

UNITED STATES INTERNATIONAL TRADE COMMISSION

LAWN AND GARDEN STEEL FENCE POSTS FROM CHINA

Investigation No. 731-TA-1010 (Preliminary)

DETERMINATION AND VIEWS OF THE COMMISSION

(USITC Publication No. 3521, June 2002)

Investigation No. 731-TA-1010 (Preliminary)

DETERMINATIONS

On the basis of the record¹ developed in the subject investigation, the United States International Trade Commission determines,² pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1673b(a)) (the Act), that there is a reasonable indication that an industry in the United States is materially injured by reason of imports from China of U-shaped or hat-shaped lawn and garden fence posts made of steel and/or any other metal, weighing one pound or less per foot, provided for in subheading 7326.90.85 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).

On the basis of the record developed in the subject investigation, the Commission also determines,³ pursuant to section 733(a) of 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 China of other fence posts made of steel and/or other metal including tee, farm, and sign posts weighing one pound or less per foot, provided for in subheading 7326.90.85 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at LTFV.

COMMENCEMENT OF FINAL PHASE INVESTIGATION

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigation. The Commission will issue a final phase notice of scheduling, which will be published in the *Federal Register* as provided in section 207.21 of the Commission's rules, upon notice from the Department of Commerce of an affirmative preliminary determination in the investigation under section 733(b) of the Act, or, if the preliminary determination is negative, upon notice of an affirmative final determination in that investigation under section 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigation need not enter a separate appearance for the final phase of the investigation. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigation.

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

² Vice Chairman Hillman and Commissioner Miller dissenting.

³ Commissioner Bragg dissenting.

BACKGROUND

On May 1, 2002, a petition was filed with the Commission and Commerce by Steel City Corporation, Youngstown, OH, alleging that an industry in the United States is materially injured or threatened with material injury by reason of LTFV imports of lawn and garden steel fence posts from China. Accordingly, effective May 1, 2002, the Commission instituted antidumping duty investigation No. 731-TA-1010 (Preliminary).

VIEWS OF THE COMMISSION

Based on the record in this investigation, we determine that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of U-shaped or hat-shaped lawn and garden fence posts made of steel and/or any other metal, weighing 1 pound or less per foot, from China that are allegedly sold in the United States at less than fair value (LTFV).^{1 2}

Based on the record in this investigation, we also 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 other fence posts made of steel and/or other metal, including tee, farm, and sign posts weighing 1 pound or less per foot, from China that are allegedly sold in the United States at LTFV.³

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 of the preliminary determination, whether there is a reasonable indication that a domestic industry is materially injured, threatened with material injury, or whether the establishment of an industry is materially retarded, by reason of the allegedly unfairly traded imports.⁴ 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.”⁵

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.⁶ 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.”⁷ Moreover, the U.S. Court of International Trade recently has reaffirmed that in applying the reasonable indication “standard for making

¹ Commissioner Lynn M. Bragg finds that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of U-shaped or hat-shaped lawn and garden fence posts made of steel and/or other metal, weighing 1 pound or less per foot, and other fence posts made of steel and/or other metal including tee, farm, and sign posts weighing 1 pound or less per foot from China. Commissioner Bragg finds one domestic like product coterminous with the scope of the investigation. See footnotes 52 and 53 of these Views. Commissioner Bragg joins parts I, II, III, and IV of these views except to the extent otherwise indicated.

² Vice Chairman Hillman and Commissioner Miller found no reasonable indication of material injury or threat thereof by reason of subject imports from China. See their Dissenting Views.

³ Whether the establishment of an industry is materially retarded is not an issue in this investigation.

⁴ 19 U.S.C. §§ 1671b(a), 1673b(a); see also American Lamb Co. v. United States, 785 F.2d 994, 1001-04 (Fed. Cir. 1986); Ranchers-Cattlemen Action Legal Foundation v. United States, 74 F. Supp.2d 1353, 1368-69 (Ct. Int’l Trade 1999). We note that no party argued that the establishment of an industry is materially retarded by reason of the allegedly unfairly traded imports.

⁵ 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).

⁶ American Lamb, 786 F.2d at 1004.

⁷ Texas Crushed Stone Co. v. United States, 35 F.3d 1535, 1543 (Fed. Cir. 1994).

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.”⁸

As discussed below, we determine that there is a reasonable indication that the domestic industry producing U-shaped or hat-shaped lawn and garden fence posts made of steel and/or any other metal, weighing 1 pound or less per foot, is materially injured by reason of the subject imports. However, we also determine that the record of this preliminary investigation contains clear and convincing evidence that the domestic industry producing other fence posts made of steel and/or other metal, including tee, farm, and sign posts weighing 1 pound or less per foot is neither materially injured nor threatened with material injury by reason of the subject imports.⁹

II. DOMESTIC LIKE PRODUCT

A. In General

To determine 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.”¹⁰ 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.”¹¹ 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”¹²

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.¹³ No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation.¹⁴ The Commission looks for clear dividing lines among possible like products, and disregards minor variations.¹⁵

⁸ R-CALF, 74 F.Supp. 2d at 1368 (Ct. Int’l Trade 1999).

⁹ Commissioner Bragg dissenting.

¹⁰ 19 U.S.C. § 1677(4)(A).

¹¹ Id.

¹² 19 U.S.C. § 1677(10).

¹³ See, e.g., NEC Corp. v. Department of Commerce, 36 F. Supp.2d 380, 383 (Ct. Int’l Trade 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Torrington Co. v. United States, 747 F. Supp. 744, 749, n.3 (Ct. Int’l Trade 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 (Ct. Int’l Trade 1996).

¹⁴ See, e.g., S. Rep. No. 96-249, at 90-91 (1979).

¹⁵ 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 domestic 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

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Although the Commission must accept the determination of the Department of Commerce (“Commerce”) as to the scope of the imported merchandise allegedly subsidized or sold at less than fair value, the Commission determines what domestic product is like the imported articles Commerce has identified.¹⁶

B. Product Description

The scope of this investigation as defined by Commerce in its notice of initiation covers the following imported merchandise:

all lawn and garden steel fence posts, in whatever form, shape, or size, that are produced in the PRC. The fence posts included within the scope of this investigation weigh up to 1 pound per foot and are made of steel and/or any other metal. Imports of these products are classified under the following categories: fence posts, studded with corrugations, knobs, studs, notches or similar protrusions with or without anchor [plates]. These posts are normally “U” shaped or “hat” shaped or any other similar shape excluding round or square tubing or pipes.

These posts are normally made in two different classes, light and heavy duty. Light duty lawn and garden posts are normally made of 14 gauge steel (0.068 inches - 0.082 inches thick), 1.75 inches wide, in 3, 4, 5, or 6 foot lengths. These posts normally weigh approximately 0.45 pounds per foot and are packaged in mini-bundles of 10 posts and master bundles of 400 posts. Heavy duty lawn and garden fence posts are normally made of 13 gauge steel (0.082 inches - 0.095 inches thick), 3 inches wide, in 5, 6, 7, and 8 foot lengths. Heavy duty posts normally weigh approximately 0.90 pounds per foot and are packaged in mini-bundles of 5 and master bundles of 200. Both light duty and heavy duty posts are included within the scope of the investigation.

Imports of these products are classified under the following Harmonized Tariff Schedules of the United States (HTSUS) subheading: 7326.90.85.35. Fence posts classified under subheading 7308.90 are also included within the scope of the investigation if the fence posts are made of steel and/or metal.

Specifically excluded from the scope are “tee” posts, farm posts, and sign posts, provided that the posts weigh over 1 pound per foot. Although the HTSUS subheadings are provided for convenience and U.S. Customs Service (“Customs”) purposes, the written description of the merchandise under investigation is dispositive.¹⁷

The products at issue are metal posts that weigh up to 1 pound per foot. These posts are produced in a variety of forms, shapes, and sizes, but do not include round or square tubing or pipes.

“Lawn and garden fence posts” (or “U-posts”) are made of cold-worked mild steel and/or other metal, are U-shaped or hat-shaped, are characterized by a row of holes and tabs to help secure fencing to

¹⁵ (...continued)

to prevent consideration of an industry adversely affected by the imports under consideration.”).

¹⁶ Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568 (Fed. Cir. 1996) (Commission may find single domestic like product corresponding to several different classes or kinds defined by Commerce); Torrington, 747 F. Supp. at 748-52 (affirming Commission’s determination of six domestic like products in investigations where Commerce found five classes or kinds).

¹⁷ 67 FR 37388, 37388 (May 29, 2002).

them by bending the tabs over the fence material, and weigh up to 1 pound per foot.¹⁸ An anchor plate is crimped or riveted near the lower end of the post to stabilize it once driven into the ground.¹⁹ Lawn and garden fence posts are designed to support fencing in home and garden applications.²⁰

Other metal posts weighing 1 pound or less primarily consist of tee-posts and angle-posts. Tee-posts weighing 1 pound or less per foot are made by rolling red-hot high-carbon steel into a “T” shape.²¹ Tee-posts normally have an attached anchor plate for added stability in the ground. These posts may be smooth or have a row of studs molded along their length to support fencing but require wire clips to hold the fence material to the post.²² Tee-posts have primarily farm and industrial uses, including containing animals, supporting plants and trees and controlling erosion.²³

Angle-posts weighing 1 pound or less per foot are likewise produced from hot-rolled high-carbon steel, and are sturdy enough to support plants and trees as grape stakes and orchard stakes. These posts are normally characterized by evenly spaced holes or notches along their length and require wire, plastic ties, or other fasteners to secure the plant or tree.²⁴

C. Domestic Like Product

Petitioner,²⁵ Steel City, contends that the domestic like product in this investigation should be lawn and garden steel fence posts.²⁶ Despite focusing on U-posts, Steel City specifically requested that Commerce define the scope of this investigation to include all metal posts weighing 1 pound or less per foot because of concern over circumvention attempts by Chinese producers if an antidumping duty order were to be issued against Chinese imports of lawn and garden steel fence posts.^{27 28}

Respondent,²⁹ MAT, does not dispute Petitioner’s proposed like product definition for purposes of this preliminary phase of the investigation.³⁰

Despite the Petitioner’s focus on U-posts, the Commission cannot limit its analysis of the domestic like product to only lawn and garden fence posts. The Commission must define the domestic like product(s) in reference to the articles “subject to investigation,” not just those that have actually been

¹⁸ Confidential Report, as revised by Memoranda INV-Z-091, June 13, 2002, and INV-Z-093, June 14, 2002, (“CR”) at I-3, n.13, I-6, and I-9; Public Report (“PR”) at I-3, n.13, I-5, and I-7 to I-8.

¹⁹ CR at I-6; PR at I-5; Conference Transcript (“Tr.”) at 61-62 (Mr. Lee); Steel City Corporation (“Steel City”) Postconference Brief at 8-9.

²⁰ CR at I-5; PR at I-4 to I-5.

²¹ CR at I-3, n.10 and I-11 to I-12; PR at I-3, n.10 and I-9.

²² CR at I-7 and nn.30 and 34; PR at I-6 and nn.30 and 34.

²³ CR at I-7 and n.32; PR at I-5 to I-6 and n.32.

²⁴ CR at I-9, I-11 and n.50; PR at I-7, I-9 and n.50.

²⁵ Petitioner is Steel City Corporation (“Steel City”).

²⁶ See, e.g., Conference Tr. at 10-11 (Mr. Speece).

²⁷ See, e.g., Petition at 6, n.4; Conference Tr. at 23-24 (Ms. Stras).

²⁸ We note that Petitioner, Steel City, and its counsel mistakenly believed, and failed to confirm, that there was no domestic production of other metal fence posts weighing 1 pound or less per foot, despite having included these products in the proposed scope of the investigation.

²⁹ Respondent is Midwest Air Technologies (“MAT”).

³⁰ See, e.g., Conference Tr. at 48-49 (Mr. Lee).

imported.³¹ Because there is domestic production of other fence posts made of steel and/or other metal, including tee, farm, and sign posts weighing 1 pound or less per foot that correspond to the scope of investigation,³² the Commission must address whether it should find a single domestic like product of domestically produced articles coextensive with the scope, or two domestic like products -- one consisting of lawn and garden fence posts and the other consisting of other fence posts made of steel and/or other metal, including tee, farm, and sign posts weighing 1 pound or less per foot (hereinafter “tee- and angle-posts”).

1. Physical Characteristics and Uses

Lawn and garden fence posts are produced from cold-worked mild steel formed into “U” or “hat” shapes. Lawn and garden fence posts are characterized by a row of holes and tabs to help secure fencing to them by bending the tabs over the fence material.³³ Homeowners in suburban and rural areas use lawn and garden fence posts for numerous home and garden applications, including pet containment, plant and sapling supports, garden protection, property boundaries, and safety barriers.³⁴ Lawn and garden steel fence posts are made in both light-duty and heavy-duty weight classes.³⁵

Tee-posts, whether under or over 1 pound per foot, are used to support plants and trees, fencing on farms and ranches (e.g., for cattle and horse containment), and erosion-control fencing (silt posts).³⁶ Tee-posts normally have an attached anchor plate for added stability in the ground. These posts may be smooth or have a row of studs molded along their length to support fencing but require wire clips to hold the fence material to the post.³⁷ Tee-posts weighing 1 pound or less per foot are sturdier than Steel City’s lawn and garden steel fence posts of comparable weight because of the hardness and tensile strength of the steel.³⁸ Steel angle-posts, whether under or over 1 pound per foot, are also strong enough to support plants and trees as grape stakes and orchard stakes. Like smooth tee-posts, angle-posts are normally characterized by holes or notches along their length and require wire, plastic ties, or other fasteners to secure the plant or tree.³⁹

2. Interchangeability

Although there are overlaps in general uses of lawn and garden fence posts and other metal posts, there are limitations to the degree of interchangeability. On the one hand, tee- and angle-posts are not typically employed by residential users because there is no convenient way to attach the wire. According to

³¹ See, e.g., 19 U.S.C. § 1677(10); Fresh Garlic from the People’s Republic of China, Inv. No. 731-TA-683 (Final), USITC Pub. 2825 (November 1994) at I-7.

³² CR at III-1; PR at III-1 to III-2.

³³ CR at I-6; PR at I-5.

³⁴ CR at I-5; PR at I-4.

³⁵ Light-duty lawn and garden posts are normally made of 14 gauge steel (.068 inch - .082 inch thick), 1 3/4 inches wide by 3 feet, 4 feet, 5 feet, and 6 feet long. These posts weigh approximately 0.45 pound per foot. Heavy-duty lawn and garden posts are usually made of 13 gauge steel (.082 inch - .095 inch thick), 3 inches wide by 5 feet, 6 feet, 7 feet, and 8 feet long. These posts normally weigh 0.90 pound per foot. See, e.g., Petition at 10.

³⁶ CR at I-7; PR at I-5 to I-6.

³⁷ CR at I-7 and nn.30 and 34; PR at I-6 and nn.30 and 34.

³⁸ CR at I-7 to I-8, n.35; PR at I-6 and n.35.

³⁹ CR at I-9; PR at I-7. See also CR at I-7, n.34; PR at I-6, n.34.

Petitioner, customers value the convenience of “user-friendly” lawn and garden fence posts. On the other hand, lawn and garden fence posts are not strong enough for use in agriculture and farm fencing and are not preferred in erosion control.⁴⁰

3. Channels of Distribution

In general, both lawn and garden fence posts and tee- and angle-posts are sold to distributors, rather than end users.⁴¹ Steel City contends that lawn and garden fence posts are usually sold in home-improvement or home-hardware retail stores while tee-posts are sold in farm and ranch supply stores. Although Steel City acknowledges that tee-posts may also be sold in home-improvement stores with lawn and garden fence posts, it maintains that these retail stores usually only stock one size of tee-post while displaying a wide range of sizes and lengths of lawn and garden fence posts.⁴² Steel City’s reported customer list for its lawn and garden steel fence posts *** overlap with other domestic producers’ customer lists for their tee- and angle-posts weighing 1 pound or less per foot.⁴³

4. Customer and Producer Perceptions

Steel City contends that its lawn and garden fence posts are not interchangeable with any other domestic product, including grape stakes, tee-posts, farm posts, and sign posts.⁴⁴ Petitioner asserts that these other posts, which are produced in steel mills from reheated railway rail or other scrap steel, are very hard and will break rather than bend like lawn and garden fence posts.⁴⁵ Other producers of metal posts weighing 1 pound or less per foot agree. *** domestic producers of tee-posts and angle-posts weighing 1 pound or less per foot reported that their posts do not compete with Steel City’s lawn and garden steel fence posts.⁴⁶

*** of overlap in customers purchasing lawn and garden fence posts and tee- and angle-posts suggests that customers also perceive these two products to be distinct.

5. Manufacturing Facilities and Production Processes

No U.S. producer produces both lawn and garden fence posts and other metal posts weighing 1 pound or less per foot.⁴⁷ Steel City produces lawn and garden steel fence posts either by stamping or by roll forming mild steel strip. Both stamping and roll forming are cold-working processes that do not require the steel to be heated prior to being bent into “U” or “hat” shaped profiles. Instead, Steel City

⁴⁰ See e.g., Conference Tr. at 15-16 (Mr. Speece).

⁴¹ CR at I-15; PR at I-11.

⁴² CR at I-15; PR at I-11. Conference Tr. at 16 (Mr. Speece).

⁴³ Steel City and importers of U-shaped fence posts weighing 1 pound per foot or less reported *** as their customers. Two or three of the domestic producers of tee-posts and angle-posts weighing 1 pound or less per foot cited their customers as ***. CR at I-16, nn.71-72; PR at I-12, nn.71-72.

⁴⁴ CR at I-13; PR at I-10; Conference Tr. at 15, 34-35, 40-41 (Mr. Speece) and 38-39 (Mr. Hendricks).

⁴⁵ CR at I-13; PR at I-11; Steel City Postconference Brief at 2-3.

⁴⁶ CR at I-13 to I-14; PR at I-11.

⁴⁷ CR at III-1 and n.2; PR at III-1 and n.2.

fabricates steel strip into U-posts at ambient temperature through a combination of forming and piercing dies (stamping) and successive rolls (roll forming).⁴⁸

Tee- and angle-posts, whether under or over 1 pound per foot, are hot-rolled from either scrapped railway rail or newly cast rail-quality billet steel, rather than being cold-stamped from sheared mild-steel strip or cold-rolled from slit mild-steel coil like Petitioner's product.⁴⁹ In the rolling process, either split portions of reheated rail in a re-rolling mill or newly cast steel billets in a minimill pass through a series of mill stands with grooved rolls that progressively reduce and shape the hot steel into posts. After rolling, posts are cut to desired lengths.⁵⁰

6. Price

According to questionnaire responses, per-pound unit values for Steel City's commercial U.S. shipments of lawn and garden fence posts ranged from \$*** to \$*** during the reporting period – considerably higher than the unit values of \$*** to \$*** per pound for domestic tee- and angle-posts weighing 1 pound or less per foot.⁵¹

As a whole, the differences between lawn and garden fence posts and other metal posts weighing 1 pound or less per foot in physical characteristics, channels of distribution, producer perceptions, manufacturing facilities and processes, and price constitute a clear dividing line for purposes of this like product analysis. Therefore, based on the foregoing, we find two domestic like products in this preliminary phase investigation. The first domestic like product consists of U-shaped or hat-shaped lawn and garden fence posts made of steel and/or any other metal (“lawn and garden fence posts” or “U-posts”). The second domestic like product consists of other fence posts made of steel and/or other metal, including tee, farm, and sign posts weighing 1 pound or less per foot (“tee- and angle-posts” or “other metal posts”).^{52 53}

⁴⁸ CR at I-9 to I-10; PR at I-7 to I-8.

⁴⁹ CR at I-11; PR at I-9.

⁵⁰ CR at I-11 to I-12; PR at I-9 to I-10.

⁵¹ CR at I-16 to I-17; PR at I-12.

⁵² Commissioner Bragg defines a single domestic like product consisting of all lawn and garden steel fence posts weighing 1 pound or less per foot, coterminous with the scope of the investigation. Commissioner Bragg finds that the preliminary record provides insufficient evidence to support a division of the products covered by Commerce's scope into two or more domestic like products. Although the record in the preliminary phase of this investigation indicates differences in manufacturing facilities and processes, producers' perceptions, price, and physical characteristics, the limited record data do indicate some similarities in uses and channels of distribution among U-shaped and T-shaped posts, farm posts, and sign posts weighing 1 pound or less per foot. CR at I-4 n.16, I-5, I-7-9, I-15; PR at I-3 n.16, I-4-7. In addition, the record is incomplete as to interchangeability and customer perceptions for T-shaped posts, farm posts, and sign posts weighing 1 pound or less per foot. CR at I-4; PR at I-3-4. Importantly, neither party addressed the question of two separate like products for all lawn and garden fence posts weighing 1 pound or less per foot, which has limited the record information available for the Commission's review. Accordingly, Commissioner Bragg finds that the record does not provide a clear dividing line between the various products upon which clear distinctions among product types may be made. Rather, Commissioner Bragg finds that there is insufficient evidence in this preliminary record investigation to support two separate domestic like products, and therefore defines one like product consisting of all lawn and garden steel fence posts, coterminous with the scope.

Furthermore, in accordance with the American Lamb standard for preliminary phase investigations, Commissioner Bragg finds that an outcome determinative definition of the domestic like product at this preliminary stage is not appropriate given the incomplete and mixed information regarding the definition of the

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III. DOMESTIC INDUSTRY⁵⁴

The domestic industry is defined as “the producers as a [w]hole of a domestic like product”⁵⁵ In defining the domestic industry, the Commission’s general practice has been to include in the industry all domestic production of the domestic like product, whether toll-produced, captively consumed, or sold in the domestic merchant market.⁵⁶

Based on our finding that there are two domestic like products, we determine that there are two domestic industries in this investigation. One domestic industry consists of all domestic producers of lawn and garden fence posts, which is only Steel City. The second domestic industry consists of all domestic producers of other metal posts weighing 1 pound or less per foot, which includes Cascade Steel Rolling Mills, Inc., Jersey Shore Steel Co., SMI Steel Arkansas/Southern Post Co., and W. Silver, Inc.^{57 58}

IV. REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF ALLEGEDLY LTFV IMPORTS OF LAWN AND GARDEN FENCE POSTS^{59 60}

⁵² (...continued)

like product. Even if the current record reasonably supported a finding of two separate like products, there nonetheless remain significant ambiguities regarding the likelihood of imminent threat of material injury by reason of subject imports of T-shaped posts, farm posts, and sign posts, especially in light of the concerns highlighted by the petitioner about possible product shifting by subject producers toward T-shaped posts, farm posts, and sign posts, as well as the respondents’ concern about the possible unreliability of the HTS data due to inclusion of nonsubject merchandise. Therefore, Commissioner Bragg defines a single like product consisting of all lawn and garden steel fence posts weighing 1 pound or less per foot, coterminous with Commerce’s scope.

⁵³ Commissioner Bragg also considered whether to expand the domestic like product definition beyond the scope of the investigation to include lawn and garden fence posts weighing over 1 pound per foot. The evidence in the record of this preliminary phase of the investigation indicates that there are differences in physical characteristics, uses, channels of distribution, customer perceptions, price, manufacturing facilities, and interchangeability between U-shaped lawn and garden metal fence posts weighing 1 pound or less per foot and T-shaped posts, farm posts, and sign posts weighing over 1 pound per foot. CR at I-7-8, I-11, I-16-17; PR at I-5-7, I-9, I-12-13. In addition, Commissioner Bragg finds that there is limited data in the record concerning all T-shaped posts, farm posts, and sign posts. Thus, for the purposes of the preliminary investigation, Commissioner Bragg does not expand the definition of the domestic like product beyond the scope to include T-shaped posts, farm posts, and sign posts weighing over 1 pound per foot.

⁵⁴ There is no issue regarding related parties in this preliminary phase investigation.

⁵⁵ 19 U.S.C. § 1677(4)(A).

⁵⁶ See United States Steel Group v. United States, 873 F. Supp. 673, 681-84 (Ct. Int’l Trade 1994), aff’d, 96 F. 3d 1352 (Fed. Cir. 1996).

⁵⁷ The companies listed are those that responded to the Commission’s questionnaires in this investigation. CR at III-1 to III-2; PR at III-1 to III-2.

⁵⁸ Based upon her definition of a single domestic like product, Commissioner Bragg finds that the domestic industry consists of all domestic producers of lawn and garden steel fence posts weighing 1 pound or less per foot, including all U.S. producers of U-shaped posts, T-shaped posts, farm posts, and sign posts.

⁵⁹ There is no issue regarding negligibility because imports of lawn and garden fence posts from China constitute 100 percent of total imports of those products. CR/PR at Table IV-2.

⁶⁰ Commissioner Bragg finds that subject imports are not negligible given that imports from China constitute virtually all U.S. imports for the 12-month period preceding the filing of the petition. CR/PR at Table IV-2.

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.⁶¹ In making this determination, the Commission must consider the volume of 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.⁶² The statute defines “material injury” as “harm which is not inconsequential, immaterial, or unimportant.”⁶³ 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.⁶⁴ 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.”⁶⁵

For the reasons discussed below, we determine that there is a reasonable indication that the domestic industry is materially injured by reason of lawn and garden fence posts from China that are allegedly sold in the United States at less than fair value.

A. Conditions of Competition

The following conditions of competition for lawn and garden fence posts are pertinent to our analysis in this investigation.

Demand for lawn and garden fence posts is driven by residential housing needs in the United States.⁶⁶ Apparent U.S. consumption of lawn and garden fence posts increased by *** percent between 1999 and 2000 and by *** percent between 2000 and 2001, before declining by *** percent in the first quarter of 2002 when compared to the first quarter of 2001.⁶⁷ Steel City anticipates continued increases in demand if the market for new housing continues to grow at its current pace.⁶⁸ MAT agrees with Steel City that demand for lawn and garden fence posts has been increasing over the period examined.⁶⁹

⁶¹ 19 U.S.C. §§ 1671b(a), 1673b(a).

⁶² 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 . . . [a]nd 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).

⁶³ 19 U.S.C. § 1677(7)(A).

⁶⁴ 19 U.S.C. § 1677(7)(C)(iii).

⁶⁵ 19 U.S.C. § 1677(7)(C)(iii).

⁶⁶ The record of this investigation indicates that other forms of metal posts are not directly interchangeable with lawn and garden fence posts. Steel City’s reported customer list for its lawn and garden steel fence posts *** overlap with other domestic producers’ customer lists for their tee-posts and angle-posts weighing 1 pound or less per foot. *** domestic producers of tee-posts and angle-posts weighing 1 pound or less per foot reported that their posts do not compete with Steel City’s lawn and garden steel fence posts. Moreover, Steel City’s belief that the only domestically produced products covered by the scope of this investigation were its lawn and garden steel fence posts indicates that it was completely unaware of other metal posts weighing 1 pound or less per foot in its domestic market. CR at I-13 to I-14, I-16; PR at I-10 to I-12; Conference Tr. at 22-25 (Ms. Stras).

⁶⁷ CR/PR at Table C-4.

⁶⁸ See, e.g., Conference Tr. at 27-28, 36 (Mr. Hendricks).

⁶⁹ See, e.g., MAT Postconference Brief at 4. MAT also maintains that, in order to reduce administrative costs and streamline orders, purchasers consider non-price factors, such as a high level of service, sufficient production capacity, and broad product mix, when choosing a supplier and that these requirements preclude Steel City from selling its product to “big box” purchasers. See, e.g., MAT Postconference Brief at 6-8.

The record indicates that lawn and garden fence post demand is seasonal. The *** of Steel City's sales of such posts are made on a contract basis. Steel City typically signs contracts in August, September, and/or October of the year preceding the delivery of the product to the customer. It produces the product from November through February, and ships the product to customers from March through June.⁷⁰ About 65 to 70 percent of Steel City's lawn and garden fence posts are shipped during the Spring season.⁷¹

The only two known sources of supply of lawn and garden fence posts in the domestic market are U.S. and Chinese producers. Steel City is the only known U.S. producer of lawn and garden fence posts,⁷² whereas Hangzhou Hongyuan Sportsware Co., Ltd. (hereinafter called "Hangzhou") was the only reporting producer of lawn and garden fence posts in China.⁷³ Steel City, which supplies a relatively small, and declining, share of the U.S. market, is only operating at *** of its reported capacity of *** pounds.⁷⁴ Moreover, Steel City maintains *** inventories that are equivalent to about *** of its annual sales.⁷⁵ Hangzhou is operating at nearly *** of its *** pound capacity and its output is *** to U.S. sales.⁷⁶ Although Hangzhou maintains *** inventories in China, there are inventories of lawn and garden fence posts from China totaling approximately *** pounds in the United States.⁷⁷

The degree of substitutability between lawn and garden fence posts produced in the United States and those produced in China is a point of contention between Steel City and MAT. Steel City acknowledges that the anchor plates on its lawn and garden fence posts are crimped to the post while the anchor plates on the Chinese imports are riveted to the post; however, Steel City contends that its customers have never questioned the quality of Steel City's lawn and garden fence posts, focusing instead on price.⁷⁸ Respondent, MAT, argues that it is not in direct competition with Steel City because MAT can supply its customers with a higher-quality product, broader product mix, and larger production volumes than Steel City.⁷⁹ According to MAT, home center purchasers also prefer the Chinese post because of its riveted anchor post and powder-based paint finish.⁸⁰

The record indicates that U.S. and Chinese lawn and garden fence posts are used interchangeably. While the conflicting claims between the parties regarding quality cannot be resolved based on the record in the preliminary phase of this investigation, the lower prices offered by Chinese suppliers (for at least some

⁷⁰ See, e.g., Steel City Postconference Brief at 14-15 and Conference Tr. at 27 (Mr. Hendricks).

⁷¹ See, e.g., Conference Tr. at 27 (Mr. Hendricks).

⁷² Although Steel City is the only domestic producer of lawn and garden steel fence posts today, another larger domestic producer of lawn and garden steel fence posts, Gilbert & Bennett, closed its operations in 1998. See, e.g., Conference Tr. at 9 (Mr. Speece).

⁷³ Hangzhou is not the only Chinese manufacturer/exporter, although it claims to represent *** percent of production and exports. All of the *** importers other than *** appear to be supplied by Chinese producer(s) other than Hangzhou. CR at VII-1, n.1; PR at VII-1, n.1.

⁷⁴ CR/PR at Table C-4. These data appear to reflect a more reasonable estimate of capacity than the estimate that appears in Steel City's postconference brief, which is highly dependent upon certain expectations concerning number of worker shifts and use of idled equipment. In any final investigation, we intend to explore further the domestic industry's ability to supply the U.S. market and the implications arising from this supply situation.

⁷⁵ CR/PR at Table C-4.

⁷⁶ CR/PR at Table VII-1.

⁷⁷ CR/PR at Table VII-2.

⁷⁸ See, e.g., Steel City Postconference Brief at 8-9; Conference Tr. at 13 (Mr. Speece) and 79 (Ms. Stras).

⁷⁹ See, e.g., MAT Postconference Brief at 8-9.

⁸⁰ See, e.g., MAT Postconference Brief at 9.

sizes) and the absence of apparent quality concerns expressed by *** do not suggest that the Chinese product is viewed in the market as superior to the domestic product.^{81 82}

B. Volume of the Subject Imports of Lawn and Garden Fence Posts

Section 771(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.”^{83 84}

By quantity, imports of lawn and garden fence posts from China declined from *** pounds in 1999 to *** pounds in 2000, but then increased to *** pounds in 2001.⁸⁵ Between interim 2001 and interim 2002, subject imports decreased from *** pounds to *** pounds. By value, subject imports initially

⁸¹ CR/PR at Tables V-1 to V-4 (price differences); CR at V-11 to V-12 (***); PR at V-5.

⁸² Based on her definition of the domestic industry, Commissioner Bragg finds the following additional conditions of competition to be pertinent to her analysis. Apparent U.S. consumption decreased irregularly over the POI from *** pounds in 1999 to *** pounds in 2001 (equal to a *** percent decrease overall), but between interim (January through March) 2001 and interim 2002, apparent U.S. consumption increased *** percent. Regarding supply to the U.S. market, although petitioner manufactures 100 percent of U-shaped fence posts production in the United States, petitioner accounts for only *** percent of production of the single, broader like product in the United States. Importantly, Commissioner Bragg finds that the record evidence is limited regarding the market competition between U-shaped posts and other fence posts covered by the scope of the investigation.

In addition, Commissioner Bragg notes that there is a seasonal business cycle for the U.S. steel fence post industry based on the fact that a majority of orders are placed in August through October, with shipments sent March through June. Given that the seasonality may influence both volume and price data, it will be important in any final investigation to further examine the seasonal business cycle of the domestic industry for a more complete analysis.

⁸³ 19 U.S.C. § 1677(7)(C)(i).

⁸⁴ Commissioner Bragg finds that despite the decrease in apparent U.S. consumption, the volume of U.S. shipments of subject imports irregularly increased by *** percent between 1999 and 2001, from *** pounds in 1999 to *** pounds in 2001. CR/PR at Table C-1. Between the interim periods, the volume of U.S. shipments of subject imports increased by another *** percent from interim 2001 to interim 2002. Subject imports’ share of the U.S. market increased from *** percent in 1999 to *** percent in 2001, but the market share of subject imports *** declined between the interim periods. U.S. importers captured market share at the expense of the domestic producer, as the domestic producer’s share of the U.S. market declined over the POI from *** percent in 1999 to *** percent in 2001, and then to *** percent in interim 2002. Nonsubject imports were not present in the U.S. market throughout the POI.

Respondents contend, however, that there is a problem with the petitioner’s volume analysis because the HTS numbers used were allegedly inflated due to the inclusion of metal or steel fence posts weighing more than 1 pound per foot. Nonetheless, the questionnaire data compiled by Commission staff indicate that the volume of subject imports has increased significantly. Furthermore, on a value basis, U.S. shipments of subject imports increased by *** percent between 1999 and 2001, and decreased by *** percent between interim periods. CR/PR at Table C-1. Thus, notwithstanding Respondents concerns regarding the import data, the preliminary record provides a reasonable indication that the absolute and relative volume of subject imports increased significantly.

⁸⁵ CR/PR at Table IV-2. We note that all imports of metal posts weighing 1 pound or less per foot were lawn and garden steel fence posts.

decreased from \$*** in 1999 to \$*** in 2000, but then increased to \$*** in 2001. Between interim 2001 and 2002, subject imports declined in value from \$*** to \$***.^{86 87}

By quantity, subject imports' market share of U.S. shipments was substantial and continued to grow over the period examined, increasing from *** percent in 1999 to *** percent in 2000 and to *** percent in 2001. Between interim periods 2001 and 2002, subject imports' market share of U.S. shipments increased from *** percent to *** percent.⁸⁸

The volume of subject imports increased at the expense of the domestic industry, whose shipments continually declined from *** pounds in 1999 to *** pounds in 2000 to *** pounds in 2001, and from *** pounds in interim 2001 to *** pounds in interim 2002.⁸⁹

By quantity, the market share of the domestic industry declined from *** percent in 1999, its highest level during the period examined, to *** percent in 2000 and to *** percent in 2001.⁹⁰ The domestic industry's market share was *** percent, compared with *** percent in interim 2001.⁹¹

For purposes of this preliminary determination, we find the volume of subject imports and the increase in volume to be significant in absolute terms and relative to consumption in the United States.⁹²

C. Price Effects of the Subject Imports of Lawn and Garden Fence Posts

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.⁹³

The available data in this investigation indicate that domestic lawn and garden fence posts and subject imports are largely interchangeable.⁹⁴ Lawn and garden fence posts are produced in eight standard sizes, which suggests that these posts are not a highly differentiated product.⁹⁵

⁸⁶ CR/PR at Table IV-2.

⁸⁷ Although MAT is the *** U.S. importer of U-posts from China, *** importers (presumably unable to sell *** to the home centers emphasized by MAT) have increased their import volumes since 1999, collectively rising from *** pounds in 1999 to *** pounds in 2000 and to *** pounds in 2001. In the first quarter of 2002, such imports were *** pounds compared to *** pounds in the first quarter of 2001. Derived from Confidential Report and importer questionnaires.

⁸⁸ CR/PR at Table C-4.

⁸⁹ CR/PR at Table C-4.

⁹⁰ CR/PR at Table C-4.

⁹¹ CR/PR at Table C-4.

⁹² In addition, we note that subject imports increased significantly relative to production in the United States. CR/PR at Tables C-1 and C-4.

⁹³ 19 U.S.C. § 1677(7)(C)(ii).

⁹⁴ CR at II-4; PR at II-3.

⁹⁵ Light-duty lawn and garden fence posts are normally made of 14 gauge steel (.068 inch - .082 inch thick), 1

(continued...)

The Commission collected pricing data for four lawn and garden steel fence post products: two light-duty lawn and garden fence post products (pricing products 1 and 2)⁹⁶ and two heavy-duty lawn and garden fence post products (pricing products 3 and 4).⁹⁷ Price comparisons for pricing products 1, 2, 3, and 4 were possible in a total of 13 quarters from January 1999 through March 2002. Underselling by the subject imports was mixed. The record indicates that prices for Chinese light-duty lawn and garden fence posts (with *** sales volumes) were generally at or below prices for Steel City's product throughout the period examined.⁹⁸ In contrast, the record indicates that prices for Chinese heavy-duty lawn and garden fence posts generally were above prices for Steel City's product.^{99 100}

Chinese prices for lawn and garden fence posts increased between 1999 and 2000, and generally *** since the first quarter of 2000.¹⁰¹ Domestic prices for lawn and garden fence posts also generally *** throughout the period examined.¹⁰²

⁹⁵ (...continued)

3/4 inches wide by 3 feet, 4 feet, 5 feet, and 6 feet long. These posts weigh approximately 0.45 pound per foot. Heavy-duty lawn and garden fence posts are normally made of 13 gauge steel (.082 inch - .095 inch thick), 3 inches wide by 5 feet, 6 feet, 7 feet, and 8 feet long. These posts weigh about 0.90 pound per foot. See, e.g., Petition at 10.

⁹⁶ Pricing Product 1 consists of light-duty lawn and garden fence posts, 14 gauge thick, 1-3/4 inches wide by 4 feet tall. Pricing Product 2 consists of light-duty lawn and garden fence posts, 14 gauge thick, 1-3/4 inches wide by 5 feet tall. CR at V-3; PR at V-2.

⁹⁷ Pricing Product 3 consists of heavy-duty lawn and garden fence posts, 13 gauge thick, 3 inches wide by 5 feet tall. Pricing Product 4 consists of heavy-duty lawn and garden fence posts, 13 gauge thick, 3 inches wide by 6 feet tall. CR at V-3; PR at V-2.

⁹⁸ For pricing product 1, the Chinese product was priced above the U.S. product in 3 quarters, with margins ranging from *** to *** percent and averaging 1.1 percent. In the other 10 quarters (for pricing product 1), the Chinese product was priced below the U.S. product, with margins ranging from *** to *** percent and averaging 7.0 percent. For pricing product 2, the Chinese product was priced below the U.S. product in all 13 quarters, with margins ranging from *** to *** percent and averaging 13.7 percent. CR at V-4; PR at V-3; CR/PR at Tables V-1 and V-2.

⁹⁹ For pricing product 3, the Chinese product was priced above the U.S. product in all 13 quarters, with margins ranging from *** to *** percent and averaging 27.9 percent. For pricing product 4, the Chinese product was priced above the U.S. product in 12 quarters, with margins ranging from *** to *** percent and averaging 8.7 percent. In the remaining quarter (for pricing product 4), the Chinese product was priced below the U.S. product, with a margin of *** percent. CR at V-11; PR at V-4; CR/PR at Tables V-3 and V-4.

¹⁰⁰ We note, however, that record evidence regarding prices is mixed. The parties did not argue that Chinese prices were higher than domestic prices, as the data for heavy-duty U-posts suggest. Moreover, import AUVs (and export AUVs) for Chinese U-posts generally are *** than domestic shipment AUVs, even though the importers' U.S. shipment AUVs are *** than the domestic AUVs. Finally, quotations for Chinese U-posts from two suppliers (both from February 2002) indicate prices below Steel City's price list for all products – Shandong offered a range of light-duty U-posts at 49-56 percent below Steel City's list price, and heavy-duty U-posts at 31-35 percent below Steel City's list price; Jackson Wire offered a range of light-duty U-posts at 30-42 percent below Steel City's list price, and heavy-duty U-posts at 6-11 percent below Steel City's list price. See, e.g., Petition exhibits 1 and 6.

¹⁰¹ CR/PR at Tables V-1 to V-4. The price of the *** Chinese product (pricing product 2) has been erratic and has declined in recent quarters. CR/PR at Table V-2.

¹⁰² CR/PR at Tables V-1 to V-4.

Steel City does not appear to adjust its prices in response to competition from the subject imports.¹⁰³ There is some evidence, however, that domestic prices have been suppressed relative to costs. The industry's unit cost of goods sold (COGS) has increased by *** percent between 1999 and 2001, and the ratio of cost of goods sold to net sales has also steadily risen over the period examined.¹⁰⁴ We intend to examine more closely the possible price suppressing effects of subject imports in any final phase investigation.¹⁰⁵

Two of Steel City's allegations of lost sales remain unconfirmed because the purchasers in question, ***, have refused to respond to the Commission's inquiries. A third purchaser, ***, has denied Steel City's lost sales allegation, but to date has refused to provide important details.¹⁰⁶

The limited record in the preliminary phase of this investigation is mixed with respect to underselling, indicates stable domestic prices, and does not support allegations of lost sales due to the subject imports. Therefore, on balance, we do not find the price effects of the subject imports to be significant.

D. Impact of the Subject Imports of Lawn and Garden Fence Posts

In examining the impact of the subject imports on the domestic industry, we consider all relevant economic factors that bear on the state of the industry in the United States.¹⁰⁷ These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive

¹⁰³ In any final phase investigation, we intend to explore further MAT's argument that "big box" stores such as Home Depot, Lowe's, and Menard's prefer suppliers with a broader product mix and higher production capacity. The record in the preliminary phase of this investigation is not clear as to whether Steel City is "qualified" to supply "big box" retailers.

¹⁰⁴ The domestic industry's unit (per pound) COGS increased from \$*** in 1999 to \$*** in 2000 to \$*** in 2001, and from \$*** in interim 2001 to \$*** in interim 2002. The domestic industry's COGS to net sales ratio increased from *** percent in 1999 to *** percent in 2000 to *** percent in 2001, and from *** percent in interim 2001 to *** percent in interim 2002. CR/PR at Table C-4.

¹⁰⁵ Commissioner Bragg finds that the preliminary record provides a reasonable indication of significant negative effects on the U.S. prices by reason of the subject imports. The pricing data show that price levels for both subject imports and the domestic like product were relatively *** or increased *** over the POI. CR/PR at Tables V-1-4 & Figures V-1-4. More specifically, quarterly price comparisons were mixed, as the Chinese product was priced below the U.S. product in 24 out of 52 quarters, equal to a 46.2 percent incidence of underselling, with underselling margins averaging 10.9 percent. CR at V-4; PR at V-3; CR/PR at Tables V-1-4. In addition, the average unit values of U.S. shipments and net sales declined by *** percent and *** percent, respectively, despite the *** unit COGS from 1999 to 2001. CR/PR at Table C-1. Thus, the increasing ratio of COGS/sales from *** percent in 1999 to *** percent in 2000, and to *** percent in 2001 corroborates that the domestic industry is experiencing a cost/price squeeze driven by declining price levels influenced by subject imports. CR/PR at Table C-1.

¹⁰⁶ CR at V-11 to V-13; PR at V-4-5. *** indicated that ***, and that ***. It did not give further details about its ***, ***. CR at V-11 to V-12 and n.11; PR at V-5 and n.11.

¹⁰⁷ 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 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).

and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”^{108 109 110}

With respect to the impact of the subject imports, available data indicate that Steel City has experienced declining U.S. sales throughout the period examined,¹¹¹ despite an increase in apparent U.S. consumption.¹¹² Conversely, sales of lawn and garden fence posts from China increased throughout the period examined.¹¹³ As a result, Steel City has seen its market share decline from *** percent in 1999 to *** percent in 2001, and to *** percent in the first quarter of 2002.¹¹⁴ Steel City’s production of lawn and garden fence posts fell by nearly *** in 2000, and remained more than *** percent below 1999 levels in 2001.¹¹⁵ Capacity utilization fell from *** percent in 1999 to *** percent in 2000, *** percent in 2001, and *** percent in the first quarter of 2002.¹¹⁶

Consistent with the decline in production and sales volumes, Steel City reduced its inventory levels by more than *** between 1999 and 2001 and cut levels of hours worked and wages paid by nearly *** percent.¹¹⁷ These reductions allowed the company to maintain manageable inventory levels (*** percent of annual shipments), generally *** levels of productivity for its work force of *** (down from ***), and *** unit labor costs of *** throughout the period examined.¹¹⁸

¹⁰⁸ 19 U.S.C. § 1677(7)(C)(iii); see also SAA at 851, 885; Live Cattle from Canada and Mexico, Invs. Nos. 701-TA-386 and 731-TA-812 to 813 (Prelim.), USITC Pub. 3155 at 25, n.148 (Feb. 1999).

¹⁰⁹ The statute instructs the Commission to consider the “magnitude of the dumping margin” in an antidumping duty proceeding as part of its consideration of the impact of imports. See 19 U.S.C. § 1677(7)(C)(iii)(V). In its notice of initiation, Commerce estimated a dumping margin of 51 to 89 percent for subject Chinese product. 67 FR 37388, 37390 (May 29, 2002).

¹¹⁰ Commissioner Bragg notes that she does not ordinarily consider the magnitude of the margin of dumping to be of particular significance in evaluating the effects of subject imports on domestic producers. See Separate and Dissenting Views of Commissioner Lynn M. Bragg in Bicycles from China, Inv. No. 731-TA-731 (Final), USITC Pub. 2968 (June 1996).

¹¹¹ Steel City *** export sales of lawn and garden fence posts. Steel City’s U.S. shipments, by quantity, declined from *** pounds in 1999 to *** pounds in 2000 to *** pounds in 2001 and from *** pounds in interim 2001 to *** pounds in interim 2002. CR/PR at Table C-4.

¹¹² Apparent U.S. consumption of lawn and garden fence posts, by quantity, increased from *** pounds in 1999 to *** pounds in 2000 to *** pounds in 2001, and decreased *** from *** pounds in interim 2001 to *** pounds in interim 2002. CR/PR at Table C-4.

¹¹³ U.S. shipments by Chinese importers of lawn and garden fence posts increased from *** pounds in 1999 to *** pounds in 2000 to *** pounds in 2001 and from *** pounds in interim 2001 to *** pounds in interim 2002. CR/PR at Table C-4.

¹¹⁴ CR/PR at Table C-4.

¹¹⁵ Steel City’s production of lawn and garden fence posts decreased from *** pounds in 1999 to *** pounds in 2000, then increased *** to *** in 2001. Between interim periods 2001 and 2002, Steel City’s production increased from *** pounds to *** pounds. CR/PR at Table C-4.

¹¹⁶ CR/PR at Table C-4.

¹¹⁷ Steel City’s inventory of lawn and garden fence posts, by quantity, decreased from *** pounds in 1999 to *** pounds in 2001, but increased *** from *** pounds in interim 2001 to *** pounds in interim 2002. Hours worked by Steel City’s employees declined from *** hours in 1999 to *** hours in 2001. Between interim periods 2001 and 2002, hours worked *** at *** hours. Wages paid decreased from \$*** in 1999 to \$*** in 2001. From interim 2001 to interim 2002, wages paid declined from \$*** to \$***. CR/PR at Table C-4.

¹¹⁸ Steel City’s production workers numbered *** in 1999, but declined to *** in 2000 and to *** in 2001.

(continued...)

Steel City's financial performance declined over the period examined, as the quantity of net sales fell by *** percent between 1999 and 2001, and was *** percent lower in the first quarter of 2002 than in the first quarter of 2001.¹¹⁹ The value of net sales followed a similar trend, as unit sales values *** at \$*** per pound throughout the period examined.¹²⁰ Steel City's costs, however, did not remain stable, as a result of continuously increasing factory overhead.¹²¹ The company's unit cost of goods sold (COGS) rose from *** in 1999 to *** in 2000, *** in 2001, and *** in the first quarter of 2002, while its unit SG&A expense fluctuated *** over the period examined.¹²² As a result, Steel City saw its operating income decline from *** in 1999 to *** in 2000 and to *** in 2001. Operating income of *** in the first quarter of 2002 was *** below the company's operating income level in the first quarter of 2001.¹²³ As a result, Steel City has essentially *** capital expenditures.¹²⁴

Thus, the record in this investigation indicates that, by gaining significant market share at the expense of Steel City, imports of lawn and garden fence posts from China have had a significant adverse impact on the domestic industry, as reflected in the declining levels of shipments, production, and employment combined with rising levels of volume-dependent costs, and a marked decline in profitability.¹²⁵

CONCLUSION

For the reasons stated above, we determine that there is a reasonable indication that the domestic industry producing U-shaped or hat-shaped lawn and garden fence posts made of steel and/or any other

¹¹⁸ (...continued)

Between interim 2001 and interim 2002, the number of Steel City's production workers *** at ***. Steel City's productivity decreased from *** pounds per hour in 1999 to *** pounds per hour in 2001. From interim 2001 to interim 2002, Steel City's productivity increased from *** pounds per hour to *** pounds per hour. CR/PR at Table C-4.

¹¹⁹ Steel City's net sales, by quantity, declined from *** pounds in 1999 to *** pounds in 2000 to *** pounds in 2001 and from *** pounds in interim 2001 to *** pounds in interim 2002. CR/PR at Table C-4.

¹²⁰ Steel City's net sales, by value, decreased from \$*** in 1999 to \$*** in 2000 and to \$*** in 2001, and from \$*** in interim 2001 to \$*** in interim 2002. CR/PR at Table C-4.

¹²¹ Staff Worksheet dated June 13, 2002.

¹²² Steel City's unit SG&A expense increased from \$*** in 1999 to \$*** in 2000, but *** at \$*** in 2001, interim 2001, and interim 2002. Steel City's SG&A expenses were consistently equivalent to *** percent of its net sales. See, e.g., CR/PR at Tables C-4 and VI-2.

¹²³ CR/PR at Table C-4.

¹²⁴ CR/PR at Table C-4.

¹²⁵ Based on her definition of the domestic industry, Commissioner Bragg finds that U.S. production decreased by *** percent from *** pounds in 1999 to *** pounds in 2001, and decreased by an additional *** percent between interim periods. CR/PR at Table C-1. In addition, U.S. shipments, number of production workers, net sales, and capital expenditures, also dropped over the POI. CR/PR at Table C-1. The deterioration of the domestic industry's performance is further evidenced by declines in operating income of *** percent over the POI, from *** in 1999 to only *** in 2001, and the ratio of operating income/sales, which decreased from *** percent in 1999 to *** percent in 2001. CR/PR at Table C-1. Thus, the preliminary record provides a reasonable indication that the increased presence of lower-priced subject imports in the U.S. market has had a significant adverse impact on the domestic industry.

metal, weighing 1 pound or less per foot, is materially injured by reason of subject imports from China that are allegedly sold in the United States at less than fair value.¹²⁶

V. NO REASONABLE INDICATION OF MATERIAL INJURY BY REASON OF SUBJECT IMPORTS OF OTHER METAL POSTS^{127 128}

A. Conditions of Competition

The following conditions of competition for tee- and angle-posts are pertinent to our analysis in this investigation.

Demand for tee- and angle-posts is driven by agricultural and industrial needs in the United States.¹²⁹ Demand for tee- and angle-posts has not experienced the same growth as demand for lawn and garden fence posts. Tee-post producers characterize demand as “stable.”¹³⁰ Apparent U.S. consumption of tee- and angle-posts, in fact, decreased by *** percent in 2000 and by *** percent in 2001.¹³¹

Domestic producers are the only known source of supply of tee- and angle-posts in the U.S. market. There are no known imports of tee- and angle-posts in the relevant weight range.¹³² There are four known producers of tee- and angle-posts weighing 1 pound or less per foot in the United States: SMI, W.Silver, Jersey Shore Steel, and Cascade Steel.¹³³

U.S. producers’ capacity has *** throughout the period examined.¹³⁴ Capacity utilization was generally *** during the period examined, rising from *** percent in 1999 to *** percent in 2000 and to

¹²⁶ Commissioner Bragg finds, on balance, the record as well as the significant data concerns that arise under the American Lamb standard for preliminary investigations warrants an affirmative determination that there is a reasonable indication that an industry in the United States is presently, materially injured by reason of imports of all lawn and garden steel fence posts weighing 1 pound or less per foot from China that are allegedly sold in the United States at less than fair value.

¹²⁷ Commissioner Bragg does not join Section V of these Views.

¹²⁸ This case presents the novel question of how the negligibility provision of the statute, 19 U.S.C. § 1677(24), which requires termination of investigations where imports account for less than 3 percent of total imports, is to be applied when there are no imports of the product from any country. Thus, the total of subject imports of these products is the same as, not less than, the total imports from all countries. While one could argue that zero imports of “other” fence posts from China is less than three percent of “total” imports of those articles, even though there are no “total” imports, the issue is essentially moot as we find no reasonable indication of material injury or threat of material injury by reason of subject imports from China.

¹²⁹ CR at I-3, n.10; PR at I-3, n.10. Tee-posts have primarily farm and industrial uses. They are used for supporting plants and trees, and have been adopted by the construction industry as the “method of choice” for erosion control. Angle-posts are sturdy enough to support plants and trees as grape or orchard stakes. CR at I-7, n.32, and I-9; PR at I-6, n.32, and I-7.

¹³⁰ CR at II-3; PR at II-2.

¹³¹ Apparent U.S. consumption was *** percent higher in the first quarter of 2002 than in the first quarter of 2001. CR/PR at Table C-5.

¹³² CR/PR at Table C-5; Petition at 6, n.4. Imports of tee, farm, and sign posts currently weigh more than 1 pound per foot. CR/PR at Tables C-2 and C-5.

¹³³ CR/PR at Table III-1.

¹³⁴ Capacity for the domestic industry has *** pounds on an annual basis throughout the period examined. CR/PR at Table C-5.

*** percent in 2001.¹³⁵ U.S. producers' end-of-period inventories increased by *** percent from 1999 to 2001, but were lower in interim 2002 to interim 2001.¹³⁶

¹³⁵ CR/PR at Table C-5.

¹³⁶ CR/PR at Table C-5.

B. Volume of the Subject Imports of Other Metal Posts

We do not find volume of the subject imports to be significant because there is no subject import volume of other metal posts weighing 1 pound or less per foot.¹³⁷

C. Price Effects of the Subject Imports of Other Metal Posts

We do not find significant price effects by reason of subject imports because there are no subject imports of other metal posts weighing 1 pound or less in the domestic market.¹³⁸ None of the U.S. producers reported any lost sales or lost revenues attributable to the subject tee- or angle-posts.¹³⁹

D. Impact of the Subject Imports of Other Metal Posts

The performance of the domestic industry deteriorated between 1999 and 2001, before recovering somewhat in the first quarter of 2002.¹⁴⁰ These trends, however, are consistent with trends in apparent U.S. consumption during the period examined. We do not find a significant impact by reason of subject imports on the domestic industry because there are no subject imports of other metal posts weighing 1 pound or less per foot.¹⁴¹

VI. NO REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF SUBJECT IMPORTS OF OTHER METAL POSTS FROM CHINA

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.”¹⁴² The Commission may not make such a determination “on the basis of mere conjecture or supposition,” and considers the threat factors “as a whole.”¹⁴³ In making our determination, we have considered all factors that are relevant to this investigation.¹⁴⁴ Based on an evaluation of the relevant statutory factors, we determine that there is no reasonable indication that an industry in the United States is threatened with material injury by reason of imports of other metal posts weighing 1 pound or less per foot from China that are allegedly sold in the United States at less than fair value.

¹³⁷ CR/PR at Table C-5.

¹³⁸ CR/PR at Table C-5.

¹³⁹ CR/PR at Table V-6.

¹⁴⁰ CR/PR at Table C-5.

¹⁴¹ CR/PR at Table C-5.

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

¹⁴³ 19 U.S.C. § 1677(&)(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 (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).

¹⁴⁴ 19 U.S.C. § 1677(7)(F)(i). Factors I (regarding countervailing subsidies) and VII (regarding raw and processed agricultural products) are inapplicable to this antidumping duty investigation.

We note that, consistent with the decrease in apparent U.S. consumption over the period examined, the domestic industry is experiencing decline in profitability as well as other performance indicators.¹⁴⁵ However, we nonetheless find no reasonable indication of a threat of material injury by reason of the subject imports.

The evidence in the preliminary phase of this investigation indicates that there are no imports of other metal posts weighing 1 pound or less per foot.¹⁴⁶ We note that Petitioner has expressed concern that Chinese suppliers “may” produce light-weight tee, farm, or sign posts for sale as lawn or garden fence posts in contrast with current practice.¹⁴⁷ The record suggests that this concern is highly speculative, especially in light of the lack of competition that currently exists between domestically produced lawn and garden fence posts and tee- and angle-posts, notwithstanding the fact that the latter appear to be priced substantially lower than the former on a per-pound basis.¹⁴⁸ Because there have been no imports of the subject merchandise, we find no likelihood of substantially increased imports. We also note that the record indicates that Hangzhou, which accounted for *** percent of Chinese production of all subject merchandise (including lawn and garden fence posts), has shipped only lawn and garden fence posts, but not other metal posts in the requisite weight range, to the United States during the period examined, and has *** to add or change production capacity or production in China.¹⁴⁹ We therefore find that there is no evidence of excess capacity that likely would result in a substantial increase in imports of “other” fence posts in the imminent future.¹⁵⁰ Given the lack of pricing effects we found above, we see no likelihood that any future imports will have significant adverse price effects. For similar reasons, there is little, if any, indication in this investigation that Hangzhou is maintaining significant inventories of subject merchandise or that Hangzhou is planning to engage in product-shifting in the imminent future. As previously discussed, we found no adverse impact suffered by the domestic industry due to subject imports of other metal posts. Thus, there have been no negative effects on the domestic industry’s development and production efforts, by reason of subject imports. Finally, for the reasons stated above, we do not find any other demonstrable adverse trends that would indicate imminent harm to the domestic industry by subject imports.

CONCLUSION

For the reasons stated above, we determine that there is no reasonable indication that the domestic industry producing other fence posts made of steel and/or other metal including tee, farm, and sign posts weighing 1 pound or less per foot is materially injured or threatened with material injury by reason of subject imports from China that are allegedly sold in the United States at less than fair value.

¹⁴⁵ Apparent U.S. consumption, by quantity, declined from *** pounds in 1999 to *** pounds in 2000, and to *** pounds in 2001. Apparent U.S. consumption increased from *** pounds in interim 2001 to *** pounds in interim 2002. CR/PR at Table C-5.

¹⁴⁶ CR/PR at Table C-5.

¹⁴⁷ Petition at 6, n.4.

¹⁴⁸ CR at I-13 to I-14 (lack of competition), CR at I-16 to I-17 and n.73 (different prices and unit values); PR at I-10 to I-11 (lack of competition), PR at I-12 and n.73 (different prices and unit values).

¹⁴⁹ CR at VII-1, n.1; PR at VII-1, n.1.

¹⁵⁰ We also note there is no evidence of antidumping duty findings or orders on the subject merchandise in other countries.

