

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

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**PRACTICAL ISSUES AND EXPERIENCE IN APPLYING ARTICLE 2.4.2**

**TERMINATION OF INVESTIGATIONS UNDER ARTICLE 5.8 IN  
CASES OF *DE MINIMIS* IMPORT VOLUME**

**PRACTICAL ISSUES AND EXPERIENCE IN CASES INVOLVING  
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**PRACTICAL ISSUES AND EXPERIENCE IN CONDUCTING  
"NEW SHIPPER" REVIEWS UNDER ARTICLE 9.5**

Paper by the United States

The following communication, dated 15 October 1999, has been received from the Permanent Mission of the United States.

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**AVERAGE-TO-AVERAGE VS. TRANSACTION-TO-TRANSACTION COMPARISONS**

Article 2.4.2 of the Antidumping Agreement states that, during the investigation phase, subject to Article 2.4, determinations of the existence of dumping margins will normally be based on comparisons of weighted-average normal values with weighted averages of prices of comparable export transactions, or by a comparison of individual transactions. These methodologies may be abandoned in favor of a comparison of weighted-average normal values with individual export transaction prices where there is a pattern of export prices which differ significantly among different purchasers, regions or time periods, and where such differences cannot be taken into account by use of average-to-average or transaction-to-transaction comparisons. The requirements of Article 2.4.2 have been incorporated directly into US law.<sup>1</sup>

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<sup>1</sup> 19 U.S.C. § 1677f-1(d)(1).

### Average-to-Average and Transaction-to-Transaction Comparisons

Since adoption of the Uruguay Round Agreements Act, Commerce has only employed the average-to-average comparison methodology for comparable merchandise in investigations. Thus, Commerce has no recent experience with use of the transaction-to-transaction method, reflecting in large part the fact that Commerce's regulations codify a preference for average-to-average over transaction-to-transaction price comparisons. The regulations state that, in an investigation, Commerce will normally use average-to-average price comparisons, and that the transaction-to-transaction method will only be used "in unusual situations."<sup>2</sup> In the Statement of Administrative Action, which accompanied US legislation implementing the Uruguay Round, the Administration stated, "[the transaction-to-transaction] methodology would be appropriate in situations where there are few sales and the merchandise sold in each market is identical or very similar or is custom-made. However, given past experience with this methodology and the difficulty in selecting appropriate comparison transactions, the Administration expects that Commerce will use this methodology far less frequently than the average-to-average methodology."<sup>3</sup> Moreover, the transaction-to-transaction method would be extremely difficult and time-consuming for Commerce, thus delaying a final decision, and would require extremely burdensome amounts of information from producers of the merchandise. In fact, in Commerce's experience, few parties have ever argued that a transaction-to-transaction methodology would be preferable.<sup>4</sup>

### Exceptions to the Average-to-Average Method

As discussed above, the Antidumping Agreement permits comparisons of individual export transactions to weighted average normal values in an investigation where there is a pattern of significant export price differences which cannot be accounted for by use of an average-to-average or transaction-to-transaction methodology. Under Commerce's regulations, this exception to the normal methods is referred to as the "targeted dumping" exception.<sup>5</sup> Commerce's regulations provide the opportunity for domestic interested parties to make an allegation of targeted dumping. In only a few cases have parties alleged a pattern of price differences which might support invocation of the exception. However, in all such cases Commerce found that the allegation was insufficiently supported by the facts, and did not satisfactorily explain why the alleged pattern of price differences could not be taken into account using the average-to-average comparison methodology.<sup>6</sup> Thus, since adoption of the Uruguay Round Agreements Act, Commerce has not invoked the targeted dumping exception in order to apply the transaction-to-average method in an investigation.

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<sup>2</sup> 19 C.F.R. § 351.414(c)(1).

<sup>3</sup> Statement of Administrative Action, H.R. Doc. No. 103-316, 103rd Cong., 2nd Sess. (1994), reprinted in Uruguay Round Agreements Act, Legislative History, Vol. VI, at 834.

<sup>4</sup> In the only recent case which appeared to meet the criteria for use of the transaction-to-transaction methodology, *i.e.*, only a few sales of custom-made merchandise, Commerce found that the market for the foreign like product was so different from the US market that they could not properly be compared. In that case, Commerce compared export prices with constructed value under Article 2.2. See Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan, 61 Fed. Reg. 38,139 (1996).

<sup>5</sup> 19 C.F.R. § 351.414(f).

<sup>6</sup> Commerce has rejected allegations of targeted dumping in the following cases: Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Taiwan, 63 Fed. Reg. 10836, 10837 (1998); Preliminary Determination of Sales at Less Than Fair Value: Fresh Tomatoes from Mexico, 61 Fed. Reg. 56608, 56610 (1996); Final Determination of Sales at Less Than Fair Value: Certain Pasta from Italy, 61 Fed. Reg. 30326, 30329 (1996).

## TREATMENT OF NEGLIGIBLE IMPORTS

United States law requires the US International Trade Commission (Commission) to determine in every anti-dumping and countervailing duty investigation whether subject import volumes are negligible. A finding by the Commission that imports are negligible results in termination of the investigation with respect to those imports.<sup>7</sup> The general rule is that imports are “negligible” if they account for less than 3 per cent of the volume of all such merchandise imported into the United States in the most recent 12-month period for which data are available preceding filing of the anti-dumping or countervailing duty petition, or, for investigations self-initiated by the US Department of Commerce, initiation of the investigation.<sup>8</sup>

US law directs the Commission to determine negligibility on the basis of imports corresponding to each domestic like product that it designates in an anti-dumping or countervailing duty investigation.<sup>9</sup> Consequently, should the Commission designate multiple domestic like products in an investigation, it will make a separate negligibility determination for each domestic like product, based on whether the imports corresponding to that domestic like product meet the 3 per cent test (subject to the various exceptions discussed below). In computing import volumes for its negligibility analysis, US law permits the Commission to make reasonable estimates on the basis of available statistics.<sup>10</sup> Thus, if available US government import statistics concern a basket tariff provision that is broader than the domestic like product designated by the Commission, the Commission may reasonably estimate a figure from the data available for the total imports corresponding to the domestic like product.

US law contains two exceptions to the general 3 per cent rule for determining negligibility. First, it states that imports will not be deemed negligible when countries, which individually account for less than 3 per cent of total imports, collectively account for more than 7 per cent of total imports.<sup>11</sup> This exception derives directly from the last sentence of Article 5.8 of the AD Agreement. US law directs the Commission, in determining this aggregated volume, not to consider imports from countries whose imports are ineligible for cumulation under 19 U.S.C. § 1677(7)(G)(ii).<sup>12</sup> (This concept is explained further in the accompanying US paper on cumulation.)

The second exception, which is applicable only to countervailing duty investigations, establishes the negligibility thresholds for certain “developing countries” at 4 per cent (in lieu of 3 per cent) and 9 per cent (in lieu of 7 per cent).<sup>13</sup> This provision implements Art. 27.9 of the Agreement on Subsidies and Countervailing Measures. The Office of the US Trade Representative designates the “developing countries” eligible for this exception and publishes a list of these countries in the *Federal Register*.<sup>14</sup>

US law additionally states that the Commission shall not treat imports as being negligible if it should determine that there is a potential that the imports will imminently exceed the 3 or 7 per cent thresholds.<sup>15</sup> In such circumstances, the Commission will not make a determination of material injury by reason of subject imports because the imports are currently negligible, but it will consider the imports for purposes of considering whether there is threat of material injury.

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<sup>7</sup> See 19 U.S.C. §§ 1671b(a)(1), 1671d(d)(1), 1673b(a)(1), 1673d(b)(1).

<sup>8</sup> See 19 U.S.C. § 1677(24)(A)(i).

<sup>9</sup> *Id.*

<sup>10</sup> See 19 U.S.C. § 1677(24)(C).

<sup>11</sup> See 19 U.S.C. § 1677(24)(A)(ii).

<sup>12</sup> See 19 U.S.C. § 1677(24)(A)(iii).

<sup>13</sup> See 19 U.S.C. § 1677(24)(B).

<sup>14</sup> See 19 U.S.C. § 1677(36).

<sup>15</sup> See 19 U.S.C. § 1677(24)(A)(iv).

When the Commission determines that it is appropriate to evaluate material injury or threat of material injury by reason of subject imports on the basis of a regional industry, as opposed to a national industry, US law states that the Commission is to base its negligibility analysis upon the volume of imports exported for sale in the pertinent regional market in lieu of the volume of all subject merchandise imported into the United States.<sup>16</sup>

## CUMULATION

When an anti-dumping or countervailing duty investigation involves subject merchandise from several different countries, United States law requires the US International Trade Commission to cumulatively assess the volume and effect of imports of subject merchandise from all countries in making its determination of material injury by reason of subject imports if two basic conditions are satisfied.

The first condition is that the investigations involving the different subject countries must be simultaneously filed or self-initiated. This requirement is satisfied if: (1) all petitions giving rise to the investigations were filed on the same day; (2) all the investigations were self-initiated by the Department of Commerce on the same day; or (3) all pertinent petitions were filed on the same day that the other investigations were self-initiated.<sup>17</sup>

The second condition is that the subject imports must compete with each other and with domestic like products in the United States market.<sup>18</sup> In assessing whether subject imports compete with each other and with the domestic like product, the Commission generally has considered four factors: (1) the degree of fungibility between the subject imports from different countries 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 subject imports from different countries and the domestic like product; (3) the existence of common or similar channels of distribution for subject imports from different countries and the domestic like product; and (4) whether the subject imports from different countries are simultaneously present in the US market.

US law provides four exceptions in which subject imports are not subject to cumulation. First, imports as to which the Department of Commerce has made a negative preliminary determination of dumping or subsidy are not subject to cumulation unless Commerce subsequently makes an affirmative final determination with respect to those imports before the Commission makes its final determination. Second, imports from any country with respect to which the investigation has been terminated may not be cumulated. Third, imports from beneficiary countries under the Caribbean Basin Economic Recovery Act (CBERA) are partially exempted from cumulation. These imports may be cumulated only with imports from other CBERA beneficiary countries. Fourth, pursuant to the US-Israel Free Trade Agreement, imports from Israel may not be cumulated with imports from other countries unless the Commission first determines that the domestic industry is materially injured by reason of such imports from Israel.<sup>19</sup>

In making determinations of threat of material injury by reason of subject imports, the Commission has the discretion to cumulate subject imports from different countries. To be eligible for cumulation, the subject imports must meet the same requirements with respect to simultaneous

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<sup>16</sup> See 19 U.S.C. § 1677(24)(D).

<sup>17</sup> See 19 U.S.C. § 1677(7)(G)(i).

<sup>18</sup> Id.

<sup>19</sup> See 19 U.S.C. § 1677(7)(G)(ii).

filing or self-initiation and to competition that are applicable to cumulation for material injury analysis. Additionally, the four exceptions to cumulation for material injury analysis are also applicable to cumulation for threat.<sup>20</sup> Factors the Commission may consider in determining whether to exercise its discretion to cumulate for purposes of threat analysis include whether the subject imports have similar pricing patterns and whether their volumes are increasing at similar rates.

## QUESTIONNAIRES/REQUESTS FOR INFORMATION

Article 6.1 of the Antidumping Agreement requires that interested parties in an investigation be given notice of the information which is required, and ample opportunity to present in writing all evidence which they consider relevant to the investigation. Article 6.1.1 requires that exporters and producers be given thirty days to reply to a questionnaire. Additionally, upon good cause shown authorities should, whenever practicable, grant requests for extension of the thirty day response period.

The Department of Commerce (Commerce) seeks information necessary for an investigation in the form of a questionnaire directed to foreign producers or exporters. Although the questionnaire is modified to meet the information requirements specific to each case, the standard form of the initial questionnaire, including special questionnaires for parties in countries with non-market or hyper-inflationary economies can be downloaded from the Internet at [http://www.ita.doc.gov/import\\_admin/records/library.htm](http://www.ita.doc.gov/import_admin/records/library.htm).

Similarly, the United States International Trade Commission (Commission) seeks information pertinent to its investigation of material injury or threat of material injury by reason of subject imports by directing questionnaires to domestic producers, importers, and purchasers, as well as to foreign producers.

### US Department of Commerce Procedures

Upon initiation of an investigation, Commerce transmits to all known foreign producers and exporters of the subject merchandise a questionnaire, typically based upon the standard form questionnaire, as modified to fit the particular case.<sup>21</sup> Commerce's regulations require that all questionnaires specify: the time limit for the response; the information to be provided; the form and manner in which the information should be provided; and that failure to submit requested information in the form and manner requested and by the date specified may result in the use of facts otherwise available.<sup>22</sup> The questionnaire also specifies the name and telephone number of the Commerce official in charge of the investigation to whom all questions should be directed. It also states that, should a party have difficulties in responding to a questionnaire in the form and manner requested, the party should contact Commerce as soon as possible in order to discuss the difficulties; Commerce's regulations specify that parties should contact Commerce regarding such difficulties within 14 days of receipt of the initial questionnaire.<sup>23</sup> Finally, the questionnaire states that requests for extensions of the specified deadlines must be requested in writing.

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<sup>20</sup> See 19 U.S.C. § 1677(7)(H).

<sup>21</sup> Commerce sends questionnaires to all known foreign producers and exporters of the subject merchandise unless there is a large number of exporters or producers involved in the investigation or review, in which case Commerce may limit its examination to 1) a statistically valid sample of the exporters or producers; or 2) those exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can reasonably be examined. See Section 777A(c)(1) of the Tariff Act of 1930, as amended.

<sup>22</sup> 19 C.F.R. § 351.301(c)(2)(ii).

<sup>23</sup> 19 C.F.R. § 351.301(c)(2)(iv).

Commerce's questionnaire is typically divided into five parts, designated as sections A through E. Section A requests information concerning the investigated company's corporate structure and business practices, the merchandise under investigation or review, and the quantity and value of sales of the merchandise in all markets. Section B requests a listing of the sales transactions, which are used to determine the normal value of the foreign like product. In investigations, Section C requests a listing of the US sales transactions for the relevant period of investigation (POI) in order to determine the export price or constructed export price. In administrative reviews, Section C requests US sales information and information on entries for the relevant period of review (POR). Unlike Sections A through C, Sections D and E do not apply in every case. Section D requests information regarding the cost of production and constructed value, and Section E requests information regarding the cost of further manufacturing in the United States.

In accordance with Article 6.1.1 of the Agreement, Commerce's regulations provide that a respondent will have at least 30 days to respond to the full initial questionnaire.<sup>24</sup> However, Commerce usually requests that section A (general information) be submitted sooner. Information requested in this section related to the overall corporate structure, as well as the volume and value of the respondent's sales. Commerce asks for information in this section early in the investigation in order to identify parties who do not need to complete the rest of the questionnaire (for example because they had no sales to the United States during the period of investigation, or because they merely acted as resellers for other producers) and to determine whether the home market is the proper market for determining normal value under article 2.2 of the Agreement. Sections B and C request information about prices and appropriate adjustments in the home market (or third country) and in the United States, respectively.

Responses to the initial questionnaire often reveal areas where Commerce requires clarification or further information. Such information is sought through supplemental questionnaires. The content of supplemental questionnaires varies greatly from case to case, and the deadline for responding to such questionnaires also varies. However, as with initial questionnaires, reasonable requests for extensions of the deadlines for supplemental questionnaires may be granted if requested in writing.

In addition to the information requested through questionnaires, parties may submit any other information which they consider relevant to the investigation. Under Commerce's regulations, the deadline for such information is seven days prior to the verification of factual information, which occurs sometime after the preliminary determination in an investigation.<sup>25</sup> Further, regardless of the stage of the investigation, if Commerce permits one party to submit information, Commerce's regulations give all other parties ten days to provide information to rebut, clarify or correct the information submitted by the party. In order to ensure that all submitted information comes to the attention of the correct personnel at Commerce, the regulations provide very specific instruction about where documents must be filed, the format of submitted documents, and the number of copies which must be submitted.<sup>26</sup>

### Commission Procedures

1. Preliminary Phase of the Investigation: The Commission issues separate questionnaires in the preliminary and final phases of its investigation. In the preliminary phase, after careful review of the petition and other information available at the time, the staff drafts questionnaires to solicit from US

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<sup>24</sup> 19 C.F.R. § 351.301(c)(2)(iii).

<sup>25</sup> 19 C.F.R. § 351.301(b)(i).

<sup>26</sup> 19 C.F.R. § 351.303.

producers, US importers, and foreign producers the information required by the Commission in order to make its preliminary determination.

As with the Commerce Department, questionnaires are sent to all US 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 mailed 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).<sup>27</sup> 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 mailed directly.

US 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 price<sup>28</sup> and other price-related information and solicits allegations of lost revenues and lost sales attributable to the subject imports (if not included in the petition).

Importer questionnaires generally consist of three parts. As in the US 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.

2. **Final Phase of the Investigation:** Information solicited by questionnaire in the final phase of the Commission's investigation follows roughly the same format as during the preliminary phase. 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 US and foreign producers, US importers, and US purchasers, the information required by the Commission in order to make its final determination. The draft questionnaires are circulated to the parties for comment before they are mailed. Party comments are filed with the Secretary to the Commission and served on the other parties to the

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<sup>27</sup> The staff may also send a telegram requesting similar information to the US embassy in the subject country(ies), particularly if the foreign producers are not represented by counsel.

<sup>28</sup> 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.

investigation.<sup>29</sup> The staff reviews and incorporates the comments, as appropriate, and forwards the questionnaires to the Commission for approval.

Questionnaires are sent to all US producers, US importers, and foreign producers that reported production or imports of 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 dropped, and the time period for which data are collected is more current.

In the final phase, purchaser questionnaires are sent to all significant purchasers of the product in cases involving as many as 50 consuming firms. In cases involving a larger number of consumer firms, questionnaires may be sent only to the largest purchasers, or if virtually all of the consumer firms are small, a representative sample may be taken. Purchaser questionnaires generally consist of at least four parts. As in the US 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.

Producer, importer, and purchaser questionnaires are mailed approximately one week after notification by Commerce of its preliminary determination. Foreign producer questionnaires are issued soon afterwards, often through counsel representing the producers.

## INDUSTRIAL USERS AND CONSUMERS

Article 6.12 of the Antidumping Agreement requires authorities to provide opportunities for industrial users and consumer organizations to submit relevant information in investigations regarding dumping, injury and causality. US law explicitly provides industrial users and consumer organizations with numerous opportunities to comment on matters relevant to a particular determination of dumping or injury.<sup>30</sup> Under the bifurcated system of the United States, the US Commerce Department (Commerce Department or Department) determines whether imports are being sold at less than fair value, while the US International Trade Commission (Commission) determines whether a domestic 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 sold at less than fair value.

### Department of Commerce

In anti-dumping proceedings administered by the Commerce Department, industrial users of the subject merchandise and representative consumer organizations can submit factual information and written arguments on relevant anti-dumping matters subject to the Department's standard filing requirements. Industrial users and consumers may provide comments to rebut, clarify or correct

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<sup>29</sup> See Commission rule 207.20 (19 C.F.R. § 207.20).

<sup>30</sup> Section 777(h) of the Tariff Act of 1930, as amended.

information previously filed by interested parties in a proceeding<sup>31</sup> and they may submit specific written arguments in case and rebuttal briefs.<sup>32</sup> They may also submit publicly available information valuing factors which the Department uses to calculate normal value in anti-dumping proceedings involving non-market economy (“NME”) countries.<sup>33</sup> Commerce Department anti-dumping regulations also contain the explicit requirement that industrial users and consumers must be provided an opportunity to submit comments on proposed agreements suspending anti-dumping duty investigations.<sup>34</sup> Finally, the Department’s regulations require that industrial users or consumers who wish to participate in sunset reviews must file a substantive response to the notice initiating the sunset review within 30 days after the notice is published in the Federal Register. They may also make other submissions in sunset reviews, should they decide to do so.<sup>35</sup>

Industrial users and consumers may request business proprietary treatment of the information contained in their submissions.<sup>36</sup> If the Department agrees to grant a submitter’s request for business proprietary treatment, the information contained in the submissions will be released only to certain persons in accordance with the terms of a valid administrative protective order issued by the Department.<sup>37</sup>

The Statement of Administrative Action, which accompanied US legislation implementing the Uruguay Round, states that submissions and comments by industrial users and consumers should focus on matters within the purview of the Department’s statutory authority to investigate and review dumping.<sup>38</sup> The Department made it clear in the preamble accompanying its final regulations implementing the Uruguay Round that industrial users and consumers are not limited to commenting only on the existence or the amount of dumping and may, for example, also comment on the scope of an investigation.<sup>39</sup> In fact, the preamble reiterates the Department’s intent that all persons, including interested parties, industrial users, and consumer groups should be included on scope service lists and be notified of scope rulings.<sup>40</sup>

Finally, throughout an investigation or review, the Department may also request that industrial users or consumers provide additional information if needed.

#### US International Trade Commission

The Commission’s regulations also provide for the submission of factual information from industrial users and consumers. The Commission’s regulations expressly accord industrial users and, when merchandise under investigation is sold at the retail level, representative consumer organizations, the ability to participate as parties in anti-dumping investigations.<sup>41</sup> As parties, such entities can submit written information and argument to the Commission which is relevant to an investigation concerning material injury and causality. They may also participate at Commission conferences and hearings. The Commission will consider the information and arguments submitted by industrial users and consumers in its investigation of whether a domestic industry is materially

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<sup>31</sup> 19 C.F.R. § 351.312(b), *citing*, 19 C.F.R. § 351.301(c)(1).

<sup>32</sup> 19 C.F.R. § 351.312(b), *citing*, 19 C.F.R. § 351.309(c) and (d).

<sup>33</sup> 19 C.F.R. § 351.312(b), *citing*, 19 C.F.R. § 351.301(c)(3).

<sup>34</sup> 19 C.F.R. § 351.208(f)(3).

<sup>35</sup> 19 C.F.R. § 351.218(d)(3)(vi).

<sup>36</sup> 19 C.F.R. § 351.312(c).

<sup>37</sup> 19 C.F.R. § 351.312(c).

<sup>38</sup> Statement of Administrative Action, H.R. Doc. No. 103-316, 103d Cong., 2nd Sess. (1994), reprinted in Uruguay Round Agreements Act, Legislative History, Vol. VI, at 871.

<sup>39</sup> Preamble to the US Department of Commerce’s Final Rule on Antidumping Duties, 62 Fed. Reg. 27295, 27343 (19 May 1997).

<sup>40</sup> *Id.*, *see also*, 19 C.F.R. § 351.225(d) and (n).

<sup>41</sup> 19 C.F.R. § 201.11(a).

injured or threatened with material injury, or whether the establishment of a domestic industry is materially retarded, by reason of subject imports.

## NEW SHIPPER REVIEWS

Consistent with Article 9.5 of the Antidumping Agreement, US law provides that a so-called “new shipper” may obtain its own individual weighted-average dumping margin on an expedited basis if it is a producer or exporter that (1) did not, during the period of the original investigation, export to the US (or sell for export) merchandise now subject to the anti-dumping duty order; (2) is not affiliated with any exporter or producer that exported (or sold for export) such merchandise during that period; and (3) provides in its request for a new shipper review all of the requisite information that must be submitted to the US Commerce Department under US anti-dumping regulations.

### Contents of Requests for New Shipper Reviews

An exporter or producer must request a new shipper review in writing, and the information that must be contained in the request under US anti-dumping regulations differs depending on whether the exporter is also the producer of the exported subject merchandise. For example, if the requester is both the exporter and the producer of the subject merchandise, the new shipper must certify in its request that it did not export such merchandise to the United States (or, in the case of a regional industry, did not export for sale in the region concerned) during the period of investigation.<sup>42</sup>

However, if the requester is only the exporter and not the producer of the subject merchandise, its request must contain both the certification discussed above *and* a certification from the producer or supplier of the subject merchandise that the producer or supplier did not export the subject merchandise to the United States (or, in the case of a regional industry, did not export for sale in the region concerned) during the period of investigation.<sup>43</sup>

Regardless of whether the prospective new shipper is both the exporter and producer of the subject merchandise, or only the exporter, in its request the new shipper must also certify that, since the investigation was initiated, it has never been affiliated with any exporter or producer who exported subject merchandise to the United States (or in the case of a regional industry, who exported for sale in the region concerned) during the period of investigation, including those not individually examined during the original investigation.<sup>44</sup>

If the new shipper making the request is located in a non-market economy (“NME”) country, it must also certify that its export activities are not controlled by the central government.<sup>45</sup>

### Documentation Required With Requests

The prospective new shipper must provide with its request documentation establishing the date on which its subject merchandise was first entered or withdrawn for consumption in the United States or, if the requestor cannot establish the date of first entry, the date on which the requestor first shipped the subject merchandise for export to the United States.<sup>46</sup> The volume of that

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<sup>42</sup> 19 C.F.R. § 351.214(b)(2)(i).

<sup>43</sup> 19 C.F.R. § 351.214(b)(2)(ii).

<sup>44</sup> 19 C.F.R. § 351.214(b)(2)(iii)(A).

<sup>45</sup> 19 C.F.R. § 351.214(b)(2)(iii)(B).

<sup>46</sup> 19 C.F.R. § 351.214(b)(2)(iv)(A).

and subsequent shipments must be provided, along with the date of the first sale to an unaffiliated customer in the United States.<sup>47</sup>

Occasionally a request may not contain all of the information required under US anti-dumping regulations. In those instances, Commerce notifies the requester of the request's deficiencies and provides an opportunity for the requester to supplement its original submission, so long as the supplemental information is submitted by a specific deadline. If the supplemental information is not submitted by that deadline, the request may be rejected in its entirety.

#### Timing of Requests and Reviews

An exporter or producer may request a new shipper review within one year of the date on which the subject merchandise was first entered or shipped for export to the United States.<sup>48</sup>

Upon receipt of a properly documented and complete request, the Department will initiate a new shipper review in the calendar month immediately following the anniversary month<sup>49</sup> or the semiannual anniversary month<sup>50</sup> if the request for the review is made during the six month period ending with the end of the anniversary month or the semiannual anniversary month (whichever is applicable).<sup>51</sup>

#### Period of Review

Generally, the period of review in a new shipper review will be either six or twelve months, depending on whether the review was initiated in the month following the semi-annual or annual anniversary month.<sup>52</sup> However, we may expand the period of review where necessary to include an entry and sale to an unaffiliated customer. For example, a new shipper might request a review based on a sale to an affiliated party who resold the merchandise after entry into the United States. To conduct the review we must include the sale to the unaffiliated party, which may have occurred after the normal period of review. In such a case, we might expand the period of review to include the sale to the unaffiliated party, provided that the necessary expansion would still permit timely completion of the review.

#### New Shipper Review Procedures

The Commerce Department publishes in the Federal Register a notice of initiation of a new shipper review no later than the last day of the month following the anniversary month, or the semi-annual anniversary month (whichever is applicable).<sup>53</sup> The Department then normally issues questionnaires within 30 days of the date of publication of the initiation notice.<sup>54</sup> The Department, at its discretion, may verify information received in response to the questionnaires, but is not required to do so.<sup>55</sup>

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<sup>47</sup> 19 C.F.R. § 351.214(b)(2)(iv)(B) and (C).

<sup>48</sup> 19 C.F.R. § 351.214(c).

<sup>49</sup> The anniversary month is the calendar month marking the annual anniversary of the anti-dumping duty order.

<sup>50</sup> The semiannual anniversary month is the calendar month that is six months after the anniversary month marking the annual anniversary of the anti-dumping duty order.

<sup>51</sup> 19 C.F.R. § 351.214(d).

<sup>52</sup> 19 C.F.R. § 351.214(g).

<sup>53</sup> 19 C.F.R. § 351.221(c)(i).

<sup>54</sup> 19 C.F.R. § 351.221(c)(ii).

<sup>55</sup> 19 C.F.R. § 351.307(b)(1)(iv).

Upon initiating a new shipper review, the Department directs the US Customs Service to suspend liquidation of any unliquidated entries of the subject merchandise from the relevant exporter or producer, and to allow, at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise.<sup>56</sup>

Preliminary results of a new shipper review are normally issued within 180 days after the date on which the review was initiated<sup>57</sup> and final results are issued within 90 days after the date on which the preliminary results are issued.<sup>58</sup> (However, if the Department concludes that a particular review is extraordinarily complicated, it may extend the 180-day period to 300 days, and the 90-day period to 150 days).<sup>59</sup>

#### Concurrent Reviews

If there is a request for a new shipper review while another new shipper review, an administrative review, an expedited anti-dumping review, a changed circumstances review (or a request for any of these types of reviews) is in progress, and covers merchandise from the same producer or exporter, the Department may undertake one of several options after consulting with the requesting exporter or producer. It may: 1) rescind, in whole or in part, the new shipper review already in progress; 2) decline to initiate, in whole or in part, the newly-requested new shipper review; or 3) where the requester seeking the new shipper review agrees in writing to waive the normal time limits of new shipper reviews, conduct concurrent reviews, in which case all of the other provisions applicable to new shipper reviews would be applied. The regulation is designed to avoid duplication of reviews, while maintaining a qualified exporter's right to the special procedures provided new shippers.

#### Rescission of New Shipper Reviews

The Department also has authority to rescind a new shipper review, in whole or in part, if:

- (1) the prospective new shipper withdraws its request for review within 60 days after the review is initiated; or
- (2) the Department determines that there has not been an entry and sale to an unaffiliated customer in the US of subject merchandise, and that expanding the normal period of review to include such a sale or entry would likely prevent the Department from being able to complete the review within the time limits prescribed by US anti-dumping duty regulations.

The Department must publish a notice in the Federal Register when it rescinds a new shipper review.<sup>60</sup>

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<sup>56</sup> 19 C.F.R. § 351.214(e).

<sup>57</sup> 19 C.F.R. § 351.214(i)(1), *citing*, 19 C.F.R. § 351.221(b)(4).

<sup>58</sup> 19 C.F.R. § 351.214(i)(1), *citing*, 19 C.F.R. § 351.221(b)(5).

<sup>59</sup> 19 C.F.R. § 351.214(i)(2).

<sup>60</sup> 19 C.F.R. § 351.214(f).