

CHAPTER 16

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LIST OF ACRONYMS & ABBREVIATIONS

AD	ANTIDUMPING
CFR	CODE OF FEDERAL REGULATIONS
DOC	DEPARTMENT OF COMMERCE
GATT	GENERAL AGREEMENT ON TARIFFS AND TRADE
ITC	INTERNATIONAL TRADE COMMISSION
PM	PROGRAM MANAGER
SAA	STATEMENT OF ADMINISTRATIVE ACTION
ANTIDUMPING AGREEMENT	AGREEMENT ON INTERPRETATION OF ARTICLE VI OF GATT
URAA	URUGUAY ROUND AGREEMENT ACT

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References:

The Tariff Act of 1930, as amended (the Act)

Section 732 (b)(2) and (d) - procedures for initiating investigations

Section 733 (a) and (f) - preliminary determinations

Section 734 (a), (e), (f), (g), and (h) - **termination** or suspensions of investigations

Section 735 (b) and (d) - final determinations

Section 736 - assessment of duty

Section 739 - short life cycle merchandise

Sections 751 (b)(2) and (c) - injury reviews for changed circumstances
and five-year reviews

Section 752 (a) - rules for determining likelihood of continuation or recurrence of
material injury for changed circumstances and five-year reviews

Section 762 - required determinations for quantitative restriction agreements

Section 771 (2), (7), (10), and (11) - definitions and injury requirements

Section 774 - hearings

Section 776 - determinations based on **facts available**

Section 777 - access to information

Section 781 (e) - injury advice for prevention of **circumvention** of antidumping duty
orders

Section 782 - conduct of investigations

Section 783 - petitions by third countries

Department of Commerce (DOC) Regulations

19 CFR 351.202 (c) - simultaneous filing of petition

19 CFR 351.205 (d) - availability of DOC information from preliminary
determinations

19 CFR 351.208 (h) - continuations of suspended investigations

19 CFR 351.210 (j) - availability of DOC information from final determinations

SAA

pp. 807-812, 817-818 various references to Article VI of the GATT 1994

846-873 determination of injury; definition of domestic industry; initiation
and subsequent investigation; and evidentiary and
procedural requirements

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Sections C.9.c.(1) and (4) - standards for determining likelihood of continuation or recurrence of injury and provision of **dumping** margins

Antidumping Agreement

Article 3 - determination of injury

Article 4 - definition of domestic industry

Article 5 - initiation and subsequent investigation

Article 6 - evidence

Article 11 - duration and review of antidumping duties and suspension agreements

Article 12 - public notice and explanations of determinations

Article 13 - judicial review

Article 17 - consultation and dispute settlement

INTRODUCTION

All antidumping (AD) investigations are governed by the Act. The Act provides that AD proceedings take place, concurrently, at two federal agencies: the DOC and the U.S. International Trade Commission (ITC).

While the DOC is responsible for determining whether "a class or kind of merchandise is being, or is likely to be, sold in the United States at less than its fair value," the ITC must decide whether a U.S. industry is materially injured by reason of the imports sold at less-than fair-value prices. Both the "less than fair value" and the "material injury" criteria must be satisfied before an AD duty order can be issued.

Part I of this chapter describes the status of the ITC as an "independent" agency. Part II provides a very brief overview of the framework of the ITC's statutory findings and determinations in an AD investigation. Finally, Part III discusses provisions in the Act, most of which are changes in the law made by the Uruguay Round Agreement Act (URAA), that will require the Import Administration staff assigned to an AD investigation to maintain a close working relationship with their counterparts at the ITC assigned to the same investigation.

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I. THE ITC

The ITC consists of a bi-partisan, six-person body that oversees a professional staff of investigators, industry analysts, financial analysts, accountants, economists, and attorneys. The Act prescribes that no more than three of the commissioners can be from the same political party. Although the chairman is selected by the President, he or she cannot be from the same party as his or her predecessor. Also, the vice chairman cannot be a member of the same political party as the chairman.

Commissioners are appointed for nine-year terms. It is possible for a commissioner to be appointed to complete the unexpired portion of a former commissioner's term and, subsequently, to be re-appointed to a full nine-year term. Thus, a commissioner appointed for a full term has a tenure that extends beyond that of an administration in the executive branch. Unlike the executive branch, where political appointees serve at the pleasure of the president, commissioners can be removed only for cause.

In addition, the ITC is authorized to represent itself in court. It is not represented by the Department of Justice and, therefore, can take positions in litigation independent of those promoted by the executive branch. Finally, the ITC's budget is submitted directly to the Congress. Its budget is not reviewed by the Office of Management and Budget. As a consequence of these statutory provisions, the ITC is an agency that is unusually independent of the executive branch.

The ITC also performs a number of other functions related to international trade. Under Section 337 of the Trade Act of 1930, ITC investigates unfair trade practices such as patent, trademark, or copyright infringement. Upon finding a violation of Section 337, the ITC may issue an exclusion order, subject to Presidential disapproval. The ITC also administers Section 201 of the Trade Act of 1974 which, subject to the discretion of the President, provides for a so-called "escape clause" or "global safeguard" mechanism for import relief. Remedies available under Section 201 include the imposition of quotas or increased tariffs on fairly traded imports from all countries in order to facilitate positive adjustment to import competition.

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In addition to conducting trade remedy investigations, the ITC is responsible for continually reviewing the Harmonized Tariff Schedule of the United States (HTS), and for recommending modifications to the HTS. Under section 332 of the Tariff Act of 1930, the ITC conducts general investigations on any matter involving tariffs and international trade, including conditions of competition between U.S. and foreign industries.

The ITC's Library has an extensive library of international trade resources called the National Library of International Trade. The library is located on the third floor of the ITC Building. It is open during agency hours. Additional information about the ITC may be found at <http://www.usitc.gov>

II. STATUTORY FRAMEWORK

The ITC must make a preliminary determination as to whether there is a "reasonable indication" of material injury within 45 days of the date of the filing of an AD duty petition or notice of self-initiation of an investigation by the DOC or within 25 days after the date on which the ITC receives notice of the initiation of the investigation if the DOC had extended the period for initiation in order to poll the industry to determine whether the petition had industry support. If this determination is affirmative, the case continues; if negative, the case is terminated.

The ITC must make a final determination of material injury within 120 days of the DOC's affirmative preliminary determination or 45 days of the DOC's affirmative final determination, whichever is longer.

If the DOC's preliminary determination is negative but its final determination is affirmative, the ITC has 75 days from the DOC's final affirmative determination to make its final material injury determination.

A. Standard for Material Injury

At both the preliminary and final stages of an AD investigation, the ITC is required to determine whether a U.S. industry is materially injured or threatened with material injury,

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or whether the establishment of a U.S. industry is materially retarded “by reason of” the alleged less-than-fair-value imports.

For the purpose of an affirmative preliminary determination, the ITC need only find a reasonable indication that a domestic industry is injured by imports allegedly sold at less than fair value. Except for the different statutory standards involved, the other statutory requirements in preliminary and final injury investigations are identical i.e., the ITC must

- o define the relevant U.S. industry;
- o determine whether that industry is experiencing or threatened with material injury, or whether the establishment of the industry has been materially retarded; and
- o determine whether there is a causal link between the injury and the imports allegedly sold at less-than-fair value.

1. The Reasonable Indication Standard

The Congress did not intend that the preliminary determination as to whether there is a “reasonable indication” of material injury be a high standard. The legislative history of the provision states that a reasonable indication of material injury exists in "each case in which the facts could reasonably indicate that an industry in the United States could possibly be suffering material injury..."

The ITC's reviewing courts have held that the “reasonable indication” standard of preliminary determination is more than just a “mere possibility” to find whether there are any facts which raise the possibility of injury. Where information available to the ITC is inconclusive that a negative determination is warranted, the ITC can continue its investigation and make a final material injury determination.

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2. Material Injury

The term "material injury" is defined as "harm which is not inconsequential, immaterial, or unimportant." Although this definition is not very helpful, it does indicate that a domestic industry need not be catastrophically injured to qualify for AD relief. In evaluating "material injury," the ITC is directed to consider three general areas of inquiry:

- a. The volume of imports and any increase in that volume, either in absolute terms or relative to domestic production. In terms of volume of imports, the ITC evaluates imports in terms of both absolute import volume and market penetration. Market penetration is the percentage of apparent U.S. consumption represented by imports. Increases in market penetration are particularly important. The measurement of market penetration is largely dependent upon the definition of the U.S. market for the "domestic like product" manufactured by the U.S. industry.
- b. The effect of imports on U.S. prices, particularly price underselling or price suppression.
- c. The impact of imports on the domestic industry, in terms of all relevant economic factors. In assessing the impact of unfair imports on a domestic industry, the ITC must consider actual and potential declines in output, sales, market share, profits, productivity, return on investments and capacity utilization. The Act also directs the ITC to consider the negative effect of imports on cash flow, inventories, employment, wages, growth, investment and the ability to raise capital. Further, the Act requires the ITC to consider the actual and potential negative effects on existing development, as well as development of derivative or more advanced versions of the domestic like product. Finally the ITC is to consider the magnitude of the margin of dumping.

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B. The Relevant Domestic Industry

The ITC must determine whether an "industry in the U.S." is materially injured by reason of the imports of the merchandise subject to investigation. The term "industry" is defined by the Act as consisting of the producers, as a whole, of a domestic like product or those producers whose collective output of the domestic like product constitutes a major proportion of the total domestic production of that product. The Act, in turn, defines "the domestic like product" as a product that is like, or in the absence of like, most similar in characteristics and uses with, the article subject to ... investigation...." The legislative history provides that the "like" product standard should not be interpreted in such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that domestically produced and imported articles are not "like" each other.

The ITC usually examines the health of the domestic industry "as a whole" but, where the statutory criteria are present, the Commission can divide the United States into regional industries. Those criteria are as follows: 1) the domestic producers within the regional market sell "all or almost all " of their production of the product within the region; and 2) the demand within the region must not be supplied, "to any substantial degree," by domestic producers located elsewhere in the U.S.

To establish material injury for a regional industry, the Act requires the ITC to find that there is a concentration of dumped imports into the isolated regional market and that all, or almost all, of the producers within that market are being injured by reason of the dumped imports.

C. Threat of Material Injury

Specific guidelines including a listing of the economic factors, for determining whether a domestic industry is threatened with material injury are found in section 771(7)(F) of the Act.

INTERNATIONAL TRADE COMMISSION INJURY DETERMINATIONS**D. Material Retardation**

The ITC can also make an affirmative determination if it finds that dumped imports have materially retarded the establishment of an industry in the United States. To date, nearly all AD investigations have been initiated on the basis of petitions by established manufacturers of the domestic like product and this provision has not been raised. In the cases in which material retardation has been raised as an issue, the ITC has required that the petitioner offer evidence to the effect that it has made a substantial commitment to the domestic production of the domestic like product and that it indicate how the dumped imports are responsible for the difficulties the petitioner experienced in attempting to establish domestic production.

E. Causation

In addition to ascertaining whether the domestic industry is materially injured, the ITC must determine whether this injury was "by reason of" the imports sold at less than fair value. The ITC's reviewing courts have held that this causation standard is satisfied if the dumped imports contribute, even minimally, to the injured condition of the domestic industry.

The Act requires that the ITC consider the cumulative effect of the dumped imports from all of the countries whose exports are the subject of AD investigations that were initiated at the same time, if such imports compete with each and the domestic like products, even though the imports from one or more of these countries might account for a small percentage of the market penetration in the United States.

The statutory focus of an ITC AD investigation consists of the following: 1) the volume of the subject imports, 2) the effect of these imports on the prices of domestically produced products in the U.S. market, and 3) the impact of this competition on the domestic producers of the like product. The ITC compares the average prices of domestically produced products, imports subject to the investigation, and imports not subject to the investigation (which, presumably, are fairly traded). In addition, the ITC has emphasized its analysis of sales lost by the domestic producers to sales of the imports subject to investigation.

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The Office of Economics at the ITC has developed a computer model, "Commercial Policy Analysis System (COMPAS)," that uses spreadsheets for estimating the effect of dumped imports on the domestic industry. It relies on certain assumptions concerning the relationship between dumping margins and pricing. Although the model is not relied upon by all of the commissioners for their determinations, a minority of commissioners have used this model, or an earlier version of this model, for several years.

III. RELATIONSHIPS OF THE DOC'S AND THE ITC'S INVESTIGATIONS

Prior to the URAA, the DOC and the ITC conducted what were, for the most part, completely independent investigations although staff of both agencies have discussed product definition issues prior to initiation. The agencies did need to understand each other's determinations and orders. A change in the DOC's scope language for an investigation language could affect the proper description of the domestic like product and, consequently, the boundaries of the domestic industry determined by the ITC. Also, a partially negative determination by the ITC at its preliminary determination could affect the DOC's scope language. A partially negative final determination by the ITC might require the DOC to recalculate the margins of dumping as well as change the scope of the AD duty order.

In addition, the extension of investigation deadlines by the DOC has always had the possibility of complicating case scheduling at the ITC. The most difficult situation is where the DOC extends determination dates for some, but not all, in a group of investigations in which the ITC had cumulated the imports in its preliminary determinations. This might force the ITC to make its final material injury determinations on certain investigations before it would have an opportunity to evaluate the causation of material injury for the others. Consult with your supervisor or program manager (PM) before recommending a postponement of a determination date for a case when there are several cases for the same product being conducted on the same time schedule.

The URAA amended certain provisions of the Act administered by the DOC that now call for the DOC to evaluate certain types of data historically gathered by the ITC rather than by the DOC. To avoid the duplicative collection of information by both agencies, there are now issues where the DOC's staff, working closely with the ITC's staff, can use

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certain data gathered by the ITC as well as methods of analysis relied upon by the ITC staff. These statutory provisions include determining domestic industry support for a petition, drafting an AD duty order in a case in which the ITC had found material injury to a regional industry, and imputing knowledge that dumped imports would be likely to cause material injury in critical circumstance determinations.

A. Determining Industry Support for a Petition

Although the DOC has the responsibility for determining whether a petition has the requisite industry support, the ITC has expertise in surveying domestic producers. In fact, the ITC normally sends questionnaires to all the domestic producers of which it is aware within five days of a petition being filed. Unfortunately, the ITC rarely has received an adequate response to its questionnaire survey by the DOC's normal initiation deadline, i.e., the twentieth day after the filing of the petition.

However, if domestic producer data are available prior to the initiation deadline, the ITC will share the results of those parts of its questionnaire survey dealing with production, imports, support of the petition, the ownership of the responding U.S. producer, and possible relationships of the responding U.S. producer to related companies importing into the United States or producing the **subject merchandise**. For example, the instructions accompanying the ITC's producers' questionnaire in its preliminary investigation of Vector Supercomputers from Japan, ITC Inv. No. 731-TA-750 (August 1996 (Preliminary)) contained the following statement concerning the release of questionnaire responses: “... if your firm is a U.S. producer, the information you provide on your production and imports of vector supercomputers and your responses to the questions in Part I of the producer questionnaire will be provided to the U.S. Department of Commerce, upon its request, for use in connection with (and only in connection with) its requirement pursuant to section 732(c)(4) of the Act (19 U.S.C. sec. 1673a(c)(4)) to make a determination concerning the extent of industry support for the petition requesting this investigation. Any information provided to Commerce will be transmitted under the confidentiality and release guidelines set forth above. Your response to these questions constitutes your consent that such information be provided to Commerce under the conditions described above.”

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See Chapter 1 for more information on ITC domestic producer information. Consult with your supervisor or PM before asking the ITC for this type of data.

B. Drafting Orders in Regional Industry Cases

The DOC's reviewing courts have held that the Constitution requires AD duties to be uniformly assessed at all ports. Article 4.2 of the Agreement on Implementation of Article VI of GATT 1994 of (the Antidumping Agreement) has required, since 1979, that, when the domestic industry is determined to be a regional industry, AD duties be assessed only against the products consumed in the region. Prior to the URAA, the United States had not implemented this provision. Now the URAA provides explicitly that the DOC must limit the assessment of duties to those exporters and/or producers that exported the subject merchandise for sale in the region during the **period of investigation**.

The findings necessary to determine if the domestic industry is regional are made by the ITC on the basis of a detailed evaluation of statistics of approximately three years' worth of domestic shipments of U.S. imports and the domestically produced like product. This analysis of U.S. shipments information can be so complex that the ITC may change its definition of the boundaries of the region between its preliminary determination and its final determination. Unlike the DOC, the ITC does not focus on the knowledge of foreign producers or foreign exporters with respect to the destination of their exports.

There are very few regional industry investigation and most of the cases to date have concerned imports of cement. Nevertheless, it would make no sense for the DOC to duplicate the information requests of the ITC to conduct our own domestic shipments analysis. When a regional industry case is filed, we should coordinate with the ITC staff to develop a methodology for tracing U.S. shipments of imports back to the appropriate importers, foreign exporters, and foreign producers. Any such effort will require an agreement with the ITC concerning the sharing of confidential information, as in the case of determining industry support for petitions. Consult with your supervisor or PM before contacting the ITC on matters involving regional industries.

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C. The Determination of Critical Circumstances

The 1979 version of the Antidumping Agreement authorized the retroactive suspension of liquidation where "critical circumstances" existed. This provision was based on the premise that the initiation of an AD investigation would motivate exporters to ship as much merchandise as possible prior to a preliminary determination of dumping, which has the accompanying suspension of liquidation. The 1979 Antidumping Agreement required that the national authority determine that the importer had knowledge that the foreign exporter was dumping and that the dumping would cause material injury. However, the 1979 Act did not contain the reference to causing material injury.

Knowledge that the dumping would cause injury has been included in the URAA. The task of imputing knowledge to the importer that the dumping was likely to cause material injury was delegated to the DOC rather than to the ITC. However, the ITC must make its own critical circumstance decision. They have nearly always not found critical circumstances to exist. This however, does not relieve the DOC of making its own determination.

DOC has had limited experience with this provision. In one case, we have concluded that we can find the requisite implied knowledge that the dumped imports were likely to cause material injury if the ITC preliminary injury determination found a reasonable indication of present injury to the domestic industry, but not if the ITC determination found only a reasonable indication of threat of material injury. However, in different cases (Preliminary Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from Ukraine 62 FR 31958 (June 11, 1997); Preliminary Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from the Russian Federation 62 FR 31971 (June 11, 1997)), our preliminary determinations made affirmative critical circumstance determinations notwithstanding the fact that the ITC's preliminary determination was based only on threat of injury.

The affirmative preliminary determination in the Steel Plate cases were based on a combination of very large margins and large increases in import volume after the initiation of the investigations. As this issue is still evolving, analysts should check carefully with their supervisors and program managers whenever this issue arises.

INTERNATIONAL TRADE COMMISSION INJURY DETERMINATIONS**VI. POST-ANTIDUMPING DUTY ORDER INJURY DETERMINATIONS
AND CONSIDERATIONS BY THE ITC****A. Reviews Based on Changed Circumstances**

Sections 751(b)(1) and (2) of the Act call for the ITC to review its injury determinations for AD duty orders or findings and affirmative determinations resulting from continued investigations involving suspension agreements based on changed circumstances to determine if **revocation** of an order or finding or termination of a suspension is likely to lead to continuation or recurrence of injury. These reviews are conducted only if the ITC receives information, or a request from an interested party which shows changed circumstances sufficient to warrant a review of the determination or agreement. Notice of the review and order, finding, or suspension agreement must be published in the FR. Also, a review cannot be undertaken until 24 months after the publication of the notice of that determination or suspension. See section 752 of the Act for the special rules governing ITC injury determinations for changed circumstances. Also see Chapter 18 for information on DOC activities with regard to changed circumstances reviews.

B. Five-Year Reviews

Section 751(c) of the Act calls for the ITC to conduct its injury determinations every five years for AD duty orders and affirmative determinations of injury associated with suspended investigations that were continued. The notice of initiation to commence a five-year review must be published in the FR not later than 30 days prior to the fifth anniversary date of the publication of the order or notice of the suspension agreement. Like a changed circumstances review, the five-year review is undertaken to determine if the revocation of an order or termination of a suspension agreement would be likely to lead to continuation or recurrence of material injury. See section 752 of the Act for special rules governing ITC injury determinations for five-year reviews. Also see section 751(c) for rules governing these ITC reviews. See Chapter 18 for information on DOC activities with regard to five-year reviews.

INTERNATIONAL TRADE COMMISSION INJURY DETERMINATIONS**C. Considerations of Injury by the ITC for Prevention of Circumvention Situations**

Under section 781(e) of the Act, the DOC must notify the ITC in situations involving determinations to include merchandise in the scope of an AD duty order completed or assembled in the United States or in other foreign countries or merchandise that is later developed. The ITC may request a consultation with the DOC over the proposed inclusion of the above cited merchandise in the scope of an AD duty order. If the consultation results in the ITC's belief that a significant injury issue is presented by the proposed inclusion, the ITC may provide written advice to the DOC as to whether the inclusion would be inconsistent with the affirmative injury determination on which the AD duty order is based. See Chapter 18 for information on DOC actions with regard to prevention of circumvention of AD duty orders.