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Michael Y. Chung

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U.S. Antidumping Laws: A Look at the New Legislation

Michael Y. Chung†

I. Introduction

Subtitles A and B of Title VII of the Tariff Act of 1930 (the Act), as amended, provide the statutory mandate for the administration of U.S. antidumping duty (AD) laws. The administration of AD laws is shared between the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (Commission or ITC). Commerce's task is to determine whether imports are being dumped, and if so, to estimate the margin of dumping. The Commission determines whether such "dumped" imports are a "cause of material injury" to a domestic "industry" producing a "like product." If both agencies make an affirmative determination, an antidumping duty order is issued by Commerce directing that duties equivalent to the dumping margin be assessed in addition to the normal duties already imposed on such imports. In addition to the antidumping laws, U.S. producers

† Staff Advisor to Chairman Peter Watson of the U.S. International Trade Commission.
University of Virginia, B.A., 1987, M.S., 1991; George Mason University, J.D., 1995; C.P.A., 1993. The views expressed herein are entirely personal and are not representative of the ITC or any member or officer of the Commission. I wish to thank Peter Watson and Mark Garfinkel for their support and encouragement in this project.

1 Although U.S. Antidumping (AD) and Countervailing Duty (CVD) laws are administered together, this Article will focus primarily on the administration of U.S. AD laws. Dumping is generally defined as international price discrimination. It occurs when the price charged by a foreign producer on a U.S. sale, the "U.S. price," is below the producer's home market price, the "foreign market value." 19 U.S.C. §§ 1677a, 1677b (1988). Foreign market value is either the price charged by the foreign producer in its home market or in third country markets, or the foreign producer's cost of production. 19 U.S.C. § 1677b (1988). The "dumping margin" is the ratio of the foreign producer's foreign market value to the U.S. price. See 19 C.F.R. § 353.42 (1994) (defining fair value).


3 19 U.S.C. § 1673(2) (1988). In making its injury determination, the Commission must first define the "like product" and the domestic "industry." The statute defines like product as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation." 19 U.S.C. § 1677(10) (1988). In turn, the statute defines the domestic industry as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product." 19 U.S.C. § 1677(4)(A) (1988).

have other trade remedy options available. However, declines in general tariff rates through the General Agreement on Tariffs and Trade (GATT) mechanism have led to the increased use of nontariff barriers, principally antidumping laws. Jagdish Bhagwati notes:

The postwar decline of tariffs has focused our minds now on nontariff barriers. And the trade experts know that administered protection, operating through the unfair use of the “unfair trade” mechanisms such as countervailing duties (CVDs) aimed at foreign subsidies and anti-dumping (AD) duties, is now the favourite weapon of the protectionists.

The new “Agreement on Implementation of Article VI of GATT 1994” (Antidumping Agreement) requires modest changes to current U.S. antidumping laws. The following is a brief discussion of some of the procedural and substantive changes which will likely affect current U.S. antidumping law and practice.

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5 Sections 201-204 of the Trade Act of 1974, as amended, authorize the President to impose temporary import restrictions where the product “is being imported... in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry” producing a like product. 19 U.S.C. §§ 2251-53 (1988 & Supp. V 1993). Under § 406 of the Trade Act of 1974, the President is authorized to impose temporary duties on imports from Communist countries where such imports are causing market disruption. 19 U.S.C. § 2436 (1988).


Sections 301-310 of the Trade Act of 1974, as amended, mandate action by the United States Trade Representative (USTR), subject to direction by the President, in cases where a foreign practice or policy violates an agreement with the United States or is unjustifiable and burdens U.S. commerce. 19 U.S.C. § 2411 (1988 & Supp V. 1993). See also Staff of House Comm. on Ways and Means, 103d Cong., 1st Sess., Overview and Compilation of U.S. Trade Statutes 51-129 (Comm. Print 1993) [hereinafter Overview].

6 The use of AD and CVD remedies increased dramatically during the 1980s. From 1980 to 1984, there were 47 total final injury affirmative determinations, but that number increased to 88 during the period 1985 to 1988 and to 72 during the period 1989 to 1992. See Congressional Budget Office, How the GATT Affects U.S. Antidumping & Countervailing Duty Policy 50 (1994) [hereinafter CBO Study].


II. Highlights of the Antidumping Agreement:

A. Calculation of Dumping Margin: Article 2 of the Antidumping Agreement

Paragraph 2.1 of Article 2 of the Agreement formally allows the national authorities (Commerce) to disregard, for purposes of determining “normal value”, sales below the cost of production, if the sales are made in “substantial quantities” and at prices which do not provide for cost recovery within a reasonable time. Costs should be calculated on the basis of exporter’s and producer’s records, provided that such records are in accordance with generally accepted accounting principles in the exporting country and reasonably reflect the costs associated with producing and selling the merchandise as provided in paragraph 2.1.1.

Article 2.2.2 of the Antidumping Agreement requires national authorities to base profit and selling, general and administrative (SG&A) expenses on actual producer’s data. Currently, in calculating export price, Commerce uses profit and SG&A expenses provided from financial statements, unless such figures fall below 8 percent and 10 percent, respectively. Thus, the Agreement will require the United States to eliminate the statutory minima for profits and SG&A.

Article 2.4 requires that comparisons of normal value and export price be made on a fair basis, at the same level of trade. Article 2.4.2 requires that in investigations, but not reviews, Commerce establish dumping margins by comparing either a weighted-average of normal values to a weighted-average of export prices of comparable merchandise; or normal value and export price on a transaction-to-transaction basis.

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9 Antidumping Agreement, supra note 8, at art. 2, para. 2.2.1. Note that under the language of the Agreement, “normal value” replaces “foreign market value” and “export price” replaces “U.S. price.” SAA, supra note 8, at 138. This is consistent with current U.S. practice. See 19 U.S.C. § 1677b(b) (1988 & Supp. V 1993). A product is considered to be “dumped” within the meaning of the Agreement if its “export price” is less than its “normal value.” SAA, supra note 8, at 138.

10 Antidumping Agreement, supra note 8, at art. 2, para. 2.1.


12 Antidumping Agreement, supra note 8, at art. 2, para. 2.2.2. In calculating the dumping margin, adjustments to the “export price” for profit and selling, general, and administrative (SG&A) expenses, in addition to other adjustments, are required. See CBO STUDY, supra note 7, at 31-32.


14 Whenever the minimum percentage figures for profit and SG&A expenses would have applied, dumping margin calculations under the constructed value method will likely be reduced via an increased “export price.” See CBO STUDY, supra note 7, at 31-32.

15 Antidumping Agreement, supra note 8, at art. 2, para. 2.4.

16 Id. at art. 2, para. 2.4.2. Currently, when the U.S. Department of Commerce (Commerce) compares U.S. import prices (export price) with the foreign exporter’s home market
B. Determination of Injury: Article 3 of the Antidumping Agreement

In making its injury determination, the Commission is required to cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports "compete with each other and with like products of the domestic industry in the U.S. market."\(^7\) Article 3.3 of the Agreement authorizes, but does not require, cumulation of imports from more than one country in assessing injury where such imports are simultaneously subject to antidumping investigations.\(^8\) U.S. law already requires a cumulative assessment of injury.\(^9\)

The Agreement adds the dumping margin to the list of factors that must be considered by the Commission in determining injury.\(^{20}\) Under current U.S. law, the Commission may, but is not required to consider the magnitude of the dumping margin.\(^{21}\) Current practice

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\(^{17}\) 19 U.S.C. § 1677(7)(C)(iv) (I) (Supp. V 1993); see also Chaparral Steel Co. v. United States, 901 F.2d 1097, 1105 (Fed. Cir. 1990). Each antidumping and countervailing duty investigation goes through four determinations: (1) a preliminary determination by the ITC of injury, (2) a preliminary determination by Commerce of dumping or subsidy, (3) a final determination by Commerce of dumping or subsidy, and (4) a final determination by the ITC of injury. \(^{18}\) Overview, supra note 5, at 66. Within 45 days of the filing of a petition by a domestic industry, the ITC preliminarily determines whether the domestic industry is injured "by reason of" the subject foreign merchandise. \(^{19}\) Id. If the ITC finds no reasonable indication of material injury, the investigation is terminated. Otherwise, the case continues to the next stage where Commerce preliminarily determines the existence of dumping or subsidy. \(^{20}\) Id. at 67. This determination does not affect the final outcome of the case. \(^{21}\) Id. Its purpose is to determine whether duties must be deposited on the goods in question that are imported. \(^{17}\) Id. The case then proceeds to the final Commerce dumping or subsidy determination. \(^{18}\) Id. If Commerce determines that imports are not being dumped or subsidized, the case is terminated and any duties that may have been imposed are refunded to importers; otherwise the case continues to the ITC's final injury determination. \(^{19}\) Id. If the ITC makes a negative final injury determination—that is, it determines that dumped (or subsidized) imports are not causing material injury to the domestic industry—the case is terminated and no antidumping (or countervailing) duties are imposed. \(^{20}\) Id. If the injury determination is affirmative, then AD duties are imposed on future imports of the subject merchandise. \(^{19}\) Id. at 69.

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\(^{18}\) This provision of the Agreement is applicable, however, only if: (a) the dumping margin for each country is more than de minimis; (b) the volume of imports from each country is not negligible; and (c) cumulative assessment is appropriate in light of the conditions of competition between the imported products and between the imports and the domestic like product. Antidumping Agreement, supra note 8, art. 3, para. 3.3; URAA, supra note 11, Pub. L. No. 103-465, § 222(e), U.S.C.C.A.N. (108 Stat.) 4809, 4873-74 (adding Tariff Act of 1930 § 771(7)(G)).


\(^{20}\) Antidumping Agreement, supra note 8, at art. 3, para. 3.4.

among commissioners varies in this regard.22

C. Procedural Rules for Investigation and Evidence: Article 5 of the Agreement

The new agreement makes it more difficult for domestic producers to initiate the antidumping process. Article 5.2 provides that a simple assertion, unsubstantiated by relevant evidence, will be deemed insufficient to support a petition.23 Authorities are furthermore told to examine for the accuracy and adequacy of evidence provided in the petition24 and to terminate an investigation if the dumping margin is de minimis (defined as less than 2 percent of the export price) or the volume of imports is negligible (i.e., less than 3 percent of the volume of total imports of each “like product”).25

Evidentiary rules for antidumping determinations are set forth in Article 6. Article 6.8 explicitly authorizes the continuation of current U.S. practice of using “best information available” (BIA) where parties do not provide, or refuse to provide, requested information.26 However, authorities must also provide respondents additional time27 and inform all interested parties of the essential facts under consideration which form the basis for the decision.28 In addition, timely opportunities must be given to all interested parties to see all information that is

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22 Chairman Watson considers dumping margins to be relevant, but gives greater or less weight to the margin, depending on the circumstances of each investigation. See Pads for Woodwind Instrument Keys from Italy, U.S.I.T.C. Pub. 2679, Inv. No. 731-TA-627 (Sept. 1993) (Final). Currently, only Commissioner Crawford bases her material injury determination on the magnitude of the dumping margin, under the “unitary but-for” analysis. See Fresh Cut Roses from Colombia and Ecuador, U.S.I.T.C. Pub. 2766, Inv. No. 731-TA-684-685 (Mar. 1994) (Prelim.). Other commissioners have not taken positions on this issue. See Welded Stainless Steel Pipe from Malaysia, U.S.I.T.C. Pub. 2744, Inv. No. 731-TA-644 (Mar. 1994) (Final). Interestingly, Commissioner Crawford’s injury analysis would likely be unaffected by this new requirement since the unitary but-for analysis already takes into account the magnitude of the dumping margin.

23 Antidumping Agreement, supra note 8, at art. 5, para. 5.2.

24 Authorities must verify support for the petition by domestic producers whose collective output constitutes more than 50% of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. Id. at art. 5, para. 5.4.

25 Id. Dumping margins of less than 0.5% were considered de minimis under preexisting law. SAA, supra note 8, at 142. As for negligibility, the ITC has not in the past had any quantitative thresholds. The requirement in Article 5.8 with respect to negligible imports, per se, will have little impact on current practice, given that the ITC almost always makes a negative determination on imports found to be negligible. In addition, even if the ITC were to make an affirmative injury finding due to imports found to be negligible, the impact on the overall market will likely be minimal given that such imports are usually quantitatively immaterial, and not likely to have a significant impact on the competing domestic industry.

26 Antidumping Agreement, supra note 8, at art. 6, para. 6.8.

27 Paragraph 1.1 of the Agreement states that foreign producers receiving questionnaires “shall be given at least 30 days for reply. Due consideration should be given to any request for an extension . . . .” Id. at art. 1, para. 1.1. Under prior practice, foreign firms were given only two weeks to respond to an initial questionnaire. SAA, supra note 8, at 142-43.

28 Antidumping Agreement, supra note 8, at art. 6, para. 6.9.
relevant to the presentation of their cases and that is used by the authorities in an investigation.\textsuperscript{29} Article 6.13 also requires authorities to take due account of difficulties faced by parties in supplying requested information and to provide assistance when practicable.\textsuperscript{30}

D. Sunset Provisions: Article 11 of the Agreement

Under prior U.S. law, antidumping duty orders could remain in effect indefinitely against imports found to cause injury to a domestic industry.\textsuperscript{31} An antidumping duty order could only be revoked by Commerce if it determined that: (1) there is no likelihood that less than fair value (LTFV) imports will be resumed, (2) sales at LTFV have been terminated, or (3) other circumstances warrant the revocation of the antidumping order.\textsuperscript{32} Article 11.3 of the Agreement changes this procedure. It provides for the termination (sunset) of antidumping duties not later than five years from the date of: (1) their imposition; (2) the most recent review that covered both dumping and injury; or (3) the most recent "sunset" review.\textsuperscript{33}

III. Highlights of the Implementing Legislation\textsuperscript{34}

A. Calculation of Dumping Margin

1. Normal Value, Export Price

New section 773(a)(5) permits Commerce to base normal value on sales to related parties in the home market.\textsuperscript{35} Commerce is required to reduce normal value to account for: (1) the cost of packing in the exporting country or to a third country; (2) if included in the price, transportation and other expenses, including warehousing expenses, incurred in bringing the merchandise from the place of shipment to the place of delivery in the exporting country; and (3) the

\textsuperscript{29} Id. at art. 6, para. 6.4.
\textsuperscript{30} Id. at art. 6, para. 6.3.
\textsuperscript{32} Id.
\textsuperscript{33} Antidumping Agreement, supra note 8, at art. 11, para. 11.3. This new "sunset" provision thus changes U.S. law which previously had no such termination mechanism for antidumping (or countervailing duty) orders. See CBO Study, supra note 6, at 72-73. Under prior law, it was thus difficult for foreign exporters to terminate AD/CVD orders. Id.
\textsuperscript{34} The URRAA was passed by the House on November 29, 1994; passed by the Senate on December 1, 1994; signed into law by the President as Public Law No. 103-465 on December 8, 1994; and went into effect on January 1, 1995. URRAA, supra note 11, Pub. L. No. 103-465, 1994 U.S.C.C.A.N. (108 Stat.) 4809.
\textsuperscript{35} URRAA, supra note 11, Pub. L. No. 103-465, § 224, U.S.C.C.A.N. (108 Stat.) 4809, 4880 (amending Tariff Act of 1930 § 773(a)(5)). However, Commerce will continue to ignore sales to affiliated parties which cannot be demonstrated to be at arm's-length prices for purposes of calculating normal value. Id. In addition, this section codifies Commerce's current practice of calculating normal value, to the extent practicable, on the basis of home market sales that are made at the same level of trade as the constructed export price. SAA, supra note 8, at 157.
amount of any indirect taxes imposed on the foreign like product that has been rebated or not collected, but only to the extent that such taxes are added to the price of the foreign like product.\textsuperscript{36} This section implements Article 2.4 of the Agreement,\textsuperscript{37} and is a change from current practice.\textsuperscript{38} Currently, Commerce deducts transportation and other movement-related expenses from the export price but does not deduct similar costs in the home country in calculating normal value.\textsuperscript{39} Section 773(a)(6)(C) further authorizes Commerce to adjust normal value to account for other differences between export price and normal value that are wholly, or partly, due to differences in quantities, physical characteristics, or other differences in the circumstances of sale.\textsuperscript{40} The export price to the first unaffiliated customer in the United States must be reduced by: (1) any commissions paid in selling the subject merchandise; (2) any expenses which result from, and bear a direct relationship to, selling activities in the United States; (3) any selling expenses which the seller pays on behalf of the purchaser; (4) any “indirect selling expenses”; (5) any expenses resulting from a manufacturing process or assembly performed on the merchandise after its importation into the U.S.; and (6) an allowance for profit allocable to the selling, distribution expenses incurred in the United States.\textsuperscript{41} Finally, Commerce is directed in new section 773(a)(1)(B) to establish normal value based on home market sales at the same level of trade as the constructed export price.\textsuperscript{42}

2. Calculation of Costs

New section 773(b) incorporates the requirements of the Agreement on exclusion of sales below cost.\textsuperscript{43} There are two substantive...
changes which may affect "normal value." 44

Costs are calculated by Commerce under the new law on the basis of records kept by the exporter or producer of the merchandise, provided such records: (1) are kept in accordance with generally accepted accounting principles of the exporting country; and (2) reasonably reflect the costs associated with the production and sale of the merchandise. 45

Section 773(f)(1)(C) incorporates provisions of the Agreement regarding the treatment of startup costs. 46 Section 773(e)(2) implements the provisions of the Agreement regarding constructed value and the calculation of amounts for profits and selling, general, and administrative (SG&A) expenses. 47

3. Currency Conversions

Under section 773A, foreign currencies must be converted based on the dollar exchange rate in effect on the date of sale. 48 Under current practice, Commerce utilizes a quarterly rate unless the daily rate varies by more than 5 percent from the rate in effect on the first day of the quarter. 49

4. Price Averaging

New section 777A(d)(1)(A) provides that Commerce will measure dumping margins on the basis of a comparison of a weighted-average of normal values with a weighted-average of export prices or con-

44 The term "extended period of time" is expanded from the current six-month period up to a year. Id. § 224, at 4882 (amending Tariff Act of 1930 § 773(b)(2)(B)). Also, under § 224 below cost sales must be at least twenty percent of total sales to be considered in "substantial quantities." Id. § 224, at 4882 (amending Tariff Act of 1930 § 773(b)(2)(C)).

45 Section 224 implements Article 2.1.1 of the Agreement. Id. § 224 at 4885-86 (amending Tariff Act of 1990 § 773(f)(1)). For a discussion of Article 2.1.1 of the Antidumping Agreement, see supra notes 10-11 and accompanying text.

46 URAA, supra note 11, Pub. L. No. 103-465, § 224, 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4884-85 (amending Tariff Act of 1990 § 773(f)(1)(C)). Commerce may make an adjustment for startup costs only if the following two conditions are satisfied: (1) a company is using new production facilities or producing a new product that requires substantial additional investment, and (2) production levels are limited by technical factors associated with the initial phase of commercial production. Id.

47 Section 773(e)(2) of the Tariff Act of 1930 does not retain the current statutory minima for profit and SG&A expenses. URAA, supra note 11, Pub. L. No. 103-465, § 224, 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4884-85; see also supra notes 10-11 and accompanying text (discussing the calculation provisions under the Antidumping Agreement). However, given that Commerce may ignore sales that are made at below cost prices, in most cases Commerce would use profitable sales as the basis for calculating profit. SAA, supra note 9, at 169-70. Thus, this provision will not likely diminish significantly calculated margins.


49 SAA, supra note 8, at 172. Section 773A also provides that Commerce will ignore fluctuations in exchange rates, and will allow exporters at least sixty days in which to adjust their prices to reflect a sustained increase in the value of a foreign currency relative to the U.S. dollar. Id.
structed export prices. In addition, this section also permits the calculation of dumping margins on a transaction-by-transaction basis, for situations where there are very few sales. However, new section 777A(d)(1)(B) allows for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods—i.e., where targeted dumping may be occurring.

5. **De Minimis Dumping Margins**

Amended sections 793(b) and 795(a) of the Antidumping Act of 1930 require that Commerce treat as de minimis any dumping margin of a foreign producer or exporter which is below 2 percent ad valorem. In addition, Commerce will make a negative dumping determination with respect to any exporters with de minimis margins.

**B. Determination of Injury**

1. **Threat of Material Injury**

Section 222(c) makes no substantive change in the Commission's threat analysis. The amended provision retains factors listed in the

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51 Id. However, consistent with Article 2.4.2 of the Agreement, supra note 8, at art. 2, para. 2.4.2, the use of an average-to-average or transaction-to-transaction comparison will be limited to investigations, and will not be allowed for reviews. SAA, supra note 8, at 173.


53 This is required by Article 5.8 of the Antidumping Agreement. Antidumping Agreement, supra note 8, at art. 5, para. 5.8.

54 URAA, supra note 11, Pub. L. No. 103-465, § 213, 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4850 (amending Tariff Act of 1930 §§ 733(b), 735(a)). The SAA notes that this requirement will have its major impact only on final DOC determinations, since margins are not known with certainty until that time. SAA, supra note 8, at 174. In addition, this requirement applies only to investigations and not to reviews. Id.

55 See SAA, supra note 8, at 184. The injury causation standards under existing U.S. law are fully consistent with the causation standards under Article 3.5 of the Antidumping Agreement, and thus no amendments are needed. Id. at 181.

Injury causation standards of ITC Commissioners vary. Chairman Watson notes that the courts have interpreted the statutory requirement that the Commission consider whether there is material injury "by reason of" the subject imports in a number of different ways. See, e.g., United Eng'g & Forging, 779 F. Supp. 1375, 1391 (Ct. Int'l Trade 1991) ("rather it must determine whether unfairly-traded imports are contributing to such injury to the domestic industry. Such imports, therefore, need not be the only cause of harm to the domestic industry" (citations omitted)); Metalwerken Nederland, B.V. v. United States 728 F. Supp. 730, 741 (Ct. Int'l Trade 1989) (affirming a determination by two Commissioners that "the imports were a cause of material injury"); USX Corp. v. United States, 682 F. Supp. 60, 67 (Ct. Int'l Trade 1988) ("any causation analysis must have at its core the issue of whether the imports at issue cause, in a non de minimis manner, the material injury to the industry"). Accordingly, Chairman Watson has decided to adhere to the standard articulated by Congress in the legislative history of the pertinent provisions, which state that the Commission must satisfy itself
current statute but not listed in the Agreements, such as factors pertaining to export subsidies, product shifting, raw and processed agricultural products, actual and potential negative effects on existing development and production efforts, and "any other" demonstrable adverse trends.\(^5\) Inclusion of these factors is not inconsistent with the Agreement since the four listed factors in Article 3.7 are nonexclusive.\(^7\)

2. Cumulation

In determining whether there is a reasonable indication of material injury by reason of the subject imports, the Commission is required to assess cumulatively the volume and effect of imports from two or more countries of like products subject to investigation if such imports "compete with each other and with like products of the domestic industry in the United States market."\(^5\) However, the Commission has discretion not to cumulate imports from a particular country that are "negligible and have no discernible adverse impact on the domestic industry."\(^5\)

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\(^7\) See SAA, supra note 8, at 184-85. Although the language of these new statutory threat factors represents a change somewhat from the previous statutory language, there is really no significant difference in any of the statutory threat factors. See 19 U.S.C. § 1677(7)(F)(i) (1988). Thus, Commission practice is not likely to change in this area.
The new legislation requires the Commission to cumulate imports from all countries as to which petitions were filed, or investigations were self-initiated by Commerce on the same day, if such imports compete with each other and with domestic like products in the U.S. market.\textsuperscript{60} The new law eliminates the "subject to investigation" terminology and instead imposes a requirement that petitions, pursuant to sections 702 and 732 be filed, and/or investigations pursuant to these provisions be self-initiated by Commerce, on the same day.\textsuperscript{61} The SAA states that this requirement is intended to promote certainty in antidumping and countervailing duty investigations by defining the countries potentially subject to cumulative analysis at the time of filing.\textsuperscript{62} Under prior law, as long as imports from two or more countries were "subject to investigation," imports from all such countries would be cumulated in determining material injury.\textsuperscript{63} The Uruguay Round Agreements Act (URAA) thus limits the domestic industry's ability to expand the AD investigation for cumulation purposes to imports from beyond those countries against which the petition was filed on the same day.\textsuperscript{64}

The new law requires the Commission to continue its current practice of cross-cumulation.\textsuperscript{65} By its terms, the statute would require cumulation of imports from all countries with respect to which petitions were filed, or investigations were self-initiated, under sections 702 or 732 on the same day.\textsuperscript{66}

With respect to review investigations, new section 752(a)(7) grants the Commission discretion to engage in a cumulative analysis if: (1) reviews are initiated on the same day; or (2) imports likely would com-

\textsuperscript{60} URAA, supra note 11, Pub. L. No. 103-465, § 222(e)(2)(G)(i), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4873 (amending Tariff Act of 1930 § 771(7)). Article 3.5 of the Antidumping Agreement allows a cumulative assessment of imports simultaneously subject to investigation but does not require it. Antidumping Agreement, supra note 8, at art. 3, para. 3.3. U.S. law, on the other hand, requires a cumulative analysis when the cumulative criteria are satisfied. 19 U.S.C. § 1677(7)(C)(iv)(I) (Supp. V 1993). Nevertheless, the U.S. provision is not necessarily inconsistent with the corresponding GATT provision, since cumulative analysis is allowed under the GATT.


\textsuperscript{62} SAA, supra note 8, at 178. Thus, the "simultaneous filing" requirement limits the number of cases eligible for cumulation to those filed on the same day.

\textsuperscript{63} See, e.g., Ferrosilicon from Brazil and Egypt, USITC Pub. 2605, Inv. Nos. 731-TA-641-642 (Feb. 1993) (Prelim.).

\textsuperscript{64} SAA, supra note 8, at 178.


\textsuperscript{66} Id.; cf. Bingham & Taylor Div. v. United States, 815 F.2d 1482, 1486-87 (Fed. Cir. 1987) (holding cross-cumulation mandatory under current statute in light of "subject to investigation" statutory language).
pete with one another and with "domestic like products." The SAA further states that the Commission may cumulate imports from countries that were not originally investigated together if the conditions for cumulation in new section 752(a)(7) are otherwise satisfied.

3. Exceptions to Cumulation

Four exceptions to the general cumulation rule are provided in new section 771(7)(G)(ii). Under subpart (I) of this section, the Commission is not to cumulate imports from any country for which Commerce has made a preliminary negative determination, unless Commerce reaches a final affirmative determination with respect to such imports before the Commission makes its final determination. The SAA notes that this exception amends current law. In addition, the Commission is not to cumulate imports from any country as to which the investigation has been terminated. This exception, which is new to the statute, codifies existing practice.

The remaining exception to cumulation concerns imports from Israel. The law now mandates that if the Commission determines

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68 SAA, supra note 8, at 215.
70 Id. This change implements the provisions of the Agreement proscribing cumulation when the dumping (or subsidy) margin is de minimis. See supra note 59 and accompanying text.
74 Under prior law, if an antidumping investigation involved imports from both Israel and other countries, the ITC was required to first examine whether there was material injury to the domestic industry by reason of imports from Israel. 19 U.S.C. § 1677(7)(C)(v) (1988). If so, the Israeli imports were cumulated. Id. If not, the ITC had discretion to not cumulate imports from Israel. Id.; see, e.g., Phthalic Anhydride from Brazil, Hungary, Israel, Mexico, and Venezuela, U.S.I.T.C. Pub. 2709, Inv. No. 308-TA-24, at 1-25, 1-52, 1-65 (Dec. 1993). Under the new law, the ITC would not have such discretion and would be required to find
that there is no material injury by reason of imports from Israel alone, it must find imports from Israel to be negligible.\textsuperscript{75} Thus, the Commission will not have the discretion to cumulate Israeli imports it possesses under prior law.\textsuperscript{76}

In making a threat of injury determination, the Commission may cumulate the price and volume effects of each country's imports.\textsuperscript{77} New section 771(7)(H) permits the Commission, to the extent practicable, to cumulatively assess the volume and effect of imports for purposes of conducting its threat analysis.\textsuperscript{78} This provision preserves the Commission's discretion to cumulate imports in threat determinations.\textsuperscript{79} Cumulation for threat analysis is precluded in the four instances in which it is precluded for material injury analysis.\textsuperscript{80}

4. Negligibility

The Commission is not required to cumulate in any case in which it determines that imports of the merchandise subject to investigation "are negligible and have no discernible adverse impact on the domestic industry."\textsuperscript{81} Section 212(b) of the URAA amends the statutory provisions pertaining to preliminary and final antidumping duty determinations to require that investigations be terminated without an injury determination if the subject imports are negligible.\textsuperscript{82} This is a change from the prior statute.\textsuperscript{83}

\begin{footnotes}
\item[76] The SAA indicates that the Israeli imports may not be cumulated unless the Commission first makes an affirmative injury determination with respect to them. SAA, supra note 8, at 180-81.
\item[79] Id.; see also Torrington Co. v. United States, 790 F. Supp. 1161, 1179 (Ct. Int'l Trade 1992) (stating that the Commission may cumulatively assess imports in determining whether a domestic industry is threatened by material injury), aff'd without opinion, 991 F.2d 809 (Fed. Cir. 1993).
\item[80] See supra notes 69-76 and accompanying text.
\item[81] 19 U.S.C. § 1677(7)(C)(v) (1988). In determining whether imports are negligible, the Commission considers all relevant economic factors including whether: "(I) the volume and market share of the imports are negligible, (II) sales transactions involving the imports are isolated and sporadic, and (III) the domestic market for the like product is price sensitive by reason of the nature of the product, so that a small quantity of imports can result in price suppression or depression." Id.
\item[83] Formerly, where the Commission determined that imports from a particular country were negligible, such imports were then given separate material injury or threat determinations. See Certain Carbon Steel Butt-Weld Pipe Fittings from France, India, Israeli, Malaysia,
New section 771(24) provides that "imports from a subject country that are less than 3 percent of the volume of all such merchandise imported into the United States . . . shall be deemed negligible." 84 Further, the negligibility decisions are to be made with respect to imports "corresponding to a domestic like product." 85 One exception to finding that imports from a single country, which comprise less than 3 percent of total imports, are negligible is when the sum of imports from all countries subject to investigations initiated on the same day that each individually account for less than 3 percent of total imports collectively account for more than 7 percent of the volume of all such imports into the United States. If the sum of imports from all such countries is 7 percent or less, then imports from those countries must be deemed negligible. 86 Moreover, no imports from a country can be aggregated: (1) whose imports have been subject to a negative preliminary determination by the Commerce Department (unless subsequently an affirmative determination had been issued prior to the time

Korea, Thailand, United Kingdom, and Venezuela, USITC Pub. 2767, Inv. Nos. 701-TA-360-361 (Apr. 1994) (Prelim.).

While amended §§ 703(a), 705(b)(1), 733(a)(1)(B), and 735(b)(1) of the Tariff Act of 1930 require termination of the investigation if the Commission determines imports to be negligible, see URAA, supra note 11, Pub. L. No. 103-465, §§ 212(b)(1)(A), 212(b)(1)(B), 212(b)(2)(A), 212(b)(2)(B), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4847-49, the SAA indicates that the amendments are also intended to preclude termination based on negligibility in a preliminary investigation where, for example: 1) the Commission is uncertain regarding appropriate like product designations; or 2) imports are extremely close to the quantitative thresholds and there is a reasonable indication that data obtained in a final investigation will establish that imports exceed the quantitative thresholds. SAA, supra note 8, at 185.

84 URAA, supra note 11, Pub. L. No. 103-465, § 222(d), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4871-72 (adding Tariff Act of 1930 § 771(24)). It should be noted that the 3 percent figure is not 3 percent of total U.S. consumption, but 3 percent of total imports. This distinction may be significant where the overall market penetration of total imports (i.e., the denominator in the 3% figure) is relatively small because imports from any particular country (i.e., the numerator) would then have to be significantly smaller than 3% of domestic consumption to meet the negligibility cutoff threshold. In the past, although Commissioners generally did not adhere to a "bright line" negligibility market share cutoff, import levels exceeding one percent (of total U.S. consumption) were generally not considered to be negligible. Thus, the seemingly beneficial (at least from a free trader's perspective) impact of a higher negligibility "bright line" cutoff is mitigated by the requirement that the 3% figure be calculated as a percentage of imports rather than as a percentage of total U.S. consumption.

85 URAA, supra note 11, Pub. L. No. 103-465, § 222(d), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4871-72 (adding Tariff Act of 1930 § 771(24)). This "like product" requirement may also be significant where the ITC finds two or more "like products". In that event, negligibility must be assessed on each like product, not on the overall subject merchandise. Thus, where the Commission finds two or more like products, the likelihood of a negligibility determination may be reduced. Hence, the likelihood of an overall affirmative determination may be increased.

86 Although the 3/7 rule is only required by the Antidumping Agreement, new § 771(24) applies to CVD investigations as well as to AD investigations which are simultaneously filed. URAA, supra note 11, Pub. L. No. 103-465, § 222(d), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4871-72 (adding Tariff Act of 1990 § 771(24)). In countervailing duty investigations of imports from developing countries, the numerical standards for negligibility are 4 percent of total imports for an individual subject country and 9 percent of total imports for aggregated subject imports. URAA, supra note 11, Pub. L. No. 103-465, § 771(24)(B), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4872; SAA, supra note 8, at 186.
for the Commission to consider issuing a determination); (2) whose imports are subject to a terminated investigation; (3) which is subject to the CBI exception to cumulation; (4) if it is party to an agreement establishing a free-trade area with the United States, which was entered into force and effect before January 1, 1997, unless the Commission determines that there is a domestic industry that will be materially injured by reason of imports from Israel alone.\textsuperscript{87}

For analyzing a threat of material injury only, the Commission is directed not to consider imports from a country negligible if “there is a potential” that imports from such a country “will imminently account for more than 3 percent” of total imports, or that aggregated volumes from subject countries exceed 7 percent of total imports.\textsuperscript{88}

The SAA further indicates that the \textit{American Lamb} standard continues to apply in preliminary injury investigations and that the Commission is to determine whether there is a “reasonable indication” that imports are not negligible.\textsuperscript{89}

5. Related Parties

The related parties provision allows for the exclusion of a domestic producer from the definition of the domestic industry in the Commission’s injury determination.\textsuperscript{90} Prior law defined a related party as a domestic producer who is either related to exporters or importers of the product under investigation, or is itself an exporter of that product.\textsuperscript{91} If a producer is a related party, the Commission may exclude such producers in “appropriate circumstances.”\textsuperscript{92}

\textsuperscript{88} SAA, supra note 8, at 186.
\textsuperscript{89} Id. at 187. The purpose of preliminary ITC determinations is to avoid the cost and disruption to trade caused by unnecessary investigations. See Maverick Tube Corp. v. United States, 687 F. Supp. 1569, 1573 (Ct. Int’l Trade 1988). An affirmative preliminary injury determination is subject only to a “reasonable indication” standard. 19 U.S.C. § 1673b(a) (1988). This standard does not require a finding of “actual material injury,” but it does require more than a “possibility” of material injury. See American Lamb v. United States, 785 F.2d 994, 998 (Fed. Cir. 1986).
\textsuperscript{92} Id. The primary factors the Commission has examined in deciding whether appropriate circumstances exist to exclude the related parties include: (1) the percentage of domestic production attributable to the importing producer; (2) the reason the U.S. producer has decided to import the product subject to investigation, i.e., whether the firm benefits from the LTFV sales or subsidies or whether the firm must import in order to enable it to continue production and compete in the U.S. market, and (3) the position of the related producers vis-à-vis the rest of the industry, i.e., whether inclusion or exclusion of the related party will skew the data for the rest of the industry. See Certain Carbon Steel Butt-Weld Pipe Fittings from France, India, Israel, Malaysia, Korea, Thailand, the United Kingdom, and Venezuela, U.S.I.T.C., Inv. Nos. 701-TA-360-361 and 731-TA-688-695 (Apr. 1995) (Final). The Commission has also considered whether the primary interests of the related producers lie in domestic production or in importation. See Garlic from the PRC, U.S.I.T.C. Pub. 2755, Inv. No. 731-TA-638 (Mar. 1994) (Prelim.).
lated party is within the Commission's discretion based upon the facts presented in each case. The URRAA amends the definition of a related party. “Related party” is now defined in terms of control between a domestic producer and an exporter or importer. Control exists when a party has the ability to legally or operationally exercise restraint or direction over the other party. The SAA notes that this new definition is consistent with Commission practice. The SAA also directs Commerce and the Commission to apply a broad definition to encompass domestic producers who are not formally importers of record.

6. Regional Industry

Currently, antidumping orders based on an affirmative injury finding to a regional industry are levied nationwide, not just on the affected regions. However, under the new law, when the Commission makes an affirmative injury (or threat of injury) determination with respect to a regional industry, duties will only be levied on imports


The rationale for the related parties provision is the concern that domestic producers who are related parties may be in a position to be shielded from any injury that might be caused by the imports. Thus, including these parties within the domestic industry would distort the analysis of the condition of the domestic industry.


The URRAA states that:

(i) If a producer of a domestic like product and an exporter or importer of the subject merchandise are related parties, or if a producer of the domestic like product is also an importer of the subject merchandise, the producer may, in appropriate circumstances, be excluded from the industry. (ii) For purposes of this clause(i), a producer and an exporter or importer shall be considered to be related parties, if—

(I) the producer directly or indirectly controls the exporter of importer,

(II) the exporter or importer directly or indirectly controls the producer,

(III) a third party directly or indirectly controls the producer and the exporter or importer, or

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

For purposes of this subparagraph, a party shall be considered to directly or indirectly control another party if the party is legally or operationally in a position to exercise restraint or direction over the other party.


95 Id.

96 SAA, supra note 8, at 188.

97 Id.

Commerce and the Commission utilize section 771(4)(B) [the related parties provision] for different purposes, Commerce to eliminate any conflicts of interest that may distort its consideration of the level of industry support for an AD or CVD petition, and the Commission to reduce any distortion in industry data caused by the inclusion in the domestic industry of a related producer who is being shielded from the effects of the subject imports.

Id.

98 See Texas Crushed Stone Co. v. United States, 85 F.3d 1535, 1542 (Fed. Cir. 1994).
into that region.99

The SAA states that the Commission will find "concentration" of imports to exist "if the ratio of the subject imports to consumption is clearly higher in the regional market than in the rest of the U.S. market, and if such imports into the region account for a substantial proportion of total subject imports entering the United States."100 The SAA indicates that concentration is to be assessed on a case-by-case basis, and that no "precise mathematical formula" is reliable in determining concentration.101 New section 771(7) (G) (iv) states that in investigations involving regional industries in which the Commission engages in cumulative analysis, its cumulative assessment should be based on the volume and effect of imports into the pertinent region(s), rather than nationwide.102 As stated in the SAA, this provision, while new, merely codifies existing Commission practice.103

In review investigations involving a regional industry, the Commission is not bound by any determination it may have made in the original investigation regarding the existence of a regional industry.104 If there is sufficient evidence to warrant revisiting the original regional industry determination, the Commission may base its likelihood determination on: (1) the regional industry defined by the Commission in the original investigation; (2) another regional industry satisfying the criteria of amended section 771(4)(C);105 or (3) the United States industry as a whole.106

7. Captive Production

In making its material injury determination, the Commission must evaluate the condition of the domestic producers of the like product as a whole.107 In addition, the impact of the dumped imports on the domestic industry must be evaluated in relation to U.S. production of the

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100 SAA, supra note 8, at 191.
103 SAA, supra note 11, at 181.
105 "In appropriate circumstances, the United States, for a particular market, may be divided into 2 or more markets and the producers within each market may be treated as if they were a separate industry if: (i) the producers within such market sell all or almost all of their production of the like product in that market, and (ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States." 19 U.S.C. § 1677(4)(C) (1988).
like product. Thus, even where a large percentage of domestic production of the like product may be consumed internally (captively) by integrated domestic producers in the production of downstream products, the Commission must assess the impact of subject imports on total domestic production of the like product.

URAA section 222(b)(2) adds a new provision on captive production. This provision "does not require the Commission to focus exclusively on the merchant market in analyzing the market share and financial performance of the domestic industry" even when the statutory provision applies. However, if the new provision applies, the Commission must determine the extent to which subject imports by a related party are sold in the market or internally consumed by the related-party importer in the production of a downstream product. If the captively-consumed imports do not compete with the upstream like product in the merchant market, those imports are to be included in the total import share of the industry’s total production, “but not in the import penetration ratio for the merchant market or in any other calculation in which captive domestic production is excluded.”

Currently, regardless of its “like product” determination, the Com-

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109 New clause (iv) to § 771(7)(C) provides:
   CAPTIVE PRODUCTION.—If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that (I) the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product, (II) the domestic like product is the predominant material input in the production of that downstream article, and (III) the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article, then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii), shall focus primarily on the merchant market for the domestic like product.
111 Id. at 182.
112 Id. at 183. This provision is likely to materially alter the conduct of Commission investigations. Data for both the captive and merchant markets will now have to be collected in many cases, especially given that many of the products subject to Commission investigations are intermediate products which have both captive and merchant market segments. Currently, where an investigation involves only one like product, the Commission collects data on the total domestic production of the like product, making no distinction between merchant and captive production. See generally Fresh Cut Roses from Colombia and Ecuador, U.S.I.T.C. Pub. 2862, Inv. No. 731-TA-684-685, at 1-6 (Mar. 1995) (Final). However, in an investigation involving more than one like product, where one like product is a downstream article of another upstream like product, the Commission may collect separate data on the captive and merchant segments. See Certain Flat-Rolled Carbon Steel Products from Arg., Aust., Austr., Belg., Braz., Can., Fin., Fr., F.R.G., Italy, Japan, Korea, Mex., Neth., N.Z., Pol., Rom., Spain, Swed., and the U.K., U.S.I.T.C. Pub. 2664, Inv. Nos. 701-TA-319-332, 334, 396-
mission already recognizes that dumped imports may affect the merchant market differently than operations involving captive production. The new provision requires that where the Commission determines that domestic producers internally transfer "significant" production of the domestic like product for the production of a downstream article but sell significant production of the domestic like product in the merchant market, then it must consider the three additional factors set forth in § 771(7)(C)(iv): (I) the internally transferred like product must not enter the merchant market; (II) the like product must be the predominant material input in the production of the downstream article; and (III) production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article. Where all such requirements are satisfied, the Commission is then required to focus primarily on the merchant market.

8. Consideration of the Dumping Margin in Injury Determinations

Section 222(b)(1)(B) of the URAA specifies that the Commission

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With respect to factor (I), where an investigation involves only one like product, it is hard to imagine a situation where internally transferred domestic like product could enter the merchant market for the same like product. Even in investigations involving multiple like products involving upstream/downstream issues, it is unlikely that internally transferred domestic like product could enter the merchant market for the same like product.

With respect to factor (III), again, it will be unlikely that production of the domestic like product sold in the merchant market will generally be used in the production of that downstream article, except where significant amounts of the domestic like product may be purchased by one domestic producer from another domestic producer for production of downstream articles. Thus, this provision will not likely be satisfied unless it is construed broadly to include other domestic producers.

URAA, supra note 11, Pub. L. No. 103-465, § 222(b)(2), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4870 (amending Tariff Act of 1930 § 771(7)(C)(iv)). This new provision would likely have affected the ITC's injury determinations under the "big steel" investigations of 1993. See Certain Flat-Rolled Carbon Steel Products, supra note 112. In those investigations, there were five like products and a significant percentage of U.S. producers' total production of some "like products" were captively consumed, and only a small percentage were sold on the merchant market. Id. As a result, the ITC, under its then available discretion with respect to captive production data, placed greater reliance on captive data than otherwise may have been allowed under this new provision. Id. This reliance may have contributed to a significant number of negative injury determinations. Under the provision, the ITC would not likely have had as much discretion, and more affirmative determinations may have resulted. URAA, supra note 11, Pub. L. No. 103-465, § 222(b)(2), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4870 (amending Tariff Act of 1930 § 771(7)(C)(iv)). This provision may make negative injury determinations more difficult in the future where the investigation involves several "like products" with captive consumption of one like product into a downstream production of another like product. Coincidentally, many AD and CVD petitions by domestic industries producing steel products have involved like product and captive consumption issues. See Certain Flat-Rolled Carbon Steel Products, supra note 112. The captive production provision may possibly be challenged as being inconsistent with GATT 1994 which requires an assessment of the entire domestic industry, including total domestic production.
is to consider in "a proceeding under subtitle B (Antidumping investigations), the magnitude of the margin of dumping." The SAA indicates that this requirement applies only to antidumping investigations, and for countervailing duty investigations, "as under current practice, the Commission will not be required to consider the rate of subsidization." The SAA also indicates that the amendment "does not alter the requirement in current law that none of the factors which the Commission considers is necessarily dispositive in the Commission's material injury analysis." Although commissioners currently have the discretion whether to consider the dumping margin in their injury analysis, under the new legislation, they will be required to consider the margin in their analysis. However, it is difficult to assess the impact that this new requirement will have on future Commission injury determinations. For one Commissioner, this new requirement will likely have little impact, but for other Commissioners, we must wait and see.

In review investigations, as well, the Commission is permitted to consider the magnitude of the dumping margin. This approach is consistent with the Commission's existing practice in changed circumstances reviews.


118 SAA, supra note 8, at 181. A higher dumping (or subsidy) margin tends to increase the likelihood of an affirmative injury determination. Thus, in cases involving simultaneously filed AD and CVD investigations where both dumping and subsidy margins are relatively high, the likelihood of an affirmative injury determination on the AD investigation may be greater than the likelihood of an affirmative injury determination on the simultaneous CVD investigation since consideration of the CVD margin is not mandatory under the new law. URAA, supra note 11, Pub. L. No. 103-465, § 222(b)(1), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4870 (amending Tariff Act of 1930 § 771(7)(C)(iii)).

119 SAA, supra note 8, at 181.


122 The SAA indicates that the dumping margin will not be dispositive, and must be considered as one factor in the overall injury determination. SAA, supra note 8, at 181. Given that this one factor is not to be determinative, the requirement that the dumping margin be considered is not likely to materially alter Commission determinations since Commissioners are still free to weigh individual factors differently in each investigation. See supra notes 21-22 and accompanying text.

123 Commissioner Crawford (and former Commissioner Brunsdale), under their "unitary but-for" analysis, already consider the level of the dumping margin in their injury analysis. See supra note 22. Commissioners Watson, Rohr, Nuzum, and Newquist, however, vary in their use of the dumping margin. See, e.g., Silicon Carbide from the People's Republic of China, U.S.I.T.C. Pub. 2779, Inv. No. 731-TA-651, at 23 (June 1994) (Final).


9. Public Comment

The Commission is required, under section 782(g), to cease collecting information before making a final determination and to provide the parties with a final opportunity to comment on the information obtained by the Commission upon which the parties have not previously had an opportunity to comment.\textsuperscript{126} The comments received, which contain new factual information, however, must also be disregarded by the Commission.\textsuperscript{127} This new provision will not affect any particular investigation substantively, but will require the Commission to modify its investigative schedule.\textsuperscript{128} Given that the duration of the investigative period itself has not been increased, this provision will affect the scheduling of AD investigations.\textsuperscript{129}

Section 228 of the new law requires Commerce and the Commission to publish the "facts and conclusions" supporting their determinations and to publish notice of that determination in the Federal Register.\textsuperscript{130}

10. Record in Staggered Investigations\textsuperscript{131}

Under prior law, the Commission made its determination based on the record on "vote day" in an investigation.\textsuperscript{132} The new law, however, provides that in simultaneously filed or self-initiated investigations in which the Commission engages in cumulative analysis, its determination shall be based on the record compiled in the first final


\textsuperscript{127} \textit{Id.}

\textsuperscript{128} Currently, the record of an investigation closes on vote day. S. REP. No. 249, 96th Cong., 1st Sess. 247-48 (1979). This new provision will thus require the Commission to close the record prior to vote day in order to allow sufficient time for parties to comment before the Commission makes its determination. URAA, \textit{supra} note 11, Pub. L. No. 103-465, § 231(a), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4895 (adding Tariff Act of 1930 § 782).

\textsuperscript{129} Since the duration of the investigation period itself has not been increased, but an additional burden (the requirement for providing parties an opportunity to comment) has been imposed on the Commission, the investigation schedule will have to be modified to fit this new requirement into the current investigation schedule. As of February 1995, the Commission has not yet approved the new scheduling which includes a period for parties to comment on any new post-hearing information. The new schedule is currently in draft form and likely will not be finalized until late 1995 given that no AD and CVD petitions subject to the URAA have been filed as of February 1995, and thus no final AD/CVD investigation under the URAA will likely materialize before the Commission until late 1995.

\textsuperscript{130} URAA, \textit{supra} note 11, Pub. L. No. 103-465, § 228, 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4888 (amending Tariff Act of 1930 § 777(i)(1)). This provision is mere codification of current ITC and Commerce practice. The SAA notes that it is not intended that this provision alter existing law regarding public notice and explanation of AD/CVD determinations. SAA, \textit{supra} note 8, at 222.

\textsuperscript{131} In investigations involving imports from more than one country, Commerce occasionally makes determinations of dumping for various countries on different dates, thereby requiring the ITC to make its injury determination on staggered dates.

\textsuperscript{132} See Chaparral Steel Co. v. United States, 901 F.2d 1047, 1104 n.6 (Fed. Cir. 1990).
investigation in which it makes a determination.\textsuperscript{138} Thus, the records are "frozen" as of the time the record in the first investigation is closed. The SAA notes that when Commerce has staggered investigation schedules, this change eliminates the need for the Commission to consider whether imports subject to the first decided investigation have a "continuing effect" on "vote day" of the subsequent investigation.\textsuperscript{134}

11. Critical Circumstances

Under current law, "critical circumstances" exist if Commerce determines that there have been massive imports of the subject merchandise within a relatively short period of time prior to the "suspension of liquidation."\textsuperscript{135} If Commerce makes an affirmative determination of critical circumstances, retroactive duties will be applied for a period ninety days prior to suspension of liquidation if the Commission determines that such duties are necessary to "prevent recurrence of material injury."\textsuperscript{136} In making this determination the Commission is required to evaluate whether the effectiveness of the order would be materially impaired if retroactive duties were not imposed.\textsuperscript{137}

Sections 214(a)(2)(B) and (b)(2)(B) of the new statute provide that the Commission is to determine whether the surge in imports prior to the suspension of liquidation will undermine the effectiveness of relief, regardless of whether the surge in imports was confined to the ninety day period for which retroactive duties may be assessed.\textsuperscript{138} Consistent with Commission practice and judicial precedent, the Commission is not required to make a separate material injury determination regarding the surge in imports.\textsuperscript{139}

12. Third Country Dumping

Section 232 of the new law adds a new provision to Title VII con-


\textsuperscript{134} SAA, \textit{supra} note 8, at 178; \textit{see also} Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608 (Ct. Int'l Trade 1993).


\textsuperscript{139} SAA, \textit{supra} note 11, at 207 (citing ICC Indus., Inc. v. United States, 632 F. Supp. 36, 40 (Ct. Int'l Trade 1986)).
cerning antidumping petitions filed by foreign governments. The provision permits the government of a WTO member country to file a petition with the U.S. Trade Representative (USTR) requesting initiation of an investigation to determine if imports from a third country "are being sold in the United States at less than fair value and an industry in the petitioning country is materially injured by reason of [these] imports." Section 783(b) grants the USTR the authority to initiate a third-country dumping investigation after consultation with the Commission and Commerce and upon approval of the WTO Council for Trade in Goods. If the USTR decides to initiate an investigation under section 783(c), it will then instruct Commerce to make a determination on dumping, and the Commission to make a determination on injury. If both the Commission and Commerce reach affirmative determinations, section 783(e) states that Commerce will issue an antidumping order. If such an order is issued, the agencies' final determinations are judicially reviewable in the same manner as final determinations under section 735.

Prior U.S. law had no provisions authorizing third country dumping investigations. Given that initiation under 783 is subject to the discretion of an executive agency (the USTR), however, third country dumping proceedings may not likely be often utilized.

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141 Member countries include: Angola, Algeria, Antigua and Barbuda, Argentina, Australia, Austria, Bahrain, Bangladesh, Barbados, Belgium, Belize, Benin, Bolivia, Botswana, Brazil, Brunei Darussalam, Burundi, Cameroon, Canada, Central African Republic, Chile, China, Colombia, Congo, Costa Rica, Cote d'Ivoire, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Egypt, El Salvador, European Communities, Fiji, Finland, France, Gabon, Germany, Ghana, Greece, Guatemala, Guinea Bissau, Guyana, Honduras, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Korea, Kuwait, Liechtenstein, Luxembourg, Macau, Madagascar, Malawi, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Morocco, Mozambique, Myanmar, Namibia, The Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Saint Lucia, Senegal, Singapore, Slovak Republic, South Africa, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, United Arab Emirates, United States, Uruguay, Venezuela, Zaire, Zambia, and Zimbabwe. Notification of Acceptances, Final Act Embodying the Results of the Uruguay Round Multilateral Trade Negotiations, Apr. 25, 1994.


143 Id. at 4897-98 (adding Tariff Act of 1930 § 783(b)).

144 Id. at 4897 (adding Tariff Act of 1930 § 783(c)).

145 Id. at 4898 (adding Tariff Act of 1930 § 783(e)).

146 Id. (adding Tariff Act of 1930 § 783(f)).

147 Prior U.S. law authorized the USTR to request that other countries take action against dumping in their markets that injures U.S. exporters, but did not allow Commerce or the Commission to take action in response to similar requests by other governments. SAA, supra note 8, at 175.

148 The administration may consider the macroeconomic implications of a third country dumping investigation. Given that antidumping proceedings, while benefitting the import-
C. Review of Antidumping and Countervailing Duty Orders

1. Changed Circumstances Reviews

Section 220(a) of the new statute amends, inter alia, section 751(b) of the Act to incorporate the provisions of the Agreements relating to changed circumstances reviews. Amended section 751(b) also contains a new "injury" standard, which is generally consistent with current Commission practice in changed circumstances reviews. Furthermore, in the case of an antidumping duty order, the Commission is directed to determine whether revocation of the order or finding, or termination of the suspended investigation, is likely to lead to "continuation or recurrence of material injury."

Under old section 751(b)(1), the "party seeking revocation of an antidumping or countervailing duty order . . . [had] . . . the burden of persuasion with respect to whether there . . . [were] . . . changed circumstances sufficient to warrant revocation." Under new section 751(b)(3), the party seeking revocation continues to bear the burden of persuasion with respect to whether there are changed circumstances sufficient to warrant revocation.

2. Sunset Reviews

New rules for "sunset reviews" have been incorporated into new section 751(c), which requires Commerce and the Commission: (1) to conduct a review no later than five years after the issuance of an order (or the suspension of an investigation or a prior review), and (2) to determine whether revocation of the order (or termination of the suspended investigation), would be likely to lead to continuation or recur-

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149 URAA, supra note 11, Pub. L. No. 103-465, § 220(a), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4860-61 (amending Tariff Act of 1930 § 751(b)). Whenever Commerce or the Commission receives information showing changed circumstances sufficient to warrant a review, it shall conduct a review of a final determination (or a suspension agreement). 19 U.S.C. § 1675(b)(1) (1988). Without good cause shown, however, no final determination or suspension agreement can be reviewed within 24 months of its notice. OVERVIEW, supra note 5, at 70.

150 URAA, supra note 11, Pub. L. No. 103-465, § 220(a), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4860 (amending Tariff Act of 1930 § 751(b)). See also American Permac v. United States, 831 F.2d 269 (Fed. Cir. 1987) (stating that in a § 751 review, the Commission determines whether an industry in the United States would be materially injured or threatened with material injury by reason of the subject merchandise if the order were revoked). "Commission must determine whether revocation of the order . . . is likely to lead to continuation or recurrence of material injury." SAA, supra note 8, at 208.


152 URAA, supra note 11, Pub. L. No. 103-465, § 220(a), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4860-61 (amending Tariff Act of 1930 § 751(b)(3)). Article 11.2 of the Agreement, however, does not require the petitioner to carry the burden of persuasion under changed circumstances. Antidumping Agreement, supra note 8, art. 11, para. 11.2. It merely requires an interested party requesting a review to submit positive evidence substantiating the need for review. Id.
rence of dumping or countervailing subsidies and injury.\textsuperscript{153} Section 751(c)(2) further requires automatic initiation of sunset reviews by Commerce no later than 30 days before the fifth anniversary of the relevant order.\textsuperscript{154} The SAA notes that such industry data may include information regarding "sales, prices, imports, and market conditions."\textsuperscript{155}

If there is no response from domestic interested parties to the notice of initiation, Commerce will revoke the order or terminate the suspended investigation within 90 days of the initiation of the review.\textsuperscript{156} Under URAA section 751(c)(3)(B), if there is inadequate response to a notice of initiation by foreign or domestic interested parties, Commerce and the Commission will conduct an expedited review based on the facts available and will issue final determinations within 120 days and 150 days, respectively, of the initiation of the review.\textsuperscript{157} The SAA states that the "facts available may include prior agency determinations involving the subject merchandise as well as information submitted on the record by parties in response to the notice of initiation."\textsuperscript{158}

To reduce the burden on all parties involved, foreign interested parties, including foreign governments, are permitted to waive their participation in a Commerce sunset review.\textsuperscript{159} If Commerce receives such a waiver, Commerce will conclude that revocation or termination would be likely to lead to continuation or recurrence of dumping with respect to the submitter.\textsuperscript{160}

Time limits for the completion of reviews are established in new section 751(c)(5).\textsuperscript{161} Normally, Commerce will make its final sunset determination within 240 days of the initiation of the review. If Commerce's determination is affirmative, however, the Commission will make its final sunset determination within 360 days of the initiation of

\begin{footnotes}
\item[153]{URAA, supra note 11, Pub. L. No. 103-465, § 220(a), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4861-63 (amending Tariff Act of 1930 § 751(c)). This requirement for Commerce and Commission review is a slight change from the requirements of Article 11.3 of the Antidumping Agreement which requires termination of any antidumping duty not later than five years from date of imposition unless the authorities determine, in a review, that the expiration of the duty would be likely to lead to continuation or recurrence of dumping and injury. Antidumping Agreement, supra note 8, at art. 11, para. 11.3. However, § 751(c)(1) is probably a permissible interpretation of Article 11.3.}
\item[155]{SAA, supra note 8, at 210.}
\item[157]{\textit{Id.} at 4862 (amending Tariff Act of 1930 § 751(c)(3)(B)).}
\item[158]{SAA, supra note 8, at 209-10.}
\item[159]{\textit{Id.} at 211.}
\item[160]{\textit{Id.}
\end{footnotes}
the review. Commerce or the Commission may declare a sunset proceeding to be extraordinarily complicated and extend the time limit for making its determination by not more than 90 days each under new section 751(c)(5)(B).

Rules for sunset reviews of antidumping duty orders and suspended investigations that are outstanding as of the date the WTO Agreement enters into force are established in the agreement. URAA section 751(c)(6)(A) specifically establishes a schedule for completing sunset reviews of transition orders in a timely and efficient manner. Commerce, furthermore, is required to begin its review of transition orders 42 months after the United States entry into force of the WTO Agreement. Commerce must commence reviews of all transition orders by the “fifth anniversary.” URAA section 751(c)(6)(A)(i) requires Commerce and the Commission to complete their review of each transition order within 18 months of the initiation of the review. Commerce and the Commission must complete their reviews of all transition orders within eighteen months of the fifth anniversary of the date of entry into force of the WTO Agreement with respect to the United States.

3. “Black Hole” Reviews

Section 271 of the new statute provides for “black hole” reviews. When a country becomes a WTO member, any countervailing duty order that did not receive an injury test will be revoked unless a domestic interested party requests an injury investigation within six months of the date the country becomes a Subsidies Agreement country.

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162 See id. at 4869 (amending Tariff Act of 1930 § 751(c)(5)(A)).
163 Id. (amending Tariff Act of 1930 § 751(c)(5)(B)).
164 Id. at 4863 (amending Tariff Act of 1930 § 751(c)(6)(A)).
165 Id. (amending Tariff Act of 1930 § 751(c)(6)(A) and (D)).
166 Id. (amending Tariff Act of 1930 § 751(c)(6)(A)).
167 Id. (amending Tariff Act of 1930 § 751(c)(6)(A)(ii)).
168 SAA, supra note 8, at 212.
169 URAA, supra note 11, Pub. L. No. 103-465, § 271(a), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4918-22 (adding Tariff Act of 1930 § 753). The term “black hole” review refers to injury tests for outstanding countervailing duty orders which were issued without an ITC injury test, under former section 19 U.S.C. § 1305(a)(1) (1988), for countries that were not under the “Subsidies Agreement.” For countries that were covered under the Subsidies Agreement, 19 U.S.C. § 1677 applied, and such countries were entitled to an ITC injury test before any countervailing duties could be imposed on imports from such countries. URAA § 262 amends § 701(a) of the Tariff Act of 1930 to provide that the injury test is applicable only to merchandise imported from a “Subsidies Agreement country.” SAA, supra note 8, at 253. Note that § 271 does not apply to outstanding AD orders since AD investigations require an ITC injury test before imposition of an AD order. Id.
170 See URAA, supra note 11, Pub. L. No. 103-465, § 271(a), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4918 (adding Tariff Act of 1930 § 753(a)). Section 701(b) defines “Subsidies Agreement country” as: 1) a state or customs territory to which the U.S. applies the WTO Agreement; 2) a country which has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Subsidies Agreement, as determined by the President; or 3) a country to which the United States does not apply the WTO Agreement.
Under 753(a)(1), the Commission must determine, if requested, whether a domestic industry is likely to be materially injured by reason of the merchandise subject to the CVD order if an outstanding CVD order is revoked.\(^{171}\) The Commission standard is intended to correspond to that employed in changed circumstances and sunset reviews. The SAA further directs the Commission to look to new section 752(a), to the extent relevant, for guidance in making its sunset review determination.\(^{172}\)

### 4. Standards for Determining Recurrence of Material Injury in Review Investigations

New section 752 establishes standards to be applied by Commerce and the Commission in conducting changed circumstances and sunset reviews.\(^{173}\) Under section 752(a)(1), the Commission must decide the likely impact of a revocation of an antidumping duty order in the reasonably foreseeable future.\(^{174}\) The SAA explains that the "likelihood of continuation or recurrence of material injury standard" is not the same as the standards for material injury and threat of material injury, although it contains some of the same elements.\(^{175}\) Under the material injury standard, the Commission determines whether there is current material injury by reason of imports of subject merchandise.\(^{176}\) Under the threat of material injury standard, however, the Commission decides whether injury is imminent.\(^{177}\) By comparison, under the likelihood standard, the Commission would engage in a counter-factual analysis. It would determine whether injury is likely in the "reasonably foreseeable" future if an antidumping order were revoked.\(^{178}\)

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\(^{171}\) Id. § 271(a), at 4918 (adding Tariff Act of 1930 § 753(a)(1)).

\(^{172}\) See SAA, supra note 8, at 273. As of July 1, 1994, there were approximately 48 outstanding individual "Black Hole" CVD orders and approximately 28 packaged "Black Hole" CVD orders. Of the 28 packaged orders, 16 had related injury cases. Internal Records, Office of Investigations, USITC (Aug. 1994).


\(^{174}\) Id. § 221(a), at 4865 (adding Tariff Act of 1930 § 752(a)(1)).

\(^{175}\) SAA, supra note 8, at 213.


\(^{178}\) SAA, supra note 8, at 214. In making its determination of impact on the domestic industry of a revocation, URRA § 221(a) directs the ITC to consider four specific circumstances. URRAA, supra note 11, Pub. L. No. 103-465, § 221(a), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4865 (adding Tariff Act of 1990 § 752(a)(1)). Under § 752(a)(1)(A), the ITC must consider "its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the order was issued." Id. § 221(a) (adding Tariff Act of 1990 § 752(a)(1)(A)). The SAA states that if the ITC finds
5. Judicial Review

Section 220(b) of the new statute amends 19 U.S.C. section 1516A to provide for judicial review of various administrative determinations.\textsuperscript{179} Determinations made after full investigation under sunset review (and changed circumstances review) shall be subject to judicial review under the substantial evidence standard. Determinations to terminate the investigation (or summary review based upon inadequate responses), however, are subject to an arbitrary and capricious standard.\textsuperscript{180}

D. Procedural Requirements

1. Industry Support

Consistent with Article 5.4 of the Antidumping Agreement,\textsuperscript{181} new sections 702(c)(4)(A) and 732(c)(4)(A) require Commerce to determine whether the petition has been filed by or on behalf of the industry.\textsuperscript{182} Industry support exists if the domestic producers or workers who support the petition account: (1) for at least twenty-five percent of the total production of the "domestic like" product, and (2) more than fifty percent of the production of the "domestic like" product produced by that portion of the industry expressing support for or opposition to the petition.\textsuperscript{183} In determining the level of industry support for the petition, Commerce is directed not to include as members of the domestic industry those domestic producers who oppose the petition, but are related to exporters, unless such producers demonstrate that their interests as domestic producers would be adversely affected by


\textsuperscript{180} See SAA, supra note 8, at 211.

\textsuperscript{181} Antidumping Agreement, supra note 8, at art. 5, para. 5.4.


\textsuperscript{183} Id.
the imposition of an order.184 Commerce is also directed not to apply a bright line test to determine whether a producer, who is also an importer of the subject merchandise or who is related to an importer, should be excluded from the domestic industry. Instead, it must examine relevant factors, such as percentage of ownership or volume of imports.185 The SAA indicates that the question of industry support will be resolved conclusively at the initiation stage.186

2. Commerce: Adequacy of Petition

Section 212 of the new statute requires Commerce to poll the industry if the petition does not establish “support of domestic producers or workers accounting for more than fifty percent of the total production of the domestic like product.”187 If Commerce polls the industry, this new provision allows Commerce to postpone its determination on the sufficiency of the petition to no later than forty days after the filing of the petition, instead of the twenty days which would normally be the case.188 New sections 703(a)(2) and 731(a)(2) accordingly provide that the Commission’s preliminary determinations be made within twenty-five days after the date on which the Commission receives notice from Commerce.189

3. Refiled Petitions

Section 217 of the new statute provides that if, within three months after the withdrawal of a petition, a new petition is filed seeking the imposition of duties on both the subject merchandise of the withdrawn petition and the subject merchandise from another country, the Commission may use, in any resulting investigation, the records compiled in the investigation conducted pursuant to the withdrawn petition.190 The provision only applies, however, to the first withdrawal and refiling of a petition.191 The SAA explains that the purpose of this provision is to allow a petitioner the benefits of cumulation when a petitioner decides to file additional petitions after an investigation is ongoing. This is necessary because the new statute limits cumulation to investigations that are filed or initiated on the same date, and would no longer permit cumulation of investigations with

185 SAA, supra note 8, at 188.
186 SAA, supra note 8, at 192. Thus, after initiation, Commerce will no longer have to reconsider the issue of industry support even when the Commission subsequently defines the like product or domestic industry differently than Commerce.
188 Id. at 4844, 4846 (amending Tariff Act of 1930 §§ 702(c)(1)(B), 732(c)(1)(B)).
189 Id. § 212(b), at 4847-49 (amending Tariff Act of 1930 §§ 705(a)(2), 733(a)(2)).
190 Id. § 217(a)(3)(B), at 4853 (amending Tariff Act of 1930 § 704(a)(1)).
191 Id.
“staggered” filing dates. The provision allows Commerce and the Commission to use the record in the earlier (now terminated) investigation in the subsequent investigations.\textsuperscript{192}

4. Post-Petition Information

Section 222(f) of the new statute authorizes the Commission to reduce the weight given to changes in the volume, price effects or impact of the subject merchandise since the filing of the petition, if the Commission finds that such changes are related to the pendency of the investigation.\textsuperscript{193} The SAA also notes that improvement in the domestic industry’s condition during the investigation can also be related to the pendency of the investigation and allows the Commission to make that presumption.\textsuperscript{194}

5. Best Information Available

New section 776 directs the Commission and Commerce to make their determinations on the basis of “the facts otherwise available” when necessary information is unavailable on the record, when a person withholds requested information or fails to provide it in a timely manner, significantly impedes a proceeding, or provides information to Commerce which cannot be verified.\textsuperscript{195} Additionally, Commerce is also authorized by this section to take an adverse inference against an interested party that has failed to cooperate by not acting to the best of its ability to comply with an agency request for information.\textsuperscript{196} In making an adverse inference, the agency may rely on information from the petition, from elsewhere in the record, from a previous final determination, or from a previous review or “black hole” determination.\textsuperscript{197}

\textsuperscript{192} These limitations are designed to prevent domestic producers from abusing the antidumping laws via repeated petition filings and withdrawals. SAA, \textit{supra} note 8, at 179.


\textsuperscript{194} SAA, \textit{supra} note 8, at 184. Again, this provision is a codification of existing practice at the ITC. Commissioners frequently give less weight to interim data which often involve only three months worth of data and which may also have been affected by the filing of the petition and Commerce’s subsequent preliminary affirmative determination. See Stainless Steel Bar from Brazil, India, Japan, and Spain, U.S.I.T.C. Pub. 2806, USITC Inv. Nos. 731-TA-678-679-681-682, at I-22, n.29 (Feb. 1995) (Watson, Chairman, dissenting) (Final).


\textsuperscript{196} Id.

\textsuperscript{197} Section 776(c), as amended by the URAA, however, directs the agency to attempt to corroborate from independent sources any information upon which it relies in making a determination other than information obtained in the course of the investigation or review at hand. Id. at 4897 (amending Tariff Act of 1930 § 776(c)).
6. **Business Proprietary Information (BPI)**

Section 226(a) of the new statute amends section 777(b)(1) to provide that the Commission or Commerce, in carrying out a "review covering the same subject merchandise," as well as an "investigation in which the information is submitted" may have access to BPI.\(^1\) The SAA indicates that this provision expressly allows BPI submitted in an original investigation to be used by the agency to which it was submitted in conducting a changed circumstance or sunset review under new section 751.\(^2\) Section 226(a)(2) of the new statute amends section 777(b) to expressly allow a BPI submitted in connection with a changed circumstance or sunset review under section 751(b) or (c) that results in termination of the order or suspended investigation to be used in a subsequent investigation involving the same subject merchandise, provided that the petition for the subsequent investigation is filed within two years after revocation or termination.\(^3\)

7. **Questionnaire Procedures**

Commerce and the Commission under section 782(d) must inform the submitter promptly when a submission is deficient and must provide the submitter, to the extent practicable, with an opportunity to remedy or explain the deficiency in accordance with the deadline established for the completion of the investigation or review.\(^4\) Under new section 782(e), even if the response to a deficiency communication is unsatisfactory, the agencies cannot decline to consider defective information that was originally submitted by an interested party if: (1) the information was submitted in a timely manner to the best of the party's ability, (2) can be verified, (3) is sufficiently complete as to be reliable, (4) and can be used without undue difficulty.\(^5\) Furthermore, Commerce or the Commission must provide, to the extent practicable, a written explanation of the grounds for their action when they

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\(^1\) Id. § 226(a), at 4887-88 (amending Tariff Act of 1930 § 777(b)(1)).

\(^2\) URAA, supra note 11, Pub. L. No. 103-465, § 226(a), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4887 (amending Tariff Act of 1930 § 777(b)(3)). This provision was intended to "conserve the resources of parties." SAA, supra note 8, at 222.

\(^3\) URAA, supra note 11, Pub. L. No. 103-463, § 231(a), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4894-95 (amending Tariff Act of 1930 § 782(d)). The SAA emphasizes, however, that this provision "is not intended to override the time-limits for completing investigations or reviews, nor to allow parties to submit continual clarifications or corrections of information which cannot be evaluated adequately within the applicable deadlines." SAA, supra note 8, at 196.

\(^4\) URAA, supra note 11, Pub. L. No. 103-465, § 231(e), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4895 (amending Tariff Act of 1930 § 782(e)). The SAA notes, however, that information need be verifiable only "to the extent that verification is required." SAA, supra note 8, at 196. Under new § 782(i), however, verification is required only for certain information on which Commerce relies in making determinations. URAA, supra note 11, Pub. L. No. 103-465, § 782(i), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4897 (amending Tariff Act of 1930 § 782(i)).
decline to accept information into the record.\textsuperscript{203}

Provisions directing Commerce and the Commission to provide assistance to interested parties who may have difficulty submitting information in the requested form or manner are also contained in section \textsuperscript{782(c)}.\textsuperscript{204} When a party indicates to the agency that it is unable to submit information as requested, section \textsuperscript{782(c)(1)} authorizes the agency to modify its requirements to the extent necessary to avoid imposing an unreasonable burden on the party.\textsuperscript{205} Commerce and the Commission are further instructed to take into account difficulties interested parties, particularly small companies, may face in responding to information requests, and to provide to such parties any assistance practicable.\textsuperscript{206} The SAA indicates that the Commission will amend its regulations to provide that exporters and foreign producers will have at least thirty days to respond to initial questionnaires in Commission final investigations or reviews.\textsuperscript{207}

The new provision requiring the Commission to make its determinations based on the “facts available” should not change Commission practice in substance. The SAA states that the new provision in section \textsuperscript{776(b)} authorizing the Commission and Commerce to draw adverse inferences against noncooperating interested parties is intended to conform to current practice.\textsuperscript{208} However, requirements under new sections \textsuperscript{782(c)-(e)} and \textsuperscript{782(g)}\textsuperscript{209} will likely improve the questionnaire response rate of respondents and thereby lead to fewer affirmative dumping findings by Commerce based on “Best Information Available.”\textsuperscript{210}

8. Interested Parties

Commerce and the Commission are directed under section \textsuperscript{777(h)} to provide an opportunity for industrial users or representative consumer organizations to submit relevant information.\textsuperscript{211} The “relevant information,” however, must pertain to dumping, subsidization, or material injury by reason of imports. The SAA states this provision does not require a change in practice because there are no constraints

\begin{thebibliography}{99}
\bibitem{204} Id. § 251(a), at 4894 (adding Tariff Act of 1930 § 782(c)).
\bibitem{205} Id. (adding Tariff Act of 1930 § 782(c)(1)).
\bibitem{206} Id. (adding Tariff Act of 1930 § 782(c)(2)).
\bibitem{207} The SAA also indicates that additional time may be allowed for “follow-up” inquiries. SAA, supra note 8, at 197.
\bibitem{208} Id. at 200.
\bibitem{209} See supra notes 201-207 and accompanying text.
\bibitem{210} Best Information Available (BIA) is often information that is supplied by petitioners, and dumping margins based on BIA are often greater than dumping margins based on comparisons of normal value to export price. See Silicon Carbide from China, U.S.I.T.C. Pub. 2779, Inv. No. 751-TA-651, at II-4 (June 1994) (Final).
\end{thebibliography}
on the ability of persons to file comments under current law.\textsuperscript{212}

IV. Analysis

The URAA eliminates or minimizes many of the perceived methodology biases in dumping margin calculations. Commerce will now have to compare the weighted-average import price with the weighted-average home market price of the foreign producer, or compare individual import prices with individual home market prices of the foreign producer.\textsuperscript{213} The former U.S. practice of comparing individual import prices with the average home-market price, a practice which tended to bias the dumping margin upwards, was eliminated.\textsuperscript{214} The new law also requires that profits and SG&A expenses used in calculating constructed value dumping margins be based on actual data on production and sales.\textsuperscript{215} This new provision requires elimination of the statutory minima for administrative overhead (10 percent) and profits (8 percent), and will tend to decrease the constructed value dumping margin whenever SG&A and profits fall below the statutory minima.\textsuperscript{216} Other statutory changes affecting calculation of the dumping margin include: the requirement that transportation costs be deducted from “normal value”;\textsuperscript{217} the provision for adjustments related to currency conversions;\textsuperscript{218} and the increase in de minimis dumping margin cutoff from 0.5 percent to 2 percent.\textsuperscript{219} In addition, the new “sunset” provisions, which require termination of AD orders after five years, unless a likelihood of continued harm can be shown, may be one of the most important provisions in the new codes.\textsuperscript{220}

The new law also implements numerous changes at the injury determination phase. URAA section 771(7)(G)(i) limits countries eligible for cumulation to imports from those countries as to which petitions were filed or investigations were self-initiated by Commerce on the same day.\textsuperscript{221} For investigations involving regional industries,
when the Commission makes an affirmative injury determination with
to a regional industry, duties will only be levied on imports into
that region.222 In addition, the requirement that dumping margins be
considered in ITC injury determinations may be significant.223

The URAA also increases transparency and due process for re-
ponents to an AD investigation. URAA sections 702(c) (4) (A) and
732(c) (4) (A) require Commerce to determine whether a petition has
been filed on behalf of the industry.224 In addition, Commerce will
be required to poll the industry if the petition does not establish sufficient
support.225 New section 782(d) requires the agencies to inform ques-
tionnaire respondents when a submission is deficient and to provide
the submitter with an opportunity to remedy or explain the
deficiency.226

Other provisions of the URAA which may not materially affect
Commerce or Commission determinations or which are mere codifica-
tions of current U.S. practice include: the ITC present injury causa-

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4874 (adding Tariff Act of 1930 § 771(7)(G) (iv)).

223 It is difficult, however, to determine how this new requirement will affect injury de-
terminations of individual ITC commissioners. The outcome will likely depend on the mag-
nitude of dumping margins (i.e., on Commerce's application of other URAA statutory
provisions), as well as the weight given to the dumping margin by individual ITC Commis-
sioners. It should be noted that amended § 771(7)(C)(iii) does not alter the requirement in
prior law that none of the factors which the Commission considers is necessarily dispositive in
the Commission's material injury analysis. SAA, supra note 8, at 180; 19 U.S.C.

224 Commerce in the past generally assumed that a petition was being submitted on be-
half of the domestic industry as long as a majority of the domestic firms did not actively
oppose the petition. See Murray, supra note 31, at 28. Commerce will now be required to
determine whether domestic producers who support the petition account for at least 25 per-
cent of the total production of the domestic like product, and the domestic producers who
support the petition account for more than 50 percent of the production of the domestic like
product produced by that portion of the industry expressing support for or opposition to the
732(c)(4)(A)).

732(c)(4)(D)).

4809, 4894-95 (adding Tariff Act of 1930 § 782(d)). If the information collected from the
foreign producer or exporter was inadequate, Commerce would often base its dumping de-
termination on the best information otherwise available, that is, the information submitted
by the petitioner. Murray, supra note 31, at 34. Commerce will now be precluded from
deciding to consider defective information that was originally submitted by an interested
party if the information was submitted in a timely manner, can be verified, is sufficiently
complete as to be reliable, and can be used without undue difficulty. URAA, supra note 11,
1930 § 782(e)).
tion standard;\textsuperscript{227} the threat of injury standard;\textsuperscript{228} the cumulation exceptions;\textsuperscript{229} cumulation for threat;\textsuperscript{230} negligibility;\textsuperscript{231} the requirement for negative dumping determinations for de minimis margin countries;\textsuperscript{232} the termination of investigation for negligible countries;\textsuperscript{233} the continuation of the American Lamb preliminary ITC injury standard;\textsuperscript{234} the related party provision;\textsuperscript{235} the use of BIA information;\textsuperscript{236} the captive production provision;\textsuperscript{237} public comment procedures;\textsuperscript{238} and public notice requirements.\textsuperscript{239}

\textsuperscript{227} Present injury standards are already fully consistent with causation standards under Article 3.5 of the Agreement. SAA,\textsuperscript{supra} note 8, at 181.

\textsuperscript{228} URAA,\textsuperscript{supra} note 11, Pub. L. No. 103-465 § 222(c), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4870 (amending Tariff Act of 1930 § 771(7)(F)). No substantive change in the Commission’s threat analysis is required. SAA,\textsuperscript{supra} note 8, at 184.


\textsuperscript{230} Id. § 222(e), at 4874 (adding Tariff Act of 1930 § 771(7)(H)).

\textsuperscript{229} URAA § 771(24) establishes a “bright line” negligibility cutoff at 3 percent of total imports. Id. § 222(d), at 4871-72 (adding Tariff Act of 1930 § 771(24)). As explained above, however, this provision will not likely materially alter the Commission’s negligibility determinations given that the 3 percent figure is not 3 percent of total U.S. consumption, but rather 3 percent of total imports. See supra note 84 and accompanying text. Thus, in investigations where total imports supply less than one-third of the U.S. market, the Commission will likely find fewer countries to be negligible than under prior law.

\textsuperscript{231} Id. § 212(b), at 4847-49 (amending Tariff Act of 1930 §§ 703(a), 705(b)(1), 739(a)(1)(B), 735(b)(1)).

\textsuperscript{232} SAA,\textsuperscript{supra} note 8, at 187.

\textsuperscript{233} Although a “related party” is now defined in terms of control, the SAA indicated that this change does not alter Commission practice in this area. SAA,\textsuperscript{supra} note 8, at 188. However, given the directive under the SAA to apply a broad definition of control to encompass domestic producers who are not formally importers of record, and given the expanded definition of a related party, which focuses on “control between a domestic producer and an exporter or importer,” the Commission will likely have greater discretion to make a related parties determination. Thus, the number of domestic companies eligible for a related parties determination, and hence the number of domestic producers eligible for exclusion from the domestic industry will likely be increased. SAA,\textsuperscript{supra} note 8, at 188; 19 U.S.C. § 1677(4)(B) (1988).

\textsuperscript{234} Although URAA § 776(a) directs Commerce and the Commission to make their determinations on the basis of “facts otherwise available,” such information is often information supplied by petitioners. URAA,\textsuperscript{supra} note 11, Pub. L. No. 103-465 § 251(c), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4896 (amending Tariff Act of 1930 § 776(a)); see, e.g., Silicon Carbide from China, U.S.I.T.C. Pub. 2779, Inv. No. 751-TA-651, at II-4 (June 1994) (Final).

\textsuperscript{235} As explained above, the new captive production provision may require commissioners to place less weight on internally (captively) consumed domestic production of the like product in investigations involving multiple like products and upstream/downstream production issues. See supra notes 109, 112, 116 and accompanying text. In such investigations, this provision may tend to make negative injury determinations more difficult.

\textsuperscript{236} New § 782(g) will also provide parties with an additional opportunity to comment before the Commission makes its determination. This new procedural requirement, however, is not likely to alter Commission injury determinations given that comments are restricted to information that is already on the record. SAA,\textsuperscript{supra} note 8, at 201.

\textsuperscript{237} The administration does not intend that new § 777(i) alter existing law regarding public notice and explanation of AD/CVD determinations. Id. at 222.
V. Conclusion

U.S. antidumping duty laws are tools increasingly used by domestic industries to shield themselves from competition from abroad.\textsuperscript{240} Continuation of this trend by the developed countries as well as adoption by the developing countries seriously threatens the progresses made under the GATT and will impede the economic development of developing countries as well as developed countries. The new GATT Antidumping Agreement and the URAA require modest changes to remedy this situation. Many of the perceived procedural and substantive biases at the dumping and injury determination phases have been significantly reduced. However, much work still lies ahead.

\textsuperscript{240} Bhagwati, \textit{supra} note 7, at 199.