

1988

## Commercial Procedures under Existing and Proposed Antidumping/Countervailing Duty Regulations

Gary N. Horlick

F. Amanda DeBusk

---

### Recommended Citation

Gary N. Horlick & F. Amanda DeBusk, *Commercial Procedures under Existing and Proposed Antidumping/Countervailing Duty Regulations*, 22 INT'L L. 99 (1988)  
<https://scholar.smu.edu/til/vol22/iss1/7>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

## Commerce Procedures Under Existing and Proposed Antidumping/Countervailing Duty Regulations†

The International Trade Administration of the United States Department of Commerce (Commerce) has proposed new regulations that would implement the Trade and Tariff Act of 1984, codify existing practice, and in some instances, change existing practice.<sup>1</sup> If adopted, these regulations would be the most comprehensive changes to the antidumping and countervailing duty regulations in six years. This article describes both existing procedures and the proposed changes.

Before delving into Commerce procedures, a brief review of the framework of the antidumping and countervailing duty laws is in order. The antidumping laws allow for a remedy when a product is being sold in the United States at a price less than its fair value and imports of that product are causing material injury to a domestic industry.<sup>2</sup> The countervailing duty laws provide redress when a product sold in the United States is subsidized and imports of that product are causing material injury to a

---

\*O'Melveny & Myers; Deputy Assistant Secretary of Commerce for Import Administration, 1981-1983; J.D. Yale Law School 1973.

\*\*O'Melveny & Myers; J.D. Harvard Law School 1981.

† The Editorial Reviewer for this article was C. Paul Rogers III, Professor of Law, Southern Methodist University.

1. Countervailing Duty Regulations, 50 Fed. Reg. 24,207-234 (1985) (to be codified at 19 C.F.R. pt. 355) (proposed June 10, 1985); Antidumping Regulations, 51 Fed. Reg. 29,046-074 (1986) (to be codified at 19 C.F.R. pt. 353) (proposed Aug. 13, 1986). It appears unlikely that the proposed regulations will be made final in 1987.

2. 19 U.S.C. § 1673 (1982 & Supp. II 1984).

domestic industry.<sup>3</sup> Commerce determines whether a product is being dumped or subsidized, as the case may be, and the International Trade Commission (the Commission) decides whether the imported product is causing material injury to a domestic industry. This article discusses only Commerce's procedures. Since these regulations most directly affect the respondent, this article discusses their impact on respondents. However, petitioner's counsel also should follow developments regarding these procedures, but with opposite goals, of course.

In general, the antidumping and countervailing duty procedures are parallel both under existing and proposed Commerce regulations. When provisions are parallel, the antidumping regulations are used for illustration.

## I. Initiation

Antidumping and countervailing duty proceedings commence when a private party files a petition<sup>4</sup> or Commerce self-initiates an investigation.<sup>5</sup> Most investigations begin with the filing of a petition by a private party.

Following such a filing, Commerce must decide whether to initiate an investigation. The Department must make this decision twenty days after receipt of a petition.<sup>6</sup>

Three important issues the respondent must consider during the initiation phase are: (1) how Commerce will define the scope of the investigation; (2) whether the petitioner has standing; and (3) whether to attempt preinitiation contact.

---

3. *Id.* § 1671(a). In addition to providing a remedy for sales that cause material injury, the antidumping and countervailing duty laws provide remedies for likely sales and sales that threaten material injury. *Id.* §§ 1671(a)(1), 1673. The Trade and Tariff Act of 1984 added language specifically including likely sales within the scope of the trade laws, but Commerce had discretion to consider likely sales prior to 1984. H.R. REP. NO. 725, 98th Cong., 2d Sess. 11, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5137-38. The proposed regulations would limit Commerce's consideration of likely sales to instances where there is an irrevocable offer. 50 Fed. Reg. 24,218 (1985) (to be codified at 19 C.F.R. § 355.2(p)); 51 Fed. Reg. 29,057 (1986) (to be codified at 19 C.F.R. § 353.2(t)). The legislative intent in amending the trade laws to include likely sales was not limited to irrevocable offers, however. H.R. REP. NO. 725, 98th Cong., 2d Sess. 11, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 5127, 5137 ("Section 101 of H.R. 4787 clarifies the applicability of countervailing duty law to situations where a product has been or is likely to be sold for importation but has not actually been imported.").

4. 19 U.S.C. §§ 1671a(b), 1673a(b) (1982 & Supp. II 1984). The proposed regulations would require a private party to provide information in a petition not required under present law, including the percentage of total exports to the United States accounted for by persons believed to be selling dumped or subsidized merchandise. 50 Fed. Reg. 24,219 (1985) (to be codified at 19 C.F.R. § 355.12(b)(6)); 51 Fed. Reg. 29,059 (1986) (to be codified at 19 C.F.R. § 353.12(b)(6)). The petitioner should be wary of antitrust problems in securing information on the market share of its foreign competitors.

5. 19 U.S.C. §§ 1671a(a), 1673a(a)(1) (1982 & Supp. III 1985).

6. *Id.* §§ 1671a(c), 1673a(c) (1982).

## A. SCOPE OF THE INVESTIGATION

In the notice of initiation, Commerce defines the scope of the investigation.<sup>7</sup> Because of the prohibition on preinitiation communication,<sup>8</sup> a respondent has no input into this important decision.

The scope of investigation regulations, both existing and proposed, are circular. Commerce's scope of investigation determination turns on the Commission's "like product" definition (*i.e.*, what U.S. product is "like" the imported product),<sup>9</sup> and the "like product" definition, which is often a hotly contested issue, is not resolved until the Commission's final determination. Thus, Commerce cannot properly define the scope of investigation until it completes the investigation.

The explanation of the proposed regulations notes that Commerce would consult the Commission regarding the "like product" definition,<sup>10</sup> as is the current practice. Nevertheless, these consultations are often *pro forma*, and the two agencies sometimes reach inconsistent conclusions.<sup>11</sup>

## B. STANDING

Many respondents are aggressively pursuing standing issues in an area of rapidly evolving trade law. For a petitioner to have standing, it must (1) be an interested party,<sup>12</sup> and (2) file the petition on behalf of an industry.<sup>13</sup> Many questions have arisen as to who must establish whether a petition is filed on behalf of an industry: the petitioner, the respondent, Commerce, or the Commission? In *Gilmore Steel Corp. v. United States*<sup>14</sup> the court said the petitioner "must show that a majority of [the] industry

7. The description of merchandise in the petition guides Commerce in defining the scope of the investigation, but it is not necessarily controlling under either existing or proposed regulations. *See* 50 Fed. Reg. 24,209 (1985); 51 Fed. Reg. 29,048 (1986).

8. As discussed *infra* in notes 21-26 and accompanying text, the prohibition on preinitiation communication is not absolute in that a consultation between the United States and a government alleged to be providing subsidies is required by the General Agreement on Tariffs and Trade.

9. 19 U.S.C. § 1677(4)(A) (Supp. II 1984).

10. 50 Fed. Reg. 24,208 (1985); 51 Fed. Reg. 29,046 (1986).

11. *See, e.g.*, Certain Valves, Couplings, Nozzles and Connections of Brass, Suitable for Use in Interior Fire Protection Systems, from Italy, 49 Fed. Reg. 47,066 (Dep't Comm. 1984) (final determination), in which Commerce found a single industry, and the Commission found seven industries, two of which were materially injured. *Id.* at 47,071. In *Badger-Powhatan, Div. of Figgie v. United States*, 608 F. Supp. 653, 655 (Ct. Int'l Trade 1985), the plaintiff challenged Commerce's directive to the U.S. Customs Service to assess a duty only on products subject to the Commission's affirmative injury determinations. The plaintiff's action to compel Commerce to expand the scope of the antidumping order was dismissed. *Id.* at 658.

12. 19 U.S.C. § 1677(9) (1982 & Supp. II 1984).

13. *Id.* §§ 1671a(b)(1), 1673a(b)(1) (1982).

14. 585 F. Supp. 670, 676 (Ct. Int'l Trade 1984).

backs its petition." Commerce takes the position that the respondent has the burden of establishing that the petitioner has *not* filed on behalf of an industry.<sup>15</sup> However, the respondent usually has no means to gather information on industry support of the petition,<sup>16</sup> and thus Commerce's position effectively squelches the issue. Indeed, Commerce itself has no means to measure accurately the degree of industry support (except for highly concentrated industries), and it usually refuses to try to gather information in any event.<sup>17</sup>

In practice, the International Trade Commission gathers information on domestic industry support of the petition. The Commission sends questionnaires to domestic producers, inquiring whether the producer supports the petition.<sup>18</sup> The final tally of industry support is not made available until the Commission issues its final investigation report, which usually occurs at least a week after its final determination. Since Commerce makes its final determination prior to the Commission's final decision and Commerce is in charge of deciding the standing issue, the data on standing are generated too late to be useful. Respondents with a standing issue should press Commerce and the Commission to gather the appropriate information in a timely fashion.

The proposed regulations would limit the period within which the respondent could raise standing allegations. The proposed rules would impose a deadline of ten days before Commerce's preliminary determination.<sup>19</sup> In imposing a ten-day deadline Commerce ignores the possibility that facts could change. For example, a company accounting for a significant volume of U.S. production could reverse its position. Furthermore, courts are not likely to uphold this arbitrary cut-off in view of the language in

15. See, e.g., *Certain Textile Mill Products and Apparel from Malaysia*, 50 Fed. Reg. 9852, 9853 (Dep't Comm. 1985) (final determination), where this position was first articulated.

16. Members of the domestic industry presumably would not respond to a questionnaire from a respondent. In theory, a respondent is not even aware of an antidumping petition until after initiation, because the Antidumping Code of the General Agreement on Tariffs and Trade contains an agreement not to publicize petitions until the initiation notice. Committee on Anti-dumping Practices (Nov. 15, 1983), GATT BISD, 3d Supp. 24, 25 (1984). A respondent would be aware of a countervailing duty petition prior to initiation because of the General Agreement on Tariffs and Trade consultation requirement, discussed *infra* notes 124-25.

17. In *Gilmore* Commerce had actively sought statements of opposition to the petition. In two recent investigations Commerce took steps to gather information on standing. In *Certain Textile Mill Products*, 50 Fed. Reg. 9852, 9853 (Dep't Comm. 1985) (negative final determination), and *Frozen Concentrated Orange Juice from Brazil*, 51 Fed. Reg. 8324-26 (Dep't Comm. 1987) (affirmative final determination), Commerce sent standing questionnaires to companies.

18. See, e.g., the Commission's questionnaire in *Candles from the People's Republic of China*, Inv. No. 731-TA-282 (Final) (May 30, 1986, reply date) at 5.

19. 50 Fed. Reg. 24,230 (1985) (to be codified at 19 C.F.R. § 355.31(c)(2)); 51 Fed. Reg. 29,067 (1986) (to be codified at 19 C.F.R. § 353.31(c)(2)).

*Gilmore* that Commerce can rescind at any time for lack of industry support.<sup>20</sup>

### C. PREINITIATION CONTACT

Often the respondent has arguments it wishes to bring to Commerce's attention regarding why the petition should not be initiated, such as the lack of standing, or how the scope of the investigation should be defined. *United States v. Roses, Inc.*<sup>21</sup> holds, however, that a respondent cannot have preinitiation contact with Commerce. In practice, however, some respondents try to make oral arguments to Commerce. Furthermore, a respondent sometimes submits documents, which Commerce returns. No sanctions are imposed if the respondent engages in preinitiation contact, although in such circumstances the possibility exists that a Commerce determination would be invalidated in a court of law (which the respondent would generally favor). A respondent, therefore, risks little by attempting preinitiation contact, provided, of course, that the respondent is careful not to provoke Commerce officials.

The proposed antidumping regulations would prohibit communication from an "interested party" prior to initiation.<sup>22</sup> An "interested party" would include producers, exporters, and importers.<sup>23</sup> Thus, while the explanation of the regulations states that the prohibition against preinitiation contact is to limit communication between Commerce and "persons that might be respondents,"<sup>24</sup> the prohibition would include the petitioner and other parties in support of the petition.<sup>25</sup>

20. The *Gilmore* court found that Commerce was empowered to make a correction in its standing finding and rescind its earlier initiation based on that finding. 585 F. Supp. at 674. "To require the ITA to continue an obviously unwarranted investigation, simply because material inaccuracies in the petition do not come to its attention until after the expiration of the 20-day period, flies in the face of reason." *Id.*

21. 706 F.2d 1563 (Fed. Cir. 1983).

22. 51 Fed. Reg. 29,059 (1986) (to be codified at 19 C.F.R. § 353.12(i)). The proposed countervailing duty regulations make an exception to the prohibition on pre-initiation contact for consultation with the government of the affected country as required by art. 3(1) of the Agreement on Interpretation and Application of articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, 522, T.I.A.S. No. 9619, GATT Bisd., 26th Supp. 56 (1980) (entered into force Jan. 1, 1980), commonly referred to as the Subsidies Code. 50 Fed. Reg. 24,220 (1985) (to be codified at 19 C.F.R. § 355.12(j)(2)). It is difficult to see how *Roses* can be squared with the permissible Subsidies Code consultation except by drawing a narrow distinction based on the fact that *Roses* involved a dumping case.

23. 50 Fed. Reg. 24,217 (1985) (to be codified at 19 C.F.R. § 355.2(i)(1)); 51 Fed. Reg. 29,057 (1986) (to be codified at 19 C.F.R. § 353.2(k)(1)).

24. 51 Fed. Reg. 29,048 (1986).

25. Under the proposed regulations, if the petitioner were not an "interested party," it could not be a "party to the proceeding" since only interested parties qualify as parties to the proceeding. 50 Fed. Reg. 24,218 (1985) (to be codified at 19 C.F.R. § 355.2(1)); 51 Fed. Reg. 29,057 (1986) (to be codified at 19 C.F.R. § 353.2(o)).

Commerce's proposed absolute prohibition on the receipt of oral or written preinitiation communication goes too far. At the very least, Commerce should leave itself the option to request information in order to fulfill its mandate under *Roses* "not only to examine the petition and supporting data for internal consistencies, but also to evaluate it in light of a wide body of other information to the end that, so far as possible, the commencement of unwarranted investigations should be avoided."<sup>26</sup>

## II. Investigation

After initiation, Commerce begins its investigation through the Office of Investigations of the Import Administration. Commerce makes its preliminary determination of the dumping margin 160 days after the filing of the petition<sup>27</sup> but may extend this period to 210 days if it determines that the case is "extraordinarily complicated."<sup>28</sup> If the preliminary determination is affirmative, Commerce orders suspension of liquidation,<sup>29</sup> to become effective on the date the preliminary determination is published in the Federal Register.<sup>30</sup> After suspension of liquidation, the importer must post a bond or cash deposit in the amount of the estimated subsidy or dumping margin.<sup>31</sup>

Whether the preliminary determination is affirmative or negative, the investigation proceeds to a final determination.<sup>32</sup> Commerce makes the final determination within 75 days of the preliminary determination<sup>33</sup> but can extend the period to 135 days at either the petitioner's request (in the case of a negative determination)<sup>34</sup> or the exporter's request (in the case of an affirmative determination).<sup>35</sup> The proposed regulations would change the deadline for the final determination from 75 days after Commerce's

26. 706 F.2d at 1569. The court also noted that since the regulations have no provision for extending the initiation deadline, "[i]f, as the end of the period approaches [Commerce] does not know whether to say yes or no, but only maybe, it has to say no in order to preserve its position." *Id.*

27. 19 U.S.C. § 1673b(b) (1982).

28. *Id.* § 1673b(c). For countervailing duty cases, the preliminary determination is due 45 days after the filing of the petition, *id.* § 1671b(b)(1) (Supp. II 1984), but may be extended to 150 days in an "extraordinarily complicated" case, *id.* § 1671b(c)(1) (1982). The petitioner, but not the respondent, can request a postponement. *Id.* §§ 1671b(c)(1)(A), 1673b(c)(1)(A).

29. No suspension of liquidation will result if the preliminary determination is negative.

30. *Id.* §§ 1671b(d)(1), 1673b(d)(1) (1982).

31. *Id.* §§ 1671b(d)(2), 1673b(d)(2).

32. *Id.* §§ 1671d(a)(1), 1673d(a)(1) (1982 & Supp. II 1984).

33. *Id.*

34. *Id.* § 1673d(a)(2)(B) (1982).

35. *Id.* § 1673d(a)(2)(A). A final determination in a countervailing duty case is due 75 days after the preliminary determination. *Id.* § 1671d(a)(1) (Supp. II 1984). Commerce may not extend the deadline although a complex countervailing duty case would seem to compel an extension at least as much as a complex antidumping case.

preliminary determination to 75 days after the date of publication of Commerce's preliminary determination.<sup>36</sup> Thus, the new rules leave the possibility that Commerce could extend the final determination by a delay in sending the preliminary determination to the Federal Register for publication. The delay could provide extra time to negotiate a settlement. In any event, since publication is generally several days to one week after the preliminary determination, the proposed regulation would effectively extend investigations.

#### A. EXCLUSION REQUEST

Under the present regulations, Commerce may exclude a manufacturer, producer, or exporter from the investigation upon request if all examined exports (usually 100 percent of exports) during the period of investigation were made at prices not less than fair value.<sup>37</sup> Commerce must exclude a firm not benefiting from subsidies.<sup>38</sup>

The proposed regulations would reduce the number of exclusion requests. First, Commerce would not have to consider an exclusion request. The proposed regulations state that Commerce will investigate exclusion requests "to the extent practicable."<sup>39</sup>

Second, under the proposed rules, exclusion requests would have to be filed thirty days after publication of the notice of initiation.<sup>40</sup> While Commerce presently imposes a thirty-day time limit for countervailing duty cases, it has no specific deadline for dumping cases.<sup>41</sup> A company, within thirty days after initiation, cannot analyze all sales over a six-month period to determine if there is a dumping margin unless the company had very few or no sales during that period. In addition, the existence of subsidies cannot be evaluated properly. Thus, the thirty-day time limit imposes an unrealistic deadline.

Third, if there are subsidy allegations, the foreign government would be required to provide within thirty days after publication of initiation a certification that the company received no subsidies.<sup>42</sup> This proposed regulation would create problems. Foreign governments often have no single agency able to make such certifications, especially if petitioner has

36. 50 Fed. Reg. 24,224 (1985) (to be codified at 19 C.F.R. § 355.20(a)); 51 Fed. Reg. 29,063 (1986) (to be codified at 19 C.F.R. § 353.20(a)).

37. *Id.* § 353.45 (1986).

38. *Id.* § 355.38.

39. 50 Fed. Reg. 24,220 (1985) (to be codified at 19 C.F.R. § 355.14(c)); 51 Fed. Reg. 29,060 (1986) (to be codified at 19 C.F.R. § 353.14(c)).

40. 50 Fed. Reg. 24,220 (1985) (to be codified at 19 C.F.R. § 355.14(a)); 51 Fed. Reg. 29,059 (1986) (to be codified at 19 C.F.R. § 353.14(a)).

41. 19 C.F.R. §§ 355.38, 353.45 (1986).

42. 50 Fed. Reg. 24,220 (1985) (to be codified at 19 C.F.R. § 355.14(b)(2)).

alleged that programs administered by many different agencies constitute subsidies. Furthermore, unless foreign governments act more quickly than the U.S. government, it would take considerably longer than thirty days to identify potential subsidy programs and ascertain if a certain company received a subsidy. For that matter, few foreign governments accept the U.S. definition of subsidy, and many would be reluctant to accept it implicitly through a certification process.

Fourth, under the proposed countervailing duty regulations, if the application of Commerce methodology would result in a subsidy, Commerce would penalize the company even though the company had certified that by applying its methodology it received no subsidy. The company would receive the greater of its individual rate or the countrywide rate.<sup>43</sup> Thus, application of the new rules results in too harsh a penalty.

Fifth, the proposed regulations provide that countervailing duty and dumping exclusion requests would be "irrevocable."<sup>44</sup> Making such requests irrevocable is in no one's best interest. For example, suppose a company in good faith certified that it received no subsidy. Subsequently, the firm discovered the receipt of a subsidy. The company could not revoke its exclusion request although a revocation would be both in Commerce's best interest (it could identify and countervail a subsidy) and in the company's best interest (it would not be penalized by having the greater of its individual rate or the countrywide rate applied).

## B. CRITICAL CIRCUMSTANCES

Prior to Commerce's preliminary determination and possible suspension of liquidation, importers try to get as much product into the United States as possible. If too large an amount of product is imported prior to the preliminary determination, a finding of critical circumstances could result. To make an affirmative critical circumstances finding, Commerce must find "massive imports" over a "relatively short period," in which case Commerce directs the U.S. Customs Service (Customs) to make the suspension of liquidation ninety days retroactive.<sup>45</sup> Of course, if Customs already has liquidated duties, the ninety-day retroactive suspension of liquidation will have no effect.

In the past, uncertainty has arisen as to what volume constitutes "massive imports" over a "relatively short period." As to the definition of "massive imports," the proposed regulations would codify the present Commerce practice of considering an increase of fifteen percent or more

43. 50 Fed. Reg. 24,225 (1985) (to be codified at 19 C.F.R. § 355.20(e)).

44. 50 Fed. Reg. 24,220 (1985) (to be codified at 19 C.F.R. § 355.14(a)); 51 Fed. Reg. 29,059 (1986) (to be codified at 19 C.F.R. § 353.14(a)).

45. 19 U.S.C. §§ 1671b(e)(2), 1673b(e)(2) (1982).

a "massive increase."<sup>46</sup> To calculate an increase of fifteen percent, however, Commerce must establish a base period for comparison, and the proposed regulations do not address this issue. The new rules merely state that the fifteen percent increase is "over the imports during an immediately preceding period of comparable duration."<sup>47</sup> Thus, what constitutes "massive imports" would remain unclear.

Regarding the definition of a "relatively short period," the proposed regulations define the term as running from the date of initiation to the date of suspension of liquidation or to an earlier period if the respondents had reason to believe a petition was about to be filed.<sup>48</sup> This definition has two problems.

First, the proposed regulations state that the deadline for alleging critical circumstances is twenty-one days before Commerce's final determination.<sup>49</sup> Since in a normal investigation only seventy-five days elapse between the preliminary and final determinations, and the lag in import statistics is often at least two months, the petitioners probably would not know if critical circumstances exist prior to the deadline for making the allegation. Therefore, petitioners would routinely allege critical circumstances, adding to Commerce's workload and forcing respondents to develop a defense.<sup>50</sup>

Second, under the proposed regulations, the "relatively short period" would commence when respondents had reason to know of the petition.<sup>51</sup> Therefore, the petitioner would have an incentive continually to publicize the preparation of a petition so that imports would not increase. Such a strategy could in some circumstances be found a violation of the antitrust laws,<sup>52</sup> but the proposed regulation presents the possibility for abuse.

---

46. 50 Fed. Reg. 24,222 (1985) (to be codified at 19 C.F.R. § 355.16(f)); 51 Fed. Reg. 29,061 (1986) (to be codified at 19 C.F.R. § 353.16(f)(2)). The explanation of the proposed regulations states that Commerce has discretion to find critical circumstances even when the increase in imports is less than 15%. 50 Fed. Reg. 24,210 (1985); 51 Fed. Reg. 29,049 (1986).

47. 50 Fed. Reg. 24,222 (1985) (to be codified at 19 C.F.R. § 355.16(f)); 51 Fed. Reg. 29,061 (1986) (to be codified at 19 C.F.R. § 353.16(f)(2)).

48. 50 Fed. Reg. 24,222 (1985) (to be codified at 19 C.F.R. § 355.16(g)); 51 Fed. Reg. 29,061 (1986) (to be codified at 19 C.F.R. § 353.16(g)).

49. 50 Fed. Reg. 24,221 (1985) (to be codified at 19 C.F.R. § 355.16(a)); 51 Fed. Reg. 29,060 (1986) (to be codified at 19 C.F.R. § 353.16(a)).

50. Although with a 21-day deadline the petitioner might not have import data up to the date of the preliminary determination prior to having to decide whether to allege critical circumstances, a deadline closer to the date of the final determination might not allow Commerce adequate time to analyze the data and draft a decision.

51. 50 Fed. Reg. 24,222 (1985) (to be codified at 19 C.F.R. § 355.16(g)); 51 Fed. Reg. 29,061 (1986) (to be codified at 19 C.F.R. § 353.16(g)).

52. For example, if co-petitioners publicized the anticipated filing of a petition to chill vigorous import competition, that action might be construed as restraining trade.

### C. QUESTIONNAIRES

In both antidumping and countervailing duty investigations, Commerce uses questionnaires as its primary means of gathering information. In antidumping investigations, foreign producers of the like product receive the questionnaires. Commerce must investigate producers who account for sixty percent of the dollar volume<sup>53</sup> of U.S. imports.<sup>54</sup> Commerce often takes advantage of the sixty percent rule to decrease its workload. In countervailing duty investigations, Commerce presents the questionnaire to the foreign government. Although the sixty percent rule does not apply to countervailing duty cases, Commerce has on occasion sent questionnaires to companies accounting for sixty percent of U.S. imports.<sup>55</sup>

The period for which Commerce requests data varies for dumping and countervailing duty investigations. Antidumping questionnaires usually request data for all sales of the product in question for a period of at least 150 days prior to and 30 days after the first day of the month during which Commerce received the petition.<sup>56</sup> Countervailing duty questionnaires request information on potential subsidy programs covering several years.<sup>57</sup> Commerce requests information for several years, because, under its methodology for calculating subsidies, a subsidy granted in one year can have a benefit for many years thereafter. In both antidumping and countervailing duty investigations, Commerce often issues a second questionnaire after the investigators have had the opportunity to analyze the initial response. The second questionnaire, referred to as a "supplemental questionnaire" or a "deficiency letter," requests further information and clarifications.

If a company submits a response that is timely, accurate, and complete, Commerce generally will consider it even though it is unsolicited. Nevertheless, Commerce has recently tried to discourage voluntary responses by stating that it might not review them.<sup>58</sup> Under the proposed antidumping and countervailing duty regulations, Commerce "normally will

---

53. Under the proposed regulations, Commerce would examine sales accounting for 60% of the dollar volume or value of the merchandise sold in the period of investigation. 51 Fed. Reg. 29,071 (1986) (to be codified at 19 C.F.R. § 353.42(b)).

54. 19 C.F.R. § 353.38(a) (1986).

55. *See, e.g.,* Certain Table Wine from France, 50 Fed. Reg. 40,580 (Dep't Comm. 1985) (initiation).

56. 19 C.F.R. § 353.38(a) (1986).

57. *See, e.g.,* Certain Fresh Atlantic Groundfish from Canada, Inv. C-122-507 (questionnaire dated Sept. 9, 1985).

58. Commerce claims it may legally refuse to review voluntary responses, because no duties are actually collected until the administrative review, although companies of course would suffer the very real commercial burden of an antidumping order in the interim. In practical terms, Commerce can get rid of an unwelcome "voluntary" response by finding a deficiency in the response and thus justifying its failure to consider it.

not consider or retain in the record of the proceeding unsolicited questionnaire responses.”<sup>59</sup> Therefore, if a manufacturer is not dumping or receiving a subsidy, but it misses the exclusion deadline and is not sent a questionnaire, Commerce will likely assess a duty against the manufacturer for a minimum of four years if it finds a margin for the sixty percent of sales investigated.<sup>60</sup>

#### D. STRATEGY FOR RESPONDING TO QUESTIONNAIRES

A respondent's questionnaire response can win or lose the case. Therefore, both petitioner and respondent should work with the Commerce investigator to make sure the appropriate questions are asked. At the earliest opportunity, the respondent should analyze Commerce questionnaires used in previous investigations to determine what revisions should be made for the investigation at hand. Comments on the questionnaire should be given to the investigator as soon as possible since the investigator begins working on the questionnaire even before the case is initiated. When the investigator completes a draft of the questionnaire, he usually will give a copy of it to the petitioner and respondent for their comments.

The respondent and petitioner will find that answering the questionnaire is a huge undertaking.<sup>61</sup> At the commencement of the investigation, the team that will prepare the response needs to be identified and briefed. Preparation of the response should begin no later than the date of receipt of the draft questionnaire. The respondent cannot afford to wait until it receives the official questionnaire to start preparing its reply, because the response is generally due thirty days after receipt,<sup>62</sup> although two-week extensions may be granted.<sup>63</sup> If a questionnaire is not submitted on time,

59. 50 Fed. Reg. 24,230 (1985) (to be codified at 19 C.F.R. § 355.31(b)(2)); 51 Fed. Reg. 29,067 (1986) (to be codified at 19 C.F.R. § 353.31(b)(2)).

60. See the discussion of administrative reviews, *infra* notes 115-34 and accompanying text.

61. Responding to the questionnaire will become even more burdensome if a proposed regulation is adopted requiring every document submitted to be translated into English. 50 Fed. Reg. 24,230 (1985) (to be codified at 19 C.F.R. § 355.31(f)); 51 Fed. Reg. 29,068 (1986) (to be codified at 19 C.F.R. § 353.31(f)). At present, some technical documents need not be translated, especially if the investigator knows the foreign language.

62. No regulatory deadline is imposed for questionnaire responses in investigations under either existing or proposed regulations. Under proposed regulations for administrative reviews, however, the questionnaire response deadline would be 60 days after receipt. 50 Fed. Reg. 24,230 (1985) (to be codified at 19 C.F.R. § 355.31(b)(4)); 51 Fed. Reg. 29,067 (1986) (to be codified at 19 C.F.R. § 353.31(b)(4)).

63. In investigations where Commerce requests data to answer allegations that merchandise is being sold below the cost of production, the response deadline is routinely extended from 30 to 45 days upon request. Under the proposed regulations, there ordinarily would be no extensions. 50 Fed. Reg. 24,230 (1985) (to be codified at 19 C.F.R. § 355.31(b)(3)); 51 Fed. Reg. 29,067 (1986) (to be codified at 19 C.F.R. § 353.31(b)(3)).

Commerce may use the best information available, which is often that contained in the petition,<sup>64</sup> as the basis for its determination.

#### E. ACCESS TO CONFIDENTIAL INFORMATION

In dealing with confidentiality, the respondent must consider two issues: what information must be released (1) to the public and (2) under an administrative protective order (APO).

The proposed regulations would require more information to be released to the public than under prior rules. They would define narrowly the term "confidential information" and make public certain information that often has been accorded confidential treatment, including channels of distribution and the destination of sales.<sup>65</sup> Disclosure of channels of distribution and the destination of sales would be damaging to a respondent who has been developing new markets unbeknownst to its U.S. competitors.

The proposed regulations also would require more information to be released to the public by requiring data reported in the public version of a document to be ranged within ten percent of the actual figures.<sup>66</sup> Although requirements for ranging data presently exist,<sup>67</sup> Commerce often does not require ranging when data are voluminous. Under the proposed regulations, ranging would be required for one percent of voluminous data.<sup>68</sup> While Commerce's objective of disclosing as much information as possible is laudatory, the ranged data requirement could allow a respondent to get a very good idea of a competing respondent's operations. In the past, Commerce has scrupulously protected one competitor's data from falling into the hands of another competitor.<sup>69</sup> The new ranging requirement will not benefit the petitioner in the investigation, because the petitioner's counsel has access to the actual, not ranged, data under an APO.

In addition to providing for the release of more information to the public, the proposed regulations would facilitate the release of information under

64. 19 C.F.R. §§ 355.39(b), 353.51(b) (1986). The proposed regulations would change the standard from "best information available" to "available information." 50 Fed. Reg. 24,220-21 (1985) (to be codified at 19 C.F.R. § 355.15(a)(1)); 51 Fed. Reg. 29,060 (1986) (to be codified at 19 C.F.R. § 353.15(a)(1)). Presumably, Commerce would continue to use the "best" available information.

65. 50 Fed. Reg. 24,218 (1985) (to be codified at 19 C.F.R. § 355.4(b)(3), (6)); 51 Fed. Reg. 29,058 (1986) (to be codified at 19 C.F.R. § 353.4(b)(3), (6)).

66. 50 Fed. Reg. 24,230 (1985) (to be codified at 19 C.F.R. § 355.32(b)(1)); 51 Fed. Reg. 29,068 (1986) (to be codified at 19 C.F.R. § 353.32(b)(1)).

67. 19 C.F.R. §§ 355.18(a)(1), 353.28(a)(1) (1986).

68. 50 Fed. Reg. 24,230 (1985) (to be codified at 19 C.F.R. § 355.32(b)(1)); 51 Fed. Reg. 29,068 (1986) (to be codified at 19 C.F.R. § 353.32(b)(1)).

69. A respondent can never obtain access to a competitor's questionnaire response.

APOs. At present, the respondent may try to delay petitioner's access to potentially releasable information by construing broadly what data can be withheld. Under the proposed regulations, the release of confidential information under an APO would be almost automatic. An APO request, to be submitted on a standard form, would be due ten days after the later of the date that one becomes a party or that the notice of initiation is published. In no event could an APO request be submitted later than ten days before the date of publication of the preliminary determination.<sup>70</sup> The form would allow a party to request both information already submitted and information not yet submitted.<sup>71</sup> By proposing to provide APO forms covering information "not yet submitted," Commerce presumes material is releasable.<sup>72</sup>

Under current practice, if a respondent believes data are not releasable but the petitioner disagrees, the petitioner will complain to Commerce, and Commerce then will make a confidentiality ruling and set a deadline for the respondent to agree to release or withdraw the information.<sup>73</sup> This process usually takes several days. Under the proposed regulations, a respondent would have only twenty-four hours to disclose or withdraw the information.<sup>74</sup> A twenty-four hour deadline imposes an unrealistic time limit because it does not allow counsel time to contact a foreign client.

The proposed regulations would permit a party to retain information released under an APO until the expiration of the deadline for filing an appeal.<sup>75</sup> In addition, they would allow a party to a judicial review to retain proprietary information provided that the party files for a court protective order for the information not later than fifteen days after Commerce files the administrative record with the Court.<sup>76</sup> Nevertheless,

70. 50 Fed. Reg. 24,231 (1985) (to be codified at 19 C.F.R. § 355.34(b)(1)(ii)); 51 Fed. Reg. 29,069 (1986) (to be codified at 19 C.F.R. § 353.34(b)(1)(ii)).

71. 50 Fed. Reg. 24,231 (1985) (to be codified at 19 C.F.R. § 355.34(b)(2)); 51 Fed. Reg. 29,069 (1986) (to be codified at 19 C.F.R. § 353.34(b)(2)).

72. The proposed regulations are inconsistent with the statutory requirement that information requested pursuant to an APO be described "with particularity." 19 U.S.C. § 1677f(c)(1)(A)(1982). The authors of the regulations have recognized the inconsistency of requiring that documents be described with particularity and that they be requested before they exist. "The regulation recognizes that the standard in Section 777(c) for particularity of description of requested information must be read in light of the 1984 Act's provision for requesting information before the Department receives it, or even before the information exists." 50 Fed. Reg. 24,215 (1985) (to be codified at 19 C.F.R. § 355.34); 51 Fed. Reg. 29,053 (1986) (to be codified at 19 C.F.R. § 353.34).

73. 19 C.F.R. §§ 355.18(c), 353.28(e) (1986).

74. 50 Fed. Reg. 24,231 (1985) (to be codified at 19 C.F.R. § 355.34(c)); 51 Fed. Reg. 29,069 (1986) (to be codified at 19 C.F.R. § 353.34(c)).

75. 50 Fed. Reg. 24,231 (1985) (to be codified at 19 C.F.R. § 355.34(d)(1)); 51 Fed. Reg. 29,069 (1986) (to be codified at 19 C.F.R. § 353.34(d)(1)).

76. 50 Fed. Reg. 24,231 (1985) (to be codified at 19 C.F.R. § 355.34(d)(2)); 51 Fed. Reg. 29,069 (1986) (to be codified at 19 C.F.R. § 353.34(d)(2)).

Commerce would not release additional proprietary information after making a judicially reviewable determination according to the explanation of the regulations.<sup>77</sup> This rule presents an unwise alternative, because it would force a party to file an appeal to obtain data to determine, for example, if a dumping margin were calculated correctly. A better solution would allow Commerce to release its calculations after a final determination and to issue a revised dumping margin, if errors were discovered, than to force the parties to go through the added expense of an appeal.

#### F. VERIFICATION

Because Commerce will verify the responses, respondents should maintain careful records of the information that they used to prepare questionnaire responses.<sup>78</sup> Verification can occur either before or after Commerce's preliminary determination. In an antidumping verification, the investigator prepares an outline of matters he will explore during a visit to the company.<sup>79</sup> He notifies the company that he will verify certain sales. The company must provide support for each number used to calculate the dumping margins for those particular sales. In addition, the investigator will verify other sales for which he gives the company no advance notification. If the company's response cannot be supported, Commerce will rely on the best information available.<sup>80</sup> In countervailing duty verifications, as in antidumping verifications, the investigator prepares an outline of matters that will be investigated. He investigates those and other matters for which he gives no advance notice. The investigator interviews government officials to ascertain how they administer various programs and how they compute subsidies. If the investigator discovers any additional subsidy programs, he may investigate them if time permits.<sup>81</sup>

Several weeks after the investigator completes verification, Commerce issues a report. Under the present regulations, both petitioner and respondent have the opportunity to comment on the verification report. Under the proposed regulations, Commerce might not allow any comments because the deadline for the submission of factual information

77. 50 Fed. Reg. 24,215 (1985) (to be codified at 19 C.F.R. § 355.34); 51 Fed. Reg. 29,054 (1986) (to be codified at 19 C.F.R. § 353.34).

78. 19 C.F.R. §§ 355.39, 353.51 (1986). However, if there are many respondents, Commerce may verify a sample of the responses. This practice would be codified in the proposed regulations. 50 Fed. Reg. 24,232 (1985) (to be codified at 19 C.F.R. § 355.37(a)(2)); 51 Fed. Reg. 29,069 (1986) (to be codified at 19 C.F.R. § 353.36(a)(2)).

79. In a countervailing duty case, investigators visit government offices and sometimes company operations.

80. 19 C.F.R. § 353.51(b) (1986).

81. *Id.* § 355.43.

would occur before verification is scheduled to commence.<sup>82</sup> Prohibiting comment on the verification report would disadvantage everyone: the petitioner, the respondent, interested parties, and Commerce. If Commerce discovers errors made by the respondent, the respondent should be allowed to submit data correcting those errors. If Commerce made an error, a better alternative would allow the error to be brought to the investigator's attention before the final determination rather than on appeal.

#### G. DISCLOSURE CONFERENCE

After Commerce makes a preliminary determination, both petitioner and respondent usually request disclosure conferences. Commerce holds separate conferences for petitioner and respondent.<sup>83</sup> At the conferences, Commerce discloses the decisions it made on various issues, the rationale for those decisions, and its dumping margin (or subsidy) calculations. A respondent should analyze carefully both the policy decisions and calculations disclosed. This analysis becomes the basis for briefs to be presented in conjunction with the hearing.

#### H. HEARING

The present regulations provide for a hearing normally within thirty days after the preliminary determination is published.<sup>84</sup> Briefs are due one week prior to the hearing.<sup>85</sup> Under the proposed regulations, the hearing would occur later in the investigation.<sup>86</sup> The deadline for prehearing briefs would be thirty-five days after publication of a preliminary determination.<sup>87</sup> The rebuttal brief would be due seven days after the prehearing brief.<sup>88</sup> The proposed regulations do not allow for posthearing

---

82. For antidumping investigations, the deadline would be seven days before verification is scheduled to commence. 51 Fed. Reg. 29,067 (1986) (to be codified at 19 C.F.R. § 353.31(a)(1)(i)). For countervailing duty investigations, the deadline would be one day before verification is to begin. 50 Fed. Reg. 24,229 (1985) (to be codified at 19 C.F.R. § 355.31(a)(1)(i)). Parties could still make telephone calls to Commerce to comment on the report, but telephone calls are an inadequate substitute for written submissions.

83. If there is more than one respondent, separate disclosure conferences are held for each respondent. Commerce does not disclose one respondent's data to another's counsel.

84. 19 C.F.R. §§ 355.35, 353.47 (1986).

85. *Id.*

86. The proposed regulations do not set a time for the hearing in relation to the preliminary determination, as do the existing regulations, but rather in relation to the rebuttal briefs. 50 Fed. Reg. 24,233 (1985) (to be codified at 19 C.F.R. § 355.39(e)); 51 Fed. Reg. 29,070 (1986) (to be codified at 19 C.F.R. § 353.38(e)).

87. 50 Fed. Reg. 24,232 (1985) (to be codified at 19 C.F.R. § 355.39(b)); 51 Fed. Reg. 29,070 (1986) (to be codified at 19 C.F.R. § 353.38(b)(1)(i)).

88. 50 Fed. Reg. 24,233 (1985) (to be codified at 19 C.F.R. § 355.39(c)); 51 Fed. Reg. 29,070 (1986) (to be codified at 19 C.F.R. § 353.38(c)).

briefs. Presumably they could be provided. The deadlines that would be imposed for the brief and rebuttal brief would not allow the parties to comment on verification.<sup>89</sup>

The absence of a provision for posthearing briefs may be attributable to Commerce's fear that some respondents will not submit a prehearing brief and will put all arguments in a posthearing brief to which the petitioner cannot respond. A better solution would allow a page limit for posthearing briefs, such as the ten-page limit set by the International Trade Commission,<sup>90</sup> than to omit posthearing briefs altogether.

The proposed regulations regarding the service of briefs are welcome. They would require counsel to serve briefs by overnight mail or courier.<sup>91</sup> Under present regulations, counsel wastes time negotiating for same day or overnight service.

## I. ASSESSMENT OF DUTIES

If both Commerce and the Commission make affirmative final determinations, Commerce issues a countervailing duty or antidumping order.<sup>92</sup> Antidumping duty orders are tailored to a specific company.<sup>93</sup> If Commerce finds that a company has a dumping margin of less than 0.5 percent, a de minimis margin, then it is excluded from the order.<sup>94</sup> The proposed regulations leave unclear whether a company with a de minimis margin would be excluded unless it previously had requested exclusion.<sup>95</sup> Countervailing duty orders are not company-specific; Commerce imposes them on a countrywide basis absent special circumstances.<sup>96</sup>

89. For the specific deadlines, see *supra* notes 86-88 and accompanying text.

90. 19 C.F.R. § 207.24 (1986).

91. 50 Fed. Reg. 24,233 (1985) (to be codified at 19 C.F.R. § 355.39(d)); 51 Fed. Reg. 29,070 (1986) (to be codified at 19 C.F.R. § 353.38(d)).

92. 19 U.S.C. §§ 1671d(c)(2), 1673d(c)(2) (1982). A cash deposit, bond, or other security is required after publication of Commerce's preliminary determination. *Id.* §§ 1671b(d)(2), 1673b(d)(2).

93. 19 C.F.R. § 353.48(b) (1986).

94. In *Carlisle Tire & Rubber Co. v. United States*, 634 F. Supp. 419, 422-24 (Ct. Int'l Trade 1986), the court held that Commerce cannot automatically assume that all weighted average dumping margins of less than 0.5% are de minimis. Rather, Commerce must analyze the facts of each case to determine whether a margin of less than 0.5% is de minimis. *Id.* Commerce has proposed a regulation incorporating a 0.5% de minimis test. 51 Fed. Reg. 35,529, 35,531 (1986) (to be codified at 19 C.F.R. pt. 353); see *Color Television Receivers, Except for Video Monitors, from Taiwan*, 51 Fed. Reg. 37,317, 37,318 (Dep't Comm. 1986) (prelim. admin. review) (applying the 0.5% test after *Carlisle*); *Certain Iron Construction Castings from India*, 51 Fed. Reg. 9486, 9490 (Dep't Comm. 1986) (final determination) (applying the 0.5% test prior to *Carlisle*).

95. 51 Fed. Reg. 29,064 (1986) (to be codified at 19 C.F.R. § 353.21(c)).

96. 19 C.F.R. § 355.36 (1986). For a discussion of Commerce's policy regarding the imposition of company-specific countervailing duty rates, see *Portland Hydraulic Cement & Cement Clinker from Mexico*, 50 Fed. Reg. 51,732-34 (Dep't Comm. 1985) (final affirmative determination of administrative review).

An antidumping duty marks the difference between the U.S. price and the foreign market value.<sup>97</sup> The U.S. price is listed at either the purchase price (if goods are sold prior to importation) or the exporter's sales price (if goods are sold after importation).<sup>98</sup> Some parties believe the purchase price is more favorable for respondents than the exporter's sales price. In exporter's sales price sales, the amount of indirect selling expenses that can be subtracted from the home market price is capped by U.S. indirect selling expenses.<sup>99</sup> When sales are purchase price sales, however, no cap is imposed.<sup>100</sup>

Lately, disputes have arisen as to what expenses can be deducted from the gross price in exporter's sales price situations. In the proposed regulations, Commerce apparently is trying to give itself leeway to make additional deductions from the exporter's sales price by omitting the requirement that the only expenses properly deductible are those incurred by or for the account of the exporter "in the United States."<sup>101</sup> At present, adjustments to the exporter's sales price clearly must be incurred "in the United States."<sup>102</sup> By deleting the words "in the United States," Commerce arguably would have authority to deduct expenses not incurred in the United States, such as credit expenses between a related exporter and importer.

A countervailing duty marks the per unit value of the subsidies.<sup>103</sup> Disputes often arise about how various grants should be amortized and how loans should be valued to arrive at a subsidy figure for a given year.

### III. Settlement

Antidumping and countervailing duty investigations may be settled either by withdrawal of the petition or a suspension agreement.

97. 19 U.S.C. § 1673e(a)(1) (1982).

98. *Id.* § 1677a(b), (c) (1982 & Supp. II 1984). Commerce's distinction between purchase price and exporter's sales price transactions on the basis of whether merchandise is sold before or after importation was questioned in *PQ Corp. v. United States*, No. 84-12-01709, slip op. at 25 (Ct. Int'l Trade Jan. 27, 1987). That case dealt with the definition of purchase price in effect prior to an amendment of the Trade and Tariff Act of 1984. *Id.* at 15. How Commerce will distinguish purchase price and exporter's sales price transactions after the 1984 amendment is unclear.

99. 19 C.F.R. § 353.15(c) (1986).

100. For purchase price transactions, indirect selling expenses are not subtracted from the gross U.S. or home market price. *Id.* § 353.10. Direct selling expenses are subtracted from both the U.S. and home market gross price but there is no cap. *Id.*

101. See 51 Fed. Reg. 29,071 (1986) (to be codified at 19 C.F.R. § 353.41(e)(2)).

102. 19 C.F.R. § 353.10(e)(2) (1986).

103. 19 U.S.C. § 1671e(a)(i) (1982).

## A. WITHDRAWAL OF PETITION

The most common settlement method, withdrawal of the petition, provides the greatest flexibility because there are few statutory or regulatory requirements.<sup>104</sup> Withdrawal of a petition at any stage in the investigation terminates the investigation.<sup>105</sup> Commerce must give notice of withdrawal to all parties and determine that withdrawal is in the public interest.<sup>106</sup>

Voluntary restraint agreements (VRAs), whereby a foreign government agrees to hold its exports to a certain level, result in withdrawal of the petition. Although VRAs are negotiated government to government, the petitioner in effect retains a veto over the final agreement since, if it finds the agreement unsatisfactory, it may refuse to withdraw the petition. The U.S. government usually cannot coerce a petitioner to accept an unfavorable VRA, because if a petitioner refused to withdraw its petition and Commerce issued a negative final determination, the petitioner undoubtedly would challenge that determination in the Court of International Trade, arguing that it should have been affirmative.<sup>107</sup>

Commerce must find that any quantitative restriction, such as an agreement between the U.S. and a foreign government, is in the public interest.<sup>108</sup> Thus far, Commerce has not taken this requirement seriously.

In negotiating a VRA or other quantitative restriction, a private company respondent must be wary of potential antitrust problems. Its participation in the negotiations can only be through the foreign government.

## B. SUSPENSION AGREEMENTS

A second settlement method involves entering into a suspension agreement. The agreement is negotiated between the U.S. government and the foreign government or exporters who account for substantially all of the merchandise subject to investigation.<sup>109</sup> Since 1983, Commerce has been increasingly unwilling to enter into suspension agreements except for political reasons. Its rationale is that it cannot undertake the burden of monitoring a suspension agreement given its heavy workload.

The proposed regulations contain numerous provisions affecting suspension agreements and may indicate a rekindling of Commerce's interest

104. *See id.* §§ 1671c(a), 1673c(a) (1982 & Supp. II 1984); 19 C.F.R. §§ 353.41(a), 355.30(d) (1986).

105. 19 U.S.C. §§ 1671c(a), 1673c(a) (Supp. II 1984). The International Trade Commission can terminate an investigation by withdrawing the petition only after Commerce's preliminary determination. *Id.*

106. 19 C.F.R. §§ 355.30(a), 353.41(a) (1986).

107. Presumably, if there were no margins or subsidies, the respondent would not accept the VRA.

108. 19 U.S.C. §§ 1671c(a)(2), 1673c(a)(2) (Supp. II 1984).

109. *Id.* §§ 1671c(b), 1673c(b) (1982).

in this method of settlement. For example, under the current regulations, the respondent and Commerce must reach a suspension agreement thirty days prior to the proposed suspension.<sup>110</sup> Under the proposed regulations, the respondent would submit the agreement to Commerce forty-five days prior to the final determination.<sup>111</sup> The proposed regulations would have a cut-off date for comments five days before Commerce's final determination.<sup>112</sup> The present regulations do not provide for a cut-off date.

The proposed regulations also contain a provision that would allow Commerce to revise a suspension agreement to include additional signatory exporters if it decides that the agreement is no longer in the public interest or no longer covers exporters who account for substantially all of the merchandise.<sup>113</sup> Since it would not be in a nonsignatory exporter's interest to enter into such an agreement, it is difficult to see how this provision could be utilized. Commerce, perhaps, could threaten self-initiation of an investigation to coerce a nonsignatory exporter to sign the agreement.

Regarding the violation of a suspension agreement, the proposed regulations would clarify that violation means "significant noncompliance" with the agreement.<sup>114</sup>

#### IV. Administrative Review

If Commerce and the International Trade Commission make final affirmative determinations, the importer must pay a cash deposit on the imported merchandise.<sup>115</sup> One year after the issuance of the dumping or countervailing duty order, Commerce, through the Office of Compliance, will conduct an administrative review to determine the actual duty owed.<sup>116</sup> Then, based on that finding, the importer may owe duties in excess of the deposits or receive a refund for some or all of the deposit.<sup>117</sup> If the cash deposits are less than the actual duties owed, the importer must pay interest to Customs on the amount of the underpayment.<sup>118</sup> Conversely, if the cash deposits are greater than the actual duties owed, Customs will

110. 19 C.F.R. §§ 355.31(h)(1), 353.42(h)(1) (1986).

111. 50 Fed. Reg. 24,223 (1985) (to be codified at 19 C.F.R. § 355.18(g)(1)); 51 Fed. Reg. 29,062 (1986) (to be codified at 19 C.F.R. § 353.18(g)(1)).

112. 50 Fed. Reg. 24,223 (1985) (to be codified at 19 C.F.R. § 355.18(g)(3)); 51 Fed. Reg. 29,062 (1986) (to be codified at 19 C.F.R. § 353.18(g)(3)).

113. 50 Fed. Reg. 24,224 (1985) (to be codified at 19 C.F.R. § 355.19(c)); 51 Fed. Reg. 29,063 (1986) (to be codified at 19 C.F.R. § 353.19(c)).

114. 50 Fed. Reg. 24,224 (1985) (to be codified at 19 C.F.R. § 355.19(d)); 51 Fed. Reg. 29,063 (1986) (to be codified at 19 C.F.R. § 353.19(d)).

115. 19 U.S.C. §§ 1671e, 1673e (1982 & Supp. II 1984).

116. *Id.* § 1675; 19 C.F.R. § 353.53a(c) (1986).

117. *Id.*

118. 19 U.S.C. §§ 1671f(b), 1673f(b) (1982).

pay interest on the overpayment.<sup>119</sup> Thus, if the importer halts the dumping or subsidization when an order is issued, Customs, at Commerce's directive, will refund all deposits, with interest.

#### A. REQUEST

Any interested party can make a request for an administrative review,<sup>120</sup> but only during the anniversary month of the publication of an antidumping or countervailing duty order.<sup>121</sup> Failure to request a review means that Commerce will direct Customs to assess a duty on the goods automatically, as discussed above. Ironically, the request for a second administrative review becomes due before Commerce completes the first administrative review.<sup>122</sup> After Commerce commences an administrative review, it follows basically the same process as in an investigation.

#### B. AUTOMATIC ASSESSMENT OF DUTIES

If the interested parties fail to request an administrative review, both existing and proposed regulations provide for Customs to assess duties at rates equal to the cash deposit of (or bond for) estimated duties "at the time of entry."<sup>123</sup> Assessing duties based on the rate "at the time of entry" is in violation of article 8(3) of the Anti-dumping Code of the General Agreement on Tariffs and Trade,<sup>124</sup> because Customs can collect duties at the preliminary determination rate even where that rate is higher than the final determination rate. The Anti-dumping Code provides that duties can be assessed only on the basis of final determinations.<sup>125</sup>

---

119. *Id.*

120. 19 C.F.R. §§ 355.10(a)(1), 353.53a(a)(1) (1986).

121. *Id.* Making administrative reviews conditional upon a request to be submitted in a certain month is one of the extensive changes Commerce made in the regulations because of the Trade and Tariff Act of 1984. At that time, administrative reviews were seriously backlogged, sometimes taking several years to be completed although the statute required Commerce to complete reviews in one year. 19 U.S.C. §§ 1671e(a)(1), 1673e(a)(1) (1982 & Supp. II 1984). The Office of Compliance still is working to clear the backlog.

122. The deadline for completion of an administrative review is twelve months after the month of Commerce's initiation of the review. 19 C.F.R. § 353.53a(c)(7) (1986). The initiation must be published not later than ten days after the anniversary month. *Id.* § 353.53a(c)(1). Hence, the first review will be completed thirteen months after the first anniversary month, and the request for the second administrative review (in the second anniversary month) will be due one month before the first review is complete.

123. 19 C.F.R. §§ 355.10(d), 353.53a(d) (1986); 50 Fed. Reg. 24,227 (to be codified at 19 C.F.R. § 355.22(g)); 51 Fed. Reg. 29,064 (1985) (to be codified at 19 C.F.R. § 353.22(e)).

124. General Agreement on Tariffs and Trade, Agreement on Implementation of Article VI, Apr. 12, 1979, art. 8(3), 31 U.S.T. 4919, 4932, T.I.A.S. No. 9650.

125. *Id.* Commerce takes the position that the authority for assessing duties based on the preliminary determination arises from the legislative history of the Trade and Tariff Act of 1984 which provides that "[t]he committee intends the administering authority should

### C. REVOCATION

Commerce does not revoke a dumping or countervailing duty order until at least three years after the date the order was issued.<sup>126</sup> Thus, including the time it takes for Commerce to complete an investigation and administrative reviews, a respondent will be subject to Commerce's price monitoring for four years if Commerce finds less than fair value or subsidized sales during the investigation. If no "interested party" requests an administrative review for four consecutive anniversary months, under the proposed regulations, Commerce would commence revocation proceedings no later than the first day of the fifth anniversary month.<sup>127</sup> The use of the term "interested party" rather than "domestic interested party" means that a foreign exporter cannot request a new margin or subsidy calculation during the four-year period or else the running of the four-year period must start anew.

The proposed regulations have certification procedures for both dumping and countervailing duty administrative reviews. For dumping cases, a foreign producer or reseller would be required to certify that dumping had ceased and that it would not sell at less than fair market value in the future.<sup>128</sup> For countervailing duty cases, both the foreign government and the foreign producer would have to submit certification.<sup>129</sup> If a company certified that it was not receiving subsidies, but the foreign government failed to provide a certificate, Commerce could not revoke the order for five years rather than three years.<sup>130</sup> Thus, the five-year requirement imposes an undue burden.

Another problem with the proposed countervailing duty revocation regulations involves the confusion concerning whether a foreign government must certify the elimination of countervailable programs or the lack of a present subsidy using Commerce's methodology.<sup>131</sup> For example, even though a foreign government might have terminated the countervailable

---

provide by regulation for the assessment of antidumping and countervailing duties on entries for which review is not requested, including the elimination of suspension of liquidation, and/or the conversion of cash deposits of *estimated duties, previously ordered*." H.R. CONF. REP. NO. 1156, 98th Cong., 2d Sess. 181 (1984) (emphasis added).

126. A party may submit an application to revoke an order if there have been no sales at less than fair market value or subsidized sales for two years. 19 C.F.R. §§ 355.42(b), 353.54(b) (1986). Because the reviews generally take at least a year to complete, the final two administrative review determinations are not made until the third year after publication of the order.

127. 50 Fed. Reg. 24,229 (1985) (to be codified at 19 C.F.R. § 355.25(d)(4)(i)); 51 Fed. Reg. 29,066 (1986) (to be codified at 19 C.F.R. § 353.25(d)(4)(i)).

128. 51 Fed. Reg. 29,066 (1986) (to be codified at 19 C.F.R. § 353.25(b)(1)).

129. 50 Fed. Reg. 24,228 (1985) (to be codified at 19 C.F.R. § 355.25(b)).

130. *Id.* (to be codified at 19 C.F.R. § 355.25(a)(2)(i)).

131. *See id.* (to be codified at 19 C.F.R. § 355.25).

program, a subsidy still could remain, because a payment in year one can result in a subsidy in year five based on Commerce methodology. As a matter of policy, requiring the latter certification is unwise because then a foreign government would have little incentive to eliminate counter-vailable programs.

Also, to revoke an order in part, Commerce must find it unlikely that the companies covered by the order will apply for, or receive, a net subsidy or sell at less than fair value in the future.<sup>132</sup> This provision gives Commerce discretion to deny revocation even if the affected companies meet all of the regulatory criteria.

Commerce currently requires a company to undergo at least two of three possible verifications before Commerce will revoke an order (assuming the dumping or subsidization ceased when an order was issued).<sup>133</sup> Under the proposed regulations, Commerce would have to conduct only one of three verifications.<sup>134</sup> Therefore, it may be in a respondent's best interest to submit complete and accurate questionnaire responses during the initial investigation so that Commerce will exercise its discretion to limit the number of verifications.

## V. Conclusion

The proposed antidumping and countervailing duty regulations would make Commerce procedures more transparent by codifying many rules that are currently a matter of agency practice. In this respect, they would be a boon to respondents.

Substantively, the proposed regulations would make it slightly more difficult than it is at present for respondents to prevail in an antidumping or countervailing duty investigation. It would become more difficult for a company to raise standing objections, be excluded from an investigation, maintain the confidentiality of information submitted, or achieve a settlement. Furthermore, voluntary questionnaire responses probably would not be accepted, and, if a duty were imposed, it could be more difficult to have the duty revoked.

---

132. 50 Fed. Reg. 24,228 (1985) (to be codified at 19 C.F.R. § 355.25(a)(3)(ii)); 51 Fed. Reg. 29,066 (1986) (to be codified at 19 C.F.R. § 353.25(a)(2)(ii)).

133. If Commerce does not review promptly, there can be innumerable verifications. *See, e.g.,* Toshiba Corp. v. United States, No. 86-10-01285, slip op. at 2 (Ct. Int'l Trade Mar. 2, 1987).

134. 50 Fed. Reg. 24,232 (1985) (to be codified at 19 C.F.R. § 355.37(a)(1)(iv)(B)); 51 Fed. Reg. 29,069 (1986) (to be codified at 19 C.F.R. § 353.36(a)(1)(iv)(B)).