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ANTIDUMPING AND COUNTERVAILING DUTY HANDBOOK

FOURTEENTH EDITION

United States International Trade Commission *Washington, DC 20436*

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PREFACE

The purpose of this handbook is to provide informal guidance to the public concerning the filing of an antidumping or countervailing duty petition and the investigation and possible review that follow. Antidumping and countervailing duty laws are administered jointly by the U.S. International Trade Commission ("Commission") and the U.S. Department of Commerce ("Commerce"). Each agency has specific responsibilities under the law. This handbook is intended to address in detail only the Commission's role in the overall process, although frequent general references are made to Commerce throughout. It is designed to be an informal summary to be used in conjunction with the relevant statute (the Tariff Act of 1930 (the "Act"), as added to and amended by subsequent laws), the Commission's Rules of Practice and Procedure, the Commission's interpretations of the statute and rules, and relevant judicial precedent, all of which take precedence over this document.

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PART I

THE PETITION PROCESS

OVERVIEW

An interested party[1] may file an antidumping or countervailing duty petition with Commerce and the Commission alleging that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry is materially retarded, by reason of imports that are being, or are likely to be, sold in the United States at less than fair value ("LTFV")[2] or by reason of imports that are being subsidized by the governments of one or more countries. Interested parties may file both antidumping and countervailing duty petitions involving the same imported merchandise, and one or both petitions may involve multiple countries. Antidumping and countervailing duty petitions may be filed as a single document, and multiple countries may be (and usually are) combined in a single petition.

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[1] Sections 702(b) and 732(b) of the Act state that a petition may be filed on behalf of an industry by an "interested party" described in subparagraph (C), (D), (E), (F), or (G) of section 771(9) of the Act (19 U.S.C. § 1677(9)). Qualified interested parties include: (1) a manufacturer, producer, or wholesaler in the United States of a domestic like product; (2) a certified or recognized union or group of workers that is representative of the industry; (3) a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product; (4) a coalition of firms, unions, or trade associations as described above; and (5) in cases involving processed agricultural products, a coalition or trade association representative of processors, or processors and producers, or processors and growers. See appendix A for a glossary of antidumping and countervailing duty terms.

[2] Selling at less than fair value, or dumping, is defined in section 771(34) of the Act (19 U.S.C. § 1677(34)) as "the sale or likely sale of goods at less than fair value." In more specific terms, dumping is defined as selling a product in the United States at a price which is lower than the price for which it is sold in the home market (the "normal value"), after adjustments for differences in the merchandise, quantities purchased, and circumstances of sale. In the absence of sufficient home market sales, the price for which the product is sold in a surrogate "third country" may be used. Finally, in the absence of sufficient home market and third country sales, "constructed value," which uses a cost-plus-profit approach to arrive at normal value, may be used.

PREPARATION OF A PETITION

This section of the handbook is intended to be used in conjunction with the questionnaire contained in the "Petition Format for Requesting Relief Under U.S. Antidumping Law" (form ITA-357P) and the "Petition Format for Requesting Relief Under U.S. Countervailing Duty Law" (form ITA-366P) prepared jointly by the Import Administration at Commerce and the Office of Investigations at the Commission.[3] As the Petition Formats state, Commerce (the "administering authority" under the Act) generally will be able to consider the initiation of an antidumping or countervailing duty investigation upon receipt of a completed questionnaire. However, the usual practice is for the petitioner to submit a petition in text rather than questionnaire form.[4] In any event, staff at both Commerce and the Commission welcome the opportunity to review a petition before it is filed. This review is performed in an expeditious manner, and the subject matter is kept in strict confidence. The petitioner benefits by being informed of any deficiencies in the petition which, if not corrected in time, may delay or

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[3] See also sections 207.10 and 207.11 of the Commission's rules (19 C.F.R. §§ 207.10 and 207.11), which address the filing of petitions with the Commission and the contents of petitions, respectively, and section 351.202 of Commerce's regulations (19 C.F.R. § 351.202), which addresses the administering authority's petition requirements.

[4] Sample petitions may be obtained from the Commission's Trade Remedy Assistance Office (TRAO). TRAO was established in 1989 to offer assistance to businesses seeking relief under U.S. trade laws. It has two main functions: (1) to respond to inquiries about various U.S. trade laws and (2) to provide technical assistance to eligible small businesses seeking a remedy under such laws. Eligibility as a small business is determined according to the size standards established by the Small Business Administration. TRAO staff will help small businesses analyze their trade-related problems in the context of existing laws and evaluate the strengths and weaknesses of potential claims. As part of this process, TRAO staff will describe the procedures for obtaining relief, provide guidance in preparing a petition, and review draft petitions before they are filed. TRAO assistance may also include informal legal advice to eligible businesses during the course of an investigation and any subsequent court review. Although such assistance may enable a small business to represent itself during the investigation, it should not be viewed as a substitute for employment of competent legal counsel. TRAO may be reached at 202.205.2200 or toll free at 800.343.9822.

prevent initiation of the investigation. A draft petition also enables both agencies to begin preliminary work in preparation for the actual filing.

A petition generally contains an introduction and conclusion, but must contain certain essential information that is usually presented in a manner consistent with the following outline used in the Petition Formats:

Section A .....General Information
Section B .....Description of Imported Goods, Exporters, and Importers
Section C .....Subsidy Information[5] and Price Information[6]
Section D .....Critical Circumstances Information[7]
Section E.....Injury Information

Introduction

The introduction, which is optional, typically contains a brief statement that alleges material injury, threat of material injury, and/or material retardation of the establishment of an industry in the United States by reason of dumped and/or subsidized imports, identifies the imported merchandise and the country(ies) involved, indicates by whom and on whose behalf the petition is filed, and requests Commerce and the Commission to initiate an antidumping or countervailing duty investigation.

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[5] Pertains only to countervailing duty petitions.

[6] Pertains only to antidumping petitions.

[7] Only if critical circumstances are alleged.

General Information

This section of the petition should provide detailed information on the petitioner and the domestic industry producing a product like or most similar in characteristics and uses to the imported product. It should identify the name and address of each firm, union, or trade association that is a petitioner and should provide some background information describing the extent of their involvement in the industry (e.g., year in which production began, approximate share of U.S. production accounted for, range of products, extent of investment, corporate affiliations, changes in ownership).

The statute states that a petition must be filed *on behalf of* an industry. A petition is deemed to have been filed on behalf of an industry if "(i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and (ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition."[8] If the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, Commerce must poll the industry or rely on other information to determine if the required level of support for the petition exists. If there is a large number of producers in the industry, Commerce may determine if there is support for the petition by using any statistically valid sampling method to poll the industry.[9]

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[8] Firms may actively support or oppose the petition, or they may take no position.

[9] Sections 702(c)(4)(A) and (D) and 732(c)(4)(A) and (D) of the Act (19 U.S.C. §§ 1671a(c)(4)(A) and (D) and 1673a(c)(4)(A) and (D)).

Prospective petitioners are advised to demonstrate as clearly as possible that they have standing to file a petition on behalf of an industry. It is common practice for various producers to file as co-petitioners (either as separate entities or collectively as in the form of an ad hoc committee); or for producers to file as co-petitioners with unions or trade associations; or for petitioners to obtain letters of support from nonpetitioning members of the domestic industry, from unions, or from trade associations.

In addition to providing information on the petitioner(s), this section of the petition should identify the name, street address, telephone number, website, email address, and contact person for each U.S. producer that is not a petitioner. Some general background information should be provided on the largest of these producers, such as their relative size, locations of production facilities, and dates when any firms have entered or exited the industry or undergone changes in ownership in the most recent four to five years. The petition should note whether any firms produce substantially for internal consumption and whether there are significant differences in producers' production processes or the range of products marketed within the product definition envisioned by the petitioner.

Finally, this section must contain a statement indicating whether the petitioner has filed within the last 12 months, is currently filing, or is planning to file for other forms of import relief[10] involving the same "subject merchandise."[11] If so, the petitioner should describe the import relief being sought and give the status of such efforts.

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[10] This import relief may be under section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337); sections 201 or 301 of the Trade Act of 1974 (19 U.S.C. §§ 2251 or 2411); or section 232 of the Trade Expansion Act of 1962 (19 U.S.C. § 1862).

[11] "Subject merchandise" is a term that defines the scope of an antidumping or countervailing

Description of Imported and Domestic Like Products, Exporters, and Importer

This section should begin with a clear and concise definition of the imported merchandise, identifying technical characteristics or precise parameters that unambiguously distinguish the goods from other merchandise not intended to fall within the scope of the investigation. It should be sufficiently broad to allow for effective relief and to discourage circumvention of any order that may be issued[12] but sufficiently narrow to avoid including imported merchandise that is not causing injury. Petitioners should be aware that the Commission will seek data from all U.S. producers of products "like" the imports described in the scope of the investigation (i.e., the subject merchandise). Effectively, broadening the scope can also expand the size of the U.S. industry. The definition of the imported product must specify the relevant tariff classification(s) of the merchandise as found in the *Harmonized Tariff Schedule of the United States ("HTS")*. The petitioner should expand on the basic definition by describing the merchandise in detail, including any inherent physical characteristics, raw materials used in the manufacturing process, differences between the imported product and that produced by U.S. firms, and both major and minor uses of the product. Catalogs, sales literature, illustrations, and other descriptive materials are useful and may be included as an attachment to the petition.

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duty investigation (i.e., the specific *imported* product or products that are under investigation).

[12] If the petition is successful at Commerce and the Commission, Commerce issues an antidumping or countervailing duty order instructing U.S. Customs and Border Protection to collect offsetting duties on the imported merchandise in an amount equal to the dumping margin or subsidy rate determined by Commerce in its investigation.

The next requirement of this section is a definition of the proposed "domestic like products."[13] This definition should be as clear and precise as possible, leaving no question as to what merchandise may or may not be included. To the extent feasible, the description of the domestic like products should include a discussion of the six factors identified in Part II that the Commission normally considers in its domestic like product analysis.

Additional requirements of this section of the petition include the following: (1) an identification of the country or countries from which the merchandise is being, or is likely to be, imported[14] and (2) the names, addresses, telephone numbers, fax numbers, email addresses, and websites of the foreign manufacturers, producers, and exporters, as well as the names, street addresses, telephone numbers, email addresses, and contact persons for the U.S. importers of the merchandise. The petitioner should also provide, if known, the volume and value of exports to the United States. Data regarding exports to the United States should cover the most recent three complete calendar years and the year-to-date periods of the current and preceding year.

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[13] In assessing material injury, the Commission is required by law to define the "domestic like product" produced by the U.S. "industry." "Domestic like product" is defined in section 771(10) of the Act (19 U.S.C. § 1677(10)) 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." "Industry" is defined in section 771(4)(A) of the Act (19 U.S.C. § 1677(4)(A)) as "the producers as a whole 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." For a further discussion of this issue, see the section of Part II entitled "*Domestic Like Product and U.S. Industry*."

[14] If the merchandise is produced in a country other than that from which it is exported, the name of the country in which it is produced should also be provided.

Subsidy Information and/or LTFV Price Information

These sections fall exclusively within the jurisdiction of the Department of Commerce. Prospective petitioners should particularly consult sections 701, 702(b), and 771(5) and (6) of the Act if filing a countervailing duty petition,[15] sections 731, 732(b), 772, and 773 of the Act if filing an antidumping petition,[16] and section 351.202(b)(7) of Commerce's regulations (19 C.F.R. § 351.202(b)(7)). Further guidance may be obtained by contacting the Import Administration's Office of Policy at Commerce (telephone 202.482.4412; fax 202.482.2308).

Critical Circumstances Information

"Critical circumstances" is a provision in both the antidumping and countervailing duty laws that allows for the limited retroactive imposition of duties if certain conditions are met.[17] The petitioner may allege critical circumstances in the petition or by amendment at any time more than 20 days before the date of Commerce's final determination.[18] Prospective petitioners who are alleging critical circumstances should provide information which indicates that a surge in imports prior to the suspension of liquidation of entries of the subject merchandise will undermine the effectiveness of the relief, regardless of whether the surge in imports was confined to the 90-day period for which retroactive duties could be assessed. Petitioners should provide information demonstrating that there have been massive imports of the merchandise over a relatively short period. In antidumping petitions, petitioners should

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[15] Also section 771(A) of the Act (19 U.S.C. § 1677-1) if an upstream subsidy is alleged.

[16] Also section 771(18) of the Act (19 U.S.C. § 1677(18)) if the merchandise is from a nonmarket economy country.

[17] Refer to the section of Part II entitled "Critical Circumstances" for a further discussion of this issue.

[18] Refer to section 351.202(b)(11) of Commerce's regulations (19 C.F.R. § 351.202(b)(11) for petition requirements related to critical circumstances allegations.

provide information demonstrating that either (1) there is a history of dumping or (2) the importer(s) knew or should have known that the exporter was selling at LTFV and that there would be material injury by reason of such sales. Countervailing duty petitions should identify any countervailable subsidy that is inconsistent with the WTO Agreement on Subsidies and Countervailing Measures.

Injury Information

This section of the petition should provide information to support the petitioner's contention that a domestic industry has been materially injured[19] by reason of the alleged unfair imports. The petition should contain statistical data to support the allegation that a domestic industry has been materially injured or threatened with material injury by reason of the alleged unfair imports. In general, such data should cover the three most recent complete calendar years as well as the year-to-date period of the current year and the like period of the previous year.[20] To the extent possible, the petition should present actual data rather than estimates. With respect to data on the domestic industry, actual data should be presented for the petitioning firm(s). Estimates may be provided for the industry as a whole if not all producers are petitioners and if published data are not available for an industry consisting of all producers of the product in question. With respect to data on imports, actual data should be presented if available from the Department of Commerce (i.e., if the relevant tariff items in the

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[19] Refer to the section of Part II entitled "*Material Injury*" for a further discussion of this issue.

[20] Partial-year periods usually correspond to calendar-year quarters (i.e., January-March, January-June, or January-September) but, in any event, should be consistent for all data presented. The Commission's practice in antidumping and countervailing duty investigations is to analyze data covering three years plus any interim periods; however, the period examined by the Commission may, under appropriate circumstances, cover a longer or shorter period of time.

Harmonized Tariff Schedule (HTS) are a fairly close match with the subject imported product). If the relevant tariff categories include statistically important products not subject to the investigation, which may substantially distort the magnitude or trend of imports, estimates may be used.

At a minimum, the petition should contain the following statistical data related to the question of material injury, presented in tabular format:

(1) The quantity and value of imports of the alleged LTFV and/or subsidized merchandise from each country supplying such imports, and imports of merchandise within the scope definition from all countries.

(2) Prices in the United States for a representative imported product[21] that is allegedly sold at LTFV and/or subsidized, and prices for the like or most similar article produced domestically by the petitioner(s)[22] and sold to the same class of customer[23] in direct competition with the imported article.[24] Prices should be presented for at least the five most recent calendar quarters and should be expressed in dollars and cents per unit, specifying the unit.

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[21] Specify the basis of the prices reported for imports (e.g., price quoted by importer, f.o.b. U.S. port of entry).

[22] Specify the basis of the prices reported for domestic product (e.g., weighted average of all sales made during this period, f.o.b. plant).

[23] Specify the class of customer (e.g., distributor or end user).

[24] Provide a detailed description of the specific article for which prices are reported. In order to permit meaningful price comparisons between the imported and domestic products, the article should be sufficiently specific so that differences in import and domestic prices do not simply reflect differences in product specifications (such differences could similarly distort trends in a given price series). The specific article also should be one that is sold in substantial volume by U.S. importers as well as U.S. producers.

(3) The capacity,[25] production, domestic sales, export sales, and end-of-period inventories of domestically produced merchandise like or most similar to the alleged LTFV and/or subsidized imports. Data should be reported separately for the petitioning firm(s) and for the U.S. industry as a whole (including the petitioning firm(s)). Data on capacity, production, and inventories should be expressed in terms of quantity (identifying the unit of measurement), and data on domestic and export sales should be expressed in terms of both quantity and value.

(4) The number of production and related workers[26] employed in the production of merchandise like or most similar to the alleged LTFV and/or subsidized imports, and the hours worked[27] by those employees. Data should

[25] Capacity is defined as the maximum level of production that an establishment can reasonably expect to attain under normal operating conditions. In estimating capacity, assume the following: (1) only machinery and equipment in place and ready to operate at the time could be utilized (i.e., facilities or equipment that would require extensive reconditioning before being made operable could not be utilized); (2) normal levels of downtime for maintenance, repair, and cleanup; (3) number of shifts and hours of plant operation not exceeding those attained in the past 5 years; (4) overtime pay, availability of labor, materials, utilities, etc., are not limiting factors; (5) a product mix that was typical or representative of production during the period; and (6) use of productive facilities outside the plant for services (such as contracting out subassembly work) not exceeding normal levels that occurred during the period examined.

[26] Production and related workers are defined as including working foremen and all nonsupervisory workers engaged in fabricating, processing, assembling, inspecting, receiving, storage, handling, packing, warehousing, shipping, maintenance, repair, janitorial and guard services, product development, auxiliary production for the plant's own use (e.g., power plant), and record keeping and other services closely associated with production operations. Not included in the definition are supervisory employees above the working foreman level (or their clerical staff), salesmen, and general office workers.

[27] Hours worked should include time paid for sick leave, holidays, and vacations, as well as overtime hours actually worked (not their equivalent in straight-time hours).

be reported separately for the petitioning firm(s) and for the U.S. industry as a whole (including the petitioning firm(s)).

(5) Income-and-loss data (net sales; cost of goods sold; gross profit or (loss); selling, general, and administrative expenses; and operating income or (loss)) on U.S. operations[28] producing merchandise like or most similar to the alleged LTFV and/or subsidized imports. If the necessary cost data for the product in question are not readily available in accounting records maintained by the petitioning firm(s), data may be provided for the next higher level of operations that includes the subject product. Data should be reported separately for the petitioning firm(s) and for the U.S. industry as a whole (including the petitioning firm(s)). Data may be reported on a calendar-year basis or, if more readily available, on an accounting-year basis (identifying the date that each reporting firm's accounting year ends).

In addition to the above data, the petition must identify each specific product on which the petitioner requests the Commission to collect pricing information in its questionnaires. It should also provide information on allegations of sales and revenues lost by each petitioning firm by reason of the subject merchandise during the period of investigation.[29] Lost sale and lost revenue information should, to the extent reasonably available to the petitioner, identify

[28] Include only U.S. manufacturing operations (i.e., include sales and related costs associated with articles produced in the establishment and sold domestically or exported, but exclude sales and related costs associated with the re-sale of purchased products of domestic or foreign origin).

[29] A lost sale occurs when a customer switches to the imported product; lost revenues occur when a U.S. producer either reduces prices or rolls back announced price increases in order to avoid losing sales to competitors selling the imported product.

customers from which petitioning firms experienced lost sales and revenues, and should include contact information for the firms (customers) involved. Finally, the petition should provide any other information relevant to the question of material injury, threat of material injury, or material retardation of the establishment of a domestic industry by reason of the alleged LTFV and/or subsidized imports.[30]

Conclusion

The conclusion generally contains a very brief, one- or two-paragraph statement affirming that the subject merchandise is being sold in the United States at LTFV and/or subsidized and that a U.S. industry producing a domestic like product is materially injured, or threatened with material injury, by reason of such imports. This statement is usually followed by a request for the imposition of antidumping and/or countervailing duties on the subject merchandise.

[30] Refer to the sections of Part II entitled "*Threat of Material Injury*" and "*Material Retardation*" for a further discussion of these issues.

PART II

THE INVESTIGATION PROCESS

CHRONOLOGY OF EVENTS

The overall investigation process for antidumping and countervailing duty cases can be divided into five stages, each ending with a determination by either Commerce or the Commission: (1) initiation of the investigation by Commerce, (2) the preliminary phase of the Commission's investigation, (3) the preliminary phase of Commerce's investigation, (4) the final phase of Commerce's investigation, and (5) the final phase of the Commission's investigation. There is a partial overlap in some of these stages as explained below. With the exception of Commerce's preliminary determination (stage 3), a negative determination by either Commerce or the Commission results in a termination of proceedings at both agencies.

The statutory deadlines relating to the five stages are as follows: initiation (20 days after the filing of the petition),[1] preliminary determination by the Commission (45 days after the filing of the petition),[2] preliminary determination by Commerce (115 days after the Commission's preliminary determination in antidumping cases or 40 days in countervailing duty cases),[3] final determination by Commerce (75 days after Commerce's preliminary

[1] Commerce has the statutory authority to postpone its initiation determination in "exceptional circumstances" by up to 20 days in order to "poll the industry" or otherwise determine industry support for the petition. Sections 702(c) and 732(c) of the Act (19 U.S.C. §§ 1671a(c) and 1673a(c)).

[2] Or if initiation is postponed, within 25 days after notification by Commerce of the initiation of the investigation.

[3] Commerce has the statutory authority to postpone its preliminary determination by up to 50 days in antidumping cases and by up to 65 days in countervailing duty cases. It may do so either (1) at the request of the petitioner if such request is made not later than 25 days before the scheduled date of the determination or (2) if it determines that the investigation is extraordinarily complicated. (Commerce will approve a request by the petitioner unless it finds "compelling reasons" to deny it.) See Commerce rule 351.205(b) and (e) (19 C.F.R. § 351.205(b) and (e)).

determination),[4] and final determination by the Commission (120 days after Commerce's preliminary determination or 45 days after its final determination,[5] whichever is later).[6] [7]

Filing of the Petition and Initiation of an Investigation

An interested party must file an antidumping or countervailing duty petition simultaneously (i.e., on the same day) with Commerce and the Commission.[8] [9] Within 20 days after the date on which the petition is filed,[10] Commerce determines whether the petition

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[4] Commerce has the statutory authority to postpone its final determination by up to 60 days in antidumping cases. It may do so at the request of either (1) the petitioner if the preliminary determination was negative or (2) the foreign producers or exporters if the preliminary determination was affirmative, if such request is made not later than the scheduled date for the final determination. (Again, Commerce will approve the request unless it finds "compelling reasons" to deny it.) See Commerce rule 351.210(b) and (e) (19 C.F.R. § 351.210(b) and (e)).

[5] (Seventy-five (75) days after its final determination if its preliminary determination was negative.)

[6] The Commission has no statutory authority to postpone its determinations, except in five-year (sunset) reviews conducted under section 751(c) of the Act. Refer to Part III, *The Review Process*.

[7] See appendix B for a flowchart depicting statutory timetables for antidumping and countervailing duty investigations.

[8] Commerce may also self-initiate an investigation (but rarely does so) whenever it determines, from information available to it, that a formal investigation is warranted.

[9] You must file a petition or request under 19 CFR 206.2 or 207.10 in paper form. For the Commission, submissions made by 12:00 pm will be counted as being filed on that date; filings made after 12:00 pm will have a filing date of the next business day. An original and eight (8) true paper copies of the petition or request must be filed. You must file all exhibits, appendices, and attachments to a petition or request in PDF format on CD-ROM, DVD, or other form of portable electronic media approved by the Secretary. You may not combine public and confidential attachments on the same CD-ROM, DVD, or other form of portable electronic media. Each CD-ROM or DVD must be labeled so as to clearly identify whether it contains public or confidential business information, in accordance with the EDIS User Guide for Submitting Electronic Media provided on the Commission website. The confidential version must be served on all parties for which the Secretary to the Commission has approved an application for administrative protective order (APO). Service must be made within two calendar days of notification by the Secretary that an APO application has been approved or within two calendar days of the establishment of the APO service list, whichever occurs first. The public version must be served on all parties within two calendar days of the establishment of the public service list. See Commission rules 201.6(b), 201.8, 201.16, 207.3, 207.7(f), and 207.10 (19 C.F.R. §§ 201.6(b), 201.8, 201.16, 207.3, 207.7(f), and 207.10) for information regarding filing of documents and service requirements. See also the section of Part II entitled "*The Administrative Protective Order Process*."

[10] Or 40 days after the filing date if Commerce must poll the industry to determine support for the petition.

alleges the elements necessary for the imposition of a duty and contains information reasonably available to the petitioner supporting the allegations. If the determination is affirmative, Commerce initiates an investigation to determine whether dumping or subsidies exist; if negative, it dismisses the petition and terminates the proceeding.[11]

Preliminary Phase of the Commission's Investigation

Within 45 days after the date on which the petition is filed,[12] the Commission makes a determination, based upon the record before it, of whether there is a reasonable indication that an industry in the United States is materially injured or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of the merchandise which is the subject of the investigation. The preliminary phase of the Commission's investigation may be broken down into six stages: (1) institution of the investigation and scheduling of the preliminary phase, (2) questionnaires, (3) staff conference and briefs, (4) staff report and memoranda, (5) briefing and vote, and (6) determination and views of the Commission.

Institution of the Investigation and Scheduling of the Preliminary Phase

Upon receipt of a properly filed petition, an eight-person team consisting of an investigator, economist, accountant/auditor, industry analyst, attorney, statistician, statistical assistant, and supervisory investigator is assigned to the investigation. The staff develops a work schedule for the conduct of the preliminary phase of the investigation and prepares a

[11] In either case, it publishes a notice of its findings in the *Federal Register*.

[12] Or within 25 days after the date on which the Commission receives notice from Commerce of the initiation of the investigation if Commerce must poll the industry to determine support for the petition.

notice of institution of investigation for publication in the *Federal Register*.[13] The purpose of the notice is to provide information to the public concerning the subject matter of the investigation and the schedule to be followed. The notice and work schedule are normally approved within two business days after receipt of the petition.

Any person other than the petitioner who wishes to appear before the Commission as a party in the investigation must file an "entry of appearance" with the Secretary to the Commission. An entry of appearance is a letter or document that states briefly the nature of the person's reason for participating in the investigation and the person's intent to file briefs with the Commission regarding the subject matter of the investigation. A person found by the Secretary to have a proper reason for participating in the investigation will be permitted to appear in the investigation as a party;[14] acceptance of that person's entry of appearance is signified by the Secretary's inclusion of the person on a document referred to as the public service list. Entries of appearance submitted during the preliminary phase of the investigation must be filed with the Secretary not later than seven days after publication of the Commission's notice of institution in the *Federal Register*.[15]

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[13] See Commission rule 207.12 (19 C.F.R. § 207.12).

[14] Industrial users and, if the merchandise under investigation is sold at the retail level, representative consumer organizations, will be deemed to have a proper reason for participating in the investigation as a party even though they may not qualify as an interested party under section 771(9) of the Act. Representatives of such industrial users and consumer organizations, however, would not be eligible to apply for access to business proprietary information under an administrative protective order if the party they represent does not qualify as an interested party. See also the section of Part II entitled "*The Administrative Protective Order Process*."

[15] See Commission rule 201.11 (19 C.F.R. § 201.11).

Questionnaires

After careful review of the petition and other information available at the time, the staff drafts questionnaires to solicit from U.S. producers, U.S. importers, and foreign producers the information required by the Commission in order to make its determination. Questionnaires are sent to all U.S. producers except in cases involving an unusually large number of firms; in such cases, they may be sent to the largest producers in the industry or to a representative sample of firms. Similarly, questionnaires generally are sent to all importers of the product in question, particularly all those importing from the country(ies) subject to investigation. If the number of importers is unusually large, questionnaires may be sent only to the largest importers or to a representative sample. Foreign producer questionnaires are sent only to producers from the subject country(ies).[16] Producer and importer questionnaires generally are sent within four business days after receipt of the petition. Foreign producer questionnaires typically are sent to the firms through counsel as soon as counsel are identified to staff or, if the firms are not represented, the questionnaires are sent directly. U.S. producers and importers are required to respond to questionnaires; failure to reply as directed can result in a subpoena or other order to compel a response.[17] Foreign producers are not required to respond to questionnaires. However, in the event foreign producer(s) fail to respond, the Commission will rely on the existing record evidence or "facts available," but may also take an adverse inference for noncompliance.

[16] The staff may request similar information to the U.S. embassy in the subject country(ies), particularly if the foreign producers are not represented by counsel.

[17] Section 333 of the Act (19 U.S.C. § 1333(a)).

In drafting questionnaires, the key issue that must be resolved at the outset is the identification of the product or products with respect to which data will be collected. In making its determination, the Commission must assess injury to a U.S. "industry" producing a product that is "like" the imported product subject to investigation. The statute defines "industry" as "the producers as a whole 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 . . . ." The law 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 . . . ." In other words, before assessing injury to a domestic industry, the Commission must first define the domestic like product. However, that determination is not made until late in the preliminary phase, while the staff, in designing the questionnaires, must select the product(s) for which to collect injury data at the beginning of the investigation. The selection of the product(s) for data collection purposes is made on the basis of a review of the petition, discussions with individuals in the industry, and any insights that the Commission's staff may have. Once this decision has been made, questionnaires are drafted using a standard format that is tailored to the nature of the industry in question.

Producer questionnaires generally consist of four parts. The first part asks a number of general questions relating to the organization and activities of the firm and whether it supports or opposes the petition, and why. The second part requests data on capacity, production, inventories, commercial shipments, export shipments, internal consumption, company transfers, employment, hours worked, wages paid, and purchases. Part three of the questionnaire involves financial data, including income-and-loss data on the product in

question; data on capital expenditures, research and development expenses, and asset valuation; and questions regarding the impact of imports on capital and investment. The fourth and final part of the producer questionnaire requests sales prices[18] and other price-related information and solicits allegations of lost revenues and lost sales attributable to the subject imports (petitioners are required to provide this information as part of the petition process rather than the questionnaire).

Importer questionnaires generally consist of three parts. As in the producer questionnaire, the first part relates to the organization and activities of the firm. The second part requests data on imports of the product in question; the quantity and value of commercial shipments, export shipments, internal consumption, and company transfers of such imports; and inventories of imports. The third part of the importer questionnaire solicits data on sales prices for subject imported merchandise and other price-related information similar to that requested in the producer questionnaire.

Foreign producer questionnaires are composed of three parts. The first two parts consist of general questions about the firm's operations in the country in question and in the United States. The third part requests data on the firm's capacity, production, home-market shipments, exports to the United States and other markets, and inventories of the subject merchandise.

[18] Sales prices generally are requested for certain narrowly defined products which are a subset of the product in question. Prices may be requested on an f.o.b. and/or delivered basis, and on a spot, contract, or bid basis. They usually are requested on a quarterly basis, but depending on industry practice, may be solicited on a daily, weekly, monthly, or annual basis.

Staff Conference and Briefs

The Commission's practice is to hold a public conference approximately three weeks into the preliminary phase of the investigation. The conference is chaired by the Commission's Director of Investigations; the staff assigned to the investigation are also present, but Commissioners do not attend. Parties in support of the petition and parties in opposition to the petition[19] are each given five minutes, beginning with the petitioner, for an opening statement in which to summarize their arguments. Following the opening statements, each side is given one hour in which to present legal and factual arguments and testimony by witnesses in support of their position.[20] Nonparties may also request permission in advance of the conference to present a brief statement of their position. Speakers are not sworn in but are reminded of the applicability of 18 U.S.C. § 1001 to false or misleading statements, and to the fact that the record of the proceeding may be subject to judicial scrutiny if there is an appeal. The presiding official and staff may question witnesses after their presentations,[21] but cross-examination and questioning by opposing parties are not permitted. After both sides have completed their presentations, they are allotted ten minutes each in which to rebut opposing statements and present summary arguments. The conference is transcribed by a court reporter

[19] A "party" is defined in Commission rule 201.2 (19 C.F.R. § 201.2) as any person who has filed a complaint or petition on the basis of which an investigation has been instituted, or any person whose entry of appearance has been accepted.

[20] If more than one party is in support of or in opposition to the petition, such parties are expected to allocate their allotted time among themselves. If they are unable to do so, the presiding official will make such allocations. It is fairly common to have more than one party in opposition, particularly in cases involving multiple countries.

[21] The presiding official may also question speakers during their testimony.

under contract to the Commission; transcripts are made available for sale by the reporting firm on the following business day.

Parties are encouraged to file postconference briefs containing information and arguments pertinent to the subject matter of the investigation. Such briefs are limited in length to 50 double-spaced pages of textual material and are due three business days after the conference.[22] Nonparties may submit a brief written statement of information pertinent to the investigation within the same time frame.[23]

Staff Report and Memoranda

The staff report is an objective, factual document written by the investigator, industry analyst, accountant/auditor, and economist under the direction of the supervisory investigator.[24] It consists of a presentation and analysis of all of the statistical data and other information collected through questionnaires, public documents, field visits, staff interviews, and other sources.[25] It also addresses various factual issues that are relevant to the investigation, including issues raised by the parties at the conference and in briefs. The staff report does not contain any recommendations regarding determinations that the Commission ultimately must make.

After review by the supervisory investigator, and subsequent review by personnel in various offices throughout the Commission, the staff report is transmitted to the Commission

[22] In addition, the presiding official may permit persons to file within a specified time answers to questions or requests made by the staff.

[23] See Commission rule 207.15 (19 C.F.R. § 207.15).

[24] See appendix C for a sample outline of a typical staff report.

[25] Statistical data generally are presented in aggregate form, although disaggregated data may be presented where appropriate.

approximately five weeks into the investigation.[26] On the next business day, the General Counsel transmits to the Commission a legal issues memorandum written by the staff attorney that identifies the relevant legal issues in the investigation, summarizes the arguments on both sides of the issues, and provides pertinent legal advice. Other memoranda in response to requests by specific Commissioners may be transmitted to the Commission at any time prior to the vote.

Briefing and Vote

Approximately four business days after receiving the staff report, the Commission convenes in a public meeting for the purpose of a briefing and vote on the investigation. At this time, Commissioners ask the staff any questions they may have regarding the investigation before approving the staff report. Then, each Commissioner announces his or her vote on the country(ies) involved in the investigation. The vote of the majority of the Commissioners participating in the decision constitutes the determination of the Commission. An evenly divided vote by the Commission represents an affirmative determination in antidumping and countervailing duty investigations. The public briefing and vote follow a period in which the Commission carefully studies all documents in the record, including the staff report and memoranda, the transcript of the conference, and the briefs. During this time, individual Commissioners may also ask the staff for private briefings concerning the subject matter of the investigation.

[26] The business proprietary version of the staff report is made available to APO parties after the Commission issues its determination. See Commission rule 207.17 (19 C.F.R. § 207.17).

Determination and Views of the Commission

The Commission is required by law to transmit its determination in the preliminary phase of an investigation to the Secretary of Commerce within 45 days after the date of filing of the petition,[27] or, typically, one business day after the public briefing and vote. The Commission then has five business days in which to write and transmit to Commerce its "views," which explain the basis for its determination.[28] The Commission issues a non-confidential, or public, version of both the views and the staff report, deleting all business proprietary information. If affirmative, it includes a notice of commencement of the final phase of the investigation. If the determination is negative, or if the Commission finds that imports are negligible,[29] the proceeding terminates.[30] A publication containing the determination and the public version of the views and the staff report is served on all parties to the investigation and made available to the public electronically on the Commission's website at http://www.usitc.gov/. The determination is subsequently published in the *Federal Register*.

Preliminary Phase of Commerce's Investigation

Under normal circumstances, assuming the Commission has made an affirmative preliminary determination, within 160 days after the date on which the petition is filed in antidumping cases or 85 days in countervailing duty cases, Commerce makes a preliminary determination, based upon the best information available to it at the time, of whether there is a reasonable basis to believe or suspect that the subject imported merchandise is being sold or

[27] Or within 25 days after receiving notification from Commerce of the initiation of the investigation in cases in which Commerce must poll the industry to determine support for the petition.

[28] Section 733(f) of the Act (19 U.S.C. § 1673b(f)).

[29] See the section of Part II entitled "*Negligible Imports*" for a further discussion of this issue.

is likely to be sold at LTFV, or whether a countervailable subsidy is being provided with respect to the subject merchandise.

If Commerce's preliminary determination is affirmative, it orders the suspension of liquidation of all entries of the subject imports that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of determination in the *Federal Register*.[31] Importers are then required to post a cash deposit or bond for each entry of the subject merchandise in an amount based on the estimated weighted average dumping margin,[32] or the estimated countervailable subsidy rate. If the determination is negative, Commerce nevertheless conducts the final phase of its investigation, although there is no requirement that importers post a cash deposit or bond.

Final Phase of Commerce's Investigation

Under normal circumstances, within 235 days after the date on which the petition is filed in antidumping cases or 160 days in countervailing duty cases, Commerce makes a final determination of whether the subject imported merchandise is being sold or is likely to be sold at LTFV, or whether a countervailable subsidy is being provided with respect to the subject merchandise.

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[30] See Commission rule 207.18 (19 C.F.R. § 207.18).

[31] If Commerce makes a preliminary affirmative determination of critical circumstances, the suspension of liquidation applies retroactively to all unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption up to 90 days before the date on which suspension of liquidation was first ordered.

[32] "Dumping margin" refers to the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise. "Weighted average dumping margin" refers to the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer. Section 771(35) of the Act (19 U.S.C. § 1677(35)).

Final Phase of the Commission's Investigation

Under normal circumstances, within 280 days after the date on which the petition is filed in antidumping cases or 205 days in countervailing duty cases, the Commission makes a final determination of whether an industry in the United States is materially injured or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of the merchandise which is the subject of the investigation. The final phase of the Commission's investigation may be broken down into eight stages: (1) scheduling of the final phase, (2) questionnaires, (3) prehearing staff report, (4) hearing and briefs, (5) final staff report and memoranda, (6) closing of the record and final comments by parties, (7) briefing and vote, and (8) determination and views of the Commission.

Scheduling of the Final Phase

Scheduling of the final phase of the Commission's investigation occurs immediately upon receipt of official notification from Commerce (either in the form of a letter or *Federal Register* notice) of its affirmative preliminary determination.[33] An eight-person team is assigned to the investigation at this time.[34] The staff develops a work schedule for the conduct of the final phase of the investigation and prepares a notice of scheduling for publication in the *Federal Register*.[35] The notice and work schedule are normally approved by the Commission

[33] If the preliminary determination is negative, no action is taken until such time, if any, that Commerce issues an affirmative final determination.

[34] The team consists of as many as possible of the same individuals who worked on the preliminary phase of the investigation; however, staff assignments may vary because of scheduling considerations.

[35] See Commission rule 207.21 (19 C.F.R. § 207.21).

within approximately one week after notification by Commerce of its preliminary determination.[36]

Any person who wishes to appear before the Commission as a party in the final phase of the investigation must file, or have filed in the preliminary phase, an entry of appearance with the Secretary to the Commission. Parties that filed an entry of appearance in the preliminary phase need not file an additional entry of appearance in the final phase. Persons desiring party status that did not file an entry of appearance in the preliminary phase may do so in the final phase at any time up until 21 days before the scheduled hearing date.[37]

Questionnaires

After careful review of the entire record from the preliminary phase of the investigation, and particularly the views of the Commission on issues affecting data collection (such as domestic like product), the staff drafts questionnaires to solicit from U.S. and foreign producers, U.S. importers, and U.S. purchasers, the information required by the Commission in order to make its final determination. The draft questionnaires generally are circulated to the parties for comment shortly before or after Commerce's preliminary determination. Party comments are filed with the Secretary to the Commission and served on the other parties to the investigation.[38] The staff reviews and incorporates the comments as appropriate, and forwards the questionnaires to the Commission for approval. Questionnaires are sent to all U.S. producers, U.S. importers, and foreign producers that reported production or imports of

[36] The longer time period for approval of notices, work schedules, and questionnaires in the final phase relative to the preliminary phase reflects the fact that Commissioners approve such documents in the final phase, whereas in the preliminary phase such approval is delegated to the Commission's staff.

[37] See Commission rule 201.11 (19 C.F.R. § 201.11).

the merchandise in question in the preliminary phase of the investigation, and to any additional firms the staff has reason to believe, on the basis of the record in the preliminary phase, may be producing or importing. The basic structure of these questionnaires is essentially the same as that of the questionnaires used in the preliminary phase, although product breakouts may be somewhat different, certain questions may be added or deleted, and the time period for which data are collected is more current.

Purchaser questionnaires are sent to all significant purchasers of the product. In cases involving an unusually large number of consumers, the mailing list may be limited to the largest purchasers, or if virtually all of the consumers are small, a representative sample may be taken.[39] Purchaser questionnaires generally consist of at least four parts. As in the producer and importer questionnaires, the first part relates to the organization and activities of the firm. The second part requests data on the quantity and/or value of purchases of the product manufactured in the United States, in each of the subject countries, and in the nonsubject countries as a group. Part three asks a number of questions about the characteristics of the market for the product in question and the firm's purchasing practices. The fourth part consists of a series of questions related to competition between the domestic product and both subject and nonsubject imports, and product comparisons in terms of price, quality, service, delivery, and other factors of sale. In some cases a fifth part requests actual purchase prices for specific types of domestic and subject imported products.

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[38] See Commission rule 207.20 (19 C.F.R. § 207.20).

[39] As is the case with U.S. producer and importer questionnaires, response to the purchaser questionnaire is mandatory and may be compelled by subpoena.

Producer, importer, foreign producers, and purchaser questionnaires are sent, primarily via email, in the weeks following notification by Commerce of its preliminary determination. All blank questionnaires are issued to counsel representing these firms before the Commission as well.

Prehearing Staff Report

The business proprietary version of the prehearing staff report (see the description of the staff report in connection with the preliminary phase of the investigation) is transmitted to the Commission and APO parties five business days before prehearing briefs are due and ten business days before the hearing; a public version is issued soon thereafter.[40] The report contains the most current industry and market information available and provides a basis for analysis of data and factual issues raised by the parties in their briefs, as well as a common ground on which Commissioners and parties may base their discussions at the hearing.

Hearing and Briefs

Parties are strongly encouraged to file prehearing briefs, which are due five business days before the hearing.[41] The prehearing brief should be a party's principal vehicle for asserting its arguments. There are no page limitations, but the brief should be as concise as possible, be limited to information and arguments relevant to the Commission's determination, and, to the extent possible, refer to the record.[42] [43] Nonparties may submit a brief written

[40] See Commission rule 207.22 (19 C.F.R. § 207.22).

[41] The exact date is specified in the notice of scheduling that is published in the *Federal Register*.

[42] The term *record* is defined in Commission rule 207.2(f) (19 C.F.R. § 207.2(f)) as all information presented to or obtained by the Commission during the course of an investigation, including completed questionnaires, any information obtained from the Department of Commerce, written communications from any person filed with the Secretary to the Commission, staff reports, all governmental memoranda

statement of information pertinent to the subject matter of the investigation within the same time frame.[44]

The Commission holds a public hearing very soon after Commerce announces its final determination. The hearing is chaired by the Chairman of the Commission, or by another Commissioner in the Chairman's absence. All Commissioners generally attend unless they are recused from the investigation. The hearing is essentially a forum for factfinding; its purpose is to allow interested parties to express their views and to permit Commissioners to ask questions and solicit information that will be useful to them in reaching a determination.

In advance of the hearing parties are notified of the time allocations and ground rules for the conduct of the hearing. Persons wishing to appear at the hearing must file a notice of participation with the Secretary to the Commission at least three business days in advance of the hearing or two business days in advance of the prehearing conference (if deemed necessary), whichever occurs first. A list of witnesses should be filed at that time. Parties in support of the petition and parties in opposition are each collectively given five minutes at the beginning of the hearing, beginning with the petitioner, to summarize their respective arguments. Generally, no questioning occurs at that point. Then the parties in support and those in opposition are given their basic allotment of time, typically one hour, in which to

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pertaining to the investigation, and the record of *ex parte* meetings required to be kept pursuant to section 777(a)(3) of the Act (19 U.S.C. § 1677f(a)(3)); and a copy of all Commission orders and determinations, all transcripts or records of conferences or hearings, and all notices published in the *Federal Register* concerning the investigation.

[43] The prehearing brief also must include a table of contents.

[44] See Commission rule 207.23 (19 C.F.R. § 207.23).

present their testimony, again beginning with those in support.[45] Nonparties may also request permission in advance of the hearing to present a brief statement of their position. Following the testimony by each group or panel of witnesses is a period of questioning by Commissioners, staff, and by opposing parties if they so desire. Questioning by Commissioners typically runs longer than the parties' direct testimony. These questions and the responses to the questions do not count against the time allotment of the group testifying at the time, and generally account for well over half of the total time involved in the hearing. Commissioners may also direct questions or requests for comments to other (non-testifying) parties. The basic allotment of time given the parties includes direct testimony, time spent in cross-examining witnesses of opposing groups,[46] and rebuttal statements. Parties may allocate their total time as they wish within these categories. In addition, parties in support and parties in opposition are each collectively given five minutes at the end of the hearing, beginning with the petitioner, to present a closing summary of their case.

All persons testifying at the hearing are sworn in by the Secretary to the Commission prior to their testimony. Testimony should be brief and to the point, and should be limited to a summary of the information and arguments contained in that party's prehearing brief, an analysis of the information and arguments contained in the prehearing briefs of other parties, and information not available at the time the prehearing brief was filed. Witnesses may speak from notes, from a prepared statement, or in response to questions posed by their counsel or

[45] If more than one party is in support of or opposition to the petition, such parties are expected to allocate their time allotments among themselves prior to the prehearing conference. If they are unable to do so, the presiding official will make such allocations at the prehearing conference.

another person. Parties may, at the hearing, file with the Secretary for acceptance into the record, supplementary material including graphic material such as charts and diagrams used to illuminate an argument or clarify a position, and information not available to a party at the time its prehearing brief was filed.[47] The Commission has an assortment of audiovisual equipment for use by witnesses who make arrangements with the Office of the Secretary at least three business days before the hearing. The hearing is transcribed by a court reporter under contract to the Commission; transcripts are made available for sale by the reporting firm on the following business day.

The Commission may hold a portion of the hearing *in camera* (i.e., closed to all individuals except Commissioners, essential staff, and participants who have been authorized to receive business proprietary information under administrative protective order).[48] Parties desiring to present a portion of their hearing testimony *in camera* must submit a written request to the Secretary showing good cause; parties are strongly encouraged to submit such requests as early in the investigation as possible, but in no event later than seven days prior to the hearing.[49]

Parties also are encouraged to file posthearing briefs containing information revealed during or after the hearing. Posthearing briefs are due by the date specified in the scheduling notice or by the presiding official at the hearing, typically five business days after the hearing. Posthearing briefs are limited in length to 15 double-spaced pages of textual material, not

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[46] Only the time spent questioning such witnesses counts against the basic time allotment (i.e., responses by the witnesses are not deducted from the allotment).

[47] See Commission rule 201.13(f) (19 C.F.R. § 201.13(f)).

[48] See the section of Part II entitled "*The Administrative Protective Order Process*."

including any information submitted in response to questions or requests from the Commission at the hearing.[50] Again, nonparties may submit a brief written statement of information pertinent to the investigation within the same time frame.[51]

Final Staff Report and Memoranda

After the hearing, the staff updates the prehearing report with information from the hearing and briefs, any questionnaire revisions, and other information obtained subsequent to the prehearing report. The final staff report is intended to supplement and correct the information contained in the prehearing staff report. The business proprietary version of the final staff report is transmitted to the Commission and APO parties approximately two weeks after posthearing briefs are due; a public version is issued soon thereafter.[52] The report, together with other documents prepared by the staff, the transcript of the hearing, party briefs, and other information in the record, provides the basis for the Commission's final determination. Two business days later, the General Counsel staff transmits to the Commission a legal issues memorandum.[53]

Closing of the Record and Final Comments by Parties

The Commission closes the factual record (i.e., ceases to accept new factual information) approximately four business days after the staff report is issued. At that time parties to the investigation are permitted to inspect all public information, and those parties

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[49] See Commission rule 207.24 (19 C.F.R. § 207.24).
[50] See Commission rule 207.25 (19 C.F.R. § 207.25).
[51] See Commission rule 207.26 (19 C.F.R. § 207.26).
[52] See Commission rule 207.22 (19 C.F.R. § 207.22).

who are under the administrative protective order are served all business proprietary information not previously disclosed. Two business days after the factual record closes, parties are given an opportunity to make final comments on the accuracy, reliability, or probative value of all information for which they have not had a previous opportunity to comment. Final party comments may not contain new factual information and are limited in length to 15 double-spaced pages of textual material.

Briefing and Vote

The Commission holds a public briefing and vote approximately three business days after final comments are due and eight business days before the statutory deadline for completion of the final phase of the investigation. During the period prior to the vote, the Commission carefully studies the record and may request private briefings by the staff. At the public briefing and vote, Commissioners ask the staff any questions they may have regarding the investigation before approving the staff report and announcing their votes on each country involved in the investigation.

Determination and Views of the Commission

The Commission is required by law to transmit its final determination to the Secretary of Commerce within 120 days after notification of Commerce's preliminary determination or 45 days after notification of its final determination,[54] whichever is later. During the period between the briefing and vote and the transmittal of its final determination, the Commission

[53] Other memoranda in response to requests by specific Commissioners may be transmitted to the Commission at any time prior to the vote; however, memoranda containing new factual information must be released to appropriate parties prior to the record closing date.

writes its views, explaining the basis for its determination.[55] The Commission then issues a public version of both the views and the staff report, deleting all business proprietary information. The determination is subsequently published in the *Federal Register*.[56] A publication containing the determination and the public version of the views and the staff report is served on all parties to the investigation and made available to the public electronically on the Commission's website at http://www.usitc.gov/.

Under certain circumstances, the Commission must make additional findings in its final determination. If Commerce makes an affirmative final determination regarding the existence of critical circumstances, and the Commission makes an affirmative final determination of material injury (as opposed to threat of material injury) to a domestic industry, the Commission must make an additional determination as to whether the imports subject to Commerce's affirmative determination of critical circumstances are likely to undermine seriously the remedial effect of the antidumping or countervailing duty order to be issued.[57] If the Commission's determination with respect to critical circumstances is affirmative, duties are applied retroactively to unliquidated entries of imported merchandise entered, or withdrawn

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[54] Seventy-five days after notification of Commerce's final determination if its preliminary determination was negative.

[55] If the Commission makes a unanimous determination, it generally issues only one set of views, although individual Commissioners may write additional views containing a particular line of analysis that they deem relevant. If the determination is not unanimous, there are separate views for Commissioners voting in the affirmative and for those voting in the negative. However, even in the latter case, all Commissioners may join in one set of common views addressing certain issues.

[56] See Commission rule 207.29 (19 C.F.R. § 207.29).

[57] See the section of Part II entitled "*Critical Circumstances*" for further information on this issue.

from warehouse, for consumption on or after the date which is 90 days prior to the date the duties would normally be levied.[58]

If the Commission makes an affirmative final determination of threat of material injury, it must make an additional finding (referred to as a "but for" finding) as to whether it would have found material injury *but for* the suspension of liquidation of entries of the subject merchandise. If this finding is affirmative, duties are effective on the date of suspension of liquidation; if negative, duties are effective on the date of publication in the *Federal Register* of the notice of the Commission's final affirmative determination. Similarly, if the Commission finds material retardation of the establishment of an industry in the United States, duties are effective on the date of publication of the Commission's final determination.[59]

Commerce is required by law to publish in the *Federal Register* an antidumping or countervailing duty order within seven days after being notified by the Commission of an affirmative final determination of material injury or threat of material injury to a domestic industry, or material retardation of the establishment of a domestic industry. Importers are then required to post a cash deposit equal to the amount of the estimated antidumping or countervailing duties pending liquidation of entries of the merchandise.

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[58] Under normal circumstances, provisional duties are imposed when Commerce publishes notice of its affirmative preliminary determination in the *Federal Register*.

[59] In these cases, Commerce releases any bond or other security, and refunds any cash deposit made, to secure the payment of antidumping or countervailing duties related to subject merchandise that was entered, or withdrawn from warehouse, for consumption before the date of publication of the Commission's final determination. Sections 706(b)(2) and 736(b)(2) of the Act (19 U.S.C. §§ 1671(e)(b)(2) and 1673(e)(b)(2)).

BUSINESS PROPRIETARY INFORMATION[60]

The Commission obtains extensive company-specific business proprietary information ("BPI") from U.S. producers, importers, and purchasers and from foreign producers, principally through questionnaires. Statistical BPI are aggregated and presented in tabular form in the staff report and are subsequently used by the Commission in its analysis of the condition of the domestic industry. The Commission's practice in presenting and analyzing statistical data is that aggregate data are confidential if they include only one or two companies, or if they include three or more companies and one company accounts for at least 75 percent of the total or two account for at least 90 percent of the total. In such cases, the Commission will not disclose the actual aggregate numbers but will limit its discussion in public documents to a nonnumerical characterization of the data (i.e., a discussion of trends). In no case will the Commission disclose individual company data, although it may discuss trends in individual company data as well.[61] Parties who have access to BPI under an administrative protective order should follow these same guidelines when discussing statistical data in public versions of their written submissions.

[60] Business proprietary information, or confidential business information, is information of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the firm or other organization from which the information was obtained. See Commission rule 201.6(a) (19 C.F.R. § 201.6(a)) for the precise definition.

[61] Submitters of BPI (e.g., questionnaire respondents) may for good cause shown request confidential treatment even for such descriptions of trends.

THE ADMINISTRATIVE PROTECTIVE ORDER PROCESS

The Commission is required by law[62] to release BPI to certain eligible persons under an administrative protective order ("APO") which is designed to protect the confidentiality of such information. Those persons eligible to apply for access to BPI under an APO ("authorized applicants") include the following persons who are representatives of an "interested party" which is a "party" to the investigation: (1) an attorney, (2) a consultant or expert under the direction and control of such an attorney, (3) a consultant or expert who appears regularly before the Commission, and (4) a representative of an interested party which is a party to the investigation if such interested party is not represented by counsel. In-house counsel may serve as authorized applicants provided they are not involved in competitive decisionmaking.[63]

Authorized applicants who are interested in obtaining access to BPI under an APO must submit an application, shown in appendix D,[64] to the Secretary to the Commission by the date specified in the *Federal Register* notice of the investigation. Shortly after the deadline for filing APO applications, the Secretary will establish an APO service list containing the names of all authorized applicants whose applications have been approved. All parties on the APO service list, and only those parties, will receive copies of completed producer, importer, and purchaser questionnaire responses as well as BPI versions of the petition, briefs and other submissions by

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[62] Section 777(c)(1)(A) of the Act (19 U.S.C. § 1677f(c)(1)(A)).

[63] *See, e.g., U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984). The Court defined competitive decisionmaking as "a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor."

[64] This form, which is available from the Office of the Secretary and on the Commission's website at http://www.usitc.gov/, must be used; no substitutes will be accepted. Each authorized applicant must file a separate application.

parties, staff reports, nonprivileged staff memoranda to the Commission, and Commissioners' opinions. Parties on the APO service list in the preliminary phase of the investigation need not file another APO application in the final phase but must file a letter with the Secretary indicating their intention to participate in the final phase of the investigation. The letter should identify any individuals named on the APO service list for the preliminary phase of the investigation who will not be involved in the final phase. New authorized applicants must file an APO application.

All parties to the investigation (identified on the public service list) are required to serve copies of their questionnaire responses and the business proprietary versions of petitions, briefs, and other submissions on all parties on the APO service list. A certificate of service, attesting that complete copies of the submission have been properly served, must accompany each such document.[65] Parties are required to submit public versions of all submissions containing BPI, with the exception of questionnaire responses, within one business day after the deadline for filing the BPI version of the submission.[66]

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[65] See Commission rule 207.7(f) (19 C.F.R. § 207.7(f)). In the event that a submission is filed before the APO service list is established, the document need not be accompanied by a certificate of service, but the submission must be served within two days of the establishment of the list and a certificate of service must be filed at that time.

[66] See Commission rule 207.3(c) (19 C.F.R. § 207.3(c)). The BPI version of the submission must enclose all BPI in brackets and have the following warning marked on every page containing such information: "Bracketing of BPI not final for one business day after date of filing." As the warning states, the bracketing becomes final one business day later (i.e., at the same time the public version is due). During the interim, the submitter may correct any errors in bracketing by filing a revised version of the document, or portions thereof. Until the bracketing becomes final, recipients of the document may not divulge any part of its contents, including non-bracketed portions of the documents, to anyone not on the APO service list. The public version of the submission must have all BPI deleted and must note where such deletions have occurred (asterisks typically are used for this purpose). No other changes are permitted.

Individuals on the APO service list are strictly forbidden to divulge BPI obtained under APO to clients or other individuals not on the APO service list. Any individual who breaches the APO is subject to sanctions, which include:

> (1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven years following publication of a determination that the order has been breached;
>
> (2) Referral to the United States Attorney;
>
> (3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;
>
> (4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of or striking from the record any information or briefs submitted by, or on behalf of, the offender or the party represented by the offender, denial of further access to BPI in the current or any future investigations before the Commission, and issuance of a public or private letter of reprimand; and
>
> (5) Such other actions, including but not limited to, a warning letter, as the Commission determines to be appropriate.

For additional information on the Commission's APO procedures, consult section 777(c) of the Act (19 U.S.C. § 1677f(c)), Commission rule 207.7 (19 C.F.R. § 207.7), and *An Introduction to Administrative Protective Order Practice in Import Injury Investigations (Fourth Edition)*, USITC Publication 3755, Office of the Secretary, March 2005.

KEY LEGAL CONCEPTS

Material Injury

The Act defines "material injury" as "harm which is not inconsequential, immaterial, or unimportant."[67] The law directs the Commission to consider (1) the volume of imports of the

[67] Section 771(7) of the Act (19 U.S.C. § 1677(7)).

subject merchandise, (2) the effect of imports of that merchandise on prices in the United States for domestic like products, and (3) the impact of imports of such merchandise on domestic producers of domestic like products in the context of production operations within the United States.

In evaluating the volume of imports, the Commission is directed to consider whether the volume of subject imports, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant. In evaluating the effect of imports of subject merchandise on prices, the Commission is instructed to consider (1) whether there has been significant price underselling by the imported merchandise as compared with the price of domestic like products in the United States and (2) whether 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.

In examining the impact of subject imports on producers of domestic like products, the Commission is to evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to (1) actual and potential declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; (2) factors affecting domestic prices; (3) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; (4) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product; and (5) in antidumping investigations, the magnitude of the margin of

dumping.[68] Congress has directed the Commission to evaluate all such relevant economic factors within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

Threat of Material Injury

The statute provides that "[i]n determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of the subject merchandise, the Commission shall consider, among other relevant economic factors--

> (I) if a countervailable subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement), and whether imports of the subject merchandise are likely to increase,
>
> (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,
>
> (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,
>
> (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,
>
> (V) inventories of the subject merchandise,
>
> (VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,

[68] In a preliminary determination the Commission is to use the dumping margin(s) published by Commerce in its notice of initiation of the investigation; in a final determination the Commission is to use the dumping margin(s) most recently published by Commerce prior to the closing of the Commission's factual record. Section 771(35)(C) of the Act (19 U.S.C. § 1677(35)(C)).

(VII) in any investigation under this title which involves imports of both a raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission under section 705(b)(1) or 735(b)(1) with respect to either the raw agricultural product or the processed agricultural product (but not both),

(VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time)."[69] [70]

The law further states that "The Commission shall consider [these factors] as a whole in making a determination of 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 . . . . The presence or absence of any factor which the Commission is required to consider . . . shall not necessarily give decisive guidance with respect to the determination. Such a determination may not be made on the basis of mere conjecture or supposition."[71]

Material Retardation

Petitioners may allege that the establishment of an industry in the United States is materially retarded by reason of imports, or sales (or the likelihood of sales) for importation, of

[69] Section 771(7)(F)(i) of the Act (19 U.S.C. § 1677(7)(F)(i)).

[70] Section 771(7)(F)(iii) of the Act (19 U.S.C. § 1677(7)(F)(iii)) further provides that, in antidumping investigations, ". . . the Commission shall consider whether dumping in the markets of foreign countries (as evidenced by dumping findings or antidumping remedies in other WTO member markets against the same class or kind of merchandise manufactured or exported by the same party as under investigation) suggests a threat of material injury to the domestic industry."

[71] Section 771(7)(F)(ii) of the Act (19 U.S.C. § 1677(7)(F)(ii)).

the subject merchandise.[72] The statute does not define "material retardation;" however, in considering this issue in past cases, the Commission has begun by examining the question of whether the U.S. industry is "established." If U.S. producers have commenced production of the product, the industry is considered to be established if U.S. producers have "stabilized" their operations. In making this assessment, the Commission has examined the following factors: (1) when the U.S. industry began production; (2) whether the production has been steady or start-and-stop; (3) the size of domestic production compared to the size of the domestic market as a whole; (4) whether the U.S. industry has reached a reasonable "break-even point;" and (5) whether the activities are truly a new industry or merely a new product line of an established firm.[73] If the industry is not established, the Commission considers whether the performance of the industry reflects normal start-up difficulties or whether the imports of the subject merchandise have materially retarded the establishment of the industry.[74]

Domestic Like Product and U.S. Industry

In determining whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of the subject imports, the Commission must first define the "domestic like product" and the "industry." The statute defines the "industry" as "the producers as a whole of a domestic like product, or those producers whose collective output of

[72] Such allegations have been relatively uncommon.

[73] *Fresh and Chilled Atlantic Salmon from Norway*, Inv. No. 701-TA-302 (Preliminary) and Inv. No. 731-TA-454 (Preliminary), USITC Pub. 2272 (April 1990) at 15-18.

[74] *Benzyl Paraben* from Japan, Inv. No. 731-TA-462 (Final), USITC Pub. 2355 (February 1991) at 11-12.

a domestic like product constitutes a major proportion of the total domestic production of the product."[75] The "domestic like product" in turn is defined in the Act 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."[76]

The Commission's determination regarding the appropriate domestic like product(s) in an investigation is a factual determination, to which it applies the statutory standard of "like" or "most similar in characteristics and uses" on a case-by-case basis.[77] Although the Commission must accept Commerce's determination as to the scope of the imported merchandise that is subject to investigation, the Commission determines what domestic product(s) is(are) like the imported article(s) Commerce has identified. The Commission may, where appropriate, define the domestic like product to include products not included in the scope, or it may find two or more domestic like products corresponding to one class or kind of imported merchandise.[78] In defining the domestic like product, the Commission generally considers a number of factors, including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) common manufacturing facilities, production processes, and production employees; (5) customer and producer perceptions; and, when appropriate, (6) price.[79] No single factor is dispositive, and the Commission may consider other factors it deems relevant on

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[75] Section 771(4)(A) of the Act (19 U.S.C. § 1677(4)(A)).

[76] Section 771(10) of the Act (19 U.S.C. § 1677(10)).

[77] *NEC Corp. v. United States*, 36 F. Supp. 2d 380, 383 (CIT 1998); *Nippon Steel Corp. v. United States*, 19 CIT 450, 455 (1995); *Torrington Co. v. United States*, 747 F. Supp. 744, 749 n.3 (CIT 1990), *aff'd*, 938 F.2d 1278 (Fed. Cir. 1991).

[78] *Hosiden Corp. v. Advanced Display Mfrs.*, 85 F.3d 1561, 1568 (Fed. Cir. 1996); *Torrington*, 747 F. Supp. at 748-752.

[79] *Timken Co. v. United States*, 913 F. Supp. 580, 584 (CIT 1996).

the basis of the facts of a particular investigation. Generally, the Commission disregards minor variations between the articles subject to an investigation and looks for clear dividing lines among possible like products.[80]

An issue that has arisen in a number of investigations is whether articles at different stages of processing should be included in the same domestic like product. In analyzing this issue, the Commission generally employs a "semifinished product analysis," examining the following factors: (1) whether the upstream article is dedicated to the production of the downstream article or has independent uses; (2) whether there are perceived to be separate markets for the upstream and downstream articles; (3) differences in the physical characteristics and functions of the upstream and downstream articles; (4) differences in the costs or value of the vertically differentiated articles; and (5) the significance and extent of the processes used to transform the upstream into the downstream articles.[81] The Commission generally does not define the domestic like product to include downstream articles that are not included in the scope of the investigation.

Once the Commission determines the domestic like product in a particular investigation, it generally defines the industry as consisting of all U.S. producers of the domestic like product. There are two exceptions to this rule. The Commission may find that "appropriate circumstances" exist to either (1) define the domestic industry as consisting of producers of the

[80] S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979); *Torrington*, 747 F. Supp. at 748-749.

[81] *Artists' Canvas from China*, Inv. No. 731-TA-1091 (Final), USITC Pub. 3853 (May 2006) at 6; *Live Swine from Canada*, Inv. No. 731-TA-1076 (Final), USITC Pub. 3766 (April 2005) at 8, n. 40; *Certain Frozen Fish Fillets from Vietnam*, Inv. No. 731-TA-1012 (Preliminary, USITC Pub. 3533 (August 2002) at 7; *Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom*, Inv. Nos. 701-TA-

like product within a particular geographic region of the United States or (2) exclude from the domestic industry certain "related parties." These exceptions are discussed in the following sections on "*Regional Industry*" and "*Related Parties*."

In a number of cases, the Commission has been faced with the question of whether a particular producer's domestic operations are sufficient for it to be considered a member of the domestic industry. In considering this issue, the Commission has examined the overall nature of the firm's production-related activities in the United States, specifically (1) the source and extent of the firm's capital investment; (2) the technical expertise involved in U.S. production activities; (3) the value added to the product in the United States; (4) employment levels; (5) the quantities and types of parts sourced in the United States; and (6) any other costs and activities in the United States directly leading to production of the domestic like product.[82]

Regional Industry

The Act states that--

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

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409-412 (Preliminary) and 731-TA-909-912 (Preliminary), USITC Pub. 3388 (January 2001) at 5-6; *Uranium from Kazakhstan*, Inv. No. 731-TA-539-A (Final), USITC Pub. 3213 (July 1999) at 6, n.23.

[82] *Diamond Sawblades and Parts Thereof from China and Korea*, Inv. Nos. 731-TA-1092-1093 (Final), USITC Pub. 3862 (July 2006) at 8-11; *Artists' Canvas from China*, Inv. No. 731-TA-1091 (Final), USITC Pub. 3853 (May 2006) at 13, n. 85; *Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam*, Inv. Nos. 731-TA-1063-1068 (Final), USITC Pub. 3748 (January 2005) at 12-14; *DRAMs and DRAM Modules from Korea*, Inv. No. 701-TA-431 (Final), USITC Pub. 3616 (August 2003) at 11; *Greenhouse Tomatoes from Canada*, Inv. No. 731-TA-925 (Final), USITC Pub. 3499 (April 2002) at 10-11; *Honey from Argentina and China*, Inv. Nos. 701-TA-402 (Final) and 731-TA-892-893 (Final), USITC Pub. 3470 (November 2001) at 6-7; *Pure Magnesium from China and Israel*, Inv. Nos. 701-TA-403 (Final) and 731-TA-895-896 (Final), USITC Pub. 3467 (November 2001) at 9-11; *Citric Acid and Sodium Citrate from China*, Inv. No. 731-TA-863 (Preliminary), USITC Pub. 3277 (February 2000) at 8; *Certain Cut-to-Length Steel Plate from France, India, Indonesia, Italy, Japan, and Korea*, Inv. Nos. 701-TA-387-391 (Final) and 731-TA-816-821 (Final), USITC Pub. 3273 (January 2000) at 9.

> (i) the producers within such market sell all or almost all of their production of the domestic like product in question in that market, and
> (ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States.
>
> In such appropriate circumstances, material injury, the threat of material injury, or material retardation of the establishment of an industry may be found to exist with respect to an industry even if the domestic industry as a whole, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of that product, is not injured, if there is a concentration of dumped imports or imports of merchandise benefiting from a countervailable subsidy into such an isolated market and if the producers of all, or almost all, of the production within that market are being materially injured or threatened by material injury, or if the establishment of an industry is being materially retarded, by reason of the dumped imports or imports of merchandise benefiting from a countervailable subsidy. The term 'regional industry' means the domestic producers within a region who are treated as a separate industry . . . ."[83]

The Commission previously has found that appropriate circumstances exist to engage in a regional industry analysis where a product had a low value-to-weight ratio and where high transportation costs made the area in which the product was produced necessarily isolated and insular.[84] The Court of International Trade, however, has cautioned against "[a]rbitrary or free handed sculpting of regional markets."[85]

If the Commission finds material injury, threat of material injury, or material retardation of the establishment of a regional industry by reason of the subject imports, to the maximum

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[83] Section 771(4)(C) of the Act (19 U.S.C. § 1677(4)(C)).

[84] *Gray Portland Cement and Cement Clinker from Mexico*, Inv. No. 731-TA-451 (Preliminary), USITC Pub. 2235 (November 1989) at 8; *Gray Portland Cement and Cement Clinker from Japan*, Inv. No. 731-TA-461 (Final), USITC Pub. 2376 (April 1991) at 16-17; and *Gray Portland Cement and Cement Clinker from Venezuela*, Inv. Nos. 303-TA-21 (Preliminary) and 731-TA-519 (Preliminary), USITC Pub. 2400 (July 1991) at 6-7.

[85] *Atlantic Sugar, Ltd. v. United States*, 519 F. Supp. 916, 920 (CIT 1981).

extent possible Commerce is to assess duties "only on the subject merchandise of the specific exporters or producers that exported the subject merchandise for sale in the region concerned during the period of investigation."[86]

Related Parties

The Act states that--

"If a producer of a domestic like product and an exporter or importer of the subject merchandise are related parties, or if a producer of the domestic like product is also an importer of the subject merchandise, the producer may, in appropriate circumstances, be excluded from the industry."

The producer and an exporter or importer are considered to be related parties if-

"(I) the producer directly or indirectly controls the exporter or importer,
(II) the exporter or importer directly or indirectly controls the producer,
(III) a third party directly or indirectly controls the producer and the exporter or importer, or
(IV) the producer and the exporter or importer directly or indirectly control a third party and there is reason to believe that the relationship causes the producer to act differently than a nonrelated producer."

[86] Sections 706(c) and 736(d) of the Act (19 U.S.C. §§ 1671e(c) and 1673e(d)).

A party is considered to directly or indirectly control another party if the party is "legally or operationally in a position to exercise restraint or direction over the other party."[87]

Application of the related parties provision is within the Commission's discretion. If a U.S. producer qualifies as a related party pursuant to the above language, the Commission determines whether "appropriate circumstances" exist for excluding that producer from the domestic industry. The purpose of excluding related parties is to minimize any distortion in the aggregate data related to the condition of the domestic industry that might result from including related parties whose operations are shielded from the adverse effects of the subject imports.[88]

The Commission has examined the following factors in determining whether appropriate circumstances exist to exclude a related party:

(1) the percentage of domestic production attributable to the related producer;

(2) the reason the related producer has decided to import the article under investigation, i.e., to benefit from the unfair trade practice or to enable it to continue production and compete in the domestic market;

(3) A comparison of the related party's imports of its subject merchandise with its domestic production to ascertain whether its principal interest is in domestic production; and

[87] Section 771(4)(B) of the Act (19 (U.S.C. § 1677(4)(B)).

[88] *Allied Mineral Products, Inc. v. United States*, F. Supp. 2d, Slip Op. 04-139 (CIT 2004) at 5; *USEC, Inc. v. United States*, 132 F. Supp. 2d 1, 12 (CIT 2001); *Torrington Co. v. United States*, 790 F. Supp. 1168 (CIT 1992), *aff'd without opinion*, 991 F.2d 809 (Fed. Cir. 1993).

(4) the position of the related producer vis-a-vis the rest of the industry, i.e., whether inclusion or exclusion of the related party will skew the data for the rest of the industry.[89] [90]

Cumulation

In the context of evaluating material injury to a domestic industry, the statute states that "the Commission ***shall*** [emphasis added] cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which [petitions were filed, or investigations were self-initiated on the same day] if such imports compete with each other and with domestic like products in the United States market."[91] [92] In the context of evaluating threat of material injury to a domestic industry, the Act states that the Commission ***may*** [emphasis added] cumulatively assess the volume and price effects of imports of the subject merchandise from all countries with respect to which [petitions were filed, or investigations

[89] *Torrington*, 790 F. Supp. at 1161.

[90] The Commission has also considered the ratio of the related producer's imports to its U.S. production in determining whether its primary interest lies in domestic production or importation.

[91] Section 771(7)(G) of the Act (19 U.S.C. § 1677(7)(G)).

[92] The statute provides for four exceptions to the cumulation provision. The Commission is not to cumulate imports (1) from any country with respect to which Commerce has made a preliminary negative determination, unless Commerce makes a final affirmative determination with respect to those imports before the Commission makes its final determination; (2) from any country with respect to which the investigation has been terminated; (3) from any country that is designated as a beneficiary country under the Caribbean Basin Economic Recovery Act ("CBERA") for purposes of making a determination with respect to that country, except that imports from such country may be cumulated with imports from any other CBERA beneficiary country (however, for purposes of making a determination with respect to non-CBERA countries, imports from CBERA countries are to be cumulated with imports from non-CBERA countries); or (4) from Israel, unless the Commission determines that a domestic industry is materially injured or threatened with material injury by reason of imports from that country.

were self-initiated on the same day] if such imports compete with each other and with domestic like products in the United States market."[93]

In determining whether imports compete with each other and with the domestic like product, the Commission generally has considered the following four factors:

> (1) the degree of fungibility between the imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality-related questions;
>
> (2) the presence of sales or offers to sell in the same geographic markets of imports from different countries and the domestic like product;
>
> (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and

[93] Section 771(7)(H) of the Act (19 U.S.C. § 1677(7)(H)).

(4) whether the imports are simultaneously present in the market.[94]

Although no single factor is determinative, and the list of factors is not exclusive, these factors provide the Commission with a framework for determining whether the imports compete with each other and with the domestic like product.[95] Only a "reasonable overlap" of competition is required.[96]

Negligible Imports

The statute requires that an investigation be terminated without an injury determination if imports of the subject merchandise are found to be negligible.[97] Negligible imports are generally defined in the Act as imports from a country of merchandise corresponding to a domestic like product where such imports account for less than 3 percent of the volume of all such merchandise imported into the United States in the most recent 12-month period for which data are available that precedes the filing of the petition or the initiation of the investigation. However, if there are imports of such merchandise from a number of countries subject to investigations initiated on the same day that individually account for less than 3 percent of the total volume of the subject merchandise, and if the imports from those countries collectively

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[94] *Certain Cast-Iron Pipe Fittings from Brazil, the Republic of Korea, and Taiwan*, Inv. Nos. 731-TA-278-280 (Final), USITC Pub. 1845 (May 1986) at 8, *aff'd*, *Fundicao Tupy, S.A. v. United States*, 678 F. Supp. 898 (CIT 1988), *aff'd*, 859 F.2d 915 (Fed. Cir. 1988); *Mukand Ltd. v. United States*, 937 F. Supp. 910, 915 (CIT 1996).

[95] *Wieland Werke, AG v. United States*, 718 F. Supp. 50, 52 (CIT 1989).

[96] *Goss Graphic System, Inc. v. United States*, 33 F. Supp. 2d 1082, 1087 (CIT 1998), *aff'd*, 216 F.3d 1357 (Fed. Cir. 2000); *Mukand*, 937 F. Supp. at 916; *Wieland Werke*, 718 F. Supp. at 52.

account for more than 7 percent of the volume of all such merchandise imported into the United States during the applicable 12-month period, then imports from such countries are deemed not to be negligible.[98] [99]

The Commission is directed not to treat imports as negligible in the context of a threat analysis if it determines that "there is a potential" that imports from a country that individually accounts for less than 3 percent of the total volume of the subject merchandise during the applicable 12-month period "will imminently account for more than 3 percent" of such volume or that the aggregate volume of imports from all countries that individually meet the 3-percent standard for negligibility "will imminently exceed 7 percent" of such volume. In countervailing duty investigations involving imports from developing countries, the Commission is to substitute "4 percent" and "9 percent" standards, respectively, for the "3 percent" and "7 percent" standards described above.

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[97] Sections 703(a)(1), 705(b)(1), 733(a)(1), and 735(b)(1) of the Act (19 U.S.C. §§ 1671b(a)(1), 1671d(b)(1), 1673b(a)(1), and 1673d(b)(1)).

[98] Section 771(24) of the Act (19 U.S.C. § 1677(24)).

[99] In determining the aggregate volume of the merchandise described above, the Commission is to disregard imports from any country subject to any of the four cumulation exceptions noted in the previous section entitled "*Cumulation*."

Captive Production

The Act states that--

"If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that--

> (I) the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product,
> (II) the domestic like product is the predominant material input in the production of that downstream article, and
> (III) the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article, then the Commission, in determining market share and the factors affecting financial performance . . ., shall focus primarily on the merchant market for the domestic like product."[100]

Critical Circumstances

"Critical circumstances" is a provision in both the antidumping and countervailing duty laws that allows for the limited retroactive imposition of duties if certain conditions are met. The petitioner may allege critical circumstances in the petition or by amendment at any time more than 20 days before the date of Commerce's final determination. Separate affirmative determinations must be made by both Commerce and the Commission before such retroactive duties may be imposed. Affirmative determinations of critical circumstances result in the retroactive imposition of duties on unliquidated entries of imported merchandise entered, or withdrawn from warehouse, for consumption on or after the date which is 90 days prior to the date the duties would

normally be levied.[101] This provision serves two purposes: (1) to deter importers from attempting to circumvent the antidumping and countervailing duty laws by making massive shipments immediately after the filing of a petition (and before any relief can be imposed) and (2) to provide relief from the effects of such massive shipments if they do occur.

Commerce must first make a determination regarding the existence of critical circumstances[102] and, if that determination is affirmative, and if the Commission makes an affirmative final determination of material injury to a domestic industry,[103] the Commission must make an additional determination as to whether the imports subject to Commerce's final affirmative critical circumstances determination are likely to undermine seriously the remedial effect of the antidumping or countervailing duty order to be issued. In making its determination, the Commission is to consider, among other factors it considers relevant, (1) the timing and the volume of the imports, (2) a rapid increase in inventories of the imports, and (3)

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[100] Section 771(7)(C)(iv) of the Act (19 U.S.C. § 1677(7)(C)(iv)).

[101] Under normal circumstances, provisional duties are imposed when Commerce publishes notice of its affirmative preliminary determination in the *Federal Register*.

[102] In making its determination in an antidumping investigation, Commerce is to determine whether (1)(a) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise *or* (b) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there would be material injury by reason of such sales *and* (2) there have been massive imports of the subject merchandise over a relatively short period. In a countervailing duty investigation, Commerce is to determine whether (1) the countervailable subsidy is inconsistent with the WTO Agreement on Subsidies and Countervailing Measures *and* (2) there have been massive imports of the subject merchandise over a relatively short period. Sections 705(a)(2) and 735(a)(3) of the Act (19 U.S.C. §§ 1671d(a)(2) and 1673d(a)(3)).

[103] If the Commission finds either no material injury or only a threat of material injury, it need not make a critical circumstances determination.

any other circumstances indicating that the remedial effect of the antidumping or countervailing duty order will be seriously undermined.[104]

[104] Sections 705(b)(4)(A) and 735(b)(4)(A) of the Act (19 U.S.C. §§ 1671d(b)(4)(A) and 1673d(b)(4)(A)).

PART III

THE REVIEW PROCESS

STATUTORY CRITERIA

The statute requires Commerce and the Commission to conduct a review ("sunset review") no later than five years after the publication of an antidumping or countervailing duty order or notice of suspension of an investigation, or a determination to continue an order or suspension agreement, to determine whether revocation of the order or termination of the suspended investigation "would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury."[1] Commerce will revoke the order after review unless it determines that dumping or a countervailable subsidy would be likely to continue or recur, *and* the Commission determines that material injury would be likely to continue or recur.[2]

In making its determination of likelihood of continuation or recurrence of material injury, the Commission is directed by law to consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated. The Commission is instructed to take into account (1) its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the order was issued or the suspension agreement was accepted, (2) whether any improvement in the state of the industry is related to the order or the suspension agreement, (3) whether the industry is vulnerable to material injury if the order

[1] Section 751(c)(1) of the Act (19 U.S.C. § 1675(c)(1)).

[2] Section 751(d)(2) of the Act (19 U.S.C. § 1675(d)(2)).

is revoked or the suspension agreement is terminated, and (4) in an antidumping proceeding, Commerce's findings regarding duty absorption.[3]

In evaluating the likely volume of imports of the subject merchandise if the order is revoked or the suspended investigation is terminated, the Commission is to consider whether the likely volume of imports of the subject merchandise would be significant if the order is revoked or the suspended investigation is terminated, either in absolute terms or relative to production or consumption in the United States. In so doing, the Commission must consider all relevant economic factors, including (1) any likely increase in production capacity or existing unused production capacity in the exporting country, (2) existing inventories of the subject merchandise, or likely increases in inventories, (3) the existence of barriers to the importation of such merchandise into countries other than the United States, and (4) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.[4]

In evaluating the likely price effects of imports of the subject merchandise if the order is revoked or the suspended investigation is terminated, the Commission is to consider whether (1) there is likely to be significant price underselling by imports of the subject merchandise as compared to domestic like products, and (2) imports of the subject merchandise are likely to enter the United States at prices that otherwise would have a significant depressing or suppressing effect on the price of domestic like products.[5]

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[3] Section 752(a)(1) of the Act (19 U.S.C. § 1675a(a)(1)).

[4] Section 752(a)(2) of the Act (19 U.S.C. § 1675a(a)(2)).

[5] Section 752(a)(3) of the Act (19 U.S.C. § 1675a(a)(3)).

In evaluating the likely impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated, the Commission is to consider all relevant economic factors which are likely to have a bearing on the state of the industry in the United States, including, but not limited to (1) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity, (2) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and (3) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the domestic like product. The Commission is instructed to evaluate all such relevant economic factors within the context of the business cycle and the conditions of competition that are distinctive to the affected industry.[6] Although the Commission is to determine whether revocation of an order or termination of a suspended investigation would be likely to lead to continuation or recurrence of material injury "within a reasonably foreseeable time," the statute cautions that "the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."[7]

In making its determination, the Commission may take into consideration the magnitude of the margin of dumping or the magnitude of the net countervailable subsidy. If a countervailable subsidy is involved, the Commission must consider information regarding the nature of the countervailable subsidy.[8]

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[6] Section 752(a)(4) of the Act (19 U.S.C. § 1675a(a)(4)).

[7] Section 752(a)(5) of the Act (19 U.S.C. § 1675a(a)(5)).

[8] Section 752(a)(6) of the Act (19 U.S.C. § 1675a(a)(6)).

The Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market. However, the Commission is not to cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.[9]

In a review involving a regional industry, the Commission may base its determination on the regional industry defined in the original investigation, another region that satisfies the criteria established in section 771(4)(C) of the Act, or the United States as a whole. In determining if a regional industry analysis is appropriate, the Commission is to consider whether the criteria established in section 771(4)(C) are likely to be satisfied if the order is revoked or the suspended investigation is terminated.[10]

TIME FRAMES FOR CONDUCT OF REVIEWS

Not later than 30 days before the fifth anniversary of the date of publication of an antidumping or countervailing duty order or the suspension of an investigation, Commerce will publish in the *Federal Register* a notice of initiation of a review and request that interested parties submit (1) a statement expressing their willingness to participate in the review by providing information requested by Commerce and the Commission, (2) a statement regarding the likely effects of revocation of the order or termination of the suspended investigation, and

[9] Section 752(a)(7) of the Act (19 U.S.C. § 1675a(a)(7)).

[10] Section 752(a)(8) of the Act (19 U.S.C. § 1675a(a)(8)).

(3) such other information or industry data as Commerce or the Commission may specify.[11] The Commission will publish a notice instituting a five-year review at the same time that Commerce publishes its notice of initiation.

If no interested party responds to the notice of initiation, Commerce will issue a final determination, within 90 days after initiation of the review, revoking the order or terminating the suspended investigation. If interested parties provide inadequate responses to an agency notice of initiation, the agency may issue without further investigation a final determination based on the facts available.[12] These reviews are known as "expedited" reviews. Commerce issues expedited determinations within 120 days after initiation of the review and the Commission issues expedited determinations within 150 days after such initiation.

If interested party responses to an agency notice are adequate, that agency will conduct a "full" review. Under normal circumstances Commerce will make its final determination in a full review within 240 days after initiation of the review and, if that determination is affirmative, the Commission under normal circumstances will make its final determination within another 120 days (i.e., not later than 360 days after initiation of the review). Either agency may postpone its final determination by up to 90 days if it determines that the review is "extraordinarily complicated."[13] Commerce or the Commission may treat a review as extraordinarily complicated if (1) there is a large number of issues, (2) the issues to be

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[11] Section 751(c)(2) of the Act (19 U.S.C. § 1675(c)(2)).

[12] Section 751(c)(3) of the Act (19 U.S.C. § 1675(c)(3)).

[13] If Commerce postpones its final determination but the Commission does not, the Commission's determination must be made not later than 120 days after publication of Commerce's final determination.

considered are complex, (3) there is a large number of firms involved, (4) the review involves two or more orders or suspended investigations that have been "grouped,"[14] or (5) it is a review of a "transition order."[15] [16]

CHRONOLOGY OF EVENTS[17]

Institution/Adequacy Phase

At the same time that Commerce initiates a five-year review under section 751(c) of the Act, the Commission will publish in the *Federal Register* a notice of institution of a five-year review, requesting that interested parties provide certain specific information on the subject matter of the review within 50 days after publication of the notice.[18] Persons wishing to participate in the review as parties must file an entry of appearance with the Secretary to the Commission no later than 21 days after publication of the notice.[19] Authorized representatives of interested parties who are parties to the review may submit, within the same time frame, an application for disclosure of business proprietary information ("BPI") under an administrative protective order ("APO").[20] The Secretary will maintain a public service list and an APO service list containing the names and addresses of such persons or their

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[14] The Commission, in consultation with Commerce, may group orders or suspended investigations for review if it considers such grouping to be appropriate and to promote administrative efficiency. In such cases, the Commission must make its final determination within 120 days after publication of Commerce's final determination with respect to the last order in the group.

[15] See the section of Part III entitled *Transition Reviews*.

[16] Section 751(c)(5) of the Act (19 U.S.C. § 1675(c)(5)).

[17] See appendix B for a series of timetables pertaining to five-year reviews.

[18] Persons other than interested parties also may submit information relevant to the Commission's review within the same time frame. See Commission rule 207.61 (19 C.F.R. § 207.61).

[19] See Commission rule 201.11 (19 C.F.R. § 201.11).

[20] See the sections of Part II entitled "*Business Proprietary Information*" and "*The Administrative Protective Order Process*" for further discussion of these subjects.

representatives. Interested parties who are parties to the review must serve the BPI and public versions of their response to the notice on all parties on the APO and public service lists, respectively.

The Commission staff reviews all interested party responses to the notice of institution and notifies such parties by email of any deficiencies in their responses. These parties are given an opportunity to cure any such deficiencies before a prescribed deadline. After that deadline the factual record closes for the institution/adequacy phase of the review, and the Commission releases all BPI not previously served under APO and all public information not previously released or served, including any secondary-source data compilations of U.S. imports and production. Interested parties that are parties to the review *and* that responded to the notice of institution and other parties to the review are then given an opportunity to comment on whether the Commission should conduct an expedited review based on the facts available, including comments on the adequacy of the various interested party responses to the notice. Such comments are limited to 15 pages of double-spaced textual material and must be submitted by the deadline specified in the notice and served on other parties as appropriate.[21]

During this phase of the review, a small team of staff prepare a report to the Commission based on the available information in the record. After assessing the adequacy of interested party responses to the notice of institution along with party submissions and other information in the record, the Commission makes a determination as to whether to conduct an

[21] See Commission rule 207.62 (19 C.F.R. § 207.62).

expedited or full review. The Secretary to the Commission promptly notifies parties of the Commission's decision and publishes a notice of the determination in the *Federal Register*.

Expedited Reviews

If the Commission concludes that interested party responses to the notice of institution are inadequate, it may decide to conduct an expedited review. In such cases, the notice announcing the Commission's decision to conduct an expedited review invites parties to the review to file, before a prescribed deadline, written comments on what determination the Commission should reach in the review.[22] The business proprietary version of the staff report referenced above is served on parties on the APO service list[23] and shortly thereafter a public version is served on parties on the public service list. Written comments may be submitted by any interested party that is a party to the review *and* that filed an *adequate* response to the notice of institution, and by any other party to the review that is not an interested party. The comments may address any information in the record, including the staff report, but must not contain any new factual information. No page limit is imposed. In addition, any person that is neither a party to the review nor an interested party may submit a brief written statement (containing no new factual information) pertinent to the review, concurrent with the deadline prescribed for written comments.[24]

Approximately one week after party comments are submitted, General Counsel staff transmits to the Commission a legal issues memorandum. The Commission holds a public briefing and vote approximately two weeks after the deadline for filing written comments and

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[22] See Commission rule 207.62 (19 C.F.R. § 207.62).

[23] The date for release of the staff report to such parties is specified in the notice.

[24] See Commission rule 207.62 (19 C.F.R. § 207.62).

seven business days before the statutory deadline for completion of the expedited review. After the briefing and vote, the Commission prepares its written views, explaining the basis for its determination. The determination, views, and the public version of the staff report are issued within 150 days after initiation of the review. The determination and views of the Commission are served on all parties to the review and made available to the public electronically on the Commission's website at http://www.usitc.gov/. The determination is subsequently published in the *Federal Register*,[25] and a publication document containing the determination, the views of the Commission, and the nonconfidential version of the staff report is created and disseminated to the public via the Commission's website.

Full Reviews

If the Commission concludes that interested party responses to the notice of institution are adequate, it will conduct a full review. The staff develops a work schedule for the conduct of the review and prepares a notice of scheduling for publication in the *Federal Register*. The notice of scheduling specifies the dates that written submissions are due as well as the hearing date and other dates of interest to participants in the review. Any person who wishes to appear before the Commission as a party in a full review must file, or have filed in response to the notice of institution, an entry of appearance with the Secretary to the Commission before the date specified in the notice of scheduling.[26] Parties that filed an entry of appearance in response to the notice of institution need not file an additional entry of appearance. In

[25] See Commission rule 207.69 (19 C.F.R. § 207.69).

[26] This date will be at least 45 days after publication of the notice of scheduling. See Commission rule 201.11 (19 C.F.R. § 201.11).

addition, authorized representatives of interested parties who are parties to the review may file before the same date specified in the scheduling notice an application for disclosure of BPI under APO. Parties granted access to BPI following publication of the notice of institution need not reapply for such access.

An eight-person team consisting of an investigator, economist, accountant/auditor, industry analyst, attorney, statistician, and statistical assistant, and supervisory investigator is assigned to each full review. Once the team is assembled, the staff drafts questionnaires to collect information pertinent to the Commission's determination from U.S. and foreign producers, U.S. importers, and U.S. purchasers of the product under review. The draft questionnaires are circulated to the parties for written comment before a prescribed deadline. All requests for collecting new information should be presented at this time.[27] Party comments are filed with the Secretary to the Commission and served on the other parties to the review.[28] The staff reviews and incorporates the comments as appropriate, and forwards the questionnaires to the Commission for approval. Questionnaires typically are sent to all U.S. and foreign producers and U.S. importers of the product under review, as well as to major U.S. purchasers of the product. The structure of the questionnaires generally follows the descriptions contained in Part II pertaining to questionnaires used in the preliminary and final phases of antidumping and countervailing duty investigations. In addition, the questionnaires solicit information concerning the effects of the original antidumping or countervailing duty

[27] The Commission will disregard subsequent requests for collection of new information absent a showing that there is a compelling need for the information and that the information could not have been requested in the comments on the draft questionnaires.

[28] See Commission rule 207.63 (19 C.F.R. § 207.63).

order on the domestic industry and the likely effects of a revocation of such order. The questionnaires are mailed immediately after approval by the Commission and are due back in approximately 30 days (37 days in the case of foreign producer questionnaires). U.S. producers, importers, and purchasers are required to respond to the questionnaires. Failure to reply as directed can result in a subpoena or other order to compel a response.[29] Foreign producers are not compelled to respond to the questionnaire; however, cooperation is strongly encouraged as failure to respond may result in an adverse inference by the Commission.

Following return of the questionnaires, the staff prepares a prehearing report. The business proprietary version of the report is transmitted to the Commission and APO parties seven business days before prehearing briefs are due; a public version is issued soon thereafter.[30] The report contains the most current information available and provides a statistical basis for analysis by the parties in their briefs, as well as a common ground for Commissioners and parties to base their discussions at the hearing.

Parties are strongly encouraged to file prehearing briefs, which are due seven business days before the hearing. The prehearing brief should be a party's principal vehicle for asserting its arguments. There are no page limitations, but the brief should be as concise as possible, be limited to information and arguments relevant to the Commission's determination, and, to the extent possible, refer to the record.[31]

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[29] Section 333 of the Act (19 U.S.C. § 1333(a)).

[30] See Commission rule 207.64 (19 C.F.R. § 207.64).

[31] The prehearing brief also must include a table of contents. See Commission rule 207.65 (19 C.F.R. § 207.65).

The Commission shall hold a hearing in each full review.[32] The date of the hearing shall be specified in the scheduling notice. The hearing is essentially a forum for factfinding; its purpose is to allow interested parties to express their views and to permit Commissioners to ask questions and solicit information that will be useful to them in reaching a determination. Time allocations and ground rules for the hearing are established in advance of the hearing. Persons wishing to appear at the hearing must file a notice of participation and a list of witnesses with the Secretary to the Commission prior to the prehearing conference.[33] Hearing procedures in full reviews will conform to those for final phase antidumping and countervailing duty investigations.[34]

Parties also are encouraged to file posthearing briefs concerning information revealed during or after the hearing. Posthearing briefs are due by the date specified in the scheduling notice or by the presiding official at the hearing, typically seven business days after the hearing. Posthearing briefs are limited in length to 15 double-spaced pages of textual material, not including any information submitted in response to questions or requests from the Commission at the hearing. Nonparties may submit a brief written statement of information pertinent to the review within the same time frame.[35]

After the hearing, the staff updates the prehearing report with information from the hearing and briefs, any questionnaire revisions, and other information obtained subsequent to

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[32] Section 751(e) of the Act (19 U.S.C. § 1675(e)). See also Commission rule 207.66 (19 C.F.R. § 207.66).

[33] The date that requests to appear at the hearing are due is specified in the notice of scheduling.

[34] See the description of hearings in the section of Part II entitled *Hearing and Briefs* for further information.

[35] See Commission rule 207.67 (19 C.F.R. § 207.67).

the prehearing report. The final staff report is intended to supplement and correct the information contained in the prehearing staff report. The business proprietary version of the final staff report is transmitted to the Commission and APO parties approximately two weeks after posthearing briefs are due; a public version is issued soon thereafter.[36] The report, together with other documents prepared by the staff, the transcript of the hearing, party briefs, and other information in the record, provides the basis for the Commission's determination. Three business days later, General Counsel staff transmits to the Commission a legal issues memorandum.[37]

The Commission closes the factual record (i.e., ceases to accept new factual information) approximately five business days after the staff report is issued. At that time parties to the review are permitted to inspect all public information, and those parties who are under the administrative protective order are served all business proprietary information not previously disclosed. Two business days after the factual record closes, parties are given an opportunity to make final comments on the accuracy, reliability, or probative value of all information for which they have not had a previous opportunity to comment. Final party comments may not contain new factual information and are limited in length to 15 double-spaced pages of textual material. The factual record closes on the date such comments are due.[38]

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[36] See Commission rule 207.64 (19 C.F.R. § 207.64).

[37] Other memoranda in response to requests by specific Commissioners may be transmitted to the Commission at any time prior to the vote; however, memoranda containing new factual information must be released to appropriate parties prior to the record closing date.

[38] See Commission rule 207.68 (19 C.F.R. § 207.68).

The Commission holds a public briefing and vote approximately five business days after final comments are due and nine business days before the statutory deadline for completion of the review. During the period prior to the vote, the Commission carefully studies the record and may request private briefings by the staff. At the public briefing and vote, Commissioners ask the staff any questions they may have regarding the record in the review before approving the staff report and announcing their votes on each country involved in the review.

Under normal circumstances (i.e., absent extensions by Commerce or the Commission in "extraordinarily complicated" reviews) the Commission is required by law to issue its final determination within 360 days after initiation of the review. During the period between the briefing and vote and the transmittal of its final determination, the Commission writes its views, explaining the basis for its determination, and the staff prepares a public version of the report, deleting any company-specific or otherwise confidential information. The determination and views of the Commission are served on all parties to the review and made available to the public electronically on the Commission's website at http://www.usitc.gov/. The determination is subsequently published in the *Federal Register*,[39] and a publication document containing the determination, the views of the Commission, and the nonconfidential version of the staff report is created and disseminated to the public via the Commission's website.

[39] See Commission rule 207.69 (19 C.F.R. § 207.69).

STATUS AND DISPOSITION OF REVIEWS

The disposition of completed five-year reviews and the scheduling of current and future reviews can be found on the Commission's website at www.usitc.gov by clicking on "Import Injury Investigations" then "Research Tools" and then "Sunset Review Schedule & Disposition" and on Commerce's website at http://ia.ita.doc.gov/sunset/. More detailed information on each review can be found at http://www.usitc.gov/ by clicking on "*Import Injury Investigations*" and then "*Sunset Review Database*."

PART IV

HISTORICAL OVERVIEW

ANTIDUMPING LAW[1]

The first antidumping legislation passed by Congress was the Antidumping Act of 1916, which provided for damages through Federal court against parties who dumped foreign goods in the United States. However, the requirements under this statute, particularly the need to demonstrate intent, were difficult to meet, leading Congress to consider a different type of antidumping law. The Antidumping Act of 1921 was passed, which until 1979 provided the statutory basis for investigations by the Department of the Treasury of alleged dumping practices and for the imposition of antidumping duties.

During the negotiations to establish an International Trade Organization following World War II, the United States submitted a draft proposal on dumping, based on the Antidumping Act of 1921. This proposal formed the basis for Article VI of the GATT, which serves as the model for the antidumping laws of countries worldwide.

The GATT Antidumping Code of 1967 was established during the Kennedy Round of Multilateral Trade Negotiations. The Code refined the concepts of Article VI of the GATT and supplemented Article VI by establishing procedural requirements for antidumping investigations. It also brought all GATT signatory countries into conformity with Article VI. The Antidumping Code came into force on July 1, 1968.

Article VI of the GATT was revised during the Tokyo Round of Multilateral Trade Negotiations in the 1970s, and the GATT Antidumping Code was amended to conform to the Agreement Relating to Subsidies and Countervailing Measures, which also was negotiated at

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[1] Extracted in part from *Overview and Compilation of U.S. Trade Statutes*, Committee on Ways and Means, U.S. House of Representatives, 104th Congress, 1st Session, 1995 Edition, August 4, 1995.

that time. A newly negotiated Agreement on Implementation of Article VI of the GATT, Relating to Antidumping Measures came into force on January 1, 1980.

Congress implemented the revised GATT Antidumping Code in passing the Trade Agreements Act of 1979. Title I of the 1979 Act repealed the Antidumping Act of 1921 and added a new Title VII to the Tariff Act of 1930 that implemented the provisions of the GATT antidumping agreement. The 1979 Act contained major substantive and procedural changes, and transferred the responsibility for administering the antidumping law from the Department of the Treasury to the Department of Commerce.

The portions of the antidumping law pertaining to the Commission were further amended by Title VI of the Trade and Tariff Act of 1984, and by Title I, Subtitle C, Part 2 of the Omnibus Trade and Competitiveness Act of 1988. Among other things, the 1984 Act modified the provisions of the antidumping law relating to cumulation of imports from subject countries and threat of material injury. The 1988 Act addressed the issue of the prevention of circumvention of antidumping orders, and amended provisions of the law relating to critical circumstances, material injury, and threat of material injury, among others.

The U.S. antidumping law was most recently amended by the Uruguay Round Agreements Act ("URAA") effective January 1, 1995. The URAA implemented changes required by the Uruguay Round Agreements ("URA"), which established the World Trade Organization ("WTO"). The URA incorporates previous GATT agreements, as amended, and includes the Agreement on Implementation of Article VI of GATT 1994 ("Antidumping Agreement 1994"). Under the URA, all countries that become Members of the WTO will automatically be subject to the Antidumping Agreement 1994.

The URAA modified provisions of the law relating to such issues as material injury, threat of material injury, critical circumstances, regional industry, related parties, and cumulation. The 1995 Act also added new provisions addressing captive production and negligible imports, and provided for sunset reviews to determine whether antidumping orders should be revoked after five years.

COUNTERVAILING DUTY LAW[2]

The first U.S. legislation that addressed unfair trade practices was a countervailing duty law passed in 1897. The provisions of that law remained essentially unchanged until 1979, when the U.S. countervailing duty law was changed to conform with the agreement reached in the Tokyo Round of Multilateral Trade Negotiations.

The pre-1979 law required the Secretary of the Treasury to assess countervailing duties on imported dutiable goods benefiting from the payment or bestowal of an export "bounty or grant." In 1922 Congress amended the law to cover bounties or grants on manufacture or production as well as on exportation. Prior to 1974 the law applied only to dutiable merchandise and did not require an injury test. The Trade Act of 1974 extended the application of the countervailing duty law to duty-free imports, subject to a showing of injury.

During the Tokyo Round of Multilateral Trade Negotiations, an agreement concerning the use of subsidies and countervailing measures was completed under Article VI of the GATT and signed by the United States and many of its trading partners. The Agreement Relating to Subsidies and Countervailing Measures, commonly referred to as the Subsidies Code, required

[2] Extracted in part from *Overview and Compilation of U.S. Trade Statutes*, Committee on Ways and Means, U.S. House of Representatives, 104th Congress, 1st Session, 1995 Edition, August 4, 1995.

evidence of injury prior to the imposition of countervailing duties. However, the grandfather clause of the GATT permitted the U.S. law, which predated the GATT, to operate without an injury test.

Congress adopted the GATT Subsidies Code in passing the Trade Agreements Act of 1979. The 1979 Act added a new Title VII to the Tariff Act of 1930 to conform the countervailing duty law to U.S. obligations under the Subsidies Code. One of the most important changes made by the 1979 Act was the requirement of an injury test in all countervailing duty cases involving imports from "countries under the Agreement."[3] The provisions of the preexisting section 303 of the Tariff Act of 1930, as amended by the 1979 Act, were retained to cover cases involving imports from countries that were not "countries under the Agreement." Imports from these countries were not entitled to an injury test except in cases in which the imports entered duty-free. In addition to major substantive and procedural changes, the 1979 Act transferred the responsibility for administering the countervailing duty law from the Department of the Treasury to the Department of Commerce.

The portions of the countervailing duty law pertaining to the Commission were further amended by Title VI of the Trade and Tariff Act of 1984, and by Title I, Subtitle C, Part 2 of the Omnibus Trade and Competitiveness Act of 1988. Among other things, the 1984 Act modified the provisions of the countervailing duty law relating to cumulation of imports from subject countries and threat of material injury. The 1988 Act addressed the issue of the prevention of circumvention of countervailing duty orders, and amended provisions of the law relating to critical circumstances, material injury, and threat of material injury, among others.

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[3] "Countries under the Agreement" were countries that either were signatories to the Subsidies Code or had assumed substantially equivalent obligations to those under the Code.

The U.S. countervailing duty law was most recently amended by the URAA effective January 1, 1995. The URAA repealed section 303 of the Tariff Act of 1930 and implemented changes required by the URA, including the Agreement on Subsidies and Countervailing Measures ("Subsidies Agreement 1994"). Under the URA, all countries that become Members of the WTO will automatically be subject to the Subsidies Agreement 1994, unlike the previous system in which GATT members individually decided whether to accede to the provisions of the Agreement.

The URAA modified provisions of the law relating to such issues as material injury, threat of material injury, critical circumstances, regional industry, related parties, and cumulation. The 1995 Act also added new provisions addressing captive production and negligible imports, and provided for sunset reviews to determine whether countervailing duty orders should be revoked after five years.

APPENDIX A

GLOSSARY OF ANTIDUMPING AND COUNTERVAILING DUTY TERMS

GLOSSARY OF ANTIDUMPING AND COUNTERVAILING DUTY TERMS

Business proprietary information.—"Business proprietary information," or "confidential business information," is defined in Commission rule 201.6(a) (19 C.F.R. § 201.6(a)) as "information . . . of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the . . . firm . . . or other organization from which the information was obtained . . . ."

Captive production.--Section 771(7)(C)(iv) of the Act (19 U.S.C. § 1677(7)(C)(iv)) states that "If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that--

> (I) the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product,
> (II) the domestic like product is the predominant material input in the production of that downstream article, and
> (III) the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article,

then the Commission, in determining market share and the factors affecting financial performance . . ., shall focus primarily on the merchant market for the domestic like product."

Countervailable subsidy.--A countervailable subsidy is defined in section 771(5) of the Act (19 U.S.C. § 1677(5)) as a subsidy [as defined below] that is "specific." A specific subsidy may be (1) an export subsidy that is "in law or in fact, contingent upon export performance, alone or as 1 of 2 or more conditions," (2) an "import substitution" subsidy that is "contingent upon export performance, alone or as 1 of 2 or more conditions," or (3) a domestic subsidy "[w]here the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry."

Countervailing duty.--A countervailing duty is a duty levied on an imported good to offset subsidies to producers or exporters of that good in the exporting country.

Critical circumstances.—"Critical circumstances" is a provision in both the antidumping and countervailing duty laws that allows for the retroactive imposition of duties if certain conditions are met. For a further discussion of this issue, see the section entitled "*Critical Circumstances*" in Part II, *The Investigation Process*.

Cumulation.--In the context of evaluating material injury to a domestic industry, section 771(7)(G) of the Act (19 U.S.C. § 1677(7)(G)) states that "the Commission ***shall*** [emphasis added] cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which [petitions were filed, or investigations were self-initiated on the same day] if such imports compete with each other and with domestic like products in the United States market." In the context of evaluating threat of material injury to a domestic industry, section 771(7)(H) of the Act (19 U.S.C. § 1677(7)(H)) states that "the Commission ***may*** [emphasis added] cumulatively assess the volume and price effects of imports of the subject merchandise from all countries with respect to which [antidumping or countervailing duty petitions were filed, or investigations were self-initiated on the same day] if such imports compete with each other and with domestic like products in the United States market." For a further discussion of this issue, see the section entitled "*Cumulation*" in Part II, *The Investigation Process*.

Domestic like product.—"Domestic like product" is defined in section 771(10) of the Act (19 U.S.C. § 1677(10)) 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."

Dumping.—"Dumping" is defined in section 771(34) of the Act (19 U.S.C. § 1677(34)) as "the sale or likely sale of goods at less than fair value." In more specific terms, dumping is defined as selling a product in the United States at a price which is lower than the price for which it is sold in the home market (the "normal value"), after adjustments for differences in the merchandise, quantities purchased, and circumstances of sale. In the absence of sufficient home market sales, the price for which the product is sold in a surrogate "third country" may be used. Finally, in the absence of sufficient home market and third country sales, "constructed value," which uses a cost-plus-profit approach to arrive at normal value, may be used.

Dumping margin; weighted average dumping margin.—"Dumping margin" is defined in section 771(35) of the Act (19 U.S.C. § 1677(35)) as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." "Weighted average dumping margin" is defined as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer."

Entry of appearance.--A letter or document filed with the Secretary to the Commission that is an application for appearance in an investigation as a party. Each entry of appearance should state briefly the nature of the person's reason for participating in the investigation and the person's intent to file briefs with the Commission regarding the subject matter of the investigation.

Industry.—"Industry" is defined in section 771(4)(A) of the Act (19 U.S.C. § 1677(4)(A)) as "the producers as a whole 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."

Interested party.--An "interested party" is defined in section 771(9) of the Act (19 U.S.C. § 1677(9)) as--

> "(A) a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise,
> (B) the government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported,
> (C) a manufacturer, producer, or wholesaler in the United States of a domestic like product,
> (D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product,
> (E) a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States,
> (F) an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) with respect to a domestic like product, and
> (G) in any [antidumping or countervailing duty] investigation involving an industry engaged in producing a processed agricultural product..., a coalition or trade association which is representative of either--
>
> > (i) processors,
> > (ii) processors and producers, or
> > (iii) processors and growers."

Material injury.—"Material injury" is defined in section 771(7) of the Act (19 U.S.C. § 1677(7)) as "harm which is not inconsequential, immaterial, or unimportant." For a further discussion of this issue, see the section entitled "*Material Injury*" in Part II, *The Investigation Process*.

Material retardation.—"Material retardation" is not defined in the statute. For a further discussion of this issue, see the section entitled "*Material Retardation*" in Part II, *The Investigation Process*.

Party.--A "party" is defined in Commission rule 201.2(h) (19 C.F.R. § 201.2(h)) as "any person who has filed a complaint or petition on the basis of which an investigation has been instituted, or any person whose entry of appearance has been accepted . . . . Mere participation in an investigation without an accepted entry of appearance does not confer party status."

Person.--A "person" is defined in Commission rule 201.2(i) (19 C.F.R. § 201.2(i)) as "an individual, partnership, corporation, association, or public or private organization."

Record.--The "record" is defined in Commission rule 207.2(f) (19 C.F.R. § 207.2(f)) as all information presented to or obtained by the Commission during the course of an investigation, including completed questionnaires, any information obtained from the Commerce Department, written communications from any person filed with the Secretary, staff reports, all governmental memoranda pertaining to the investigation, and the record of *ex parte* meetings required to be kept pursuant to section 777(a)(3) of the Act (19 U.S.C. § 1677f(a)(3)); and a copy of all Commission orders and determinations, all transcripts or records of conferences or hearings, and all notices published in the *Federal Register* concerning the investigation.

Regional industry.--Section 771(4)(C) of the Act (19 U.S.C. § 1677(4)(C)) states that "In appropriate circumstances, the United States, for a particular product market, may be divided into 2 or more markets and the producers within each market may be treated as if they were a separate industry if--

> (i) the producers within such market sell all or almost all of their production of the domestic like product in question in that market, and
> (ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States.

In such appropriate circumstances, material injury, the threat of material injury, or material retardation of the establishment of an industry may be found to exist with respect to an industry even if the domestic industry as a whole, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of that product, is not injured, if there is a concentration of dumped imports or imports of merchandise benefiting from a countervailable subsidy into such an isolated market and if the producers of all, or almost all, of the production within that market are being materially injured or threatened by material injury, or if the establishment of an industry is being materially retarded, by reason of the dumped imports or imports of merchandise benefiting from a countervailable subsidy. The term 'regional industry' means the domestic producers within a region who are treated as a separate industry . . . ."

Related parties.--Section 771(4)(B) of the Act (19 U.S.C. § 1677(4)(B)) states that "If a producer of a domestic like product and an exporter or importer of the subject merchandise are related parties, or if a producer of the domestic like product is also an importer of the subject merchandise, the producer may, in appropriate circumstances, be excluded from the industry." The producer and an exporter or importer are considered to be related parties if--

> "(I) the producer directly or indirectly controls the exporter or importer,
> (II) the exporter or importer directly or indirectly controls the producer,
> (III) a third party directly or indirectly controls the producer and the exporter or importer, or
> (IV) the producer and the exporter or importer directly or indirectly control a third party and there is reason to believe that the relationship causes the producer to act differently than a nonrelated producer."

A party is considered to directly or indirectly control another party if the party is "legally or operationally in a position to exercise restraint or direction over the other party."

Subject merchandise.—"Subject merchandise" is defined in section 771(35) of the Act (19 U.S.C. § 1677(35)) as "the class or kind of merchandise that is within the scope of an investigation" (i.e., the specific *imported* product or products that are under investigation).

Subsidy.--A subsidy occurs when an "authority" (i.e., "a government of a country or any public entity within the territory of the country")--

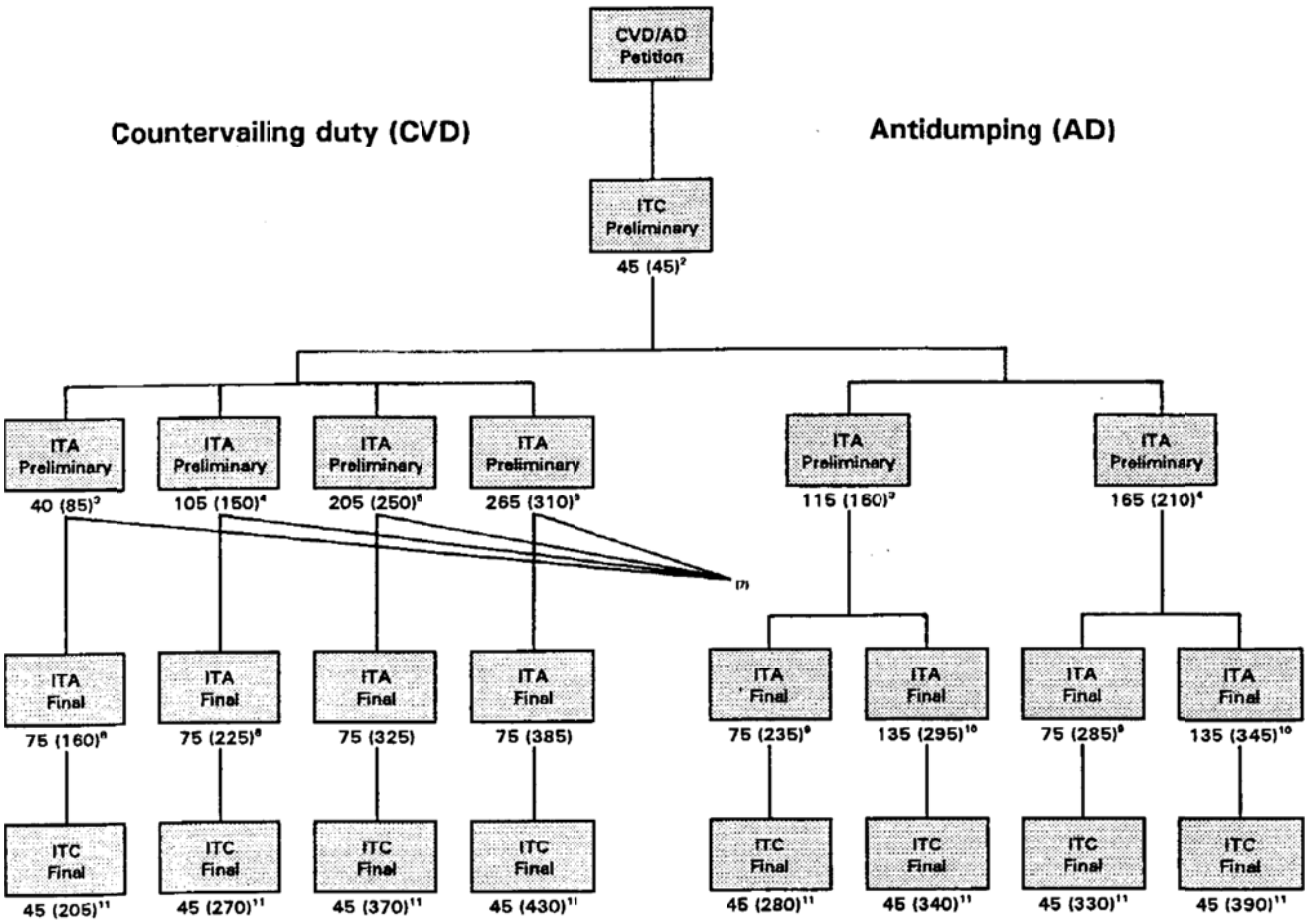
> "(i) provides a financial contribution,
> (ii) provides any form of income or price support within the meaning of Article XVI of the GATT 1994, or
> (iii) makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments, to a person and a benefit is thereby conferred." See section 771(5) of the Act (19 U.S.C. § 1677(5)).

Threat of material injury.—"Threat of material injury" is defined fully in section 771(7)(F) of the Act (19 U.S.C. § 1677(7)(F)). This definition is repeated in its entirety in the section entitled "*Threat of Material Injury*" in Part II, *The Investigation Process*.

APPENDIX B

TIMETABLES FOR ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS AND REVIEWS

Figure 1
Statutory timetables for antidumping and countervailing duty investigations[1]



[1] Shown in incremental days and, in parentheses, total days from the filing of the petition. There will be some slippage in the schedules because of time lags in having ITA determinations published in the *Federal Register*. ITA = International Trade Administration, U.S. Department of Commerce; ITC = U.S. International Trade Commission.

[2] Normal case. ITA may extend the time allowed for it to initiate an investigation from 20 days to up to 40 days after a petition is filed if the extra time is needed to determine industry support for the petition. In the event of such an extension, the deadline for the ITC's preliminary determination and all following dates would be increased by the amount of the extension.

[3] Normal case. In AD cases, expedited determinations are authorized when "short life cycle" merchandise is involved (see section 739 of the Tariff Act of 1930). In such cases the schedule following the ITC preliminary determination would be shortened by either 40 or 60 (in the case of multiple offenders) days.

[4] Complicated case, extended at request of petitioner or on ITA's motion.

[5] Normal case with upstream subsidy allegation; extended on ITA's motion.

[6] Complicated case with upstream subsidy allegation; extended on ITA's motion.

[7] At this time, ITA may, at the request of petitioner, extend the date for its final subsidy determination to the date of its final dumping determination in simultaneously filed AD cases.

[8] It is also possible for ITA to extend an investigation after its preliminary determination for the purpose of investigating an upstream subsidy allegation. In such cases the schedule following ITA's preliminary determination would be extended by 90 days in a normal case or 150 days in a complicated case.

[9] Normal case.

[10] Extended at request of exporters.

[11] If ITA's preliminary determination was negative, add 30 days (to an incremental total of 75) to ITC's final determination.

Figure 2
Timetables for five-year reviews[1]

ACTION/EVENT	DAY
Notice of institution published in the *Federal Register*	0
Entries of appearance/APO applications	21
Responses to notice of institution	30
Comments on appropriateness of expedited review	75
Notice of expedited or full review	95

Expedited Review

ACTION/EVENT	DAY
Commerce expedited determination (if issued)	120
Staff report to parties	122
Written submission on merits by parties	127
Commission vote	141
Commission determination and views transmitted to Commerce	150

Full Review[2]

ACTION/EVENT	DAY
New entries of appearance/APO applications	180
Draft questionnaires to parties for comment	190
Party comments on draft questionnaires	205
Questionnaire mail date	225
Commerce subsidy/dumping determination	240
Questionnaire return date[3]	255
Prehearing report to Commission and parties	285
Prehearing briefs	295
Hearing	305
Posthearing briefs	315
Staff report to Commission and parties	330
Final party comments	340
Commission vote	348
Commission determination and views transmitted to Commerce	360

[1] This sample schedule is provided for general guidance; work schedules for specific reviews may vary because of weekends and holidays. In addition, the Commission may extend its deadline by up to 90 days in all transition reviews and other extraordinarily complicated cases.

[2] The Commission may begin full reviews earlier than day 180; in such cases, the same relative schedule will apply.

[3] For U.S. firms; the return date for foreign producers' questionnaires will be 37 days from the mail date.

APPENDIX C

SAMPLE REPORT OUTLINE

SAMPLE REPORT OUTLINE

PART I: INTRODUCTION

Background (case history, related investigations, nature and extent of subsidies/sales at LTFV, U.S. tariff treatment, major firms involved in the market, summary tables, etc.)

The subject product (definition, physical characteristics, uses, and manufacturing processes, including similarities of and differences between the domestic and imported products)

Domestic like product issues (identification of any alternative domestic like products raised by Commissioners or parties, including a brief summary of party arguments and, for each alternative domestic like product, a discussion (in comparison with the subject product) of its physical characteristics and uses; interchangeability; manufacturing facilities, production processes, and production employees; channels of distribution; customer and producer perceptions; and price (reference other parts of the report as appropriate))

PART II: CONDITIONS OF COMPETITION IN THE U.S. MARKET

Distinctive market characteristics
Business cycles/growing seasons
Supply and demand considerations
Substitutability issues
Elasticity estimates

PART III: U.S. PRODUCERS' PRODUCTION, SHIPMENTS, AND EMPLOYMENT

U.S. producers (number, geographic location, parent firms, concentration, position on the petition, related-party issues, etc.)

U.S. production, capacity, and capacity utilization (including discussions of any restraints on production other than plant capacity (labor, raw materials, etc.) and any factors that limit capacity utilization)

U.S. producers' domestic shipments, company transfers, and export shipments (quantity, value, and unit value)

U.S. producers' inventories (including the ratio of inventories to preceding-period shipments)

U.S. employment, wages, and productivity

PART IV: U.S. IMPORTS, APPARENT CONSUMPTION, AND MARKET SHARES

U.S. importers (number, geographic location, related-party issues, etc.)
U.S. imports (quantity, value, unit value, rates of increase/decrease, and negligibility and cumulation considerations)
Apparent U.S. consumption (quantity and value)
U.S. market shares (quantity and value)
Ratio of imports to U.S. production

PART V: PRICING AND RELATED DATA

Prices (including a note on data coverage and discussions of the effects of imports, as well as other factors, on prices in the United States; price trends; under- or overselling by imports; suppression or depression of U.S. producers' prices, if any, by imports; and transportation costs)
Lost sales and/or revenues related to subsidized/LTFV imports

PART VI: FINANCIAL EXPERIENCE AND CONDITION OF U.S. PRODUCERS

Revenue, costs, and profitability (in total, in ratios, and on a unit basis, both in the aggregate and on a company-by-company basis, including variance analysis and value-added analysis, if appropriate)
Capital expenditures and research and development expenses
Assets and return on investment
Capital and investment (actual and potential negative effects, if any, of subsidized/LTFV imports on U.S. producers' cash flow, growth, ability to raise capital, investment, and/or existing development and production efforts)

PART VII: THREAT CONSIDERATIONS AND INFORMATION ON NONSUBJECT COUNTRIES

Subject country data (ability of foreign producers to generate exports and availability of export markets other than the United States, including a discussion of foreign producers and data on their production, capacity, capacity utilization, any restraints on production other than plant capacity (labor, raw materials, etc.), any factors that limit capacity utilization, domestic shipments, export shipments, and inventories; a discussion of product shifting; and a discussion of any dumping in third-country markets)
U.S. importers' inventories (including the ratio of inventories to preceding-period shipments of imports)
U.S. importers' imports anticipated imports
Trade actions or measures in third-country markets
Information on nonsubject countries

APPENDICES (*Federal Register* notices, witness lists, summary data, etc.)

APPENDIX D

ADMINISTRATIVE PROTECTIVE ORDER FORMS

AD/CVD APO Form
Revised March 2005

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

ADMINISTRATIVE PROTECTIVE ORDER

Inv. No(s). _____

(Name of Investigation(s))

A. Application

(1) To obtain disclosure of business proprietary information (BPI) under this Administrative Protective Order (APO), an authorized applicant, as defined in section 207.7(a)(3) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 207.7(a)(3), as amended), must comply with the terms of this APO.

(2) An application for disclosure must be made by an authorized applicant in the form attached hereto. The authorized applicant shall file an application with the Secretary to the Commission (the Secretary) within the deadlines provided in section 207.7(a)(2) of the Commission's rules. An authorized applicant need file only one application in order to obtain BPI in both the preliminary and the final phases of an investigation.

(3) In order to obtain disclosure of BPI under this APO from Commission personnel, an authorized applicant must present a copy of his application and personal identification satisfactory to the Secretary. If the authorized applicant wishes a person described in paragraph B(1)(iv) of this APO to act for him in obtaining disclosure, the person must present a copy of his or her, Acknowledgment for Clerical Personnel form and personal identification satisfactory to the Secretary.

B. Obligations of the authorized applicant

By filing an application, the authorized applicant shall agree to:

(1) Not divulge any of the BPI disclosed under this APO or otherwise obtained in this investigation and not otherwise available to him or her, to any person other than

(i) Personnel of the Commission concerned with the investigation,

(ii) The person or agency from whom the BPI was obtained,

(iii) A person whose application for disclosure of BPI under this APO has been granted by the Secretary, and

(iv) Other persons, such as paralegals and clerical staff, who (a) are employed or supervised by and under the direction and control of the authorized applicant or another authorized applicant in the same firm whose application has been granted; (b) have a need thereof in connection with the investigation; (c) are not involved in competitive decision making for an interested party which is a party to the investigation; and (d) have signed the acknowledgment for clerical personnel in the form attached hereto (the authorized applicant shall also sign such acknowledgment and will be deemed responsible for such persons' compliance with this APO);

(2) Use such BPI solely for the purposes of the above-captioned Commission investigation or for judicial or binational panel review of such Commission investigation;

(3) Not consult with any person not described in paragraph (1) concerning BPI disclosed under this APO or otherwise obtained in this investigation without first having received the written consent of the Secretary and the party or the representative of the party from whom such BPI was obtained;

(4) Whenever materials (e.g. documents, computer disks, etc.) containing such BPI are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container (N.B.: storage of BPI on so-called hard disk computer media is to be avoided, because mere erasure of data from such media may not irrecoverably destroy the BPI and may result in violation of paragraph C of this APO);

(5) Serve all materials containing BPI disclosed under this APO as directed by the Secretary and pursuant to section 207.7(f) of the Commission's rules;

(6) Transmit each document containing BPI disclosed under this APO:

(i) with a cover sheet identifying the document as containing BPI,

(ii) with all BPI enclosed in brackets and each page warning that the document contains BPI,

(iii) if the document is to be filed by a deadline, with each page marked "Bracketing of BPI not final for one business day after date of filing," and

(iv) if by mail, within two envelopes, the inner one sealed and marked "Business Proprietary Information--To be opened only by [name of recipient]", and the outer one sealed and not marked as containing BPI;

(7) Comply with the provisions of this APO and section 207.7 of the Commission's rules;

(8) Make true and accurate representations in the authorized applicant's application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (e.g., change in personnel assigned to the investigation);

(9) Report promptly and confirm in writing to the Secretary any possible breach of this APO; and

(10) Acknowledge that breach of this APO may subject the authorized applicant and other persons to such sanctions or other actions as the Commission deems appropriate, including the administrative sanctions and actions set out in this APO.

C. Return or destruction of BPI

(1) At any time, the Secretary may order the return, destruction, or transfer of any BPI disclosed under this APO, in which case the authorized applicant shall promptly return such BPI to the Secretary or to the submitter of the BPI or destroy the BPI or transfer the BPI to another authorized applicant, as the Secretary may direct. Unless otherwise directed, an authorized applicant to whom BPI was disclosed under this APO during the preliminary phase of the above-captioned investigation may retain possession of such BPI during the final phase of the investigation.

(2) Subject to paragraphs C(3) and C(4) below, within sixty (60) days after the completion of this investigation (e.g., after the publication in the *Federal Register* of a Commission preliminary negative determination, a Commerce Department final negative determination, a Commission final determination, or other final termination of this investigation), or at such other time as the Secretary may direct, the authorized applicant shall return or destroy all copies of BPI disclosed under this APO and all other materials containing such BPI, such as charts or notes based on such BPI. Whenever the authorized applicant returns or destroys BPI pursuant to this paragraph, he shall file a certificate attesting that to the applicant's knowledge and belief all copies of such BPI have been returned or destroyed and no copies of such BPI have been made available to any person to whom disclosure was not specifically authorized and a copy of the signed and dated acknowledgment for clerical personnel forms maintained during the course of the investigation(s).

(3) In the event that judicial review of the Commission's determination in the above-captioned investigation is sought, the authorized applicant shall not be required to comply with paragraph C(2) above, provided that the authorized applicant applies to the appropriate reviewing authority for a protective order agreed to by the Commission within 150 days after the completion of the investigation or, in cases before the U.S. Court of International Trade, files a BPI certification agreed to by the Commission, within 150 days. If by such date a protective order has not been applied for, or a BPI certification has not been filed, the authorized applicant shall then promptly comply with paragraph C(2) above.

(4) Special rule applicable only to investigations involving imports from Canada or Mexico:

(i) An authorized applicant may retain BPI disclosed under this APO during any binational panel review of the Commission's determination in the above-captioned investigation, subject to the additional terms and conditions set forth in the current version of APO NAFTA Form C. By filing an application for disclosure of BPI under this APO, and by failing to return or destroy all copies of BPI disclosed under this APO on or before the fifteenth (15) day after a First Request for Panel Review has been filed with the NAFTA Secretariat, the authorized applicant agrees to be bound as of that date by the terms and conditions set forth in APO NAFTA Form C, and by the provisions in that form regarding sanctions for violations of those terms and conditions.

(ii) Persons described in paragraph B(1)(iv) of this APO who have filed a statement described in that paragraph shall become subject to the terms and conditions of APO NAFTA Form C on the same date as the authorized applicant, or as soon thereafter as they file a statement described in paragraph B(1)(iv).

D. Sanctions and other actions for breach of this APO.

The authorized applicant shall in the application acknowledge that, pursuant to section 207.7(d) of the Commission's rules, breach of this Administrative Protective Order may subject an offender to:

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven years following publication of a determination that the order has been breached:

(2) Referral to the United States Attorney;

(3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate, professional association;

(4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of, or striking from, the record any information or briefs submitted by, or on behalf of, such person or the party he represent, denial of further access to business proprietary information in the current or any future investigations before the Commission, and issuance of a public or private letter of reprimand; and

(5) Such other actions, including but not limited to, a warning letter, as the Commission determines to be appropriate.

By order of the Commission.

Marilyn R. Abbott
Secretary

Issued:

Attachments:

1. Form Application for Disclosure of Business Proprietary Information under Administrative Protective Order

2. Form Administrative Protective Order Acknowledgment for Clerical Personnel

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

APPLICATION FOR DISCLOSURE OF
BUSINESS PROPRIETARY INFORMATION
UNDER ADMINISTRATIVE PROTECTIVE ORDER

Inv. No(s)._____

I. Authorized applicant status

I, the undersigned, am an authorized applicant, as defined in section 207.7(a)(3) of the Commission's Rules of Practice and Procedure (19 C.F.R. §207.7(a)(3), as amended), for the disclosure of business proprietary information (BPI) under the administrative protective order (APO) issued in the above-captioned investigation. I represent the following interested party, as defined in 19 U.S.C. §1677(9), which is a party to the investigation:

_____
(State the name of the interested party and its category, e.g., domestic producer, importer, etc.).

I am (check one):

( ) (1) An attorney, excepting in-house corporate counsel.

( ) (2) An in-house corporate attorney. I am not involved in competitive decisionmaking for the interested party I represent. I have attached a written statement describing my job functions, disclosing all financial holdings I may have in my employer or its affiliates, and indicating whether I am involved in the formulation of my employer's pricing policies.

( ) (3) A consultant or expert under the direction and control of an attorney under paragraph (1) or (2) above. That attorney has also signed this application to indicate that the attorney is held responsible for my compliance with the APO:

_____
(Name of Attorney--Please Print) (Signature of Attorney)

( ) (4) A consultant or expert who appears regularly before the Commission and is not involved in competitive decisionmaking for the interested party I represent. I have attached a written statement listing my appearances before the Commission in the past three (3) years.

( ) (5) A representative of an interested party that is not represented by counsel. I am not involved in competitive decisionmaking for that interested party. I have attached a written statement describing my job functions, disclosing all financial holdings I may have in the interested party I represent or its affiliates, and indicating whether I am involved in the formulation of the interested party's pricing policies.

Competitive decisionmaking: As defined in section 207.7 of the Commission's rules, involvement in "competitive decisionmaking" includes past, present, or likely future activities, associations, and relationships with an interested party which is a party to the investigation that involve the prospective authorized applicant's advice or participation in any of such party's decisions made in light of similar or corresponding information about a competitor (pricing, product design, etc.).

II. Request for information

I hereby apply for disclosure to me, subject to the APO issued in the above-captioned investigation, all BPI properly disclosed pursuant to section 207.7 of the Commission's rules, for the purpose of representing an interested party in the investigation and filing comments on the BPI so disclosed. I agree to be bound by the provisions of the APO and section 207.7.

III. Sanctions and other actions for breach of the APO

I acknowledge that, pursuant to section 207.7(d) of the Commission's rules, breach of the APO may subject me to:

(1) Disbarment from practice in any capacity before the Commission along with my partners, associates, employer, and employees, for up to seven years following publication of a determination that the other has been breached;

(2) Referral to the United States Attorney;

(3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;

(4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of or striking from the record any information or briefs submitted by, or on behalf of, me or the party I represent, denial of further access to business proprietary information in the current or any future investigations before the Commission, and issuance of a public or private letter of reprimand; and

(5) Such other actions, including but not limited to, a warning letter, as the Commission determines to be appropriate.

IV. Oath

I declare under penalty of perjury that the foregoing is true and correct. Executed on this

_____ day of _____, _____, in _____.
(month) (year) (city, state)

_____
(Signature)

_____
(Name--Please Print)

_____
(Title--Please Print)

_____
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