

# WORLD TRADE ORGANIZATION

RESTRICTED

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**Committee on Anti-Dumping Practices  
Ad Hoc Group on Implementation**

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**TOPIC 1\* - ARTICLE 6.5: TREATMENT OF CONFIDENTIAL INFORMATION**  
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## Paper by the United States

The following communication, dated 19 October 1998, has been received from the Permanent Mission of the United States.

### Topic 1 - Article 6.5: Treatment of Confidential Information

The United States has previously submitted three papers on the treatment of confidential information: G/ADP/AHG/W/3 (21 March 1997); G/ADP/AHG/W/26 (13 October 1997); and G/ADP/AHG/W/41 (16 April 1998). The United States submitted information regarding what it considers to be “confidential by nature” in its previous papers and now responds to the Secretariat’s invitation to answer the additional questions contained in document WTO/AIR/900 (12 August 1998).

The Commerce Department (the Department) and the United States International Trade Commission (the Commission) have statutory authority to release confidential or business proprietary information (BPI) submitted by parties during the course of an anti-dumping proceeding. The statute authorizes both the Department and the Commission to release BPI to representatives of interested parties pursuant to an Administrative Protective Order (APO), which governs how BPI is to be protected and used. The Department and the Commission issue and administer APOs independently in accordance with detailed regulations.<sup>1</sup>

### How Should Confidential Information Be Submitted To The Investigating Authorities?

Persons submitting BPI to both the Department and the Commission must indicate on the front of the proprietary document that it contains protected information and list on the front of the document those pages on which that information is contained.<sup>2</sup> Each page containing BPI within the document must also be marked (usually with a black or red stamp) which reads, “contains business proprietary information”, or “business proprietary treatment requested”. Protected information within the document must be contained within brackets, such as [ ]. Information which a party seeks to exempt from disclosure under an APO before the Department (e.g., customer names in an

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\* See document G/ADP/W/401 for description of the topics.

<sup>1</sup> The Department's regulations are set forth at 19 C.F.R.351.105 and 351.303-306. The Commission's regulations are set forth at 19 C.F.R.207.7.

<sup>2</sup> The marking requirements are contained in 19 C.F.R. §351.303.

investigation) must be enclosed in double brackets , such as [[ ]], and information which a submitter seeks to exempt from disclosure under an APO before the Commission must be enclosed in triple brackets, such as [[[ ]]].

#### How Should The Non-Confidential Version Of The Confidential Information Be Submitted?

Public versions of business proprietary documents submitted to the Department or the Commission are required by section 777(b)(1)(B) of the statute and Article 6.5.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement). The public version must contain a summary of the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.<sup>3</sup> The public version must be filed no later than one business day after the due date of the business proprietary version of the document. This practice is known as the “one-day lag” rule by the Department and the “24-hour rule” by the Commission. In public versions of documents filed with the Commission, parties simply redact (delete from the brackets) any BPI. In public versions of documents filed with the Department, parties may choose either to range or index business proprietary numerical data. If parties choose to range numerical data, the figures provided must be within a range of 10 per cent of the actual number. Where the number is so small that a range of 10 per cent would be impractical, a range of 20 per cent may be used upon receipt of approval by the Department. Voluminous data, such as computer printouts, may be summarized by ranging at least 1 per cent of the data included. A party must be consistent in its use of ranged or indexed data.

#### What Are The Criteria Applied By The Investigation Authorities In Deciding Whether To Accept Or Reject A Request For Confidentiality?

A person submitting proprietary information must identify the information for which it claims business proprietary treatment in brackets and must provide with the information an explanation of why each item of bracketed information is entitled to business proprietary treatment. The authority’s determination of whether to accept a request for proprietary treatment turns on whether the bracketed information is BPI (or, what the Commission refers to as confidential business information), meaning information the disclosure of which the Department or Commission has decided is limited under its regulations.<sup>4</sup>

The Department will grant a request for proprietary treatment if the information covered by the request satisfies the Department’s definition of “business proprietary information”. The Department generally considers the following factual information to be BPI, if it is so designated by the submitter: (1) business or trade secrets concerning the nature of a product or production process; (2) production costs (but not the identity of the production components, *e.g.*, parts and equipment, unless a particular component is a trade secret); (3) distribution costs (but not channels of distribution); (4) terms of sale (but not terms of sale offered to the public); (5) prices of individual sales, likely sales, or other offers; (6) names of particular customers, distributors or suppliers<sup>5</sup>; (7) the dumping margin on individual sales; (8) the names of particular persons from whom business proprietary information was obtained; (9) the position of a domestic producer or workers regarding

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<sup>3</sup> Under Section 777(b)(1)(B)(II) of the Tariff Act of 1930, as amended, if the information cannot be summarized, the submission must be accompanied by a statement that the information is not susceptible to summary and a statement of the reasons in support of that contention.

<sup>4</sup> See 19 C.F.R.351.105(c) and 19 C.F.R.201.6(a)(1).

<sup>5</sup> But not the destination of the sale or the designation of the type of customer, distributor, or supplier, unless the destination or designation would reveal the name of the customer.

support for a petition; and (10) any other specific business information which, if released to the public, would cause substantial harm to the competitive position of the submitter".<sup>6</sup>

Similarly, the Commission will grant a request for proprietary or confidential treatment if the information covered by the request satisfies its definition of "confidential business information". The Commission defines "confidential business information" as "information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other 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 person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information".<sup>7</sup>

If the Department or the Commission determines that the designation of any information as business proprietary or confidential is unwarranted, it will notify the person who submitted it and ask for a more detailed explanation of the reasons for the designation. If the Department or the Commission ultimately finds that the designation is unwarranted, and the submitter declines to withdraw its designation of the information submitted, the agency denying the request must return the information to the submitter.<sup>8</sup>

The Department may exempt certain information from disclosure under APO if such information is deemed to be privileged (e.g., protected by the attorney-client privilege or submitted by a government informant) or classified (relating to US national security or military secrets).<sup>9</sup> Moreover, in some extraordinary circumstances, BPI may also be withheld from disclosure under APO based on a determination by the Department that there is a clear and compelling need to withhold such information.

The Commission will also exempt information from disclosure under APO if the submitter requests such exemption and establishes that the information in question is "nondisclosable confidential business information," which encompasses "privileged information, classified information, or specific information (e.g. trade secrets) of a type for which there is a clear and compelling need to withhold from disclosure".<sup>10</sup>

#### How Is The Confidential Information Handled By The Authority?

The Department and the Commission each maintain one office that is responsible for the entire APO process in all anti-dumping proceedings. The Department or Commission APOs prohibit a representative who acquires BPI subject to APO from disclosing that BPI to any person not subject to the APO. This means the representative may not reveal such BPI to officials of the interested party that it represents. The Department or the Commission may also not disclose BPI to any person not subject to the APO without the consent of the person who submitted it. However, the agencies may disclose BPI to an officer or employee of the Department or the Commission, respectively, who is directly concerned with conducting the investigation or review in connection with which the information is submitted, or officers or employees of the US Customs Service who are directly involved in conducting a fraud investigation relating to an anti-dumping proceeding.

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<sup>6</sup> See 19 C.F.R.351.105(c).

<sup>7</sup> See 19 C.F.R.201.6(a)(1).

<sup>8</sup> See 19 C.F.R.351.304(d); Section 777(B)(2) of the Tariff Act of 1930, as amended.

<sup>9</sup> See 19 C.F.R.351.105(d)-(e).

<sup>10</sup> See 19 C.F.R.201.6(a)(2), 207.7(g).

The Department will release proprietary information to outside parties within the employ or control of a representative who has acquired APO access to BPI, only if the employee or independent contractor within the control of the representative presents identification including a picture and a letter of identification from the firm of the interested party authorizing the agency to release the proprietary information to that particular individual. The Commission will release proprietary information to outside parties within the employ or control of a representative who has acquired APO access to BPI, only if the employee or independent contractor within the control of the representative presents picture identification, and the firm of the interested party has previously submitted written authorization permitting the Commission to release proprietary information to that particular individual.

In The Event That A Member Provides Access To Confidential Information, How Should The Confidential Information Be Accessed?

Only an authorized representative of an interested party (such as a US or foreign producer, importer, exporter, US labour union, or foreign government) may access the BPI of another party. The representative is usually a lawyer, economist or trade specialist. Representatives are typically from private law or consulting firms; a representative who is involved in competitive decision-making for an interested party is ineligible to obtain access to BPI under an APO. The representative files an application with each agency from which it desires to obtain BPI, asking to receive all BPI filed with that agency in a particular proceeding. If the representative's application is approved, the Department and/or Commission authorizes the representative to use the information only as authorized by the APO, to adopt office procedures to prevent unauthorized disclosure of the information, and to report to the agency any violation of the terms of the APO.

Interested parties are required to serve BPI they have submitted to the Department or the Commission on representatives to other parties to the proceeding that are authorized by the Department or the Commission to receive such information under APO.

Interested parties themselves are provided timely access to the non-proprietary public file of each proceeding at both the Department and the Commission, permitting them to defend their interests throughout the pendency of the actions. The file contains all information presented by parties and any reactions of the authorities to such information, either in the form as written or in the form of a proper public summary of the proprietary information.

Topic 5 - Article 5.5: Notification to the Exporting Members

The United States previously submitted two papers on this topic in G/ADP/AHG/W/3 (21 March 1997) and G/ADP/AHG/W/41 (16 April 1998). In those documents, the United States provided information on how it implements Article 5.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement). This paper responds to the Secretariat's invitation in WTO/AIR/900 (12 August 1998) for information on (1) points of contact for Article 5.5 notifications, and (2) content of Article 5.5 notifications.

1. Points of Contact

In the case of the United States, notifications under Article 5.5 normally are transmitted to the Embassy of the United States in the investigating country. The Office of the US Trade Representative and the US Department of Commerce monitor anti-dumping investigations initiated by other countries on imports of merchandise from the United States. It would be useful if a copy of Article 5.5 notifications could be sent to the following points of contact in the United States Government:

Audrey Winter  
Associate General Counsel  
Office of the US Trade Representative  
Room 223  
600 17th Street, N.W.  
Washington, D.C. 20508

Jeffrey A. May  
Director, Office of Policy  
Import Administration  
US Department of Commerce, Room #3713  
14th Street and Constitution Avenue, N.W.  
Washington, D.C. 20230

## 2. Contents of a Notification

On the question of the appropriate content of Article 5.5 notifications, the names, addresses and phone numbers (if available) of exporters or producers who might be the object of an investigation should be included in the notification to the extent these are known to the authorities.

## Topic 8 – Article 12: Public Notices

In WTO/AIR/900 (12 August 1998), Members were invited to submit their relevant Internet addresses to the Secretariat, along with information concerning how their public notices are issued, and the contents of the various public notices issued at different points of the investigative process.

### Internet Addresses

The relevant Internet address of Import Administration, the authority within the US Department of Commerce (Department) which determines whether sales of allegedly dumped imports have been made at less than fair value, is as follows:

[http://www.ita.doc.gov/import\\_admin/records/](http://www.ita.doc.gov/import_admin/records/)

The relevant Internet address of the US International Trade Commission (Commission), which determines whether a domestic industry in the United States is materially injured, threatened with material injury, or the establishment of a domestic industry is materially retarded by reason of dumped imports, is as follows:

<http://www.usitc.gov/>

### Common Practices Regarding Article 12 Public Notices

Public notices issued by both the Department and the Commission are published in the Federal Register of the United States, normally within approximately seven days of issuance. The Federal Register, which is the official daily publication containing rules, proposed rules, and notices of US Government agencies and organizations, may be accessed on the Internet at [http://www.access.gpo.gov/su\\_docs/aces/aces140.html](http://www.access.gpo.gov/su_docs/aces/aces140.html). Notices issued by the Department or the Commission may also be accessed at their respective Internet sites, provided above.

The Department and the Commission both issue public notices of the initiation or institution of their respective investigations.<sup>11</sup> (The Commission issues notices instituting both the preliminary and final phases of its investigations, respectively, while the Department issues one notice initiating its anti-dumping investigation in its entirety.) Both agencies also issue public notices of their

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<sup>11</sup> 19 C.F.R.351.203(c); 19 C.F.R.207.12. (The Department also issues and publishes in the Federal Register notices of the initiations of its administrative reviews and the preliminary and final results of those reviews.)

respective preliminary and final determinations (and amendments or postponements thereof). Each public notice of a relevant determination sets forth, or, in the case of the Commission's preliminary and final determinations, otherwise makes available in a separate report, in sufficient detail, the findings and conclusions reached on all issues of fact and law that are considered material by the agencies.

## The US Department of Commerce

### Notices of Initiation

As mentioned above, the Department publishes notices initiating its investigations in the Federal Register.<sup>12</sup> Consistent with Article 12.1.1 of the Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement), the Department's notice of initiation includes the name(s) of the exporting country or countries and the product involved; the date of initiation of its investigation; the basis on which dumping is alleged in the application; a summary of the factors on which the allegation of injury is based; the Department's address, to which representations by interested parties should be directed; and the time limits for comment by interested parties. The published initiation notices also contain a description of the scope of the investigation(s); a description of the Department's findings concerning industry support for the petition; and a description of the initiation of a concurrent cost investigation (if necessary). They also reference the Department's notification of the initiation to the Commission.<sup>13</sup>

If a petition is deemed insufficient, and the Department's decision to initiate an investigation is negative, a notice to that effect will also be published in the Federal Register.<sup>14</sup>

### Preliminary Determinations

The Department's regulations require that it publish in the Federal Register public notice of any affirmative or negative preliminary anti-dumping determination, including applicable anti-dumping duty rates, if any, along with an invitation for argument (both written - in the form of case or rebuttal briefs - and oral in the form of hearings).<sup>15</sup> The argument is taken into consideration by the Department in making its final determination. Consistent with Article 12.2.1 of the Anti-Dumping Agreement, the Department's notices of preliminary determinations provide sufficiently detailed explanations of the Department's determination on dumping and refer to the matters of fact and law that have led to the Department's decisions.<sup>16</sup> The preliminary determination may also include a preliminary finding concerning critical circumstances, if appropriate.<sup>17</sup>

The Department's notices of preliminary determinations reference applicable statutes and regulations, and they provide a summary history of the proceeding. They provide a definition of the scope of the investigation and the relevant period of investigation. Consistent with Article 12.2.1, they provide the names of the exporters and/or producers of the subject merchandise and the exporting nations involved; a description of the product under investigation identified by tariff numbers sufficient for customs purposes; preliminary margins of dumping; a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2 of the Anti-Dumping Agreement; and the main reasons leading to the determinations.

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<sup>12</sup> See 19 C.F.R.351.203(c).

<sup>13</sup> Section 732(d) of the Tariff Act of 1930, as amended.

<sup>14</sup> See 19 C.F.R.351.203(d).

<sup>15</sup> See 19 C.F.R.351.205.

<sup>16</sup> Section 777(i) of the Tariff Act of 1930, as amended.

<sup>17</sup> See 19 C.F.R.351.205(c) (critical circumstances may be alleged in certain situations involving massive imports of the subject merchandise over a relatively short period).

The notice will also state that the Department either has conducted a verification or will verify the information utilized by the Department in its final determination.

In affirmative preliminary determination notices, the Department determines an estimated weighted-average dumping margin for each exporter and producer individually investigated, and an estimated all-others rate for all exporters and producers not individually investigated. The Department also orders the posting of a cash deposit, bond, or other security, as it deems appropriate, for each entry of the subject merchandise in an amount based on the estimated weighted-average dumping margin or the estimated all-others rate, whichever is applicable. In addition, in an affirmative preliminary determination, the Department orders the suspension of liquidation of all entries of merchandise subject to the determination which are entered or withdrawn from warehouse on or after the later of the date on which notice of the determination is published in the Federal Register, or the date that is 60 days after the date on which notice of the determination to initiate the investigation is published in the Federal Register.<sup>18</sup>

The preliminary determination may be postponed for up to 190 days from initiation if the petitioner makes a timely request for an extension, or if the Department concludes that the parties concerned are cooperating but the case is extraordinarily complicated by reason of (1) the number and complexity of the transactions to be investigated or adjustments to be considered; (2) the novelty of the issues presented; or (3) the number of firms whose activities must be investigated. If the Department decides to postpone the preliminary determination based on its own initiative or upon the request of the petitioner, it must notify parties to the investigation and publish notice of the postponement in the Federal Register.<sup>19</sup>

#### Final Determinations

The Department also publishes in the Federal Register notices of affirmative or negative final anti-dumping determinations.<sup>20</sup> Affirmative notices contain all relevant information on matters of fact and law; the reasons which have led to the imposition of final measures; and the reasons that led to decisions by the acceptance or rejection of relevant arguments considered by the Department, consistent with Article 12.2.2.

The Department's notice of its final determination, if affirmative, again includes the Department's determination of an estimated weighted-average dumping margin for each exporter and producer individually investigated, and an estimated all-others rate for all exporters and producers not individually investigated.<sup>21</sup> The Department, in its notice of final determination, will again order the posting of a cash deposit, bond, or other security, as it deems appropriate, for each entry of the subject merchandise in an amount based on the estimated weighted-average dumping margin or the estimated all-others rate, whichever is applicable.

In cases where the Department's preliminary determination is negative but the final determination is affirmative, the Department, in its notice of final determination, will order the suspension of liquidation consistent with its practice with regard to an affirmative preliminary determination made under Section 733(d) of the statute.<sup>22</sup> The final affirmative determination may also include a finding concerning critical circumstances, if appropriate.<sup>23</sup>

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<sup>18</sup> Section 773(d) of the Tariff Act of 1930, as amended.

<sup>19</sup> Section 733(c) of the Tariff Act of 1930, as amended.

<sup>20</sup> Section 735(d) of the Tariff Act of 1930, as amended.

<sup>21</sup> Section 735(c)(1) of the Tariff Act of 1930, as amended.

<sup>22</sup> Section 735(c)(1)(C) of the Tariff Act 1930, as amended.

<sup>23</sup> Section 735(a)(3) of the Tariff Act of 1930, as amended, (critical circumstances may be alleged in certain situations involving massive imports of the subject merchandise over a relatively short period).

If the Department's final determination is negative, the Department will terminate any suspension of liquidation which was imposed pursuant to an affirmative preliminary determination, and it will release any bond or other security, or refund any cash deposits, that were required with respect to entries of the merchandise on which liquidation was suspended as a result of the affirmative preliminary determination.<sup>24</sup> The Department will also publish notice of its final negative determination in the Federal Register.<sup>25</sup>

If the Department decides to postpone the final determination, it will publish notice of the postponement in the Federal Register, along with the reasons for the postponement.<sup>26</sup> Where a proposed suspension agreement is submitted in an anti-dumping investigation, an investigation may be postponed upon the request of an exporter, producer (or the government, in the case of an investigation involving a non-market economy country). If the Department subsequently decides to accept an agreement to suspend an investigation, it will publish notice of the suspension in the Federal Register, along with the text of the agreement, consistent with Article 12.2.3.<sup>27</sup>

The Department may terminate an investigation it has initiated at any time, after providing notice to all parties to the investigation. If the investigation is terminated, the Department will publish notice of the termination in the Federal Register.<sup>28</sup>

#### Imposition of Final Measures (Order)

The Department publishes an anti-dumping duty order in the Federal Register within seven days of being notified by the Commission of an affirmative determination of injury. The order directs customs officers to assess an anti-dumping duty upon further advice by the Department regarding the assessment amount; includes a description of the subject merchandise in such detail as the Department finds necessary; and requires the deposit of estimated anti-dumping duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on the merchandise are deposited.<sup>29</sup>

#### Related Notices For The Correction of Ministerial Errors

If necessary, the Department will publish in the Federal Register corrections of ministerial errors found in a preliminary or final determination, in the preliminary or final results of an administrative review, or in the notice of the anti-dumping duty order.<sup>30</sup>

#### The US International Trade Commission

##### Notice of Institution of Preliminary Phase Investigations

The Commission also publishes notice of the institution of its preliminary investigations in the Federal Register.<sup>31</sup> Consistent with Article 12.1.1 of the Anti-Dumping Agreement, the Commission's notice instituting and scheduling its preliminary phase investigation includes the name of the exporting country or countries and the product involved; the date of institution of the investigation; the basis on which dumping is alleged in the application; a summary of the factors on

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<sup>24</sup> Section 735(c)(3) of the Tariff Act of 1930, as amended.

<sup>25</sup> Section 735(d) of the Tariff Act of 1930, as amended.

<sup>26</sup> See 19 C.F.R.351.210(g); Section 735(a)(2) of the Tariff Act of 1930, as amended.

<sup>27</sup> See 19 C.F.R.351.208(g)(2).

<sup>28</sup> See 19 C.F.R.351.207; Section 734(k) of the Tariff Act of 1930, as amended.

<sup>29</sup> Section 736 of the Tariff Act of 1930, as amended.

<sup>30</sup> See 19 C.F.R.351.224(e).

<sup>31</sup> See 19 C.F.R.207.12.



which the allegation of injury is based; the Commission's address, to which representations by interested parties should be directed; and the time limits for comment and participation in a staff conference by interested parties.

### Preliminary Determinations

The Commission makes a preliminary determination of injury within 45 days of the filing of an anti-dumping duty petition with both the Commission and the Department. The Commission, based on information available to it at the time, determines whether there is a reasonable indication that an industry in the United States is materially injured, threatened with material injury or materially retarded by reason of imports of the allegedly dumped merchandise.<sup>32</sup>

Prior to the Commission's preliminary determination, the Commission's Director of Operations will submit to the full Commission a staff report.<sup>33</sup> Once the preliminary determination is made, copies of the preliminary determination and a public version of the staff report are served by the Commission on the petitioner, other parties to the investigation, and the Department. The Commission also publishes notice of its determination in the Federal Register.<sup>34</sup> The contents of the Commission's notice, published in the Federal Register or provided in the separate report, include the main reasons leading to its determination. The notice contains a definition of the domestic industry producing the relevant like product (described in a manner sufficient for customs purposes); the names of the producing or exporting countries involved; preliminary findings on the conditions of competition in the domestic industry, including the volume and/or price effects of the allegedly dumped imports; and the impact of the allegedly dumped imports on domestic producers of the domestic like product(s).<sup>35</sup> The Commission, if applicable, also references in its preliminary determination its cumulation of imports from all countries subject to investigation, so long as the imports compete with each other and with the domestic like product.<sup>36</sup>

In assessing whether there is a reasonable indication that the domestic industry is materially injured by reason of allegedly dumped imports, the Commission in its preliminary determination notice, or in a separate report, will describe its consideration of all relevant economic factors that it has found bear on the state of the industry in the United States. The factors can include, among others, output, sales, inventories capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, the ability to raise capital, and research and development.<sup>37</sup>

In its preliminary determination, the Commission also explains its analysis of each of these relevant factors and identifies any other factors which it has determined are relevant to the determination.<sup>38</sup> In the absence of evidence of material injury, the Commission will describe evidence leading to a preliminary finding of threat of injury, or of material retardation of the establishment of an industry. In any preliminary determination, the Commission will also provide preliminary evidence demonstrating whether there is a clear causal link between dumped imports and material injury.

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<sup>32</sup> Section 733(a)(1) of the Tariff Act of 1930, as amended.

<sup>33</sup> See 19 C.F.R.207.17.

<sup>34</sup> See 19 C.F.R.207.18.

<sup>35</sup> Section 771(7)(B)(i) of the Tariff Act of 1930, as amended.

<sup>36</sup> Section 771(7)(G)(i) of the Tariff Act of 1930, as amended.

<sup>37</sup> Section 771(7)(C)(iii) of the Tariff Act of 1930, as amended.

<sup>38</sup> Section 771(7)(B)(ii) of the Tariff Act of 1930, as amended.

### Final Phase Notice of Scheduling

Upon receipt of the Department's notice of a preliminary determination (affirmative or negative), the Commission publishes in the Federal Register a public notice scheduling the final phase of its investigation.<sup>39</sup> The Commission holds a hearing during its final phase investigation and, prior to the hearing, a non-public prehearing staff report, which may contain proprietary information on the subject matter of the investigation, is prepared and placed in the record of the proceeding. (A public version of the prehearing staff report is also placed in the public record.)<sup>40</sup> After the hearing, the prehearing staff report is revised and submitted as a final staff report for the consideration of the Commission in making its final determination. The final report is intended to supplement and correct the information contained in the preliminary staff report. A public version of the final staff report is also made available to the public.<sup>41</sup>

### Final Determination

The Commission makes a final determination as to whether an industry in the United States is materially injured, threatened with material injury, or the establishment of an industry in the United States is materially retarded by reasons of allegedly dumped imports.<sup>42</sup> If the Commission determines that imports of the subject merchandise are negligible, the investigation is terminated.<sup>43</sup> If the final determination of the Commission is that there is no material injury but there is threat of material injury, its final determination will include a finding as to whether material injury by reason of the subject imports found by the Department to be dumped would have been found but for any suspension of liquidation of the merchandise.<sup>44</sup> Once the Commission has made a final determination, it publishes public notice of the determination in the Federal Register,<sup>45</sup> and copies of the determination and non-business proprietary versions of the final staff report are served on the petitioner, other parties to the investigations, and the Department. In this manner, the Commission's public notice of its final determination sets forth, or otherwise makes available in a separate report, all relevant information on matters of fact and law and the reasons that led to the acceptance or rejection of relevant arguments considered by the Commission consistent with Article 12.2.2.

An anti-dumping investigation may be terminated by the Commission at any time by its providing notice to all parties to the investigation in the Federal Register.<sup>46</sup> In addition, upon receipt of notice of suspension of an investigation by the Department, the Commission will issue a notice of suspension of the Commission's investigation.<sup>47</sup>

### Topic 9 – Contents of Preliminary Affirmative Determinations

The US International Trade Commission (the Commission) and the US Department of Commerce (the Department) each issue notices of their respective preliminary determinations in accordance with Articles 7 and 12 of the Anti-Dumping Agreement.<sup>48</sup> Each notice sets forth, or otherwise makes

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<sup>39</sup> 19 C.F.R.207.21(b).

<sup>40</sup> 19 C.F.R.207.22(a).

<sup>41</sup> 19 C.F.R.207.22(b).

<sup>42</sup> Section 735(b)(1) of the Tariff Act of 1930, as amended.

<sup>43</sup> Section 735(b)(1)(B) of the Tariff Act of 1930, as amended.

<sup>44</sup> Section 735(b)(4)(B) of the Tariff Act of 1930, as amended.

<sup>45</sup> See 19 C.F.R.207.29; Section 735(d) of the Tariff Act of 1930, as amended.

<sup>46</sup> See 19 C.F.R.207.40(a).

<sup>47</sup> See 19 C.F.R.207.40(b).

<sup>48</sup> The notices also include considerations relevant to injury determinations, as set out in the Anti-Dumping Agreement at Article 3 and referenced by Article 12.2.1(iv).

available in a separate report, in sufficient detail, the preliminary findings and conclusions reached on all issues of fact and law that are considered material by the respective authorities.

### The Commission

The Commission makes a preliminary determination of injury within 45 days of the filing of an anti-dumping duty petition with both the Commission and the Department. The Commission, based on information available to it at the time, determines whether there is a reasonable indication that an industry in the United States is materially injured, threatened with material injury, or the establishment of an industry is materially retarded by reason of imports allegedly sold at less than fair value.<sup>49</sup> If the Commission makes a preliminary affirmative finding of injury, it must also find that the injurious imports are not negligible; if the imports are determined to be negligible, or if the Commission otherwise makes a negative preliminary determination of injury, the investigation is terminated.<sup>50</sup>

The contents of a preliminary affirmative determination issued by the Commission include a description of the product under investigation sufficient for customs purposes; the names of the exporting nations involved; and the main reasons leading to the determination. Considerations relevant to the injury determination as set out in Article 3 of the Anti-Dumping Agreement are included in the determination, along with a definition of the domestic industry producing the relevant like product; preliminary findings on the conditions of competition in the domestic industry, including the volume and/or price effects of the allegedly dumped imports; and the impact of the allegedly dumped imports on domestic producers of the domestic like product(s).<sup>51</sup> The Commission, if applicable, will also reference in its preliminary affirmative determination its cumulation of imports from all countries subject to investigation, so long as the imports compete with each other and with the domestic like product.<sup>52</sup>

In assessing whether there is a reasonable indication that the domestic industry is materially injured by reason of allegedly dumped imports, the Commission in its preliminary affirmative determination will describe its consideration of all relevant economic factors that it has found bear on the state of the industry in the United States. The factors can include, among others, output, sales, inventories capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, the ability to raise capital, and research and development.<sup>53</sup>

In its preliminary affirmative determination, the Commission explains its analysis of each of these relevant factors and identifies any other factors which it has determined are relevant to the determination.<sup>54</sup> In the absence of evidence of material injury, the Commission will describe evidence leading to a preliminary finding of threat of injury, or of material retardation of the establishment of an industry. In any preliminary affirmative determination, the Commission will also provide preliminary evidence demonstrating a clear causal link between dumped imports and material injury.

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<sup>49</sup> Section 733(a)(1) of the Tariff Act of 1930, as amended. (If the Department extends the time in order to determine support for the petition, the preliminary determination of the Commission is due within 25 days after the date on which the Commission receives notice from the Department of initiation of the investigation, pursuant to Section 733(a)(2)(A)(ii) of the Tariff Act of 1930, as amended.)

<sup>50</sup> Section 733(a)(1)(B) of the Tariff Act of 1930, as amended.

<sup>51</sup> Section 771(7)(B)(i) of the Tariff Act of 1930, as amended.

<sup>52</sup> Section 771(7)(G)(i) of the Tariff Act of 1930, as amended.

<sup>53</sup> Section 771(7)(C)(iii) of the Tariff Act of 1930, as amended.

<sup>54</sup> Section 771(7)(B)(ii) of the Tariff Act of 1930, as amended.

Prior to the Commission's preliminary determination, the Commission's Director of Operations will submit to the full Commission a staff report.<sup>55</sup> Once the preliminary determination is made, copies of the preliminary determination and a public version of the staff report are served by the Commission on the petitioner, other parties to the investigation, and the Department. The Commission will also publish notice of its determination in the Federal Register.<sup>56</sup> If the Commission's preliminary determination of injury is affirmative, the next stage of the investigation takes place before the Department, which subsequently issues its preliminary determination of whether sales of the subject merchandise are being sold at less than fair value in the United States.

#### The Department

The Department normally makes its preliminary determination of whether there is a reasonable basis to believe or suspect that merchandise is being sold, or is likely to be sold, at less than fair value, within 140 days of the date of initiation of the anti-dumping duty investigation.<sup>57</sup> Consistent with Article 12 of the Anti-Dumping Agreement, a preliminary affirmative determination by the Department is published in a public notice in the Federal Register and provides a sufficiently detailed explanation for the determination on dumping and refers to the matters of fact and law that led to decisions by the Department. [Audrey: 12.2.1 language, with a slight modification by Mike Rill.] The preliminary affirmative determination may also include a preliminary finding concerning critical circumstances, if appropriate.

The Department's notices of preliminary affirmative determinations reference applicable statutes and regulations, and they provide a summary history of the proceeding (not including confidential information). They provide a definition of the scope of the investigation and the relevant period of investigation. Consistent with Article 12.2.1, they also contain the names of the exporters and/or producers of the subject merchandise and the exporting nations involved; a description of the product under investigation identified by tariff numbers sufficient for customs purposes; preliminary margins of dumping; a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2 of the Anti-Dumping Agreement; the main reasons leading to the determinations; and notice that the Department either has conducted a verification or will verify the information utilized by the Department in its final determination. The preliminary determination also contains an invitation for argument (both written - in the form of case or rebuttal briefs - and oral in the form of hearings). The argument is taken into consideration by the Department in making its final determination.

A preliminary affirmative determination by the Department, which occurs subsequent to the Commission's preliminary affirmative determination of injury, results in the Department's finding an estimated weighted-average dumping margin for each exporter and producer individually investigated, and an estimated all-others rate for all exporters and producers not individually investigated. Consistent with Article 7 of the Anti-Dumping Agreement, the Department in its preliminary affirmative determination orders the posting of a cash deposit, bond, or other security, for each entry of the subject merchandise in an amount based on the estimated weighted-average dumping margin or the estimated all-others rate, whichever is applicable. (The security provided cannot be greater than the provisionally estimated margin of dumping.) In its preliminary affirmative determination, the Department also orders the suspension of liquidation of all entries of merchandise subject to the determination that are entered for consumption on or after the later of the date on which

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<sup>55</sup> See 19 C.F.R.207.17.

<sup>56</sup> See 19 C.F.R.207.18.

<sup>57</sup> Section 733(b)(1) of the Tariff Act of 1930, as amended. (However, under section 733(c), the preliminary determination may be postponed for up to 190 days from initiation if the petitioner makes a timely request for an extension, or the Department concludes that the parties concerned are cooperating and the case is extraordinarily complicated.

notice of the determination is published in the Federal Register, or the date that is 60 days after the date on which notice of the determination to initiate the investigation is published in the Federal Register. At that time, the Department makes available to the Commission all information upon which its preliminary affirmative determination was based, and which the Commission considers relevant to its final injury determination (except for confidential or business proprietary information subject to protective order).<sup>58</sup>

Under US law and the Anti-Dumping Agreement, no provisional measures can be applied prior to 60 days from the date of initiation of an investigation, and the requirements of the Department's preliminary affirmative determination cannot be maintained for over four months, except in response to a request from exporters representing a significant proportion of exports of the subject merchandise. In receipt of such a request, the Department may extend the period of provisional measures from four to six months.<sup>59</sup>

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<sup>58</sup> Section 773(d) of the Tariff Act of 1930, as amended.

<sup>59</sup> Section 733(d)(3) of the Tariff Act of 1930, as amended.