UNITED STATES INTERNATIONAL TRADE COMMISSION

CERTAIN CARBON STEEL PRODUCTS FROM AUSTRALIA, BELGIUM, BRAZIL, CANADA, FINLAND, FRANCE, GERMANY, JAPAN, KOREA, MEXICO, THE NETHERLANDS, POLAND, ROMANIA, SPAIN, SWEDEN, TAIWAN, AND THE UNITED KINGDOM

Investigations Nos. AA-1921-197 (Remand), 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350 (Remand), and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Remand)

DETERMINATION AND VIEWS OF THE COMMISSION
(USITC Publication No. 3526, July 2002)

VIEWS OF THE COMMISSION

I. INTRODUCTION

These Views respond to the Court's order of remand.[1]

The decision of the Court remanding these reviews to the Commission[2] stated that the Court was unable to ascertain whether the Commission determined competition overlap to be likely in accordance with the statute. The Court stated that the Commission must construe "likely" to mean "probable" in analyzing cumulation and other relevant issues. The Court also stated that the Commission must address respondents' arguments that developments in the European Community will deter respondents from shipping subject imports to the United States and that the Commission must cite substantial evidence in the record showing that subject imports are likely despite these changes. Further, the Court required the Commission to analyze the purported discrepancy identified by German respondents in data reported by domestic producers in these reviews as compared to that reported in the 1999 investigations of Certain Cut-to-Length Plate from France, India, Indonesia, Italy, Japan, and Korea[3] and to weigh that evidence accordingly when making its overall remand analysis.[4] [5]

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[1] The Commission's initial Views in these reviews are hereby adopted as further elaborated herein. *See* Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, The Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and The United Kingdom, Inv. Nos. AA1921-197 (Review), 701-TA-231, 319-320, 322, 325-328, 340, 342, and 348-350 (Review), and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, and 614-618 (Review), USITC Pub. 3364 (Nov. 2000).

[2] Usinor Industeel, S.A. v. United States, Consol. Ct. No. 01-00006, Slip Op. 02-39 (Apr. 29, 2002).

[3] Certain Cut-to-Length Plate from France, India, Indonesia, Italy, Japan, and Korea, Inv. Nos. 701-TA-387-391 (Final) & 731-TA-816-821 (Final), USITC Pub. 3273 (Jan. 2000).

[4] Vice Chairman Hillman does not join the remainder of Section I, or Section II, of these Views. She joins Sections III and IV. *See* Separate Views of Vice Chairman Jennifer A. Hillman Regarding

Before addressing the specific issues that the Court ordered the Commission to consider in its remand determination, we choose to discuss one significant area in which we disagree with the Court's analytical approach to construing the statutory provision relating to the Commission's determination in reviews pursuant to 19 U.S.C. § 1675(c). These matters are currently the subject of a pending request for certification for interlocutory appeal filed with the Court on June 13, 2002. Given the importance of the Statement of Administrative Action (SAA) to the Commission's interpretation of and administration of the trade remedy provisions set forth in Title VII of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671 *et seq.*, the Commission begins its views on remand with a discussion of the role that Congress intended the SAA to have in the interpretation of provisions of the Uruguay Round Agreements Act (URAA), including those provisions governing the Commission's investigations and reviews under the antidumping and countervailing duty laws.

According to the URAA,

> The statement of administrative action approved by the 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.

19 USC § 3512(d). Thus, the role of the SAA is greater than that of conventional legislative history, in that its status as the definitive interpretation of the statute has been codified and it must be considered in interpreting the URAA.[6] At least three cases before the United States Court of Appeals for the

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the Interpretation of the Term "Likely."

[5] Commissioner Koplan does not join the remaining discussion in Section I.

[6] Given the fact that the Congress as well as the administration adopted the SAA, it is more authoritative than former legislative history, which was not codified as the definitive interpretation of the

Federal Circuit (CAFC), which interpret the statute and the role of the SAA in assisting in that interpretation, reinforce this view. In those cases, the CAFC used the SAA to construe the meaning of the relevant statutory provisions even when the court had found the statutory language to be unambiguous.[7]

The Court, however, appears to disagree that section 3512(d) elevates the SAA to "more than mere legislative history." Instead, Judge Restani states that the legislative history "is not necessarily inconsistent" with the Court's interpretation of the statute, and does so without consulting the SAA before interpreting the statute. It is clear from the URAA, and from the CAFC's opinions, that to

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statute. *See* H.R. Rep. No. 96-317 (1979) (pertaining to Trade Agreements Act of 1979).

[7] In SKF USA, Inc. v. United States, 263 F.3d 1369 (Fed. Cir. 2001), the CAFC stated that: "[t]he SAA, of course, is more than mere legislative history," and went on to quote section 3512(d) as support for this statement. *Id*. at 1373 n.3. In Micron Technology, Inc. v. United States, 243 F.3d 1301, 1305 & n.3 (Fed. Cir. 2001), the court looked first at the statute, then to the SAA for a definition of "same level of trade," noting again that the SAA is the authoritative expression of the meaning of the statute. The CAFC again recognized the SAA as being the authoritative expression of the interpretation of the statute in AK Steel Corp. v. United States, 226 F.3d 1361 (Fed. Cir. 2000) when it noted that a change in statutory language generally means that Congress meant to effect some change in the meaning of the law, but because the SAA stated the contrary in this particular instance, found that the "authoritative weight given the SAA in the statute" precluded such a presumption. *Id*. at 1368-69.

We note that the CAFC has recently decided a case involving the Department of Commerce and interpretation of the SAA. FAG Italia S.p.A v. United States, Nos. 01-1212, -1213, -1214 & -1215 (May 24, 2002). That case is inapposite here in that it does not pertain to the role of the SAA in interpreting the URAA, nor the explanation of a term used to interpret the URAA, which is the crux of the matter in the instant case. Indeed, in FAG Italia the Court noted, "[n]or is there any legislative history suggesting that Congress" contemplated the action taken by Commerce. *Id*. at 19.

discern the meaning of a provision of this particular statute, one must read the statute in conjunction with the SAA.[8]

The course taken by this Court in its April 29 opinion deviates from that taken in other decisions of the CIT. *See, e.g.,* NTN Bearing Corp. v. United States, 25 CIT ___, ___, 155 F. Supp.2d 715, 721, (2001) (Tsoucalas, J.) (reading text of statute in conjunction with SAA and recognizing the latter as being the authoritative expression of the former); Allied Tube & Conduit Corp. v. United States, 24 CIT ___, ___ & n.7, 127 F. Supp.2d 207, 216-17 & n.7 (2000) (Carman, J.) ("The Federal Circuit and this Court have recognized the controlling nature of the SAA and have used it as an authoritative guide in interpreting the Uruguay Round Agreements"); Torrington Co. v. United States, 24 CIT ___, ___ & n.3, 100 F. Supp.2d 1102, 1108 & n.3 (2000) (Tsoucalas, J.) (recognized SAA as authoritative expression of the statute and looked at agency's actions to determine if they were consistent with the SAA); Taiwan Semiconductor Industry Ass'n v. United States, 23 CIT ___, ___ n.6, 59 F. Supp. 2d 1324, 1328 n.6 (1999) (Pogue, J.) ("[t]he Court must be guided by language in the [SAA]"); Micron Technology, Inc. v. United States, 23 CIT ___, ___, 40 F. Supp. 2d 481, 485 (1999) (Goldberg, J.), *aff'd in part, rev'd in part on other grounds*, 243 F.3d 1301 (Fed. Cir. 2001) ("the SAA should not be dismissed as mere legislative history").[9]

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[8] *See* SKF USA, Inc., 263 F.3d 1369; Micron Technology, Inc., 243 F.3d 1301; AK Steel Corp., 226 F.3d 1361.

[9] The Commission is particularly confused in light of this Court's references in other cases to the "binding quasi-legislative requirements of the SAA," Nippon Steel Corp. v. United States, 25 CIT __, ___, 146 F. Supp.2d 835, 843 (2001) (Restani, J.), and to the fact that because Congress approved the SAA, it carries "particular authority." Delverde, SrL v. United States, 21 CIT 1294, 1307 n.18, 989 F. Supp. 218, 230 n.18 (1997) (Restani, J.).

II. THE INTERPRETATION OF "LIKELY"[10]

To comply with the Court's remand determination, the Commission must apply a fundamental term in the statute, "likely," as it pertains to five-year reviews. We have applied the term "likely" in over 250 sunset reviews. We have looked to the SAA in applying the term and have applied the term in a consistent manner. The Commission, in rendering its initial determination in these reviews, did not equate "likely" with "probable" or "possible" for purposes of its determination of whether material injury was likely to recur. The SAA, which is quasi-legislative in nature and must be read in tandem with the statute, requires the Commission to make a determination of whether "revocation of an order . . . would be likely to lead to continuation or recurrence of [material] injury" that is reasonable in the context of the facts of each case.[11] As is explained below, we have done so.

We begin by explaining our view of the meaning of the word "likely" as that term is used in the various provisions of the statute relating to sunset reviews by the Commission. The starting point necessarily is the statutory language itself and the relevant explication of that text to be found in the SAA. Reading the term "likely" in conjunction with the SAA leads us to the conclusion that "likely" means something more than a mere possibility, but something less than probable. We reach this conclusion based on an examination of the SAA itself. The SAA explains, unambiguously, that after the

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[10] Commissioner Koplan does not join Section II of these Views. *See* Dissenting Views of Commissioner Stephen Koplan Regarding the Interpretation of the Term "Likely."

[11] SAA at 883.

revocation "[t]here may be *more than one* likely outcome."[12] Congress' recognition of the possibility of "more than one likely outcome" runs counter to the notion that likely means "probable."

Our conclusion based on the SAA is fortified by consideration of the ordinary meaning of the term as determined from consideration of dictionary definitions and usage of these terms in other legal contexts. While, admittedly, some dictionaries treat the terms "probable," "likely" and "possible" as synonymous,[13] others do not.[14] We believe that those sources that recognize different connotations for these words identify ordinary meanings that are more consistent with the congressional intent reflected in the text of the SAA.

In our view, the term "likely" captures a concept that falls in between "probable" and "possible" on a continuum of relative certainty. Many dictionaries treat the term "probable" as connoting a relatively high degree of certainty, but something short of absolute certainty.[15] On the other hand, the word "possible" is construed to mean almost any practicable outcome.[16] The term "likely" is ascribed a

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[12] *Id*. (emphasis added).

[13] *See, e.g.*, Webster's Third New Int'l Dictionary (1965) (unabridged).

[14] *See, e.g.*, The New Shorter Oxford English Dictionary on Historical Principles (1993) (likely and probable are synonyms, but not possible); West's Law and Commercial Dictionary in Five Languages (1985) (same).

[15] *See, e.g.*, Ballentine's Law Dictionary (3d ed. 1969) ("likely" is "not more than 'probable' and sometimes less than 'probable' depending upon the context"); *see also* The New Shorter Oxford English Dictionary on Historical Principles (probable means "that may reasonably be expected to happen"); West's Law and Commercial Dictionary in Five Languages (1985) (probable means "[h]aving more evidence for than against"); Webster's New Int'l Dictionary of the English Language (2d ed. 1958) (unabridged) (probable means same).

[16] *See, e.g.*, The New Shorter Oxford English Dictionary on Historical Principles (possible means "[e]xpressing capability"); West's Law and Commercial Dictionary in Five Languages (possible means

meaning that is somewhere between that of the other two words.[17] Thus, when we apply the statutory criteria "likely," we require the facts in a particular case, consistent with the statute and the SAA, to satisfy a lower level of certainty of result than would be required were we applying the term "probable."

To the extent the Court used "probable" as a synonym for "likely" in order to distinguish "likely" from "possible," but not to impute to "likely" any higher level of certainty of result (which would preclude more than one likely outcome), then the Commission in its initial Views applied "likely" as consistent with the statute and with this Court's opinion. In this remand, however, we have re-examined the factual record and our findings and determinations to assess whether they also satisfy the higher level of certainty of result encompassed by the term "probable," and we conclude that they do.

In our initial five-year review determinations, the Commission found that subject imports from each of the 12 countries subject to review likely would have a discernible adverse impact on the domestic industry if the orders were revoked, based on an examination of the size of the industry in

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"capable of existing, happening, being, becoming or coming to pass); The American Heritage Dictionary of the English Language (3d ed. 1992) (possible means "capable of happening, existing, or being true without contradicting proven facts, laws, or circumstances"); The Random House Dictionary of the English Language (1966) (possible means "that may or can exist, happen, be done, be used, etc.").

[17] *See, e.g.*, Random House Webster's Unabridged Dictionary (2d ed. 1998) (likely means "seeming to fulfill requirements or expectations"); The American Heritage Dictionary of the English Language (likely means "[w]ithin the realm of credibility; plausible"); Webster's Third New Int'l Dictionary of the English Language (1981) (unabridged) (likely means "having a better chance of occurring than not"); Oxford American Dictionary (1980) ("likely" means "such as may reasonably be expected to occur or be true").

each country, each country's capacity to produce all types of plate products and its actual production of plate products, as well as the percentage of exports from each country.[18]

The Commission found, based on evidence regarding interchangeability between domestically-produced plate products and imported plate products, as well as evidence pertaining to interchangeability among imported plate products, and evidence as to channels of distribution and current market presence and geographic overlap, that there likely would be a reasonable overlap of competition between subject imports and the domestic like product, and among the subject imports, if the orders were revoked.[19] We also evaluated the evidence in the record regarding capacity (and excess capacity), the ease by which product-shifting could occur, the substantial quantities of plate exported by cumulated subject countries, outstanding antidumping and countervailing duty findings applicable to the subject countries, and the level of competition among subject plate products and between those products and the domestic like product, as well as other evidence, and found that the

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[18] USITC Pub. 3364 at 19-20, 59. Commissioner Bragg determined that subject imports from Canada would not have a discernible adverse impact on the domestic industry if the order on Canada were revoked. *Id.* at 70.

[19] *Id*. at 21-22, 59-60. The Commission majority determined not to exercise its discretion to cumulate subject imports from Canada with the other subject imports, based on significant differences in conditions of competition. *Id.* at 22-23. Commissioner Bragg determined that subject imports from Canada were not amenable to cumulation because likely import volumes from Canada would not have a discernible adverse impact on the domestic industry. *Id.* at 70; *see also* Separate Remand Views of Commissioner Lynn M. Bragg Regarding Cumulation. Nevertheless, Commissioner Bragg joined Commissioners Okun, Hillman, and Miller, in a cumulative analysis of subject imports from Belgium, Brazil, Finland, Germany, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom. *Id*. at 25-33.

volume of cumulated subject imports likely would be significant within a reasonably foreseeable time if the orders were revoked.[20]

With respect to likely price effects, we found that the evidence regarding the nature of price competition, prices that were falling or stabilizing at low levels, as well as the findings of significant price effects in the original investigations demonstrated that the significantly increased volumes of subject plate imports likely would undersell domestic plate products to a significant degree and have significant price suppressing and depressing effects within a reasonably foreseeable time.[21] Lastly, we found, after evaluating the evidence in the record regarding the condition of the domestic industry, including levels of production and U.S. shipments, amount of gross profits and operating income, and capacity, and other factors, and noting their decline as a result of successive waves of unfairly traded plate imports, that the price and volume declines induced by the cumulated subject imports likely would have a significant adverse impact on the production, sales, revenue, and employment levels of the domestic industry.[22]

We satisfied the requirements of the URAA, evaluating the factors referenced therein to make the review determinations, and also met the requirements of the SAA by making reasonable determinations based on the facts of these reviews. The Court sustained our findings on the facts of these reviews, stating that the Commission provided sufficient support for its findings regarding cumulation, likely volumes of subject imports, their likely price effects, and their likely adverse impact on the domestic industry, and did not err in its reasoning.

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[20] *Id*. at 26-28.

[21] *Id*. at 29.

[22] *Id*. at 30-33.

The Court, however, did not accept our proffered application of the term "likely." The differences between the Court's and our approaches are fundamental and meaningful. In a case such as this one where the legislative history carries "particular authority," deference is due to the agency's construction of its governing statute.[23]

A. The Commission's Interpretation of the Term "Likely" Is Reasonable

1. The SAA Explains that Because a Review Determination Is Inherently Predictive, More than One Outcome May Be Likely

The SAA's explanation that more than one outcome may be likely after the revocation of an order supports our view that the plain meaning of likely is not "probable." As explained above, the SAA is authoritative on any question regarding the interpretation of the URAA.

The SAA explains that a determination by the Commission in a five-year review "is inherently predictive."[24] A determination of whether continuation or recurrence of material injury is likely differs from a determination of material injury or threat of material injury in an original investigation.[25] Under the material injury standard, the Commission makes a determination of whether there is present material injury by reason of subject imports.[26] In a threat determination, the Commission decides whether material injury is imminent, given the status quo.[27] By contrast, under the likelihood of material injury

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[23] *See* U.S. Steel Group v. United States, 21 CIT 761, 762, 973 F. Supp. 1076, 1080 (1997).

[24] SAA at 883.

[25] *Id*.

[26] *Id.*

[27] *Id*.

standard, the Commission must engage in a "counter-factual analysis: it must decide the likely impact in the reasonably foreseeable future of an important change in the status quo – the revocation . . . of [an order] and the elimination of its restraining effects on volumes and prices of imports."[28]

As a result of the inherently predictive nature of the inquiry, the SAA explains that "[t]here may be *more than one* likely outcome following revocation."[29] The SAA explains further that

> [t]he possibility of other likely outcomes does not mean that a determination that revocation . . . is likely to lead to continuation or recurrence of . . . injury . . . is erroneous, as long as the determination of likelihood of continuation or recurrence is reasonable in light of the facts of the case.[30]

2. The SAA's Definition of the Likelihood Standard Does Not Equate "Likely" with "Possible"

The SAA states that there "may" be more than one likely outcome after the revocation of the orders.[31] Thus, while in some investigations there may be more than one likely outcome after revocation of the order, in other investigations there will not be. As the SAA explains, where there are other likely outcomes, "a determination that revocation . . . is likely to lead to continuation or recurrence of . . . injury, is [not] erroneous, as long as the determination of likelihood of continuation or recurrence is reasonable in light of the facts of the case."[32] Thus, the SAA always requires that a determination that revocation of an order will likely lead to the continuation or recurrence of material injury be

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[28] *Id*. at 883-84.

[29] *Id*. at 883 (emphasis added).

[30] *Id*.

[31] *Id*. at 883.

[32] *Id*.

"reasonable in light of the facts of the case." This explanation that there can be more than one likely outcome after the revocation of an order does not mean that the fact that material injury after the revocation of an order is "possible" satisfies the likelihood standard. In almost every case it may be "possible" that material injury will continue or recur if the orders are revoked.

The Commission must accept that the SAA is authoritative, and thus that more than one outcome may be likely in a given investigation if reasonable in light of the facts.[33] However, we did not indicate in the initial review determinations that we had determined that the revocation of the orders is likely to lead to continuation or recurrence of injury in reliance on the mere possibility of more than one likely outcome.

3. The SAA, in Referring to the "Possibility of Other Likely Outcomes," Does Not Simply Restate the Substantial Evidence Test

The Court holds the view that the SAA "possibility of other likely outcomes" language may merely restate the substantial evidence test.[34] However, canons of statutory construction support an examination of the context in which particular language is used to assist in gleaning its meaning.[35] It is noteworthy that there is no discussion of judicial review or standard of review anywhere in the passages of the SAA relating to the likelihood standard. The fact that the URAA left the question of judicial review in connection with the antidumping and countervailing duty determinations untouched altogether

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[33] *See* 19 U.S.C. § 3512(d).

[34] Slip Op. 02-39 at 14.

[35] *See* Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

indicates that the SAA language on likelihood should not be associated solely with the substantial evidence rule or any other judicial standard of review. In fact, the judicial standard of review is addressed elsewhere in the SAA.[36] [37] The passage is clearly directed in the first instance to the evidentiary standard to be applied by the Commission in five-year reviews and therefore guides the application of the likelihood standard, as is made absolutely clear by the paragraph immediately preceding the SAA passage quoted in the Court's opinion. The preceding paragraph reads as follows:

> Section 221(a) of the bill adds new section 752 which establishes standards to be applied by Commerce and the Commission in conducting changed circumstances and five-year reviews. Specifically, section 752 elaborates on the standards for determining whether revocation of an order or termination of a suspended investigation would be likely to lead to a continuation or recurrence of injury, countervailable subsidies, or dumping.[38]

Thus, the SAA paragraph relating to the "possibility of other likely outcomes" speaks to the considerations to be undertaken by Commerce and the Commission in making their likelihood determinations. Accordingly, it would be unreasonable to construe the relevant SAA language as merely an out of context restatement of the long-standing substantial evidence standard of judicial review.

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[36] SAA at 880-81 (sections 516A(a)(1) and 516A(b)(1)(B) were amended to apply the arbitrary and capricious standard to expedited reviews and the substantial evidence standard to full reviews).

[37] Based upon the foregoing, Commissioner Bragg finds that the referenced language in the SAA is entirely unrelated to any judicial standard of review; rather, Commissioner Bragg finds that the purpose of the referenced language is to inform the Commission's evaluation of the record in review investigations.

[38] *Id*. at 883.

4. Conclusion

For the purpose of the Commission's determinations on remand in these reviews we follow the Court's instructions to apply the meaning of "likely" as "probable," not "possible." To the extent the Court used "probable" to impute to "likely" a higher level of certainty of result than "likely," we also apply that standard, but only for purposes of this remand, as we find such a standard to be inconsistent with the statute and the SAA. We have reviewed the facts on which the Commission's initial determinations were based and concluded that these facts support findings in these reviews that it is probable that there would be a reasonable overlap of competition; it is probable that there would be significant volumes of cumulated subject imports within a reasonably foreseeable time; it is probable that there would be significant volumes of cumulated subject imports that would undersell domestic plate products to a significant degree and have significant price suppressing and depressing effects; and it is probable that there would be cumulated subject imports that would have a significant adverse impact within a reasonably foreseeable time. We make this determination in these reviews because, based on the facts in the record, there is a high degree of certainty that this outcome will occur, although we did not couch our determination in those terms. We note that there may not be such a high degree of certainty in all reviews, however. Nonetheless, our definition of "likely," and as explained below, our application of this definition in these reviews, is reasonable and in accordance with law.

III. CUMULATION[39] [40]

The Commission determines in this remand that, as stated in its initial Views, subject imports from each of the 12 countries likely would have a discernible adverse impact on the domestic industry if the orders were revoked, and that a reasonable overlap of competition between the subject imports and the domestic like product likely would exist if the orders were revoked. We therefore exercise our discretion to cumulate subject imports from 11 countries, but do not cumulate subject imports from Canada, because of the significant differences in conditions of competition as explained in the Commission's initial Views and incorporated herein.

A. Likelihood of No Discernible Adverse Impact

As the Commission stated in its initial Views, the size of the industry in each subject country is significant; each has substantial capacity to produce all types of plate products; actual production of subject plate as well as other plate is significant; and most countries export a substantial percentage of their production.[41] Because the types of plate products manufactured in the subject countries do not differ dramatically from those produced in the United States, we again find that imports from each of the subject countries likely would be substitutable for, and competitive with, domestically produced plate. We also again find that competition likely would be on the basis of price, as stated in the

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[39] Except as otherwise noted, Commissioner Bragg does not join Section III of these remand Views. *See* Separate Remand Views of Commissioner Lynn M. Bragg Regarding Cumulation.

[40] Commissioner Koplan joins in this discussion with respect to Belgium, Brazil, Finland, Germany, Mexico, Poland, Romania, Spain, Sweden, and Taiwan, but not with respect to the United Kingdom. *See* Dissenting Views of Chairman Stephen Koplan and Commissioner Thelma J. Askey in Cut-to-Length Carbon Steel Plate from the United Kingdom, USITC Pub. 3364 at 59-61.

[41] *Id*. at 20.

Commission's initial Views. Thus, for the foregoing reasons, as explained in more detail in those Views, and in light of the weakened condition of the U.S. industry, as described below and in our initial determinations, the likely imports of plate from each of the subject countries would have an adverse impact on the domestic industry.[42]

B. Reasonable Overlap of Competition

As the Commission explained in its initial Views in these reviews, there is a reasonable overlap in the types of subject plate produced in each subject country and in the United States. U.S. producers and importers generally reported that domestically produced plate products were interchangeable with imported plate products and that imports from subject countries were used interchangeably. Purchasers comparing domestic and subject import plate products found the U.S. product to be comparable to, and sometimes superior to, the subject imports. Purchasers most often ranked price as the most important factor considered when choosing a supplier, and quality second. Both domestic producers and U.S. importers shipped plate to end users, distributors, and service centers/processors. While the record is mixed regarding current market presence and geographic overlap with the orders in place, in light of the importance of sales to steel service centers, which are dispersed throughout the United States and hold sizeable plate inventories, we find it likely that subject imports from each subject country would be simultaneously present in the U.S. market as a whole and in the same geographical markets as other subject imports and the domestic like product.[43]

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[42] *See id*.

[43] *See id*. at 21-22.

In sum, we find that the record indicates that a reasonable overlap of competition upon revocation is likely (*i.e.* probable) and not merely possible, given that each subject country continues to produce, as they did in the original investigations, a variety of plate products, including commodity grades that account for a large share of the U.S. market, notwithstanding that subject countries have shifted to exporting specialized plate to the United States as a result of the orders; subject plate and the domestic product are generally interchangeable and compete substantially on price; and service centers, a major distribution channel for both the U.S. product and subject imports, have consolidated since the original investigations and enhanced their ability to purchase and hold in inventory sizeable quantities of imported plate.[44]

C. Other Considerations/Conditions of Competition[45]

In its initial Views, the Commission found no significant differences in conditions of competition among subject imports from all subject countries other than Canada. In its opinion remanding the Commission's Views, the Court stated that the Commission is to address respondents' arguments as to whether changes in the European Union (EU) since the 1993 investigations have significantly affected conditions of competition and whether, despite these changes, increased imports to the United States likely will occur, explaining its reasoning.[46] We find that these changes have not significantly affected

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[44] *Id*.

[45] Commissioner Bragg joins Section III.C. of these remand Views.

[46] Slip Op. 02-39 at 20.

conditions of competition and that it is likely, *i.e.* probable, that significant volumes of imports from subject EU countries to the United States will occur in the event of revocation.[47]

In its initial determinations in these reviews, the Commission stated:

> Several European respondents argue that the EU is effectively their home market and that strengthened integration in the EU means that they are increasingly focused on the European market, making them less likely to export to the United States upon revocation. The European Community was in existence for some time prior to the original investigations, although further steps at integration and expansion have taken place since the original investigations. While these steps could have the potential to reduce to some degree exports of EU countries to the United States compared to the original investigation, we are not convinced that there has been a shift of such a fundamental nature as to make significant exports to the United States unlikely. With respect to the adoption of a common currency, we believe it is too early to judge its likely effects on trade outside the EU.[48]

We reaffirm this finding and provide additional analysis.

The process of economic integration within Europe has taken place over a period of many years following World War II. The European Economic Community was formed by the Treaty of Rome in 1957. By 1968, the original six member countries eliminated tariffs on trade in goods between them. By 1986, the European Economic Community had expanded to 12 member countries. The Single Europe Act of 1986 provided for the elimination of internal customs border checks and for other harmonization measures by 1992, after which the European Economic Community became known as the European Union. In 1995, Sweden, Finland, and Austria acceded to the EU.[49]

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[47] *See infra* Section IV.A. (discussing volume generally).

[48] USITC Pub. 3364 at 27 n.155.

[49] *See* Domestic Producers' Cold-Rolled Posthearing Brief, Exh. 2.

We reiterate our conclusion from the Commission's initial Views that the additional integration and expansion steps that occurred as a result of the formation of the European Union could have the potential to increase the intra-EU focus of subject countries of the EU and thereby reduce to some degree these countries' exports to the United States compared to the original investigation.[50] However, substantial economic integration had already taken place by the time of our original investigations in 1992-1993. Such pre-existing integration did not prevent the subject EU countries, cumulated with the other subject countries, from exporting subject plate to the United States at volumes and prices that were injurious to the domestic industry producing the like product.

We have considered the information provided by the German respondents purporting to show a growing percentage of plate shipments destined for other EU countries. From 1990-1992, combined German plate shipments into the German market and to other EU countries averaged *** percent of total shipments, compared to a modestly-higher *** percent between 1993-99.[51] Average total plate shipments to all markets *** from *** million net tons to *** million net tons. While the most recent years (*e.g.* 1998-99) show lower exports outside the EU compared to previous periods,[52] there is fluctuation on a year-to-year basis in the volume of shipments that are sent to the various destinations.[53] Accordingly, at most these data could suggest some incremental increase in the intra-EU focus of these

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[50] USITC Pub. 3364 at 27 n.155.

[51] Domestic Producers' Cold-Rolled Posthearing Brief, Exh. 2.

[52] *Id*.

[53] *Id*.

German companies since the original investigations. However, we are hesitant to place undue weight on this information as it pertains to only one of six subject EU countries.[54]

Moreover, while the German respondents would have the Commission believe that the EU members are looking toward themselves as their primary market, other evidence they have submitted undermines this claim. There are numerous references in their exhibits to EU actions to enhance competitiveness within a global market.[55]

In addition, much of the German respondents' argument with respect to strong intra-EU trade was based on the strength of demand in the EU market for plate.[56] Evidence submitted by the German respondents, however, also suggests weakness of demand and an economic downturn in Europe ("the situation remains rather fragile").[57] Any weakening of the demand for plate within Europe would provide an incentive for European producers to look to other markets, including the United States.

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[54] Commissioner Bragg notes that much of the evidence provided by the German respondents pertains to heavy plate from the EU, not Germany, that is defined as being over 10 mm in thickness, *i.e.* 0.39 inches, with no maximum thickness defined. *See* Germany's Prehearing Brief at 17 & n.75 & App. 43; Germany's Posthearing Brief at 4 & App. 1. The Germans compare this product to the Commission's pricing product 1, Germany's Prehearing Brief at App. 44, which is defined, in part, as being 0.5" through 0.99" in thickness. CR/PR at PLATE-V-5. Commissioner Bragg finds a comparison of data for plate that is potentially quite thick, with plate that is not at all thick, to be unhelpful.

[55] *See, e.g.*, Germany's Prehearing Brief, App. 29 at 8 (reference to "need to export" and "increased participation outside the EU"), 9 (framework for "improving access to global markets"), 12 ("[e]nsuring a level playing field within the EU and globally"), 16 ("[p]romoting industrial co-operation with third countries"), 17 (*id.*); Germany's Responses to Posthearing Questions, App. 5 (accession to EU is means for "greater integration in the global economy").

[56] Germany's Responses to Posthearing Questions at 21-25.

[57] Germany's Prehearing Brief, App. 29 at 8.

Other data pertaining to the iron and steel trade of the EU as a whole contradict respondents' arguments. Data obtained from the World Trade Organization (WTO) show that, for all iron and steel products, exports by EU members outside of the EU have increased rather than decreased. The average ratio of these exports from the 15 EU members to non-EU countries as compared to iron and steel exports of the 15 EU members to each other rose from 0.446 between 1990-92 to 0.470 between 1996-98.[58] This means that external exports, *i.e.* exports to countries outside of the EU, averaged 44.6 percent of internal EU exports, *i.e.* exports to other countries within the EU, between 1990-92. Between 1996-98, external exports averaged 47.0 percent of internal EU exports.[59] Thus, it appears that external exports have not decreased as respondents claim.

We also note, as explained in the Commission's initial Views, that the fact that certain EU members are subject to antidumping and countervailing duty investigations in third countries indicates their interest in exporting outside the EU. Plate from Finland is subject to an ongoing investigation in Canada; plate from Spain is subject to antidumping and countervailing duty findings in Canada; and the United States imposed antidumping and countervailing duty orders on plate from France and Italy.[60]

Finally, with respect to the adoption of a common currency, we again find that it is too early to judge its probable effects on trade outside the EU, based on the record in these reviews. The single

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[58] 1998 is the latest year for which comparable data are available. Domestic Producers' Cold-Rolled Posthearing Brief, Exh. 2 at n.3.

[59] Domestic Producers' Cold-Rolled Posthearing Brief, Exh. 2.

[60] USITC Pub. 3364 at 27-28.

currency was not adopted until January 1, 1999.[61] The Commission voted in these reviews in November 2000, and its period of review extends only through March 2000. Not all subject EU countries have adopted the single currency. The United Kingdom has not adopted it and there is evidence on the record that it has experienced difficulties shipping to continental Europe because of this situation.[62] Sweden has not adopted the single currency either.[63] Germany's submissions, moreover, refer to the volatility of the euro.[64] Despite adoption of the common currency, German respondents projected lower shipments of subject plate to other EU countries in 2000 and 2001 than in any year since 1994.[65]

In view of the above-explained record evidence, we do not find respondents' contention that developments in the EU since 1993 will deter the member countries from shipping significant volumes of subject merchandise to the United States upon revocation of the orders to be persuasive. We find that, in the event of revocation of the orders, significant exports to the United States are likely, *i.e.* probable, notwithstanding changes in the EU since the original investigations, as there has not been a shift of such a fundamental nature as to indicate otherwise.[66] With respect to the adoption of a common currency, we also reaffirm our finding that it is too early to judge its likely effects on trade outside the EU.

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[61] *See* Germany's Prehearing Brief at 14.

[62] Tr. at 124 (Mr. Dempsey).

[63] Germany's Responses to Posthearing Questions at 15 n.35.

[64] *Id.*, App. 5 at 17.

[65] *See* German Producers' Questionnaire Responses.

[66] *See infra* Section IV.A.

IV. Revocation of the Orders on Subject Plate Imports from Belgium, Brazil, Finland, Germany, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom Is Likely to Lead to Continuation or Recurrence of Material Injury Within a Reasonably Foreseeable Time[67] [68]

A. Likely Volume of Subject Imports

We adopt our findings in our initial review determinations and find in these reviews that the volume of cumulated subject imports likely would be significant within a reasonably foreseeable time if the orders are revoked.[69]

In particular we have again examined, on a cumulative basis, the excess capacity of the subject countries and found that it greatly exceeds the volume of total subject imports in the 1993 investigations. We have also examined excess subject capacity, as well as cumulated capacity to produce both subject and non-subject plate, and excess capacity for the production of non-subject plate. Shifting between the production of non-subject and subject plate is not difficult.

We again note that, with the exception of Mexico, all cumulated countries export substantial quantities of their production. Further, there are a number of barriers to importation of subject plate in other countries, namely of plate from Brazil, Finland, Romania, and Spain.

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[67] Commissioner Koplan joins in this discussion with respect to Belgium, Brazil, Finland, Germany, Mexico, Poland, Romania, Spain, Sweden, and Taiwan, but not with respect to the United Kingdom. *See* Dissenting Views of Chairman Stephen Koplan and Commissioner Thelma J. Askey in Cut-to-Length Carbon Steel Plate from the United Kingdom, USITC Pub. 3364 at 59-61.

[68] Because the interim data for 1999 and 2000 cover only limited three-month periods, we have placed less emphasis on interim period comparisons.

[69] *Id*. at 26-28.

Notwithstanding respondents' arguments regarding improved demand conditions in a number of the subject countries, the following evidence supports our finding that it is likely (*i.e.* probable), and not merely possible, that the volume of cumulated subject imports would be significant upon revocation: significant capacity, and excess capacity, to produce both subject plate, particularly commodity grades, and non-subject plate products; foreign plate inventories; significant exports by most subject producers (indicating that exporting is an important part of these producers' businesses); barriers to exporting to third countries; the incentive for steel producers to increase sales to maximize the use of available capacity; and the growing role of consolidated service centers in seeking out sources of low-cost supplies.

B. Likely Price Effects of Subject Imports

We adopt our findings in our initial review determinations and find that in these reviews the significant increased volumes of cumulated subject imports likely would undersell domestic plate products to a significant degree and have significant price suppressing and depressing effects within a reasonably foreseeable time if the orders are revoked.[70]

We have reexamined the available pricing data, which indicate that domestic prices are falling or, at best, have stabilized at low levels. Because of the minimal levels of subject imports during the period of review, we have little data with which to compare the current U.S. prices of subject imported

[70] *Id.* a*t* 29.

and domestically-produced plate. As such, we have taken special note of the underselling, price suppression and price depression evidenced on the record of the original investigations.[71]

Domestic and subject imported plate are generally interchangeable and purchases are based largely on price competition. In addition, as a result of the price-sensitive nature of the plate market and the weakened condition of the domestic industry, even a relatively modest volume of subject imports would have a significant negative effect on U.S. prices and the U.S. industry. We therefore find that negative price effects by reason of the cumulated subject imports would be likely (*i.e.* probable), and not merely possible, upon revocation.

C. Likely Impact of Subject Imports

We adopt our findings in our initial review determination and find that, in these reviews, if the orders are revoked, cumulated subject imports likely would enter the U.S. market in sufficient quantities and at prices below those of the domestic product so as to have a significant adverse impact on the domestic industry within a reasonably foreseeable time.[72]

In particular, we note that the state of the domestic industry improved somewhat following the imposition of the subject orders, but began to decline following multiple rounds of other unfairly traded plate imports. Production, shipments, gross profits, and operating income increased between 1997 and 1998, but declined noticeably toward the end of the review period. The domestic industry remains in a weakened state, as evidenced by a decrease in operating income, low capacity utilization, falling

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[71] Commissioner Bragg notes that the statute expressly instructs the Commission to consider "its prior injury determination, including the volume, price effect, and impact of imports of the subject merchandise on the industry" before imposition of the order(s). 19 U.S.C. § 1675a(a)(1)(A).

[72] USITC Pub. 3364 at 30-33.

production, higher inventories, and declining production and related workers, as well as the steady decline in capital expenditures.

We determine in these reviews that a significant adverse impact to the domestic industry upon revocation of the orders would be likely (*i.e.* probable), and not merely possible. The domestic industry's price and volume declines resulting from revocation of the orders likely would cause it to lose market share, and would also be likely to cause significant declines in the domestic industry's financial indicators, as we explained in our initial review determinations.

German respondents claim that the Commission's data are incomplete because only 22 domestic producers responded to the Commission's questionnaires, whereas in recent final investigations involving plate,[73] 29 producers submitted information. They argue that most of the non-responding producers were service centers and claim that the domestic industry therefore under-reported certain information in the review proceedings, namely capacity, production, and shipments, and that the Commission should have used publicly available information to replace the "missing" information.[74]

The record of each proceeding before us is distinct. Indeed, differences in the data collected by the Commission prevent direct comparisons between data in the current record and that in Plate from France. Microalloy plate is not included in the scope of these reviews or in the domestic like

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[73] Plate from France, USITC Pub. 3273.

[74] We explained in our initial review determinations, *see* USITC Pub. 3364 at 24 n.128, and repeat here, that consumption figures are somewhat understated. Although all of the major mill producers are represented, as well as many of the largest processors, the response rate for processors is somewhat less than the rate in the Plate from France investigations. Nonetheless, we find that the data are adequate to permit us to evaluate the likely effect of revocation of the orders.

product,[75] although a number of the responding domestic producers indicated that they could not separate out data pertaining to microalloy plate.[76] Similarly, grade X-70 plate is not included in the scope of these reviews.[77] In Plate from France, the Commission collected and analyzed information and data from producers and importers of carbon and microalloy cut-to-length plate, as well as grade X-70 plate, which were within the scope of those investigations.[78] Thus, the data in Plate from France are simply not comparable to the data obtained in these reviews.[79]

In these reviews the Commission received both mill and non-toll processor data that are included in the trade and financial data.[80] Thirteen mills and 7 processors provided trade data, with non-toll shipments equivalent to approximately 100 percent of U.S. commercial shipments of plate in 1999 based on AISI data.[81] In the Plate from France investigations, the Commission obtained data

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[75] USITC Pub. 3364 at 6-7; CR at PLATE-I-25-26, PLATE-I-30 n.44; PR at PLATE-I-23-24, I-27 n.44.

[76] CR at PLATE-I-30 n.44, PR at PLATE-I-27 n.44. The import data that we evaluated do not include microalloy products. *Id*.

[77] USITC Pub. 3364 at 7 & n.23; CR at PLATE-I-25-26; PR at PLATE-I-23-24.

[78] USITC Pub. 3273 at 4 & n.10, 5-7, III-1.

[79] We note that these data differences are not limited to domestic data. Import volumes, and therefore apparent U.S. consumption and market share calculations, are directed affected. *See, e.g., id*. at II-8 - II-9 (specialty plate, especially X-70 plate, accounted for a substantial share of plate imports from France; specialty plate also accounted for a substantial share of plate imports from Japan and Italy).

[80] We note that in the original investigations, we did not obtain data from processors. Original Report at I-61 - I-65. Thus, coverage of the domestic industry is more complete in these reviews than in the original investigations.

[81] CR/PR at PLATE-III-1 & Overview Table 2. An eighth processor provided data for its toll operations. CR/PR at PLATE-III-1 n.1. Data obtained in these reviews shows that in 1998, total

from 13 mills and 16 processors representing 86 percent of U.S. production of the domestic like product at issue.[82] Given that the large majority of the domestic industry responded to the Commission's questionnaires in these reviews, it would not be appropriate for us to take adverse inferences against the domestic producers or to base our findings on other data.[83]

In these reviews, the Commission examined data from 13 mills, 7 non-toll processors, and one toll processor; in Plate from France, the data was from 13 mills, 9 non-toll processors, and 7 toll processors.[84] Thus, the only significant difference in the number of responses is that more toll processors responded in Plate from France. However, processors toll primarily on behalf of U.S. mills; thus their data are already included in U.S. shipments. Indeed, to avoid double-counting of the same plate handled both by a mill and the single responding toll processor, that processor's data are presented separately in an Appendix to the Staff Report.[85] Moreover, toll processors employ relatively

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U.S. plate production was 6.8 million short tons, CR/PR at Table PLATE-III-1, while U.S. plate shipments totaled 6.5 million short tons in that year. CR/PR at Table PLATE-III-2.

[82] USITC Pub. 3273 at III-1 & n.2. Total U.S. plate production was 7.9 million short tons in 1998, the last year of the investigations, USITC Pub. 3273 at Table III-2, while U.S. plate shipments totaled 7.6 million short tons in that year. *Id*. at Table III-3.

[83] *See* 19 U.S.C. § 1677e(b) (the Commission may take adverse inferences against an interested party that has failed to cooperate with the investigation). Virtually no failure to cooperate exists in these reviews. *See also* Elkem Metals Co. v. United States, 193 F. Supp.2d 1314, 1318 & n.2 (Ct. Int'l Trade 2002) (taking of adverse inferences is permitted so as not to reward recalcitrant interested parties).

[84] *Compare* CR/PR at PLATE-III-1 *with* USITC Pub. 3273 at Table II-1, VI-1 (the fourteenth mill noted on page VI-1 did not report any production in 1998).

[85] *See* CR at PLATE-1-30 n.45, PR at PLATE-I-27 n.45; CR/PR at App. D.

few workers; own no inventory of finished goods; and generate relatively little revenue.[86] Accordingly, the impact of data from toll producers is significantly less than the number of establishments might imply.

Respondents would have the Commission rely on publicly available data obtained from the Steel Service Center Institute (SSCI) that pertain to U.S. processor shipments of carbon plate.[87] However, we have grave concerns over the nature of the data respondents would have us use. SSCI data for shipments of carbon plate are not a valid proxy for shipments of plate that is cut to length at steel service centers. Rather, SSCI data for shipments of carbon plate represent sales of plate by steel service centers. As this figure necessarily includes substantial volumes of subject plate sold to steel service centers by U.S. mills and U.S. importers and re-sold by service centers, respondents suggest a methodology that double counts shipment volume.[88]

In light of the foregoing, we conclude that, if the antidumping and countervailing duty orders are revoked, subject imports would enter the U.S. market in sufficient quantities and at prices below those of the domestic product so as to have a significant adverse impact on the domestic industry within a reasonably foreseeable time.

CONCLUSION

Accordingly, based on the record in these reviews and pursuant to the Court's instructions upon remanding the review determinations to the Commission, we conclude that revocation of the

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[86] CR/PR at Table D-1; USITC Pub. 3273 at Table C-4.

[87] *See* Germany's Prehearing Brief at App. 6.

[88] *See* CR/PR at Tables PLATE-V-1 - V-4, which indicate that shipment volume by U.S. producers to distributors (*i.e.* service centers) are substantial (and in the case of commodity grade plate, heavily weighted toward service centers rather than end users).

antidumping and countervailing duty orders on cut-to-length plate from Belgium, Brazil, Finland, Germany, Mexico, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, would be likely (*i.e.* probable) to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.