competition, there was a lower domestic initial quote. In one instance, * * * lowered its quote with no apparent competition. For the 1987 contracts awarded to * * *, its initial and winning quotes were higher than some of the domestic quotes, and for its 1988 contract all its initial and winning quotes are higher than all of the domestic competition.

* * *.-- U.S. producers reported (**table 22**) that * * * awarded *** tons of new steel rails, valued at *** during 1987 and *** tons, valued at *** during 1988. Questionnaire responses indicated that * * * did not purchase any rails produced in Canada during the period under investigation. All rail purchases since 1986 have been from a U.S. supplier, * * *. [122] Quote information submitted by U.S. and Canadian producers shows that the U.S. producer, * * *, provided the lowest final quote and received the orders from

[121] Although there is a five month difference on a bid for *** tons between * * * initial bid during July 1987 and * * * estimated bid date of February 1987, a comparison was made because the tonnage bid was the same.

[122] * * *.

Table 21
New steel rails: Quote information to * * * submitted by U.S. and Canadian producers, and U.S. importers of Canadian-produced new steel rails, for shipment during 1986-88

*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Table 22
New steel rails: Quote information to * * *, and * * * submitted by U.S. and Canadian producers, and U.S. importers of Canadian-produced new steel rails, for shipment during 1986-88

*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

* * *. In four of six instances, * * * reduced its initial quote when there were lower Canadian quotes.

* * *.-- U.S. producers reported (table 22) that * * * awarded *** tons of new steel rails, valued at *** during 1988. Questionnaire responses indicated that *** did not purchase any rails produced in Canada during the period under investigation. All rail purchases have been from a U.S. supplier, * * *.

* * *.-- U.S. producers and Canadian importers reported (table 23) that * * * awarded *** tons of new steel rails, valued at *** during 1986, *** tons, valued at *** during 1987, and *** tons, valued at *** during 1988. * * * reported that it has traditionally purchased nearly all its requirements from U.S. suppliers. * * * reported that in seven of eight instances it reduced its initial quote. In the one instance that there was competition from Canada, the Canadian's initial quote was higher than * * *. The winning quote was submitted by a U.S. producer, * * *, which received the award of *** tons after lowering its initial quote of *** to ***, or below that of * * * initial quote of ***. * * * raised its initial quote of *** to *** because of a change in the requested delivery site.

* * *.-- U.S. producers and Canadian importers reported (table 23) that * * * awarded *** tons of new steel rails during 1987 and *** tons, valued at *** during 1988. Although a quote offered by * * * for the Canadian product in 1987 was the lowest quote, * * * selected * * * who supplied a U.S.-produced rail. * * * quoted a price $*** per ton higher than * * * and received the order for *** tons.

* * *.-- Producers and importers reported (table 23) that * * * awarded *** tons of new steel rails, valued at *** during 1986; it made no awards during 1987, and awarded *** tons, valued at *** during 1988. Neither * * * submitted quotes to * * *. The information indicates that all of the *** quotes by * * * to * * * that appear to compete with domestic rail were higher than the lowest initial quote by a U.S. producer. * * * reported that in three of five instances it reduced its initial quote. In one instance there was competition from * * *; however, * * * initial quote was higher than any domestic initial quote. In two instances, * * * lowered its quote with no apparent competition. * * * reported that in all *** of its quote submissions it reduced its initial quote. In two instances there was competition from * * *, but * * * initial quote was higher than that of * * *. In one instance, * * * lowered its quote with no apparent competition.

Table 23
New steel rails: Quote information to * * * , * * * , and * * * submitted by U.S. and Canadian producers, and U.S. importers of Canadian-produced new steel rails, for shipment during 1986-88

*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

* * *.-- Producers reported (table 24) that * * * awarded *** tons of new steel rails, valued at *** during 1986, *** tons, valued at *** in 1987, and *** tons, valued at *** in 1988. Neither * * * submitted quotes to * * *. * * * reported that in 6 of 12 instances it reduced its initial quote. In four instances, * * * lowered its quote with no apparent competition. * * * reported that in two of its quote submissions it reduced the value of its initial quote.

* * *.-- Producers reported (table 24) that * * * awarded *** tons of new steel rails, valued at *** during 1986, *** tons, valued at *** during 1987, and *** tons, valued at *** during 1988. Neither * * * submitted quotes to * * *. * * * reported that in six of nine instances it reduced its initial quote. In two instances, * * * lowered its quote with no apparent competition. * * * reported that in *** of its quote submissions it reduced its initial quote.

* * *.-- Producers and importers reported (table 24) that * * * awarded *** tons of new steel rails, valued at *** during 1986, *** tons, valued at *** during 1987, and *** tons, valued at *** during 1988. Neither * * * submitted quotes to * * *. * * * bid for *** tons of 136RE rail in 1988. * * * reported that in two of seven instances it reduced its initial quote. In those two instances, * * * lowered its quote with no apparent competition. * * * did not lower its quote when there appeared to be Canadian competition.

* * *.-- Producers reported (table 25) that * * * awarded *** tons of new steel rails, valued at *** during 1986, *** tons, valued at *** during 1987, and *** tons, valued at *** during 1988. Only * * * reported bidding for this business.

* * *.-- Producers reported (table 25) that * * * awarded *** tons of new steel rails, valued at *** during 1986, *** tons, valued at *** during 1987, and *** tons, valued at *** during 1988. Neither * * * submitted quotes to * * *.

* * *.-- * * * reported that * * * awarded *** tons of new steel rails, valued at *** during 1988. Questionnaire responses indicated that domestic producers did not bid to supply rail to the * * * during the period under investigation.

Bid competition with transit authorities.-- U.S. producers and importers of steel rails were also requested to provide information on all bids to transit authorities, won or lost, between January 1986 and December 1988 that involved competition between U.S. and Canadian suppliers. All three U.S. producers and both Canadian producers submitted

Table 24
New steel rails: Quote information to * * * , * * * , * * * , and * * * submitted by U.S. and Canadian producers, and U.S. importers of Canadian-produced new steel rails, for shipment during 1986-88

*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Table 25
New steel rails: Quote information to * * * , * * * , and * * * submitted by U.S. and Canadian producers, and U.S. importers of Canadian-produced new steel rails, for shipment during 1986-88

*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

information on the bid process. Aggregate bid information to transit authorities is presented by producer and by year in table 26.

* * * reported that it quoted to *** transit authorities during 1986, *** during 1987, and *** during 1988. Over the 3-year period, * * * was awarded *** tons, valued at ***. This represented nearly *** percent of all transit business reported. * * * reported that it quoted to *** transit authorities during 1986, *** during 1987, and *** during 1988. * * * was awarded business by *** transit authority for *** tons, valued at *** during the period under investigation. * * *. * * * was awarded *** tons, valued at *** during 1986.

* * * reported that it * * *. This * * *. * * *. * * * shipped *** tons, valued at ***.

* * * reported that it does not actively pursue the transit market because most U.S. transit systems follow buy-American policies. Transit authorities that receive Federal funds are often required to purchase domestic product unless the price of the foreign rail is 25 percent below the domestic price. In New York State, the foreign price must be at least 7 percent below the domestic bid price to allow foreign purchases. * * *. * * *. * * *.

Spot market sales to distributors and end users.--Spot market sales of prime and industrial rail by rail producers are made to both distributors and end users. Distributors often compete with rail producers for spot sales to end users. Class I railroads make spot purchases of prime rail for one of two reasons: if there is an unexpected need for rail such as is caused by derailments, or if the railroad failed to provide for enough rail in its yearly contracts. None of the Class I railroads reported purchasing industrial rail. Typically spot sales are small with quantities usually below 1,000 tons. Class I railroads and distributors have indicated that spot market sales do not effect the quote competition to Class I railroads. [123] Many spot market sales are made to smaller railroads, transit authorities, and industrial sites with small rail lines.

[123] Conversations with Class I railroads * * * , and conversations with the distributors * * * .

Table 26
New steel rails: Aggregate bid information to transit authorities by U.S. producers, 1986-88

*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

U.S. producers and importers of steel rails were also requested to provide information on their largest spot market sales of the most frequent sold types of prime and industrial rail in each quarter to distributors and end users between January 1986 and March 1989. * * * and * * * and both Canadian producers submitted information on such sales (**tables 27-31**).

Prime rail.-- Bethlehem's spot market prices of 115RE rail to * * * increased *** percent from *** per ton in April-June 1987 to *** per ton in October-December 1987 before falling *** percent to *** per ton in April-June 1988 (**table 27**). An April-June 1986 sale at *** was not considered representative because of its small magnitude of *** tons. Bethlehem's spot market prices of 132HT rail to * * * showed no apparent trend.

CF&I's spot market prices of 115RE rail to * * * ranged from *** per ton to *** per ton during 1986-88. In January-March 1989 CF&I's price increased to *** per ton, but this sale was for a relatively small quantity of *** tons. CF&I's spot market prices of 136RE rail to * * * declined *** percent from *** per ton during January 1986-September 1987 to *** per ton during January-March 1989.

Canadian spot market prices of 115RE and 132RE to * * * and 115RE to * * * showed no apparent trend (**table 28**). Canadian spot market prices of 132RE to * * * increased *** percent from *** per ton during January-June 1987 to *** per ton during July-September 1988 before falling to *** per ton in January-March 1989. In several instances the largest quantity of Canadian rail sold in the spot market was below 100 tons.

There were isolated sales of several different types of rail by U.S. and Canadian producers that did not lend themselves to tabular presentation. For standard rails, these included *** sales by U.S producers of 115RE to distributors for *** per ton during January-June 1987 and *** sales each of 132RE to distributors and end users. *** of these sales were to distributors, for *** and *** per ton during January-June 1986 and the other was for *** per ton during January-March 1989. Of the *** sales to end users, *** occurred in each of the years 1986-88 with per ton prices of ***, respectively. There was one sale of 136RE to distributors during April-June 1988 for *** per ton. For premium rails, these included *** sales of 115HT to distributors. These sales ranged between *** and *** per ton. There were *** sales to end users of 132HH (39-foot lengths) at *** and *** per ton, and *** to distributors of 136HT at *** per ton. U.S.

Table 27
Prime rails: Spot market prices and quantities of the largest sales by U.S. producers of new steel rails, by quarters, January 1986-March 1989

*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Table 28
Prime rails: Spot market prices and quantities of the largest sales by U.S. importers of Canadian-produced new steel rails, by quarters, January 1986-March 1989

*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

producers had *** of 115HT to end users and *** sales of 132HT. These sales ranged between *** and *** per ton for 115HT, and *** and *** per ton for 132HT. There were *** sales to end users of 136HT at *** and *** per ton.

Isolated sales of Canadian rail included *** sales of 136RE to end users for *** per ton and one of 136HH to distributors for *** per ton.

There were nine possible price comparisons between sales of domestic and Canadian rail in the spot market. [124] Margins of underselling are presented in **table 29**. Six of the comparisons occur in sales of 80-foot 115RE rail by Bethlehem to end users. Canadian rails were priced lower than the domestic rail in three of the comparisons, by between 3 and 8.4 percent, and in the other three comparisons domestic rail was priced lower than the Canadian rail, by between 4 and 28 percent. The remaining three comparisons occur in sales of 115RE and 132RE to distributors and 132RE to end users. Canadian rail was lower priced than the domestic rail by *** and *** percent for the comparisons of 115RE and 132RE to distributors, and Domestic rail was priced *** percent lower than the Canadian rail for the comparison of 132RE to end users.

Industrial rail.--A discussion of trends in the spot market for industrial rail is difficult because the quality of industrial rail varies greatly and because it is sold in different lengths when defective sections are cut from the rail. Domestic producers reported 10 spot market sales of industrial rail. Eight of the sales were to distributors, with three of 115RE, three of 132RE, and two of 136RE. Prices of these eight sales ranged from *** to *** per ton. The other two sales were of 115RE for *** per ton to an end user, * * *.

Canadian rail producers reported sales of 115RE, 132RE, and 136RE industrial rail to distributors (**table 30**). Prices of industrial rail sold by Canadian producers to distributors ranged from *** to *** per ton for 115RE, from *** to *** per ton 132RE, and from *** to *** per ton for 136RE. Distributors of Canadian rail reported sales of 115RE, 132RE, and 136RE industrial rail to end users (**table 31**). Prices of industrial rail sold by distributors to end users ranged from *** to *** per ton for 115RE, from *** to *** per ton for 132RE, and from *** to *** per ton for 136RE.

[124] Since there were no spot sales of Canadian 39-foot rail, price comparisons were only made between domestic and Canadian 80-foot rail. Thus CF&I's sales of 39-foot 115RE and 136RE to end users in table 27 could not be compared with Canadian sales of 80-foot rail.

Table 29
New Steel rails: Margins of underselling/overselling by importers of Canadian produced new steel rails compared with U.S. produced new steel rails, by quarters, January 1986-March 1989

	Prime				*Industrial*			
	Distributor		*End-user*		*Distributor*			*End-user*
Period	*115RE*	*132RE*	*115RE*	*132RE*	*115RE*	*132RE*	*136RE*	*115RE*
	(In percent)							
1986:								
January-March	-	-	-	-	-	-	-	-
April-June	-	-	(4.0)	-	-	-	-	-
July-September	-	-	-	-	-	-	-	-
October-December	-	-	-	-	-	-	-	-
1987:								
January-March	-	-	-	-	-	-	-	-
April-June	9.2	-	3.0	-	-	-	-	-
July-September	-	-	8.0	-	-	-	-	-
October-December	-	-	8.4	-	-	58.7	33.2	-
1988:								
January-March	-	-	(8.3)	-	-	-	-	-
April-June	-	-	(27.8)	-	-	-	-	-
July-September	-	-	-	(3.2)	-	-	-	-
October-December	-	-	-	-	28.9	37.2	-	12.1
1989:								
January-March	-	5.4	-	-	28.6	-	46.7	(3.9)

Note.-- A dash is shown where no data were available.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Table 30
Industrial rails: Spot market prices and quantities of the largest sales by U.S. importers of Canadian-produced new steel rails to distributors, by quarters, January 1986-March 1989

*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Table 31
Industrial rails: Spot market prices and quantities of the largest sales by U.S. distributors of Canadian-produced new steel rails to end-use customers, by quarters, January 1986-March 1989

*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

There were eight possible price comparisons between sales of domestic and Canadian industrial rail in the spot market, although differences in quality and length raise questions (table 29). Six of the comparisons occur in sales to distributors and two in sales to end users. Canadian rails were priced lower than the domestic rail in all six of the distributor sales comparisons, by between 28.6 and 58.7 percent. In one sale to end users Canadian rails were priced lower than domestic rails by *** percent, and in the other comparison domestic rail was priced lower than the Canadian rail by *** percent.

Lost sales and lost revenues [125]

U.S. producers were asked for additional information relating to any sales or revenues that have been lost, other than in a quote or bid situation involving Class I railroads or transit authorities, as a result of imports of new steel rails from Canada since January 1986. There were two allegations of such sales lost and one of revenues lost because of competition from imports from Canada. These alleged sales lost to imports from Canada totaled *** tons. No value was given to the quantity of alleged revenues lost.

* * *, a Class I railroad was named by * * * in an allegation of sales lost during 1987, involving *** tons of rail. * * * reported that it purchased domestic rail produced by * * * through * * * distributors.

* * * was named by * * * in an allegation of sales lost during 1987, involving *** tons of rail. * * * stated that although his company requested quotes for 10 miles of 115RE rail, it did not purchase any rail.

* * * was named by * * * in an allegation of revenues lost during 1988, involving *** tons of 115HT rail. * * * said that this allegation was incorrect. He stated that there are no second quotes by producers, that * * * receives only one quote. * * * stated that * * * is small, with only *** miles of track. Because of its size, this company has trouble purchasing from domestic producers. When purchases are made the domestic producers stipulate that the price of rail is established at the time of rolling, which, according to * * *, can be a year later.

[125] The producer questionnaire requested lost sales and lost revenues allegations that were not included in the bid section.

Exchange rates

Quarterly data reported by the International Monetary Fund indicate that during the period January 1986 through December 1988, the nominal value of the Canadian dollar appreciated 16.4 percent relative to the U.S. dollar. Adjusted for movements in producer price indices in the United States and Canada, the real value of the Canadian currency appreciated 16.9 percent during the same period.

Table 32 presents U.S.-Canadian exchange rates, [126] including nominal exchange rate equivalents of the Canadian dollar in U.S. dollars, real exchange rate equivalents, [127] and producer price indicators in the United States and Canada, [128] for the period January 1986 through March 1989. [129] Figure 13 presents the quarterly relative values of the yen, deutche mark, pound, and Canadian dollar to the U.S. dollar during the period January 1986 through March 1989.

[126] Exchange rates expressed in U.S. dollars per Canadian dollar.

[127] The indexed real exchange rate represents the nominal exchange rate adjusted for the relative movements in Producer Price Indices in the United States and Canada. Producer prices in the United States increased 6.7 percent during the period January 1986 through December 1988, compared with a 7.2 percent increase in Canadian prices during the same period.

[128] Producer price indicators -- intended to measure final product prices -- are based on average quarterly indices presented in line 63 of the International Financial Statistics.

[129] International Financial Statistics, June 1989.

Table 32
U.S.-Canadian exchange rates: Nominal-exchange-rate equivalents of the Canadian dollar in U.S. dollars , real-exchange-rate equivalents, and producer price indicators in the United States and Canada, January 1986-March 1989

Period	*U.S. Producer Price Index*	*Canadian Producer Price Index*	*Nominal-exchange-rate index*	*Real-exchange-rate index*
	U.S. dollars per Canadian dollar			
1986:				
January-March	100.0	100.0	100.0	100.0
April-June	98.2	98.5	101.4	101.8
July-September	97.7	98.7	101.3	102.4
October-December	98.1	99.4	101.4	102.8
1987:				
January-March	99.2	99.8	104.9	105.6
April-June	100.8	101.1	105.3	105.6
July-September	101.9	102.6	106.2	106.8
October-December	102.3	103.6	107.1	108.4
1988:				
January-March	102.9	103.9	110.8	111.8
April-June	104.8	105.2	114.1	114.6
July-September	106.2	106.3	115.1	115.2
October-December	106.7	107.2	116.4	116.9
1989:				
January-March	109.0	1/	117.8	1/

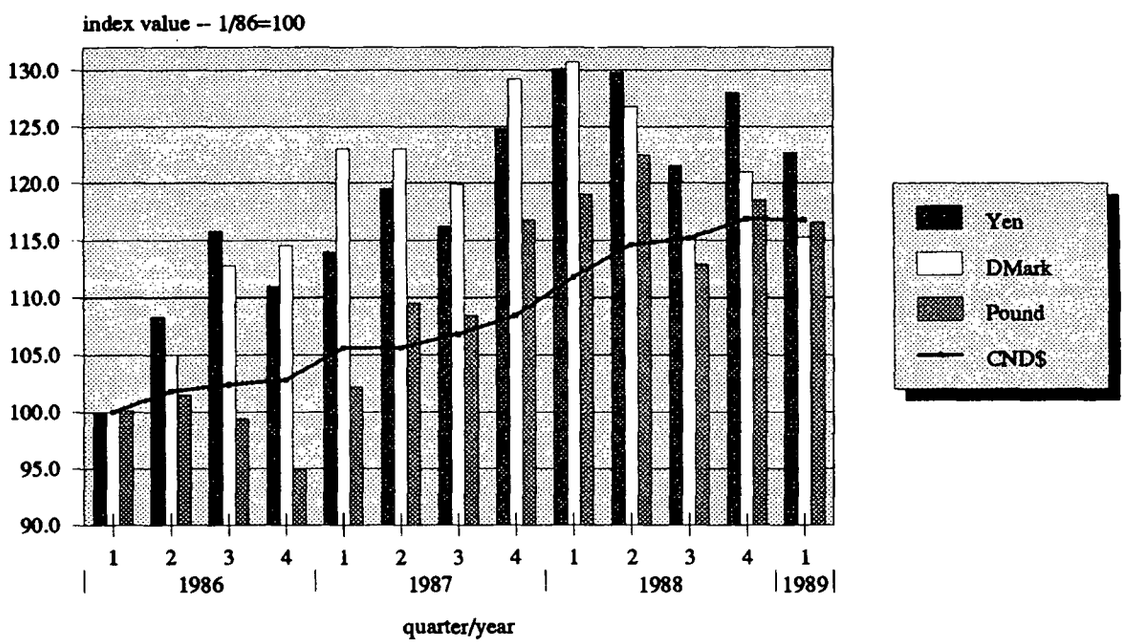
1/ Not available

Note.-- January-March 1986=100.0

Source: International Monetary Fund, International Financial Statistics.

Figure 13

Exchange rate comparison: Relative value of major world currencies to U.S. dollar



International Financial Statistics,
International Monetary Fund, August 1989
RF exchange rate: line 3; PPI: line 63

Appendix A

The Commission's Federal Register notices and List of Witnesses Appearing at the Hearing

[Investigations Nos. 701-TA-297 (Final) and 731-TA-422 (Final)]

New Steel Rails From Canada

AGENCY: United States International Trade Commission.

ACTION: Institution of final countervailing duty and antidumping investigations and scheduling of a hearing to be held in connection with the investigations.

SUMMARY: The Commission hereby gives notice of the institution of final countervailing duty investigation No. 701-TA-297 (Final) under section 705(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)) (the Act) to determine whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Canada of new steel rails,[1] that have been found by the Department of Commerce, in a preliminary determination, to be subsidized by the Government of Canada. Commerce will make its final subsidy determination in this investigation on or before July 26, 1989.

The Commission hereby gives notice of the institution of final antidumping investigation No. 731-TA-422 (Final) under section 735(b) of the Act (19 U.S.C. 1673d(b)) to determine whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Canada of new steel rails, that have been found by the Department of Commerce, in a preliminary determination, to be sold in the United States at less than fair value (LTFV). Commerce will make its final LTFV detemination on or before July 26, 1989.

As provided in sections 705(b) and 735(b) of the Act, the Commission must complete final countervailing duty and antidumping investigations before the later of 120 days after the date of Commerce's affirmative preliminary

[1] For the purposes of these investigations, "new steel rails" include rails, whether or not of alloy steel, provided for in subheadings 7302.10.10, 7302.10.50, and 8548.00.00 of the Harmonized Tariff Schedule of the United States (previously classified in items 610.20, 610.21, and 688.42 of the Tariff Schedules of the United States). Specifically excluded from the scope of these investigations are imports of "light rails," which are 60 pounds or less per yard, such as are used in amusement park rides. "Relay rails," which are used rails that have been taken up from a primary railroad track and are suitable to be reused as rails (such as on a secondary rail line or in a rail yard), are also excluded.

determination, or 45 days after its final determination, if affirmative.

For further information concerning the conduct of these investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 207, subparts A and C (19 CFR Part 207, as amended by Commission interim rules published in 53 FR 33041-43 (August 29, 1988)), and part 201, subparts A through E (19 CFR Part 201)

EFFECTIVE DATE: April 18, 1989.

FOR FURTHER INFORMATION CONTACT: Fred Rogoff (202-252-1179), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-252-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-252-1000.

SUPPLEMENTARY INFORMATION:

Background.—These investigations are being instituted as a result of affirmative preliminary determinations by the Department of Commerce that certain benefits which constitute subsidies within the meaning of section 701 of the Act (19 U.S.C. 1671) are being provided to manufacturers, producers, or exporters in Canada of new steel rails and that exports of such merchandise to the United States are being sold at less than fair value within the meaning of section 731 of the Act (19 U.S.C. 1673). The investigations were requested in a petition filed on September 26, 1988, by counsel on behalf of the Bethlehem Steel Corporation, Bethlehem, PA. In response to that petition the Commission conducted preliminary countervailing duty and antidumping investigations and, on the basis of information developed during the course of those investigations, determined that there was a reasonable indication that an industry in the United States was materially injured by reason of imports of the subject merchandise (53 FR 47588, November 23, 1988).

Participation in the investigations.—Persons wishing to participate in these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules (19 CFR 201.11), not later than twenty-one (21) days after the publication of this notice in the Federal Register. Any entry of appearance filed after this date will be referred to the Chairman, who will determine whether to accept the late entry for good cause shown by the person desiring to file the entry.

Service list.—Pursuant to § 201.11(d) of the Commission's rules (19 CFR 201.11(d)), the Secretary will prepare a service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance. In accordance with §§ 201.16(c) and 207.3 of the rules (19 CFR 201.16(c) and 2073.3, as amended), each document filed by a party to the investigation must be served on all other parties to the investigations (as identified by the service list), and a certificate of service must accompany the document. The Secretary will not accept a document for filing without a certificate of service.

Limited disclosure of business proprietary information under a protective order.—Pursuant to § 207.7(a) of the Commission's rules (19 CFR 207.7(a), as amended), the Secretary will make available business proprietary information gathered in these final investigations to authorized applicants under a protective order, provided that the application be made not later than twenty-one (21) days after the publication of this notice in the Federal Register. A separate service list will be maintained by the Secretary for those parties authorized to receive business proprietary information under a protective order. The Secretary will not accept any submission by parties containing business proprietary information without a certificate of service indicating that it has been served on all the parties that are authorized to receive such information under a protective order.

Staff report.—The prehearing staff report in these investigations will be placed in the nonpublic record on July 10, 1989, and a public version will be issued thereafter, pursuant to § 207.21 of the Commission's rules (19 CFR 207.21).

Hearing.—The Commission will hold a hearing in connection with these investigations beginning at 9:30 a.m. on July 27, 1989, at the U.S. International Trade Commission Building, 500 E Street, SW., Washington, DC. Requests to appear at the hearing should be filed in writing with the Secretary of the Commission not later than the close of business (5:15 p.m.) on July 17, 1989. All persons desiring to appear at the hearing and make oral presentations may file prehearing briefs and attend a prehearing conference to be held at 9:30 a.m. on July 20, 1989, at the U.S. International Trade Commission Building. The deadline for filing prehearing briefs is July 20, 1989.

Testimony at the public hearing is governed by § 207.23 of the Commission's rules (19 CFR 207.23). This rule requires that testimony be limited to a nonbusiness proprietary summary and analysis of material contained in prehearing briefs and to information not available at the time the prehearing brief was submitted. Any written materials submitted at the hearing must be filed in accordance with the procedures described below and any business proprietary materials must be submitted at least three (3) working days prior to the hearing (see 201.6(b)(2) of the Commission's rules (19 CFR 201.6(b)(2))).

Written submissions.—All legal arguments, economic analyses, and factual materials relevant to the public hearing should be included in prehearing briefs in accordance with § 207.22 of the Commission's rules (19 CFR 207.22). Posthearing briefs must conform with the provisions of section 207.24 (19 CFR 207.24) and must be submitted not later than the close of business on August 3, 1989. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations on or before August 3, 1989.

A signed original and fourteen (14) copies of each submission must be filed with the Secretary to the Commission in accordance with § 201.8 of the Commission's rules (19 CFR 201.8). All written submissions except for business proprietary data will be available for public inspection during regular business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary of the Commission.

Any information for which business proprietary treatment is desired must be submitted separately. The envelope and all pages of such submissions must be clearly labeled "Business Proprietary Information." Business proprietary submissions and requests for business proprietary treatment must conform with the requirements of §§ 201.6 and 207.7 of the Commission's rules (19 CFR 201.6 and 207.7, as amended).

Parties which obtain disclosure of business information pursuant to § 207.7(a) of the Commission's rules (19 CFR 207.7(a)) may comment on such information in their prehearing and posthearing briefs, and may also file additional written comments on such information no later than August 8, 1989. Such additional comments must be limited to comments on business proprietary information received in or after the posthearing briefs.

Authority: This investigation is being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 207.20 of the Commission's rules (19 CFR § 207.20).

By order of the Commission.

Kenneth R. Mason,

Secretary.

Issued: April 20, 1989.

[FR Doc. 89-10052 Filed 4-26-89; 8:45 am]

BILLING CODE 7020-02-M

[Investigations Nos. 701-TA-297 (Preliminary) and 731-TA-422 (Preliminary)]

New Steel Rails From Canada

Determinations

On the basis of the record [1] developed in the subject investigations, the Commission unanimously determines, pursuant to section 703(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a)), that there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports from Canada of new steel rails,[2] provided for in items 610.20, 610.21, and 688.42 [3] of the Tariff Schedules of the United States (subheading 7302.10.10, 7302.10.50, and 8548.00.00 of the Harmonized Tariff Schedule of the United States), that are alleged to be subsidized by the Government of Canada.

The Commission also determines, pursuant to section 7339(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)), that there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports

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

[2] For the purposes of these investigations, "new steel rails" include rails, whether of carbon, high carbon, alloy or other quality steel, including, but not limited to, standard rails, all main line sections (over 60 pounds per yard), heat-treated or head-hardened (premium) rails, transit rails, contact rails (or "third rails"), and crane rails, provided for in items 610.2010, 610.2025, 610.2100, and 688.4280 of the *Tariff Schedules of the United States Annotated* (TSUSA) (subheadings 7302.10.1020, 7302.10.1040, 7302.10.5000, and 8548.00.0000 of the *Harmonized Tariff Schedule of the United States* (HTS)).

Specifically excluded from the scope of these investigations are imports of "light rails," which are 60 pounds or less per yard. "Relay rails," which are used rails that have been taken up from a primary railroad track and are suitable to be reused as rails (such as on a secondary rail line or in a rail yard), are also excluded.

[3] The petition states that contact rails are provided for under this item number; however, according to the U.S. Customs Service, contact rails are provided for under TSUS item number 685.90 (HTS item 8530.90.00). Irrespective of where classified in the TSUS or HTS, contact rails are clearly included within the scope of these investigations.

from Canada of new steel rails that are alleged to be sold in the United States at less that fair value (LTFV).

Background

On September 26, 1988, a petition was filed with the Commission and the Department of Commerce by Bethlehem Steel Corporation, Bethlehem, PA, alleging that an industry in the United States is materially injured or threatened with material injury by reason of subsidized imports of new steel rails from Canada and by reason of LTFV imports from Canada. Accordingly effective September 26, 1988, the Commission instituted preliminary countervailing duty investigation No. 701-TA-297 (Preliminary) and preliminary antidumping investigation No. 731-TA-422 (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 October 3, 1988, (53 FR 38795). The conference was held in Washington, DC, on October 19, 1988, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in these investigations to the Secretary of Commerce on November 10, 1988. The views of the Commission are contained in USITC Publication 2135 (November 1988), entitled "New Steel Rails from Canada: Determinations of the Commission in Investigations Nos. 701-TA-297 (Preliminary) and 731-TA-422 (Preliminary) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigations."

By order of the Commission:

Kenneth R. Mason,

Secretary

Issued: November 14, 1988.

[FR Doc. 88-27136 Filed 11-22-88; 8:45 am]

BILLING CODE 7020-02-M

CALENDAR OF PUBLIC HEARINGS

Those listed below appeared as witnesses at the United States International Trade Commission's hearing:

Subject	:	New Steel Rails from Canada
Invs. No.	:	Invs. 701-TA-297 (Final) and 731-TA-422 (Final)
Date and time	:	July 27, 1989 - 9:30 a.m.

Sessions were held in connection with the investigation in the Main Hearing Room 101 of the United States International Trade Commission, 500 E Street, S.W., in Washington.

In support of the imposition of countervailing/antidumping duties:

Stewart and Stewart
Washington, D.C.
on behalf of

Bethlehem Steel Corporation

Timothy Lewis, President, Steelton Rail Products and Pipe Division, Bethlehem Steel Corporation, Steelton, Pennsylvania

John H. Martens, Senior Product and Quality Engineer, Steelton Plant Products, Bethlehem Steel Corporation, Bethlehem, Pennsylvania

Robert E. Watkins, Jr., Planning Manager, Steelton Rail Products and Pipe Division Bethlehem Steel Corporation, Steelton, Pennsylvania

Mr. David E. Miller, Controller, Steelton Rail Products and Pipe Division, Bethlehem Steel Corporation, Steelton, Pennsylvania

In support of the imposition of
countervailing/antidumping duties:

Laird D. Patterson, Esq., Counsel,
Bethlehem Steel Corporation

Richard T. Binder, Manager, Railroad Product
Sales, CF&I Steel Corporation, Pueblo,
Colorado

Michael W. Coriden, Corporate Attorney, Secretary
CF&I Steel Corporation, Pueblo, Colorado

Eldon Johnson, Director of Sales and Marketing,
Bethlehem Steel Corporation

Eugene L. Stewart)
)--OF COUNSEL
James R. Cannon, Jr.)

In opposition to the imposition of
countervailing/antidumping duties:

Dow, Lohnes and Albertson
Washington, D.C.
on behalf of

Algoma Steel Corporation, Limited ("Algoma")

William J. Kissick, Government Affairs Manager,
The Algoma Steel Corporation, Limited

Robert W. Witty, Manager, Quality Engineering,
Steelworks, The Algoma Steel Corporation,
Limited

Alex Stewart, P.Eng., Marketing Manager, Shape
Products, The Algoma Steel Coporation, Limited

Robert E. Litan, Economist, The Brookings Institution

William Silverman)
Ryan Trainer)--OF COUNSEL
Carrie A. Simon)

In opposition to the imposition of
countervailing/antidumping duties:

O'Melveny and Meyers
Washington, D.C.
on behalf of

Sydney Steel Corporation ("Sysco")

Dr. John Strasser, President, Sydney Steel Corporation, Sydney, Canada

Dr. Robert Litan, Economist, The Brookings Institution

Gary N. Horlick)
)--OF COUNSEL
F. Amanda DeBusk)

Appendix B

Commerce's Federal Register notices

[C-122-605]

Final Affirmative Countervailing Duty Determination: New Steel Rail, Except Light Rail, From Canada

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: We determine that benefits which constitute subsidies within the meaning of the countervailing duty law are being provided to producers, manufacturers or exporters in Canada of new steel rail, except light rail ("steel rail"), as described in the "Scope of Investigation" section of this notice. The estimated net subsidy is 113.56 percent *ad valorem* for all manufacturers, producers or exporters in Canada of steel rail, except the Algoma Steel Corporation Ltd. (Algoma), which is excluded from this determination. The estimated net subsidy for Algoma is 0.24 percent *ad valorem*, which is *de minimis*. We have calculated a separate estimated net subsidy for Algoma because its rate differs significantly from the country-wide rate. (See the "Suspension of Liquidation" section of this notice.)

We have notified the United States International Trade Commission (ITC) of our determination. If the ITC determines that imports of steel rail materially injure, or threaten material injury to a U.S. industry, we will direct the U.S. Customs Service to resume suspension of liquidation of all entries of steel rail from Canada that are entered or withdrawn from warehouse, for consumption on or after the date of publication of our countervailing duty order and to require a cash deposit on entries of steel rail in an amount equal to the estimated net subsidy.

EFFECTIVE DATE: August 3, 1989.

FOR FURTHER INFORMATION CONTACT: Roy A. Malmrose or Margot Paijmans, Office of Countervailing Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 377-5414 (Malmrose) or 377-1442 (Paijmans).

SUPPLEMENTARY INFORMATION:

Final Determination

Based on our investigation, we determine that certain benefits which constitute subsidies within the meaning of section 701 of the Tariff Act of 1930, as amended (the Act), are being provided to manufacturers, producers or exporters of steel rail in Canada. For purposes of this investigation, the following programs are found to confer subsidies:

Federal Programs

- Debenture Guarantees Provided to Sydney Steel Corporation (Sysco)
- Forgiven Wharf Loan
- Regional Development Incentives Program
- Certain Investment Tax Credits

Joint Federal-Provincial Programs

- General Development Agreements
- Economic and Regional Development Agreements
- Iron Ore Freight Subsidy to Algoma

Provincial Programs

- Grants for Payment of Principal and Interest on Debentures
- Operating Grants Provided to Sysco
- Long-Term Loan Guarantees Provided to Sysco
- Equity Infusions Provided to Sysco

We determine the estimated net subsidy to be 113.56 percent *ad valorem* for all manufacturers, producers or exporters in Canada of steel rail, except Algoma, which is excluded from this determination.

Case History

Since the last Federal Register publication pertaining to the substance of this investigation ("Preliminary Affirmative Countervailing Duty Determination: New Steel Rail, Except Light Rail, from Canada," (Preliminary Determination), 54 FR 8784, March 2, 1989, the following events have occurred.

On March 13, 1989, petitioner filed a request for alignment of the countervailing duty and antidumping duty final determinations. On March 16, 1989, respondents filed a request for postponement of the final determination for 60 days. Pursuant to section 705(a)(1) and section 735(a)(2)(A) of the Act, respectively, we aligned the countervailing duty and antidumping duty final determinations and postponed the final determinations to no later than July 26, 1989 (54 FR 14264, April 10, 1989).

On May 18, 1989, we delivered a supplemental/deficiency questionnaire to the Government of Canada (GOC). On May 25, 1989, we received responses to our questionnaire from Algoma, Sydney Steel Corporation (Sysco), Nortrack Ltd. (Nortrack), Grand Valley Steel Limited (Grand Valley) and Sessenwein Inc. (Sessenwein). On May 26, 1989, Sessenwein filed corrections to certain errors contained in its May 25, 1989, submission.

We conducted verification in Canada from May 29 through June 14, 1989, of the questionnaire responses from the GOC, the Provincial Government of Ontario, the Provincial Government of Nova Scotia (GONS), Sysco, Algoma, Grand Valley, Sessenwein, C.P. Rail and Nortrack.

On June 6, 1989, Nortrack submitted corrections to certain clerical errors reported during verification. Also on June 6, 1989, Sysco submitted clarifications to its responses. On June 29, 1989, Algoma submitted clarifications, corrections, and other supplemental information.

On July 6, 1989, in accordance with Article 5, paragraph 3 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code), we notified U.S. Customs to terminate the suspension of liquidation in this investigation as of July 1, 1989.

On July 10, 1989, GOC submitted supplemental information on the tariff classification of contact or "third" rails. On July 12, 1989, GOC forwarded a report to the Department which was inadvertently omitted at verification.

On July 13, 1989, Algoma filed supplemental information that the Department had requested at verification. On July 14, 1989, Sysco submitted clarification of information on its debentures which the Department had requested at verification.

Petitioner and respondents requested a public hearing in this case on March 8, 1989, which was held on July 18, 1989. Petitioner and Sysco filed case briefs on July 13, 1989, and rebuttal briefs on July 17, 1989. Algoma did not file a case brief but filed a rebuttal brief on July 19, 1989.

Scope of Investigation

The United States has developed a system of tariff classification based on the international harmonized system of Customs nomenclature. On January 1, 1989, the United States fully converted to the Harmonized Tariff Schedule (HTS), as provided for in section 1201 *et seq.* of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered or withdrawn from warehouse for consumption on or after this date is now classified solely

according to the appropriate HTS item numbers. The HTS item numbers are provided for convenience and U.S. Customs Service purposes. The written description remains dispositive.

The product covered by this investigation is new steel rail, whether of carbon, high carbon, alloy or other quality steel, includes but is not limited to, standard rails, all main line sections (at least 30 kg. per meter or 60 pounds per yard), heat-treated or head-hardened (premium) rails, transit rails, contact rail(or "third rail") and crane rails. Rails are used by the railroad industry, by rapid transit lines, by subways, in mines and in industrial applications.

Specifically excluded from this investigation are light rails (rails less than 30 kg. per meter or 60 pounds per yard). Also excluded are relay rails which are used rails taken up from primary railroad track and relaid in a railroad yard or on a secondary track.

The product covered by this investigation is currently provided for under the following HTS subheadings: 7302.10.1020, 7302.10.1040, 7302.10.5000 and 8548.00.0000. Prior to January 1, 1989, such merchandise was classifiable under items 610.2010, 610.2025, 610.2100 and 688.4280 of the "Tariff Schedules of the United States Annotated" (TSUSA).

Analysis of Programs

For purposes of this determination, the period for which we are measuring subsidies ("the review period") is calendar year 1987 for Algoma and April 1, 1987–March 31, 1988 for Sysco. These review periods correspond to the respective companies' fiscal years. Normally, we would select the calendar year as the review period for all companies if the companies under investigation had different fiscal years. We have chosen Sysco's fiscal year as that company's review period in order to measure more accurately the subsidies received over time, which have been reported to the Department on a fiscal year basis.

Petitioner alleged that Sysco is unequityworthy and uncreditworthy. We have consistently held that the government provision of equity does not *per se* confer a subsidy. Government equity purchases bestow countervailable benefits only when they occur on terms inconsistent with commercial considerations. When there is no market-determined price for equity, it is necessary to determine whether the company was a reasonable commercial investment or, in other words, whether the company was "equityworthy."

The GONS is the sole owner of Sysco, which it purchased in 1968. Sysco has never issued shares; therefore, we must determine whether Sysco was equityworthy in each instance when the GONS made an equity infusion. We do not reach the question of whether Sysco was equityworthy in 1968. The initial purchase of Sysco by the GONS occurred prior to the 15 year period in which we are examining all the financial assistance received by Sysco which may have benefited the company during the review period. We are using 15 years because it represents the average useful life of assets in the steel industry as determined by the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System. Use of the IRS tables is in accordance with past practice and is described in detail in the "Subsidies Appendix" attached to the "Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: Cold-Rolled Carbon Steel and Flat-Rolled Products from Argentina," (Subsidies Appendix), 49 FR 18006, April 26, 1984.

Although Sysco's equityworthiness in 1968 and the GONS's equity infusion in 1968 will not be examined, the GONS made additional equity infusions into Sysco in the period 1974 through 1988. Therefore, we have reviewed Sysco's equityworthiness in each of the years in which it received equity capital from the GONS during that period.

A company is considered unequityworthy if it is deemed unable to generate a reasonable rate of return within a reasonable period of time. In making our equityworthiness determinations, we assess the company's current and past financial health, as reflected in various financial indicators taken from its financial statements. The indicators we examine include the following ratios: rate of return on total assets and net equity, profit margin on sales, operating loss to financial expense, the current and quick ratios and debt to equity and debt to total assets. We give great weight to the company's recent ability to earn a return on total assets and to generate a profit margin on sales as indications of the company's financial health and prospects. Based on the factors described above, we determine that Sysco was unequityworthy in each year in which it received an equity infusion in the period from 1973 through 1988.

Petitioner additionally alleged that Sysco is uncreditworthy. We consider a company creditworthy if it appears that it will have sufficient revenues or resources to meet its costs and fixed financial obligations, absent government intervention. Like our equityworthiness test, to determine the creditworthiness of a company we analyze the company's past operations, as reflected in various financial indicators calculated from its financial statements. We give great weight to the company's recent past ability to meet its financial cost obligations with its cash flow. Based on an analysis of the factors described above, we determine Sysco to be uncreditworthy for the period from 1973 through 1988.

We determine that Sysco is uncreditworthy despite the fact that it has received financing from private commercial sources. We are discounting the importance of such financing because we have determined that Sysco would not have received this financing but for the guarantees provided by the GOC and the GONS.

All of Sysco's debentures and loans are guaranteed by either the federal or the provincial government. (See sections I.A.1., I.C.3. and II.A.) With respect to the provincial loan guarantees, Sysco has argued that these guarantees are not countervailable. In support of their position, respondents cite § 355.44(c)(1) of the proposed Countervailing Duty regulations, published in the **Federal Register** on May 31, 1989 (54 FR 23366) (to be codified at 19 CFR Part 355) (proposed regulations), which states "[t]he explicit guarantee by a government of a loan to a firm shall not confer a countervailable benefit if the government is a principal owner or majority shareholder of the firm and it is a normal commercial practice in the country in question for owners or shareholders to provide loan guarantees on comparable terms to their firms."

The statement in the proposed regulations embodies the Department's general policy on loan guarantees as exhibited in previous cases. (*See*, "Final Affirmative Countervailing Duty Determination on Carbon Steel Wire Rod from Trinidad and Tobago," 49 FR 480, January 4, 1984.) However, we note that our past practice has been limited largely to government guarantees on commercial loans to equityworthy companies or to government guarantees on loans from government sources. When analyzing loan guarantees to companies that may not be reasonable commercial investments, we believe it is appropriate to use the same "reasonable investor" analysis as we would for an equity infusion. Just as a reasonable investor would not purchase stock in an unequityworthy firm, it would not guarantee a loan to a company in such poor financial straits that the guarantor would be bound to lose money. This analysis is consistent with prior cases in

which we considered the government guarantee to be "the action of a major shareholder contributing to its investment in a * * * project." *Id.* at 485. In such cases, we have evaluated the loan guarantees in terms of whether the investment was inconsistent with commercial considerations. *Id.* Based on our analysis of Sysco's financial position, as outlined earlier under our equityworthy analysis, we determine that the government's provision of loan guarantees to Sysco is not a reasonable commercial decision. Based on this analysis, and because these guarantees are limited to a specific industry, we determine that the government provision of loan guarantees to Sysco provides a potential countervailable benefit.

Our past practice, described in the "Subsidies Appendix", for measuring the benefit conferred by the provision of a government loan guarantee, is to first compare the cost of the government guarantee to the cost the firm would have paid for a comparable commercial guarantee. If no difference between government and commercial guarantee costs is evident, we then compare the terms of the guaranteed loan to the benchmark financing. We verified that loan guarantees cannot normally be purchased from commercial sources. Consequently, we cannot compare Sysco's treatment against normal commercial practices in Canada. Therefore, for all of Sysco's guaranteed financing we analyzed the extent to which the company received more favorable terms on its financing than the benchmark financing. (See sections I.A.1., I.C.3. and II.A.)

With respect to the calculations of benefits from grants and government debenture and loan guarantees received by Sysco, we used as the discount rate for allocating the benefits over time the benchmark interest rate calculated for purposes of valuing the subsidy provided on Sysco's debentures and loans which were guaranteed by either the federal or provincial government. (See sections I.A.1. and I.C.3.) We were unable to use Sysco's weighted cost of capital, which is our preferred method of deriving the discount rate, for the following reasons. In the years 1973–1976, we do not have information on the national average rate of return on equity. In the years 1977–1988, either Sysco's equity as a percent of total capitalization was negative or Sysco's capitalization in its entirety was negative. Consequently, we could not meaningfully employ our weighted cost of capital formula.

Sysco received grants and/or equity infusions, which we are treating as grants (see section I.C.4.), in every year during the period 1974–1983. In accordance with past practice (*see* "Final Affirmative Countervailing Duty Determination: Oil Country Tubular Goods from Canada", (*OCTG*), 51 FR 15037, April 22, 1986), for all the programs which provided non-recurring grants and for all the benefits received by Sysco which we treated as non-recurring grants, we first determined if the benefit amount received by Sysco, in each of the years in which the benefit was received, was more than 0.50 percent of the company's total sales for that year. In every year, the benefit amount exceeded the 0.50 percent rate; therefore, for all of the grants and equity infusions received by Sysco, we allocated the benefit over the average useful life of equipment in the steel industry, which is 15 years. Using the above methodology, we also allocated over 15 years, unless otherwise specified, the benefit from the grants received by Algoma.

As mentioned in the "Case History" section, we verified questionnaire responses from the two producers and four non-producer exporters. We verified that none of the non-producer exporters received any benefits from the programs under investigation with respect to steel rails exported to the United States. Therefore, the steel rail exports of each respondent non-producer exporter will be subject to the estimated net subsidy of the producer from which it purchased the steel rail. As the best information available, we are assigning the estimated net subsidy rate of Sysco to the one non-respondent non-producer exporter, Bernard Railtrack Export Inc.

Based upon our analysis of the petition, the responses to our questionnaires, verification, and written comments filed by petitioner and respondents, we determine the following.

I. Programs Determined to Confer Subsidies

We determine that subsidies are being provided to manufacturers, producers or exporters in Canada of steel rail under the following programs.

A. Federal Programs

1. Debenture Guarantees Provided to Sysco

Sysco issued its Series C debenture in 1973 and its Series D debenture in 1975. Series C was denominated in U.S. dollars, issued for 20 years and guaranteed by the GONS. The terms of Series C provided for semi-annual interest payments and annual principal repayments starting in 1979.

Series D was denominated in Canadian dollars, issued for 20 years and guaranteed by the Cape Breton Development Corporation (Devco), a crown corporation of the GOC. The terms of Series D provided for semi-annual interest payments and gradually increasing annual principal repayments. No fee was paid for the GONS or Devco guarantees.

These guarantees were provided to one company. Thus, we determined that their provision was limited to a specific enterprise. Based on the reasons explained in the "Analysis of Programs" section pertaining to the government provision of debenture and loan guarantees, Sysco's debenture guarantees are countervailable to the extent that the terms are more favorable than the benchmark financing.

As described in the "Analysis of Programs" section, we have determined that Sysco has been uncreditworthy throughout the period 1973–1988. In the case of uncreditworthy companies, we assume that private lenders either would not provide loans to such companies or would require a premium interest rate. (See the Subsidies Appendix.) In selecting an appropriate benchmark, we must formulate an approximation of the premium interest rate a commercial source of financing would charge an uncreditworthy company. The first step in the formulation of such an interest rate is to determine the highest long-term fixed interest rate a marginally creditworthy borrower would have to pay in order to receive a loan.

The next step is the calculation of a risk premium. This amount represents the difference in risk between a marginally creditworthy company and an uncreditworthy company. In previous cases (*See* "Certain Carbon Steel Products from Brazil: Final Results of Countervailing Duty Administrative Review", 52 FR 829, January 9, 1987), we have derived this risk premium by examining the difference between Moody's Aaa and Baa corporate bond rates and calculating the percentage this difference represents of the prime interest rate in the United States. We have found that the risk premium as calculated by this approach is 12 percent. If the financing is not in U.S. currency, this percentage is then applied to the prime interest rate in the country concerned to derive a comparable measure of the risk premium in the local economy. The final step in our calculation of the appropriate benchmark for an uncreditworthy

company is to add the risk premium to the highest long-term fixed interest rate commonly available to a marginally creditworthy company.

For the series D debenture denominated in Canadian dollars, we chose for the highest long-term fixed interest rate commonly available to a marginally creditworthy company the rate on BBB Canadian corporate bonds. To this we added the risk premium, calculated as 12 percent of the Canadian prime rate. We used the resulting interest rate as our benchmark for the debenture denominated in Canadian currency.

With respect to the series C debenture denominated in U.S. dollars, we followed the same general approach described above in constructing a benchmark. We used the rate on Baa U.S. corporate bonds as the highest long-term fixed interest rate commonly available to a marginally creditworthy company and 12 percent of the U.S. prime rate for the calculation of the risk premium. Based on this methodology, we derived a benchmark for the debenture denominated in U.S. dollars. In addition, we calculated an effective interest rate on this debenture to account for the difference in the face value of the issue and the actual amount received by Sysco for the issue.

We compared the two benchmarks formulated above to the interest rates received on the two series of debentures issued by Sysco and found that the interest rates on Sysco's debentures were lower than the respective benchmarks. Therefore, we determine that the guarantees provided to Sysco by the GOC and the GONS are countervailable.

To determine the benefit, we calculated the payment differential between the benchmark financing and the guaranteed debentures using our long-term loan methodology which is described in the "Subsidies Appendix" and has been described in numerous previous cases. (*See*, for example, "Final Affirmative Countervailing Duty Determination; Certain Granite Products from Spain", 53 FR 24340, June 28, 1988.) We allocated the benefit over 20 years using as the discount rate the benchmark interest rates described above. (We were not able to base the discount rate on Sysco's weighted cost of capital for the reasons discussed in the "Analysis of Programs" section.) We then divided the benefit attributable to the review period by Sysco's total sales and calculated an estimated net subsidy of 1.13 percent *ad valorem* for Sysco.

2. Forgiven Wharf Loan

In 1972, the federal government provided Sysco with a loan to construct a loading wharf, which was completed in June 1978. Beginning in June 1979, Sysco was to make twenty equal payments to pay off the total advances from the government consisting of principal and interest accrued during the construction of the wharf. The twenty equal payments did not include any additional interest charges beyond 1978. No payments on the loan were made. In May 1981, the federal government announced that the loan would be forgiven. In 1982, Sysco removed the outstanding principal and estimated accrued unpaid interest from its long-term liabilities as shown in its audited financial statement.

We determine that the benefit provided by the loan forgiveness is countervailable because it was provided to a specific enterprise. Furthermore, we determine that for the period 1979 through 1981, the year in which the loan was forgiven, the loan was interest-free. Therefore, we have added to the original balance the interest that would have been paid for the period 1979 through 1981 at the benchmark interest rate, described in the previous section. We treated this entire amount as a grant given in 1981. Using the declining balance methodology and the benchmark rate, we allocated the benefit over 15 years, for reasons explained in the "Analysis of Programs" section of this notice, and divided the benefit attributable to the review period by Sysco's total sales. The calculated estimated net subsidy rate is 2.36 percent *ad valorem* for Sysco.

3. Regional Development Incentives Program (RDIP)

The RDIP was administered by the Department of Regional Economic Expansion (DREE) until its replacement with the Industrial Regional Development Program (IRDP) in 1983. It was established in 1969 for the purpose of creating stable employment opportunities in certain regions of Canada where employment and economic opportunities are chronically low, particularly the Atlantic provinces. The DREE offered incentives based on a case-by-case evaluation of capital investment projects. Projects that could proceed without RDIP assistance were ineligible. Assistance was provided in the form of grants or loans guarantees.

Although the program was terminated in 1983, RDIP grants were provided to both Sysco and Algoma prior to its termination. We determine that the RDIP grants are countervailable because the benefits are limited to companies located within certain regions of Canada. (*See* also OCTG and "Final Affirmative Countervailing Duty Determination: Certain Fresh Atlantic Groundfish from Canada" (Groundfish), 51 FR 10041, March 24, 1986.)

Algoma received two RDIP grants; Sysco received four RDIP grants. We verfied that one of the grants received by Algoma was specifically tied to the production of products not under investigation. Therefore, consistent with past practice (see OCTG), we did not include this grant in our calculations. Algoma's other grant was approved in 1972.

To calculate the benefit, we used the declining balance methodology. We used as the discount rate for Algoma the national average long-term interest rate in Canada in 1972. (We were unable to use our weighted cost of capital formula because we do not have information on the national average rate of return on equity in Canada in 1972.) We used as the discount rate for Sysco the interest rate benchmark discussed in section I.A.1. On this basis, we calculated the benefits attributable to the review period and allocated them to the respective total sales of Algoma and Sysco. We calculated the estimated net subsidy to be 0.03 percent *ad valorem* for Algoma and 1.10 percent *ad valorem* for Sysco.

4. Certain Investment Tax Credits (ITCs)

There are a number of categories of ITCs in Canada and varying tax credit percentage levels within some of the categories. Based on our previous examination of all the types of ITCs in Canada (See OCTG and Groundfish), we initiated an investigation on the following four types of ITCs: (1) Tax credits of three and 13 percent, above the basic seven percent rate which we have previously found non-specific, for investment in "qualified property" located in certain regions of Canada; (2) tax credits for investment in "certified property"; (3) tax credits for large companies of ten percent above the basic 20 percent for investment in capital equipment used for scientific research; and (4) tax credits for investment in transportation and construction equipment.

Canadian tax law provides that ITCs may be subtracted from taxes owed, but if no taxes are owed (either because a company is initially in a tax loss position or because only some of the ITCs have been used to satisfy all tax liability), those excess ITCs earned after April 19, 1983, have a refundable, one-time cash value equal to 20 percent of

the initial, face value of the ITC (40 percent for small businesses).

We verified that Sysco, as a provincially-owned corporation, is not liable for federal tax. Because the company is not liable for federal taxes, it was not eligible for a refund of taxes under the ITC law.

We verified that Algoma benefited from the three percent tax credit, above the basic rate of seven percent, for investment in "qualified property" because it is located in northern Ontario, and that it did not use the other ITCs under investigation. Furthermore, we verified that Algoma did not owe taxes on the tax return filed in the review period, but that it received a refund under the procedures described above.

We determine that the three percent tax credit, above the basic rate of seven percent, for investment in "qualified property" is countervailable because it is limited to companies located in certain regions of Canada.

To calculate the benefit from the "qualified property" ITC, we followed our standard tax methodology. Under our tax methodology, we allocate an income tax benefit claimed on a tax return to the year in which that tax return was filed. Algoma received a refund on the tax return filed during the review period. Therefore, we consider the amount of the refund attributable to the three percent in excess of the basic rate of seven percent to be the benefit Algoma received during the review period. We divided this benefit amount by Algoma's total sales for the review period and calculated an estimated net subsidy of 0.02 percent *ad valorem*.

B. Joint Federal-Provincial Programs

1. General Development Agreements (GDA)

GDAs provided the legal basis for various departments of the federal and provincial governments to cooperate in the establishment of economic assistance programs. The GDAs were umbrella agreements which stated general economic development goals. Ten-year GDAs were signed with most provinces in 1974.

Subsidiary agreements were signed pursuant to the GDAs. Subsidiary agreements were generally between particular federal and provincial government departments and addressed certain economic development problems under the jurisdiction of the government agency signatories. These agreements established various individual types of economic development programs, delineated administrative procedures, and set out the relative funding commitments of the federal and provincial governments. Subsidiary agreements were typically directed at establishing traditional government economic assistance programs, developing infrastructure, providing for economic development assistance for certain regions within the province, and providing financial assistance to specific industries or enterprises.

Three such subsidiary agreements were signed between the federal government and the GONS. Two agreements were specifically established to provide assistance to Sysco. We determine that funds provided to Sysco under these agreements are countervailable in their entirety because they provided grants to a specific enterprise.

The third subsidiary agreement primarily provided funds for feasiblity and market studies and funds for the development of industrial parks. In our Preliminary Determination, we determined that only the GOC's portion of funds under this third subsidiary agreement was countervailable because it was limited to companies in a particular region of Canada (*i.e.*, the Province of Nova Scotia). We also stated that the GONS's portion of funding was not countervailable because the assistance was not limited to a specific enterprise or industry or group of enterprises or industries in Nova Scotia. However, we also noted in our Preliminary Determination that, although the agreement provided benefits to a wide range and number of industries, an amendment was made to the agreement, subsequent to its implementation, naming Sysco as the specific recipient of new funds not previously authorized under the agreement. Consequently, we stated that we would examine this amendment in detail to determine whether it constituted a discretionary governmental action which provided a benefit to a specific enterprise.

As noted above, the general purpose of the third subsidiary agreement was for general feasibility and market studies and the development of industrial parks. No specific companies were named in the original agreement. The amendment however specifically permitted the provision of funds to Sysco for capital repair. During verification, federal and provincial agreement officials were unable to provide any specific information concerning the circumstances surrounding this amendment. Therefore, we are assuming, as the best information available, that the amendment to the third subsidiary agreement constituted a discretionary governmental action which provided a benefit to a specific enterprise. Thus, we determine that funds provided to Sysco under the amendment to the third subsidiary agreement are countervailable in their entirety.

No assistance to Algoma was provided under the Canada/Ontario GDA or corresponding subsidiary agreements.

We calculated the benefit conferred by the grants using the discount rate for Sysco referred to above (see section I.A.1.) and our declining balance methodology. We divided the benefit attributable to the review period by Sysco's total sales and calculated an estimated net subsidy of 25.48 percent *ad valorem* for Sysco.

2. Economic and Regional Development Agreements (ERDA)

ERDAs are essentially a continuation of the GDAs. ERDAs were signed with every province and territory in the early 1980's. Similar to GDA subsidiary agreements, ERDA subsidiary agreements establish programs, delineate administrative procedures and set up the relative funding commitments of the federal and provincial governments.

Two subsidiary agreements were signed between the federal government and the province of Nova Scotia which related to Sysco. The first provided for grants to fund the modernization of Sysco's operations. The second provided for the funding of economic planning studies throughout the Province, including three feasibility studies which examined different modernization alternatives for Sysco.

We determine that funds provided to Sysco under the first subsidiary agreement are countervailable in their entirety because the agreement provides grants to a specific enterprise.

The monies under the second subsidiary agreement were used to conduct feasibility and market studies for various projects throughout the Province of Nova Scotia. We verified that these funds were provided for such diverse projects as the development and diffusion of communications and information, the identification of a site for a harness racing facility, the assessment of viability of a miniature theme park, and impact studies for rail line abandonment. Therefore, we determine that the portion of funds provided by the GONS is not countervailable because the assistance is not limited to a specific enterprise or industry or group of enterprises or industries. We determine that the portion of funds provided by the GOC

are countervailable because they are limited to companies in a particular region of Canada (*i.e.* the Province of Nova Scotia).

The only indirect assistance received by Algoma under the Canada/Ontario ERDA is described in the next section.

To calculate the benefit we used the same methodology described in the "GDA" section. We calculated an estimated net subsidy of 6.70 percent *ad valorem* for Sysco.

3. Iron Ore Freight Subsidy to Algoma

Algoma ships sintered iron ore pellets from its mine in Wawa, Ontario to its steel mill at Sault Ste. Marie by rail on the Algoma Central Railway (ACR). The ACR also operates the Agawa Canyon Tour Train which is an important tourist attraction in Northern Ontario.

In 1986, Algoma reconsidered its use of Wawa iron ore because the delivered cost of Wawa ore was not competitive when compared to the delivered cost of ore from alternative sources. We verified that Algoma obtained and analyzed bids from a number of companies capable of trucking its iron ore from the Wawa mine. In order to make the delivered cost of Wawa ore competitive, Algoma sought a reduction in ACR's freight rates.

If ACR did not reduce its freight rate to a competitive level, Algoma was considering closing its Wawa mine. Such an action would have forced ACR to cease all operations, including its tour train operation. To preserve the continued operation of ACR, the federal and the Ontario governments provided grants to ACR. The grants were made under the "Canada-Ontario Subsidiary Agreement for Tourism Development" (COTDA), which is a subsidiary agreement under ERDA. As a result of these grants ACR was able to charge Algoma a lower freight rate.

Because the amount of the grants was calculated to permit ACR to charge the lower freight rate sought by Algoma, we determine that the COTDA grants provided an indirect benefit specifically to Algoma. Thus, we determine that this benefit was limited to a specific enterprise.To calculate the benefit to Algoma we compared the truck rate Algoma would have been charged to the reduced freight rate charged by ACR. We divided the difference by Algoma's total sales and found the estimated net subsidy rate to be 0.19 percent.

C. Provincial Programs—Province of Nova Scotia

1. Grants for Payment of Principal and Interest on Debentures

The GONS has provided Sysco with grants to cover principal payments and interest payments on its long-term debentures since 1982. Because these grants are limited to a specific enterprise they are countervailable.

Respondents have argued that we should treat these grants as recurring grants. In determining whether grants are recurring or non-recurring, we must consider the following factors: (1) Whether the program providing the benefit is exceptional; (2) whether the program is of longstanding nature: and (3) whether there is any reason to believe that the program will not continue into the future. (*See* "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada," 50 FR 25,097, June 15, 1985, and Groundfish.)

In this case, we determine that these grants are non-recurring for the following reasons. First, the government action of providing these grants is exceptional because it is not under any particular established provincial program and because the provincial legislature must approve the funds each year. Moreover, if Sysco had turned a profit, it is unlikely the province would have continued to provide the grants. Second, although these grants have been provided for several years, presumably they will terminate when the debentures are paid off in the near future. Third, if Sysco does become profitable in the future, the grants will probably stop. Therefore, we determine that these grants are non-recurring grants.

To calculate the benefit, we used the same methodology described in the "GDA" section. The estimated net subsidy is 22.73 percent *ad valorem* for Sysco.

2. Operating Grants Provided to Sysco

The GONS has provided Sysco with operating grants to cover its general operating expenses and for capital expenditures. We determine that these operating grants are countervailable because they provide funds to a specific enterprise. We further determine that they are non-recurring because they are not provided under any particular provincial program and because they are provided according to the irregular financial needs of Sysco.

To calculate the benefit, we used the same methodology described in the "GDA" section. The estimated net subsidy is 19.34 percent *ad valorem* for Sysco.

3. Long-term Loan Guarantees Provided to Sysco

Sysco has a number of five-year loan agreements with several Canadian trust companies. The GONS guarantees all of these loans. Interest rates on these five-year loans are variable according to the prime or banker's acceptance (BA) rates. Interest is payable monthly. The trust companies have the option of demanding repayment, in full, of the outstanding principal with 30 days notice. Sysco also has the option of repaying, in full, the outstanding principal. None of these loans have ever been prepaid, nor have the trust companies ever demanded payment before maturity.

These guarantees were provided to one company. Thus, we determine that their provision was limited to a specific enterprise. For the reasons explained in the "Analysis of Programs" section pertaining to the government provision of debenture and loan guarantees, Sysco's loan guarantees are countervailable to the extent that the terms are more favorable than the benchmark financing.

As described in the "Analysis of Programs" section, we have determined that Sysco has been uncreditworthy throughout the period 1973–1988. In the case of uncreditworthy companies, we assume that private lenders either would not provide loans to such companies or would require a premium interest rate. (*See* the "Subsidies Appendix".) In selecting an appropriate benchmark, we must formulate an approximation of the premium interest rate a commercial source of financing would charge an uncreditworthy company. Our preferred benchmark for a long-term variable interest rate government guaranteed loan to an uncreditworthy company is the highest long-term variable interest rate commonly available to a marginally creditworthy company in the country in question, plus the risk premium described in section I.1.A. Statistical information concerning the highest long-term variable interest rate in Canada does not exist. Absent such a rate, we have determined that the best alternative benchmark is the highest long-term fixed interest rate commonly available to a marginally creditworthy company in the country in question. Although in prior cases we have used short-term financing as our benchmark, it is more appropriate to use a long-term benchmark when it is available. For long-term projects a company will

6. Community-Based Industrial Adjustment Program Grants

7. Export Credit Financing

B. Joint Federal-Provincial Programs

Mineral Development Agreement Benefits to Algoma

C. Provincial Programs

1. Ontario Development Corporation Export Support Loans, Other Loans and Loan Guarantees

2. Provision of Electricity by Ontario Hydro to Algoma

3. Income Tax Exemption for Sysco

Comments

All written comments submitted by the interested parties in this investigation which have not previously been addressed in this notice are addressed below.

Comment 1: Sysco argues that the short-term interest rate benchmark should be the interest rate on BAs and commercial paper, which represent the normal type of short-term financing for large companies. Furthermore, Sysco quotes from the Proposed Regulations that a short-term benchmark should be based on an average of the predominant interest rate.

Petitioner contends that the short-term benchmark should be based on the predominant form of short-term financing and the highest short-term rate observable on that form of financing, which would be prime plus three percent. Petitioner maintains that corporate paper and BAs do not constitute the predominant forms of financing because, together, they only account for 20 percent of short-term financing in Canada. Petitioner also argues that there is no justification for a benchmark based on BAs and corporate paper because Sysco does not have the assets of a "large" company as defined by the GOC.

DOC Position

According to past practice, the short-term benchmark is based on the average interest rate on the predominant form of short-term financing. (See Redraw Rod.) Absent information on a single predominant form of short-term financing, we use as the short-term benchmark the weighted-average of the interest rates from two or more sources of short-term financing that together account for at least 50 percent of all short-term financing. We verified that BAs and corporate paper together account for only 20 percent of short-term financing in Canada. Average interest rate information on the remaining 80 percent of short-term financing is not available. Therefore, we chose as the best information available, for purposes of this investigation, the rate charged Algoma on its short-term financing.

Comment 2: Sysco contends that its five-year trust company loans should be considered short-term loans. Sysco's argument is based on the fact that each of the trust companies has the option to demand payment in full of the outstanding principal and interest with 30 days notice. In addition, as is characteristic of short-term loans, these five-year loans have variable interest rates.

Petitioner holds that Sysco's trust company loans should be considered long-term loans because on their face the loans have a term of five years. Furthermore, petitioner argues that Sysco has not demonstrated that the demand option has ever been used or that Sysco has ever prepaid any of these loans. Moreover, petitioner points out that Sysco rolled over several of these loans past their original terms.

DOC Position: We have determined that Sysco's five-year trust company loans should be treated as long-term loans because: (1) They are recorded as long-term loans in the audited financial statements of the company, (2) payment has never been demanded or made before maturity, (3) several of the loans have been rolled-over past their original term, and (4) Sysco has a grossly insufficient amount of liquid assets which could be used to pay these loans if they were demanded before maturity. This last point indicates that Sysco does not anticipate these loans being paid before maturity.

Comment 3: Sysco argues that its five-year trust company loans should be considered short-term loans because for all long-term loan benefits, and other benefits allocated over time, a "grant equivalent" can be calculated and that for a long-term loan with a variable interest rate a grant equivalent cannot be calculated because the total amount of any countervailable benefit is contingent upon future benchmarks. Therefore, according to Sysco, we must treat Sysco's five-year trust company loans as short-term.

DOC Position: It is true that a grant equivalent cannot be calculated for a variable rate loan. However, simply because a grant equivalent cannot be calculated does not prevent the Department from treating the loans in question as long-term for other purposes.

Comment 4: Petitioner argues that the benchmark for the long-term variable interest rate loans guaranteed by the GONS should be eight percent over prime, plus a risk premium.

Sysco argues that petitioner's suggested benchmark should not be used because it was a "guesstimate" by a Canadian banking official. Sysco also points out that the Department in Groundfish stated that there was "no comparable long-term variable or fixed interest rate commonly available to Canadian firms" and that, as a result, "a short-term benchmark interest rate was used to calculate the benefit from long-term variable rate loans."

DOC Position: We have explained our choice of a benchmark for Sysco's long-term variable rate loans in Section I.C.3. Petitioner's suggested benchmark is based on a statement made by a Canadian banking official, which we have determined to be too speculative for use. With respect to Sysco's comment, regarding Groundfish, in this investigation we were able to obtain information on a comparable long-term fixed interest rate; therefore, we did not use a short-term benchmark.

Comment 5: Sysco argues that if the debenture guarantees are considered countervailable, the benefit is equal to an annual fee of one percent which is charged under other government loan guarantee programs.

DOC Position: We have determined that the most appropriate method of measuring the benefit from a government loan guarantee is to compare the terms of the guaranteed financing to the benchmark financing. (See the "Analysis of Programs" section.)

Comment 6: Sysco argues that a "put" option on its debenture effectively lowered the risk on the debenture issue and, therefore, lowered the interest rate. Respondent refers to the "Final Affirmative Antidumping Determination: Generic Cephalexin Capsules from Canada" (Cephalexin), 54 FR 26.820, June 26, 1989, in which the Department made the following statement regarding the treatment of a stock convertibility option: "this option represents a real * * * cost to respondent over and above the cost of the interest payments to the debenture holders." Sysco also submitted with its case brief two debenture prospectuses, one with a "put" option and the other without, and calculated the value of the option at 1.375 percent.

Petitioner first points out that Sysco never provided information concerning the "put" option in its questionnaire responses. Petitioner further argues that Sysco has not adequately stated how the two debenture prospectuses submitted are comparable to Sysco's debentures. Moreover, petitioner states that Sysco mischaracterizes its option as

one of convertibility rather than redemption and that Sysco omitted a key portion of the quote from Cephalexin, which reads in full "[t]his represents a real, though unquantifiable cost to respondent over and above the cost of the interest payments to the debenture holders."

DOC Position: This issue was not raised in any of the questionnaire responses of Sysco. It was first raised during verification. Thus, this information was submitted too late for the Department to analyze prior to verification and for the petitioner to meaningfully comment upon. (See § 353.31(a) of the Department's regulations published in the **Federal Register** on December 27, 1988 (53 FR 52306) (to be codified at 19 CFR 353.31(a).)

Comment 7: Sysco argues that, because the interest rates on its debentures are at market rates, an appropriate benchmark for the U.S. dollar denominated debenture would be rates on comparable debentures issued in 1973. Respondents submitted prospectuses for two debenture issues for use as possible benchmarks.

Petitioner refutes respondent's suggested benchmarks by stating that they do not represent a national average, do not follow the hierarchy of benchmarks for long-term loans outlined in the Proposed Regulations and do not include the risk premium calculated for an uncreditworthy company.

DOC Position: According to our standard practice, our benchmark in the case of long-term fixed rate financing provided to an uncreditworthy company is the highest long-term fixed interest rate commercially available to a marginally creditworthy company plus the risk premium. (See the "Subsidies Appendix" and the "Analysis of Programs" section.) We are using the rate on U.S. Baa corporate bonds as the highest long-term fixed interest rate.

Comment 8: Respondent contends that for the final determination the effective interest rate on the Series C debenture should take into account exchange rate fluctuations between the Canadian and U.S. dollars. Respondent argues that the fluctuations between the Canadian and U.S. dollars have increased the effective interest rate to Sysco of its Series C financing.

Petitioner aruges that the Department's use of effective interest rates is to ensure that, when a potentially preferential interest rate is compared to a benchmark, both rates reflect the full cost of the loan to the borrower. Petitioner then lists other aspects of a loan, such as the prepayment of interest, which can change the actual cost to the borrower. Petitioner concludes by stating that the declining value of the Canadian dollar is irrelevant and that the only question is whether the debenture guarantee permitted Sysco to pay an interest rate lower than it would have otherwise.

DOC Position: The benefit from the debenture guarantee is one that arises from issuing the debenture on terms that were more favorable than those commercially available. The currency in which the company chooses to issue the debenture is immaterial; this represents a risk chosen by the company which is irrelevant to the terms and conditions of the issue.

Comment 9: Sysco states that the Department erred in applying the specificity test to the individual subsidiary agreements and not to the general agreements under the GDA and ERDA programs. Because GDA and ERDA agreements cover all areas of Canada, these programs do not meet the specificity test and, as such, are not countervailable. Finally, Sysco argues that any government assistance program if broken down into sufficiently small subparts can be found to meet the specificity test.

Petitioner argues that GDA and ERDA benefits are specific and, thus, are countervailable. Monies provided to Sysco were at the discretion of the governments and were provided to Sysco specifically. Lastly, petitioner states that under Sysco's analysis, governments could avoid the imposition of countervailing duties by lumping all of their subidy programs into a single overall program.

DOC Position: We have found in our past cases that GDAs and ERDAs do not actually establish any government programs but instead ar merely legal agreements which, dual or conflicting jurisdictions, provide a framework to permit departments of the federal and provincial governments to cooperate in establishing and administering traditional government assistance programs. The implementation, administration and funding of industry- and regional-specific programs occur exclusively through subsidiary agreements. Therefore, we have decided that in determining whether subsidiary agreement programs are limited to a specific enterprise or industry or group thereof, the proper level of analysis is the subsidiary agreement. (*See also* Groundfish and "Final Negative Countervailing Duty Determination: Certain Softwood Products from Canada," 48 FR 24,159, May 31, 1983.)

Comment 10: Petitioner states that the basic seven percent tax credit should be countervailed since it is provided only to epecific investments, *i.e.*, to "qualified property." Petitioner also states that the Department erred in relying on past Department cases on this issue and not verifying the program in this investigation. Petitioner states that an amendment to the Act made by the Omnibus Trade and Competitiveness Act of 1988 now requires the Department to investigate whether a program is in fact provided to specific industries or groups of industries.

DOC Position: The 1988 Act provision referred to clarified that in all cases the Department must examine the availability and use of alleged subsidy programs on a *de facto* as well as a *de jure* basis. Our prior investigations of the basic seven percent tax credit have satisfied us that this credit is not limited to a specific enterprise or industry or group thereof on either a *de facto* or *de jure* basis. Because the seven percent tax credit ws previously found not countervailable, and petitioner did not provide the Department with a sufficient basis to reexamine it, we did not include the program in this investigation. (*See* OCTG and Groundfish.)

Comment 11: Sysco states that the Department erroneously treated grants for repayment of principal on its debentures as equity infusions. Petitioner states that the Department should countervail the equity infusions made by GONS and use the grant methodology as it did in the preliminary determination.

DOC Position: As noted in the "Analysis of Programs" section and section I.C.4., the Department was not able to use its standard method of calculating the benefit from an equity infusion but had to treat all equity infusions as grants. As such, this issue is moot.

Comment 12: Petitioner states that in analyzing the freight rate issue the Department should not consider Algoma's ability to transport iron ore by truck or buy iron ore from other sources. Petitioner argues that the proper test is whether the freight service was provided at a preferential rate. In support of its position, petitioner cites the "Final Negative Countervailing Duty Determination: Granite from Italy" (Granite), 43 FR 27,197, July 19, 1988. Petitioner states that the reductions in freight rates was a direct result of government action so that it constituted the provision of a service on preferential terms, within the meaning of the statue.

Algoma argues that the grants to ACR did not benefit Algoma because (1) the ACR freight rates were the result of arm's length negotiations and were not

set by government intervention, (2) the ACR tour grants were tied to ACR's tour operations, and (3) even if the tour grants resulted in lower freight rate to Algoma, they have provided no commerical benefits to the company and have had an insignificant impact on its cost of production.

DOC Position: We verified that the lowering of Algoma's freight rates was part of a four party arrangement, which included the federal and provincial governments, ACR and Algoma, the result of which was the reduction in the freight rate paid by Algoma. Therefore, we have determined that the provision of grants to ACR provided an indirect subsidy to Algoma in the form of reduced freight rates.

We calculated the benefit by comparing the difference between the lowered freight rates and the available trucking rates. This case is distinguishable from Granite because unlike Granite it does not involve a government-owned railway. Therefore, the issue is not the preferential provision of a good or service by a government.

Comment 13: Petitioner states that the Department erred in not initiating an investigation on the alleged special tax subsidy to Algoma. Petitioner alleges that Algoma has accumulated ITCs which it was unable to use because it was in a loss position. In an attempt to utilize these credits and complete construction of a seamless tube mill, Algoma formed a partnership with its parent, the Canadian Pacific Railroad (CP). According to petitioner, CP was able to reduce its tax liability by using the accrued ITCs of Algoma, which had been transferred to the partnership. Later, Algoma purchased CP's partnership units, thereby dissolving the partnership.

Algoma argues that petitioner did not allege in a timely manner facts sufficient to establish a prima facie case that warranted an investigation and that, even if petitioner did make a timely allegation, the ITCs are tied to the production of seamless tube mill and, thus, do not provide any benefit to Algoma's steel rail production.

DOC Position: Our position concerning the alleged special tax subsidy has not changed since the beginning of this investigation. As we have stated previously in two memoranda to the file, we did not include this program in the investigation because the alleged benefit received by Algoma is tied to a product not under investigation. All the information submitted by petitioner clearly indicates that the specific purpose of the Algoma/CP partnership, and the attendant tax and financial transactions, was to complete the construction of a seamless tube mill. Thus, any benefit is tied to a product other than the merchandise under investigation. Nothing in the information submitted by petitioner indicates that any of the alleged benefits can be tied to the production of the subject merchandise. Therefore, we did not include the alleged special tax subsidy in the investigation.

Comment 14: Sysco maintains that the treatment of the wharf loan should be the same as at the preliminary determination. Sysco argues that only the principal amount of $7,734,483, uncollectible as of June 1978 and forgiven in 1981, should be considered a grant and allocated over 20 years.

DOC Position: The wharf was completed in June 1978, and Sysco was to make payments beginning in June 1979. Sysco made no payments on the principal and interest outstanding. The total outstanding was effectively an interest-free loan for the period 1979 through 1981. Therefore, we have added to the total original balance of $7,734,483, the interest that would have been paid on the principal outstanding at the benchmark rate and treated this total amount as a grant given in 1981.

Comment 15: The GOC raises the issue of whether HTS item number 8548.00.0000 is properly included within the scope of this investigation.

DOC Position: The HTS item number referred to by the GOC includes contact rail or "third rail" and, therefore, is properly included within the scope.

Verification

In accordance with section 776(b) of the Act, we verified the information used in making our final determination. As mentioned previously, when we could not verify the information, we used the best information available. During verification, we followed standard verification procedures, including meeting with government and company officials; inspecting internal documents and ledgers; tracing information in the responses to source documents, accounting ledgers and financial statements; and collecting additional information that we deemed necessary for making our final determination.

Suspension of Liquidation

In accordance with our preliminary affirmative countervailing duty determination published on March 2, 1989, we directed the U.S. Customs Service to suspend liquidation on the products under investigation and to require that a cash deposit or bond be posted equal to the estimated bonding rate. The instant final countervailing duty determination was extended to coincide with the final antidumping duty determination on the same product from Canada, pursuant to section 606 of the Trade and Tariff Act of 1984 (section 705(a)(1) of the Act).

Under Article 5, paragraph 3 of the Subsidies Code, provisional measures cannot be imposed for more than 120 days without final affirmative determinations of subsidization and injury. Therefore, we instructed the U.S. Customs Service to discontinue the suspension of liquidation on the subject merchandise entered on or after July 1, 1989, but to continue the suspension of liquidation of all entries, or withdrawals from warehouse, for consumption of the subject merchandise entered between March 2, 1989, and June 30, 1989. We will reinstate suspension of liquidation under section 703(d) of the Act, if the ITC issues a final affirmative injury determination, and will require a cash deposit on all entries of the subject merchandise from producer exporters, except entries by Algoma, in an amount equal to 113.56 percent *ad valorem*. Algoma is excluded from this final determination.

If we reinstate suspension of liquidation and require a cash deposit, entries of the subject merchandise by Grand Valley, Sessenwein, C.P. Rail and Nortrack (all of whom are non-producer exporters) will not be subject to suspension of liquidation and a cash deposit equal to the estimated net subsidy if it can be demonstrated to the U.S. Customs Service that the entries of the subject merchandise were produced by and purchased from Algoma.

Entries made by Bernard Railtrack Export Inc. and new non-producer exporters will be subject to suspension of liquidation and a cash deposit or bond equal to the estimated net subsidy shown of 113.56 percent *ad valorem*.

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files provided the ITC confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Assistant Secretary for Import Administration.

If the ITC determines that material injury, or the threat of material injury,

does not exist, this proceeding will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or cancelled. If, however, the ITC determines that such injury does exist, we will issue a countervailing duty order directing Customs officers to assess countervailing duties on all entries of steel rail from Canada entered, or withdrawn from warehouse, for consumption, as described in the "Suspension of Liquidation" section of this notice.

This determination is published pursuant to section 705(d) of the Act (19 U.S.C. 1671(d)).

Dated: July 26, 1989.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 89-18065 Filed 8-2-89; 8:45 am]

BILLING CODE 3510-DS-M

[A-122-804]

Final Determination of Sales at Less Than Fair Value: New Steel Rail, Except Light Rail, From Canada

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: We determine that new steel rail, except light rail, (hereinafter referred to as new steel rail) from Canada is being, or is likely to be, sold in the United States at less than fair value. We have notified the U.S. International Trade Commission (ITC) of our determination and have directed the U.S. Customs Service to continue to suspend liquidation of all entries of new steel rail from Canada as described in the "Suspension of Liquidation" section of this notice. The ITC will determine, within 45 days of the publication of this notice, whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

EFFECTIVE DATE: August 3, 1989.

FOR FURTHER INFORMATION CONTACT: Kate Johnson or Bradford Ward, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 377-5050 or (202) 377-5288, respectively.

SUPPLEMENTARY INFORMATION:

Final Determination

We determine that new steel rail from Candada is being, or is likely to be, sold in the United States at less than fair value, as provided for in section 735(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1673d(a)) (the Act). The estimated weighted-average dumping margins are shown in the "Suspension of Liquidation" section of this notice.

Case History

On March 6, 1989, we made an affirmative preliminary determination (54 FR 10393, March 13, 1989). The following events have occured since the publication of that notice.

On March 13, 1989, petitioner filed a request for alignment of the countervailing duty and antidumping duty final determinations. On March 16, 1989, respondent filed a request for postponement of the final determination for 60 days. Pursuant to section 705(a)(1) and section 735(a)(2)(A) of the Act, respectively, we aligned the countervailing duty and antidumping duty final determinations and postponed the final determinations to not later than July 26, 1989 (54 FR 14264, April 10, 1989).

The questionnaire responses from the Algoma Steel Corporation, Ltd. (Algoma) were verified in Canada between May 8 and May 17, 1989.

On June 28, 1989, the Department held a public hearing. Interested parties submitted comments for the record in their case briefs on June 19, 1989, and in their rebuttal briefs of June 26, 1989.

Scope of Investigation

The United States has developed a system of tariff classification based on the international harmonized system of Customs nomenclature. On January 1, 1989, the United States fully converted to the Harmonized Tariff Schedule (HTS), as provided for in section 1201 *et seq.* of the Omnibus Trade and competitiveness Act of 1988. All merchandise entered or withdrawn from warehouse for consumption on or after this date is now classified solely according to the appropriate HTS item numbers. The HTS item numbers are provided for convenience and U.S. Customs Service purposes. The written description remains dispositive.

The product covered by this investigation is new steel rail, whether of carbon, high carbon, alloy or other quality steel, and includes, but is not limited to, standard rails, all main line sections (at least 30 kg. per meter or 60 pounds per yard), heat-treated or head-hardened (premium) rails, transit rails, contact rail (or "third rail") and crane rails. Rails are used by the railroad industry, by rapid transit lines, by subways, in mines and in industrial applications.

Specifically excluded from this investigation are light rails (rails less than 30 kg. per meter or 60 pounds per yard). Also excluded are relay rails which are used rails taken up from a primary railroad track and relaid in a railroad yard or on a secondary track.

The product covered by this investigation is currently provided for under the following HTS subheadings: 7302.10.1020, 7302.10.1040, 7302.10.5000, 8548.00.0000. Prior to January 1, 1989, such merchandise was classifiable under items 610.2010, 610.2025, 610.2100 and 688.4280 of the *Tariff Schedules of the United States Annotated* (TSUSA).

Period of Investigation

The period of investigation is April 1, 1988, through September 30, 1988.

Fair Value Comparisons

To determine whether sales of new steel rail from Canada to the United States were made at less than fair value, we compared the United States price to the foreign market value, as specified below.

United States Price

As provided in section 772(b) of the Act, we used the purchase price to represent the United States price for sales of new steel rail where sales were made to unrelated purchasers prior to importation of the product into the United States. We also used the purchase price to represent the United States price for sales of the subject merchandise where sales were made to an indirectly related purchaser, who was the end-user of the product, prior to importation of the product into the United States.

We calculated purchase price based on packed, f.o.b. prices. We made deductions, where appropriate, for inland freight, duty, and brokerage and handling.

Foreign Market Value

For the reasons cited below and in accordance with section 776(b) of the Act, we have determined that the use of best information available is appropriate for foreign market value. As best information available, we used the constructed values for certain types of new steel rail. These constructed values were developed from costs presented in the petitioner's allegations of sales below the cost of production (COP). We were not able to use all U.S. sales in our analysis because we did not have costs for all products. Furthermore, because we used best information available for foreign market value, we did not use any of the claimed home market adjustments in our calculations.

On January 19, 1989, petitioner alleged that Algoma's home market sales of new steel rail were made at prices below the COP. On March 3, 1989, we initiated a COP investigation and requested cost information from the respondent.

At verification we determined that the cost information submitted by the respondent was materially deficient and could not be verified. For further discussion of this issue see our response to Comment 1 under the "Interested Party Comments" section of this notice.

As respondent's costs could not be verified, we were unable to compare home market prices to the respondent's COP. Accordingly, we have assumed that all home market prices are below the COP. Therefore, as previously noted, as best information available for foreing market value, we based our calculation of constructed values on the cost information contained in the petitioner's COP allegation.

Petitioner calculated a COP for each of the four rail sizes with a particular hardness range. Each COP was developed separately for both the second and third quarters of 1988. Petitioner's costs were based on standard costs adjusted for variances, fixed costs, depreciation and general, selling, and administrative expenses (GS&A). Adjustments were also made for differences between steel production costs using electric furnace versus basis oxygen furnace technology and for other differences between U.S. and Canadian production costs, including materials, fabrication, and factory overhead.

We substracted U.S. taxes from petitioner's COP because a home market constructed value is net of taxes. We also added U.S. credit expenses to petitioner's COP because the U.S. price includes credit and petitioner's COP was net of any sales-specific credit expenses. We added the statutory eight percent profit, in accordance with section 773(e)(1)(B)(ii) of the Act, to obtain a constructed value for each rail size. Petitioner's COP included GS&A which exceeded the statutory minimum of 10 percent. We further adjusted the constructed values by adding U.S. packing, in accordance with section 773(e)(10)(C) of the Act. We also made a circumstance of sale adjustment for U.S. credit, in accordance with section 773(A)(4) of the Act.

Currency Conversion

We used the official exchange rates in effect on the dates of sale, in accordance with section 773(a)(1) of the Act. All currency conversions were made at the rates certified by the Federal Reserve Bank of New Nork in accordance with § 353.60 of the Commerce Department's regulations published in the **Federal Register** on March 28, 1989 (54 FR 12742) (to be codified at 19 CFR 353.60).

Verification

Except where noted, used verified information in making our final determination in this investigation in accordance with section 776(b) of the Act. We used standard verification procedures, including examination of relevant accounting records and original source documents provided by the respondent.

Interested Party Comments

Comment 1: Petitioner maintains that Algoma's cost of production information should not be used because it could not be verified. Petitioner, theefore, claime that "best information available" should be used and that such information should be the higher of the petitioner's information or the "actual costs" obtained during verification.

Respondent claims that the Department should use the submitted cost response, which Algoma considers reasonable, because its costs are based on the cost of sales, with subsequent adjustments made for the purposes of the investigation. Respondent contends that it misinterpreted the Department's cost questionnaire, and instead of providing the actual cost of production which it records in its normal course of business, it chose to submit product costs based on standards developed subsequent to the period of investigation. Respondent also maintains that it would be unfair to reject the response at this late date.

DOC Position: Because Algoma's cost respones could not be verified, we have not compared Algoma's home market prices to its COP. Instead, we have used the cost information submitted in petitioner's allegations of sales below COP to calculate constructed values. These constructed values were compared top respondent's verified U.S. sales information to calculate the less than fair value margins.

The Department did not accept the cost of production information provided in the response for the following reasons. The Department requested actual costs in its questionnaire. However, respondent developed information for the investigation based on the standard product costs used by the company, which were not part of the normal financial accounting system and which were for a period subsequent to the period of investigation. Moreover, the company had a cost system which investigation. Moreover, the company had a cost system which reported actual costs for each product but chose not to use this information for its response. The company also did not provide documentation to support the reported standard costs or to tie them to the company's financial records. In addition, the standard costs, as adjusted, submitted by respondent did not reconcile to the company's actual inventory costs and were developed based on data outside the period of investigation. These and other deficiencies are outlined in detail in the public version of our cost verification

report, which is on file in Room B-099 of the Main Commerce building.

Based on the respondent's failure to report actual costs and its inability to provide supporting documentation for the standard costs at verification, the Department determined that Algoma's cost response could not be relied upon for this final determination. Because we did not use the cost response, other comments by the petitioner and the respondent relating to cost of production methodologies are moot.

Comment 2: Petitioner argues that the Department's determination of "such or similar" merchandise should be based upon objective physical characteristics used in the marketplace, *i.e.*, size, hardness and length, in accordance with American Rail Engineering Association (AREA) standards. Petitioner argues that the Department placed disproportionate importance on rail hardness in the preliminary determination, thereby skewing the fair value comparison.

Respondent claims that rail hardness, as opposed to rail size, is the most important physical and commercial characteristic of steel rails. Respondent contends that railway specifications distinguish between small differences in rail hardness. Furthermore, respondent states that rails with different hardnesses have different metallurgical properties, and that both petitioner and respondent sell rails of the same hardness, but different sizes, at about the same prices and charge a premium price for rails with a higher hardness.

Respondent further argues that AREA specifications alone should not dictate how the Department makes its product comparisons because many railways specifically order rail with a hardness that deviates from AREA standards. Respondent claims that petitioner's own testimony and pricing practices conflict with its contention that rail size is the most important distinguishing factor between different types of rails. Respondent argues that the Department should use its preliminary product comparisons in the final determination.

DOC Position: As best information available, we used the costs alleged by petitioner to calculate a constructed value as the basis for foreign market value. We matched constructed values to particular U.S. sales using two criteria: Size (pounds per yard of rail) and hardness (as measured by the Brinnell hardness scale). U.S. sales were compared to the adjusted constructed values when the sizes were exactly the same and when the hardness was within the narrow hardness range of the costs developed by petitioner.

Using these two criteria, we also determined that there were no corresponding costs in the petition which could reasonably be compared to certain sales in the United States. Accordingly, these sales, representing a small percentage by value of all U.S. sales during the period of investigation, were not included in our calculation of the margins in this final determination.

Comment 3: Petitioner claims that what respondent terms "downgraded" rail is in fact standard rail and should be compared to other sales of standard rail. Petitioner also argues that sales of industrial rail should be included in the Department's calculations for the final determination.

Respondent contends that there is no basis for petitioner's argument disputing the existence of downgraded rail. Respondent further argues that the Department should disregard sales of downgraded and industrial rail in its analysis because these sales were made of obsolete and clearance merchandise and were made outside the ordinary course of trade.

DOC Position: Sales of industrial rail, downgraded rail and rail with a hardness outside the range used by petitioner in its COP allegation were not used in our calculations for this final determination because we did not have constructed values for these types of rails.

Comment 4: Petitioner contends that the Department's treatment of Canadian federal and provincial sales taxes in the preliminary determination was incorrect. Petitioner claims that it is improper for the Department to deduct home market taxes from the reported home market price and add back the amount of taxes imputed to the U.S. sale. Petitioner argues that the statute does not require this methodology and that this approach results in an undercollection of duties. There is no indication in the statute that the foreign market value should be adjusted, nor does this tax qualify as a circumstance of sale adjustment. Petitioner contends that the Department should add the estimated taxes to the U.S. price and then include the tax actually paid in the foreign market value. On the other hand, petitioner argues that the Department could instruct Customs on entry to adjust the U.S. price used to calculate the estimated duty deposit.

Respondent states that the Department's methodology in the preliminary determination is consistent with the statute and past practice. Respondent argues that the Department should use the methodology applied in the preliminary determination in its final determination.

DOC Position: This issue is moot because home market prices were not used to calculate foreign market value. Accordingly, no adjustments were made to foreign market value or U.S. price for Canadian federal and provincial taxes.

Comment 5: Petitioner argues that respondent's claim for duty drawback should be either partially or entirely rejected because verification did not establish that the allocation was reasonable. Petitioner contends that, at the least, the Department should include the duty drawback on rails to the extent that the increased cost of blooms is allocated to rails as well as structural shapes. Petitioner also claims that the Department only verified that imported materials were used in the production of steel as opposed to steel rails, and that respondent did not provide documentation showing that the steel tonnage on which the duty drawback claim was made included steel rails.

Respondent claims that it is entitled to a full adjustment for duty drawback. Respondent contends that petitioner does not define its "reasonableness test" nor cite statutory authority for its claim that the Department should only include the duty drawback on rails to the extent that the increased cost of blooms is allocated to rails as well as structural shapes. Respondent further argues that the information which the Department verified is sufficient to satisfy the meaning of section 772 of the Act.

DOC Position: It is unclear whether any duties are reflected in the costs submitted by petitioner which we used as the basis for foreign market value. As best information available, we have assumed that duties are not included and accordingly have not made an adjustment to U.S. price for duty drawback.

Comment 6: Petitioner claims that the Department should not assume that the U.S. credit period was equal to the average number of days on shipments for which no payments were received by April 30, 1989. This average is applied as the number of payment days in the very first transaction in the listing. Petitioner argues that if the shipment for a particular transaction took place during the second quarter of 1988, the payment period is much greater than the average payment days reported. Petitioner also argues that the supporting documentation submitted in respondent's rebuttal brief has not been verified and, therefore at the least, the Department should assume that all sales where no payment has been made prior to April 30, 1989, have a credit cost

equal to the number of days between the date of shipment and May 1, 1989.

Respondent states that payment has now been made for U.S. observation 1 and the average days payment figure should be corrected.

DOC Position: This sale was not used in our analysis because we did not have a constructed value to compare to this U.S. sale.

Comment 7: Petitioner claims that duty charges on U.S. observations 5 and 6 are apparently incorrect.

Respondent states that the duty amount on U.S. observation 5 is incorrect due to a clerical error. Respondent argues that the duty charge on U.S. observation 6 was verified and is correct.

DOC Position: U.S. observation 5 was not used in our analysis because we did not have a constructed value to compare to this U.S. product. Although the rail in observation 6 is an alloy rail, the actual duty charged by respondent to its customer was based on the sale of a carbon rail (U.S. observation 2). We verified that the duty actually charged on the invoice for U.S. observation 6 was based on this carbon rate. We have therefore accepted respondent's figure for duty for U.S. observation 6.

Suspension of Liquidation

We are directing the U.S. Customs Service to continue to suspend liquidation, under section 733(d) of the Act, of all entries of new steel rail from Canada, as defined in the "Scope of Investigation" section of this notice, that are entered or withdrawn from warehouse for consumption on or after the date of publication of this notice in the **Federal Register**. The U.S. Customs Service shall continue to require a cash deposit or posting of a bond equal to the estimated amounts by which the foreign market value of the subject merchandise exceeds the United States price, as shown below. This suspension of liquidation will remain in effect until further notice.

The weighted-average margins are as follows:

Manufacturer/Producer/Exporter	Weighted-average margin percentage
Algoma Steel Corporation, Ltd.	38.79
All Others	38.79

ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our determination. In addition, pursuant to section 735(c)(1) of the Act, we are making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Assistant Secretary for Import Administration.

If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all securities posted as a result of the suspension of liquidation will be refunded or cancelled. However, if the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing Customs officials to assess antidumping duties on new steel rail from Canada entered or withdrawn from warehouse for consumption on or after the effective date of the suspension of liquidation, equal to the amount by which the foreign market value exceeds the United States price.

This determination is published pursuant to section 735(d) of the Act, 19 U.S.C. 1673(d).

Eric I. Garfinkel,

Assistant Secretary for Import Administration

July 26, 1989.

[FR Doc. 89-18064 Filed 8-2-89; 8:45 am]

BILLING CODE 3510-DS-M

Appendix C

American Railway Engineering Association Specifications for steel rails, 1988

[1]Part 2

Specifications

[1]SPECIFICATIONS FOR STEEL RAILS

(Reapproved with revisions 1988)

1. Scope

1.1 These specifications cover steel tee rails for use in railway track.

1.2 Supplementary requirements S1 and S2 shall apply only when specified by the purchaser.

2. Manufacture

2.1 The steel shall be made by any of the following processes: open hearth, basic oxygen, or electric furnace.

2.2 The steel shall be cast by a continuous process, in hot topped ingots, or by other methods agreed by purchaser and manufacturer.

2.3 Sufficient discard shall be taken from ingots and blooms rolled from ingots to insure freedom from injurious segregation and pipe.

3. Chemical Composition

3.1 The chemical composition of the standard rail steel determined as prescribed in 3.3 shall be within the following limits:

	Chemical Analysis Weight Percent Nominal Weight lb/yd		Product Analysis Weight Percent Allowance Beyond Limits of Specified Chemical Analysis	
Element	90 to 114	115 & Over	Under Min	Over Max
Carbon	0.67-0.80	0.72-0.82	0.04	0.04
Manganese	0.70-1.00	0.80-1.10*	0.06	0.06
Phosphorus, Max	0.035	0.035	—	0.008
Sulfur, Max	0.037	0.037	—	0.008
Silicon	0.10-0.50	0.10-0.50	0.02	0.02**

*The upper manganese limit may be extended to 1.25% by the manufacturers to meet the hardness specifications. When the manganese exceeds 1.10% the residual alloy contents will be held to 0.25% max. Ni, 0.25% max. Cr, 0.10% max. Mo., and 0.03% max V.

**Product analysis for continuously cast steel shall be 0.05% over maximum limit for Silicon.

3.1.1 Finished material representing the heat may be product tested. The product analysis shall be within the limits for product analyses specified in the Table of 3.1.

[1]Proceedings, Vol. 3, 1902, pp. 204, 208; Vol. 5, 1904, pp. 465, 469; Vol. 6, 1905, pp. 183; Vol. 7, 1906, pp. 549, 573; Vol. 10, 1909, part 1, pp. 374, 383; Vol. 11, 1910, part 1, pp. 237, 255; Vol. 12, 1911, part 1, p. 467; Vol. 12, 1911, part 2, p. 12; Vol. 13, 1912, pp. 853, 1017; Vol. 14, 1913, pp. 181, 1103; Vol. 15, 1914, pp. 158, 375; Vol. 16, 1915, pp. 1117; Vol. 21, 1920, pp. 1070, 1447; Vol. 26, 1925, pp. 619, 1413; Vol. 31, 1930, pp. 1455, 1770; Vol. 32, 1931, pp. 347, 816; Vol. 34, 1933, pp. 606, 821; Vol. 37, 1936, pp. 426, 991; Vol. 38, 1937, pp. 216, 635; Vol. 40, 1939, pp. 596, 738; Vol. 43, 1942, pp. 575, 704; Vol. 47, 1946, pp. 373, 625; Vol. 52, 1951, pp. 596, 824; Vol. 54, 1953, pp. 1177, 1413; Vol. 55, 1954, pp. 775, 1098; Vol. 57, 1956, pp. 786, 1088; Vol. 58, 1957, pp. 962, 1248; Vol. 63, 1962, pp. 301, 768; Vol. 64, 1963, pp. 498, 680; Vol. 65, 1964, pp. 521, 851; Vol. 68, 1967, p. 408; Vol. 69, 1968, p. 356; Vol. 71, 1970, p. 223; Vol. 75, 1974, p. 479; Vol. 80, 1979, p. 82; Vol. 85, 1984, p. 13; Vol. 87, 1986, p. 69; Vol. 89, 1988, p. 71.

[1]*Latest page contains: 1 to 6 incl. (1988).*

5.2 Verification of tolerances shall be made using appropriate gages, as agreed upon by purchaser and manufacturer.

6. Branding and Stamping

6.1 Branding shall be rolled in raised characters on the side of the web of each rail at a minimum of every 16 ft. in accordance with the following requirements:

6.1.1 The data and order of arrangement of the branding shall be as shown in the following typical brand, the design of letters and numerals to be optional with the manufacturer.

132 (Weight)	RE (Section)	CC (Method of Hydrogen Elimination if indicated in Brand)	Manufacturer (Mill Brand)	1982 (Year Rolled)	III (Month Rolled)

6.2 The web of each rail shall be hot stamped at a minimum of every 16 ft. on the side opposite the brand, and shall not occur within two feet of either end of rails of standard lengths, and in accordance with the following requirements:

6.2.1 The data shall be shown in the following typical stamping. The height of the letters and numerals shall be 5/8".

297165 (Heat Number)	ABCDEFGH (Rail Letter)	12 (Ingot Number) or (Strand & Bloom Number)	BC (Method of Hydrogen Elimination, if indicated in stamping)

6.2.2 The top rail from each ingot shall normally be hot stamped "A" and succeeding ones "B", "C", "D", "E", etc., consecutively.

6.2.2.1 The top rail from each hot topped ingot may be hot stamped "B" and succeeding ones "C", "D", "E", etc. consecutively, when agreed between purchaser and manufacturer.

6.2.3 Ingots shall be numbered in the order cast.

6.2.4 Rails from continuous cast blooms shall be identified by a designation for heat number, strand number, and bloom number.

(Note strand and bloom numbers may be joined or may be coded at the manufacturer's option)

The rail shall be identified by an alphabetical designation beginning with "P", and succeeding "R", "S", "T", etc., consecutively, or any other identification of the position of the rail within the cast, as agreed between the purchaser and manufacturer.

6.2.5 Stamping shall be legible and not injurious to the rail. The characters shall be of a uniform depth not exceeding 1/16 inch and approximately centered on the web.

6.2.6 High strength rail shall be identified in accordance with Section 15.1.

7. Hydrogen Elimination

7.1 The rail shall be free from shatter cracks

7.2 The above shall be accomplished by at least one of the following processes:

Control Cooling of Rails (CC) (See Appendix 1)

9. Interior Condition/Macroetch Standards

9.1 Sample Location and Frequency

9.1.1 Ingot Steel - A test piece representing the top end of the top rail from one of the first three, middle three, and last three ingots of each heat shall be macroetched.

9.1.2 Continuous Cast Steel - A test piece shall be macroetched representing a rail from each strand from the beginning of each sequence and whenever a new ladle is begun, which is the point representative of the lowest level in the tundish (i.e. the point of lowest ferrostatic pressure.) One additional sample from the end of each strand of the last heat in the sequence shall also be tested. A new tundish is considered to be the beginning of a new sequence.

9.1.3 Upon receipt the purchaser has the right to examine any rail from any part of a heat at his option, and if the purchaser determines that the rail sample selected is rejectionable, the entire heat shall be re-evaluated according to Section 9.4.

9.2 Sample Preparation

9.2.1 A full transverse section of the rail can be cut by abrasive or mechanical means as long as care is maintained in preventing metallurgical damage.

9.2.2 The face to be etched shall have at least a 125 microinch finish.

9.2.3 The sample shall be degreased and totally immersed in a hot (160° to 180°F) one to one mixture, by volume, of concentrated hydrochloric acid (38 volume percent) and water to sufficiently etch the specimen. Etching time shall be between ten and twenty minutes. The solution surface shall be at least one inch above the etched surface.

9.2.4 Upon removal from the bath, the sample shall be rinsed and brushed under hot water and dried. The sample shall not be blotted dry. A rust inhibitor shall be applied to the etched face.

9.3 Macroetch Evaluation

9.3.1 According to Figure 9.1, the areas of cross section shall be defined as head, web, and base.

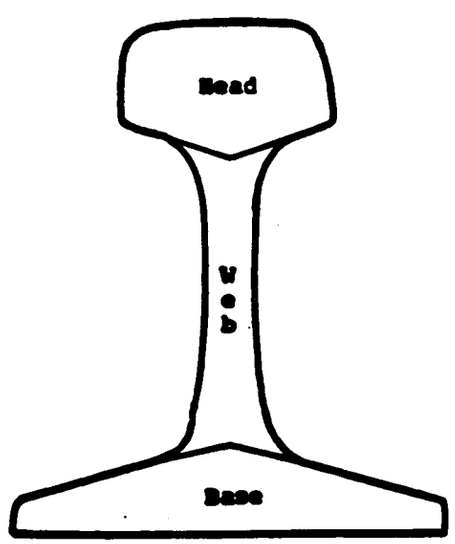


Figure 9.1 Definition of Rail Cross Sectional Areas for Macroetch Evaluation

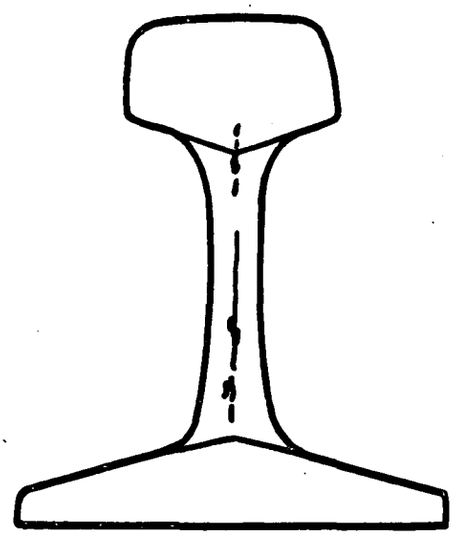


Figure 9.6 Central Web Streaking Extending into Head

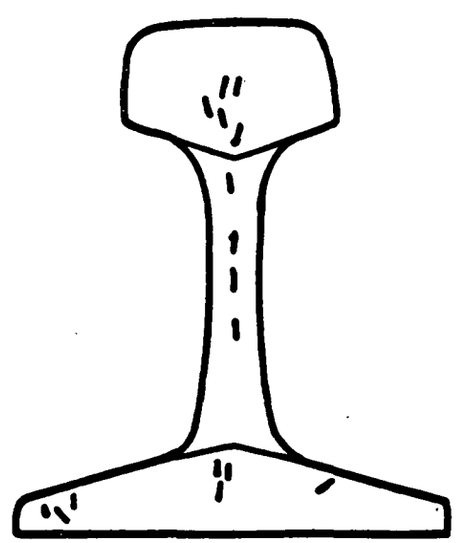


Figure 9.7 Scattered Central Web Streaking Extending into Head and Base

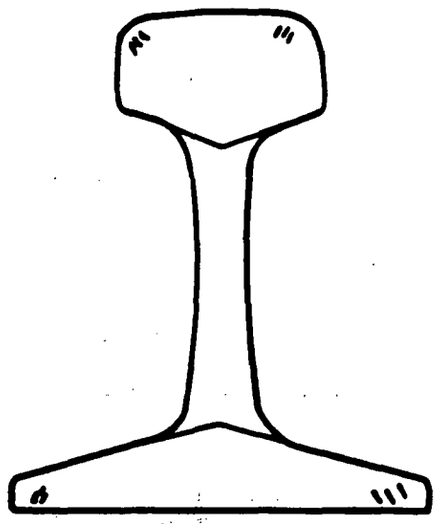


Figure 9.10 Radial Streaking

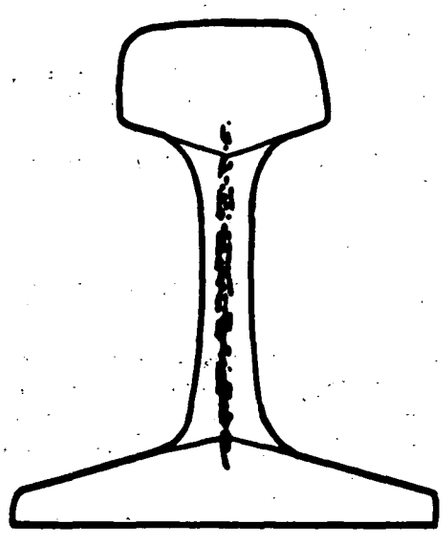


Figure 9.11 Scattered Central Web Segregation

10. Surface Classification.

Rails which do not contain surface imperfections in such number or of such character as will, in the judgement of the purchaser, render them unfit for recognized uses, shall be accepted

10.1 Hot Marks

10.1.1 Rails with hot marks such as from shearing, scabs, pits, or hot scratches greater than 0.020 in. in depth shall be rejected

10.1.2 Rails with guide marks in the head greater than 0.020 in. deep or greater than 0.062 in. wide shall be rejected.

10.2 Cold Scratches

10.2.1 Rails with longitudinal cold scratches, formed below 700°F, exceeding 36 in. in length and 0.010 in. in depth shall be rejected

10.2.2 Rails with transverse cold scratches, formed below 700°F, which exceed 0.010 in. in depth shall be rejected.

10.3 Protrusions

10.3.1 Rails with any protrusion of excess metal extending from the surface of the rail, such as could be caused by a hole in the roll or a roll parting in the web shall be rejected if the protrusion affects the fit of the joint bar or causes the fishing template to stand out more than 1/16 in laterally.

10.3.2 Rails with any protrusion in the web greater than 1/16 in. high and greater than 1/2 square inch in area shall be rejected.

10.3.3 No protrusion of excess metal shall be allowed on the head or the base of the rail.

11. Length

11.1 The standard length of rails shall be 39 ft. and/or 80 ft., when corrected to a temperature of 60°F. Other standard lengths may be specified by the purchaser.

11.2 Up to 15 percent of 80 ft. or 9 percent of 39 ft. rail of the total tonnage accepted from each individual rolling will be accepted in shorter lengths as follows: 79'-78'-77'-75'-70'-65'-60'-39'-38'-37'-36'-33'-30'-27'-25'

11.3 A variation of plus or minus 7/16 in. on 39 ft. rails or plus or minus 7/8 in. on 80 ft. rails from the specified length will be permitted.

11.4 Standard short length variations other than those set forth in 11.2 and 11.3 may be established by agreement between the purchaser and manufacturer.

11.5 Lengths of rails shall be designated with proper color paint as set forth in Section 15.

12. Drilling

12.1 The purchaser's order shall specify the amount of right-hand drilled and left-hand drilled rails, drilled-both-end rails and undrilled (blank) rails desired. The right-hand or left-hand end of the rail is determined by facing the side of the rail on which the brand (raised characters) appears.

12.1.1 When right-hand and left-hand drilling is specified, at least the minimum quantity of each indicated by the purchaser will be supplied

12.1.2 Disposition of short rails which accrue from left-hand drilled, right-hand drilled, and undrilled (blank) rail production, and which are acceptable in accordance with 12.2 shall be established by agreement between the purchaser and the manufacturer.

12.2 Circular holes for joint bolts shall be drilled to conform to the drawings and dimensions furnished by the purchaser.

13.6 Uniform lateral sidesweep in any 39 feet shall not exceed 3/4 inch as illustrated in Figure 13.4

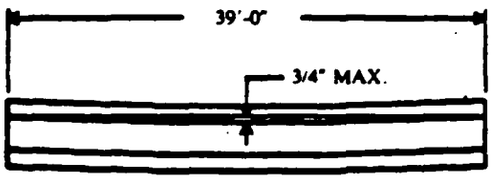


FIG. 13.4. Top View of Uniform Lateral Sidesweep Tolerance per Section 13.6.

13.7 When required, proof of compliance with Section 13.2 shall be determined by string (wire) lining, and a straightedge and taper gauge shall be used to determine rail end surface and line characteristics specified in Sections 13.3, 13.4, and 13.5.

13.8 Rails shall be hot sawed, cold sawed, milled, abrasive wheel cut, or ground to length, as specified by purchaser on purchase order, with a variation in end squareness of not more than 1/32 in. allowed. The method of end finishing rails shall be such that the rail end shall not be metallurgically or mechanically damaged.

13.9 If the rail shows evidence of twist while being laid head up on the final inspection bed, it will be checked by inserting a taper or feeler gage between the base and the rail skid nearest the end. If the gap exceeds 0.090 in. the rail will be rejected. Alternatively, a twist gage may be used and if the rail exceeds 1.5° in 39 feet the rail will be rejected. Rejected rails may be subject to straightening.

14. Acceptance

14.1 To be accepted, the rails offered must fulfill all the requirements of these specifications.

14.2 Only A-rails produced on the purchaser's order will be accepted.

14.3 Rails accepted shall be shipped and invoiced based on the calculated weight per yard for the rail section.

15. Markings

15.1 High-strength rails shall be marked by either a metal plate permanently attached to the neutral axis, hot stamped, or in the brand which gives the manufacturer, type and/or method of treatment. Heat treated rail shall be paint-marked orange and alloy rail shall be paint-marked aluminum.

15.2 "A" rails shall be paint-marked yellow.

15.3 Rails except for those 80 ft. or 39 ft. shall be paint-marked green.

15.4 Individual rails shall be paint-marked only one color, according to the order listed above, or as agreed upon by purchaser and manufacturer.

15.5 Paint markings will appear on the top of the head at one end only, at least 3 ft. from the end.

15.6 All short length rails produced shall have the length identified in a manner acceptable to the purchaser and manufacturer on the top of the head approximately one foot from each end.

16. Loading

16.1 All rails shall be handled carefully to avoid damage and shall be loaded with the branding on all rails facing the same direction. Rails of different markings shall not be intermixed in loading, but shall be segregated and loaded head up. If there are not enough rails of one marking for a full car, smaller groups consisting of tiers of different markings as approved by the purchaser, may be loaded onto one car.

SUPPLEMENTARY REQUIREMENTS

The following supplementary requirements shall apply only when specified by the purchaser in the inquiry, order, and contract.

S1. End Hardening

S1.1 The drilled ends may be specified to be end hardened. When so specified, end hardening and chamfering shall be in accordance with S1.1.1 through S1.1.7.

S1.1.1 End-hardened rails may be hot stamped with letters "CH" in the web of the rail ahead of the heat number.

S1.1.2 Water shall not be used as a quenching medium except in oil-water or polymer-water emulsion process approved by the purchaser.

S1.1.3 Longitudinal and transverse sections showing the typical distribution of the hardness pattern produced by any proposed process shall, upon request of purchaser, be submitted for approval before production on the contract is started.

S1.1.4 The heat-affected zone defined as the region in which the hardness is above that of the parent metal shall cover the full width of the rail head and extend longitudinally a minimum of 1-1/2 in. from the end of the rail. The effective hardness zone 1/2 in. from the end of the rail shall be at least 1/4 in. deep.

S1.1.5 The hardness measured at a spot on the center line of the head 1/4 in. to 1/2 in. from the end of the rail shall show a Brinell hardness number range of 341 to 401 when decarburized surface has been removed. A report of hardness determination representing the product shall be given to the purchaser or his representative.

S1.1.6 The manufacturer reserves the right to retreat any rails which fail to meet the required Brinell hardness number range.

S1.1.7 Chamfering rail ends shall be done in such a manner as will avoid formation of grinding cracks.

S2. Manual Ultrasonic Testing

S2.1 The rail may be specified by the purchaser to be ultrasonically tested for internal imperfections subject to the provisions of S2.2.

S2.2 Manual Ultrasonic Test of Web at the Rail Ends for Weld Plant Application

S2.2.1 Manual End testing shall be performed using standard ultrasonic testing equipment acceptable to the purchaser and manufacturer.

S2.2.2 The search unit shall be a standard dual element crystal or similar transducer acceptable to the purchaser and manufacturer.

S2.2.3 The calibration test block shall be of the following characteristics: Material 4340 AISI Steel/Nickel plated, manufactured in accordance with ASTM E428. As an alternate, reference standards may be fabricated from a section of rail as agreed upon between the purchaser and manufacturer.

S2.2.4 Dimensions of the calibration test block and calibration references shall be agreed upon by the purchaser and manufacturer. (For calibration reference the recommended thickness of the block should approximate the thickness of the rail web and contain a 1/16 flat bottom hole drilled to one-half the thickness.)

S2.2.5 Calibration of the instrument shall be performed before the commencement of testing, every 100 rail ends thereafter, and after any test delay exceeding 30 minutes.

Appendix D

Excerpt from the Harmonized Tariff Schedule of the United States

USITC Publication 2030

HARMONIZED TARIFF SCHEDULE
Of the United States

Annotated for Statistical Reporting Purposes

First Edition
Supplement 2

United States International Trade Commission
Washington, D.C. 20436

SECTION XV

BASE METALS AND ARTICLES OF BASE METAL

Section Notes

Chapter 72 Iron and steel

73 Articles of iron or steel

74 Copper and articles thereof

75 Nickel and articles thereof

76 Aluminum and articles thereof

77 Reserved for possible future use

78 Lead and articles thereof

79 Zinc and articles thereof

80 Tin and articles thereof

81 Other base metals; cermets; articles thereof

82 Tools, implements, cutlery, spoons and forks, of base metal; parts thereof of base metal

83 Miscellaneous articles of base metal

SECTION XVI

MACHINERY AND MECHANICAL APPLIANCES: ELECTRICAL EQUIPMENT; PARTS THEREOF; SOUND RECORDERS AND REPRODUCERS, TELEVISION IMAGE AND SOUND RECORDERS AND REPRODUCERS, AND PARTS AND ACCESSORIES OF SUCH ARTICLES

Section Notes

Chapter 84 Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof

85 Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound records and reproducers, and parts and accessories of such articles

SECTION XVII

VEHICLES, AIRCRAFT, VESSELS AND ASSOCIATED TRANSPORT EQUIPMENT

Section Notes

Chapter 86 Railway or tramway locomotives, rolling stock and parts thereof; railway or tramway track fixtures and fittings and parts thereof; mechancial (including electromechanical) traffic signalling equipment of all kinds

87 Vehicles, other than railway or tramway rolling stock, and parts and accessories thereof

88 Aircraft, spacecraft, and parts thereof

89 Ships, boats and floating stuctures

SECTION XVIII

OPTICAL, PHOTOGRAPHIC, CINEMATOGRAPHIC, MEASURING, CHECKING, PRECISION, MEDICAL OR SURGICAL INSTRUMENTS AND APPARATUS; CLOCKS AND WATCHES; MUSICAL INSTRUMENTS; PARTS AND ACCESSORIES THEREOF

Chapter 90 Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof

91 Clocks and watches and parts thereof

92 Musical instruments; parts and accessories of such articles

SECTION XIX

ARMS AND AMMUNITION; PARTS AND ACCFESSORIES THEREOF

Chapter 93 Arms and ammunition; parts and accessories thereof

CHAPTER 73

ARTICLES OF IRON OR STEEL

Notes

1. In this chapter the expression "cast iron" applies to products obtained by casting in which iron predominates by weight over each of the other elements and which do not comply with the chemical composition of steel as defined in Note 1(d) to chapter 72.

2. In this chapter the word "wire" means hot- or cold-formed products of any cross-sectional shape, of which no cross-sectional dimension exceeds 16 mm.

Additional U.S. Notes

1. For the purposes of heading 7304 or 7306, the rate of duty "Free (C)" appearing in the "Special" subcolumn applies only to tubes and pipes with attached fittings, suitable for conducting gases or liquids.

2. For the purposes of subheading 7303.19.30, the expression "ductile fittings" refers to fittings which contain over 2.5 percent carbon and over 0.02 percent of magnesium or of magnesium and cerium, by weight.

Heading/ Subheading	Stat. Suf. & cd	Article Description	Units of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
7301		Sheet piling of iron or steel, whether or not drilled, punched or made from assembled elements; welded angles, shapes and sections, of iron or steel:				
7301.10.00	00 9	Sheet piling	kg	0.8%	Free (E,IL) 0.7% (CA)	2%
7301.20		Angles, shapes and sections:				
7301.20.10	00 5	Of iron or nonalloy steel	kg	2.8%	Free (E,IL) 2.5% (CA)	20%
7301.20.50	00 6	Of alloy steel	kg	3.9%	Free (E,IL) 3.5% (CA)	28%
7302		Railway or tramway track construction material of iron or steel, the following: rails, check-rails and rack rails, switch blades, crossing frogs, point rods and other crossing pieces, sleepers (cross-ties), fish-plates, chairs, chair wedges, sole plates (base plates), rail clips, bedplates, ties and other material specialized for jointing or fixing rails:				
7302.10		Rails:				
7302.10.10		Of iron or nonalloy steel		0.3%	Free (E,IL) 0.2% (CA)	1%
		New:				
	20 2	Standard tee rails over 30 kg per meter	kg			
		Other:				
	40 8	Over 30 kg per meter	kg			
	60 3	Other	kg			
	80 9	Used	kg			
7302.10.50	00 7	Of alloy steel	kg	3.5%	Free (E,IL) 3.1% (CA)	9%
7302.20.00	00 6	Sleepers (cross-ties)	kg	0.9%	Free (E,IL) 0.8% (CA)	2%
7302.30.00	00 4	Switch blades, crossing frogs, point rods and other crossing pieces	kg	5.7%	Free (A,E,IL) 5.1% (CA)	45%
7302.40.00	00 2	Fish-plates and sole plates	kg	0.9%	Free (E,IL) 0.8% (CA)	2%
7302.90.00	00 1	Other	kg	5.7%	Free (A,E,IL) 5.1% (CA)	45%
7303.00.00		Tubes, pipes and hollow profiles, of cast iron		6.5%	Free (A,E,IL) 5.8% (CA)	33%
	30 3	Soil pipe	kg			
	60 6	Pressure pipe with an inside diameter of less than 356 mm	kg			
	90 0	Other	kg			

CHAPTER 85

ELECTRICAL MACHINERY AND EQUIPMENT AND PARTS THEREOF; SOUND RECORDERS AND REPRODUCERS, TELEVISION IMAGE AND SOUND RECORDERS AND REPRODUCERS, AND PARTS AND ACCESSORIES OF SUCH ARTICLES

Notes

1. This chapter does not cover:

   (a) Electrically warmed blankets, bed pads, foot-muffs or the like; electrically warmed clothing, footwear or ear pads or other electrically warmed articles worn on or about the person;

   (b) Articles of glass of heading 7011; or

   (c) Electrically heated furniture of chapter 94.

2. Headings 8501 to 8504 do not apply to goods described in heading 8511, 8512, 8540, 8541 or 8542.

   However, metal tank mercury arc rectifiers remain classified in heading 8504.

3. Heading 8509 covers only the following electromechanical machines of the kind commonly used for domestic purposes:

   (a) Vacuum cleaners, floor polishers, food grinders, processors or mixers, and fruit or vegetable juice extractors, of any weight;

   (b) Other machines provided the weight of such machines does not exceed 20 kg, exclusive of extra interchangeable parts or detachable auxiliary devices.

   The heading does not, however, apply to fans or ventilating or recycling hoods incorporating a fan, whether or not fitted with filters (heading 8414), centrifugal clothes dryers (heading 8421), dishwashing machines (heading 8422), household washing machines (heading 8450), roller or other ironing machines (heading 8420 or 8451), sewing machines (heading 8452), electric scissors (heading 8508) or to electrothermic appliances (heading 8516).

4. For the purposes of heading 8534 "printed circuits" are circuits obtained by forming on an insulating base, by any printing process (for example, embossing, plating-up, etching) or by the "film circuit" technique, conductor elements, contacts or other printed components (for example, inductances, resistors, capacitors) alone or interconnected according to a pre-established pattern, other than elements which can produce, rectify, modulate or amplify an electrical signal (for example, semiconductor elements).

   The term "printed circuits" does not cover circuits combined with elements other than those obtained during the printing process. Printed circuits may, however, be fitted with non-printed connecting elements.

   Thin- or thick-film circuits comprising passive and active elements obtained during the same technological process are to be classified in heading 8542.

5. For the purposes of headings 8541 and 8542:

   (a) "Diodes, transistors and similar semiconductor devices" are semiconductor devices the operation of which depends on variations in resistivity on the application of an electric field;

   (b) "Electronic integrated circuits and microassemblies" are:

      (i) Monolithic integrated circuits in which the circuit elements (diodes, transistors, resistors, capacitors, interconnections, etc.) are created in the mass (essentially) and on the surface of a semiconductor material (doped silicon, for example) and are inseparably associated;

      (ii) Hybrid integrated circuits in which passive elements (resistors, capacitors, interconnections, etc.) obtained by thin- or thick-film technology and active elements (diodes, transistors, monolithic integrated circuits, etc.) obtained by semiconductor technology, are combined to all intents and purposes indivisibly, on a single insulating substrate (glass, ceramic, etc.). These circuits may also include discrete components;

      (iii) Microassemblies of the molded module, micromodule or similar types, consisting of discrete, active or both active and passive, components which are combined and interconnected.

   For the classification of the articles defined in this note, headings 8541 and 8542 shall take precedence over any other heading in the tariff schedule which might cover them by reference to, in particular, their function.

6. Records, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are entered with the apparatus for which they are intended.

Additional U.S. Notes

1. For the purposes of headings 8501 and 8503, 746 watts (W) is taken to be equivalent to 1 horsepower (hp).

2. For the purposes of subheading 8516.72, the term "toasters" includes toaster-ovens which are designed essentially for toasting bread but can also bake small items, such as potatoes.

3. For the purposes of heading 8525 the term "transceivers" refers to combinations of radio transmitting and receiving equipment in a common housing, employing common circuit components for both transmitting and receiving, and which are not capable of simultaneously receiving and transmitting.

4. For the purposes of subheading 8529.90.15 and 8529.90.20:

   (a) Each subassembly that contains as a component, or is covered in the same entry with, one or more of the following television components, viz.,

      tuner, channel selector assembly, antenna, deflection yoke, degaussing coil, picture tube mounting bracket, grounding assembly, parts necessary for fixing the picture tube or tuner in place, consumer-operated controls or speaker,

   shall be classified in subheading 8529.90.15; and

   (b) Each subassembly shall be counted as a single unit, except that two or more different printed circuit boards or ceramic substrates covered by the same entry and designed for assembly into the same television models shall be counted as one unit.

5. Picture tubes imported in combination with, or incorporated into, other articles are to be classified in subheadings 8540.11 through 8540.12, inclusive, unless they are--

   (a) incorporated into complete television receivers, as defined in additional U.S. note 6 below;

   (b) incorporated into fully assembled units such as word processors, ADP terminals, or similar articles;

   (c) put up in kits containing all the parts necessary for assembly into complete television receivers, as defined in additional U.S. note 6 below; or

   (d) put up in kits containing all the parts necessary for assembly into fully assembled units such as word processors, ADP terminals, or similar articles.

6. For the purposes of additional U.S. note 5 above the term "complete television receivers" means television receivers, fully assembled in their cabinets, whether or not packaged or tested for distribution to the ultimate purchaser(s).

Statistical Notes

1. For the purposes of heading 8528 the video display diagonal is determined by measuring the maximum straight line dimension across that part of the faceplate used for displaying video.

2. For the purposes of this chapter the terms "AM" and "FM" refer to the entertainment broadcast bands of 550-1650 kHz and 88-108 MHz, respectively.

3. For statistical reporting purposes under subheading 8539.10, the size of a sealed beam lamp unit is determined by measuring the largest diagonal dimension across the faceplate.

4. For statistical reporting purposes under subheading 8544.70, the unit of quantity "fiber m", as it pertains to optical fiber cables, is determined by multiplying the number of individual fibers contained therein by the length in meters.

5. For statistical reporting purposes under subheadings 8525.10.60, 8525.20.30 and 8527.90.60, the lowest operating frequency will determine the classification.

Heading/ Subheading	Stat. Suf. & cd	Article Description	Units of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
8544		Insulated (including enameled or anodized) wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors; optical fiber cables, made up of individually sheathed fibers, whether or not assembled with electric conductors or fitted with connectors:				
		Winding wire:				
8544.11.00		Of copper	.....	5.3%	Free (A,B,E,IL) 4.7% (CA)	40%
	20 9	33 AWG (0.18 mm in diameter) and finer	kg			
	30 7	22 AWG (0.643 mm in diameter) and finer but larger than 33 AWG (0.18 mm in diameter)	kg			
	50 2	Other	kg			
8544.19.00	00 5	Other	kg	4.9%	Free (A,B,E,IL) 4.4% (CA)	35%
8544.20.00	00 2	Coaxial cable and other coaxial electric conductors	kg	5.3%	Free (A*,B,E,IL) 4.7% (CA) 1/	35%
8544.30.00	00 0	Ignition wiring sets and other wiring sets of a kind used in vehicles, aircraft or ships	X	5%	Free (A*,B,C,E,IL) 4.5% (CA) 1/	30%
		Other electric conductors, for a voltage not exceeding 80 V:				
8544.41.00	00 7	Fitted with connectors	X	5.3%	Free (A*,B,E,IL) 4.7% (CA) 1/	35%
8544.49.00	00 9	Other	kg	5.3%	Free (A,B,E,IL) 4.7% (CA)	40%
		Other electric conductors, for a voltage exceeding 80 V but not exceeding 1,000 V:				
8544.51		Fitted with connectors:				
8544.51.40	00 6	Fitted with modular telephone connectors	X	5.3%	Free (A*,E,IL) 4.7% (CA)	35%
8544.51.80	00 7	Other	X	5.3%	Free (A*,B,E,IL) 4.7% (CA)	35%
8544.59		Other:				
8544.59.20		Of copper	.....	5.3%	Free (A,B,E,IL) 4.7% (CA)	40%
	40 4	For a voltage exceeding 600 V	kg			
	80 5	Other	kg			
8544.59.40	00 8	Other	kg	4.9%	Free (A,B,E,IL) 4.4% (CA)	35%
8544.60		Other electric conductors, for a voltage exceeding 1,000 V:				
8544.60.20	00 9	Fitted with connectors	X	5.3%	Free (A*,B,E,IL) 4.7% (CA)	35%
		Other:				
8544.60.40	00 5	Of copper	kg	5.3%	Free (A,B,E,IL) 4.7% (CA)	40%
8544.60.60	00 0	Other	kg	4.9%	Free (A,B,E,IL) 4.4% (CA)	35%
8544.70.00	00 1	Optical fiber cables	Fiber m.	8.4%	Free (A,E,IL) 7.5% (CA)	65%

1/ Equipment, originating in the territory of Canada, intended for use in the repair or maintenance of certain motor vehicles subject to accelerated staged rate reductions. See heading 9905.

Heading/ Subheading	Stat. Suf. & cd		Article Description	Units of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
8545			Carbon electrodes, carbon brushes, lamp carbons, battery carbons and other articles of graphite or other carbon, with or without metal, of a kind used for electrical purposes:				
			Electrodes:				
8545.11.00	00	2	Of a kind used for furnaces.....	kg.....	2.4%	Free (A,E,IL) 1.9% (CA)	45%
8545.19			Other:				
8545.19.20	00	0	Of a kind used for electrolytic purposes.....	kg.....	2.4%	Free (A,E,IL) 1.9% (CA)	45%
8545.19.40	00	6	Other.....	kg.....	4.9%	Free (A,E,IL) 3.9% (CA)	45%
8545.20.00	00	1	Brushes.....	kg.....	3.7%	Free (A,B,E,IL) 3.3% (CA) 1/	45%
8545.90			Other:				
8545.90.20	00	2	Arc light carbons.....	kg.....	2.8%	Free (A,E,IL) 2.5% (CA)	60%
8545.90.40	00	8	Other.....	kg.....	4.9%	Free (A,E,IL) 4.4% (CA)	45%
8546			Electrical insulators of any material:				
8546.10.00	00	2	Of glass.....	No.....	5.8%	Free (A,E,IL) 5.2% (CA)	50%
8546.20.00			Of ceramics.....	.....	6%	Free (A,B,E,IL) 5.4% (CA)	60%
			Used in high-voltage, low-frequency electrical systems:				
	30	4	Commonly known as suspension, pin-type or line post insulators...	No.			
	60	7	Other.....	No.			
	90	1	Other.....	No.			
8546.90.00	00	5	Other.....	No.....	3.7%	Free (A,B,E,IL) 3.3% (CA) 1/	30%
8547			Insulating fittings for electrical machines, appliances or equipment, being fittings wholly of insulating material apart from any minor components of metal (for example, threaded sockets) incorporated during molding solely for the purposes of assembly, other than insulators of heading 8546; electrical conduit tubing and joints therefor, of base metal lined with insulating material:				
8547.10			Insulating fittings of ceramics:				
8547.10.40	00	3	Ceramic insulators to be used in the production of spark plugs for natural gas-fueled, stationary, internal combustion engines.....	No.....	3.5%	Free (A,E,IL) 3.1% (CA)	60%
8547.10.80	00	4	Other.....	No.....	6%	Free (A,B,E,IL) 5.4% (CA)	60%
8547.20.00	00	9	Insulating fittings of plastics.....	No.....	3.7%	Free (A,B,E,IL) 3.3% (CA)	30%
8547.90.00			Other.....	.....	5.8%	Free (A*,B,E,IL) 5.2% (CA)	45%
	10	2	Other insulating fittings.....	No.			
			Electrical conduit tubing and joints therefor, of base metal lined with insulating material:				
	20	0	Conduit tubing.....	kg			
			Joints:				
	30	8	Threaded.....	kg			
	40	6	Other.....	kg			
8548.00.00	00	2	Electrical parts of machinery or apparatus, not specified or included elsewhere in this chapter....	X.....	3.9%	Free (A*,B,E,IL) 3.5% (CA) 1/	35%

1/ Equipment, originating in the territory of Canada, intended for use in the repair or maintenance of certain motor vehicles subject to accelerated staged rate reductions. See heading 9905.

Appendix E

U.S. steel producers' selected data for 1984-85

Appendix Table E
U.S. steel rail producers' selected data for 1984-85

Item	*1984*	*1985*
Capacity (short tons)	1,165,000	1,075,000
Production (short tons)	903,340	690,605
Capacity utilization (percent)	77.5	64.2
Domestic shipments (short tons)	870,618	667,087
Domestic shipments ($1,000)	359,824	299,834
Export shipments (short tons)	2,878	2,418
Export shipments ($1,000)	1,796	1,410
Total shipments (short tons)	906,303	690,455
Total shipments ($1,000)	378,258	313,128
End-of-period inventories (short tons)	5,198	2,759
Production and related workers 1/	1,582	1,324
Hours worked (1,000 hours) 1/	2,815	2,484
Wages paid ($1,000) 1/	39,552	35,864
Average hourly wages 1/	14.05	14.44
Total compensation paid ($1,000) 1/	52,652	48,718
Net sales ($1,000)	378,252	313,126
Operating income or *(-)loss* ($1,000)	*-20,129*	*-9,599*
Operating income or *(-)loss* as a share of net sales (percent)	*-5.3*	*-3.1*

1/ For workers producing new steel rails.

Source: Based on data submitted in response to questionnaires of the U.S. International Trade Commission.

Appendix F

Impact of imports on U.S. producers' existing development and production efforts, growth, investment, and ability to raise capital

The Commission requested U.S. Producers to describe and explain the actual and potential negative effects, if any, of imports of new steel rails from Canada on their firm's existing development and production efforts, growth, investment and ability to raise capital. Their responses are shown below:

Bethlehem:

* * * * *

Wheeling:

* * * * *

CF&I:

* * * * *

Appendix G

U.S. imports for consumption using Commerce and Statistics Canada data for imports from Canada

Appendix Table G (Commerce data for Canada)

Steel rails: U.S. imports for consumption, by principal sources, 1986-88, January-March 1988, and January-March 1989

Item	1986	1987	1988	January-March-- 1988	1989
	Quantity (short tons)				
Canada	70,136	70,881	88,258	19,204	9,848
Japan	60,079	61,348	28,716	17,580	8,790
Belgium & Luxembourg	7,095	10,992	22,125	8,442	4,280
West Germany	34,837	10,333	15,502	7,216	4,786
United Kingdom	3,836	5,662	3,707	1/	2,909
Sweden	270	3,583	2,945	1,042	1/
France	13,296	2,569	308	1/	6,306
Republic of Korea	2,541	2,514	1,339	428	1/
All others	63	2	413	1/	197
Total	192,153	167,884	163,312	53,912	37,115
	Landed-duty paid (1,000 dollars)				
Canada	9,387	11,840	19,413	4,343	3,797
Japan	27,937	27,273	14,259	8,192	4,957
Belgium & Luxembourg	3,391	5,829	11,929	4,069	2,027
West Germany	15,167	4,175	7,229	3,250	2,579
United Kingdom	1,623	1,954	1,555	1/	1,580
Sweden	57	1,417	907	215	1/
France	5,973	1,007	162	1/	3,065
Republic of Korea	1,013	756	579	174	1/
All others	37	9	207	1/	327
Total	64,584	54,260	56,241	20,243	18,332
	Unit value (per short ton)				
Canada	$133.84	$167.04	$219.96	$226.15	385.56
Japan	465.00	444.56	496.55	465.98	564.00
Belgium & Luxembourg	477.94	530.29	539.16	481.99	473.60
West Germany	435.37	404.05	466.33	450.39	538.86
United Kingdom	423.10	345.11	419.48	2/	543.14
Sweden	211.11	395.48	307.98	206.33	2/
France	449.23	391.98	525.97	2/	486.05
Republic of Korea	398.66	300.72	432.41	406.54	2/
All others	587.30	3/	3/	2/	3/
Average	336.11	323.20	344.38	375.48	493.92

1/ Negligible. Estimated to be zero.
2/ Not applicable.
3/ Statistical aberration.

Note.--Because of rounding, figures may not add to the totals shown.

Source: Compiled from official statistics of the U.S. Department of Commerce.

Appendix Table G (Statistics Canada data for Canada)

New steel rails: U.S. imports for consumption, by principal sources, 1986-88, January-March 1988, and January-March 1989

Item	1986	1987	1988	January-March 1988	January-March 1989
	Quantity (short tons)				
Canada 1/	8,008	23,241	32,106	5,451	10,721
Japan	60,079	61,348	28,716	17,580	8,790
Belgium & Luxembourg	7,095	10,992	22,125	8,442	4,280
West Germany	34,837	10,333	15,502	7,216	4,786
United Kingdom	3,836	5,662	3,707	2/	2,909
Sweden	270	3,583	2,945	1,042	2/
France	13,296	2,569	308	2/	6,306
Republic of Korea	2,541	2,514	1,339	428	2/
All others	63	2	413	2/	197
Total	130,025	120,244	107,161	40,159	37,988
	Landed-duty paid (1,000 dollars)				
Canada 3/	2,228	7,009	13,880	2,770	5,740
Japan	27,937	27,273	14,259	8,192	4,957
Belgium & Luxembourg	3,391	5,829	11,929	4,069	2,027
West Germany	15,167	4,175	7,229	3,250	2,579
United Kingdom	1,623	1,954	1,555	2/	1,580
Sweden	57	1,417	907	215	2/
France	5,973	1,007	162	2/	3,065
Republic of Korea	1,013	756	579	174	2/
All others	37	9	207	2/	327
Total	57,426	49,429	50,707	18,670	20,275
	Unit value (per short ton)				
Canada	$278.22	$301.58	$432.32	$508.16	$535.40
Japan	465.00	444.56	496.55	465.98	564.00
Belgium & Luxembourg	477.94	530.29	539.16	481.99	473.60
West Germany	435.37	404.05	466.33	450.39	538.86
United Kingdom	423.10	345.11	419.48	4/	543.14
Sweden	211.11	395.48	307.98	206.33	4/
France	449.23	391.98	525.97	4/	486.05
Republic of Korea	398.66	300.72	432.41	406.54	4/
All others	587.30	5/	5/	4/	5/
Average	441.65	411.08	473.19	464.90	533.72

1/ Statistics Canada, International Trade Division, Government of Canada. Includes prime rail only.
2/ Negligible. Estimated to be zero.
3/ Canadian export value, converted to U.S. dollars; International Financial Statistics.
4/ Not applicable.
5/ Statistical aberration.

Source: Compiled from official statistics of the U.S. Department of Commerce, except as noted.

Appendix H

Apparent consumption tables using Commerce and Statistics Canada data

Appendix Table H (Commerce data for Canada)

New steel rails: Apparent U.S. consumption, U.S. imports, and ratios of imports to consumption, 1986-88, January-March 1988, and January-March 1989

Item	*1986*	*1987*	*1988*	January-March-- *1988*	January-March-- *1989*
	Quantity (short tons)				
Apparent U.S. consumption	651,823	590,049	***	***	***
U.S. imports from:					
Canada	70,136	70,881	88,258	19,204	9,848
All other countries	122,017	97,003	75,055	34,708	27,267
Total imports	192,153	167,884	163,312	53,912	37,115
	Ratios (percent of quantity)				
To apparent U.S. consumption of imports from:					
Canada	10.8	12.0	***	***	***
All other countries	18.7	16.4	***	***	***
Total	29.5	28.4	***	***	***
	Value (1,000 dollars)				
Apparent U.S. consumption 1/	258,423	224,862	***	***	***
U.S. imports from:					
Canada 2/	9,387	11,840	19,413	4,343	3,797
All other countries	55,198	42,420	36,827	15,900	14,535
Total imports	64,584	54,260	56,241	20,243	18,332
	Ratios (percent of quantity)				
To apparent U.S. consumption of imports from:					
Canada	3.6	5.3	***	***	***
All other countries	21.4	18.9	***	***	***
Total	25.0	24.1	***	***	***

1/ Includes value of domestic shipments (F.O.B. producers' mill), plus imports at U.S. CIF value plus duty paid.
2/ U.S. Customs value.

Note.--Because of rounding, figures may not add to the totals shown.

Source: Compiled from official statistics of the U.S. Department of Commerce.

Appendix Table H (Statistics Canada data for Canada)
New steel rails: Apparent U.S. consumption, U.S. imports, and ratios of imports to consumption, 1986-88, January-March 1988, and January-March 1989

Item	*1986*	*1987*	*1988*	*January-March-- 1988*	*1989*
	Quantity (short tons)				
Apparent U.S. consumption 1/	589,695	537,619	***	***	***
U.S. imports from:					
Canada 1/	8,008	23,241	32,106	5,451	10,721
All other countries	122,017	97,003	75,055	34,708	27,267
Total imports	130,025	120,244	107,161	40,159	37,988
	Ratios (percent of quantity)				
To apparent U.S. consumption of imports from:					
Canada	1.4	4.3	***	***	***
All other countries	20.7	17.9	***	***	***
Total	22.1	22.2	***	***	***
	Value (1,000 dollars)				
Apparent U.S. consumption 2/	258,126	223,595	***	***	***
U.S. imports from:					
Canada 3/	2,228	7,009	13,880	2,770	5,740
All other countries	55,198	42,420	36,827	15,900	14,535
Total imports	57,426	49,429	50,707	18,670	20,275
	Ratios (percent of quantity)				
To apparent U.S. consumption of imports from:					
Canada	0.9	3.1	***	***	***
All other countries	21.4	19.0	***	***	***
Total	22.3	22.1	***	***	***

1/ Based on Statistics Canada import data for Canada.
2/ Includes value of domestic shipments (F.O.B. producers' mill), plus imports at U.S. CIF value plus duty paid.
3/ Value (F.O.B. Canadian producers' mill) converted to U.S. dollars; International Financial Statistics.

Note.--Because of rounding, figures may not add to the totals shown.

Source: Compiled from official statistics of the U.S. Department of Commerce, except as noted.