Vector Supercomputers From Japan (Views on Remand)

Investigation No. 731-TA-750 (Remand)

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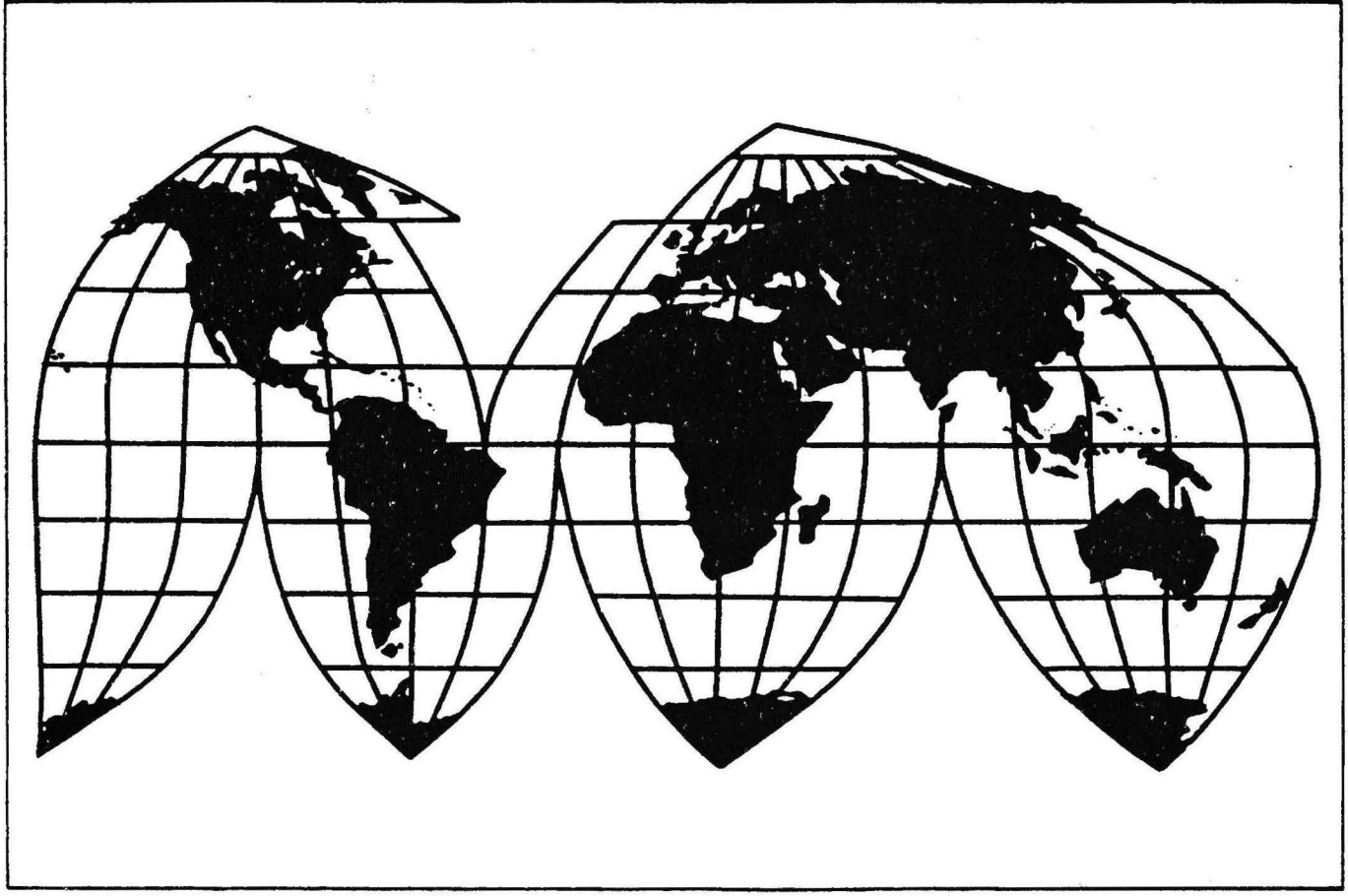
U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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BACKGROUND

In October 1997, the Commission determined that an industry in the United States was threatened with material injury by reason of imports of vector supercomputers from Japan.[12] That determination was appealed to the U.S. Court of International Trade ("Court"). On December 15, 1998, the Court upheld the Commission's determination in all respects except two. First, the Court remanded the investigation to the Commission because it "[could not] conclude that the Commission made the requisite determination that the LTFV imports themselves made a material contribution to the threat of material injury." *NEC Corp. v. Department of Commerce*, Consol. Court No. 97-11-01967, slip op. 98-164, at 31 (Dec. 15, 1998). In addition, the Court required further explanation or reconsideration of the determination that future imports would likely suppress or depress domestic prices. *Id.* at 34 (Dec. 15, 1998). On remand, we determine that the industry in the United States producing vector supercomputers is threatened with material injury by reason of imports of vector supercomputers from Japan that the Department of Commerce (Commerce) has determined are sold at less than fair value (LTFV).[13]

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[12] *Vector Supercomputers from Japan,* Inv. No. 731-TA-750 (Final) USITC Pub. 3062 (October 1997).

[13] Chairman Bragg, Vice Chairman Miller, and Commissioner Koplan reach affirmative determinations on remand. Chairman Bragg presents separate views. Commissioner Askey reaches a negative determination in this remand investigation. Commissioners Crawford and Hillman did not participate in this remand investigation.

VIEWS OF THE COMMISSION

I. LEGAL STANDARD FOR DETERMINING THREAT OF MATERIAL INJURY

Section 771(7)(F) of the Act directs the Commission to determine whether the U.S. industry is threatened with material injury by reason of subject imports by analyzing whether "further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted."[14] The statute sets forth nine specific factors that the Commission must consider "among other relevant economic factors" in making its determination.[15] The Commission may not make such a determination "on the basis of mere conjecture or supposition," and considers the threat factors "as a whole" in making its determination whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued.[16]

The Court emphasized that the Commission must find that material injury or threat of material injury would be "by reason of" the subject imports. In other words, the Commission must find a causal connection between the subject imports and the likely material injury to the domestic industry. *NEC* at 26. Relying on the Federal Circuit's decision in *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997), the Court held that "the statute requires adequate evidence to show that the harm will occur by reason of the LTFV imports, not by reason of a minimal or tangential contribution to material harm caused by LTFV goods." *NEC* at 27.

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[14] 19 U.S.C. § 1677(7)(F)(ii).

[15] 19 U.S.C. § 1677(7)(F)(i).

[16] 19 U.S.C. § 1677(7)(F)(ii).

The Court criticized the Commission's final determination because it "did not undertake any analysis to distinguish between the contribution to material harm caused by LTFV goods and these economic factors unrelated to the subject imports." *NEC* at 29-30. The Court stated that the Commission's refusal to "weigh" causes suggested that the Commission "may have adopted the reasoning that any contribution to material harm caused by LTFV imports constitutes sufficient causation to satisfy the 'by reason of' test." *NEC* at 30. The Court held that such a test is contrary to the causation standard articulated by the Federal Circuit in *Gerald Metals*. *NEC* at 30.

We agree that the "by reason of" test requires more than a *de minimis* (*i.e.*, minimal or tangential) contribution to material injury or threat thereof.[17] We also agree that it is appropriate to consider significant, non-subject import economic factors that also may contribute to material injury or threat of material injury. The statute instructs the Commission to consider "other relevant economic factors" in analyzing threat of material injury.[18] Moreover, the legislative history provides that the Commission "must examine other factors to ensure that it is not attributing injury from other sources to the subject imports."[19] The case law likewise has stressed the requirement to take other factors into account in evaluating material injury or threat of material injury by reason of subject imports. *See Suramerica de Aleaciones Lamidadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994) (in evaluating threat of material injury,

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[17] *Magnesium from Ukraine*, Inv. No. 731-TA-698 (Remand), USITC Pub. No. 3113 at 3 (June 1998).

[18] 19 U.S.C. § 1677(7)(F)(i).

[19] Statement of Administrative Action of Uruguay Round Agreements Act, H. Doc. 100-316 at 852 (Sept. 27, 1994) ("SAA").

Commission must examine "any other factors that tend 'to make the existence of a [threat of material injury] more probable or less probable than it would be without the [factors],'" *quoting* Fed. R. Evid. 401; *Gerald Metals*, 132 F.3d at 722-23 (evaluation of non-subject imports appropriate in certain circumstances).

We have attempted in this remand determination to address the Court's concerns and more fully explain how we have taken into account the significant, non-subject import economic factors in reaching our conclusion that the domestic industry is threatened with material injury by reason of subject imports. In other words, having taken into account the significant economic factors unrelated to imports, we conclude that the subject imports themselves contribute in a more than *de minimis* way to the threat of material injury to the domestic industry.

We note, however, that we perceive limits on the extent to which the Commission can and must take these other factors into account or, in the words of the Court, "distinguish between the contribution to material harm caused by LTFV goods and these economic factors unrelated to the subject imports." *NEC* at 30. In particular, the SAA states that in examining other causes of injury, the Commission is not required to "isolate" the effects of subject imports from other factors contributing to injury.[20]

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[20] SAA at 851. The SAA expressly adopts language from a GATT panel report in *United States -- Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, Report of the Panel Par. 555, GATT Doc. ADP87 (Nov. 30, 1992), which ruled that "the requirement 'not to attribute injuries caused by other factors to the imports from Norway ... did not mean that, in addition to examining the [volume and price] effects of the imports [and their consequent impact] ... the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury cause by the imports from Norway.'" *See also* H. Rep. No. 96-317 at 47 (1979) (in taking other economic factors into account, the Commission is not required "to make any precise, mathematical calculations, as to the harm associated with respect to such factors").

Nor do we understand the Court's opinion -- or the Federal Circuit's decision in *Gerald Metals* -- to require the Commission to "weigh" the various causes of injury or threat in order to rank causal factors in order of importance. Thus, in our view, we are not required to determine that subject imports contribute as much or more than any other economic factors. Rather, we understand the Court's opinion and the other legislative and judicial authority discussed above, to mean that the Commission may not analyze subject imports in a vacuum. Instead, we fully consider other significant economic factors in determining that subject imports themselves contribute in a more than *de minimis* way to material injury or threat.

In this sense, our causation analysis in antidumping and countervailing duty investigations is very different from the causation analysis we must undertake in "safeguard" investigations under section 201 of the Trade Act of 1974, pursuant to which the Commission investigates whether increased imports are a "substantial cause of serious injury, or the threat thereof, to the domestic industry."[21] That statute requires the Commission to weigh causes and determine that imports contribute as much or more than any other factors in causing serious injury or threat of serious injury to the domestic industry.[22]

Thus, in our injury analysis in antidumping and countervailing duty investigations, we may

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[21] 19 U.S.C. § 2252(b)(1)(A).

[22] 19 U.S.C. §2252(b)(1)(B) ("the term 'substantial cause' means a cause which is important and not less than any other cause"). *See also, e.g.*, *Wheat Gluten*, Inv. No. TA-201-67, USITC Pub. No. 3088 at I-14 (March 1998). ("The term 'substantial cause' is defined in section 202(b)(1)(B) to mean 'a cause which is important and not less than any other cause.' Thus, the increased imports must be both an important cause of the serious injury or the threat thereof, *and* a cause that is equal to or greater than any other cause. The latter requires a weighing of causes.") (citation omitted); *Broom Corn Brooms*, Inv. Nos. TA-201-65 and NAFTA 302-1, USITC Pub. No. 2984 at I-15 (Aug. 1996) (same).

not attribute injury from other sources to the subject imports. Rather, we examine all likely causes of injury in determining whether the subject imports themselves contribute in a more than *de minimis* way to material injury or threat of material injury to the domestic industry.

II. THREAT OF MATERIAL INJURY BY REASON OF LTFV IMPORTS

We have analyzed each of the relevant statutory threat factors and the significant, non-subject import economic factors in this investigation. We reaffirm the conclusion reached in the original determination that the domestic industry is threatened with material injury by reason of imports of vector supercomputers from Japan.[23] With the exception of the effects of subject imports on domestic prices, which is discussed in section III, our analysis of the relevant statutory threat factors and significant, non-subject import factors is discussed below.

The record reflects that there was a significant increase in the volume of subject imports during the latter part of the period of investigation. The volume of subject imports was relatively small in 1994 and 1995, but increased significantly in 1996 and interim 1997, both absolutely and relative to domestic consumption. Although there was [[ ]] subject import shipment of supercomputer systems in each of [[ ]], the number of imported systems shipped increased to [[ ]] in 1996. [[ ]] subject import systems were shipped in interim (January-June) 1997 compared with [[ ]] systems shipped in interim 1996.[24] Based on the number of systems, these shipments of imports accounted for [[ ]] percent of apparent domestic

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[23] Commission's Final Determination, CD 172 at 37-47. Commissioner Koplan, in making a *de novo* review of the record adopts the original like product, and the negative present material injury determination as his own. He also adopts the portion of the threat determination that is not subject to the remand determination.

[24] Final Staff Report, CD 35 at Table IV-2; IV-5.

consumption in 1994, [[ ]] percent in 1995, and [[ ]] percent in 1996. Subject import systems accounted for [[ ]] percent of apparent domestic consumption of systems in interim 1997 compared with [[ ]] in interim 1996.[25] Thus, there were a total of [[ ]] systems shipped during the period of investigation, [[ ]] of which were imported after January 1, 1996. These systems accounted for a significant and increasing percentage of domestic consumption during the latter part of the period of investigation, whether viewed in terms of systems, value of systems, or number of gigaflops.

We find that the large increases in subject import volume and market share during the latter part of the period of investigation, coupled with the fact that there were a significant number of potential sales that were either canceled or postponed because of the pendency of this investigation, indicate the imminent likelihood of substantially increased imports.[26] Perhaps of greatest importance, we find that NEC's initial success in the University Corporation for Atmospheric Research ("UCAR") procurement indicates that Japanese producers are also making inroads into the market for larger, higher value vector supercomputers[27] which offer the highest profit margins.[28]

As discussed in greater detail in the next section of this opinion, we determine that the increased subject imports will enter at prices likely to depress or suppress domestic prices to a significant degree.

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[25] Final Staff Report, CD 35 at Table IV-3, IV-6.

[26] *See* Final Determination, CD 172 at 40-41.

[27] Final Determination, CD 172 at 43, *citing* Table V-1, CR at V-7, PR at V-2.

[28] Final Determination, CD 172 at 32, *citing* CR at VI-3, PR at VI-1.

Japanese producers' capacity increased overall throughout the period of investigation, and is expected to increase in the future.[29] In an industry characterized by a limited number of high-value, custom-configured sales (or leases), capacity appears to be determined primarily by sales volumes rather than production constraints or ceilings.[30] We find, therefore, that there is available capacity in Japan to increase exports to the United States.

We also determine that home market shipments for the Japanese producers have declined throughout the period of investigation, and exports to all other markets also declined from 1995 to 1996.[31] At the same time, exports to the United States increased as a percentage of total shipments of systems.[32]

Inventories of the subject merchandise are not a factor in this investigation because the Japanese producers reported that inventories are [[

]].[33] Finally, as respondents acknowledged, product shifting is not an issue in this investigation because of the excess capacity to produce vector supercomputers in Japan, thereby enabling Japanese producers

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[29] Final Determination, CD 172 at 38, *citing* Table VII-1, CR at VII-7, PR at VII-4, Table VII-2, CR at VII-8, PR at VII-4.

[30] Final Determination, CD 172 at 38-39, *citing* CR at VII-4, PR at VII-2.

[31] Final Determination, CD 172 at 39, *citing* Table VII-1, CR at VII-7, PR at VII-2, Table VII-2, CR at VII-8, PR at VII-4.

[32] Final Determination, CD 172 at 39, *citing* Table VII-1, CR at VII-7, PR at VII-4, Table VII-2, CR at VII-8, PR at VII-4.

[33] Final Determination, CD 172 at 45, *citing* CR at VII-5, PR at VII-3, CR at VII-5, PR at VII-3.

to increase exports to the United States without resorting to production shifting.[34]

We also considered factors other than subject imports that could affect the condition of the domestic industry in the imminent future. In the original determination, the Commission determined that three such non-import factors largely accounted for the injury suffered by the U.S. vector supercomputer industry during the investigation period: the post-Cold War decline in government purchases of supercomputers, the conversion of certain applications from vector to non-vector systems, and the major financial restructuring that Cray undertook partly in response to these events.[35] Thus, our finding of no present material injury by reason of subject imports is based on the fact that economic conditions other than subject imports accounted for the harm experienced by the domestic industry during the period of investigation. We have examined the impact of these factors for purposes of this threat determination.

First, notwithstanding the decline in government purchases over the period of investigation, we expect that government and government-related sales will not decline significantly in the imminent future.[36] These purchases remain significant in both volume and value.[37] We note that government and government-related purchases cover a wide variety of applications, some of which, such as weather and geological research, are unlikely to be affected

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[34] Final Determination, CD 172 at 16, *citing* Fujitsu's Prehearing Brief at 91.

[35] Final Determination, CD 172 at 36.

[36] Final Staff Report, CD 35 at II-1(indicating that government purchases are projected to "slowly decline").

[37] For example, sales and leases of vector supercomputer systems subject to "Buy American" restrictions totaled [[
]]. *See also* Figure II-1 (breakdown of number of systems sold and revenue by industry). Final Staff Report, CD 35 at II-2-3.

by the decline in defense spending that followed the end of the Cold War. Accordingly, while this decline in demand contributed to Cray's poor performance during the period of investigation, we find that the impact from that decline will lessen to some extent in the imminent future. However, the decline in government purchases means that the domestic industry will face direct competition from subject imports for an increasing proportion of its production.

We also considered whether the substitution of non-vector for vector supercomputers in certain applications will reduce demand for vector supercomputers in the near term. Initially, we note that vector technology is the only feasible solution for a core group of applications,[38] and substitution of non-vector supercomputers for vector supercomputers can impose significant costs.[39] We also note that the value of vector supercomputers shipped to U.S. customers increased and then plateaued at the end of the investigation period, indicating that the erosion in demand for vector supercomputers may have diminished somewhat.[40] In addition, a survey of large supercomputer purchasers projected [[ ]] demand for vector supercomputers for 1998-2000.[41] Nevertheless, based on what took place during the period of investigation, it appears that competition from non-vector supercomputers may continue to impact demand for vector supercomputers in the future. However, the competition with non-vector systems occurs primarily at the low end of the vector market (systems valued at $300,000 to $1 million) where the returns also are lower. Competition with the subject imports takes place at the higher end

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[38] Final Staff Report, CD 35 at II-10.

[39] Final Staff Report, CD 35 at II-17.

[40] Final Staff Report, CD 35 at C-3.

[41] Final Staff Report, CD 35 at II-7.

(sales valued at $1 million to $40 million) where each lost sale has a far greater effect on the domestic industry.[42]

Cray underwent a massive restructuring program during the investigative period partly in response to the reduction and change in demand for vector supercomputers. This process generated substantial costs which in large measure accounted for the industry's poor financial performance during the period of investigation. These restructuring costs, however, were essentially fully realized by the end of the investigative period.[43] Therefore, we do not expect that Cray's restructuring will have an adverse impact on the domestic industry in the imminent future. Instead, we expect the restructuring will achieve its goal of making the company more competitive in the changed marketplace. In essence, Cray's restructuring has positioned it to better compete in the commercial arena with both vector and non-vector systems.

Nevertheless, we reaffirm the Commission's original determination that the industry's weakened financial condition due to the substantial restructuring expenses, greater competition from non-vector systems, and lower government purchases render the industry vulnerable to material injury by reason of subject imports.[44] In particular, the precarious financial condition

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[42] Final Staff Report, CD 35 at I-22-23.

[43] Cray's restructuring expenses were substantial during the period of investigation. CD 35 at VI-4.

[44] *See Suramerica*, 44 F.3d 978, 983 *citing* Fed. R. Evid. 401, 19 C.F.R. § 210.42(b)(1994)(the Commission is required to examine "any other factors that tend 'to make the existence of a [threat of material injury] more probable or less probable"); *Calabrian Corporation v. United States*, 16 CIT 342, 353, 794 F. Supp. 377, 387 (1992). ("The current condition of an industry is relevant in the evaluation of whether imports will, in the imminent future, force that industry into a state of material injury . . . The present relative health of an industry is an important indicator as to the imminence of material injury); *Hosiden Corp. V. Advanced Display Mfrs.*, 85 F.3d 1561, 1569 (Fed. Cir. 1996), *quoting Iwatsu Elec. Co., Ltd. V. U.S.*, 15 CIT 44,

makes Cray particularly vulnerable to future adverse price effects from the dumped imports. While Cray has positioned itself to better compete in the marketplace, it has little room to counter the aggressive pricing likely to be presented by the subject imports.

In this context, we find that the subject imports themselves threaten material injury to this vulnerable industry. First, as indicated above, LTFV imports are likely to enter the U.S. market in significant volumes. While the vector supercomputer market is characterized by a relatively small number of purchases in any given year,[45] these purchases can involve significant expenditures, ranging from $300,000 to $1 million per sale up to $40 million or more.[46] Thus, each sale has a significant impact on the vendor's revenues and, as stated above, subject imports likely will take sales from the domestic industry at the high end of the price range. Consequently, the likely significant increase in subject imports discussed above at prices that likely will suppress or depress domestic prices threatens injury to the domestic industry.

Most directly, the likely increase of subject imports will impede the domestic industry's ability to fund research and development.[47] Development of a new generation of vector

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57, 758 F. Supp. 1506, 1518 (1991), "importers take the domestic industry as they find it"); *Accord, Goss Graphics Systems, Inc. v. United States*, slip op. 98-148 (Oct. 16, 1998). *See also*, SAA at 885 (While [factors other than subject imports], in some cases, may account for the injury to the domestic industry, they also may demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports. In threat determinations, the Commission must carefully assess current trends and competitive conditions in the marketplace to determine the probable future impact of imports on the domestic industry and whether the industry is vulnerable to future harm.")

[45] Final Staff Report, CD 35 at VI-2.

[46] Final Staff Report, CD 35 at I-22.

[47] Final Determination, CD 172 at 46.

supercomputers, which entails large capital expenditures, is absolutely critical to the industry's performance and survival.[48] Technical innovation and thus research and development are imperative in this industry. As such, failure of the domestic industry to obtain an adequate rate of return on any given generation of product and even the loss of one substantial sale can severely handicap the industry's ability to fund the next generation product.

We recognize that the significant non-subject import factors discussed above will continue to contribute to the condition of the domestic industry. However, based on our examination of all the factors likely to affect the domestic industry in the imminent future, including the significant, non-import economic factors, we determine that the subject imports themselves make a more than *de minimis* contribution to the threatened material injury to the domestic industry.[49]

III. SUBJECT IMPORTS ARE LIKELY TO HAVE SIGNIFICANT NEGATIVE EFFECTS ON DOMESTIC PRICES

The Court has instructed the Commission to further explain its findings in the original determination that "increased subject imports will enter at prices likely to depress or suppress domestic prices to a significant degree."[50] The Court stated that "the Commission has failed to explain how bids involving imports would affect future prices when price has not been previously determinative."[51] Based on the record in this investigation, we determine that increased subject imports will enter at prices likely to depress or suppress domestic prices to a significant degree.

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[48] Petitioner's Prehearing Brief at 28.

[49] Finally, we do not determine that, but for the suspension of liquidation in April, 1997, we would have found that the domestic industry is materially injured by reason of the subject imports.

[50] Final Determination, CD 172 at 43.

[51] *NEC* at 34.

While price may not play the same role in each vector supercomputer transaction, it is clear from the record that price is a critical factor in all purchasing decisions. Although the record does not contain a tally of purchasers who ranked price as a factor in their purchasing decision, we obtained equivalent information in the form of narrative information in the questionnaires, testimony, and staff interviews with vector supercomputer producers, importers, and purchasers that provides the basis for our finding that price is an important factor in purchasing decisions.

As discussed in the original determination, transactions in this industry are consummated through a bidding procedure. Although each vector supercomputer purchaser employs unique specifications and criteria for assessing the bids received, a further discussion of the different types of transactions establishes that price was always an important factor.

The domestic producer, importers, and purchasers agreed that supercomputer buyers generally try to obtain the greatest amount of computing capability or performance for the lowest possible price.[52] For many purchasers, this objective took the form of an evaluation of the price/performance ratios[53] of various bids, in which price obviously bears a weight equal to the

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[52] *See, e.g.*, [[

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[53] Each purchaser measured "performance" in terms relevant to its own specifications. Many of them used the cost or time requirement for applying standard software to solve a problem typically encountered in the purchaser's work area. *See, e.g.*, [[

]]. Others considered "performance" to include intangible factors, such as servicing expenses. *See, e.g.*, [[

computer's performance.[54] As the original determination noted, many customers conducted an initial bid to determine which suppliers were "within the competitive range of offers," and then solicited a best and final offer (BAFO) from the qualifying suppliers.[55] Other customers set a budget and then evaluated bids on the basis of which of the suppliers performed the best within the budget constraints.[56]

Once suppliers met the initial performance threshold and were within the "competitive range of offers," price took on an elevated role. Evidence in the record demonstrates that the BAFO stage itself tends to maximize price competition among those bidders reaching that critical

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]]. The Commission used maximum GFLOPS as an indication of performance, but recognized that other factors entered into the comparison of the price/performance offered by various venders.

[54] *See, e.g.*, [[

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[55] Final Determination, CD 172 at 35, n. 110.

[56] *See, e.g.*, [[

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final stage.[57] We note that the producer who supplies the most performance for a fixed price is, in effect, charging a lower price per unit of computing performance than the other bidders.[58] Moreover, the record reveals that the terms of supercomputer sales often become known later to other purchasers.[59] Purchasers who learned of previous sale prices often expected to obtain similar pricing, further demonstrating the critical role of price in the ultimate awarding of a contract.[60]

In this context, we find that adverse price effects were not *significant* during the investigation, rather than nonexistent. There was no material causal link at that time between

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[57] *See, e.g.*, [[

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[58] As the Court of International Trade has noted, " 'Competition' consists of rivalry in the marketplace, where goods will be bought from those who, in the view of the buyers, provide 'the most for the money.' " *Granges Metallverken AB v. United States*, 716 F. Supp. 17, 22 (CIT 1989), *quoting* J.P. Friedman, *Dictionary of Business Terms* 109 (1987).

[59] *See* [[

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[60] *See* [[

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subject imports and any material price suppression or depression. As discussed below, the aggressively priced import offerings generally consisted of inferior product. In addition, cancellation of the UCAR contract, which involved an aggressively priced comparable import product, would have its effect on Cray's revenue or domestic prices only after the investigation period. Finally, the [[ ]] transaction was relatively small.

We recognize that the lower level of government purchases will have an adverse effect on domestic prices in the imminent future. We also find that competition from non-vector systems will put some downward pressure on prices in the near term. The effect of this competition on the industry is somewhat attenuated, however, since it takes place only at the low end of the market; non-vector systems compete for sales valued at roughly $1 million or less.[61] In addition, imported LTFV vector supercomputers are bound to have a more direct negative effect on domestic vector supercomputer prices than will non-vector equipment, either domestic or imported.

Based on the entire record in this investigation, we determine that subject imports are likely to suppress or depress prices to a significant degree in the imminent future.[62] In particular,

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[61] Final Staff Report, CD 35 at I-22 and Appendix D.

[62] *United States Steel Group v. United States*, 96 F.3d 1352, 1365 n. 13 (Fed. Cir. 1996) ("[A]t the moment in time when an injurious trade practice begins, it frequently will not cause an instantaneous material injury to the domestic industry. Consequently, between commencement of the injurious trade practice and the ripening of its materially injurious effect, the Commission may detect a threat of material injury (even absent a finding that patterns of trade are likely to further change), although a finding of present material injury would be premature"); *accord Bando Chemical Indus., Ltd. v. United States*, 17 CIT 798, 811 (1993); *aff'd*, 26 F.3d 139 (Fed. Cir. 1994) (Table) (upholds vulnerability finding after negative current injury finding because "[w]ith regard to threat . . . the ITC considers the current situation with an eye towards the future. This is not the same perspective and may not lead to conclusions reached about material injury to the domestic industry now.").

we find that the likely significant increase in subject imports in the near future will result in price suppression or depression and lost sales. In this regard, we reiterate that price relative to performance plays an important role in purchasing decisions. Moreover, although the aggressive subject import pricing behavior did not always result in a sale for the subject imports during the period of investigation, the record revealed that the performance of the subject supercomputers had improved significantly toward the end of the period. While Japanese vector supercomputers [[

]].[64] At this point, price became even more important in deciding purchases.

This change in market conditions is evident in the UCAR aborted purchase of NEC equipment through FCC. That transaction was one of the largest to occur during the

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[64] *See* [[

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investigation period. NEC opened the bidding at a per-unit price lower than Cray's, decreased the price yet more sharply in the final bid, and would have won the sale if there had been no dumping petition.[65] UCAR admitted that if not for NEC, it would have granted Cray a three-year contract worth $13.25 million.[66] Even more telling, [[

]][67]

The record indicates that Cray lowered its price/performance ratio to UCAR in response to knowledge of NEC's presence in the bidding and UCAR indicated that it would purchase the subject imports at the offered price[68] Once it lost such a large sale to NEC at such a low price, Cray would have had to reduce prices on subsequent sales in which it faced competition from subject imports.

Thus, our conclusion that subject imports did not have a significant effect on domestic prices during the period of investigation is based on the nature of competition between subject

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[65] NEC increased the peak performance of its [[ ]] million bid by [[ ]] percent between its initial and final bids without changing the price, suggesting a [[ ]] percent reduction in the price per GFLOPS. *See* [[ ]] We believe that a comparison of the initial and final bid data reported by NEC provides a rough indication of the magnitude of the change in the price per GFLOPS. *See* Final Staff Report, CD 35 at V-11.

[66] Final Staff Report, CD 35 at V-30-31.

[67] *See* [[ ]] (emphasis added).

[68] Cray originally offered UCAR a [[ ]] million system with a [[ ]] GFLOPS peak performance to UCAR, or [[ ]]/GFLOPS. [[ ]] Once UCAR began the formal bidding process, based on its knowledge of Japanese pricing, Cray added equipment to its offer, reaching [[ ]] million for the final bid, reducing the average price to [[ ]]/GFLOPS. Final Staff Report, CD 35 at V-7, V-11.

imports and the domestic product up to the UCAR transaction.[69] While [[

]] bid, Cray and NEC were competing on roughly equal performance terms for the later UCAR sale.[70] The fact that the subject imports continued to be aggressively priced despite the marked improvement in performance indicates that subject imports likely will suppress or depress prices to a significant degree in the imminent future. As the subject imports became comparable in performance to the domestic systems "price has therefore become a key criteria."[71] We find that, absent the imposition of antidumping relief, knowledge of past aggressive pricing by suppliers of Japanese supercomputers would increase demand for further subject imports and result in further aggressive bidding to new customers.[72] Thus, the Japanese

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[69] In the [[ ]] In the [[ ]] transaction, [[ ]]. [[ ]]. [[ ]]. Therefore, Cray did not face viable competition at the time of the purchaser's final choice, and any conclusion about the effect (or lack of effect) of NEC's bid would be speculative. In addition, [[ ]] Final Staff Report, CD 35 at G-3. The [[ ]] sale was not directly probative because it involved [[ ]]. Final Staff Report, CD 35 at V-27. Finally, the record does suggest that [[ ]] won the [[ ]] bid for non-price reasons. However, we found this transaction to be less probative of likely future subject import price effects than the more recent UCAR transaction, which was also much larger in value terms.

[70] *See* Final Determination, CD 172 at 44. We also note that in [[ ]].

[71] Letter from [[ ]]

[72] Vice Chairman Miller and Commissioner Koplan find that the magnitude of the dumping margins issued by Commerce provide some additional evidence of aggressive pricing by the

producers were not likely to change their behavior even as the performance, and competitiveness, of the subject supercomputers improved.[73]

Moreover, we reaffirm the Commission's original determination that imports will likely increase significantly. As stated above, each transaction in this industry is significant in dollar terms and the aggressive pricing of the significant volume of subject imports is likely to suppress domestic prices to a significant degree. Indeed, subject import prices are likely to have an effect beyond the significant volume of transactions which they likely would be awarded. As purchasers learn of the price levels offered on comparable transactions, they will naturally pressure vendors to offer similar pricing in their transactions. One purchaser stated that [[

]][74]

We note that these price effects would extend even to single source and Buy American sales.[75] As one government purchaser explained, [[

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subject imports.

[73] We note that Japanese producers essentially abandoned the U.S. market soon after the filing of the petition, rather than modify their pricing practices.

[74] [[
[[ ]]. We were careful not to attribute injury caused by this [[ ]] sale to the subject merchandise. We use this example solely to demonstrate that aggressive pricing to one customer can affect prices more generally in the market.

[75] [[

]] We also note that those purchases identified as "single-

they must offer the National Security Agency their best commercial price in any system which we acquired."]][76] Domestic producers are also required by statute to report their best commercial price to defense accounts with Buy American restrictions.[77] A purchaser opposed to the petition confirmed that low subject import prices generally suppress and depress U.S. prices.[78]

For the foregoing reasons, we conclude that subject imports will suppress and depress domestic prices to a significant degree in the imminent future.

Conclusion

Having considered all relevant statutory and non-statutory economic factors, we conclude that the domestic industry is threatened with material injury by reason of imports of vector supercomputers from Japan.

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source" in fact greatly overstates the proportion of sales in which the domestic industry faced no import competition. *See* Final Staff Report, CD 35 at V-4, n. 2.

[76] [[ ]].

[77] *See* 10 U.S.C. § 2306a.

[78] [[

]].

VIEWS OF CHAIRMAN LYNN M. BRAGG

Pursuant to the order of the U.S. Court of International Trade (CIT) in *NEC Corp., HSNX Supercomputers, Inc., Fujitsu Limited and Fujitsu America, Inc. v. Department of Commerce and U.S. International Trade Commission*, Consol. Court No. 97-11-01967, Slip Op. 98-164 (December 15, 1998) ("*NEC*"), I determine that the industry in the United States producing vector supercomputers is threatened with material injury by reason of imports of vector supercomputers from Japan that the Department of Commerce (Commerce) has determined are sold at less than fair value (LTFV).

I. Issues on Remand

The CIT remand concerns two issues in the original *Supercomputers* determination: (I) whether the Commission applied the correct standard in determining that the domestic industry was threatened with injury "by reason of" subject imports; and (ii) whether the Commission followed "the analysis mandated by the Federal Circuit" in *Gerald Metals* in evaluating the likely price effects of subject merchandise.

The CIT stated that the Commission did not "distinguish between the contribution . . . caused by LTFV goods and . . . economic factors unrelated to the subject merchandise," and instead followed the Commission's practice of considering, but not "weighing" other causes of injury. The CIT noted that this prior standard mirrored legislative history stating that the "law does not contemplate that the effects from [LTFV] imports be weighed against the effects associated with other factors," which the Federal Circuit "declined to endorse" in *Gerald Metals*. On that basis, the CIT decided that the Commission's analysis did not include "the requisite

determination that the LTFV imports themselves made a material contribution to the threat of material injury."[1]

Upon consideration of the CIT's opinion and the record evidence, I conclude that the causation standard employed in my analysis here and the Commission's original analysis is consistent with the dictates of *Gerald Metals* and current law. Therefore, I reaffirm my original determination that an industry in the United States is threatened with material injury by reason of imports of vector supercomputers from Japan. I provide below further explanation of my original conclusion that subject imports are "likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports."[2]

My original findings concerning like product, domestic industry, present material injury, and threat factors not related to pricing were not affected by the Court's remand order.[3] I therefore reaffirm my original findings. I assume familiarity with my original views, and refer to the original views only as is necessary to further explain our affirmative determination here.

II Threat Of Material Injury By Reason of Subject Imports

In making my final determination that the domestic industry was threatened with material injury by reason of imports of dumped vector supercomputers from Japan, I considered the then present state of the domestic industry, and found that it was in a vulnerable condition. I found the largest market for supercomputers to be the scientific and engineering market, much of which was

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[1] *NEC* at 31.

[2] Tariff Act of 1930, § 771(7)(F)(I)(IV).

[3] I note that the parties have raised arguments in their comments on remand directed to other threat factors. *See, e.g.*, Fujitsu's Comments on Remand at 13-19; NEC's Comments at 4-10, 16-18. These factors were fully discussed in the Commission's original determination, and were briefed and argued before the Court in the appeal of that determination. In an exhaustive analysis of the Commission's determination, the Court did not criticize the Commission's reasoning on any of the other statutory threat factors. These arguments were outside the Commission's instructions to the parties for comments in remand.

funded by the federal government. I also found that this market was declining and was projected to further decline in size. I recognized that some of these sales were subject to "Buy American" restrictions, and that the value of "Buy American" restrictions declined overall throughout the period of investigation.[4] Similarly, sales to U.S. governmental and commercial customers primarily serving the U.S. government represented a declining portion of the domestic market for supercomputers.[5] I found that this post Cold-War decline in government spending on vector supercomputers caused Cray Research, Inc., ("Cray") to focus its efforts on the commercial market, which generally consists of purchasers of smaller, lower-margin systems. In my present injury analysis, I found that the subject imports had not presently had a significant adverse impact on the domestic industry.[6] Rather, the industry's poor financial performance during the period of investigation resulted from several factors: (1) a shift in the product mix to smaller, lower-value, and lower-margin machines, (2) a decrease in sales of its high-end products, resulting primarily from this product transition, and (3) proportionally increased service revenues, which have lower gross margins than product revenues.[7] These market conditions at least in part led Cray to undertake a major restructuring of its operations, which had an adverse effect on its operating income from 1995 onward.[8] Because these factors were not related to the imports, I did not find that the subject imports had a present adverse impact on the domestic industry producing vector

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[4] Commission's Final Determination at 23, Confidential Document ("CD") 172 at 23.

[5] Final Determination, CD 172 at 23.

[6] Commissioner Newquist found that the industry was not materially injured, but was vulnerable to the continuing adverse effects of LTFV imports. Consequently, he did not reach the issue of whether there was no material injury by reason of LTFV imports. Final Determination, CD 172 at 29.

[7] Final Determination, CD 172 at 36.

[8] Final Determination, CD 172 at 36-37.

supercomputers. I did find, however, that these conditions of competition made the vector supercomputer industry vulnerable to the effects of imports.[9]

The shift in demand conditions had already depressed the industry's operating levels.[10] Thus, future inroads by subject imports would affect an already vulnerable industry. Moreover, recent trends demonstrated the likelihood that there would be future changes in other conditions of competition between domestic production and the subject imports. The domestic industry was also facing increasing import competition in the market for smaller vector systems, which had become an increasingly important market to the domestic industry. Indeed, even in the market for large vector supercomputers, in which foreign producers had not had a significant prior presence, domestic producers faced significant bid competition from foreign producers.[11]

Thus, my finding that the domestic industry was vulnerable to the effects of future dumped imports did not attribute the effects of these non-import factors to subject imports, as asserted by respondents. Rather, I recognized that these "other factors" rendered the domestic industry more vulnerable to the effects of subject imports in the imminent future.[12]

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[9] Final Determination, CD 172 at 46.

[10] Respondents argue that growing sales of nonvector supercomputers and the decline in government purchases are "the predominant cause of any threatened injury to Cray." NEC Remand Comments at 18-20. I have considered the effect of these trends in my analysis of the domestic industry and have concluded that the subject imports will cause a separate, distinct, and significant worsening of the domestic industry's performance.

[11] Fujitsu argues that future purchases by government or government-related entities is unlikely given the circumstances of the NCAR procurement. Fujitsu's Comments on Remand at 6. This argument, however, overlooks the fact that this transaction was canceled because of the pendency of this investigation. Final Determination, CD 172 at 34. That antidumping investigations or findings may diminish sales is recognized in the statute as typical. 19 U.S.C. § 1677(7)(I).

[12] The Federal Circuit held in *Suramerica* that the Commission is required to consider the enumerated threat factors "among other relevant economic factors" and that this requires an examination of "any other factors that tend 'to make the existence of a [threat of material injury] more probable or less probable.' " Thus, this analytical approach is consistent with Federal Circuit

NEC incorrectly asserts in its remand brief that the Commission impermissibly amalgamated the substantial evidence that factors unrelated to LTFV imports caused injury to the domestic industry with insignificant evidence regarding the impact of LTFV imports in order to find that imports posed a threat of material injury.[13] Rather, the Commission recognized that these factors, which were unrelated to imports, placed the industry in a vulnerable position to the effect of imports. The fact that the Commission did not attribute these other causes of injury to imports is clear from the fact that it did not make an affirmative present injury determination.

The Commission's original determination, and my reaffirmance of that determination, was and is based on an analysis of the statutory threat factors which pertain only to the effect of the subject imports. Thus, evaluation of threat of material injury necessarily is an analysis of whether

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precedent. *Suramerica de Aleaciones Lamidadas, C.A. v. United States*, 44 F.3d 978, 983 *citing* Fed. R. Evid. 401, 19 C.F.R. § 210.42(b)(1994).

Congress expressed a similar understanding of the causation standard in its statement in the Statement of Administrative Action ("SAA") of the Uruguay Round Agreements Act ("URAA") that:

> [i]n material injury determinations, the Commission considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they may also demonstrate that the industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports.

SAA, *in* H. Doc. 103-316, vol. 1 at 885. *See also Calabrian Corporation v. United States,* 16 CIT 342, 353, 794 F. Supp. 377, 387 (1992). ("The current condition of an industry is relevant in the evaluation of whether imports will, in the imminent future, force that industry into a state of material injury . . . The present relative health of an industry is an important indicator as to the imminence of material injury. A healthy industry can better withstand competition from future imports than can one that is functioning close to a state of material injury. . .") *Nitromethane from the Peoples Republic of China,* Inv. No. 731-TA-650 (Final), *Angus Chemical v. United States,* 944 F. Supp. 943, 956 (CIT 1996), *aff'd*, 140 F.3d 1478 (1998); *Trent Tube Div. v. United States,* 975 F.2d 807 (Fed. Cir. 1992), *aff'g.* 752 F. Supp. 468 (CIT 1990) (upholding a decision in which an industry's other troubles were regarded as making it more susceptible to the adverse effects of imports); *accord Goss Graphics Systems, Inc. v. United States*, slip op. 98-148 (Oct. 16, 1998).

[13] NEC Brief on Remand at 3.

the "imports themselves" are threatening material injury to the domestic industry. I assessed the impact of these imports taking into account the current condition of the domestic industry, which I found to be vulnerable to the effect of the increased imports. An analysis of the industry's current condition is clearly relevant to the Commission's assessment that the subject imports would have an adverse impact on the domestic industry in the imminent future.[14] As the Federal Circuit stated in *Hosiden Corp. v. Advanced Display Mfrs.*, 85 F.3d 1561, 1569 (Fed. Cir. 1996), *quoting Iwatsu Elec. Co., Ltd. V. U.S.*, 15 CIT 44, 57, 758 F. Supp. 1506, 1518 (1991), "importers take the domestic industry as they find it."

Both respondents emphasize in their comments in this proceeding that language in the *Gerald Metal* opinion[15] stating that "another event may have such a predominant effect in producing the harm [to the domestic industry] as to prevent the LTFV imports from being a material factor." Fujitsu argues that under this reasoning, "[t]here is no question that the bar for the petitioner here has been raised considerably, and the bar cannot be cleared unless the Commission now weighs all of the causes of threat and then finds, after that weighing, that imports alone constitute a threat of material injury."[16] Similarly, NEC argues that "the Commission must consider the relative injury caused by non-import factors."[17] I disagree. This mode of analysis mistakenly equates the legal requirement not to attribute other causes of injury to the subject imports with a quantitative weighing of causes that the law clearly does not demand. The type of analysis advocated by respondents is directly contrary to the authoritative interpretation of the URAA, under which this investigation was conducted. As the Court

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[14] *Suramerica*, 44 F.3d at 978.

[15] *Gerald Metals, Inc. v. United States*, slip op. 98-148 at 12, n.8, (CIT, Oct. 20, 1998).

[16] Fujitsu's Brief on Remand at 2.

[17] NEC's Brief on Remand at 3.

recognized in the decision in this case, the SAA is "an authoritative expression by the Administration concerning its views regarding the interpretation of the Uruguay Round agreements."[18] As discussed by the Court in its decision in this investigation, the SAA provides that the Commission must examine other causes of injury to the domestic industry to ensure that it is not attributing injury from such other causes to subject imports.[19]

The SAA clarifies, however, that in examining other causes of injury, the Commission is not required to isolate the effects of subject imports from other factors contributing to injury. In particular, the SAA indicates that the requirement not to attribute the effects of other causes of injury to the subject imports should be interpreted in light of the GATT decision in *United States -- Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway,* GATT Doc. ADP87, Nov. 30, 1992), upholding the Commission's determination in *Fresh and Chilled Atlantic Salmon from Norway*, Inv. No. 7310-0TA-302 (Final).[20] The SAA specifically adopts paragraph 555 of the *Salmon* panel report as comporting with the statutory causation standard.

> Thus, the requirement "not to attribute injuries caused by other factors to the imports from Norway . . . did not mean that, in addition to examining the [volume and price] effects of the imports [and their consequent impact]. . . *the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway. Rather, . . . the USITC was required to conduct an examination sufficient to ensure that in its analysis [of*

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[18] *NEC* at 31 n.8 (citing SAA at 852). *See also* 19 U.S.C. 3512(d), indicating that Congress also approved the SAA ("The statement of administrative action approved by Congress under section 3511(a) of this title *shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.")* (emphasis added).

[19] *NEC* at 31.

[20] SAA at 851, *citing* "United States–Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway," (GATT Panel Nov. 30, 1992), 2 Handbook of WTO/GATT Dispute Settlement 849, ¶ 555.

> *volume, price, and impact] it did not find that material injury was caused by imports from Norway when material injury to the domestic industry allegedly caused by imports from Norway was in fact caused by factors other than these imports.*"

SAA at 181. (emphasis supplied). Clearly, the current law does not contemplate the type of analysis advocated by respondents.

Nor do I interpret the remand determination in *Gerald Metals* as requiring a finding that LTFV imports are more important than other causes of injury, or any other weighing of the various causes of injury. The Court itself in the remand decision in *Gerald Metals* recognizes that there may be more than one factor that causes material injury.[21] To the extent that the Federal Circuit opinion in *Gerald Metals* can be interpreted as requiring this type of analysis, it was decided under the law prior to the Uruguay Rounds Agreements Act, a fact specifically recognized by that Court.[22] In other words, the SAA's approval of the *Norwegian Salmon* causation standard invalidates respondents' interpretation of *Gerald Metals*.

This Court's statement in its recent *Gerald Metals* opinion that the Commission must examine whether other factors "dilute" the effects of LTFV imports[23] is consonant with the SAA

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[21] *Gerald Metals* at 12, n.8 ("That is not to say, however, that there may not be more than one material factor to injury."). In addition, that same opinion specifically approved Commissioner Crawford's remand determination in *Magnesium from China, Russia, and Ukraine*, Inv. No. 731-TA-696-698, because "her test requires that the LTFV imports *independently* cause a material injury." *Id.* at 15. Her remand determination incorporated her original conclusions, in which she states that:

> There may be, and often are other "factors" that are causing injury. These factors may even be causing greater injury than the dumping. However, the statute does not require us to weigh or prioritize the factors that are independently causing material injury.

Magnesium from China, Russia, and Ukraine, Invs. No. 731-TA-696-698 (Final), Pub. 2885 at 42 (May 1995).

[22] *Gerald Metals, Inc. v. United States*, 132 F.3d at 718 ("Because this investigation was initiated before the effective date of the Uruguay Round Agreement Act, it is decided under the pre-existing antidumping statute.")

[23] *Gerald Metals* at 11, n.8.

insofar as the Court means that the Commission should examine whether other factors may "account for" the harm apparently due to LTFV imports. Such an analysis led the Commission to its negative determination concerning present injury. The Court did not state, as respondents urge, however, that other factors may render the impact of LTFV imports insignificant simply because such other factors may be more important. Such a rule would be directly contrary to the SAA.[24]

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[24] The SAA, at page 885, specifically cites in this connection page 47 from the 1979 House Report, which states in relevant part:

> 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 weighted against other factors (e.g. the volume and prices of nonsubsidized imports or imports sold at fair value . . .)* which may be contributing to overall injury to an industry. *Any such requirement has the undesirable result of making relief more difficult to obtain for those industries facing difficulties from a variety of sources, precisely those industries that are most vulnerable to subsidized or dumped imports.* Of course, in examining the overall injury being experienced by a domestic industry, the ITC will take into account evidence presented to it which demonstrates that the harm attributed by the petitioner to the subsidized or dumped imports is attributable to such other factors. However, the petitioner will not be required to bear the burden of proving the negative, that is, that material injury is not caused by such other factors, nor will the ITC be required to make any precise, mathematical calculations, as to the harm associated with respect to such factors.

H. Rep. No. 96-317 at 47 (1979) (emphasis added).

The Federal Circuit in *Gerald Metals* declined to rely on one aspect of the above statement (regarding the weighing of causes) as that statement appeared almost verbatim in the Senate Report accompanying the 1979 amendments to the Tariff Act, finding the comment general in nature and isolated. *Id.*, 132 F.3d at 722. To the extent that the Federal Circuit viewed this passage as not supporting the conclusion that a *de minimis* contribution from imports to overall injury is sufficient, I agree. Respondents, however, urge that I read the Federal Circuit's comments as requiring me to ignore the Congressional direction completely. I do not read the Federal Circuit in *Gerald Metals* as having gone so far, nor if it had would such guidance apply to this case, decided under a statute that was revised after the Federal Circuit's decision. That decision, however, on its face reflected that it considered only pre-URAA law. *Id.* As the discussion of vulnerability in the URAA's SAA, and the SAA citation to the 1979 House Report reflect, that statement is not isolated. Nor, particularly given the SAA's endorsement of *Norwegian Salmon*, can it reasonably be called general. Contrary to respondents' claim, the Federal Circuit's declining to adopt the 1979 Senate Report in a pre-URAA case as to the

In keeping with its endorsement of this earlier history, the SAA states, "While [other factors that may be contributing to overall injury], in some cases, may account for the injury to the domestic industry, they also may demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports." SAA at 885. The SAA is quite explicit as to how this analysis should apply to threat of injury determinations such as the one here. It states, "In threat determinations, the Commission *must* carefully assess current trends and competitive conditions in the marketplace to determine the probable future impact of imports on the domestic industry and whether the industry is vulnerable to future harm." Id. (emphasis added.) Such an analysis is precisely the one that I have conducted here. The decision of the Court of International Trade in this case properly directs me to consider the SAA as binding. I reject respondents' suggested approach because it would have me disregard the analysis that the SAA requires of the Commission.

III. Subject Imports Are Likely To Have A Significant Negative Effect On Domestic Prices

In response to the CIT's instructions, I provide the following additional explanation of my finding in the original determination that "increased subject imports will enter at prices likely to depress or suppress domestic prices to a significant degree."[25]

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weighing of causes, *e.g.*, Fujitsu's Brief at 2, does not apply to a post-URAA case such as this one. Moreover, to the extent that this Court in affirming the Commission's remand determination in *Gerald Metals*, Slip Op. 98-148, suggested that legislative history to 1988 amendments changed the causation standard set out in 1979, the 1994 SAA specifically reaffirms the vitality of the 1979 legislative history. Indeed, the SAA also indicates in another passage that "[e]xisting U.S. law *and legislative* history fully implement the causation standard" of the URAA, which was unchanged from the 1979 Tokyo Round causation standard. SAA at 851. The Federal Circuit's declining to adopt the 1979 Senate Report is therefore controlling only as to the Senate Report in pre-URAA cases, and does not overrule the authoritative SAA rule for post-URAA cases, or the SAA's endorsement of the discussion on page 47 of that Senate Report.

[25] Final Determination, CD 172 at 43.

My explanation begins with the evidence that led the Commission to conclude that price was an important factor in purchasing decisions. That is not to say that price played the *same* role in each transaction. Each vector supercomputer purchaser employed unique specifications and criteria for measuring performance. However, a review of the different types of transactions shows that price was always an important factor.

At the most basic level, the domestic producer and the importers agreed that supercomputer buyers generally try to obtain the greatest amount of computing capability for the lowest possible price.[26] For many purchasers, this objective took the form of an evaluation of the price/performance ratios[27] of various bids, in which price obviously bore a weight equal to the computer's performance.[28] As the original determination noted, many customers conducted an

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[26] [[

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[27] Each purchaser measured "performance" in terms relevant to its own specifications. Many of them used the cost or time requirement for applying standard software to solve a problem typically encountered in the purchaser's work area. *See, e.g.*, [[

]]. The Commission used maximum GFLOPS as an indication of performance, but recognized that other factors entered into the comparison of the price/performance offered by various venders.

[28] *See, e.g.*, [

initial bid to determine which suppliers were "within the competitive range of offers," and then solicited best and final offers from the qualifying suppliers.[29] Other customers set a budget and then evaluated bids on the basis of which of the suppliers performed the best within the budget constraints.[30] Although purchasers in these situations may have viewed the ultimate selection as based solely on performance, the competition occurred at that point only because suppliers met the critical initial price threshold, meaning that price was decisive at a certain point in the process. I note that the producer who supplies the most performance for a fixed price is, in effect, charging a lower price per unit of computing performance than the other bidders.[31] Price is also important in "sole source" bids because even a buyer who has a favored supplier still negotiates to get the best price possible.[32]

I note the CIT's concern that the record did not "clearly demonstrate" the importance of price, as it had in *Large Newspaper Printing Presses*, through a tally of purchasers who listed price as a "critical," "very important," or "moderately important" factor in their purchasing

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[29] Final Determination, CD 172 at 35, n. 110.

[30] *See, e.g.*, [[

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[31] As this Court has noted, " 'Competition' consists of rivalry in the marketplace, where goods will be bought from those who, in the view of the buyers, provide 'the most for the money.' " *Granges Metallverken AB v. United States*, 716 F. Supp. 17, 22 (CIT 1989), *quoting* J.P. Friedman, *Dictionary of Business Terms* 109 (1987).

[32] [[

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decisions.[33] Although the Commission did not solicit a rating or ranking of the importance of price in this investigation, it obtained equivalent information in the form of narrative information in the questionnaires, testimony, and interviews with vector supercomputer producers, importers, and purchasers. This information, much of which is cited above, allows me to determine the importance of price.[34]

The Commission also concluded that imports will enter at prices likely to depress or suppress domestic prices to a significant degree based on aggressive Japanese pricing and Japanese underselling in three of five sales in which the subject imports competed with domestic merchandise.[35] The CIT did not fault the Commission's characterization of Japanese prices as "aggressive." However, it suggested that this evidence may not support a finding of price suppression or depression because the winning bidder in the five sales often charged a higher per-GFLOPS price than the loser, and domestic industry won most of the sales.

I have considered the concerns raised by the CIT and conclude that they do not detract from my price depression finding. First, neither concern applies to the University Corporation for Atmospheric Research ("UCAR") transaction, one of the highest value transactions to occur during the investigation period. NEC opened the bidding at a price/performance ratio lower than Cray's, decreased the ratio yet more sharply in the final bid, and would have won the sale if there had been no dumping petition.[36] UCAR admitted that if not for NEC, it would have granted Cray

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[33] *NEC* at 33.

[34] *See infra*, notes 26-28, 30, and 32.

[35] Final Determination, CD 172 at 43.

[36] NEC increased the peak performance of its [[ ]] million bid by [[ ]] percent between its initial and final bids without changing the price, suggesting a [[ ]] percent reduction in the price per GFLOPS. *See* [[ ]]. Although the Commission staff substantially revised the reported peak performance of NEC's equipment for the final bid, *see* Staff Report, CD 172 at V-11, I believe that a comparison of the

a three-year contract worth $13.25 million.[37] Cancellation of the purchase prevented me from finding any current price effects. However, had Cray lost a large sale to NEC at such a low price, Cray would have been forced to reduce prices on subsequent bids in which it faced import competition. Moreover, the record indicates that Cray lowered its price to UCAR in response to knowledge of NEC's presence in the bidding.[38] Thus, as the volume of imports by NEC and Fujitsu would have increased, their bidding for additional business would have resulted in price depression and suppression that would have subsequently reduced the domestic industry's revenues.

In the [[ ]] sale, Cray did win with the highest per-GFLOPS price, but only after nearly [[ ]] its price/performance ratio between initial and final bids.[39] The explanation for the reduction appears in the customer's statement that it [[

]].[40] Cray's position as the high bidder did not dissuade me from finding that price depression occurred. Although the customer rated Cray's equipment as better and was willing to pay a premium, it also recognized the Japanese suppliers as equivalent in some respects.[41] Therefore, Cray risked losing the sale if it

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initial and final bid data reported by NEC provides a rough indication of the magnitude of the change in the price per GFLOPS.

[37] Final Staff Report, CD 172 at V-30-31.

[38] Cray originally offered UCAR a [[ ]] million system with a [[ ]] GFLOPS peak performance to UCAR, or [[ ]]/GFLOPS. Cray Producers' Questionnaire at 25, CD 164. Once UCAR began the formal bidding process, based on its knowledge of Japanese pricing, Cray added equipment to its offer, reaching [[ ]] million for the final bid, reducing the average price to [[ ]]/GFLOPS. Staff Report, CD 172 at V-7, V-11.

[39] Final Staff Report, CD 172 at V-31.

[40] [[ ]]

[41] [[

].") (emphasis in original). See

charged too much more than the Japanese supplier, and had to lower its price when it learned that [[ ]] had offered a [[ ]] lower price.[42]

Nor does information about the remaining competitive bid situations detract from this conclusion. In another sale cited by the CIT, both Cray and [[ ]] submitted final bids to [[ ]]. However, [[

]].[43] Therefore, Cray did not face viable competition at the time of the purchaser's final choice, and any conclusion about the effect (or lack of effect) of NEC's bid would be speculative. I did not place great weight on the [[ ]] sale, which Cray won by selling [[

]].[44] The record does suggest that [[ ]] won the [[ ]] bid for non-price reasons.[45] However, I placed greater weight on

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below for a further discussion of this point.

[42] Respondents have suggested that lower bids submitted for non-vector supercomputers were responsible for any price depression in this transaction. Fujitsu Br. at 11. However, the record indicates that the final competition for the contract was between [[

]] Final Staff Report, CD 35 at V-32. Clearly, the ultimate decision was between [[ ]] In any event, I conclude that a vector supercomputer price would have a more direct effect on Cray's bid than would prices for less comparable non-vector equipment.

[43] [[

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[44] Final Staff Report, CD 35 at V-27.

[45] I note that if the two bids are placed on equivalent terms, the difference between the Cray and HNSX bids is not as large as it appears in the staff report. HNSX's [[

]]. Cray bid [[

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the UCAR and [[ ]] sales, as UCAR was more recent and the two sales together involved a larger volume of equipment than the [[ ]] sale.[46]

Respondents' own arguments in this remand proceeding lend further support to our conclusion. They claimed sales of non-vector supercomputers suppressed and depressed prices for vector supercomputers, which supports my finding that price is an important element in the competition for these sales.[47] In light of their claim, offers of subject vector supercomputers, which are much more competitive with domestic vector supercomputers than non-vector equipment, are then bound to have an even more direct negative effect on domestic vector supercomputer prices.

I conclude that aggressive Japanese pricing is likely to continue in the future. Japanese producers bid aggressively on [[ ]] sales in which they faced domestic competition, and those [[ ]] sales outweighed the remaining competitive sales in value by a factor of [[ ]].[48]

I further find that aggressive subject import pricing is likely to have a significant effect beyond the transactions in which Japanese producers actually bid. The terms of supercomputer sales often become known to later potential purchasers.[49] Purchasers who learn of previous sale

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[46] *See* Final Staff Report, CD 35 at V-11 & V-14.

[47] *See* Fujitsu prehearing brief at 32-33; 82; *see also* Tr. at 139 (Chrysler engineer "is positively gleeful" about getting good test results on a non-vector system "[b]ecause he is saving so much money."). Respondents argued that imported vector supercomputers had little effect on the domestic industry because of Buy American requirements and purchasers' unique technical requirements. For the reasons discussed above, I find that price is also an important factor, and that Buy American requirements do not insulate government accounts from the effect of pricing on subject imports.

[48] *See* Final Staff Report, CD 35 at V-26-27.

[49] *See* [[

prices often expect to obtain similar pricing,[50] which gives import prices an effect beyond the specific transaction in which they appeared. This effect extended even to single source and Buy American sales. As one government purchaser explained, [[

]][51] Domestic producers are also required by statute to report their best commercial price to defense accounts with Buy American restrictions.[52] Another government purchaser stated that [[

]][53] A purchaser opposed to the petition confirmed that low subject import prices generally suppress and depress U.S. prices.[54]

]].

[50] *See* [[

]].

[51] [[ ]] at 6, CD 114.

[52] *See* 10 U.S.C. § 2306a.

[53] [[

]] However, Cray and [[ ]] recognize the existence of a "world market" in supercomputers. Testimony of Tracy Qualters, Tr. at 35; [[ ]]. Therefore, I believe that the past effect on U.S. prices of aggressive Japanese pricing [[ ]] is one indication of the effect that aggressive Japanese pricing *in the United States* will have on U.S. customers *in the future*. In fact, I expect that Japanese prices to the U.S. customers would have a greater effect than their prices to [[ ]] customers.

[54] [[

I find that industry knowledge of past aggressive pricing by Japanese suppliers would increase demand for further imports and result in further aggressive bidding to new customers. Given my findings that aggressive bids depress U.S. prices or cause lost sales or revenues, and that widespread knowledge of such bids causes price reductions even on sales where imports do not enter a bid, I conclude that subject imports will suppress and depress domestic prices to a significant degree in the imminent future.

The CIT criticized the original determination on the grounds that it "failed to explain how bids involving imports would affect future prices when price has not been previously determinative."[55] The Federal Circuit has indicated how such an explanation may be made:

> [The] argument that, given a unanimous negative material injury finding, the Commission may not find a *threat* of material injury absent some showing that existing patterns of trade will likely change in the imminent future . . . [is] without merit. . . . [A]t the moment in time when an injurious trade practice begins, it frequently will not cause an instantaneous material injury to the domestic industry. Consequently, between commencement of the injurious trade practice and the ripening of its materially injurious effect, the Commission may detect a threat of material injury (even absent a finding that patterns of trade are likely to further change), although a finding of present material injury would be premature.[56]

My reasoning in this investigation proceeded along similar lines. I found that adverse price effects were not *significant* during the investigation, rather than nonexistent. There was no sufficient current causal link between subject imports and any material price suppression or depression because cancellation of the UCAR contract would have its primary effect on Cray's

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·]].

[55] *NEC* at 34.

[56] *United States Steel Group v. United States*, 96 F.3d 1352, 1365 n. 13 (Fed. Cir. 1996); *accord Bando Chemical Indus., Ltd. v. United States*, 17 CIT 798, 811 (1993); *aff'd*, 26 F.3d 139 (Fed. Cir. 1994) (Table) (upholds vulnerability finding after negative current injury finding because "[w]ith regard to threat . . . the ITC considers the current situation with an eye towards the future. This is not the same perspective and may not lead to conclusions reached about material injury to the domestic industry now.").

revenue or domestic prices only following the investigation period, and the [[ ]] transaction was relatively small. However, for the reasons discussed above, I found that these transactions indicated a likelihood that future Japanese sales would result in price suppression and depression or lost sales. Since I found that the volume of imports is likely to increase and that past low pricing will generate future demand for dumped Japanese imports, I conclude that the imports will have a larger and more pervasive effect on domestic prices in the future that will be significant.

There was also an important change in the conditions of competition, beyond those noted above, that indicated that subject imports would have a greater effect on Cray's prices in the future than they did during the investigation period. While Japanese vector supercomputers [[

]].[58] Thus, while Cray [[

]] bid, Cray and NEC were competing on roughly equal terms for the UCAR sale.[59] The [[ ]] competitiveness of Japanese vector supercomputers further increases the likelihood of price suppression and depression in the future.

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[57] [[

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[58] *See* [[

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[59] See Final Determination at 44. I also note that in evaluating Cray's bid, [[

]].

The record shows further that price need not be the "determinative" factor in purchasing decisions for subject imports to suppress or depress domestic prices. When price is merely one among many factors, a reduction in one competitor's prices may still force the others to follow suit, with a resulting decline in prices and lost revenue.

Conclusion

In my analysis of the current condition of the domestic industry, I found that factors unrelated to subject imports, such as a reduction in demand, a shift in sales from large sales to less profitable small sales, and Cray's restructuring expenses, resulted in poor financial performance for the industry. I was careful not to attribute these effects to imports, as witnessed by our negative current material injury determination. At the same time, I recognized that, distinct from the effect of these factors themselves on the industry, the non-import factors rendered the domestic industry vulnerable, meaning that they increased the likelihood that imports would cause harm, and the seriousness of the harm that would likely result.

I conclude, however, that the impact of subject imports is likely to increase if an order is not issued, and will significantly impair any improvement in domestic industry performance that I would expect to follow a restructuring effort. As the Commission noted in the original determination, the Japanese producers have the capacity to increase sales to the United States. Their documented marketing activities and the trend of increasing sales of Japanese vector supercomputers and increasing import volumes indicate that the volume of imports is likely to grow in the future. The low prices NEC and Fujitsu charged during the investigation period are also likely to generate greater demand for further imports. With evidence showing that imports depressed prices during the investigation period, are likely to continue to enter at low prices, and influence pricing expectations even in sales for which they do not compete, I conclude that subject

imports will depress and suppress domestic prices to a degree disproportionately greater than the increasing import volume might indicate. These trends will result in lost sales and lost revenue, which will limit the industry's ability to fund the research and development necessary to maintain the technological sophistication that the market demands.

This consideration of the imports themselves within the context of the statutory threat factors leads me to conclude that the effect of imports will be greater in the imminent future than it was during the investigation period. Given my separate conclusion that the industry was already weak, imports are likely by themselves to cause a significant reduction in the prices for domestic merchandise and the revenue realized by the domestic producer. Therefore, I determine that the domestic industry producing vector supercomputers is threatened with material injury by reason of LTFV imports from Japan.

DISSENTING VIEWS OF COMMISSIONER THELMA J. ASKEY

The Court of International Trade ("CIT") remanded this case for the Commission to reconsider its original determination that the domestic industry is threatened with material injury by reason of less than fair value ("LTFV") sales of vector supercomputers from Japan. I did not participate in the original decision, and therefore I reviewed the record *de novo*. I concur in the Commission's original determination concluding that the domestic industry is not materially injured by reason of LTFV sales of the subject imports; I set forth my reasoning below. I have also determined that the domestic industry is not threatened with material injury by reason of LTFV sales of the subject imports. Therefore, I respectfully dissent from the majority's opinion.

I. Domestic Like Product and Domestic Industry

The Commission's determination before remand defined the domestic like product as all vector supercomputers, after analyzing whether some non-vector supercomputers should also be included. Certain computers, such as massively parallel processors (MPPs), scalable parallel processors (SPPs) and/or symmetric multiprocessors (SMPs) are also considered supercomputers because of their high processing speeds and their ability to handle numerically intensive problems too large for conventional computers.

I concur in the Commission's definition of the domestic like product, which the CIT upheld in NEC Corp. v. Department of Commerce ("NEC").[1] I believe it appropriate to limit the domestic like product to vector supercomputers, primarily because of the vast range of specifications and capabilities of non-vector systems, and to consider the presence in the market of increasingly competitive non-vector supercomputers as one of the conditions of competition facing vector supercomputer manufacturers.

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[1] Consol. Ct. No. 97-11-01967 (Ct. Int'l Trade Dec. 15, 1998) ("Slip Op.").

Based on the foregoing definition of the domestic like product, the Commission found the domestic industry to consist of all producers of vector supercomputers. I concur in this determination. There is currently one domestic producer – Cray Research International ("CRI" or "Cray").

II. Conditions of Competition

I also concur in the conditions of competition as set forth by my colleagues in their original determination. I also found the following conditions of competition relevant to my analysis.

First, vector supercomputers face increasingly effective competition from non-vector systems. Theoretically, all code that runs on vector systems can run on non-vector systems, although in practice such a change may be difficult or impossible to implement.[2] The cost of non-vector parallel systems is diminishing to the point where purchasers may find it cost-effective to buy a non-vector system and convert the vector machine code to run on that non-vector machine.[3] Also, non-vector systems are generally more scalable than vector systems, which means that their structure more readily allows for future expansion.[4] In addition, Unix is the most common operating language for both non-vector supercomputers and for workstations, so the purchase of

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[2] CR at I-17-18.

[3] Id. at II-8, and II-9 n. 16, citing questionnaire responses that "[[

]]."

[4] CR at I-16 n.54, citing questionnaire response [[

]]; CR 35 at I-18.

non-vector supercomputers may facilitate inter-computer communication.[5] The library of parallel computer programs is also growing, which should increase their attraction for consumers who run common applications.[6]

Second, and related, the entire supercomputer sector changes very rapidly due to advances in technology. An industry standard known as "Moore's Law" estimates that, due to technical innovation, the price/performance ratios for vector supercomputers should decline by 10 percent every 18 months.[7] Factors favoring the purchase of non-vector systems over vector systems are the increased performance capabilities of less expensive RISC-based systems, the increased ability to port vector applications and algorithms to non-vector systems, reduced government purchases, the ease of using smaller mid-range and non-vector systems, and the lack of significant performance breakthroughs in vector technologies since 1994.[8] Non-vector supercomputers have dramatically increased their market share in recent years. Non-vector supercomputers accounted for [[ ]] percent (by value) of domestic consumption in 1994; that share increased to [[ ]] percent in 1995 and increased again to [[ ]] percent in 1996.[9] Non-vectors accounted for [[ ]] percent of domestic consumption in interim 1996 and [[ ]] percent in interim 1997.[10]

Third, all parties agree that despite the encroachment of non-vector systems, a base of core customers continue to see vector supercomputers as necessary to their computing needs.[11]

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[5] CR at I-18.

[6] Id. at I-19.

[7] Id. at V-5 n.6.

[8] Id. at II-9.

[9] Table C-1, CR at C-3-4; Table C-5, CR at C-11. U.S. producers account for virtually all non-vector supercomputer sales. Table C-3, CR at C-7; Table C-4; CR at C-9.

[10] Table C-1, CR at C-3-4; Table C-5, CR at C-11.

[11] CR at I-20.

One of those core uses is national-security applications. Therefore, although national security-related spending has diminished in the 1990s, that market, which effectively belongs to Cray by virtue of the "Sabo Amendment," which requires the Department of Defense to purchase U.S. products," will exist for the foreseeable future. [[

]][12]

III. Material Injury Determination

While I concur in the Commission's initial determination that the domestic industry is not materially injured by reason of the subject imports, my analysis differs from theirs in certain respects. I therefore write separately to explain the reasons for my conclusion.

A. Volume

The volume of subject imports was small in 1994 and 1995, but increased in 1996 and in interim 1997, both in absolute terms and relative to domestic consumption. Only [[

]] imported from Japan in each 1994 and 1995, while [[ ]] imported in 1996.[13] Imports increased from [[ ]] in interim (January - June) 1996 to [[ ]] in interim 1997.[14] Again, in terms of numbers of systems, subject imports accounted for [[ ]] percent of apparent domestic consumption in 1994, [[ ]] percent in 1995, and [[ ]] percent in 1996.[15] Imports rose to [[ ]] percent in interim 1997 as compared to [[ ]] percent in interim 1996.[16]

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[12] Id. at II-3 n.5.

[13] Table IV-2, CR at IV-5.

[14] Id.

[15] Table IV-3, CR at IV-6.

[16] Id.

Subject imports also increased in terms of value from 1994 to 1996. Imports were worth [[ ]] million in 1994, [[ ]] million in 1995, and [[ ]] million in 1996.[17] In terms of market penetration, subject imports accounted for [[ ]] percent of domestic consumption in 1994, [[ ]] percent in 1995, and [[ ]] percent in 1996.[18] Imports accounted for [[ ]] percent of value in interim 1996 as compared to [[ ]] percent in interim 1997.[19]

Though imports increased, I do not find that import volumes have reached significant levels. First, as Fujitsu and NEC note, the volume numbers include imports used for demonstration purposes by NEC and Fujitsu.[20] The record does not show that those computers have ever been sold in the domestic market. Second, the percentages based on the number of systems sold are somewhat inconclusive because of the relatively small number of total systems sold. For example, interim 1996 shows Japanese producers as having [[ ]] percent of the market based on sales of [[ ]] systems, but that share decreased to [[ ]] percent for the year when Japanese producers sold only [[ ]] more systems in the rest of 1996. Moreover, most systems are built according to specifications and vary significantly in size and value. Therefore, market penetration based on value seems a more accurate measure of the extent to which Japanese imports are affecting the market and the domestic manufacturer's market share. Japanese imports accounted for [[ ]] percent (by value) of domestic consumption in interim

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[17] Table IV-2, CR at IV-5.

[18] Table IV-3, CR at IV-6.

[19] Id.

[20] CR at IV-2 n.10; Brief on Remand of NEC and HNSX, filed Feb. 16, 1999 ("NEC Brief") at 7-8.

1996 and only [[ ]] percent of domestic consumption for the entire year. Subject imports accounted for only [[ ]] percent (by value) of domestic consumption in interim 1997.[21]

B. Price

Comparing system prices is difficult because system specifications differ greatly. The record indicates that price is only one of many factors purchasers consider when making their decisions. The record also indicated that LTFV imports did not significantly affect domestic prices during the period of investigation. Any pricing analysis is complicated by the customized nature of different systems and the different requirements of potential purchasers. Systems competing for the same contract may vary in a wide array of specifications, including product configurations, processor type, memory technology and size, maximum memory bandwidth, the type of cooling system required and the software required to run the machine. Bids may also vary in terms of the technical support offered and system modifications or upgrades included in the bid as technology is expected to advance within a few years of the system's sale.

The primary consideration for purchasers appears to be performance. Many purchasers require bidders to run several sets of benchmark programs; performance on one or more of these benchmarks is likely to be more important than any other concern, including price.[22] Different

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[21] Table IV-3, CR at IV-6. According to NEC, if the Commission excludes shipments of computers destined for internal use, Japanese market penetration falls to [[ ]] percent in 1996 and [[ ]] and [[ ]] percent for interim 1996 and 1997, respectively. NEC Brief at exhibit 2.

[22] Questionnaire responses were fairly consistent that price was not a decisive factor. For example, [[

]] CR at V-31. One purchaser bought [[

]]. CR at V-28.

systems may have divergent strengths, and purchasers may decide on those bases.[23] For instance, one purchaser noted that [[

]].[24] Thus, systems may or may not be truly interchangeable, and many factors besides price may influence the purchasing decision.[25]

One may attempt to accommodate for the differences among systems by measuring price in terms of dollars per gigaflop (billion floating point operations). However, this measure is based on theoretical peak performance, not actual sustained performance, and does not take into account all considerations important to purchasers, such as differences in memory capacity or differences in configuration.[26] Further, questionnaire responses suggest that cost per job comparisons may more accurately reflect the considerations purchasers bring to bear on their

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[23] CR at II-21 n.43. Often one supplier's equipment will outperform another supplier's equipment on some of the benchmarks, but will underperform on others. Purchasers must therefore decide which benchmarks are the most important, and weigh the differing performance results. Performance evaluations usually involve more than a simple comparison of overall peak performance rates.

[24] CR at II-23. See also Petitioner's Remand Comments, filed Feb. 16, 1999 ("Cray Brief") at Appendix H, [[

]]; CR at I-9 (ECL processors are expensive to manufacture and require a more expensive cooling system than CMOS processors).

[25] [[

]] CR at V-27.

[26] CR at V-26 n.8, V-27.

buying decisions.[27] For all these reasons, it is difficult to compare the prices even of directly competing systems.

Most vector supercomputers are acquired either through a closed-bid procedure or are sole-sourced.[28] Of the [[ ]] sales of large-scale vector supercomputer systems that were not subject to "Buy American" restrictions, [[ ]] sales worth [[ ]] single-sourced by Cray.[29] Of the [[ ]] sales of mid-range systems, [[ ]] sales worth [[ ]] million were single-sourced by Cray. We have full information on [[ ]] instances worth a combined value of [[ ]] million in which Cray and the Japanese producers directly competed for contracts.[30] Cray won the bids on [[ ]] of those projects, despite having bid a significantly higher price (more than 30 percent) in [[ ]] A Japanese supplier (HSNX) won the [[ ]] bid, despite having a final bid more than [[ ]] the competing bid from Cray. The [[ ]] and most well-known case, was the procurement by the Federal Computer Corporation ("FCC") on behalf of the University Corporation for Atmospheric Research ("UCAR"). NEC initially won the bid in that case; the [[

]][31]

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[27] Cray Brief at Appendix H [[

]].

[28] CR at V-2; Table V-2, CR at V-8-11.

[29] Table V-1, CR at V-6-7.

[30] CR at V-26-27.

[31] CR at H-8 & n.3, H-9; CR at V-30; Cray Brief at Appendix H (NEC and Cray Research Benchmark Results).

Based on the preceding evidence, I find that subject imports do not have price suppressing or depressing effects. The majority of bids are sole-sourced. Moreover, in situations where suppliers competed for bids, the higher-priced bid won in [[ ]] of [[ ]] cases. In the remaining case, the evidence suggests that the deciding factor was performance, not price. In fact, [[

]][32]

Nothing in the record suggests that price will become determinative in future sales for vector supercomputers. In fact, Cray itself suggests that buyers are willing to pay a premium for vector systems.[33]

C. Impact

The low volume of subject imports, combined with their lack of price suppressing or depressing effects, leads me to conclude that LTFV imports are not having a negative impact on the domestic industry. In fact, even the information we have showing declines in the domestic industry's sales and revenue may be misleading.

The domestic industry has had a large backlog of orders due primarily to production constraints on its T-90 and the product transition to the T-3E. Most of the backlog was due to 1996 bid acceptances, and the delivery schedule for the T-90 systems and the T-3E systems began in the second quarter of 1996.[34] According to Fujitsu, Cray's order backlog as of March 31, 1997 was still [[ ]][35] Filling those orders earlier would have improved Cray's financial

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[32] CR at V-30. [[

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[33] Id. at I-23.

[34] Id. at III-8-9 n.31.

[35] Id.

performance in the periods at issue; the fact that the orders were still outstanding augurs well for Cray's 1997 financial performance.[36] In addition, Cray extensively restructured its operations in 1995, which caused it to take a one-time financial charge that significantly affected financial performance.[37] I also note that Cray itself predicts a two to seven percent per-year increase in market demand through 2003.[38]

One of the most significant factors likely to affect future sales of vector supercomputers is dramatically increasing competition from non-vector systems. MPPs and SPPs are more "scalable" than vector systems, which is to say they may be expanded more easily to respond to new computing needs.[39] Though some applications continue to require vector processors, the movement towards scalable MPP and SMP/SPP systems has eliminated much of the potential growth in the vector supercomputer market.[40] Particularly at the low end of the vector market, the prices of vector systems are beginning to reflect the results of increased competition with non-vector systems.[41]

In addition, the decline of "Buy American" purchases, and its impact, is another cause of injury to domestic industry unrelated to subject imports. "Buy American" purchases declined through the period of investigation from [[ ]] million in 1994 to [[ ]] million in 1995, and then increased to [[ ]] million in 1996.[42]

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[36] After disappointing financial performance in 1996, Cray showed an upswing in initial 1997 numbers. Table VI-1, CR at VI-2.

[37] CR at VI-4-5.

[38] Id. at II-7.

[39] Id. at I-16, n. 54, I-18.

[40] Id. at I-22.

[41] Id. at I-22.

[42] Id. at II-3.

IV. Threat of Material Injury

I have considered all of the relevant factors and have determined that the domestic industry is not threatened with material injury by reason of subject imports.[43] The statute states that a threat determination "may not be made on the basis of mere conjecture or supposition."[44] In undertaking my analysis, I have been mindful of the CIT's discussion of the legal standard in NEC Corp. Specifically, the CIT determined that the Federal Circuit's analysis in Gerald Metals, Inc. v. United States,[45] applied to threat cases and required the Commission to find a causal, rather than merely a temporal, connection between the LTFV goods and the [threat of] material injury.[46] Further, the harm caused by the LTFV imports must rise to the standard of "material injury" – "harm which is not inconsequential, immaterial, or unimportant."[47] The CIT recognized that the Commission's threat analysis is less quantifiable than an injury analysis, but found that the statute requires "adequate evidence to show that the harm will occur by reason of the LTFV imports, not by reason of a minimal or tangential contribution to material harm caused by LTFV goods."[48]

The CIT opinion also directs the Commission to make an "analytically distinct determination" that the LTFV imports themselves made a material contribution to the threatened injury.[49] This directive does not necessarily mandate a two-pronged analysis; rather, it requires

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[43] 19 U.S.C. § 1677(7)(F) sets forth nine factors the Commission should consider in determining whether an industry in the United States is threatened with material injury.

[44] Id. at § 1677(7)(F)(ii).

[45] 132 F.3d 716 (Fed. Cir. 1997).

[46] Slip. Op. at 26.

[47] Id. at 27 (citing 19 U.S.C. § 1677(7)(A)).

[48] Id. (quoting Gerald Metals, 132 F.2d at 722).

[49] Id. at 28-29.

that the Commission take literally the statutory language that the injury be "by reason of" subject imports – the mere fact that the industry experiences some injury at the same time that LTFV imports are in the marketplace does not satisfy the statutory criterion.[50]

The CIT also reminded the Commission that part of the analytically distinct determination is distinguishing "between the contribution to material harm caused by LTFV goods and [those] economic factors unrelated to the subject imports."[51] The CIT expressed concern that the Commission may have concluded that any contribution to material harm by subject imports would be enough to satisfy the "by reason of" test, contrary to the statute and Gerald Metals.[52] To consider the role other factors may play in injuring the domestic industry is entirely consistent with longstanding precedent that agency decisions must be based on substantial evidence in the record. "[T]he substantial evidence standard requires more than mere assertion of "'evidence which in and of itself justified [the Commission's determination], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.'"[53] "'Rather, [t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.'"[54]

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[50] "[T]o claim that the temporal link between these events [rise in domestic prices plus concurrent decline in imports after imposition of preliminary tariffs] *proves* that they are causally related is simply to repeat the ancient fallacy: *post hoc ergo propter hoc*." United States Steel Group v. United States, 96 F.3d 1352, 1358 (Fed. Cir. 1996) (emphasis in original).

[51] Slip Op. at 29-30.

[52] Id. at 30 (citing Gerald Metals, 132 F.2d at 722).

[53] Gerald Metals, 132 F.3d at 720 (quoting Suramerica de Aleaciones Laminadas, C.A. v. United States, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951)).

[54] Id. at 720 (quoting Suramerica, 44 F3d. at 985 (quoting Universal Camera, 340 U.S. at 488)).

Though the domestic industry describes itself as vulnerable, I do not find that to be the case. It is insulated from competition by "Buy American" requirements. Many large government and government-funded sales must be to Cray, the sole U.S. producer of vector supercomputers. Therefore, despite the recent decline in the size of government procurements, Cray has a substantial protected market in which it is not subject to any competition. Further, as noted above, Cray's recent financial performance may well have been understated because of its backlog of orders. Moreover, a significant number of supercomputer purchases are single-sourced. Even excluding "Buy American" purchases, Cray was the sole bidder in [[ ]] prospective sales, and it won in head-to-head competition [[ ]] times.[55]

Japanese producers have had and continue to have some excess production capacity due primarily to the nature of the industry, which requires that systems be built to specification. The factories therefore respond to particular orders and do not work in the same kind of consistent manner as do producers of interchangeable products. Japanese capacity utilization increased from [[ ]] percent in 1994 to [[ ]] percent in 1995, and increased to [[ ]] percent in 1996.[56] Though capacity utilization was [[ ]] percent in interim 1997, as compared with [[ ]] percent in interim 1996, this excess capacity is no greater than that available in 1994 and 1995, but neither of those years saw a surge in imports (only [[ ]] imported in each year).[57]

Imports of subject merchandise increased in volume from 1994 to 1997, but that increase was not significant in absolute terms. Subject imports increased from [[ ]] in each

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[55] Table VI, CR at V-6-7.

[56] Table VII-2, CR at VII-7.

[57] Id.; Table IV-2, CR at IV-5.

1994 and 1995 to [[ ]] in 1996 and [[ ]] in interim 1997.[58] Expressed in terms of value, the increase was from [[ ]] million in 1994 to [[ ]] million in 1995, and imports reached [[ ]] million in 1996.[59] Interim 1997 shipments were worth [[ ]] million, as compared to [[ ]] million in 1996.[60] Given that the price of vector supercomputers ranges from $300,000 to $40 million, these numbers are not high.

The significance declines even more when expressed in terms of percentage of domestic consumption as expressed by value. In 1994, subject imports accounted for [[ ]] percent of domestic consumption.[61] In 1995, they rose to [[ ]] percent, and in 1996, they accounted for [[ ]] percent.[62] Subject imports reached their peak in interim 1996 at [[ ]] percent, but they stood at only [[ ]] percent in interim 1997.[63]

I do not find that imports of the subject merchandise are likely to have price suppressing or depressing effects such as to increase demand for subject imports. As I indicated above, price considerations have not been determinative in past vector supercomputer purchases. Nothing in the record suggests a change in the future. More than [[ ]] percent (by value) of vector supercomputer purchased from January 1994 to June 1997 were single-sourced.[64] [[ ]] projects cited by the Commission in support of its analysis were actually won by the domestic industry. Finally, the majority of projects reviewed were won by suppliers whose bids

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[58] Table IV-2, CR at IV-5.

[59] Id.

[60] Id.

[61] Table IV-3, CR at IV-6.

[62] Id.

[63] Id.

[64] CR at V-4 n.2. This number may be overstated because companies may have considered competing bids at an earlier stage in the procurement process.

were significantly higher-priced. Price was not the determinative factor in any of the [[ ]] instances in which the domestic industry competed directly with subject imports. In fact, Cray itself won [[ ]] of those contracts despite having the highest bid. In another instance, Fujitsu won the contract despite a bid [[ ]] higher than that of any competitor.

Many firms make their decisions in favor of existing vendors. Changing systems, even from one vector to another vector supercomputer, requires significant retooling in computer operating programs and applications. Purchasers therefore have a strong incentive to upgrade their existing systems with the same manufacturer to facilitate the transition to an upgraded product.[65] To the extent Cray already dominates the U.S. market, therefore, it is in a protected and enviable position as compared to any competitor.

Nearly all supercomputers are built to specification depending on the applications the purchaser intends to run on them. Inventories of the subject merchandise are therefore not at issue.[66] For the same reason, product-shifting is not at issue in this case. As I have already stated, Japanese producers have excess capacity and could increase production of the subject merchandise, but would be unlikely to do so absent an increase in orders.

I also do not find that the record supports any conclusion that Cray's production and development efforts have been hampered due to increases in subject imports. Cray was responsible for [[ ]] percent of worldwide computer shipments in 1995, and was projected to have [[ ]] percent of worldwide supercomputer revenue in 1996.[67]Cray was acquired as of July 1, 1996, by SGI. Together, Cray and SGI have become perhaps the worlds leading high-

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[65] Id. at II-22 n.46.

[66] Id. at VII-5.

[67] Id. at II-2 n.5.

performance computer company.[68] Cray and SGI [[

]].[69] Because of the size and market strength of the merged company, and the relatively small volume of subject imports, I do not find that Cray's production and development efforts are likely to be adversely affected by imports Japanese supercomputers.

I have not discerned any other adverse effects that would lead me to believe the domestic industry is threatened with material injury by reason of the subject imports. Though the industry faces increasing competition from non-vector supercomputers and may be adversely affected should the perceived decline in U.S. government procurements continue, further dumped imports are not imminent and no material injury by reason of the subject imports would occur unless an order is issued.

V. Conclusion

For the foregoing reasons, I find that the domestic industry is not materially injured or threatened with material injury by reason of imports of the subject merchandise.

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[68] Id. at III-2.

[69] CR at II-2-3 n.10.

Appendix

FEDERAL REGISTER NOTICE

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–750 (Final) (Remand)]

Vector Supercomputers From Japan; Notice and Scheduling of Remand Proceedings

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The U.S. International Trade Commission (the Commission) hereby gives notice of the court-ordered remand of its final antidumping investigation No. 731–TA–750 (Final).

EFFECTIVE DATE: January 19, 1999.

FOR FURTHER INFORMATION CONTACT: Valerie Newkirk, Office of Investigations, telephone 202–205–3190 or Cynthia P. Johnson, Office of General Counsel, telephone 202–205–3098, U.S. International Trade Commission. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (http://www.usitc.gov).

SUPPLEMENTARY INFORMATION

Background

On December 15, 1998, the United States Court of International Trade ("CIT") issued a remand Order to the Commission in NEC Corporation and HSNX Supercomputers, Inc., and Fujitsu Limited and Fujitsu America, Inc., v. Department of Commerce & U.S. International Trade Commission, Consol. Ct. No. 97–11–01967, Slip. Op. 98–164. That case involved review of the Commission's October 1997 affirmative determination in Vector Supercomputers from Japan, Inv. No. 731–TA–750 (Final). The CIT held that it could not uphold the Supercomputers determination because the Commission "may have adopted" reasoning that "is contradictory to the 'by reason of' standard adopted by the Federal Circuit." NEC, Slip Op. 98–164 at 30. In addition, the CIT held that the Commission "did not apply the analysis mandated by the Federal Circuit" in examining the price effects of future imports. Id. at 31. Accordingly, the CIT remanded the Commission's threat of material injury determination for further explanation or reconsideration.

Participation in the Proceedings

Only those persons who were parties to the original administrative

proceedings (i.e., persons listed on the Commission Secretary's service list) may participate in these remand proceedings.

Written Submissions

Briefs should be concise, limited to the issue on remand, and thoroughly referenced to information on the record in the original investigation. This remand investigation is being conducted on the evidentiary record from the original investigation. Therefore, the submission of new factual information is not permitted. Written briefs shall be limited to twenty-five (25) pages, and must be filed no later than close of business on February 4, 1999. No further submissions will be permitted unless otherwise ordered by the Commission.

All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain business proprietary information (BPI) must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This action is taken under the authority of the Tariff Act of 1930, title VII.

Issued: January 20, 1999.

By order of the Commission.

Donna R. Koehnke,

Secretary.

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