

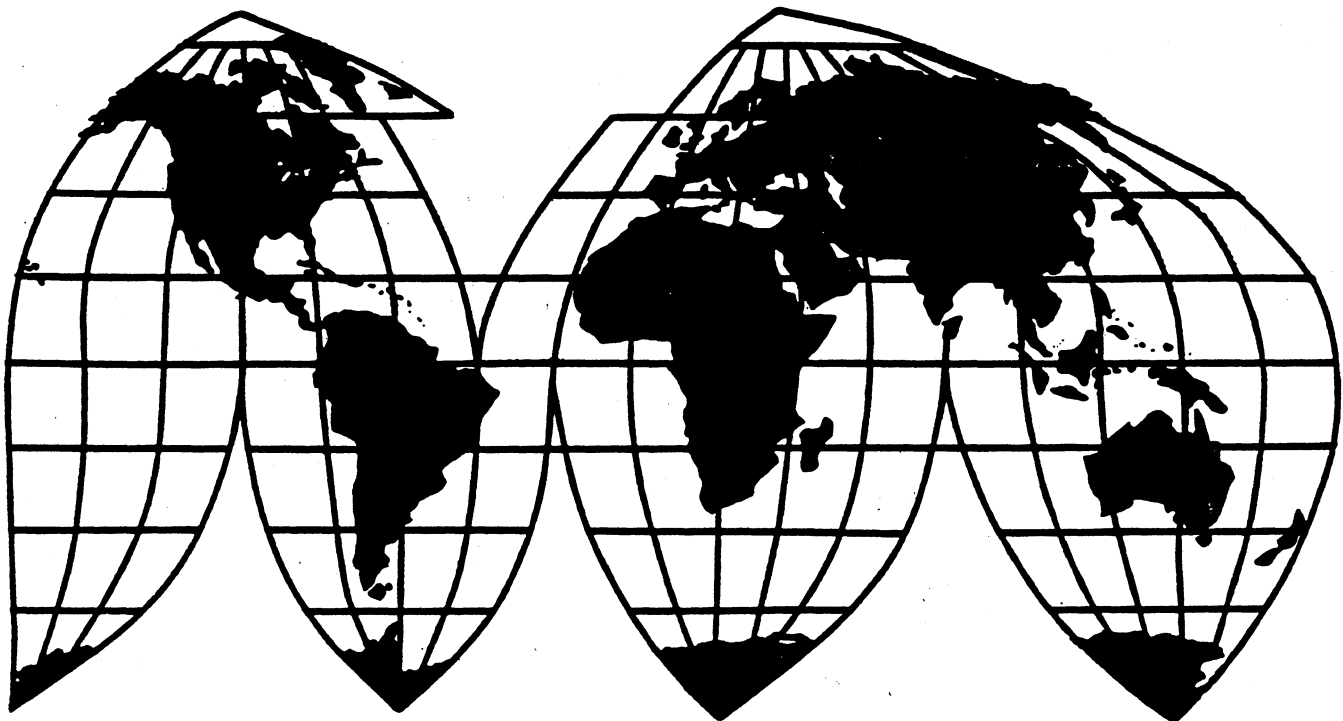
# Gray Portland Cement and Cement Clinker From Japan

Views on Remand in  
Investigation No. 731-TA-461 (Final)

Publication 2657

June 1993

**U.S. International Trade Commission**



# **U.S. International Trade Commission**

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# U.S. International Trade Commission

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Washington, DC 20436

## Gray Portland Cement and Cement Clinker From Japan



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In April 1991, the U.S. International Trade Commission determined that an industry in the United States was materially injured by reason of imports from Japan of gray portland cement and cement clinker, (USITC Publication No. 2376 (April 1991)). The Commission's determination was appealed to the Court of International Trade ("CIT"), and on April 27, 1993, the CIT remanded the Commission's determination. *Mitsubishi Materials Corp., et al. v. United States*, Slip Op. 93-62 (April 27, 1993)). The attached views were submitted to the court in response to the remand.



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VIEWS OF VICE CHAIRMAN PETER S. WATSON AND  
COMMISSIONER JANET A. NUZUM ON REMAND<sup>1</sup>

Pursuant to the Order and Opinion of the Court of International Trade in Mitsubishi Materials Corp. v. United States, Slip op. 93-62 (Ct. Int'l Trade, April 27, 1993),<sup>2</sup> we determine, on the basis of the information in the record of the Commission's final investigation, that an industry in the United States is threatened with material injury by reason of imports of gray portland cement and cement clinker from Japan that the Department of Commerce has determined are sold in the United States at less than fair value (LTFV).<sup>3</sup>

Like Product and Domestic Industry

In the original final determination in this investigation, the Commission<sup>4</sup> found that the like product was gray portland cement and cement clinker, that domestic grinding-only operations should be included in the domestic industry, and that no related parties should be excluded from the

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<sup>1</sup> Commissioner Rohr readopts his determination and Views as set forth in Gray Portland Cement and Cement Clinker from Japan, Inv. No. 731-TA-461 (Final), USITC Pub. 2376 (April 1991) at 45-65.

<sup>2</sup> We note that the Court's remand was directed to certain points in the analysis of Commissioners Lodwick and Newquist, who determined that the domestic industry was experiencing material injury by reason of the dumped imports. Although we determine that the domestic industry is threatened with material injury, we also address the issues that were the subject of the Court's remand at the appropriate points in our analysis. Of course, we have complied with the Court's express instruction not to cumulate the imports from Japan with imports that entered from Mexico before August 1990.

<sup>3</sup> Material retardation is not an issue in this investigation and will not be discussed.

<sup>4</sup> We note that we did not participate in the Commission's original final determination in April 1991, as we were not members of the Commission at that time. In order to comply with the Court's remand Order and instructions, we have considered the record de novo.

domestic industry.<sup>5</sup> No party challenged these findings on review of the Commission's determination before the Court of International Trade, and the Court did not remand any of these findings to the Commission. We concur in those findings.

#### Regional Industry

In the final determination, the Commission also concluded that "appropriate circumstances" existed for a regional industry analysis of domestic cement production, and that the appropriate regional industry comprised producers in the Southern California region.<sup>6</sup> No party challenged these aspects of the Commission's determination on review. We concur in the conclusion that the statutory market isolation criteria<sup>7</sup> are satisfied in this case, and that regional analysis is appropriate. Based on the realities of the market for cement, and the relatively greater isolation of the Southern California region from outside supplies, we also concur in the conclusion that producers in the Southern California region constitute the appropriate regional industry for our consideration.

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<sup>5</sup> Gray Portland Cement and Cement Clinker from Japan, Inv. No. 731-TA-461 (Final) USITC Pub. 2376 (April 1991) (hereinafter 1991 Japan Final) at 13 (Views of Commissioner Seeley G. Lodwick and Commissioner Don E. Newquist); id. at 46-47, 50 (Views of Commissioner David B. Rohr); id. at 67-68 (Views of Acting Chairman Anne E. Brunsdale).

<sup>6</sup> 1991 Japan Final at 13-20 (Views of Commissioner Seeley G. Lodwick and Commissioner Don E. Newquist). Commissioner Rohr reached the same conclusions. Id. at 47-50.

<sup>7</sup> 19 U.S.C. § 1677(4)(C)(i) & (ii).

We also find that imports are sufficiently concentrated in the Southern California region.<sup>8</sup> As noted by the plurality in its determination,<sup>9</sup> and as held by the Court of International Trade,<sup>10</sup> there is no precise numerical

test for determining when imports are sufficiently concentrated in the region. The percentage of total imports from Japan which entered Southern California was 67.9 percent in 1986, 70.8 percent in 1987, 73.0 percent in 1988, 73.7 percent in 1989, and 61.2 percent in 1990.<sup>11</sup> Determining whether the subject imports are concentrated in the region is an area in which the Commission exercises considerable discretion. Although these percentages are somewhat low in comparison to past Commission practice, we note that the Southern California region accounted for between 8 and 9.9 percent of total consumption, yet a significant majority of U.S. imports from Japan were shipped to that region. In this case, therefore, we conclude that imports from Japan are sufficiently concentrated.

#### Conditions of Competition and Impact of Dumped Imports from Japan

Gray portland cement is a fungible commodity. All gray portland cement sold in the Southern California market, whether domestically produced or imported, meets the same standards, and the record indicates there are no

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<sup>8</sup> This was the conclusion reached by the Commission in its original final determination. 1991 Japan Final at 20-21 (Views of Commissioner Seeley G. Lodwick and Commissioner Don E. Newquist); 48-50 (Views of Commissioner David B. Rohr). The Court of International Trade affirmed this aspect of the Commission's determination on review. Mitsubishi Materials, Slip Op. 93-62 at 10-14.

<sup>9</sup> 1991 Japan Final at 20.

<sup>10</sup> Mitsubishi Materials, Slip Op. 93-62 at 11; Texas Crushed Stone Company v. United States, Slip Op. 93-81 (Ct. Int'l Trade, May 25, 1993) at 17-18.

<sup>11</sup> Report at A-13.

significant distinctions between cement from different sources in terms of quality, delivery, marketing, or terms of sale.<sup>12</sup> Cement is sold on a daily basis. Sales are sensitive to changes in price, and pricing information is spread rapidly throughout the market.<sup>13</sup> Thus, a change in one supplier's price is likely to be met rapidly by all other suppliers. Demand for cement is derived from demand for concrete, which in turn depends primarily on the level of construction activity. Cement represents a small portion of the cost of most construction projects, and there are no good substitutes for cement in the production of concrete.<sup>14</sup> Thus, the total amount of cement demanded in the regional market is unlikely to respond to a change in price.

Cement production is capital intensive, and hence subject to high fixed costs. Thus, as production increases and approaches the limits of capacity, unit costs would decline. In addition, as consumption increases, supplies in the market tighten (absent increased supplies from sources outside the region), prices increase, producers get increased revenues, and operating margins widen. Construction of new production facilities is both expensive and lengthy -- estimates of the time necessary to bring a new cement production facility on line range from three to five years, at a cost of approximately \$175 million.<sup>15</sup> Under these conditions, there is little, if any, incentive for producers to cut prices during periods of increasing demand

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<sup>12</sup> Memorandum INV-0-064 at 15-16.

<sup>13</sup> See Petitioners' Pre-hearing Brief at Exhibits 12 and 22-26, discussing purchasers' use of low price quotes from one supplier to obtain a lowered price from another supplier.

<sup>14</sup> Memorandum INV-0-064 at 17; Report at A-63 & n.52.

<sup>15</sup> Petitioners' Pre-hearing Brief at Exhibit 36.

in an effort to increase market share and revenues. Price cuts are spread rapidly through the market, and prices will tend to stabilize quickly at a lower level, resulting in decreased per unit revenues. Any increase in market share is likely to be relatively short-term, and certainly unlikely to yield sufficient increased revenues to fund capacity expansion.

Cement production historically has been subject to cyclical performance, with poor performance in periods of low or declining consumption, and boom performance during periods of high or increasing consumption.<sup>16</sup> In this investigation, we believe it is particularly important to consider the business cycle as well as the overall conditions of competition of the cement industry in this region. Over the period 1986 through 1990, the cement market in Southern California was characterized first by a surge in consumption from 1986 to 1989, and then by declining consumption in 1990.<sup>17</sup> Apparent consumption of cement in Southern California increased by 24 percent from 1986 to 1989, and fell by 8 percent in 1990 as compared with 1989 levels.<sup>18</sup> Nevertheless, even with the decline in consumption in 1990, consumption was still 13.3 percent higher in 1990 than it was in 1986.<sup>19</sup> Consumption of cement clinker increased irregularly during the period 1986-1990, by 5 percent.<sup>20</sup>

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<sup>16</sup> See, e.g., Petitioners' Pre-hearing Brief at 67, and Economic Appendix A at 25-27; Petitioners' Reply Brief on the Impact of Domestic Industry Cost Trends on Prices at Attachment A. Respondents did not contest the existence of these cyclical effects.

<sup>17</sup> Report at A-16.

<sup>18</sup> Id. at A-15 and Table 6.

<sup>19</sup> Id. at A-16, Table 6.

<sup>20</sup> Id.

Production of cement in the region increased less than consumption from 1986 to 1989, by 11 percent overall, before declining by 6 percent in 1990.<sup>21</sup> Production of cement clinker increased by 7 percent during 1986-1990.<sup>22</sup> Southern California producers' capacity to produce both cement and clinker reflected an inverse relationship to production levels during 1986-90, falling 1 percent and 9 percent, respectively.<sup>23</sup> As a result, cement capacity utilization increased from 76 percent in 1986 to 86 percent in 1989, before falling to 80 percent in 1990.<sup>24</sup> Clinker capacity utilization rose from 85 percent in 1986 to approximately 100 percent in 1989 and 1990.<sup>25</sup>

In this industry, inventories are not generally maintained for long, or at high levels. Nevertheless, despite increasing consumption, Southern California producers' inventories of cement increased from 1986 to 1987, declined slightly in 1988, and increased in 1989 and 1990, for an overall substantial increase of 69 percent during the period.<sup>26</sup> Inventories of cement clinker increased significantly from 1986 to 1987, dropped in 1988 and 1989, and increased dramatically in 1990, for an overall increase of 30 percent over the period.<sup>27</sup>

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<sup>21</sup> Id. at A-23 and Table 7.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Id. at A-29 and Table 10.

<sup>27</sup> Id.

The volume of U.S. shipments of cement by producers in Southern California increased by 11 percent from 1986 to 1989, but declined by 6 percent in 1990.<sup>28</sup> Shipments within the region were virtually the same in 1990 as in 1986, while shipments to destinations outside Southern California increased by 26 percent.<sup>29</sup> Because transportation costs are high, and cement is sold on a delivered price basis, sales in more distant markets are relatively less profitable to producers. Thus, the increase in shipments to destinations outside the region supports the conclusion that producers were unable to take full advantage of increased consumption within the region, and were forced to turn to other markets.

The value of U.S. shipments of cement by producers in Southern California fell by 7 percent during 1986-1988, despite the increased volume of shipments, due to declines in unit values during the period. The value of Southern California producers' shipments increased by 8 percent in 1989 and then declined by 3 percent in 1990.<sup>30</sup> Unit values of domestic producers' shipments declined 12 percent from 1986 to 1988, and then increased during 1989 and 1990 at an annual rate of about 3 percent, ending at a level well below that reported in 1986.<sup>31</sup>

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<sup>28</sup> Id. at A-25 and Table 8. Most of the clinker produced in Southern California during the period of investigation was consumed internally in the production of cement. Id. at A-25.

<sup>29</sup> Id. at A-25 and Table 8.

<sup>30</sup> Id.

<sup>31</sup> Id.

Employment in the regional industry decreased over the period of investigation.<sup>32</sup> The number of production and related workers producing cement and clinker in Southern California decreased by over 16 percent, as did the number of hours worked by those workers.<sup>33</sup> Total wages and compensation paid to production and related workers producing cement and clinker in the region decreased by approximately 9 percent.<sup>34</sup> Productivity increased from 1.9 tons per hour in 1986 to 2.4 tons per hour in 1989 and 1990.<sup>35</sup> Unit labor costs declined in Southern California from 1986 to 1989, and increased in 1990.<sup>36</sup> Five of the seven Southern California producers reported permanent layoffs in an effort to reduce costs during the period of investigation.<sup>37</sup>

The financial data reveal that domestic producers in Southern California operated profitably throughout the period of investigation.<sup>38</sup> Net sales of cement and cement clinker decreased by 3.5 percent from 1986 to 1987, and increased marginally in 1988 and by 4.6 percent in 1989. Net sales declined in 1990 to a level below that reported in 1986 and 1987.<sup>39</sup> Operating income increased from 1986 to 1987, declined in 1988, and then increased in 1989, but

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<sup>32</sup> Id. at A-30 and Table 11.

<sup>33</sup> Id.

<sup>34</sup> Id. Hourly wages in Southern California were generally slightly lower than those in the state as a whole. Id.

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Id. at A-30.

<sup>38</sup> Id. at A-32.

<sup>39</sup> Id. at A-32 and Table 12.



fell significantly in 1990.<sup>40</sup> Pre-tax net income margins followed a similar trend.<sup>41</sup>

Weighted average prices for both domestically produced and imported Japanese cement declined from 1986 through 1988.<sup>42</sup> Domestic prices increased

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<sup>40</sup> Id. at A-32 and Table 12.

<sup>41</sup> The company specific information varies in the extent of increases and declines in various operating performance indicators during the period of investigation, but shows largely the same overall trends. Id. at Appendix C, Table C-12.

We do not believe that differences in the absolute level of different producers' performance indicators is probative on the issue before us -- whether the producers of all or almost all production of cement in the region are materially injured or threatened with material injury by reason of dumped imports of cement from Japan. Such differences are primarily attributable to endogenous factors specific to each producer -- its capacity, the efficiency of its production operations, its capital structure, management, sales efforts, etc. The record evidence demonstrates that all producers in the region compete under substantially the same conditions, and thus the impact of dumped imports will be substantially the same for all producers, although for one producer that impact might be reflected in stable profits, while for another it might be reflected in declining profits or even losses. This is particularly true since we reach no independent conclusion on whether the industry, or any individual producer, is "healthy" in the abstract. See H.R. Rep. 40, 100th Cong., 1st Sess. (1987) at 128 ("in examining the impact of imports on domestic producers, the ITC should not examine the health or condition of an industry in any abstract sense. An industry's health should be determined in the context of the impact that imports are having on that industry."). Accord, S. Rep. No. 71, 100th Cong., 1st Sess. (1987) at 117 (same language). A producer or industry may be materially injured or threatened with material injury by reason of dumped imports even if it is reporting profitable operations, or improving performance. See USX Corp. v. United States, 655 F. Supp. 487, 490 (Ct. Int'l Trade 1987).

<sup>42</sup> Report at A-66 - A-68, Tables 31-34. We reject respondents' argument that "real" prices increased during the period of investigation. First, we reject a methodology that recalculates market prices reported by domestic producers and importers by a cost of goods sold factor indexed to 1986. The Court of International Trade has explicitly held that the statutory requirement that the Commission consider the issue of price undercutting "focuses solely on prices and does not mandate any cost analysis or adjustment of prices for cost factors. . . ." British Steel Corp. v. United States, 593 F. Supp. 405, 412 (emphasis in original). Moreover, there is nothing in the record or in respondents' argument to support the selection of 1986 costs as the base line for this analysis, other than the fact that 1986 was the first year of our period of investigation. Second, respondents' recalculated company specific

somewhat in two of the four market areas examined in 1989, and declined again in 1990.<sup>43</sup> The prices of imports from Japan increased somewhat in one market area in 1989.<sup>44</sup> In 1990, the prices of imports from Japan declined in one market area, remained stable in one market area and increased slightly in the other two market areas.<sup>45</sup> However, despite the increases in prices in some market areas during the latter part of the period of investigation, price levels in three of the four market areas examined were at a significantly lower level at the end of the period of investigation than at the beginning of the period.<sup>46</sup> Although domestic producers reduced their prices, they were no better off at the end of the period of investigation than at the beginning. Even taking into account the decline in consumption from 1989 to 1990, the size of the Southern California regional market had grown by nearly one million tons during the period of investigation. Yet, the industry's shipments in 1990 returned to 1986 levels, and thus the industry had a smaller share of this expanded market. In sum, the industry was not able to fully

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prices do not reflect sales of clinker or company transfers, while the costs for these sales are included in their cost of goods sold index. Third, respondents' recalculated prices are based on "adjusted" costs for two producers, not their actual reported costs. Fourth, respondents' analysis ignores the operating dynamics of cement production, the business cycle, and the conditions of competition in the industry. Finally, even respondents' recalculated prices show a decline from 1987 to 1988, and only slight increases in 1989 and 1990, to a level below that calculated for 1988. Remand Brief on Behalf of the Japanese Respondents at Exhibit 5. In the context of the conditions in the market during the period of investigation, even respondents' pricing data would support the conclusion that the domestic industry suffered price depression and suppression.

<sup>43</sup> Report at A-66 - A-68, Tables 31-34.

<sup>44</sup> Id. at A-66 - A-68, Tables 31-34.

<sup>45</sup> Id.

<sup>46</sup> Id. at A-66 - A-67.

realize the magnitude of benefits -- i.e., increased profits -- that one could reasonably have expected during the growth in the market in the first four years of the period of investigation, or even the overall growth between 1986 and 1990. But neither was the industry able to improve its position in the market in terms of market share. Relative to the robust growth in the market, in other words, the industry's performance was, at best, stagnant.

As consumption increased in the Southern California market, imports from Japan more than quadrupled from 1986 to 1989, from 349,000 short tons to 1.6 million short tons, before declining to 1.2 million tons in 1990, equivalent to the 1988 level.<sup>47</sup> As a share of regional consumption, imports from Japan increased significantly, from 4.9 percent in 1986 to 18.2 percent in 1989, before declining to 14.7 percent in 1990.<sup>48</sup> Thus, the dumped imports from Japan rapidly gained a significant and increasing share of the increased consumption in the Southern California market through 1989. On the other hand, although domestic producers' production and sales increased, they lost market share.<sup>49</sup> The effects of lost market share can have a significant adverse impact on the condition of this industry over the long term, by

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<sup>47</sup> Id. at A-16.

<sup>48</sup> Id. at A-60. We note that the 1990 decline in Japanese imports was due at least in part to the total cessation of imports into the region in November and December, after Commerce's preliminary affirmative dumping determination, and the calculation of substantial dumping margins. Id. at A-58, Table 27. Through October of 1990, imports from Japan into Southern California were at approximately the same level as during the same period in 1989. Petitioners' Brief on the Impact of Domestic Industry Cost Trends on Prices at Attachment A. Overall, imports from Japan into other areas of the United States were higher in 1990 than in 1989.

<sup>49</sup> Market penetration by imports cannot be calculated for individual producers. Thus, the aggregate market share information for regional producers is the only meaningful data on this issue.

depriving the industry of the benefits of the upsurge in consumption that would otherwise have been expected, and making it more difficult for the industry to survive the downturn evident in 1990.

Imports from Japan consistently undersold the domestic like product during the period of investigation.<sup>50</sup> Purchaser price comparisons also showed significant underselling.<sup>51</sup> The fungible character of cement, the price sensitive nature of cement sales, and the localized nature of competition in the Southern California market support the conclusion that, faced with increased levels of dumped imports, domestic producers must either forgo market share or lower prices in an effort to maintain market share. Because producers must maintain production levels as high as feasible in order to cover their high fixed costs to the maximum extent possible, they are more likely to lower prices in an effort to compete rather than accept loss of market share.<sup>52</sup> The decline in cement prices in the region, and the

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<sup>50</sup> Out of 60 possible comparisons in the Los Angeles market area, all revealed underselling by Japanese imports, by margins ranging from 0.8 percent to 17.2 percent. Out of 60 possible comparisons in the Orange County market area, 57 revealed underselling by Japanese imports, by margins ranging from 1.7 percent to 13.4 percent. The remaining three comparisons revealed overselling by Japanese imports, by margins ranging from 0.4 percent to 1.3 percent. Out of 59 possible comparisons in the Riverside County market area, all revealed underselling by Japanese imports, by margins ranging from 4.3 percent to 17.9 percent. Out of 12 possible comparisons in the San Diego market area, all revealed underselling by Japanese imports, by margins ranging from 0.1 percent to 8.1 percent. Report at A-66 - A-68 and Tables 31-34.

<sup>51</sup> Id. at A-69 and Appendix F, Tables F-1-F-11. In 123 of the 240 possible price comparisons, Japanese cement was priced lower than domestic cement, by margins ranging from less than 0.05 percent to 14.0 percent. In 59 of those 240 months, domestic and Japanese cement were priced the same, and in the remaining 58 months, domestic cement was priced below Japanese cement by margins ranging from less than 0.05 percent to 6.9 percent. Id.

<sup>52</sup> We note that while purchaser questionnaire data show many instances where purchasers obtained cement from both Japanese and domestic suppliers at the same price, this is consistent with our conclusion that regional producers

increasing market share of subject imports, support the conclusion that the subject imports had a suppressing and depressing effect on prices for cement in Southern California during the period of investigation.<sup>53</sup>

The loss of market share throughout the earlier part of the period of investigation, combined with declining prices, adversely affected the financial condition of the domestic producers. The adverse effects of import volumes and prices on the domestic producers' financial condition was reflected in their inability to invest during the period of investigation, despite the significant increases in consumption and increasing capacity utilization. The record in this investigation reflects that domestic producers curtailed planned investments, and that the risk of investment in the Southern California cement industry increased.<sup>54</sup> Domestic producers, faced with price competition from dumped imports from Japan, reduced prices in an effort to maintain production volumes and capacity utilization levels, so as to minimize the adverse effect of declining prices on profits.<sup>55</sup> While

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reduced their prices in order to meet competition from dumped imports. See Report at A-71-A-72.

<sup>53</sup> The decline in market share accounted for by non-subject imports after 1987, when prices were declining and subject imports' market share was increasing rapidly, suggests that the importers of non-subject cement were unwilling to match declining prices in Southern California, and instead gave up market share. See Report at A-54, Table 25.

<sup>54</sup> Id. at Appendix D.

<sup>55</sup> Due to the high fixed costs of cement production, maintaining output volume and capacity utilization at levels as high as possible is vital to maintaining profit margins.

this effort kept production and shipments at increased levels through 1989, it adversely affected the producers' financial indicators.<sup>56,57</sup>

Threat of material injury by reason of dumped imports from Japan

Section 771(7)(F) of the Tariff Act of 1930 directs the Commission to determine whether a U.S. industry is threatened with material injury by reason of imports "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."<sup>58</sup> The Court of International Trade has upheld the Commission's consideration of the present condition of the industry in assessing the issue of threat, stating that such consideration

is supported by the language of the statute and the legislative history. Such consideration, however, only establishes the background against which the Commission considers the likely

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<sup>56</sup> We note that in considering the impact of dumped imports from Japan on the domestic industry, we have not focussed on an analysis of the performance of individual producers. In part, this is because of the nature of our analysis, and our affirmative determination of threat of material injury to the domestic industry by reason of dumped imports from Japan. As noted above, differences in the performance of individual producers are not probative on the issue before us. In addition we note that, as the Court of International Trade has held, and the Court of Appeals for the Federal Circuit affirmed, "[n]either the statute nor case law . . . requires a particular method of analysis in a regional industry investigation. . . . a pure producer-by-producer analysis is not required by statute[.]" CEMEX, S.A. v. United States, 790 F. Supp 290, 294-95 (Ct. Int'l Trade 1992), aff'd 989 F.2d 1202 (T) (Fed. Cir. 1993). Accord, Mitsubishi Materials, Slip Op. 93-62 at 19-20; Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1562 n.27 (Fed. Cir. 1984).

<sup>57</sup> In assessing the impact of dumped imports on producers of all or almost all of the cement production in the regional industry, Commissioner Nuzum notes that she reviewed and found Commissioner Rohr's "percentage of production" analysis very useful. See Memorandum C064-O-030, April 17, 1991. She concurs with Commissioner Rohr's view that the percentage of production analysis demonstrates that the data "reveal a downward trend in the most recent period . . . which indicate some serious vulnerability to the potential effects of LTFV imports." 1991 Japan Final at 61.

<sup>58</sup> 19 U.S.C. § 1677(7)(F)(ii). See Metallwerken Nederland B.V. v. United States, 744 F. Supp. 281, 287 (Ct. Int'l Trade 1990).

effect of future imports, based on consideration of the factors set forth in the statute.<sup>59</sup>

The Commission must consider ten factors specifically set forth in the statute in a threat analysis.<sup>60</sup> These statutory factors primarily serve as guidelines for the Commission's analysis of the likely impact of future imports.<sup>61</sup>

Despite increases in the domestic industry's production and shipments, the industry suffered significant declines in market share. Further, domestic prices declined notwithstanding increased demand over much of the period of investigation.<sup>62</sup> Domestic producers were able to operate profitably in part because of lower costs, which outweighed the revenue effects of lower prices during the first four years of the period of investigation.<sup>63</sup> While the industry was adversely affected by the surge in imports during the period of investigation, we are not persuaded that it was materially injured by reason of dumped imports of cement from Japan during the period of investigation. However, given the changes in the market evident in 1990, specifically, the decline in consumption, as well as the industry's increased costs of

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<sup>59</sup> Calabrian Corp. v. United States, 794 F. Supp 377, 388 (Ct. Int'l Trade 1992).

<sup>60</sup> 19 U.S.C. § 1677(7)(F)(i)-(X). Factors (I), (VIII), and (IX) are not at issue in this investigation. In addition, the Commission is required to consider the effect of dumping in third-country markets. 19 U.S.C. § 1677(7)(F)(iii). There is no information in the record concerning dumping in third country markets.

<sup>61</sup> Calabrian, 794 F. Supp at 387.

<sup>62</sup> See Petitioners' Preliminary Conference Exhibit 6, Figure 1, indicating that, from 1975 to 1979, as regional consumption and domestic capacity utilization increased, average shipment values also increased, while from 1985 to 1989, as regional consumption and domestic capacity utilization increased, average shipment values declined.

<sup>63</sup> Report at A-37.

production, the regional industry is clearly vulnerable to the impact of dumped imports from Japan. Continued dumped imports of cement from Japan, potentially at increased levels, pose a threat of material injury to the industry in the near future.

Total Japanese capacity to produce cement clinker declined from 1986 to 1988, then remained stable through 1990.<sup>64</sup> Capacity utilization declined from 1986 to 1987, and increased in each year thereafter, reaching 90 percent in 1990.<sup>65</sup> Notwithstanding the decline in capacity, the Japanese cement industry remains one of the three largest in the world. The unused clinker capacity of the Japanese industry is equivalent to cement production exceeding the entire amount of cement consumed in the Southern California region.<sup>66</sup>

Even looking only at information for only those Japanese producers who exported cement to the United States during the period of investigation, there is substantial unused capacity. These producers reported declining capacity to produce clinker, and increasing capacity utilization.<sup>67</sup> However, not all of the reductions in capacity undertaken as part of the rationalization of the Japanese cement industry are permanent - while some clinker kilns were

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<sup>64</sup> Id. at A-48. Clinker capacity is a limiting factor on cement production. Total Japanese cement production capacity increased from 1986 to 1987, then declined through 1990. Id. at A-49, Table 22. Capacity utilization declined from 1986 to 1987, then increased, reaching 86.5 percent in 1990. Id.

<sup>65</sup> Id. We note that Japanese producers reported capacity based on operating 24 hours per day, 43 weeks a year, while domestic producers reported capacity based on operating 23.9 hours per day, 47.7 weeks a year. Id. at A-48; A-24. It thus appears that reported Japanese capacity may be understated, and capacity utilization overstated.

<sup>66</sup> Id.

<sup>67</sup> Id. at A-52, Table 24.



reportedly dismantled or scrapped, others were merely "shut down."<sup>68</sup> Although producers indicated that they had no present intention of reactivating shut down kilns,<sup>69</sup> this capacity is not entirely lost, and could be reactivated if conditions warrant. Their cement grinding capacity also declined during the last three years of the period of investigation, after increasing from 1986 to 1987, and capacity utilization increased from 1987 to 1990. Nonetheless, unused clinker capacity for the exporting Japanese producers was near 3.5 million tons in 1990, and unused cement grinding capacity was close to 7 million tons. These amounts represent a substantial ability to export cement to the Southern California region, where total consumption in 1990 was 8.1 million tons.

The information in the record does not support the conclusion that the Japanese home market will be able to absorb the entirety of this unused capacity. Although Japanese home market shipments increased during the period of investigation, so too did exports until 1990.<sup>70</sup> In addition, while the Japanese Cement Association projects continued increases in Japanese cement consumption, other forecasts suggest that Japanese consumption peaked in 1990, and will decline over the next several years.<sup>71</sup> Information in the record indicates that Korean exports of cement to Japan, which accounted for 73 percent of Korean exports in 1990, are likely to increase, and thus be available to satisfy Japanese home market demand and enable Japanese producers

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<sup>68</sup> Id. at A-50.

<sup>69</sup> Id.

<sup>70</sup> Id. at A-49, Table 22; A-51, Table 23.

<sup>71</sup> See Petitioners' Pre-hearing Brief, Exhibits 67-71.

to continue exports to the United States. Thus, even considering only those producers who exported cement to the United States during the period of investigation, the Japanese cement industry clearly is in a position to continue shipments of dumped cement to the Southern California region at the levels reported during the period of investigation, and even to increase shipments.

The substantial investment in large import terminals in Southern California by Japanese cement producers certainly provides an incentive to continue and even increase exports to the region.<sup>72</sup> The terminals are obviously dependent on imports in order to operate profitably, and the Japanese production facilities of their owners are a likely source of the necessary imports. Mexico is unlikely to continue to be as significant a supplier to the Southern California market as it was during most of the period of investigation, in light of the August, 1990 antidumping duty order on imported Mexican cement which resulted in a substantial decline in the volume of imports from Mexico.<sup>73</sup> Although respondents argued that the terminals would be supplied from other countries as well, third country imports into the Southern California region declined by over 60 percent from 1987 to 1990, when

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<sup>72</sup> By the end of 1991, Japanese cement producers will own or have interests in import terminals which have a throughput capacity estimated at close to 2 million tons per year. Report at A-50. It is true that these producers also own production facilities in Southern California. Respondents argued that the import terminals do not pose a threat of material injury because of economic disincentives to import to an extent that would jeopardize optimal utilization of their domestic production facilities. Post-hearing Brief on Behalf of the Japanese Respondents at 9. However, we do not believe those import terminals can be viewed as "faucets" that will simply be turned off if Southern California consumption declines, in order to benefit related U.S. production operations. Such action would be extremely uneconomical in light of the substantial capital investment in these terminals.

<sup>73</sup> Report at A-58, Table 27.

they were 41 percent below the level reported in 1986.<sup>74</sup> The information in the record does not demonstrate that this trend is likely to be reversed in the near future, particularly in light of the declines in prices in the Southern California market, and the decline in consumption in 1990.

As discussed above, Japanese imports into the region increased significantly, both in volume and as a share of domestic consumption, from 1986 through 1989. Although imports declined in 1990, they remained above the level reported in 1988. Much of the decline is attributable to the complete cessation of imports into the region following Commerce's preliminary affirmative determination and the imposition of deposit requirements of between 46.07 and 67.68 percent in late October 1990. In this regard, it is noteworthy that while imports from Japan into Southern California declined 26 percent from 1989 to 1990, imports into the rest of the United States increased by 31 percent.<sup>75</sup>

The price declines reported by domestic producers, importers, and purchasers, and the consistent underselling by dumped imports from Japan, indicate significant price depression and suppression in the Southern California market during the period of investigation. Although producers were able to operate profitably during the period, this was primarily due to the positive effects of lower costs and increased sales volumes.<sup>76</sup> However, these

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<sup>74</sup> Id. at A-54, Table 25.

<sup>75</sup> Id. at A-60.

<sup>76</sup> Id. at A-37. We note that comparison of domestic cost and price trends can be helpful in considering the issue of price suppression, which is the situation where prices do not increase as much as might otherwise be expected. However, we do not find such comparison useful in considering the issue of price depression, which is a decline in reported transaction prices in the market. This is particularly true in a case such as this one, involving a

positive effects of lower costs were less each year of the period of investigation after 1987, and by 1990, had disappeared.<sup>77</sup> Indeed, in 1990, increased production costs had a significant negative effect on the domestic industry's revenues.<sup>78</sup> Combined with the negative effect of declining sales volumes, these cost increases resulted in a significant decline in the industry's net sales in 1990 despite somewhat increased prices. Moreover, the 1990 price increases were outstripped by cost increases, supporting the conclusion that prices were suppressed.

Given the relationship between cement production levels and unit costs, it is unlikely that the domestic producers will be able to obtain significant (if any) cost declines during a period of declining consumption. Thus, it is probable that continued dumped imports, even at the prices prevailing in 1990, will continue to have a depressing or suppressing effect on domestic prices. We therefore conclude that dumped imports of gray portland cement and cement

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competitive, price sensitive market for a commodity good, and consistent underselling by dumped imports. A domestic producer in this market has little, if any, incentive to pass cost declines along to consumers in the form of price declines, since other producers will be forced to follow suit in order to avoid losing market share, resulting in decreased per unit revenues throughout the industry. Rather, producers are more likely to attempt to keep their prices as high as the market will allow, and benefit from lower unit costs in periods of high consumption in the form of increased operating margins. Such increased operating margins help to offset the negative effects of increased costs in periods of lower consumption and production. In any event, to the extent that the declines in costs of production may have contributed to declines in prices, that ceased to be the case in 1990, when costs began to rise again as consumption fell. Indeed, as the variance analysis in the staff report shows, the rise in costs outpaced the rise in prices during the latter part of the period of investigation. Id. Meanwhile, dumped imports from Japan continued to undersell domestic producers. Id. at A-66 - A-68 and Tables 31-34, A-69, and Appendix F, Tables F-1 - F-11.

<sup>77</sup> Id. at A-37.

<sup>78</sup> Id.

clinker from Japan pose a real threat of imminent material injury to the domestic producers of all or almost all cement in the region.

As required by section 735(b)(4)(B)<sup>79</sup> of the statute, we conclude that we would not have found material injury by reason of the dumped imports from Japan but for the suspension of liquidation. Even taking into account the cessation of imports from Japan into the region after Commerce's preliminary determination, we are not persuaded that there would have been material injury to the domestic industry but for the suspension of liquidation. Prices in the regional market had shown some recovery during the latter part of the period, and notwithstanding the decline in consumption in 1990, the industry was operating profitably. In our view, the record does not support the conclusion that but for the suspension of liquidation, continued dumped imports from Japan would have had a sufficiently deleterious impact on the domestic industry during the period of investigation to warrant a finding of material injury by reason of those imports.

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<sup>79</sup> 19 U.S.C. § 1673(b)(4)(B).



## SEPARATE VIEWS OF CHAIRMAN NEWQUIST ON REMAND

I set forth these separate views for the purpose of responding to the remand instructions of the Court of International Trade.<sup>1</sup> To the extent not inconsistent with the court's order, I adopt and incorporate by reference my views in Gray Portland Cement and Cement Clinker from Japan,<sup>2</sup> and herein add only such findings as are needed to address the Court's instructions.

I. Explanation of Plant-By-Plant Data

In reaching my original affirmative determination, and as directed by the statute, I considered whether producers of all or almost all production in the region were materially injured by reason of less than fair value imports into the region of cement from Japan. 19 U.S.C. § 1677(4)(C). Though not a statutory

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<sup>1</sup> Mitsubishi Materials Corp. v. United States, Slip. Op. 93-62 (Ct. Int'l Trade, April 27, 1993). As further discussed below, I believe the legal reasoning underlying the remand instructions are contrary to the statute and other precedent. Although I am bound by the court's reasoning in this remand, I will not necessarily follow it in other investigations pending definitive resolution of these conflicts. See Certain Electrical Conductor Aluminum Redraw Rod from Venezuela, Invs. Nos. 701-TA-287 (Remand) and 731-TA-378 (Remand) (June 2, 1993).

<sup>2</sup> Inv. No. 731-TA-461 (Final), USITC Pub. 2376 (April 1991).

requirement,<sup>3</sup> I also examined plant-specific data.<sup>4</sup> Nonetheless, for purposes of satisfying the court's instruction, I provide additional explanation.

Although most of the regional producers' production of gray portland cement increased irregularly between 1986 and 1988, a majority experienced declines between 1988 and 1990, in some cases to below 1986 levels.<sup>5</sup> Although capacity utilization for many of the regional producers increased in the early part of the period, more than half experienced capacity utilization declines between 1988-90.<sup>6</sup>

A majority of the regional producers' shipments to the region declined between 1988-90, in some cases by as much as

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<sup>3</sup> See Atlantic Sugar v. United States, 744 F.2d 1556, 1562 n.27 (Fed. Cir. 1984); CEMEX S.A. v. United States, 790 F. Supp. 290 (Ct. Int'l Trade 1992), aff'd, \_\_\_ F.2d \_\_\_ (1993); Mitsubishi Materials, Slip Op. 93-62 at 19-20.

<sup>4</sup> USITC Pub. 2376 at 23-24, 27 n.77, 29. The court, however, instructs that I provide further explanation of my analysis of the plant-by-plant information. Slip. Op. at 21. This instruction is particularly curious, as my discussion of plant-by-plant information in this case was substantially more detailed and analytical than then-Commissioner Lodwick's discussion of such information in Gray Portland Cement and Cement Clinker from Mexico, Inv. No. 731-TA-451 (Final), USITC Pub. 2305 (August 1990) (compare USITC Pub. 2376 at 23-24, 29 with USITC Pub. 2305 at 66), which the Court of International Trade found sufficient on review. CEMEX S.A. v. United States, 790 F. Supp. 290 (Ct. Int'l Trade 1992), aff'd, \_\_\_ F.2d \_\_\_ (1993).

<sup>5</sup> Report at Appendix C (Table C-1). In characterizing these trends, I have considered the total number of plants operated by the regional producers, rather than the number of regional producers.

<sup>6</sup> Report at Appendix C (Table C-1).



20%.<sup>7</sup> The total and unit value of these shipments declined irregularly for virtually every regional producer during the entire period of the investigation.<sup>8</sup> All but one of the regional producers for which information was available, reported an increase in inventories during the period.<sup>9</sup> Almost all regional producers suffered declines in levels of employment, hours worked, and wages and total compensation paid.<sup>10</sup>

Net sales for most of the regional producers declined during the period of the investigation, as did operating and net income.<sup>11</sup> Not unexpectedly, operating and net income margins, whether as a ratio to net sales or return on total assets, declined as well for most producers.<sup>12</sup>

Accordingly, I conclude as I did in the final determination that, "in most cases, the company specific information did not reveal any significantly different performance than did the industry information as a whole."<sup>13</sup>

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<sup>7</sup> Report at Appendix C (Table C-2).

<sup>8</sup> Report at Appendix C (Table C-2).

<sup>9</sup> Report at Appendix C (Table C-5).

<sup>10</sup> Report at Appendix C (Table C-11).

<sup>11</sup> Report at Appendix C (Table C-12).

<sup>12</sup> Report at Appendix C (Table C-12).

<sup>13</sup> USITC Pub. 2376 at 24 (footnote omitted).

## II. Analysis of Imports from Japan Alone

Approximately eight months prior to the affirmative determination in Gray Portland Cement and Cement Clinker from Japan, the Commission reached an affirmative determination of material injury to a regional industry by reason of less than fair value imports of cement from Mexico.<sup>14</sup> The regional industry at issue there encompassed all of the regional industry at issue here. Thus, in reaching my affirmative determination and within my judicially approved discretion,<sup>15</sup> I cumulated the volume and price effects of imports from Mexico entered prior to the imposition of the antidumping order with those of imports from Japan. I further explained that based on the record, I would have found material injury absent cumulation.<sup>16</sup>

The court, however, directs that I ignore the lingering effects of the unfairly traded Mexican cement on the regional industry and consider, with "full and complete explanation, only

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<sup>14</sup> Gray Portland Cement and Cement Clinker from Mexico, Inv. No. 731-TA-451 (Final), USITC Pub. 2305 (August 1990).

<sup>15</sup> Chaparral Steel Co. v. United States, 901 F.2d 1097, 1105-06 (Fed. Cir. 1990).

<sup>16</sup> USITC Pub. 2376 at 36 n.93. In making that conclusion, I noted both the steady increase in Japanese imports until 1990, and the substantial underselling by the Japanese imports, which had led to the suppression and depression of prices for the domestic like product. The reasoning behind my determination concerning the injurious effects of dumped imports from Japan alone was the same as that set forth in the opinion in support of the conclusion that the regional industry was materially injured by reason of cumulated imports. See United Engineering and Forging v. United States, 779 F. Supp. 1375, 1393 (Ct. Int'l Trade 1991).

cement from Japan."<sup>17</sup> Though I continue to believe that cumulating the adverse effects of unfairly traded cement from Japan with the lingering adverse effects of cement from Mexico is within my discretion and appropriate, I discuss below only unfair imports from Japan.

Imports of cement from Japan into the region more than quadrupled between 1986-89 (from 349,000 short tons to 1.6 million short tons), declining slightly in 1990.<sup>18</sup> As a share of the quantity of total consumption in the region, cement from Japan increased from 4.9% in 1986 to 18.2% in 1989, declining to 14.9% in 1990.<sup>19</sup>

Price comparisons (based on producers' and importers' questionnaire data), between the subject imports and the domestic product were available for four different market areas within the region, for periods varying between non-consecutive twelve months, up to all five years of the investigation. Cement from Japan undersold the domestic product in 188 of 191 direct

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<sup>17</sup> Slip. Op. at 31. The court has previously expressed the view that the Commission lacks authority to consider lingering effects of unfair imports in a material injury analysis. Chr. Bjelland Seafoods A/C v. United States, No. 92-196 (Ct. Int'l Trade October 23, 1992), appeal docketed, No. 93-1235 (Fed. Cir. March 4, 1993), appeal dismissed as premature (June 15, 1993). I note that a majority of the Commission authorized appeal of the court's determination in that case.

<sup>18</sup> Report at A-60 (Table 28). In fact, during the last three years of the period of investigation, imports from Japan far exceeded imports from Mexico. Id.

<sup>19</sup> Report at A-60 (Table 28).

comparisons, by margins as high as 17.2%.<sup>20</sup>

As discussed at length in my original determination, cement is highly fungible, its sales are sensitive to price changes, and demand is unlikely to change in response to changes in price. Thus, in response to the increasing presence of the less than fair value Japanese cement in Southern California, regional producers faced a Hobson's Choice: either continue to lose market share to the unfairly traded imports or lower prices in an effort to maintain market share. Either choice would have adverse consequences. The record demonstrates that the regional producers chose the latter. Prices of regionally produced cement declined substantially throughout the period. Average net sales price per short ton fell from \$61.11 in 1986 to \$52.94 in 1988, a 13% decline.<sup>21</sup> Average net sales prices rebounded slightly, by \$1.75, between 1988-90.<sup>22</sup>

As a result of the subject import's dramatic increase in market share, consistent and substantial margins of underselling,

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<sup>20</sup> Report at A-66-69 (Tables 31-34). Purchasers' price data also showed underselling by dumped imports of Japanese cement, albeit in fewer instances. Report at A-69 and Appendix F, Tables F-1-F-11. In 123 of the 240 possible price comparisons, Japanese cement was priced lower than domestic cement, by margins ranging from less than 0.05 percent to 14.0 percent. In 59 of those 240 months, domestic and Japanese cement were priced the same, and in the remaining 58 months, domestic cement was priced below Japanese cement by margins ranging from less than 0.05 percent to 6.9 percent. Id.

<sup>21</sup> Report at A-36 (Table 14).

<sup>22</sup> Report at A-36 (Table 14).

and the overall decline in the average net sales price of the regional product, I find that the dumped Japanese cement had a price depressing or suppressing effect.

The reasoning underlying my original determination of material injury by reason of cumulated imports applies equally to an analysis of the effects of imports from Japan alone, and supports the conclusion that dumped imports from Japan are a cause of material injury in this case. Therefore, based on the above discussion, as well as the analysis set forth in my original determination, I determine that dumped imports from Japan are a cause of material injury to producers of all or almost all cement in the Southern California region.

### III. Effect of Cost Declines on Prices

Finally, although the statute is silent on whether I am to consider the effect of declining costs on prices and, at least one judge has held that I have no such obligation,<sup>23</sup> the court instructs that I am "to explain the impact of these [declining] cost trends upon prices."<sup>24</sup> Though I will continue to be guided by the absence of such a requirement in the statute, as well as

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<sup>23</sup> British Steel Corp. v. United States, 593 F. Supp. 405, 412 (Ct. Int'l Trade 1984) (the statutory requirement that the Commission consider the issue of price undercutting "focuses solely on prices and does not mandate any cost analysis or adjustment of prices for cost factors") (emphasis in original).

<sup>24</sup> Slip. Op. at 36. I would also note that the respondents offered little, if any, evidence during the investigation attributing declining prices to declining costs.

judicial precedent, I consider below the effect of cost declines on prices.<sup>25</sup>

As discussed above, average net sales prices per short ton declined by more than \$8.17 between 1986-88, and by \$6.42 during the entire period.<sup>26</sup> In contrast, the cost of goods sold per short ton declined only \$5.02 between 1986-88, and \$5.31 for the entire period.<sup>27</sup> Thus, even if the suggestion is that each decline in the cost of goods sold will result in a parallel decline in the sales price, here, the cost declines fail to explain the price depression and suppression experienced during the period of investigation.

Absent the presence of unfair imports in the marketplace, during an upturn in the business cycle of a commodity industry, such as the one that occurred in this regional industry during the period 1986 through 1989, market conditions generally will bear increased, or at least stable, prices.<sup>28</sup> Cost declines,

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<sup>25</sup> In addition, I note that such an exercise is of limited relevance in examining price depression. See "Views of Vice Chairman Peter S. Watson and Commissioner Janet A. Nuzum on Remand" at 19, n.76.

<sup>26</sup> Report at A-36 (Table 14).

<sup>27</sup> Report at A-36 (Table 14). The variance analysis also indicates that price declines were greater than cost declines. Report at A-37 (Table 15).

<sup>28</sup> As discussed by my colleagues, Vice Chairman Watson and Commissioner Nuzum, cement production is capital intensive, and hence subject to high fixed costs. Thus, as production increases and approaches the limits of capacity, unit costs decline. In addition, supplies in the market tighten (absent increased supplies from sources outside the region), which will tend to  
(continued...)

therefore, are typically not passed on to the consumer in the form of lower prices during periods of increased demand. In a capital intensive commodity industry, such as the regional industry here, profits generated by maintaining a sales price as high as market conditions will allow in the wake of cost declines often will be greater than those earned by increasing market share through price reductions. Such increases in market share are likely to be short-lived, as the prices are likely to decline throughout the market, and market shares readjust. Consequently, in the cement industry, a decline in costs is likely to cause little if any, decline in sales price. Prices in the market declined significantly during the period 1986 to 1989, before recovering somewhat in 1990.<sup>29</sup> Therefore, I conclude that the dumped imports of cement from Japan were a cause of price depression and suppression.

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<sup>28</sup> (...continued)

result in increased prices, and consequently increased revenues and operating margins.

<sup>29</sup> In this regard, I disagree with respondents' argument that "real" prices increased during the period of the investigation. I join in my colleagues' discussion of this issue. See "Views of Vice Chairman Peter S. Watson and Commissioner Janet A. Nuzum on Remand" at 9, n.42.

IV. Conclusion

Based upon the reasons expressed in my original determination as well as those discussed above, I reaffirm my determination that the producers of all or almost all gray portland cement and cement clinker in the Southern California region are materially injured by reason of less than fair value imports of the subject merchandise from Japan.



VIEWS OF COMMISSIONER CAROL T. CRAWFORD  
REMAND OF GRAY PORTLAND CEMENT AND CEMENT CLINKER FROM JAPAN  
INV. NO. 731-TA-461 (FINAL)

In response to the remand order of the U.S. Court of International Trade (CIT),<sup>1</sup> I determine that an industry in the United States is not materially injured or threatened with material injury by reason of imports of gray portland cement and cement clinker from Japan that the Department of Commerce has determined are sold in the United States at less than fair value (LTFV).<sup>2</sup> My determination is based on my de novo review of the record obtained in this investigation.

I. Like Product and Domestic Industry

In the final determination, all Commissioners determined that the like product in this investigation includes gray portland cement and cement clinker; that domestic grinding-only operations should be included in the domestic industry; and that no related parties should be excluded from the domestic industry. I concur in these findings.

II. Regional Industry

Both Petitioners and respondents assert that the Commission should make its determination by employing the regional industry analysis of 19 U.S.C. §1677(4)(C), which provides:

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<sup>1</sup> Mitsubishi Materials Corp. v. United States, Slip Op. 93-62 (CIT Apr. 27, 1993).

<sup>2</sup> Material retardation is not an issue in this investigation and will not be discussed.

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

(i) the producers within such market sell all or almost all of their production of the product like in question in that market, and

(ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States.

In such appropriate circumstances, material injury, the threat of material injury, or material retardation of the establishment of an industry may be found to exist with respect to an industry even if the domestic industry as a whole, or those producers whose collective output of a like product constitutes a major proportion of the total domestic production of that product, is not injured, if there is a concentration of subsidized or dumped imports into such an isolated market and if the producers of all, or almost all, of the production within that market are being materially injured or threatened by material injury, or if the establishment of an industry is being materially retarded, by the reason of the subsidized or dumped imports.

The CIT entered its remand order in this investigation on April 27, 1993. Shortly thereafter, on May 25, 1993, the CIT in Texas Crushed Stone Co. v. United States<sup>3</sup> affirmed the Commission's determination in Crushed Limestone from Mexico, USITC Pub. 2533, Inv. No. 731-TA-562 (Prelim.) (July 1992).<sup>4</sup> That CIT opinion sets

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<sup>3</sup> Texas Crushed Stone Co. v. United States, Slip-Op. 93-81 (CIT May 25, 1993).

<sup>4</sup> Although Commissioner Brunsdale adopts her original views as her views on remand, she expressly notes her approval of Commissioner Crawford's discussion of Texas Crushed Stone Co. and its application to this investigation.

forth clearly and concisely the legal requirements of the Commission in a regional industry analysis:

The statute sets up three prerequisites which must be satisfied before the Commission can reach an affirmative determination under a regional industry analysis. The Commission must determine that there is: (1) a regional market satisfying the requirements of the statute, (2) a concentration of dumped imports into the regional market, and (3) material injury or threat thereof to producers of all or almost all of the regional production, or material retardation to the establishment of an industry due to the subsidized or dumped imports. The Commission will move on to the next step only if each preceding step is satisfied.<sup>5</sup>

Petitioners assert that Southern California meets the statutory criteria for a regional market. Respondents, on the other hand, assert that the statutory criteria are satisfied by the regional market consisting of the entire state of California. My analysis of each of these asserted regional markets follows.

A. Southern California

Requirements of a Regional Market

As required by Texas Crushed Stone, the Commission must determine whether Southern California is a regional market that satisfies the requirements of the statute. The statute sets out two requirements to define a regional market, 19 U.S.C. §1677(4)(C)(i) and (ii), both of which must be satisfied.

In determining whether these two requirements are met, the Commission measures 1) the sales within the market by producers in

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<sup>5</sup> Texas Crushed Stone, Slip Op. at 10.

the market, and 2) the demand within the market that is supplied by producers located outside the market. The plain language of the statute limits the Commission's analysis to these two measurements. As a result, the "market realities" discussed by the majority in this investigation are not relevant to the determination of whether a market meets the requirements of the statute. Similarly, the characteristics of a product (e.g. a low value-to-weight ratio, fungibility, etc.) are not relevant. While a product's characteristics may determine sales and shipment patterns, it is the sales and shipment data -not the product's characteristics- that are relevant under the statute.

As discussed above, Texas Crushed Stone sets forth three distinct prerequisites to be met in a regional analysis. The first is that there be a regional market; the second is that there be a concentration of subject imports in the regional market. Accordingly, determining whether there is a concentration of imports is a separate test, not a factor in defining the regional market.<sup>6</sup>

Furthermore, it is not necessary to consider market realities, imports, product characteristics or other matters to choose between or among regional markets if more than one market satisfies the requirements of the statute. In the event that more than one region satisfies the first prerequisite of the statute that a regional market exists, the Commission proceeds to the next step

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<sup>6</sup> See also Crushed Limestone from Mexico at 13; Nepheline Syenite from Canada, Inv. 731-TA-525 (Final), USITC Pub. 2502 (April 1992) at 15-16.

and determines whether the import concentration prerequisite is met.

If imports are concentrated in more than one regional market, the Commission then conducts an injury analysis in each regional market that meets the first two prerequisites. If injury is found to the producers of all or almost all the production in any properly defined regional market, the prerequisites to an affirmative determination have been met. In the event that multiple regional markets are asserted, the Commission can limit its analysis to the two markets asserted by the parties as most appropriate under the statute, as is the case in this investigation.

In this investigation, producers in Southern California shipped the following percentages<sup>7</sup> of their production to destinations within Southern California:

<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>
85.7%	87.3%	84.8%	81.9%	82.6%

In its final determination, the majority found that the first requirement of the statute, i.e. that Southern California producers "sell all or almost all" of their production within Southern California, is satisfied. Specifically, the plurality found that the 82.6 percent of production shipped within Southern California constitutes "all or almost all" of the production.

I disagree that 82.6 percent constitutes "all or almost all" of Southern California production. The statute does not provide

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<sup>7</sup> Staff Report at A-18, Table 4.

a numerical definition of "all or almost all."<sup>8</sup> Nor have the Commission's reviewing courts addressed what the terms "all or almost all" mean in the context of a regional market determination. The CIT has, however, analyzed the identical terms in the context of whether the statutory requirement has been met that the producers of "all or almost all" of the production within a regional market are materially injured. In Atlantic Sugar, Ltd. v. United States, the CIT ruled that approximately three-fourths of regional production was "a level clearly below the amount required" to constitute "all or almost all" of regional production in the context of an injury analysis.<sup>9</sup>

By definition, "all" is 100 percent of Southern California production. "Almost all", therefore, must be a percentage of production that is very nearly 100 percent. On its face, 82.6 percent is not "almost" 100 percent. It is closer to the approximately 75 percent that the CIT has found to be clearly below the amount required to constitute "almost all" of regional production. Moreover, had the Congress intended a lower

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<sup>8</sup> 82.6 percent is at the very low end of the range that the Commission previously has found sufficient. See, e.g., Sugars and Sirups from Canada, Inv. No. 731-TA-3 (Final) USITC Pub. 1047 (1980) at 8 (96% found to be sufficient); Frozen French Fried Potatoes from Canada, Inv. No. 731-TA-93 (Preliminary), USITC Pub. 1259 (1982) at 7 (66% found not to be sufficient); Portland Hydraulic Cement from Australia and Japan (Final), USITC Pub. 1310 (1982) at 4 (93% found to be sufficient); Fall Harvested Round White Potatoes from Canada, 731-TA-124 (Final), USITC Pub. 1463 (1983) at 7 (84.7% found to be sufficient); Offshore Platform Jackets and Piles from the Republic of Korea and Japan, 701-TA-248, 731-TA-259 and 260 (Final), USITC Pub. 1848 (1986) at 8 (100% found to be sufficient); Operators for Jalousie and Awning Windows from El Salvador, 701-TA-272, 731-TA-319 (Final), USITC Pub. 1934 (1987) (over 80% found to be sufficient).

<sup>9</sup> 573 F. Supp. 1142 (1983) at 1145 (reversed on other grounds).

percentage, it would have more likely used substantial, majority, large majority, or similar terms to denote something less than "all or almost all."

For these reasons, I determine that Southern California producers do not sell all or almost all of their production in Southern California. Because Southern California as a region does not satisfy one of the two requirements of the statute, it is not a regional market. As a result, one of the prerequisites for an affirmative determination under a regional industry analysis is not present.

B. The State of California

Requirements of a Regional Market

I determine that the state of California ("California") constitutes a regional market that satisfies the two regional market requirements of the statute. In 1990, 93 percent of California production was shipped to destinations within California. As discussed previously, while there is no numerical definition of "all or almost all" regional production, "almost all" must be almost 100 percent. I believe that 93 percent is sufficiently close to 100 percent to satisfy the statutory requirement.

California also meets the second statutory regional market requirement that "the demand in that market is not supplied, to any substantial degree", by domestic producers located outside of

California.<sup>10</sup> In 1990, domestic producers located outside of California accounted for 3.5 percent of consumption within California. I conclude that a market share of 3.5 percent does not constitute supplying the demand within California to any substantial degree.<sup>11</sup>

#### Concentration of Dumped Imports

Having determined that California satisfies the two statutory requirements of a regional market, I proceed to the next step under Texas Crushed Stone, that is, determining whether subject imports are concentrated within the regional market. The statute does not define concentration of dumped imports. The Commission generally has found concentration to exist where 80 percent or more of total imports into the United States are being sold in the regional market.<sup>12</sup> The Commission has accepted import levels as low as 68

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<sup>10</sup>19 U.S.C. §1677(4) (C) (ii).

<sup>11</sup> The Commission has stated that no precise numerical cutoff exists for outside supply above which an area is disqualified from regional industry status. See Cut-to-Length Carbon Steel Plate from Germany, Inv. No. 731-TA-147 (Preliminary-Remand), USITC Pub. 1550 (1984). In Atlantic Sugar, Ltd. v. United States, however, the Court of International Trade suggested that 12 percent outside supply may be too high to be considered insubstantial "in the abstract." 2 CIT 295, at 298 (1981). The Commission has found on several occasions that percentages of outside supply of less than 10 percent were acceptable. See, e.g., Sugars and Sirups from Canada, Inv. No. 731-TA-3 (Final), USITC Pub. 1047 (1980) (5.5% found acceptable); Portland Hydraulic Cement from Australia and Japan, Inv. Nos. 731-TA-108 and 109 (Preliminary), USITC Pub. 1310 (1982) (less than 10% found acceptable), and found in one case that 30 percent was too large. See Frozen French Fried Potatoes from Canada, Inv. No. 731-TA-93 (Preliminary), USITC Pub. 1259 (1982).

<sup>12</sup> See, e.g., Portland Hydraulic Cement from Australia and Japan, Nos. 731-TA-108 and 109 (Preliminary), USITC Pub. 1310 (1982) (99%); Sugars and Syrups from Canada, Inv. No. 731-TA-3 (Final), USITC Pub. 1047 (1980) (96.7%); Offshore Platform Jacket and Piles from the Republic of Korea and Japan, 701-TA-248, 731-TA-259 and 260 (Final), USITC Pub. 1848 (1986) (100%). Another Commission determination questioned whether the concentration level was sufficient when the



percent and 43 percent as satisfying the statutory requirement to find concentration.<sup>13</sup> However, these determinations were made during the "formative stages of the administration of the new law", and do not, in my judgment, comport with the statutory requirement.<sup>14</sup>

Fairness in application of the statute also argues for requiring a high level of concentration of dumped imports in the regional market. A regional analysis permits the imposition of antidumping duties on all subject imports into the entire United States based upon an injury determination that examines the effect of those imports on only a subset, *i.e.* regional producers. Thus in a regional analysis, there is no examination of domestic producers or the domestic industry outside the regional market, and injury may or may not exist. If a high percentage of imports is concentrated in the regional market where injury is found, duties will be imposed on imports that have been found to cause the injury, as the statute intended. The lower the test of concentration, however, the greater the volume of imports that will

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percentages of imports ranged from 66.3 percent to 79.2 percent, Certain Welded Carbon Steel Pipes and Tubes from Taiwan, Inv. No. 731-TA-349 (Final), USITC Pub. 1994 (1987), and in one case the Commission found insufficient concentration when the imports into the region ranged from 69.2 percent to 84.1 percent during the period of investigation. Certain Welded Carbon Pipes and Tubes from the Philippines and Singapore, Inv. Nos. 731-TA-293, 294 and 296 (Final), USITC Pub. 1907 (1986).

<sup>13</sup> Concentration has been found at levels as low as 68 percent, Fall Harvested Round White Potatoes from Canada, Inv. No. 731-TA-124 (Final), USITC Pub. 1463 (1983), and 43 percent, Certain Steel Wire Nails from the Republic of Korea, Inv. No. 731-TA-26 (Final), USITC Pub. 1994 (1980).

<sup>14</sup> See Atlantic Sugar, Ltd. v. United States, 529 F. Supp. 916 (1981) at 920.

be penalized without having received the benefit of an injury test. The remedial purpose of the antidumping law will not be served and the concept of fundamental fairness will be violated.

In this investigation, 67.5 percent of subject imports were shipped to destinations within the California market in 1990.<sup>15</sup> Subject imports shipped to other markets represent a significant volume of subject imports --nearly one-third. I do not believe two thirds of subject imports accurately reflects the statutory requirement for finding concentration of imports. Moreover, fully one third of all subject imports could be subject to antidumping duties without the benefit of an injury test if concentration were to be found at this level. In its most recent determination, the Commission found levels below 60 percent to be insufficient to satisfy the statute's concentration requirement.<sup>16</sup> The level of concentration in this case, i.e. 67.5 percent is more consistent with the Commission's determination in Crushed Limestone than in its determinations involving concentration at or above 80 percent. In light of these determinations and the remedial purpose of the antidumping law, I determine that subject imports are not

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<sup>15</sup> There were no subject imports in the California region in the last two months of 1990. This may affect the market share of subject imports in the evaluation of the volume of subject imports in an injury analysis. However, it does not affect my determination regarding concentration of imports because concentration is determined by the ratio of imports into a region to total imports, not market share. Assertions that respondents attempted artificially to decrease the import concentration ratio amount to "pure conjecture." See Texas Crushed Stone, Slip Op. at 20-21.

<sup>16</sup> Crushed Limestone at 13-14.

concentrated in the California market.<sup>17</sup>

III. No Material Injury or Threat of Material Injury to a Separate Industry by Reason of LTFV Imports

Because of my finding that Southern California does not satisfy both requirements of 19 U.S.C.1677(4)(C)(i) and (ii), it does not meet the prerequisite of being a regional market. In addition, although the region of California meets the statutory requirements for a regional market, the prerequisite that subject imports be concentrated in the California market is not met. Accordingly, I determine that the domestic industry in this investigation is not materially injured or threatened with material injury by reason of LTFV imports of gray portland cement and cement clinker from Japan.

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<sup>17</sup> Had I found, as the majority found in the final determination, that Southern California constituted a regional market, I would have determined that the concentration requirement was not met. In 1990, only 61.2 percent of subject imports were shipped to Southern California, a level very close to the level in Crushed Limestone. Using the same analysis as above, I would determine that subject imports were not concentrated in Southern California.

