

UNITED STATES INTERNATIONAL TRADE COMMISSION
HYDRAULIC MAGNETIC CIRCUIT BREAKERS FROM SOUTH AFRICA
Investigation No. 731-TA-1033 (Preliminary)

DETERMINATION AND VIEWS OF THE COMMISSION
(USITC Publication No. 3600, June 2003)

DETERMINATION

On the basis of the record¹ developed in the subject investigation, the United States International Trade Commission (Commission) determines, pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1673b(a)) (the Act), that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded, by reason of imports from South Africa of hydraulic magnetic circuit breakers, provided for in subheadings 8535.21.00 and 8536.20.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (LTFV).

BACKGROUND

On April 14, 2003, a petition was filed with the Commission and Department of Commerce (Commerce) by Airpax Corp., Cambridge, MD, alleging that an industry in the United States is materially injured and threatened with material injury by reason of LTFV imports of hydraulic magnetic circuit breakers from South Africa. Accordingly, effective April 14, 2003, the Commission instituted antidumping duty investigation No. 731-TA-1033 (Preliminary).

Notice of the institution of the Commission's investigation and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of April 22, 2003 (68 *FR* 19849). The conference was held in Washington, DC, on May 5, 2003, and all persons who requested the opportunity were permitted to appear in person or by counsel.

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

VIEWS OF THE COMMISSION

Based on the record in this investigation, we determine that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of hydraulic magnetic circuit breakers (“HMCBs”) from South Africa that are alleged to be sold in the United States at less than fair value (LTFV).¹

I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS

The legal standard for preliminary antidumping and countervailing duty determinations requires the Commission to determine, based upon the information available at the time, whether there is a reasonable indication that a domestic industry is materially injured, threatened with material injury, or that the establishment of an industry is materially retarded, by reason of the subject imports.² In applying this standard, the Commission weighs the evidence before it and determines whether “(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation.”³

The Court of Appeals for the Federal Circuit has stated that the purpose of preliminary determinations is to avoid the cost and disruption to trade caused by unnecessary investigations and that the “reasonable indication” standard requires more than a finding that there is a “possibility” of material injury.⁴ It also has noted that, in a preliminary investigation, the “[t]he statute calls for a reasonable indication of injury, not a reasonable indication of need for further inquiry.”⁵ Moreover, the CIT recently has reaffirmed that in applying the reasonable indication “standard for making a preliminary determination regarding material injury or threat of material injury, the Commission may weigh all evidence before it and resolve conflicts in the evidence.”⁶

The record in this investigation includes complete or nearly complete information from the sole domestic producer of HMCBs, the sole producer of the subject merchandise, and the only known importers of the subject merchandise and non-subject merchandise. It also contains information from some of the purchasers of HMCBs. As we discuss below, we find that this record contains clear and convincing evidence that the domestic industry producing HMCBs is neither materially injured nor threatened with material injury by reason of the subject imports. We see no likelihood that any evidence we obtain in any final investigation would change our findings that the domestic industry has been impacted in a minimal manner, at most, by the subject imports during the period and no likelihood that any evidence obtained in any final investigation would change our findings with respect to either present material injury or threat of material injury by reason of subject imports.

¹ Whether the establishment of an industry is materially retarded is not an issue in this investigation.

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

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

⁴ American Lamb, 785 F.2d at 1004.

⁵ Texas Crushed Stone Co. v. United States, 35 F.3d 1535, 1543 (Fed. Cir. 1994).

⁶ R-CALF, 74 F. Supp.2d at 1368 (Ct. Int’l Trade 1999).

II. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. In General

In determining whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the Commission first defines the “domestic like product” and the “industry.”⁷ Section 771(4)(A) of the Tariff Act of 1930, as amended (“the Act”), defines the relevant domestic industry as the “producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product.”⁸ In turn, the Act defines “domestic like product” as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation”⁹

The decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and the Commission has applied the statutory standard of “like” or “most similar in characteristics and uses” on a case-by-case basis.¹⁰ No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation.¹¹ The Commission looks for clear dividing lines among possible like products and disregards minor variations.¹² Although the Commission must accept the determination of the Department of Commerce (“Commerce”) as to the scope of the imported merchandise allegedly sold at LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified.¹³

⁷ 19 U.S.C. § 1677(4)(A).

⁸ 19 U.S.C. § 1677(4)(A).

⁹ 19 U.S.C. § 1677(10).

¹⁰ See, e.g., NEC Corp. v. Department of Commerce, Slip Op. 98-164 at 8 (CIT, Dec. 15, 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Torrington Co. v. United States, 747 F. Supp. 744, 749, n.3 (CIT 1990), aff’d, 938 F.2d 1278 (Fed. Cir. 1991) (“every like product determination ‘must be made on the particular record at issue’ and the ‘unique facts of each case’”). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes and production employees; and, where appropriate, (6) price. See Nippon, 19 CIT at 455, n.4; Timken Co. v. United States, 913 F. Supp. 580, 584 (CIT 1996).

¹¹ See, e.g., S. Rep. No. 96-249, at 90-91 (1979).

¹² Nippon Steel, 19 CIT at 455; Torrington, 747 F. Supp. at 748-49. See also S. Rep. No. 96-249, at 90-91 (1979) (Congress has indicated that the like product standard should not be interpreted in “such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not ‘like’ each other, nor should the definition of ‘like product’ be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under consideration.”).

¹³ Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568 (Fed. Cir. 1996) (Commission may find single like product corresponding to several different classes or kinds defined by Commerce); Torrington, 747 F. Supp. at 748-752 (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

B. Product Description

In its notice of institution, Commerce defined the scope of this investigation as follows:

all hydraulic magnetic circuit breakers (sometimes referred to as magnetic hydraulic) . . . incorporating a tripping means of a magnetic coil surrounding a tube and plunger, restrained by air, liquid or spring, whether or not sealed, whether or not of molded case, of any voltage less than 72.5 kilovolts, of any amperage rating, with single or multiple poles, of any mounting or connection means and of any terminal type, whether or not having a magnetic latch, and excluding thermal and thermal magnetic circuit breakers.¹⁴

A circuit breaker is a device that breaks an electrical circuit when the electrical current exceeds a predetermined value. Breaking the circuit in such an “overcurrent” condition protects the wires and other devices connected within the circuit. Breaking can be performed by a fuse or circuit breakers of various types, including HMCBs, thermal circuit breakers (TCBs), and thermal magnetic circuit breakers (TMCBs). Like other circuit breakers, after an HMCB breaks (or “trips”) the circuit, it can be reset in order to restore the circuit.¹⁵

C. Domestic Like Product Issues

Petitioner Airpax Corp. asserts that the Commission should find a single domestic like product that is co-extensive with the scope of the subject merchandise. Respondents in the investigation -- Circuit Breaker Industries, Ltd. (the sole foreign producer) and CBI, Inc. (an importer of the subject merchandise) (collectively “Respondents”) -- initially requested a broader like product that also included TCBs and TMCBs, but did not address the issue at the preliminary staff conference or in their brief.

For the reasons set forth below, we define the domestic like product co-extensively with the subject merchandise: all HMCBs of any voltage of less than 72.5 kilovolts. We do not include TCBs or TMCBs in the domestic like product.

1. Physical characteristics and uses

HMCBs differ from TCBs and TMCBs both in their tripping mechanisms and in the performance characteristics that result from the different tripping mechanisms. The tripping mechanism in HMCBs is a delay tube containing a fluid and a movable solid core. The core moves in response to changes in a surrounding magnetic field produced by passing electricity through wires coiled around the tube. In contrast, the tripping mechanism in a TCB is a strip containing two different metals (a “bimetal”), which warps in response to heat. TMCBs use a three-sided piece of metal surrounded by a bi-metal plate.¹⁶

The delay tube generally permits HMCBs to provide a more precisely-calibrated tripping performance than do TCBs or TMCBs. Movement of the core within the tube is readily controlled,

¹⁴ 68 Fed. Reg. 25332, 25333 (May 12, 2003).

¹⁵ Confidential Staff Report (“CR”) and Public Staff Report (“PR”) at I-2.

¹⁶ CR and PR at I-2 to I-4; Petition at 8-9; Petitioner’s Postconference Brief at 3; Transcript of May 5, 2003 Conference (“Tr.”) at 10-13 (testimony of Steven A. McDonald, Executive Vice President and General Manager of Airpax Corporation).

primarily by adjusting the viscosity of the fluid. The delay tube allows a precise trip time delay (the length of time between the sensing of the overcurrent and the breaking of the circuit), ranging from milliseconds to minutes. In contrast, trip times in TCBs and TMCBs are not as readily adjusted.¹⁷

There are other differences in physical characteristics as well. All circuit breakers are calibrated to trip when they sense a specified amount of current, measured in amperes (“A”). HMCBs are offered in amperage rating increments of 0.1A, while TCBs and TMCBs typically are offered in increments of 5A or 10A, although some are offered in increments of 0.5A.¹⁸ HMCBs have a better direct current short circuit rating than do TCBs or TMCBs. HMCBs also provide a lower handle force than TCBs and TMCBs, allowing HMCBs to function as a switch in some instances. Because their tripping mechanism is not activated by heat, HMCBs are not subject to the nuisance tripping due to changes in ambient temperature that can occur in TCBs and TMCBs.¹⁹

The broader range of performance offered by HMCBs, and their greater precision, result in more varied uses for HMCBs than for TCBs or TMCBs. Although all circuit breakers are used to break circuits, HMCBs primarily are used by original equipment manufacturers in equipment applications, including telecommunications; power equipment; base transceiver stations; UPS systems; datacom/server equipment; HVAC systems; railway equipment; marine panels; and power generators. Uses in many of these industries require particular trip time characteristics to accommodate different conditions and requirements.²⁰ TCBs primarily are used as supplementary protectors and generally are not capable of branch circuit protection. TMCBs primarily are used in wire protection applications.²¹

2. Interchangeability

Interchangeability between HMCBs on the one hand and TCBs and TMCBs on the other is limited. TCBs and TMCBs cannot substitute for HMCBs in many products where the user requires the tripping characteristics available only through HMCBs.^{22 23} Moreover, once a product is designed, interchangeability is very low.²⁴ Even prior to design, performance characteristics or industry standards may prevent the use of a TCB or TMCB instead of an HMCB.²⁵

¹⁷ CR and PR at I-2 to I-4.

¹⁸ CR at I-4, PR at I-3, Petition at 8-9, Tr. at 10-14 (McDonald), Petitioner’s Postconference Brief at 2-4.

¹⁹ CR at I-4 to I-5; PR at I-3 to I-4; Tr. at 12-14, 36 (McDonald); Petitioner’s Postconference Brief at 3. Nuisance tripping can be minimized in TCBs by use of a compensating bimetal. Tr. at 66 (Helmuth H. Fischer, Managing Director of Circuit Breaker Industries, Ltd. and President of CBI, Inc.).

²⁰ Tr. at 14 (McDonald).

²¹ CR at I-4, PR at I-3, Tr. at 15-16 (McDonald), Petitioner’s Postconference Brief at 4-5.

²² As discussed above, Respondents assert that their Q-Frame products may be substituted for TCBs and TMCBs. Tr. at 65 (Fischer). Respondents also assert, however, that their Q-Frame product is smaller than that of the domestic producer, and thus that there is no comparable domestic product. Tr. at 94 (Chris Oliver, Sales and Marketing Manager, CBI, Inc.). Accordingly, it does not appear that domestically produced Q-Frame HMCBs are often substituted for TCBs or TMCBs.

²³ CR at I-2, I-4 to I-5, II-11; PR at I-2 to I-4, II-6 to II-7; Tr. at 17 (McDonald); Petitioner’s Postconference Brief at 6.

²⁴ CR at II-11, PR at II-7.

²⁵ CR at I-2, I-4 to I-5; PR at I-3 to I-4; Tr. at 90-92 (John M. Tremaine, Chief Executive Officer, Q-Tran, Inc. (a purchaser of HMCBs)).

3. Channels of distribution

There is some overlap in the channels of distribution through which HMCBs and TCBs are sold, but relatively little between the channels through which HMCBs and TMCBs are sold. About 80 percent of HMCBs are sold directly to OEMs while 20 percent are sold to distributors. About 40 percent of TCBs are sold to OEMs and 60 percent to distributors. Nearly all TMCBs are sold directly to distributors and large retailers.²⁶

4. Common Production Facilities, Production Processes, and Production Workers

The sole domestic producer of HMCBs does not produce TCBs or TMCBs. Accordingly, there is no overlap in manufacturing facilities or production employees.²⁷ The record also indicates that production processes differ. The production process for HMCBs is more labor-intensive than that for TCBs or TMCBs, particularly the production of the delay tubes, which is done by hand by skilled workers.²⁸ Petitioner states that it would be unable to ***, suggesting a lack of overlap in production processes.²⁹

5. Producer and Customer Perceptions

The sole domestic producer of HMCBs views HMCBs as distinct from TCBs and TMCBs, and it does not produce TCBs or TMCBs.³⁰ The Commission received the testimony of a customer who generally viewed HMCBs to be distinct from TCBs and TMCBs, due to performance and regulatory requirements, as well as design constraints.³¹

6. Price

Available record data indicate that HMCBs are higher in price than TCBs and TMCBs, but the difference is less than in the past.³²

In summary, HMCBs appear distinct from either TCBs or TMCBs due to differences in their tripping mechanisms. These differences in structure result in important differences in performance, and ultimately in uses. The differences limit interchangeability, and there is no overlap in manufacturing facilities or production workers. Producers and customers appear to view HMCBs as distinct from TCBs and TMCBs. There is some overlap in channels of distribution between HMCBs and TCBs, but very little between HMCBs and TMCBs. There are some differences in price as well.

²⁶ CR at I-7, PR at I-5, Tr. at 16-17 (McDonald), Petitioner's Postconference Brief at 5-6.

²⁷ CR and PR at III-1, Petitioner's Postconference Brief at 6.

²⁸ Tr. at 18-19 (McDonald), Petitioner's Postconference Brief at 7.

²⁹ CR at II-6, PR at II-3.

³⁰ Tr. at 17 (McDonald).

³¹ Tr. at 89-93 (Tremaine). See generally Tr. at 75-79 (Tremaine) (addressing design constraints in another context).

³² Tr. at 16 (McDonald), Petitioner's Postconference Brief at 6-7.

On the basis of the foregoing, we find a clear dividing line between HMCBs on the one hand and TCBs and TMCBs on the other, for purposes of this preliminary phase investigation. Accordingly, we define the domestic like product as HMCBs, co-extensive with the scope of the subject merchandise.³³

D. Domestic Industry

The domestic industry is defined as “the producers as a [w]hole of a domestic like product . . .”³⁴ In defining the domestic industry, the Commission generally includes in the industry all of the domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market.³⁵ Based on our definition of the domestic like product, we conclude that the domestic industry consists of Airpax Corp., the only domestic producer of HMCBs.³⁶

III. NEGLIGIBLE IMPORTS³⁷

By statute, imports from a subject country corresponding to a domestic like product that account for less than three percent of all such merchandise imported into the United States during the most recent 12 months for which data are available preceding the filing of the petition shall be deemed negligible.³⁸ The statute further provides that imports from a single country that comprise less than three percent of total imports of such merchandise may not be considered negligible if there are several countries subject to investigation with negligible imports and the sum of such imports from all those countries in the aggregate accounts for more than seven percent of the volume of all such merchandise imported into the United States.³⁹

The statute also provides that, even if imports are found to be negligible for purposes of present material injury, they shall not be treated as negligible for purposes of a threat analysis should the Commission determine that there is a potential that imports from the country concerned will imminently account for more than three percent of all such merchandise imported into the United States.⁴⁰ By operation of law, a finding of negligibility terminates the Commission’s investigations with respect to such

³³ No party advocated that the domestic like product be expanded to include upstream components of HMCBs, although there is production of HMCB components in the United States for assembly into HMCBs in Mexico. See CR at II-1 to II-2, n. 4; PR at II-1 n.4; Petitioner’s Brief at Appendix, p. 27; Respondents’ Postconference Brief at 5 n.17 and at Exh. A at 2-3.

³⁴ 19 U.S.C. § 1677(4)(A).

³⁵ See United States Steel Group v. United States, 873 F. Supp. 673, 681-84 (CIT 1994), aff’d, 96 F.3d 1352 (Fed. Cir. 1996).

³⁶ No party has argued for the exclusion of Airpax under the related party provision of the statute, 19 U.S.C. §1677(4)(B), and nothing in the record indicates that it was a related party during the period examined.

³⁷ When considering negligibility in a preliminary determination, the Commission applies the American Lamb standard. The Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, Vol. 1 at 857 (1994) (“SAA”).

³⁸ 19 U.S.C. § 1677(24)(A)(i)(I).

³⁹ 19 U.S.C. § 1677(24)(A)(ii).

⁴⁰ 19 U.S.C. § 1677(24)(A)(iv).

imports.⁴¹ The Commission is authorized to make “reasonable estimates on the basis of available statistics” of pertinent import levels for purposes of deciding negligibility.⁴²

The most recent twelve-month period prior to the filing of the petition for which data are available is April 2002 through March 2003, and it is the appropriate period for evaluating negligibility in this investigation.⁴³ Total imports over the period were calculated using complete information received from all known importers of HMCBs. The record includes import data measured in units, in “poles,”⁴⁴ and in value. During the twelve-month period, the ratio of subject imports to all imports corresponding to the domestic like product was *** percent in units, *** percent in poles, and *** percent in value. For the reasons discussed below, we base our negligibility determination on the data based in units. Although the volume of subject imports is less than three percent of total imports when measured in poles or by value, it is not negligible when measured by units and we therefore do not terminate this investigation on the basis of negligibility.

The Commission must determine whether the volume of subject imports makes up three percent of all imports corresponding to a domestic like product, but the statute does not specify whether volume should be measured in units, by value, or by some other measure. The Commission’s general practice is to evaluate such volume based on units, unless the record clearly demonstrates that some other measure better represents volume.⁴⁵ There is no indication on this record that poles or value clearly is a better measure of volume than units.⁴⁶

The SAA supports the use of units. The SAA permits the Commission to estimate the percentage of subject imports based on U.S. government import statistics, which are collected and reported according to the provisions of the Harmonized Tariff System of the United States (HTSUS).⁴⁷ Specifically, the SAA permits the Commission to base estimates on data from U.S. government import statistics, even if the basket tariff provision encompasses not only the imports at issue but others as well. Because the SAA permits the use of HTS methodology, the method of measuring volume in that data is also, by implication, permitted under the SAA. The SAA does not, however, prohibit the use of other data as the basis for

⁴¹ 19 U.S.C. § 1671b(a)(1), 19 U.S.C. § 1673b(a)(1).

⁴² 19 U.S.C. § 1677(24)(C). See also SAA at 856-57.

⁴³ The Commission has found that the 12-month period preceding the filing of the petition ends “with the last full month prior to the month in which the petition is filed, if those data are available.” Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela, Inv. Nos. 701-TA-417-421 (Preliminary) and 731-TA-953-963 (Preliminary), USITC Pub. 3456 (October 2001) at 8 n. 37.

⁴⁴ HMCBs can have one or multiple “poles.” A pole consists of a delay tube and the exterior attachments. CR at II-3, PR at II-2. Each pole is a completely separate circuit that can be protected simultaneously by an HMCB. CR and PR at I-2. In some instances, one HMCB with two poles can substitute for two HMCBs with one pole. Industry data sometimes are recorded in poles rather than units. See CR and PR at I-2.

⁴⁵ See Ball Bearings from China, Inv. No. 731-TA-989 (Preliminary), USITC Pub. 3504 (May 2002) at 7 n.28 & at 8 n.38; Engineered Process Gas Turbo-Compressor Systems from Japan, Inv. No. 731-TA-748 (Final), USITC Pub. 3042 (June 1997) at 13-14 and 20-21; Static Random Access Memory Semiconductors From the Republic of Korea and Taiwan, 731-TA-761-762 (Final), USITC Pub. 3098 (April 1998) at 12 n.78.

⁴⁶ In its Postconference Brief, Petitioner suggested that in making the negligibility determination the Commission measure volumes of HMCBs in units because that is how HMCB imports were reported in Census Bureau statistics. Petitioner’s Postconference Brief at 12 n.26. Petitioner also, however, suggested that the Commission use poles when measuring volume for its injury analysis, because data based on units were incomplete at that time. Petitioner’s Postconference Brief at 10 n.21. Although the data were incomplete at the time of Petitioner’s brief, the Commission subsequently received complete data.

⁴⁷ SAA at 856.

reasonable estimates. The HTSUS provisions at issue here -- those covering subject HMCBs -- require import volumes to be reported in numbers (units).⁴⁸

Given that the volume of subject imports as measured in units exceeds the three percent negligibility threshold, we determine that the volume of subject imports is not negligible for purposes of this preliminary determination.^{49 50}

IV. NO REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF ALLEGEDLY LTFV IMPORTS FROM SOUTH AFRICA

In the preliminary phase of antidumping duty investigations, the Commission determines whether there is a reasonable indication that an industry in the United States is materially injured by reason of the imports under investigation.⁵¹ In making this determination, the Commission must consider the volume of subject imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations.⁵² The statute defines “material injury” as “harm which is not inconsequential, immaterial, or unimportant.”⁵³ In assessing whether there is a reasonable indication that the domestic industry is materially injured by reason of subject imports, we consider all relevant economic factors that bear on the state of the industry in the United States.⁵⁴ No single factor is dispositive, and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”⁵⁵

For the reasons discussed below, we determine that there is no reasonable indication that the domestic industry is materially injured by reason of subject imports of HMCBs from South Africa that are allegedly sold in the United States at less than fair value.

A. Conditions of Competition

When performing our analysis in this investigation, we took into account the following conditions of competition:

Non-subject imports, almost all from Mexico, accounted for the vast majority (more than *** percent) of HMCBs sold in the United States throughout the period examined.⁵⁶ Prior to the period examined, several domestic concerns that formerly produced HMCBs in the United States relocated all of

⁴⁸ Harmonized Tariff Schedule of the United States, subheadings 8535.21.00 and 8536.20.00.

⁴⁹ Moreover, although the volume of subject imports is below the negligibility threshold when measured by poles or by value, because subject imports exceed the threshold when measured in units, we conclude that the record evidence as a whole does not contain clear and convincing evidence that the volume of subject imports is negligible.

⁵⁰ The remainder of our analysis is based on HMCB volume measured in units, although volume measured in poles and by value both exhibit similar trends. See CR and PR at Tables C-1 and C-2.

⁵¹ 19 U.S.C. § 1673b(a).

⁵² 19 U.S.C. § 1677(7)(B)(i). The Commission “may consider such other economic factors as are relevant to the determination” but shall “identify each [such] factor . . . [and] explain in full its relevance to the determination.” 19 U.S.C. § 1677(7)(B). See also Angus Chemical Co. v. United States, 140 F.3d 1478 (Fed. Cir. 1998).

⁵³ 19 U.S.C. § 1677(7)(A).

⁵⁴ 19 U.S.C. § 1677(7)(C)(iii).

⁵⁵ 19 U.S.C. § 1677(7)(C)(iii).

⁵⁶ CR and PR at Table IV-4.

their HMCB production activity to Mexico.⁵⁷ Similarly, Petitioner Airpax, the sole remaining domestic producer of HMCBs, shifted the vast majority of its production to Mexico prior to the appearance of subject imports in the United States.⁵⁸ During the period examined, more than *** percent of Airpax's production was in Mexico.⁵⁹ A substantial portion of Airpax's domestic production is of military specification HMCBs for sale to the U.S. military and small production runs to satisfy small orders.⁶⁰ During the period examined, the Petitioner and former U.S. producers Carling and Eaton produced the vast majority of HMCBs sold in the United States at their production facilities in Mexico and accounted for all non-subject imports from Mexico.^{61 62}

While supply is concentrated in the Mexican operations of a few concerns, demand in the United States is widely dispersed among many small-volume customers. HMCBs, including both domestic product and imports, are sold primarily to OEMs (80 percent), with the remainder sold to distributors.⁶³ HMCBs have a wide range of end-use applications, including telecommunications equipment, power equipment, base transceiver stations, UPS systems, datacom/server equipment, HVAC systems, railway equipment, marine panels, and power generators.⁶⁴

Among HMCBs sold in the United States, the most common frame sizes are B, C, D, E, F, and Q.⁶⁵ In general, HMCBs of one frame size cannot be substituted for HMCBs of another frame size, due to differences in size, amperage capacity, and industry standards.⁶⁶

Even within frame sizes, there are a multitude of configurations sold. For example, Petitioner builds roughly 40,000 to 50,000 different configurations from its domestic production in a year, often ordered in very small quantities.⁶⁷ HMCBs produced in these small runs are tailored for a particular application.⁶⁸

⁵⁷ Petition at 3-4 & Exh. 3; Respondents' Postconference Brief at 11-12; Tr. at 41 (McDonald), 61 (Fischer).

⁵⁸ Petitioner's Postconference Brief at Exh. 4. The Petitioner revised some of the data contained in Exhibit 4 in a subsequent submission to the Commission. Both sets of data show that Airpax shifted the bulk of its production to Mexico well before the period examined. Petitioner asserts that subject imports appeared in the U.S. market in 2000. Petition at 17. Even during 2000, subject imports accounted for less than *** of U.S. apparent consumption. CR and PR at Table IV-4, Petitioner's Postconference Brief at 11.

⁵⁹ CR at II-2 to II-3, PR at II-2.

⁶⁰ Tr. at 33-34, 48-50 (McDonald) and Petitioner's Postconference brief at Exhibit 2.

⁶¹ Airpax's HMCB production in Mexico accounted for *** percent of apparent U.S. consumption during the period examined, Carling's Mexican production accounted for *** percent, and Eaton's Mexican production accounted for *** percent. Subject imports made up the remaining *** percent. CR at II-2 to II-3, PR at II-2.

⁶² In addition, several of the former U.S. producers manufacture HMCBs in China, and Petitioner will begin production in China in the near future. Tr. at 69-70 (Fischer); Respondents' Postconference Brief, Exh. A at 4 and Exh. Q; Petition at 3-4 and Exh. 4 at 1-2; CR and PR at II-1 n.3.

⁶³ Petitioner's Postconference Brief at 5.

⁶⁴ Petitioner's Postconference Brief at 4.

⁶⁵ Tr. at 9 (McDonald), 65 (Fischer).

⁶⁶ Petitioner's Postconference Brief at 27-28. See Tr. at 9 (McDonald). Respondents' Postconference Brief at Exh. V.

⁶⁷ Tr. at 33, 48-50 (McDonald).

⁶⁸ Tr. at 33-35 (McDonald). See Respondents' Postconference Brief at 14.

Apparent U.S. consumption fell *** over the period examined, from *** million units in 2000 to *** million units in 2001 and *** million units in 2002.⁶⁹ The value of apparent U.S. consumption fell even more abruptly, from \$*** million in 2000 to \$*** million in 2001 and \$*** million in 2002.⁷⁰

The decline in overall demand was due largely to a sharp decline in demand for HMCBs for use in telecommunications equipment.⁷¹ Prior to the period examined, the need for telecommunications equipment expanded substantially and demand for HMCBs in this application increased significantly. This trend reversed dramatically during the period examined, however, as the telecommunications “bubble” burst.⁷² Investment in the U.S. telecommunications sector declined by 44.5 percent from 2000 to 2002, and the U.S. telecommunications sector reportedly amassed total debts of about \$1 trillion and lost 500,000 jobs.⁷³ In contrast, demand in other end-use applications, such as lighting and industrial equipment, has been steady or has increased from 2000 to 2002.⁷⁴

Certain factors limited direct competition between subject imports and the domestic like product during the period examined. Sales of HMCBs for telecommunications applications accounted for nearly *** of Petitioner’s sales (in units) over the period examined.⁷⁵ In contrast, over *** of subject imports were sold for use in lighting products.^{76 77} As a result, there is *** on the other (E-T-A Circuit Breakers was the only other importer of record of subject merchandise apart from CBI, Inc.).⁷⁸ Also reflective of the limited direct competition, Airpax ships HMCBs in 40,000 to 50,000 configurations per year, while Circuit Breaker Industries, Ltd. supplies only *** to *** configurations.⁷⁹ In contrast, Carling offers HMCBs from its Mexican production in up to *** configurations, and Airpax indicated that Carling was its biggest competition in the U.S. HMCB market.⁸⁰ A high share of Airpax’s U.S. production is in small runs to

⁶⁹ CR and PR at Table IV-4.

⁷⁰ CR and PR at Table IV-4.

⁷¹ Petitioner’s Postconference Brief at 14. Petitioner contends that “the telecommunications sector is largely responsible for the overall decline in estimated U.S. apparent consumption from 2000 to 2002 . . . [and that,] [i]n contrast, demand in other end-use sectors, such as lighting and industrial equipment, has been static or increased from 2000 to 2002.” Id. See CR and PR at VI-1 n.1.

⁷² Tr. at 44 (McDonald). Accord Petitioner’s Postconference Brief at Appendix, p. 26:

***.

⁷³ CR at II-10, PR at II-6.

⁷⁴ Petitioner’s Postconference Brief at 14.

⁷⁵ CR at II-14, PR at II-8 to II-9. U.S. shipments of HMCBs were sold primarily into the telecommunications sector, followed by the HMCB distributor, industrial user, and power distribution market sectors. CR at II-14, PR at II-8.

⁷⁶ CR at II-14, PR at II-8 to II-9. See CR at II-8 n.31, PR at II-5, n.31 (***).

⁷⁷ Pricing data gathered by the Commission reflect limits on competition between subject imports and the domestic product as well. The Commission requested sales prices on certain HMCB products, as further discussed in subsection C below. The quantity of sales represented in the reported sales in those categories account for *** percent of the U.S. shipment quantity of subject imports over the period examined, but only *** percent of the U.S. shipment quantity of the domestic product. CR at V-8 & nn.19-20, PR at V-5 & nn.19-20.

⁷⁸ CR at II-4, PR at II-2.

⁷⁹ Tr. at 33 (McDonald), CR at II-3 and PR at II-2.

⁸⁰ CR at II-3, PR at II-2.

satisfy specialized small orders, while a large portion of its non-subject production in Mexico is in larger runs, directed to large-volume customers.⁸¹

B. Volume of the Subject Imports

Section 771(7)(C)(i) of the Act provides that the “Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.”⁸²

The volume of subject imports increased between 2000 and 2002, but we determine, in light of the prevailing market conditions, that neither the absolute volume nor increase in volume is significant. The volume of U.S. shipments of subject imports from South Africa started from a very low level. The volume of U.S. shipments of subject imports was *** units in 2000, *** units in 2001, and *** units in 2002.⁸³ In the first quarters of 2002 and 2003, the volume of U.S. shipments of subject imports was *** and *** units, respectively.⁸⁴ In contrast, apparent U.S. consumption was *** units in 2000, *** units in 2001, and *** units in 2002.

Despite these absolute increases, the volume of U.S. shipments of subject imports remained small in terms of market share, due primarily to the very large presence of non-subject imports. The market share of U.S. shipments of subject imports was *** percent in 2000, *** percent in 2001, and *** percent in 2002.⁸⁵ In the first quarters of 2002 and 2003, the market shares of subject imports were *** and *** percent, respectively.⁸⁶ Due to the predominant presence of non-subject imports, market share held by the domestic product was low as well. In units, the market share of the domestic product was *** percent in 2000, *** percent in 2001, and *** percent in 2002.⁸⁷ For the first quarters of 2002 and 2003, the domestic industry’s market share was *** percent and *** percent, respectively.⁸⁸ In contrast, non-subject

⁸¹ The majority of sales of the domestic product is made pursuant to ***. CR at II-15, PR at II-9. ***, subject imports primarily are sold ***. CR at II-16, PR at II-9.

⁸² 19 U.S.C. § 1677(7)(C)(i).

⁸³ CR and PR at Table IV-3. In poles, U.S. shipments of subject imports were *** in 2000, *** in 2001, and *** in 2002. CR and PR at Table IV-3. In value, U.S. shipments of subject imports were \$*** in 2000, \$*** in 2001, and \$*** in 2002. CR and PR at Table IV-3.

⁸⁴ CR and PR at Table IV-3. In poles, U.S. shipments of subject imports were *** in the first quarter of 2002 and *** in the first quarter of 2003. *Id.* In value, U.S. shipments of subject imports were \$*** in the first quarter of 2002 and \$*** in the first quarter of 2003. *Id.*

⁸⁵ CR and PR at Table IV-4. In poles, the market share of subject imports was *** percent in 2000, *** percent in 2001, and *** percent in 2002. *Id.* In value, the market share of subject imports was *** percent in 2000, *** percent in 2001, and *** percent in 2002. *Id.*

⁸⁶ CR and PR at Table IV-4. In poles, the market share of subject imports was *** percent and *** percent in the first quarters of 2002 and 2003, respectively. *Id.* In value, the market share of subject imports was *** percent and *** percent in the first quarters of 2002 and 2003, respectively. *Id.*

⁸⁷ CR and PR at Table IV-4. In poles, the domestic industry’s market share was *** percent in 2000, *** percent in 2001, and *** percent in 2002. *Id.* In value, the domestic industry’s market share was *** percent in 2000, *** percent in 2001, and *** percent in 2002. *Id.*

⁸⁸ CR and PR at Table IV-4. In poles, the domestic industry’s market share was *** percent in the first quarter of 2002 and *** percent in the first quarter of 2003. *Id.* In value, the domestic industry’s market share was *** percent in the first quarter of 2002 and *** percent in the first quarter of 2003. *Id.*

imports held a market share of *** percent in 2000, *** percent in 2001, and *** percent in 2002.⁸⁹ For the first quarters of 2002 and 2003, the non-subject imports held a market share of *** percent and *** percent, respectively.⁹⁰ Accordingly, even in 2002, when the market share of subject imports was at its highest and that of non-subject imports at its lowest, the market share of non-subject imports was still more than *** times greater than the volume of subject imports.

Moreover, these figures show that any increase in the market share of subject imports tended to displace the predominant non-subject imports, rather than the domestic product. From 2000 to 2001, the market share of subject imports increased by *** percentage points while that of the domestic industry also increased, by *** percentage points.⁹¹ Accordingly, subject imports did not displace the domestic product from 2000 to 2001. From 2001 to 2002, the market share of subject imports increased by *** percentage points, while the market share of domestic shipments decreased by only *** percentage points. During these years, therefore, the small increase in market share of subject imports primarily displaced non-subject imports. Overall, from 2000 to 2002, the market share of subject imports increased by *** percentage points, while that of the domestic industry also increased, by *** percentage points.⁹² Between the first quarters of 2002 and 2003, the market share of the domestic industry rose very ***, while subject imports lost market share, primarily to non-subject imports.⁹³

We find that the volume and increase in volume of subject imports are not significant, because the volume and increase in volume of subject imports are relatively small, because the volume of non-subject imports was at least *** times greater, and because the small increases in subject import volumes tended not to displace domestic production, but rather the predominant non-subject imports.

Our finding is not changed by a comparison of subject import volumes to the volume of domestic production.⁹⁴ Relative to domestic production, subject imports increased sharply, from an amount much smaller than the amount of domestic production in 2000 to an amount much larger than domestic production in 2002.⁹⁵ However, we do not find this measure of increased volume to be significant in light of the pertinent market conditions. The absolute volume of subject imports, as noted, remained small, and the vast majority of demand in the United States is satisfied by neither subject imports nor the domestic product, but by non-subject imports from Mexico. The non-subject imports from Mexico are produced solely at the Mexican production facilities of Carling and Eaton, former U.S. producers, and Airpax, the current U.S. producer, the three companies that account for all current non-subject imports from Mexico. These three companies' relocation of all or most of their production to Mexico -- actions unrelated to and predating the appearance of subject imports -- dramatically reduced the amount of domestic production,

⁸⁹ CR and PR at Table IV-4.

⁹⁰ CR and PR at Table IV-4.

⁹¹ Measured by poles, the market share held by U.S. product showed a slight decrease over the period examined, of *** percentage point, but the increase in subject imports' market share of *** percentage points was still mainly at the expense of non-subject imports, whose market share decreased by *** percentage points. CR and PR at Table IV-4.

⁹² As indicated in our discussion of the conditions of competition, the Petitioner conceded that it experienced lower sales as a result of sharp contraction in demand in the telecommunications sector, whereas subject imports were concentrated in the lighting sector.

⁹³ CR and PR at Table IV-4.

⁹⁴ Petitioner urged the Commission to find the volume of subject imports significant relative to domestic production. Petitioner's Postconference Brief at 8-9, 12.

⁹⁵ Domestic production was *** units in 2000, *** units in 2001, and *** units in 2002. CR and PR at Table III-1. As reported in the text above, the volume of U.S. shipments of subject imports was *** units in 2000, *** units in 2001, and *** units in 2002.

and thus the ratio of subject imports to U.S. production. In this investigation, therefore, factors not related to subject imports explain the change in the volume of subject imports relative to domestic production.

An additional factor supporting our conclusion is that more than *** percent of domestic production of HMCBs was exported outside the United States during the period examined.⁹⁶ These export shipments declined sharply over the period examined, and thus contributed to lower production by the domestic industry later in the period examined.⁹⁷ This decline cannot be due to subject imports.⁹⁸

In conclusion, we find that the volume of subject imports, and the increase in that volume, both in absolute terms and relative to domestic consumption or production, is not significant.

C. Price Effects of the Subject Imports

Section 771(C)(ii) of the Act provides that, in evaluating the price effects of the subject imports, the Commission shall consider whether –

- (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
- (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.⁹⁹

Gathering meaningful pricing data for this industry is complicated by the multitude of configurations in which HMCBs are sold. As noted, the sole domestic producer reported selling 40,000 to 50,000 different configurations in a single year. One company producing non-subject imports reported nearly *** different configurations.¹⁰⁰ As a result, no single configuration or group of configurations accounted for a significant share of sales, which makes it impractical to obtain pricing data accounting for a substantial percentage of total sales or to make price comparisons covering a substantial volume of product. Analysis of price comparisons is further complicated by the very large volume discounts provided by suppliers in this market, which can result in price discounts of 50 to 60 percent.^{101 102}

The Commission requested quarterly price data for domestic products and subject imports for four HMCB products suggested by Airpax. As requested, Product 1 was defined as all single pole, B-Frame size HMCB. Product 2 was defined as all single pole, D-Frame size HMCB.¹⁰³ Products 1 and 2 each

⁹⁶ Figure derived from CR and PR at Tables III-1 and III-2.

⁹⁷ CR and PR at Table III-2.

⁹⁸ We cannot attribute the effects of other factors to the subject imports. See Senate Doc. 96-249, 96th Cong. 1st Sess. (1979) at 74-75 and H.R. Doc. 96-317, 96th Cong., 1st Sess. (1979) at 47 (Commission's analysis to take into account evidence showing that harm to the domestic industry is attributable to other factors, including competition of non-subject imports sold at fair value, contraction in demand or changes in patterns of consumption, and the export performance of the domestic industry). Accord SAA at 851-52.

⁹⁹ 19 U.S.C. § 1677(7)(C)(ii).

¹⁰⁰ CR at II-3, PR at II-2.

¹⁰¹ CR at V-6, PR at V-4.

¹⁰² Even if the Commission were to proceed to a final phase investigation, the same limitations would apply. Moreover, due to the substantial range of products and volume discounts, average unit values are not a useful proxy for prices.

¹⁰³ CR at V-7 and PR at V-5.

encompassed a broad range of configurations.¹⁰⁴ Product 3 was defined as a subset of Product 1: single pole, B-Frame HMxCB, single coil, 25-ampere capacity, 240 vAC.^{105 106} The pricing data coverage for subject imports is relatively high, representing *** percent of U.S. shipments of subject imports during the period examined, but only *** percent of U.S. shipments of U.S. product.¹⁰⁷ We attribute the lower coverage for U.S. product not to a lack of response to our data request, given that the data sought were based on product categories suggested by the sole U.S. producer, but to limited competition with the subject imports, as discussed more fully below.

While the average quarterly pricing data for Products 1 and 2 may be used to show trends, the trends observed are mixed and inconclusive. Prices for Product 1 produced in the United States fluctuated but tended to rise in 2000 and 2001, before declining in the last quarter of 2002 to a level approximately the same as in the first quarter of 2000.¹⁰⁸ Prices for Product 1 from South Africa showed a different trend, falling *** during 2000, and then decreasing at a much *** rate during 2001 and 2002.¹⁰⁹ Prices for Product 2, for both subject imports and the domestic product, fluctuated in a downward trend during the period examined. We do not find a clear correlation in these trends between U.S. and subject import prices, particularly given that the broad product mixes reported in the pricing categories admit the possibility that changes in the composition of the products accounted for changes in average prices rather than changes in the prices for particular products.¹¹⁰

Five quarterly price comparisons were possible for Product 3, which is a subset of Product 1. Three comparisons showed that the subject imports undersold the domestic like product, by margins ranging from *** percent to *** percent.¹¹¹ The two other comparisons showed the subject imports oversold the domestic product, by margins of *** percent and *** percent.¹¹²

We do not find these mixed instances of underselling to be significant. First, there are multiple configurations of HMxCBs within the definition of Product 3.¹¹³ Additionally, the volume of product captured in these comparisons was very small for the domestic producer.¹¹⁴ As noted, volume discounts are significant in this market, and thus price comparisons of sales of different volumes may not indicate actual price differences.¹¹⁵

¹⁰⁴ CR at V-7 and PR at V-5. See Tr. at 33, 48-50 (McDonald); CR at II-3; PR at II-2.

¹⁰⁵ CR at V-7, V-8 n.20; PR at V-5 & n.20.

¹⁰⁶ The Commission also gathered data as to a Product 4 suggested by Petitioner. Product 4 is a subset of Product 2: single pole, D-frame HMxCBs, single coil, 100-ampere capacity, 240 vAC. CR at V-7, V-8 n.20; PR at V-5 & n.20. Airpax ultimately determined that it did not sell any HMxCBs of that description during the period examined. CR at V-16 and PR at V-8. Accordingly, no price comparison or domestic price trend data are available regarding Product 4.

¹⁰⁷ CR at V-8; PR at V-5.

¹⁰⁸ CR and PR at Figure V-2.

¹⁰⁹ CR and PR at Figure V-2.

¹¹⁰ See, e.g., CR and PR at VI-1 n.1.

¹¹¹ CR at V-16 and PR at V-8.

¹¹² CR at V-16 and PR at V-8.

¹¹³ CR at V-7 and PR at V-5. Petitioner stated that ***. Staff interview with Messrs. John Smirnow and Myron Barlow, counsel to Petitioner, April 2, 2003.

¹¹⁴ CR at V-16 and PR at V-8.

¹¹⁵ With respect to price trends for Product 3, the limited and sporadic data show an increase in price for domestically manufactured Product 3 and a decrease in the price for subject imports of Product 3. CR and PR at

(continued...)

Price comparisons for broadly defined Products 1 and 2 are problematic because they each include HMCBs with very different configurations and values.¹¹⁶ Moreover, due to the large volume discounts in this market, even if sales of Products 1 or 2 of the same configuration were available, analysis of price comparisons would still be complicated.

Competition between subject imports and the domestic product is attenuated due to their respective concentrations in different end-use applications, as well as by the many differing configurations of the products. As indicated in our discussion of the conditions of competition, the domestic product is concentrated in telecommunications, HMCB distributors, industrial users, and power distribution. By contrast, about *** of subject imports were sold for use in lighting applications. The limited competition is corroborated by the Commission's investigation of Airpax's allegations of lost sales and lost revenues, which indicated that the vast majority of Airpax's sales allegedly lost to subject imports were of Airpax's Mexican production, that is, non-subject imports, rather than its U.S. production.¹¹⁷

In addition, we again note the predominant presence of non-subject imports, which never accounted for less than *** times the volume of subject imports. Although price comparisons involving non-subject imports are subject to the same limitations discussed above, data submitted by one producer of non-subject imports (***), indicate that they on occasion undersold both the U.S. product and subject imports.¹¹⁸ Further, the record suggests that any price declines¹¹⁹ for domestic HMCBs were due to the sharp contraction in demand in the telecommunications sector. In short, we do not attribute any significant price depression experienced by the domestic industry to subject import volume given the predominant position of non-subject imports and the limits on competition between subject imports and the domestic product.

Nor do we find that subject imports prevented the domestic industry from raising prices to any significant degree. The rising per unit costs and lower per unit sales values in 2002 experienced by the domestic industry indicate a motivation to raise prices. We do not attribute to subject imports to a significant degree any inability on the part of the domestic industry to raise prices given the steep decline in demand for HMCBs, the predominant presence of non-subject imports, and the limits on competition between subject imports and the domestic product.

We accordingly find that subject imports have not had significant adverse effects on domestic prices during the period examined.

D. Impact of the Subject Imports

Section 771(7)(C)(iii) provides that the Commission, in examining the impact of the subject imports on the domestic industry, "shall evaluate all relevant economic factors which have a bearing on the state of the industry."¹²⁰ These factors include output, sales, inventories, capacity utilization, market share,

¹¹⁵ (...continued)
Table V-3a.

¹¹⁶ CR at V-7 and PR at V-5. Compare General Motors Corp. v. United States, 827 F. Supp. 774, 787 (Ct. Int'l Trade 1993) (differences in the products made specific price comparisons unreliable).

¹¹⁷ CR at V-19 to V-23, PR at V-8 to V-10.

¹¹⁸ CR at V-16, V-19; PR at V-8.

¹¹⁹ See Tr. at 20 (McDonald), 23 (Michael V. Rabasca, Vice President and Chief Executive Officer, Airpax Corp.) (asserting price declines). As noted above, however, price trends on Products 1 and 2 are mixed and inconclusive.

¹²⁰ 19 U.S.C. § 1677(7)(C)(iii); see also SAA at 851 and 885 ("In material injury determinations, the Commission considers, in addition to imports, other factors that may be contributing to overall injury. While these (continued...)

employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the industry.”¹²¹

We find that the subject imports of HMCBs from South Africa have not had a significant adverse impact on the condition of the domestic industry. As discussed below, the domestic industry experienced substantial losses in 2002 after positive financial results in 2000 and 2001. A comparison of data from the first quarters of 2002 and 2003 suggest that the domestic industry’s losses are continuing, likely at a higher rate. We do not attribute the domestic industry’s financial reversal to subject imports, consistent with our findings that the volume of subject imports is not significant and that subject imports are not having significant negative price effects on prices for the domestic product. Instead, the record demonstrates that the domestic industry’s poorer performance after 2001 is due to other factors, as described below.

By most measures, the domestic industry showed positive results in 2000 and 2001, in contrast to declining performance in 2002. The domestic industry produced *** units in 2000, *** units in 2001, and *** units in 2002.¹²² During the first quarter of 2002 the domestic industry produced *** units compared to *** units during the first quarter of 2003.¹²³

Because the domestic industry produces to order, its output and shipments follow a similar pattern. The industry’s domestic shipments were *** units in 2000, *** units in 2001, and *** units in 2002.¹²⁴ Its domestic shipments totaled *** during the first quarter of 2002 compared to *** units in the first quarter of 2003.¹²⁵

As noted previously, the industry’s share of apparent U.S. consumption was low throughout the period. The domestic industry had a market share of *** percent in 2000, *** percent in 2001, and *** percent in 2002. Overall, the domestic industry’s market share did not decline over the period examined, and any increase in subject imports’ market share over the period examined came at the expense of non-subject imports, not the domestic product. Primarily as a result of Airpax’s ongoing shift of production activities to Mexico, the domestic industry’s capacity utilization rates were low and declining throughout the period examined. The domestic industry’s capacity utilization rate was *** percent in 2000, *** percent in 2001, and *** percent in 2002.¹²⁶ During the first quarter of 2002, its capacity utilization rate was *** percent, compared to *** percent in the first quarter of 2003.¹²⁷

The domestic industry’s financial performance reflects the same pattern. As a ratio of net sales, the domestic industry earned an operating margin of *** percent in 2000, *** percent in 2001, but it

¹²⁰ (...continued)

factors, 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.” *Id.* at 885).

¹²¹ 19 U.S.C. § 1677(7)(C)(iii). The statute instructs the Commission to consider the “magnitude of the dumping margin” in an antidumping proceeding as part of its consideration of the impact of imports. In its notice of initiation, Commerce estimated that dumping margins for imports of HMCBs from South Africa ranged from 129.43 to 721.95 percent. 68 Fed. Reg. 25332, 25334 (May 12, 2003).

¹²² CR and PR at Table III-1.

¹²³ CR and PR at Table III-1.

¹²⁴ CR and PR at Table III-2.

¹²⁵ CR and PR at Table III-2.

¹²⁶ CR and PR at Table III-1.

¹²⁷ CR and PR at Table III-1.

experienced an operating margin of a negative *** percent in 2002.¹²⁸ During the first quarter of 2002, the domestic industry experienced operating margins of negative *** percent and negative *** percent in the first quarter of 2003.¹²⁹ Gross profits, operating income, and net income followed similar patterns.¹³⁰

The record indicates that the domestic industry's financial reversal after 2001 resulted from sharp reductions in the quantity of its U.S. shipments as well as the lower per unit value of its sales that year. The quantity of the domestic industry's U.S. shipments fell by nearly *** from 2001 to 2002, from *** units to *** units.¹³¹ The lower quantity of shipments resulted in lower net sales and lower production.¹³² The drop in production had the effect of raising per unit costs, as substantial fixed costs were spread across fewer units in 2002 than in 2001. The other major factor adversely affecting the financial performance of the domestic industry is *** lower unit values for sales, which declined nearly *** from \$*** in 2001 to \$*** in 2002.^{133 134}

We find that the factors affecting the domestic industry's performance were not related to any significant degree to subject imports. As to the decrease in quantity of U.S. shipments, the domestic industry experienced a decline from 2000 to 2002 that was slightly less than the overall decline in apparent U.S. consumption over the same period.¹³⁵ From 2001 to 2002, the domestic industry experienced a decline in U.S. shipments that was steeper than the decline in apparent U.S. consumption. The domestic industry indicated to the Commission, however, that the telecommunications sector "played a dominant role during [fiscal years] 2000 and 2001" and "experienced a significant downturn as the end of 2001 that has carried through to the present."¹³⁶ Telecommunications was the leading end-use application for the HMCBs that the domestic industry sold, and therefore the decline in telecommunications demand accounts in large part for the domestic industry's decline in sales in 2002.

Other factors unrelated to subject imports also contributed to the domestic industry's decline in U.S. shipments after 2001. Sales of military specification HMCBs accounted for between *** and *** percent of Airpax's total sales of domestically produced HMCBs during each full year of the period examined.¹³⁷ Airpax is the sole certified domestic producer of military specification HMCBs, so these sales were effectively shielded from competition with subject imports.¹³⁸ Nevertheless, the domestic industry largely shifted the sourcing of HMCBs to fill military orders from its U.S. production to its Mexican production in 2002.¹³⁹ In 2000, the domestic industry sourced only *** percent of its HMCBs for military

¹²⁸ CR and PR at Table VI-1.

¹²⁹ CR and PR at Table VI-1.

¹³⁰ CR and PR at Table VI-1.

¹³¹ CR and PR at Table C-1.

¹³² The domestic industry produces only to order. CR at II-15, PR at II-9.

¹³³ CR and PR at Table C-1.

¹³⁴ In the first quarter of 2002, the domestic industry's unit values were much higher than any full-year average at \$***, while during the first quarter of 2003 they were much lower than any full-year average at \$***. CR and PR at Table C-1. Because the figures appear aberrational, we place little weight on these quarterly unit value data.

¹³⁵ For the domestic industry, the decline was *** percent whereas the decline in overall U.S. apparent consumption was *** percent. CR and PR at Table C-1.

¹³⁶ CR and PR at VI-1 n.1.

¹³⁷ Petitioner's Postconference Brief at Exh. 2 (Petitioner supplied these data in poles).

¹³⁸ Petition at 34, Tr. at 37-38 (Smirnow).

¹³⁹ Petitioner's Postconference Brief at Exh. 2. It appears that the domestic industry has found it more profitable to produce HMCBs for military orders in Mexico, even though domestic production and sales were shielded from

(continued...)

orders from Mexico; this figure rose to *** percent in 2001 and *** percent in 2002.¹⁴⁰ During the first quarter of 2003, the domestic industry sourced fully *** percent of its military sales from Mexico.¹⁴¹ Airpax's shift of this production to Mexico – production effectively shielded from competition with subject imports – contributed in significant part to the decline in the domestic industry's U.S. shipments in 2002.

The subject imports in contrast had no significant role. From 2000 to 2002, the domestic industry gained slightly in market share, and thus the small increase in market share by the subject imports did not displace the domestic product. From 2001 to 2002, the small volume gain in subject imports predominantly displaced non-subject imports. The subject imports had a smaller market share in the first quarter of 2003 than in the first quarter of 2002, yet the domestic industry's performance was significantly worse in the first quarter of 2003 than the first quarter of 2002.¹⁴²

Nor does the record indicate that the lower unit sales values experienced by the domestic industry in 2002 were due to any significant degree to subject imports. The domestic industry informed the Commission that:

***¹⁴³

Based on this and other record information, we conclude that the lower unit values experienced by the domestic industry in 2002 were the result of changes in product mix caused by the contraction in demand for “***” HMCBs used in the production of telecommunications equipment.¹⁴⁴

For the reasons discussed above, we do not find that the subject import volume had any significant adverse effects on the domestic industry during the period examined. The decline in the domestic industry's financial performance in 2002 was due to its lower volume of sales and lower unit values for the sales. Both of these declines were caused by factors not related to subject imports. Although subject imports increased in volume and market share over the period examined, they did not gain market share at the expense of the domestic industry, which increased its market share ***. Instead, these adverse factors observed in 2002 were caused by the ongoing contraction in demand for higher unit value HMCBs for use in the production of telecommunications equipment, and the decision by the domestic industry to produce military specification HMCBs in Mexico rather than in the United States and to shift some production to lower unit value HMCBs.

¹³⁹ (...continued)

competition from subject imports. Airpax's combined U.S. and Mexican HMCB operations were *** at a gross profit level, even during 2002. Airpax's questionnaire response (April 29, 2003) attachment to Part III. Airpax experienced positive operating margins for its combined U.S. and Mexican operations ***. *Id.* As Petitioner urges, however, the Commission must as a matter of law examine only the U.S. operations of the domestic industry in evaluating material injury and threat of material injury. Petitioner's Postconference Brief at 8; 19 U.S.C. § 1677(7)(B)(i)(III); *General Motors Corp. v. United States*, 827 F. Supp. 774, 779-80 (Ct. Int'l Trade 1993).

¹⁴⁰ Figures derived from Petitioner's Postconference Brief at Exhibit 2.

¹⁴¹ Figures derived from Petitioner's Postconference Brief at Exhibit 2.

¹⁴² Even if the domestic industry had captured the entire volume of sales filled by subject imports, the domestic industry still would have operated at low capacity utilization rates. Moreover, there is no indication that the domestic industry could have captured more than a modest portion of the already small volume of subject import sales, given that subject imports gained market share at the expense of non-subject imports.

¹⁴³ CR and PR at VI-1 n.1.

¹⁴⁴ Petitioner's Postconference Brief at Exh. 2. The domestic industry's decision to supply the bulk of its military orders from its Mexican production after 2001 also affected product mix.

Accordingly, for the reasons discussed above, we determine that there is not a reasonable indication that the domestic HMCB industry is materially injured by reason of subject imports from South Africa.

V. NO REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF ALLEGEDLY LTFV IMPORTS FROM SOUTH AFRICA

Section 771(7)(F) of the Act directs the Commission to determine whether an industry in the United States is threatened with material injury by reason of the subject imports by analyzing whether “further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted.”¹⁴⁵ The Commission may not make such a determination “on the basis of mere conjecture or supposition,” and considers the threat factors “as a whole.”¹⁴⁶ In making our determination, we have considered all factors that are relevant to this investigation.¹⁴⁷ Based on an evaluation of the relevant statutory factors, we find that there is no

¹⁴⁵ 19 U.S.C. § 1677d(b) and 1677(7)(F)(ii).

¹⁴⁶ 19 U.S.C. § 1677(7)(F)(ii). An affirmative threat determination must be based upon “positive evidence tending to show an intention to increase the levels of importation.” Metallverken Nederland B.V. v. United States, 744 F. Supp. 281, 287 (Ct. Int’l Trade 1990), citing American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1280 (Ct. Int’l Trade 1984); see also Calabrian Corp. v. United States, 794 F. Supp. 377, 387-88 (Ct. Int’l Trade 1992), citing H.R. Rep. No. 98-1156 at 174 (1984).

¹⁴⁷ 19 U.S.C. § 1677(7)(F). The Commission must consider, in addition to other relevant economic factors, the following statutory factors in its threat analysis:

- (I) if a countervailable subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement) and whether imports of the subject merchandise are likely to increase,
- (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,
- (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,
- (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices and are likely to increase demand for further imports,
- (V) inventories of the subject merchandise,
- (VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,
- (VII) in any investigation under this subtitle which involves imports of both a raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission under section 1671d(b)(1) or 1673d(b)(1) of this title with respect to either the raw agricultural product or the processed agricultural product (but not both),
- (VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
- (IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

Moreover, the Commission shall consider the threat factors “as a whole” in making its determination

(continued...)

reasonable indication that an industry in the United States is threatened with material injury by reason of imports of HMCBs from South Africa that allegedly are sold in the United States at LTFV.

As an initial matter, we find that the record has mixed indications regarding whether the domestic industry is vulnerable to a threat of material injury by reason of subject imports from South Africa. The domestic industry's performance generally was positive during 2000 and 2001, but it experienced losses in 2002. One of the factors causing those losses was the Petitioner's decision to supply military orders through Mexican production instead of its U.S. production.¹⁴⁸ There is no indication that the domestic industry intends to shift production back to the United States for its military orders, and thus the effect of this decision appears likely to continue in the imminent future. As to the other factor causing the domestic industry's lower performance in 2002, it is unclear whether demand in the telecommunications sector will remain at current levels, decline further, or recover somewhat.¹⁴⁹ On balance, we conclude that the financial condition of the domestic industry likely will remain in a weakened state during the imminent future.

As with regard to present material injury, our consideration of threat of material injury takes into account the predominant position of non-subject imports in the market. There is no indication that non-subject imports will cease to dominate the U.S. market in the imminent future. Our threat analysis also takes into account the limits on the competition between subject imports and the domestic product. As discussed more fully above, subject imports and the domestic product are sold primarily for different end-use applications; subject imports are offered in many fewer configurations than is the domestic product; and subject imports, in contrast to the domestic product, are directed to large volume, rather than small volume, customers.

We do not find a significant rate of increase in the volume or market penetration of subject imports that would indicate a likelihood of substantially increased imports. Neither the volume nor increase in volume of subject imports was high during the period examined. In addition, increases in the market share held by subject imports primarily came at the expense of non-subject imports. From 2000 to 2002, the domestic industry increased its market share ***, despite concurrent gains by subject imports. Circuit Breaker Industries, Ltd., the sole foreign producer of the subject merchandise, provided a listing of all booked orders through ***, and on that basis projects a decline in sales compared to 2002.¹⁵⁰ Moreover, subject import volumes were lower during the first quarter of 2003 than during the first quarter of 2002.¹⁵¹

Nor do we find that existing inventories of the subject merchandise indicate the potential for a significant increase in the volume of subject imports in the imminent future. Inventories were not

¹⁴⁷ (...continued)

“whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur” unless an order issues. In addition, the Commission must consider whether dumping findings or antidumping remedies in markets of foreign countries against the same class of merchandise suggest a threat of material injury to the domestic industry.

Factors I and VII are inapplicable to this investigation.

¹⁴⁸ As noted above, it appears that the domestic industry has found it more profitable to produce HMCBs for military orders in Mexico, even though they are shielded from competition from subject imports. As also noted, the Commission must as a matter of law examine only the U.S. operations of the domestic industry in evaluating material injury and threat of material injury.

¹⁴⁹ CR at II-10, PR at II-6; Petitioner's Postconference Brief at Exh. 6.

¹⁵⁰ CR at VII-5, PR at VII-2, Respondents' Postconference Brief at 48.

¹⁵¹ CR and PR at Table IV-2.

substantial relative to apparent U.S. consumption.¹⁵² Subject imports have competed primarily with the predominant non-subject imports during the period examined, and they likely will continue to do so in the imminent future. Approximately 46 percent of the inventory of subject imports held in the United States (80 percent of CBI's U.S. inventories) is earmarked to fill existing orders, and thus is not available to supply new orders.¹⁵³ Almost all the uncommitted inventory is a Q-Frame product sold for lighting applications, which is not a major area of sales for the domestic industry.¹⁵⁴ As for subject merchandise in inventory in South Africa, only a small portion of it is suitable for sale in the United States.¹⁵⁵

Our conclusion is supported further by record evidence regarding the operations of Circuit Breaker Industries, Ltd. The sole foreign producer operated at nearly full capacity during the period examined, and it is projected to do so in 2003 and 2004.¹⁵⁶ Circuit Breaker Industries, Ltd. reported a recent expansion in capacity, but it also represented that the new capacity was for HMCBs that cannot be sold in the United States.¹⁵⁷

The record also indicates that the foreign producer is not primarily export oriented. Although that figure declined somewhat during the period examined, the percentage of Circuit Breaker Industries, Ltd.'s sales that were made into the home market still accounted for the bulk (more than ***), of its total sales in 2002.¹⁵⁸ Even as to its exports, the foreign producer's sales to third country markets increased more rapidly than did its exports to the United States.¹⁵⁹ There are no reported antidumping orders on exports of HMCBs from South Africa into third country markets.

Subject imports are not entering the United States at prices likely to have significant price depressing or price suppressing effects, or to result in a significantly increased volume of sales. In considering price effects, we note that the volume of subject imports is small, particularly considering that non-subject imports were at least *** times higher. Moreover, as discussed above, subject imports and the domestic product largely were sold to different customers for different end-use applications, and subject imports were offered in many fewer configurations than was the domestic product. These and other factors mentioned previously result in limited competition between subject imports and the domestic product. Finally, the sharp decline in demand for HMCBs for use in telecommunications end-use applications strongly influenced any price declines during the period examined. Given these facts, we conclude that any possible price effects of subject imports are not significant or likely to result in increased volumes of subject imports at the expense of U.S. product.

The record does not indicate any actual or potential negative effects by subject imports on the existing development and production efforts of the domestic industry. The domestic industry reduced spending on research and development ("R&D") during the period examined, but we do not find the decline substantial nor do we attribute it to subject imports. The domestic industry's R&D expenses were \$*** in

¹⁵² CR and PR at Table C-1.

¹⁵³ Tr. at 71 (Fischer), CR at II-7 n.28, PR at II-4 n.28.

¹⁵⁴ Tr. at 71 (Fischer), CR at II-14, PR at II-8.

¹⁵⁵ Tr. at 71 (Fischer).

¹⁵⁶ CR and PR at Table VII-1.

¹⁵⁷ CR at II-7 n. 27, PR at II-4 n.27. Respondents indicated that this additional capacity cannot be shifted to production of HMCBs suitable for sale in the United States without "significant retooling and time." Tr. at 71 (Fischer). Similarly, Respondents indicated that it would require significant retooling to shift production of TMCBs to HMCBs. Respondents' Postconference Brief at 49.

¹⁵⁸ CR and PR at Table VII-1.

¹⁵⁹ CR and PR at Table VII-1.

2000, \$*** in 2001, and \$*** in 2002.¹⁶⁰ For the first quarter of 2002, R&D expenses were \$***, compared to \$*** in the first quarter of 2003.¹⁶¹

We do not find that these modest declines are evidence of actual or potential negative effects of subject imports on the domestic industry. The domestic industry slightly reduced R&D expenses from 2000 to 2001, even though in 2001 it gained market share, and remained profitable. Although most of the small gain in market share by subject imports occurred from 2001 to 2002, the reduction in R&D by the domestic industry from 2001 to 2002 was *** as it was from 2000 to 2001. Thus, the record does not indicate an accelerated reduction in R&D spending as a result of the increase in subject imports from 2001 to 2002. Moreover, based on the record, we attribute the slight decreases in R&D spending to the significant decline in HMCB demand discussed above.

The domestic industry's capital expenditures declined sharply from \$*** in 2000 to \$*** in 2001, but then were higher at \$*** in 2002.¹⁶² During the first quarters of 2002 and 2003, capital expenditures were little changed, at \$*** and \$*** respectively.¹⁶³ The record does not indicate that subject imports caused the fluctuations to any significant degree. From 2000 to 2001, the domestic industry reduced capital expenditures yet it continued to generate operating income. Subject imports gained minimally in market share, and the domestic industry increased its market share as well. The domestic industry increased capital expenditures from 2001 to 2002, although it lost some market share to subject imports and experienced operating losses. Therefore, we do not find that the domestic industry's fluctuating capital expenditures are evidence of actual or potential negative effects of subject imports on the domestic industry.

Finally, there is no evidence of any other demonstrable adverse trends that indicate that there is likely to be material injury by reason of subject imports.¹⁶⁴ Petitioner notes that public statements by Circuit Breaker Industries, Ltd. indicate an intent to expand sales in the United States market. As discussed above, however, we do not find a likelihood that the volume of subject imports is likely to increase substantially, or that subject imports will enter the United States at prices likely to result in price depression or price suppression. Competition between subject imports and the domestic like product is limited. Subject imports primarily compete with non-subject imports, which never held less than a *** percent market share during the period examined.

CONCLUSION

For the reasons stated above, we determine that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of HMCBs from South Africa that are allegedly sold in the United States at less than fair value.

¹⁶⁰ CR and PR at Table VI-3.

¹⁶¹ CR and PR at Table VI-3.

¹⁶² CR and PR at Table VI-3.

¹⁶³ CR and PR at Table VI-3.

¹⁶⁴ 19 U.S.C. § 1677(7)(F)(I)(IX).