

ANNEX 5 – BASIC DESCRIPTION OF US TRADE DEFENCE INSTRUMENTS

| | | |
|-----------|--|----------|
| 1. | OVERVIEW | 3 |
| 1.1 | LEGAL AUTHORITY | 3 |
| 1.2 | INSTITUTIONS | 3 |
| 2. | ANTI-DUMPING AND COUNTERVAILING DUTIES | 4 |
| 2.1 | SUBSTANCE | 4 |
| | (a) <i>Summary of Statute and Regulations</i> | 4 |
| | (b) <i>Definition of Dumping</i> | 4 |
| | (c) <i>Normal Value</i> | 5 |
| | (d) <i>Export Price/Constructed Export Price</i> | 7 |
| | (e) <i>Dumping Calculation</i> | 7 |
| | (f) <i>Exporter-Specific Dumping Margins</i> | 8 |
| | (g) <i>All Others Rate</i> | 9 |
| | (h) <i>Subsidy</i> | 9 |
| | (i) <i>Financial Contribution</i> | 9 |
| | (j) <i>Benefit</i> | 9 |
| | (k) <i>Specificity</i> | 10 |
| | (l) <i>Allocation of the Benefit</i> | 11 |
| | (m) <i>Subsidy Rate Calculation</i> | 11 |
| | (n) <i>Non-Market Economies</i> | 12 |
| | (o) <i>Injury</i> | 12 |
| | (p) <i>Like Product</i> | 12 |
| | (q) <i>Material Injury</i> | 13 |
| | (r) <i>Cumulation</i> | 13 |
| 2.2 | PROCEDURE | 13 |
| | (a) <i>Overview of Procedures</i> | 13 |
| | (b) <i>Petition and Initiation</i> | 16 |
| | (c) <i>Petition Requirements</i> | 17 |
| | (d) <i>Standard for Initiation</i> | 17 |
| | (e) <i>Industry Support</i> | 17 |
| | (f) <i>Time Limits</i> | 18 |
| | (g) <i>Target of the Investigation</i> | 18 |
| | (h) <i>Notice of Initiation</i> | 18 |
| | (i) <i>ITC Preliminary Investigation Phase</i> | 19 |
| | (j) <i>Negligibility</i> | 19 |
| | (k) <i>Period of Investigation</i> | 19 |
| | (l) <i>Questionnaire</i> | 19 |
| | (m) <i>Description of the Standard Dumping Questionnaire</i> | 20 |
| | (n) <i>Time Limits</i> | 21 |
| | (o) <i>Verification</i> | 21 |
| | (p) <i>Written Argument</i> | 21 |
| | (q) <i>Hearings</i> | 22 |
| | (r) <i>Disclosure and Access to Information</i> | 22 |
| | (s) <i>Overview of Duties</i> | 23 |
| | (t) <i>Provisional Measures</i> | 23 |
| | (u) <i>Final Phase of ITC Injury Investigation</i> | 23 |
| | (v) <i>Definitive Duties</i> | 24 |
| | (w) <i>Undertakings</i> | 24 |
| | (x) <i>Structure of an Undertaking</i> | 25 |
| | (y) <i>Types of Duties</i> | 25 |
| | (z) <i>Level of Duties</i> | 25 |

| | | |
|-----------|--|-----------|
| (aa) | <i>Duty Absorption</i> | 25 |
| (bb) | <i>Scope</i> | 26 |
| (cc) | <i>Circumvention</i> | 26 |
| (dd) | <i>Revocation</i> | 26 |
| (ee) | <i>Sunset</i> | 26 |
| (ff) | <i>Judicial Review</i> | 27 |
| 3. | SAFEGUARDS | 27 |
| 3.1 | SUBSTANCE | 27 |
| (a) | <i>Summary of Statute and Regulations</i> | 27 |
| (b) | <i>Injury Phase Considerations</i> | 28 |
| (c) | <i>Increased Imports</i> | 28 |
| (d) | <i>Injury or Threat of Injury to the Domestic Industry</i> | 28 |
| (e) | <i>Causation</i> | 29 |
| (f) | <i>Adjustment Plans</i> | 29 |
| (g) | <i>Types of Relief</i> | 30 |
| (h) | <i>Presidential Discretion to Impose Relief</i> | 30 |
| (i) | <i>Limits on Relief Granted</i> | 30 |
| (j) | <i>Exclusion of Certain Countries</i> | 31 |
| (k) | <i>Exclusion of Certain Products</i> | 31 |
| 3.2 | PROCEDURES | 31 |
| (a) | <i>Overview of Procedures</i> | 31 |
| (b) | <i>Petition and Initiation</i> | 31 |
| (c) | <i>Petition Requirements and Initiation</i> | 32 |
| (d) | <i>Questionnaires</i> | 32 |
| (e) | <i>Hearings</i> | 32 |
| (f) | <i>Disclosure and Access to Information</i> | 32 |
| (g) | <i>Interagency Process Regarding Presidential Action</i> | 33 |
| (h) | <i>Appellate Review</i> | 33 |
| (i) | <i>Limits on Subsequent Investigations</i> | 33 |

1. OVERVIEW

1.1 Legal Authority

U.S. trade defense instruments are governed by domestic laws, which implement the United States obligations under the relevant WTO Agreements. The WTO Agreements themselves do not have direct legal effect under U.S. law.

The statutory authority for U.S. anti-dumping and countervailing (anti-subsidy) measures is found in Title VII (sections 701-783), of the Tariff Act of 1930, as amended. The statutory authority for safeguard actions is found in Title II (sections 201-204) of the Trade Act of 1974, as amended. These statutory authorities were most recently amended by the Uruguay Round Agreements Act to implement the WTO Agreements.

1.2 Institutions

The institutions that play a role in the imposition and enforcement of U.S. trade defense instruments are: the U.S. Department of Commerce (Commerce), the International Trade Commission (ITC), the Office of the United States Trade Representative (USTR), the Bureau of Customs and Border Protection (Customs), the Court of International Trade and the Court of Appeals for the Federal Circuit.

Commerce, a cabinet level agency of the executive branch, has primary responsibility for enforcement of the U.S. anti-dumping and countervailing duty laws. Responsibility within Commerce for conducting investigations and administering anti-dumping and countervailing duty measures rests with Import Administration, and decision-making authority has been delegated by the Secretary of Commerce to the Assistant Secretary for Import Administration.

The ITC, which is an independent agency comprised of six commissioners (3 Democrats and 3 Republicans) appointed by the President for 12-year terms, is responsible for making the injury determinations in anti-dumping and countervailing duty proceedings.

The ITC is also responsible for conducting safeguard investigations. However, it is the President that makes the final determination as to whether relief will be provided and the extent of that relief. The President is advised by the USTR, which is part of the Office of the President.

Customs collects anti-dumping and countervailing cash deposits and duty assessments, in accordance with instructions received from Commerce. Customs' role is ministerial. Customs does not have decision-making authority in AD/CVD or safeguards cases.

The Court of International Trade is responsible for judicial review of anti-dumping and countervailing duty and safeguard determinations by Commerce and the ITC. Decisions by the Court of International Trade may be appealed to the Court of Appeals for the Federal Circuit. Although further appeal to the U.S. Supreme Court is possible, review by the Supreme Court is rarely sought and was last granted in 1979.

2. ANTI-DUMPING AND COUNTERVAILING DUTIES

2.1 Substance

(a) Summary of Statute and Regulations

Commerce is required by law to impose anti-dumping or countervailing duties if the following conditions exist:

- (i) either,
 - (A) the subject merchandise is being, or is likely to be, sold in the United States at less than normal value; or
 - (B) a government is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production or export of the subject merchandise, and
- (ii) 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 dumped or subsidized imports.

The United States has a bifurcated system in which Commerce determines whether dumping or subsidization exists and the ITC determines whether the U.S. domestic industry is injured by reason of those dumped or subsidized imports.

The U.S. anti-dumping and countervailing duty laws are found in Title VII (sections 701-782) of the Tariff Act of 1930,¹ as amended (“the Act”).

Commerce’s implementing regulations are codified in Title 19 of the Code of Federal Regulations, Part 351 (“Commerce Regulations”).

The ITC’s implementing regulations are codified at Title 19 of the Code of Federal Regulations, Part 207 (“ITC Regulations”).

The Act and Regulations were amended, as necessary, to reflect the WTO Agreement on the Implementation of Article VI of GATT 1994 (“the Anti-dumping Agreement”) and the WTO Agreement on Subsidies and Countervailing Measures (“SCM Agreement”), which were negotiated in the Uruguay Round.

(b) Definition of Dumping

Dumping is defined as the extent to which the “normal value” of the merchandise exceeds the export price to the United States. The comparison of export price and normal value is normally

¹ These provisions are codified at 19 U.S.C. §§ 1671 et seq.

made at the “ex-factory” level, *i.e.*, exclusive of movement expenses. The dumping calculation is complex, usually requiring numerous adjustments to export price and normal value to eliminate differences that effect price comparability.

(c) Normal Value

Whenever possible, normal value is determined on the basis of prices at which the exporter sells the foreign like product for consumption in the exporting country (“home market prices”). The three most common situations where home market prices do *not* provide a basis for determining normal value are: (1) the home market is not “viable” (*i.e.*, total sales in the home market are less than 5% of total sales to the United States); (2) sales in the home market were made at prices below the cost of production; or (3) there are no home market sales of a comparable product. If normal value cannot be based on home market sales, Commerce will base normal value on prices at which the exporter sells the foreign like product in third countries, or on the basis of a “constructed value.”

Note that the U.S. law defines “foreign like product” as an identical or comparable product “produced in the same country by the same person.” An exporter’s normal value is therefore never based on sales by other companies.

There is a preference in U.S. law for determining normal value on the basis of actual prices. If possible, therefore, Commerce will use a viable third country market rather than constructed value when home market sales are unavailable. However, Commerce has the discretion to use constructed value in lieu of third country sales if the agency deems it to be more appropriate in a given case.

Constructed value is most commonly used when, although the home market is viable, home market sales are found to be below the cost of production or otherwise outside the ordinary course of trade, or when there is no comparable product sold in the home market.

Constructed Value = Cost of Manufacturing, including, material, labor, variable and fixed overhead (“COM”) + selling general and administrative expenses (SG&A) + profit

Sales below cost. If, within an extended period of time, prices are below cost for a substantial quantity of sales, Commerce will disregard the below cost sales when calculating normal value. “Substantial quantities” means 20% or more and an “extended period of time” is normally one year. Therefore, if below cost sales during the period of investigation are less than 20% no sales are disregarded.

Cost of Production = COM + SG&A

Sales to affiliated parties. Home market sales to affiliated parties are only used in the normal value calculation if they are “in the ordinary course of trade.” In 2002, in response to an adverse WTO decision, Commerce adopted a new test to determine if affiliated party sales are in the ordinary course of trade. Sales to affiliates will be treated as in the ordinary course of trade if prices to the affiliate fall, on average, within a defined range around prices for the same or

comparable merchandise sold to all unaffiliated customers. The price range for sales within the ordinary course of trade is between 98 percent and 102 percent, inclusive, of prices to unaffiliated customers. If sales to affiliates fall outside this range, Commerce normally requests the affiliate's downstream sales. If, however, sales to the affiliate are less than 5% of the home market, Commerce will simply disregard them.

Adjustments. Numerous adjustments are made to normal value to ensure comparability to the export transactions. Adjustments include:

Difference in Merchandise ("Difmer"): When the product sold in the home market is not identical to the product sold to the United States, the normal value is adjusted by the net difference in variable manufacturing costs incurred to produce the different physical characteristics. If the difmer adjustment exceeds 20% of the total average cost of manufacturing, on a model-specific basis, sales of the product will not be used to determine normal value. Normally in such cases, Commerce will use a constructed value.

Packing: To eliminate differences in packing costs, the packing costs for home market sales are deducted from normal value and packing costs for sales to the United States are added to normal value.

Circumstances of Sale: These adjustments account for differences in direct selling expenses such as commissions, warranties and credit expenses.

Level of Trade: Comparisons are made, to the extent possible, between sales at the same level of trade. If, however, sales in the home market are made at a different level of trade and the record evidence demonstrates that the difference in level of trade affects price comparability, Commerce makes a level of trade adjustment to normal value.

Non-Market Economies. When the exporting country is a non-market economy ("NME"), Commerce does not determine normal value on the basis of prices and costs in the NME. Instead, Commerce constructs a normal value using what is commonly referred to as the "factors of production" method. Under that method, the NME producer provides Commerce with its factors of production, *i.e.*, labor hours, quantities of inputs, energy consumption and capital costs. Commerce then constructs normal value by valuing those factors, plus an amount for SG&A and profit, in a surrogate market economy that is a significant producer of comparable merchandise and is at a comparable level of economic development.

Over the years, Commerce has compiled a significant amount of market-economy data on which to value the factors of production. Commerce publishes an index of that information on the Import Administration website. In addition, Commerce has established a practice of using the NME producer's actual cost for inputs that the producer purchases from a market economy, rather than use a surrogate value for those input costs.

If there is inadequate surrogate value information available to use the factors of production method, Commerce has the discretion to rely on prices at which comparable products produced

in a surrogate market economy are sold in other markets, including the United States. Commerce has rarely, if ever, resorted to this alternative.

Before Congress amended the anti-dumping law to establish the factors of production method, Commerce's NME method relied to the extent possible on price and cost information from surrogate market economy producers. That approach was abandoned due, at least in part, to difficulties in finding surrogate producers willing to cooperate in the investigation.

(d) Export Price/Constructed Export Price

Commerce bases its calculation of export price on the first sale to an unaffiliated party.

Export Price: U.S. law defines "export price" as the price at which the product is first sold before importation by the producer or exporter outside of the United States to an unaffiliated purchaser in the United States, or to an unaffiliated purchaser outside the United States for export to the United States. In sum, export price sales are made by someone outside the United States to an unaffiliated party in, or for export to, the United States.

Constructed Export Price ("CEP"): There are other circumstances, however, in which the first sale to an unaffiliated party is made in the United States (before or after importation) by someone affiliated with, or acting on behalf of the foreign exporter or producer. These are not situations in which someone in the United States is merely facilitating a sale by the foreign exporter or producer (e.g., arranging customs clearance). Rather, they are situations in which the selling activity is taking place in the United States. In such cases, the price to the affiliate is not a legally permissible basis to determine export price. Commerce therefore constructs an export price. To do so, Commerce deducts from the price to the first unaffiliated purchaser in the United States all selling expenses incurred in the United States by or on behalf of the exporter or by the affiliated reseller.²

Non-market Economies: In NME cases, Commerce applies the normal rules for calculating the export price or constructed export price.

(e) Dumping Calculation

The merchandise under investigation must fall within a single product type – what is referred to in U.S. law as a single "class or kind" of merchandise.³ The subject merchandise is, however, frequently comprised of multiple subcategories or models, not all of which are comparable to each other. For example, an investigation of widget imports may include various sizes of widgets ranging from one to ten inches. As discussed above, if the variable cost of manufacturing a ten-inch widget is more than 20% higher than the cost of a one-inch widget, Commerce would find that sales of one inch widgets are not comparable to sales of ten inch widgets. In addition, even if the products are identical, the sales transactions may not be comparable for other reasons, e.g., they may be made at different levels of trade. To perform the

² These CEP deductions are in addition to the normal adjustments made to determine export price.

³ If the petition covers more than a single class or kind of merchandise, Commerce will conduct separate investigations of each class or kind of imports.

dumping calculation, therefore, Commerce creates groups of comparable transactions, taking into account, to the extent possible, physical characteristics and level of trade so that sales to the United States are compared to the most comparable transactions in the home market.

In an investigation, Commerce normally uses an average-to-average comparison. Under that method, Commerce calculates a single weighted-average export price for each group of comparable transactions, using all export transactions within the group. Likewise, Commerce calculates a single-weighted-average normal value for each group of comparable transactions, using all home market transactions in the group. Commerce then compares the two weighted-averages to determine the amount of dumping, if any, that occurred in each group of comparable transactions.

Commerce then calculates the total amount of dumping by adding the amount, if any, by which the normal value for each group of comparable transactions exceeds the export price for the group. The total amount of dumping is then divided by the total value of the export sales to the United States to arrive at an *ad valorem* dumping margin.

If, for a particular transaction group, the normal value is equal to or less than the export price, Commerce assigns a dumping value of zero to that comparison group when calculating the total amount of dumping. This is the practice commonly referred to as “zeroing.” The total value of U.S. sales in the “zero dumping” groups are included in the denominator of the *ad valorem* margin calculation, *i.e.*, the total dumping is allocated over total U.S. sales of the product under investigation. This method has been found illegal by panels and the Appellate Body, notably in the case concerning the US anti-dumping duties on imports of softwood lumber from Canada (DS264).

In reviews and final assessment proceedings, Commerce uses a transaction-to-average comparison. Under that method, Commerce calculates monthly weighted-average normal values for each group of comparable transactions. Commerce then compares each sale to the United States to the normal value for the month in which the sales was made. The total amount of dumping is determined by summing up the positive amounts of dumping, while the negative amounts of dumping are set a zero – a variation of the “zeroing” practice applied in initial investigations. As a rule, this “zeroing” practice will inflate the margin of dumping even more than the one applied in original investigations. Commerce then calculates importer-specific assessment rates by dividing the amount of dumping on sales to the importer over the entered value of those imports. Commerce applies “zeroing” here as well on a transaction by transaction basis. In essence, the importer pays in excess of the actual margin of dumping of the exporter concerned. No refund proceeding for this excess payment is available.

(f) Exporter-Specific Dumping Margins

Commerce calculates an exporter-specific dumping margin for each individually investigated exporter. If, in an investigation, Commerce determines that an exporter’s dumping margin is zero or *de minimis*, that exporter is excluded from the application of the order, *i.e.*, that exporter’s merchandise is not subject to anti-dumping or countervailing duties or to subsequent review. The exporter’s merchandise enters the United States free of any anti-dumping duty liability.

(g) All Others Rate

When, due to the large number of exporters, Commerce limits the number of individually investigated companies, Commerce calculates what is known as the “all others” rate, which applies to all uninvestigated exporters. The all others rate is the weighted-average of the rates determined for the investigated companies, excluding zero or *de minimis* rates and rates based entirely on facts available. In *U.S. – Japan Hot Rolled Steel*, the WTO Appellate Body found that the Anti-dumping Agreement required the United States to exclude from the all others rate calculation not only margins based entirely on facts available, but also any margins based *in part* on facts available. U.S. law has not yet been amended to implement that decision, although the United States has expressed its intention to do so.

(h) Subsidy

The definition of a subsidy in the U.S. countervailing duty law is taken almost verbatim from the SCM Agreement. The elements of a subsidy are: (1) a financial contribution or income or price support by the government,⁴ which (2) confers a benefit. A subsidy may be subject to countervailing measures only if it is specific.

(i) Financial Contribution

A government financial contribution is deemed to exist if the government

- makes a direct transfer of funds (e.g., grant, loan, equity infusion) or potential transfer of funds (e.g., loan guarantee);
- foregoes or does not collect revenue that is otherwise due (e.g., tax credits);
- provides goods or services, other than general infrastructure, or
- purchases goods

A government financial contribution may be made directly or indirectly. An indirect financial contribution occurs when the government makes a payment to a funding mechanism, or entrusts or directs a private party to make the financial contribution.

(j) Benefit

A benefit is an artificial advantage, *i.e.*, it is the extent to which the recipient is better off than it otherwise would have been absent the government’s financial contribution. To measure a subsidy benefit, therefore, Commerce uses a market benchmark, such as a commercial loan rate (including a risk premium if the recipient is not creditworthy), or a market price for goods provided. The U.S. statutory guidelines for market benchmarks are essentially identical to the guidelines in Article 14 of the SCM Agreement.

⁴ Income or price support has the same meaning as in Article XVI of GATT 1994.

To calculate the subsidy benefit, Commerce compares what the government provided to what the marketplace would have otherwise provided, *e.g.*, the difference between the interest on a government loan and the interest that would have been paid on a comparable commercial loan.⁵ The “net countervailable subsidy” is that difference, less: (1) any fees or similar payments made to qualify for or receive the subsidy; (2) loss in value of the subsidy due to a government-mandated deferral of receipt; and (3) any export taxes, duties or other charges imposed on exports of the subject merchandise to the United States by the foreign government to offset the subsidy.

(k) Specificity

Not all government largesse constitutes a countervailable subsidy. Only subsidies that are “specific” may be subject to countervailing duties. The specificity of an alleged subsidy is often a very contentious issue in a countervailing duty investigation.

A subsidy is specific if it is limited to an enterprise, industry, or group of enterprises or industries within the jurisdiction of the granting authority. Thus, while the specificity of a federal subsidy program is determined at the national level, the specificity of a subsidy granted by a state government is determined at the state level. Moreover, a subsidy may be specific in law (*de jure*) or in fact (*de facto*).

A subsidy is *de jure* specific if the granting authority, or the legislation under which it operates the subsidy program, explicitly limits access to the subsidy to certain enterprises or industries. If, however, the granting authority or the legislation establishes objective, neutral criteria under which eligibility for, and the amount of, the subsidy is determined automatically (*e.g.*, certain tax benefits), the subsidy is *not* specific.

A subsidy is *de facto* specific if, despite the absence of any express limitation,

- the number of actual subsidy recipients is limited,
- a certain enterprise or industry is a predominant user of the subsidy, or
- a certain enterprise or industry receives a disproportionately large amount of the subsidy.

A subsidy that is limited to enterprises or industries within a designated geographical region within the jurisdiction of the granting authority is also specific. (Note that the US also considers “regional aid” i.e. federal government aid to a limited number of regions, to be specific, even if the aid is generally available within the regions concerned).

Finally, subsidies that are contingent on export performance or on the use of domestic over imported goods – the two types of subsidies prohibited under the WTO rules – are deemed to be specific in all cases.

⁵ Certain types of government assistance, such as grants and tax benefits, have no counterpart in the market. Thus, the benefit from a grant or tax credit is simply the face value.

(l) Allocation of the Benefit

Commerce determines the subsidy benefit received in a particular period based on when the benefit is realized by the recipient. When the benefit is realized depends upon whether the subsidy is “recurring” or “non-recurring.”

Recurring subsidies are those that provide benefits on a recurring basis. For example, the Commerce Regulations identify tax exemptions, price supports and the provision of goods or services as types of subsidies that Commerce will normally treat as providing recurring benefits. The benefit from a recurring subsidy is expensed in the year of receipt. For example, in the case of a direct tax credit the benefit (tax savings) is received each year when the company files its tax return. The benefit is therefore attributed to that year.

In addition, if the subsidy benefits may fluctuate from year to year, Commerce treats the subsidy as recurring. For example, a long-term variable rate loan is a recurring subsidy. The amount of the benefit varies from year to year with the interest rate, and the benefit received each year is expensed in that year.

Non-recurring subsidies generally provide a lump sum benefit amount. For example, the Commerce Regulations specifically identify grants, debt forgiveness and equity infusions as types of subsidies that Commerce normally treats as non-recurring. In the case of a non-recurring subsidy, Commerce calculates the benefit (*e.g.*, the amount of the grant or debt forgiveness) then amortizes the benefit over a certain number of years, based on the average useful life of assets in the industry, using a declining balance method. The rationale is that, given the time value of money, the value of the benefit realized in each subsequent year diminishes. The “time value of money” approach inflates the face amount of the subsidy to take account of notional interest on the unamortized part ; as the unamortized amount declines every year, the amount of subsidy allocated to each year declines. Thus, the benefit calculated for the period of investigation or review will be lower the further removed in time the investigation or review is from the time at which the subsidy was granted, *i.e.*, where you are in the benefit stream.

In a recent change in methodology (June 2003), the US accepted that a privatization or other change in ownership, at arms-length and for fair market value, removes the benefit of prior non-recurring subsidies. This change was made following the *British Steel (DS138)* and *Certain products from the EC (DS212)* WTO cases brought by the EC.

(m) Subsidy Rate Calculation

Once the amount of the benefit for a particular period has been calculated, Commerce calculates the *ad valorem* subsidy rate by attributing the benefit to production. Commerce attributes export subsidies only to products that were exported during the period. In contrast, all other subsidies (“domestic” subsidies) are attributed to all products sold by the company during the period.

Subsidy Program A (export subsidy)

Net benefit during the period: \$100 ÷

| | |
|---------------------------------------|----------|
| Total Export Sales during the period: | \$10,000 |
| Subsidy Rate: | 1% |

Subsidy Program B (domestic subsidy)

| | |
|--------------------------------|-----------|
| Net benefit during the period: | \$2,000 ÷ |
| Total Sales during the period: | \$40,000 |
| Subsidy Rate: | 5% |

| | |
|---------------------------------------|----|
| Total <i>Ad Valorem</i> Subsidy Rate: | 6% |
|---------------------------------------|----|

(n) Non-Market Economies

Although there is no explicit exclusion of non-market economies in the U.S. countervailing duty law, Commerce's longstanding interpretation of the law is that it does not apply to non-market economies. In the landmark decision in *Georgetown Steel*, the Court of Appeals upheld Commerce's interpretation. However, primarily in response to concerns about imports from China, legislation has recently been introduced in the U.S. Congress that would explicitly apply the countervailing duty law to non-market economies.

(o) Injury

As noted above, under the bifurcated U.S. system, the ITC is responsible for making the injury determination. Anti-dumping or countervailing duties may be imposed only if the domestic industry is materially injured, or threatened with material injury, or the establishment of an industry is materially retarded, by reason of the dumped or subsidized imports. The ITC therefore must find both injury and a causal link between the imports and the injury.

(p) Like Product

The ITC must determine whether there is injury to the domestic industry, which is generally defined as producers of the "domestic like product." The Commission's injury analysis must therefore begin with defining the like product and the U.S. industry. Note that the ITC's like product determination may differ from the like product used by Commerce to determine industry support for purposes of initiation (see discussion of Procedures below).

The domestic like product is defined as the product that is "like," or "most similar in characteristics and uses," to the subject imports. In determining the domestic like product, the ITC considers: physical characteristics and uses; channels of distribution; common manufacturing facilities, production processes, and production employees; customer and producer perceptions; and, if appropriate, price.⁶ No single factor is determinative and the ITC may consider other factors, as appropriate.

⁶ Note that these factors are very similar to those used by Commerce to determine if the subject imports constitute a single class or kind of merchandise or multiple classes or kinds. See footnote 9, below.

In defining the like product, the ITC ignores minor product variations and looks for clear dividing lines. Thus, the ITC may define the domestic like product to include a broader range of merchandise than is within the class or kind of imports under investigation (e.g., the domestic like product might be “widgets” even though only imports of “blue” widgets are under investigation). The Commission may also find that there are multiple domestic like products that correspond to the class or kind of imports under investigation (e.g., if the class or kind of imports were citrus fruit, lemons, limes and oranges might constitute separate domestic like products).

Once the Commission defines the domestic like product, the industry is normally defined as all U.S. producers of that product. The only exceptions to that general rule are where a “regional industry” exists, and the exclusion of certain related parties.

(q) Material Injury

The statute defines material injury as “harm which is not inconsequential, immaterial, or unimportant.”⁷ In determining whether material injury exists, the Commission must consider: the volume of the subject imports, the effect of the imports on prices in the United States for the domestic like product (price undercutting, price depression, or price suppression), and the impact of the imports on U.S. producers of a domestic like product (e.g., declines in output, sales, market share, profits, employment).

(r) Cumulation

In evaluating injury, the statute requires the Commission to cumulatively assess the impact of imports from all countries with respect to which petitions were filed, or cases were self-initiated, on the same day, if the imports compete with each and with domestic like products in the United States. In evaluating a threat of injury, the Commission has the discretion to do a cumulative assessment but is not required to do so.

2.2 Procedure

(a) Overview of Procedures

Generally, the procedures for anti-dumping and countervailing duty investigations are identical, but there are a few differences, primarily in the timing of decisions. An investigation normally takes between 12 and 18 months, with many, if not most, cases probably falling within the 15-18 month range. There are five determinations made during the course of the investigation, which occur in the following order: Commerce’s decision to initiate, the ITC’s preliminary injury determination (if negative the entire proceeding is immediately terminated), Commerce’s preliminary dumping or subsidy determination, Commerce’s final dumping or subsidy determination and, finally, the ITC’s final injury determination.

The timeline for these determinations is set out below. Notice of each of the Commerce and ITC determinations is published in the Federal Register. The bases for Commerce’s preliminary determinations are normally explained in the Federal Register notice. Commerce final

⁷ Section 771(7) of the Act.

determinations, however, are normally more lengthy because they also respond to comments submitted by interested parties on the preliminary determination. Thus, although Commerce publishes a notice of the final determination in the Federal Register, the explanation for the decision and the agency's response to comments is contained in a "Decision Memorandum" posted on Import Administration's website (<http://ia.ita.doc.gov>). Similarly, the ITC also publishes a notice of its preliminary and final injury determinations in the Federal Register, but the detailed explanation of the decisions is contained in published reports which are posted on the ITC's website (<http://usitc.gov>).

| STAGE | WHAT HAPPENS | TIMING |
|--|---|---|
| <i>Petition</i> | Industry files petition simultaneously with Commerce and the ITC | |
| <i>Initiation</i> | Commerce initiates an investigation against one or a number of countries | 20 days for Commerce to decide whether to initiate; may be extended another 20 days if necessary to determine industry support |
| <i>ITC Preliminary Injury Determination</i> | The ITC determines whether there is a “reasonable indication” of material injury; if the ITC preliminary determination is negative the investigation is terminated | Within 45 days of the filing of the petition or, if Commerce extended the period of initiation, 25 days after receiving notice of Commerce’s decision to initiate |
| <i>Commerce Preliminary Determination and Provisional measures</i> | If Commerce makes an affirmative preliminary determination, Commerce orders Customs to suspend liquidation ⁸ of entries of the subject merchandise and to collect cash deposits or bonds for all entries of subject merchandise on or after the date of publication of the preliminary determination; if Commerce makes a negative preliminary determination, the investigation continues but these provisional measures are not imposed | AD prelim within 140 days from initiation; can be extended to 190 days CVD prelim within 65 days from initiation; can be extended to 130 days; AD - provisional measures may be imposed for 4 to 6 months CVD – provisional measures for 4 months only |
| <i>Undertakings</i> | Price undertakings (AD), or Quotas or elimination of subsidies (CVD), may be proposed by exporter to Commerce | After an affirmative preliminary determination, up to 30 days prior to the final determination |
| <i>Commerce Final Determination</i> | If Commerce makes an affirmative final determination, Commerce orders Customs to continue suspension of liquidation (i.e., suspension of final assessment) and to collect cash deposits; if Commerce makes a negative final determination, the investigation is terminated, suspension of liquidation is discontinued and all cash deposits are refunded | Final determination within 75 days after prelim; may be extended to 135 days in AD cases; CVD final may be aligned with AD final if there are simultaneous cases. |

⁸ “Liquidation” refers to the final assessment of duties, i.e., a “liquidated” Customs entry means that the merchandise has entered the United States and the final duty liability has been determined and assessed. When liquidation is suspended, the goods enter the United States but Customs does not assess final duties because the final assessment amount has not yet been determined.

| | | |
|--|---|--|
| <i>ITC Final Injury Determination</i> | If the ITC makes an affirmative final determination of injury, Commerce issues an anti-dumping or countervailing duty order; cash deposits at the rates established in Commerce’s final determination are required for all entries of subject merchandise on or after the date of the ITC final determination, bonds are no longer sufficient. If the ITC determination is negative, Commerce orders Customs to discontinue suspension of liquidation and return all cash deposits. | ITC final within 120 days of affirmative Commerce prelim, or 45 days of affirmative Commerce final, whichever is later. If Commerce prelim is negative but final is affirmative, 75 days from Commerce final Commerce publishes AD/CVD Order within 7 days of notification of ITC final |
| <i>Administrative Review</i> | Each year, an interested party may request a review to determine the amount of duties to be assessed on specific entries during the previous 12 months (18 months for the first review period). If no review is requested for a particular exporter, entries of that exporter’s merchandise will be assessed at the cash deposit rate in effect at the time of entry. | Requests for administrative (assessment) review must be made during the anniversary month of the order |
| <i>Expiry (“Sunset”) Review</i> | The order is revoked unless Commerce and the ITC determine that dumping or subsidization and injury are likely to continue or recur; revocation is effective as of the fifth anniversary of the order. All subsequent entries are liquidated without regard to AD/CVD duties. | Sunset reviews are automatically initiated 30 days prior to the fifth anniversary of the order |

(b) Petition and Initiation

Typically, anti-dumping and anti-subsidy investigations are initiated by a petition filed by the domestic industry. Petitions are filed simultaneously with Commerce and the ITC, but Commerce makes the decision whether to initiate an investigation. Commerce does have the authority to self-initiate an investigation, but that authority has rarely been used.

A petition may be filed by any domestic “interested party”, which is defined to include: U.S. manufacturers, producers or wholesalers of a domestic like product; a 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; a trade or business association a majority of whose members manufacture, produce or wholesale a domestic like product in the United States, and an association, a majority of whose members are composed of interested parties that fall within the preceding groups.

Potential petitioners may, and normally do, submit draft petitions to Commerce for review and comment before they are formally filed. This “pre-petition counseling” enables Commerce to

make petitioners aware of potential problems, such as the adequacy of supporting information. If Commerce raises significant concerns with a draft petition and those concerns cannot be addressed, it is unlikely that the petition will ever be formally filed. Commerce is prohibited from disclosing the existence of a draft petition.

(c) Petition Requirements

In addition to identifying the petitioner, a petition must contain information reasonably available to the petitioner on: (1) the identity of the industry on behalf of which the petitioner is filing, including the names and contact information for all other known members of the industry; (2) the degree of industry support for the petition, including the volume and value of U.S. production of the domestic like product, and the volume and value of the domestic like product produced by the petitioner and each of the other identified producers; (3) a detailed description of the subject imports, including technical characteristics, uses and tariff classification; (4) the name of the country (or countries) where the subject imports are produced; and (5) the names and addresses of each person alleged to be dumping or receiving subsidies and the percentage of total exports to the United States accounted for by that person in the most recent 12-month period.

The petition must also allege the elements necessary for the imposition of anti-dumping or countervailing duties (i.e., dumping or subsidization and injury) and provide information reasonably available to the petitioner in support of those allegations, in particular documentary evidence on export price and normal value, or the alleged subsidy.

When a petition is filed, it is a public document that immediately becomes part of the administrative record of the investigation. Although the public has access to petitions, Commerce does not publicize their existence.

(d) Standard for Initiation

Although a petition is filed simultaneously with Commerce and the ITC, as noted above, Commerce has sole authority to determine whether the petition is sufficient to warrant an investigation. In order to initiate an investigation, Commerce must determine that the petition alleges the elements necessary for relief and includes information reasonably available to the petitioner supporting the allegations. With the exception of the industry support determination (discussed below), Commerce's initiation decision is generally based on the adequacy and accuracy of the information contained in the petition. Commerce may ask the petitioner for additional information or clarification. However, Commerce does not accept comments on the petition from other interested parties, except for comments pertaining to industry support.

(e) Industry Support

Commerce must also determine that the petition is supported by the U.S. domestic industry, a decision that is subject to strict numerical requirements. The requisite industry support exists if: (1) domestic producers or workers supporting the petition account for at least 25% of total production of the domestic like product, and (2) those supporting domestic producers and workers account for at least 50% of the production of the domestic like product by that portion of the industry that expresses either support for, or opposition to, the petition. Normally,

Commerce will conduct the industry support analysis on the basis of the like product defined in the petition. It is not uncommon, however, for the like product definition to be heavily disputed at the ITC for purposes of the injury analysis.

INDUSTRY SUPPORT

If the petition itself does not establish support by producers or workers accounting for more than 50% of total production, Commerce is required to poll the industry or rely on other information to determine if the requisite support exists. Polling situations rarely arise, however. Expressions of support or opposition by workers and the position of management are given equal weight. As a result, if workers and management express opposing views they cancel each other out and are counted as neutral. Moreover, except where the facts demonstrate the existence of a regional industry, the ITC examines the domestic industry “as a whole”, *i.e.*, all producers of the domestic like product. The ITC’s investigation is not limited to petitioners.

(f) Time Limits

Normally, Commerce must decide whether to initiate within 20 days after the filing of the petition. If additional time is necessary to determine whether the requisite industry support exists, Commerce may extend the initiation decision for 20 days, with a total of 40 days being the maximum time within which Commerce may make the initiation decision. Occasionally, if a petitioner believes that Commerce has significant problems with a petition (usually in the area of industry support) the petitioner will withdraw the petition before the deadline to avoid having the petition rejected. The petitioner may then revise and resubmit the petition. If a petition meets the statutory requirements, Commerce must initiate the investigation. Commerce does not have the discretion to decline a legally valid petition.

(g) Target of the Investigation

A single petition normally covers a single “class or kind” of merchandise, but may cover imports of the subject merchandise from multiple countries. Commerce treats multi-country petitions as requests for separate investigations of imports from each country. Thus, Commerce will initiate separate proceedings for each country, with a separate case number and administrative record. Occasionally, respondents claim that the petition covers multiple classes or kinds of merchandise. If Commerce determines that is the case, it will define the separate classes or kinds of merchandise and conduct separate investigations of each.⁹

(h) Notice of Initiation

Commerce will publish in the Federal Register a Notice of Initiation which identifies the petitioner, the products and countries subject to investigation and an explanation of Commerce’s examination of the allegations and information in the petition.

⁹ To define a “class or kind” of merchandise Commerce considers the following factors: physical characteristics; expectations of the ultimate purchaser; ultimate use of the product; and channels of trade in which the product is advertised and sold.

(i) ITC Preliminary Investigation Phase

Because the ITC is required to make a preliminary injury finding within 25 days after initiation, the ITC initiates the preliminary phase of its investigation very soon after a petition is filed. In this preliminary phase, the ITC issues questionnaires to domestic producers of the “like” product, U.S. importers and foreign producers. Normally, approximately three weeks after the petition is filed, the ITC also holds a public conference with the investigation staff (Commissioners are not present). At the staff conference, interested parties may present legal and factual arguments and testimony by witnesses. The ITC staff may ask questions, and usually does so. Parties may also file post-conference briefs. The staff then prepares a report to the Commission presenting and analyzing all of the information obtained during the preliminary phase of the investigation.

Approximately four days after receiving the report, the Commission holds a public meeting in which the Commissioners may question the staff and then each Commissioner announces his or her vote on the preliminary injury determination. The vote of the majority constitutes the determination of the Commission. A tied vote is deemed to be an affirmative determination.

(j) Negligibility

An investigation must be terminated immediately if the Commission finds that imports of the subject merchandise are “negligible”. Negligible imports are defined as imports accounting for less than 3 percent of the volume of all such products imported into the United States in the most recent 12-month period preceding the filing of the petition for which data is available. If cases are initiated on multiple countries (on the same day) that individually account for less than 3 percent of the total volume of subject imports, but imports from those countries collectively exceed 7 percent of total imports, the imports for those countries are deemed not to be negligible.

(k) Period of Investigation

In a dumping investigation, Commerce normally examines sales made during the four most recently completed fiscal quarters as of the month preceding the month in which the petition was filed. In a subsidy investigation, Commerce normally will examine information relating to the most recently completed fiscal year for the government and the exporters. If the fiscal years differ, Commerce normally looks at the most recently completed calendar year.

The ITC’s injury investigation generally covers the three years prior to filing of the petition but that information is normally updated in the final phase of the investigation to include more recent data.

(l) Questionnaire

Commerce obtains the bulk of the information considered in an investigation by issuing questionnaires and verifying the responses to the questionnaires. Questionnaires contain instructions for completion, including the time period for which data is requested and definitions of terms, and the deadline for responding to the questionnaire. Responses to the original (“standard”) questionnaire are reviewed by the case analysts, and supplemental questionnaires are sent out to clarify the initial response and obtain additional information, as necessary.

Normally, at least one round of supplemental questionnaires is necessary. Multiple supplemental questionnaires, time permitting, are not uncommon.

(m) Description of the Standard Dumping Questionnaire

Commerce's initial anti-dumping questionnaire is highly standardized, but may be tailored, as necessary, to meet the specific needs of a particular case. Normally, in an investigation, the questionnaire is sent out as soon as possible, at least by the time of the ITC's preliminary injury determination. The questionnaire is divided into five parts:

Section A. This section may be sent out in advance of the other sections. The Section A information is relevant to certain methodological decisions that Commerce must make, and the Section A response may be used to tailor the remainder of the questionnaire, as appropriate. For example, Section A requests information on the volume and value of sales to the United States and in the home market and, if necessary, third country markets. This information is necessary to determine the appropriate market in which to calculate normal value. Section A also requests information on corporate structure and affiliations and sales to affiliated parties which is necessary, for example, to determine if an export price or constructed export price calculation is appropriate. Section A also requests information on the sales and distribution process; accounting and financial practices; the merchandise sold to the United States and the merchandise sold in the home (or third country) market; further manufacturing in the United States; and exports through intermediate countries.

Section B (Normal Value). The response to this section is comprised of two parts: a computer tape or disk containing information on all home market sales during the POI, including product and customer identifiers, dates of sale, quantities, prices and adjustments to price (e.g., level of trade, indirect expenses, packing costs); and (2) a narrative description of each of the elements in the sales listing.

Section C (Export Price). This section requests for sales to the United States the same information requested in Section B for home market sales. In addition, Section C also requests information on international movement charges and duty drawback,¹⁰ and information to determine if export price or constructed export price is appropriate.

Section D (Cost of Production). Section D seeks information on the cost to produce the merchandise. This section is required if it is likely that normal value will be based on a constructed value. For example, section D is required if the petitioner makes a timely allegation that the respondent is making sales in the home market at prices below the cost of production.

Section E. This section is used, if necessary, to obtain information on further manufacturing in the United States.

Non-Market Economy Questionnaires. In cases involving a non-market economy, Commerce uses a special questionnaire that requests information on the producer's factors of production in

¹⁰ "Duty drawback" refers to programs under which the duties paid on imported inputs are refunded when the products produced from those inputs are exported.

lieu of Section B of the standard questionnaire. In addition, NME exporters who wish to receive a company-specific rate must complete a “separate rates” questionnaire to establish that the company’s export activities are free of government control.

(n) Time Limits

Normally, respondents are given 21 days from issuance of the questionnaire to complete Section A, and at least 30 days from receipt of the questionnaire for the remaining sections. Extensions may be requested, but must be in writing and filed *before* the deadline expires. Normally, extensions do not exceed two weeks. It is common for Commerce to grant one two-week extension of the 30-day deadline to respond to the initial questionnaire. Subsequent extensions are much less common, as are extensions for responding to supplemental questionnaires.

(o) Verification

In an investigation, Commerce bases its preliminary dumping determination on the unverified questionnaire responses. Verification takes place after the preliminary determination. Verification of the export price and normal value questionnaires normally takes one week. If there is also a cost questionnaire response (Section D), verification of that response normally takes an additional week. In addition, where U.S. sales are made through an affiliate in the United States, Commerce will also conduct a sales verification in the United States, which normally takes approximately one week. In subsidy cases, information received from the government is also verified.

Normally at least two weeks prior to verification, Commerce sends the respondent a standardized verification outline which sets out the various steps in verification, and the records and supporting information that Commerce will need to examine at verification. The outline identifies specific transactions in the sales database that will be verified and notifies the respondent that an additional group of unidentified transactions will also be verified.

The key element of verification is the completeness checks. These are the various means by which Commerce tests the thoroughness and accuracy of the information in the questionnaire response. The most import of these checks is for completeness and accuracy in the listing of U.S. and home market sales.

Following verification, Commerce issues a Verification Report. The purpose of the verification report is to create a factual record of what was done at verification and the results, *i.e.*, whether the information in the response was verified, or whether discrepancies were found. The report is intended to be purely factual. The report does not contain an analysis of the information verified or draw any conclusions.

(p) Written Argument

In an investigation, within 50 days of publication of the preliminary determination, interested parties may submit written comments on the preliminary determination (commonly referred to as a “case brief”). Within 5 days after the deadline for case briefs, parties may submit rebuttal briefs, which must be limited to issues raised in case briefs.

Comments typically address both legal and methodological issues and questions of fact. Case briefs should contain the party's comments on all issues the party believes to be in dispute. In the final determination, Commerce will only address those comments raised in the case briefs. Failure to address an issue in the case brief may affect the party's ability to raise that issue in a subsequent court challenge.

(q) Hearings

Within 30 days after publication of the preliminary determination, any interested party may request a public hearing. The purpose of the hearing, which takes place late in the investigation, is not for parties to raise new issues. Rather, the purpose is to clarify or elaborate on issues previously raised. Under Commerce's regulations, parties may make an affirmative presentation at the hearing only on issues raised in their case brief, and may make a rebuttal presentation only on issues raised in that party's rebuttal brief.

(r) Disclosure and Access to Information

U.S. law requires that the administrative records of anti-dumping and countervailing duty proceedings include copies of all information presented to or obtained by Commerce during the course of the administrative proceeding, including all government memoranda pertaining to the case and a record of any *ex parte* meetings with decision-makers.

Interested parties have extensive access to the administrative record, which is facilitated by a requirement that written submissions must be provided ("served") by the submitting party to all other interested parties. Commerce maintains two "service lists."

Public Service List. All parties that participate in a proceeding are placed on a "public" service list. Whenever a party makes a submission, the party must provide each person on the public service list with a copy of the public version of the submission. In the public version all business proprietary information is redacted.

APO Service List. The other service list is comprised of independent representatives (normally legal counsel) who have applied for and been granted access to business proprietary information under what is known as an Administrative Protective Order (APO). Copies of the business proprietary version of all submissions must be provided by the submitting party to all individuals on the APO service list.

The public and APO service lists for each proceeding are available on Import Administration's website.

Only in very limited circumstances does Commerce decline to release certain information under APO (*e.g.*, to protect certain confidential sources). Thus, normally the representatives have access to the full administrative record on which Commerce will base its determination.

Normally within five days of issuing a preliminary or final determination, Commerce discloses its calculations, including computer printouts, under APO and will, if requested, conduct a

disclosure conference. The scope of disclosure is normally limited to a factual presentation by Commerce of the calculations. Although Commerce will answer specific factual questions, legal or methodological arguments and comments are not normally addressed during disclosure.

Within five days of disclosure, a party may submit comments on what it believes to be “ministerial” errors in the calculation. A ministerial error is defined as an error in an arithmetic function, a clerical error resulting from (e.g.) inaccurate copying, and similar types of unintentional administrative errors.

Commerce will correct a “significant” ministerial error in a preliminary determination. A significant error is defined as one that makes a difference of at least 5 percentage points, but not less than 25 percent of the weighted average margin. Commerce will amend a final determination to correct *any* ministerial error.

(s) Overview of Duties

The United States has a “retrospective” assessment system. Under that system, the liability for antidumping duties attaches at the time of entry, but duties are not actually assessed until later. At the time of importation, Customs collects security in the form of a cash deposit or bond to cover the estimated duty liability. Definitive duties are not assessed until at least one year later, when parties have the opportunity to request an “administrative review” to determine the amount of the assessment. As noted above, the assessment of the final liability is based on a methodology incorporating “zeroing”.

(t) Provisional Measures

When Commerce issues a preliminary affirmative determination of dumping or subsidization, it orders the imposition of provisional measures. Specifically, Commerce instructs Customs to suspend liquidation (*i.e.*, final duty assessment) of entries of the subject merchandise on or after the date of publication of the preliminary determination, and to require the importer to post a cash deposit or bond in the amount of the estimated anti-dumping or countervailing duties. After publication of the ITC’s final injury determination, the “provisional measures” period is over and bonds in lieu of cash deposits are no longer permitted. A cash deposit in the amount of the estimated duties is required on all future imports.

(u) Final Phase of ITC Injury Investigation

Following Commerce’s preliminary determination of dumping or subsidization, the ITC enters the final stage of its injury investigation. Taking into account the record developed during the preliminary phase and any comments by Commissioners on data collection issues, the staff prepares questionnaires for U.S. and foreign producers, U.S. importers and U.S. purchasers to obtain the information necessary for a final determination.

The staff again prepares a report for the Commission presenting and analyzing all of the information obtained during the investigation. Parties also receive the staff report and may file pre-hearing briefs.

Soon after Commerce issues a final affirmative determination of dumping or subsidization, the Commission holds a public hearing. The hearing is considered a forum for fact finding. The Commissioners ask questions and solicit information. Parties express their views and may submit supplemental information. Persons testify at the hearing under oath.

Following the hearing, the staff prepares a final report to the Commission. The public record is then closed and parties have an opportunity to comment on information on which they have not previously had an opportunity to comment.

Shortly after the deadline for final comments, the Commission holds a public briefing and votes.

(v) Definitive Duties

Within seven days after an affirmative final determination of injury by the ITC, Commerce issues an anti-dumping or countervailing duty order in which it instructs Customs to impose duties “upon further advice” from Commerce. Thus, although definitive duties are ordered, Commerce’s advice as to the amount of those duties comes later.

Once a year, during the anniversary month of the anti-dumping or countervailing duty order, interested parties may request a review to determine the amount of duties to be assessed on each entry made during the previous year (“period of review”).¹¹ Antidumping duties are calculated based on sales data during the period of review. The duties are calculated on a transaction-specific basis and are assessed on an importer-specific basis. Countervailing duties are calculated based on the amount of the subsidy benefit received during the period of review. Based on the results of the review, Commerce advises Customs regarding the amount of duties to be assessed on imports made during the period of review.

If, based on the results of the review, the duties owed are less than the cash deposits, the excess cash deposits are refunded with interest. If the duties owed exceed the cash deposits the additional duties, plus interest, are collected.

If no review is requested, soon after the close of the anniversary month Commerce advises Customs to assess duties on imports during the review period in an amount equal to the cash deposits paid at the time of importation -- a process referred to as “automatic assessment.”

(w) Undertakings

Commerce has sole authority to negotiate undertakings, commonly referred to under U.S. law as “suspension agreements.” Commerce’s longstanding policy is that suspension agreements are a sparingly used exception to the normal remedy, *i.e.*, the imposition of duties. The majority of suspension agreements have been accepted in non-market economy cases.

¹¹ The first review period is normally approximately 18 months because it covers imports on or after the date of the preliminary determination, up through the month preceding the anniversary month of the order.

(x) Structure of an Undertaking

Generally, the law provides that a suspension agreement will require:

- the exporters accounting for substantially all (at least 85%) of the imports to eliminate dumped sales by either (a) ceasing exports to the United States, or (b) not selling the subject merchandise for export to the United States at prices less than a specified constructed normal value;
- the government of the exporting country, or exporters accounting for substantially all of the imports agree to eliminate subsidized imports by either (a) ceasing exports to the United States, or (b) eliminating or offsetting the subsidy; or
- the government or exporters agree to eliminate the injurious effects of dumped or subsidized imports (this type of agreement is very rare; it may only be used in if Commerce determines it is “more beneficial” to the domestic industry than continuation of the investigation); or
- the foreign government agrees to restrict the volume of exports to the United States (countervailing duty and non-market economy cases only).

In addition, Commerce may not accept a suspension agreement unless it determines that the agreement is in the public interest and that effective monitoring of the agreement is practicable.

(y) Types of Duties

Normally Commerce assesses duties on an *ad valorem* basis.¹² As explained above, for antidumping duties, the *ad valorem* rate is normally calculated on an importer-specific basis, by dividing the total amount of dumping duties owed on the transactions examined by the entered value of the imports during the period of review. For countervailing duties, the *ad valorem* rate is normally calculated by dividing the total amount of the subsidy benefit received during the period of review by total value of the relevant sales during the period.

(z) Level of Duties

The United States does not have a lesser duty rule. Commerce is required by law to impose duties in an amount equal to the amount of dumping or subsidization found to exist.

(aa) Duty Absorption

During the second and fourth review periods following publication of an anti-dumping duty order, Commerce will, upon request, determine whether duties have been absorbed by the foreign producer or exporter. This situation normally arises when the goods are sold in the United States through an affiliated party or when the exporter is itself also the importer. In such

¹² In exceptional cases, Commerce has calculated a specific duty amount (e.g., x cents per pound).

cases, Commerce will normally find that duty absorption exists unless the foreign producer or exporter can demonstrate that the cost of the duties has been passed on to the first unaffiliated purchaser in the United States.

Commerce notifies the ITC of the results of the duty absorption inquiry for the ITC to consider in the five-year sunset review. The duty absorption finding does not, however, have any effect on Commerce's calculation of the anti-dumping duties to be assessed.

(bb) Scope

While an order is in effect, questions may arise whether a specific product falls within the scope of the order. Questions concerning the scope of an order are resolved by Commerce. An interested party may submit technical information concerning a particular product and request that Commerce make a scope ruling. If Commerce can decide the issue based on the language of the scope and prior determinations by Commerce and the Commission, it will make a ruling without conducting a formal inquiry. If the issue is more complex, however, Commerce will initiate a formal inquiry and solicit information and comment from interested parties.

(cc) Circumvention

An interested party may request that Commerce conduct an inquiry to determine whether certain imports are circumventing the order. There are three types of circumvention inquiries: (1) products that have undergone a "minor alteration" such that they now fall outside the technical description in the scope; (2) products that are comprised of inputs from the subject country but undergo minor assembly in a third country before importation into the United States; and (3) imports into the United States of parts and components that then undergo minor assembly in the United States.

(dd) Revocation

Commerce has two procedures under which an order may be revoked, in whole or in part, other than through a five-year sunset review (discussed below). First, if the producer/exporter has been found not to be dumping in three consecutive review periods, Commerce will revoke the order with respect to that producer/exporter, unless there is substantial evidence that revocation is likely to lead to a recurrence of dumping. In addition, Commerce has broad authority to revoke an order, in whole or in part, whenever it determines that there are "changed circumstances" sufficient to warrant revocation. Normally, this procedure is used when the domestic industry no longer has an interest in maintaining all or a part of the order. If substantially all of the industry expresses no further interest, Commerce will revoke.

(ee) Sunset

Every five years an anti-dumping or countervailing duty order must be reviewed to determine whether dumping or subsidies and material injury are likely to continue or recur if the order is revoked. If the decision regarding either dumping/subsidies or injury is negative, the order is revoked. This is known as a "five year sunset review." As in the original investigation, Commerce makes the determination with respect to dumping or subsidies and the ITC makes the

determination with respect to injury. Initiation of the sunset review is automatic. No later than 30 days prior to the fifth anniversary of the order, Commerce must publish a notice initiating the review. If no interested party responds to the Notice of Initiation, or the responses do not contain all the required information, Commerce and the ITC will conduct the review under an expedited schedule. Parties may waive participation in the Commerce proceeding, in which case Commerce would issue a decision that dumping or subsidies are likely to continue or recur. Parties would then focus solely on the ITC's review of injury. The U.S. waiver provisions were found to be inconsistent with the WTO Anti-dumping Agreement in *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*.

(ff) Judicial Review

Any interested party who participated in the anti-dumping or countervailing duty proceeding (i.e., investigation, review, scope determination, anti-circumvention inquiry) has the right to challenge the results of that proceeding in the Court of International Trade (CIT). A majority of cases are challenged in court.

The CIT does not review the determinations of Commerce and the ITC *de novo*. Rather, the court reviews the determination "on the record" and will reverse the decisions of those agencies only if the determination is not supported by substantial evidence or is not otherwise in accordance with the law. The CIT is required to accord the agency deference in interpreting the statute and regulations that it administers. On findings of fact, the purpose of the court is to determine whether the agency's determination is supported by the evidence, not whether the court would have reached the same or a different conclusion based on the record evidence.

Despite this deferential standard of review, the CIT frequently overturns the agency's determination in at least some respects. In such cases, the court remands the decision to the agency for further consideration in light of the court's opinion.

Once the decision of the CIT is final, the agencies or the parties have the right to appeal the court's decision to the Court of Appeals for the Federal Circuit (CAFC).

3. SAFEGUARDS

3.1 Substance

(a) Summary of Statute and Regulations

The global U.S. safeguards law is found in Title II (Sections 201-204) of the Trade Act of 1974, as amended. A global safeguards action under U.S. law is often referred as a "Section 201" action due to its location in the Trade Act. The U.S. law implements U.S. obligations under the WTO Agreement on Safeguards and Article XIX of GATT 1994. The regulations of the U.S. International Trade Commission (the "ITC") governing Section 201 investigations can be found at 19 Code of Federal Regulations, Part 206.

Section 201 allows the United States to escape from its obligations under international trade agreements when increased imports of a product are found to be a substantial cause of serious

injury, or threat of serious injury, to the U.S. industry producing a like or directly competitive product. Safeguard measures are intended to be of limited duration while the domestic industry adjusts to import competition.

Global safeguards do not require the finding of an unfair trade practice as in the case of U.S. antidumping and countervailing duty laws. Another major difference from the unfair trade practice statutes is that safeguard investigations apply to all countries that export the subject merchandise to the U.S., while antidumping and countervailing duty proceedings are country specific.

The ITC is responsible for conducting safeguard investigations, although the President makes the final determination as to whether relief will be provided and the extent of that relief. The ITC's investigation is conducted in two phases: the injury phase and the remedy phase.

(b) Injury Phase Considerations

During the injury phase of an investigation, the ITC considers three basic criteria: (i) whether imports of the subject merchandise have increased; (ii) whether U.S. producers of a like or directly competitive product with the subject merchandise are being seriously injured, or threatened with serious injury; and (iii) whether the increased imports were the substantial cause of the serious injury or threat of serious injury to the domestic industry.

(c) Increased Imports

Imports are considered to have increased when the increase is "either actual or relative to domestic production." The U.S. safeguards law does not specify a minimum amount by which imports must have increased, nor the time period during which the increase must have occurred. Typically, the ITC will examine the import trends over the most recent five-year period. The ITC has considered longer and shorter periods, however, when warranted by the circumstances.

(d) Injury or Threat of Injury to the Domestic Industry

The ITC must find that the domestic industry is seriously injured or threatened with serious injury at the time the ITC makes its determination. The injury standard under Section 201 is considered to be more difficult to meet than the injury standard in the antidumping and countervailing duty statutes because of its requirements that the injury or threatened injury must be *serious*. The term "serious injury" is defined as "a significant overall impairment in the position of a domestic industry." The term "threat of serious injury" is defined as "serious injury that is clearly imminent."

In making its determination of serious injury, the ITC must consider all relevant economic factors, including, but not limited to:

- (i) the significant idling of productive facilities in the domestic industry;
- (ii) the inability of a significant number of firms to carry out domestic production operations at a reasonable level of profit; and

(iii) significant unemployment or underemployment within the domestic industry.

With respect to determining whether a threat of serious injury exists, the ITC is also directed to consider all relevant economic factors, including, but not limited to:

(i) a decline in sales or market share, a higher and growing inventory (whether maintained by domestic producers, importers, wholesalers, or retailers), and a downward trend in production, profits, wages, productivity, or employment (or increasing underemployment) in the domestic industry;

(ii) the extent to which firms in the domestic industry are unable to generate adequate capital to finance the modernization of their domestic plants and equipment, or are unable to maintain existing levels of expenditures for research and development; and

(iii) the extent to which the United States market is the focal point for the diversion of exports of the article concerned by reason of restraints on exports of such article to, or on imports of such article into, third country markets.

In examining whether serious injury or threat exists, the ITC should not regard the presence or absence of any of the economic factors that it is required to evaluate as being “necessarily dispositive.”

(e) Causation

The causation requirement under Section 201 is considered to be more difficult to meet than the causation requirement in the antidumping and countervailing duty statutes because increased imports must be a “substantial cause” of injury. As defined in the statute, “substantial cause” means a “cause which is important and not less than any other cause.” In determining whether increased imports are a substantial cause of serious injury, the ITC is directed by the statute to “consider the condition of the domestic industry over the course of the relevant business cycle,” but the ITC “may not aggregate the causes of declining demand associated with a recession or economic downturn in the United States economy into a single cause of serious injury or threat of injury.” The statute also directs the ITC to “examine factors other than imports” that may be a cause of injury and include the results of its examination in its report. The ITC typically engages in a two part analysis, first examining whether the increased imports are an important cause of the serious injury, or threat, and second, if they are, whether other possible causes of injury are a more important cause of the serious injury. The ITC is not required to make a finding that an injury caused by other factors is not attributable to imports.

(f) Adjustment Plans

Petitioners may submit to the ITC an adjustment plan to explain how the domestic industry plans to facilitate positive adjustment to import competition, either at the time the petition is filed or within 120 days of the filing of the petition. The ITC, in determining what action to recommend, and the President, in deciding whether to take action, are directed to consider any adjustment plans submitted.

(g) Types of Relief

If the ITC makes an affirmative injury determination, it may recommend to the President any of the following forms of trade relief, or any combination of these measures:

- An increase in or imposition of a tariff
- A modification or imposition of a quantitative restriction
- A tariff-rate quota system where goods enter at a higher duty once the quota is filled
- Trade adjustment assistance or other appropriate adjustment measures
- Initiation of international negotiations to address the underlying cause of the increase in imports
- Implementation of any other action authorized under law that is likely to facilitate positive adjustment to import competition

Where more than one product is under investigation, the ITC's relief may be different for each product.

(h) Presidential Discretion to Impose Relief

The President makes the final determination as to whether relief will be provided and the type and duration of such relief. The President is to take "all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs." In deciding what action to take, if any, the President is directed to take into account the ITC's report, industry adjustment plans, factors related to the national economic interest of the United States, including consumer interests, and other statutory factors. The President must report to Congress the relief he is granting. If he takes action that differs from the ITC or decides not to grant any relief, Congress is authorized to pass a joint resolution within 90 days to direct the President to take the action recommended by the ITC.

(i) Limits on Relief Granted

Initially, the President may grant relief for a period of up to four years and this may be extended one or more times. The overall period of relief may not exceed eight years, however. A tariff may not be increased to a level that is more than 50 percent *ad valorem* above the rate existing before relief was granted. Any quantitative restriction imposed must allow entry of at least that quantity or value of imports entered during the most recent three years that is representative of imports of such item, unless the President determines that a different quantity or value is clearly justified in order to prevent or remedy serious injury. If action is taken for more than one year in the form of a tariff, tariff-rate quota or quantitative restriction, it must be phased down at regular intervals.

(j) Exclusion of Certain Countries

As noted above, safeguard actions apply to all countries that export the subject item to the United States. However, the North American Free Trade Agreement (“NAFTA”) limits the relief that may be imposed on imports from Canada and Mexico. The President must exclude imports from Canada or Mexico from relief if he determines that imports from such country or countries do not account for a substantial share of total imports or do not contribute importantly to the injury or threat of injury found by the ITC. These countries may be included at a later day if it is determined that a surge of imports from a NAFTA country or countries is undermining the effectiveness of the action taken. Certain other FTAs concluded with the U.S. provide for the exclusion from safeguard measures of imports from the FTA partner, if certain conditions are met. The President may also exclude imports from certain WTO developing countries from safeguard measures.

(k) Exclusion of Certain Products

The President has the authority to exclude specific products from a safeguard remedy. Typically, a notice is published in the *Federal Register* requesting the submission of exclusion requests and outlining the procedures and timeline for such exclusion requests. The President makes the decision whether to exclude specific products and notices of such exclusions are published in the *Federal Register*.

3.2 Procedures

(a) Overview of Procedures

When the ITC commences a safeguard investigation, it must publish a notice in the *Federal Register* to alert the public to the investigation. The overall investigation must be completed within 180 days from the receipt of the petition or request. Typically, the ITC has 120 days (150 days in more complicated cases) to complete the injury phase and, assuming there is an affirmative injury determination, 60 days to complete the remedy phase. Typically, a tied vote of the ITC in a trade remedy investigation is considered as an affirmative determination. In a safeguard investigation, a tied vote of the ITC on the injury determination may be considered an affirmative determination by the President. Only those members of the ITC who agreed to the affirmative injury determination may vote on the remedy recommendations. The ITC forwards its findings and any remedy recommendations in a report to the President.

The President has complete discretion to decide whether relief will be granted and the type and duration of such relief, subject only to statutory time deadlines. Within 60 days of receiving the ITC’s report, the President must decide whether to provide relief to the U.S. industry and the type of relief to provide. The President may request additional information from the ITC within 15 days of receiving its report. The ITC then has 30 days to provide such information.

(b) Petition and Initiation

An entity that is representative of a domestic industry (including a trade association, firm, certified or recognized union, or group of workers) may file a petition with the ITC requesting an investigation under Section 201. The law also authorizes the President, U.S. Trade

Representative (“the USTR”), the Senate Committee on Finance and the House Committee on Ways and Means to make such a request. While it is unusual for the request not to come from sources within the industry concerned, it is not unprecedented. For example, the USTR requested a recent safeguard action against steel imports. Prior to that, the Administration had not requested the initiation of a safeguard action since 1985. In addition, the ITC may initiate an investigation on its own initiative. The ITC is required to promptly make each petition, request or ITC motion available for public inspection (with the exception of business confidential information).

(c) Petition Requirements and Initiation

Petitions must describe the imported product, provide detailed information supporting the claim that increased imports are causing serious injury, and set forth the remedy requested. The petition is also required to include data, covering at least the most recent five years, on volumes of imports, domestic sales and production, productivity, employment, capacity utilization of the domestic industry and overall financial performance. The petition must also include a description of the steps being taken, or planned to be taken, by firms and workers in the industry to make a positive adjustment to import competition. If the petition is properly filed, the ITC will promptly institute an investigation (subject to the limitations on subsequent investigations for the same product, discussed below).

(d) Questionnaires

Once the ITC initiates an investigation, it sends out formal questionnaires to members of the domestic industry, importers, foreign producers and U.S. purchasers of the subject merchandise. The ITC uses the data reported in the responses to the questionnaires, along with other information gathered by ITC staff, to produce a staff report that is released to the parties in a confidential form and released to the public in a non-confidential form (with business proprietary information redacted from the report).

(e) Hearings

The ITC is required to hold a public hearing during the injury phase of the investigation, and if it makes an affirmative injury determination, it must hold a second hearing during the remedy phase. All interested parties, including consumers, may appear, testify, and present evidence.

(f) Disclosure and Access to Information

The ITC releases confidential business information submitted to it under administrative protective order (“APO”) to authorized representatives of interested parties that are parties to the proceeding. As with antidumping and countervailing duty proceedings, only in very limited circumstances will the ITC decline to release certain information under APO. Parties to the investigation must serve all information subject to APO on all other parties that have applied for and been granted access to APO materials.

The ITC's final report to the President is made available to the public (with the exception of information which the ITC determines to be confidential) and a summary of the report is published in the *Federal Register*.

(g) Interagency Process Regarding Presidential Action

After the ITC makes its recommendations to the President, an interagency group, chaired by the Office of the USTR, conducts an information-gathering process to examine all of the relevant issues involving whether to take action. Interested parties typically may provide written submissions, present hearing testimony and provide other input.

(h) Appellate Review

ITC decisions are appealable to U.S. courts on procedural grounds only. WTO members may seek review of any U.S. action under the WTO Dispute Settlement Understanding. Canada and Mexico may seek review of a U.S. safeguard action under NAFTA.

(i) Limits on Subsequent Investigations

As a general rule, the ITC may not initiate a new investigation covering the same subject matter within one year of completing a prior investigation, unless good cause is found to exist. Moreover, an item that has been the subject of prior relief under Section 201 may not be the subject of a new action unless a period of time equal to the period of prior relief has elapsed since termination of that relief. This rule does not apply to relief in effect for 180 days or less, however.