

CHAPTER 12
CRITICAL CIRCUMSTANCES

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References:

- The Tariff Act of 1930, as amended (the Act)
 - Section 732(e) - information regarding critical circumstances
 - Section 733(e) - preliminary determinations
 - Section 735(a)(3), 735(b)(4)(A), 735(c)(3), 736(c)(4) - final determinations
- Department of Commerce (the Department) Regulations
 - 19 CFR 351.206 - preliminary and final determinations
- SAA
 - Section C.8.a. - critical circumstances
 - Section C.8.b. - time limits on retroactive assessments
- Antidumping Agreement
 - Article 10.6 - retroactive duties
- Policy Bulletin
 - Change in Policy Regarding Timing of Issuance Of Critical Circumstances
Determinations; [Policy Bulletin 98.4](#), issued October 8, 1998 (63 FR 55364; (Oct 15, 1998)
- Legislative History
 - 1994 Uruguay Round Agreements Act; H. Rep. 103-826 at 50-51; S. Rep. 103-412 at
38-39
 - 1987 Omnibus Tariff Act; S. Rep. 100-71 at 91-94
 - 1988 Omnibus Trade and Competitiveness Act; H. Rep. 100-576 at 610-612

I. Introduction

In investigations, an importer of a product under investigation becomes liable for antidumping duties at the time the product enters the United States for consumption. If the merchandise is subject to suspension of liquidation in a proceeding, when an entry takes place, the importer must post a bond or a cash deposit of estimated dumping duties with CBP. Normally, suspension of liquidation is effective the date that an affirmative preliminary determination is published in the Federal Register. An importer of a product under investigation becomes liable for potential antidumping duties on entries made after this date.

Usually, an importer can import subject merchandise prior to the preliminary determination without being liable for dumping duties. However, in anticipation of high preliminary dumping duties, the importer could deliberately import and stockpile large quantities of a product under investigation prior to the Department ordering suspension of liquidation in order to avoid paying antidumping duties later. In order to counter this type of stockpiling, section 733(e) of the Act provides for 90-day retroactive suspension of liquidation where certain “critical circumstances” are present. Whether critical circumstances are found and whether duties on these pre-preliminary entries will ever be collected depends on affirmative findings by both the Department and the ITC.

To determine critical circumstances, the Department must determine that: 1) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise; or 2) the importer knew or should have known that the exporter was selling the merchandise at less than fair value and that there was likely to be material injury by reason of such sales; and 3) there have been massive imports of the subject merchandise over a relatively short period of time. Further, for action to be taken, the ITC must determine that the imports seriously undermine the remedial effectiveness of the antidumping duty order. See Section 733(e) of the Act.

II. Submission of Allegation

Generally petitioner may allege critical circumstances in the petition, or by amendment to the petition at any time. However, an allegation may be no later than 21 days before the date of the final determination. See section 351.206(b) of the Department’s regulations and Chapter 2 of the manual.

In cases where the surge of imports is expected to occur after the filing of the petition, the petitioner clearly cannot provide information in the petition to demonstrate a surge. However, where the petitioner additionally alleges that producers, exporters or importers had advance knowledge that a petition would be filed, it is appropriate to evaluate the evidence provided in the petition for sufficiency. For example, in Steel Plate from the Czech Republic, the petitioners alleged that there was sufficient pre-filing notice of the antidumping petitions. See [Initiation of Antidumping Investigations: Certain Cut-to-Length Carbon-Quality Steel Plate from the Czech](#)

[Republic, France, India, Indonesia, Italy, Japan, the Republic of Korea, and the Former Yugoslav Republic of Macedonia](#), 64 FR 12959, 12966 (March 16, 1999) ([Steel Plate from the Czech Republic](#)).

III. Basis For Finding Critical Circumstances

A. Critical Circumstances Criteria

1. There is a history of dumping and material injury

To determine whether there is a history of dumping, we examine recent antidumping duty cases of the product under investigation in the United States or elsewhere.

a. Generally

A history of injurious dumping typically exists when the United States has had an antidumping duty order on the product, or another country has a current antidumping duty order on the product. See, e.g., [Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances in Part: Certain Lined Paper Products From India](#), 71 FR 19706, 19712 (April 17, 2006) ([Lined Paper Products From India](#)). In determining whether a history of dumping and material injury exists, the Department generally examines current or previous antidumping duty orders in the United States on the subject merchandise from the country under investigation. *Id.* The Department also considers current orders in any other country that cover the subject merchandise from the country under investigation. *Id.* The Department will normally not consider the initiation of a case, or a preliminary or final determination of sales at LTFV in the *absence* of an affirmative finding of material injury by the ITC, as indicative of a history sufficient to satisfy this criterion. See [Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determinations of Critical Circumstances in Part: Prestressed Concrete Steel Wire Strand from Mexico](#), 68 FR 42378, 42384 (July 17, 2003); see also [Partial Affirmative Preliminary Determination of Critical Circumstances: Chlorinated Isocyanurates from the People's Republic of China](#), 70 FR 18362, 18364, fn. 5, (April 11, 2005) ([Chlorinated Isocyanurates from the PRC](#)) (unchanged in [Final Determination](#), 70 FR 24502 (May 10, 2005)) (the Department refrained from regarding the European Union's initiation of an antidumping investigation of isocyanurates as a factor in determining the existence of injurious dumping).

The Office of Policy is responsible for researching whether there are any outstanding antidumping duty orders for the product under investigation in countries other than the United States. The primary source of this information is the Semi-Annual Report to the Committee on Antidumping Measures published by the WTO.

b. Relevance of an Historical Order

To determine whether a history of injurious dumping exists, the Department evaluates the relevance of historical orders on the product. As discussed below, the Department assesses relevance independent of its product similarity determination. See “Scope of the Order,” below. The Department generally looks to how recent the historical order is relative to the current proceeding. In so doing, the Department looks to the totality of the circumstances and the full historical content of the proceeding when making a relevance assessment. See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Refined Brown Aluminum Oxide (Otherwise known as Refined Brown Artificial Corundum or Brown Fused Alumina) from the People’s Republic of China, 68 FR 23966, 23971 (May 6, 2003); Notice of Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber from the Republic of Korea, 65 FR 16880 (March 30, 2000) and the accompanying Issues and Decision Memorandum at Comment 1; Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, 67 FR 55788 (August 30, 2002) and the accompanying Issues and Decision Memorandum at Comment 3; and Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon-Quality Steel Plate Products from Japan, 64 FR 73215, December 29, 1999 at Comment 2.

c. Scope of the Existing or Historical Order

The Department does not require that an existing or historical antidumping order have the identical scope as the new proceeding. However, normally there should be some overlap between the scope of the existing or historical order and the new proceeding. In the past, we have determined that partial overlap in product coverage is sufficient to find a history of injurious dumping. See, e.g., Chlorinated Isocyanurates from the PRC, (unchanged in Final Determination, 70 FR 24502 (May 10, 2005)); Preliminary Determination of Critical Circumstances: Certain Small Diameter Carbon and Alloy Seamless Standard Pipe and Pressure Pipe from the Czech Republic, 65 FR 33803, May 25, 2000; Notice of Final Determination of Sales at Less Than Fair Value: Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from the Czech Republic, 65 FR 39363, June 26, 2000, (unchanged in Final Determination, 69 FR 39363 (August 14, 2000)); and Notice of Final Determination of Sales at Less Than Fair Value: Disposable Pocket Lighters from the People’s Republic of China, 60 FR 22359, 22368 (May 5, 1995).

2. The importer knew or should have known that exporter was selling at less than fair value and that there was likely to be material injury

To determine whether an importer knew or should have known that the exporter was selling at less than fair value, we consider the magnitude of the calculated dumping margins in our preliminary determination and final results and we also consider whether transactions have been made to

affiliated or unaffiliated importers. In its past practice, the Department has generally found that a margin of 25 percent is sufficient to impute knowledge of dumping if the exporter is selling to an unaffiliated importer (export price situations). If the exporter is selling to an affiliated importer (constructed export price situations) a margin of 15 percent has generally been found to be sufficient to establish that the importer should have known that the exporter was selling at less than fair value. See, e.g., [Preliminary Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China](#), 62 FR 31972, 31978 (June 11, 1997) (unchanged in [Final Determination](#)) and [Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam](#), 69 FR 42672 (July 16, 2004) (unchanged in [Final Determination](#)).

For companies that respond to our antidumping questionnaire, we typically use the margin we calculate for the preliminary determination of sales at less than fair value as the basis for deciding whether an importer knew or should have known that dumping was occurring. See, e.g., [Silicomanganese from India: Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances Determination](#), 67 FR 15531, (April 2, 2002) and the accompanying [Issues and Decision Memorandum](#) at Comment 1. However, if an early critical circumstances determination is made, the Department will rely upon the margin alleged in the petition. See the “Critical Circumstances Analyses With Advance Knowledge of the Petition” section, below. For companies that do not respond to our questionnaire, we generally rely on the “all others” rate to be assigned to that company or group of companies. See sections below discussing, “all others,” non-cooperative (AFA) companies, non-selected (Section A) companies, and NME entities. Also, in the past, we have relied on margins alleged in the petitions to determine importer knowledge of dumping. See, e.g., [Notice of Preliminary Determinations of Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products from Australia, the People's Republic of China, India, the Republic of Korea, the Netherlands, and the Russian Federation](#), 67 FR 19157, 19158 (April 18, 2002) ([Certain Cold-Rolled Carbon Steel Flat Products from Australia, et al.](#)) (upheld in [Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Australia](#), 67 FR 47509 (July 19, 2002)).

To determine whether an importer knew or should have known that there was likely to be material injury, we typically consider the ITC's preliminary injury determination. If the ITC finds material injury (as opposed to the threat of injury), we normally find that the ITC's determination provided importers with sufficient knowledge of injury. Where the ITC finds only threat of material injury, the Department may consider additional sources of information, such as trade and price statistics or press reports. See, e.g., [Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan](#), 64 FR 24329 (May 6, 1999) at Comment 2 (where the Department considered other sources of information, including press reports regarding rising imports, falling domestic prices resulting from rising imports and domestic buyers shifting to foreign suppliers).

3. There are “massive” imports over a relatively short period of time

a. Generally

As specified in 19 CFR 351.206(h)(1), we consider the following factors in determining whether imports have been “massive” over a relatively short period:

- a. the volume and value of imports,
- b. seasonal trends (if applicable), and
- c. the share of domestic consumption accounted for by the imports.

As outlined in 19 CFR 351.206(h)(2)(i), we consider at least a three-month period, beginning with the filing of the petition as a “relatively short period of time.” However, in recent investigations we have considered the period beginning with the filing of the petition and ending with the preliminary determination. We then compare this period to a period of equal duration immediately prior to the filing of the petition to determine whether imports had been “massive” over a relatively short period of time. If it can be substantiated that the importers or exporters of the product under investigation had knowledge prior to the filing of the petition, we can consider a period including the time prior to the filing as part of the “post-petition” period.

If the petition is filed in the first half of the month, that month should be considered part of the “post-petition” period. However, if the petition is filed in the second half of the month, that month should be considered part of the “pre-petition” period. For the purposes of our preliminary determination, we base our “massive” imports determination on the data available from the questionnaire response. The respondents must submit updated data for “massive” imports through the date of the preliminary determination. Recall that the preliminary determination usually occurs prior to verification.

As stated in 19 CFR 351.206(h)(2), we consider imports of the product under investigation to be “massive” if there has been an increase of 15 percent or more over a relatively short period of time. However, the determination of “massive” imports goes beyond an examination of import levels prior to and after the filing of the petition. We must also consider trends over time and determine whether there is seasonality with respect to the imports.

b. “Massive” Imports

As noted above, imports are found to be “massive” when they increase by 15 percent or more from the base period to the comparison period. In analyzing whether imports are “massive”, the Department will also consider seasonal trends (if applicable) and the imports’ share of domestic consumption. 19 CFR 351.206(h)(1) and (h)(2). We consider these additional factors because

they may provide an alternative explanation of why imports are increasing. For example, is the surge in imports of the product from August to October due to the filing of an antidumping petition in August, or is it due to retailers stocking up for holiday sales? If the Department determines that the surge is explained by seasonality, we would not find “massive” imports. Also, the Department typically determines whether imports have been “massive” on a company-by-company basis. To make this determination, we usually rely on shipment data submitted by the responding companies. However, there are situations where company-specific analyses are not possible, e.g., for companies covered by the “all others rate” and companies that are part of the NME entity. These situations will be discussed later. The initial focus is on responding producers/exporters and the issues of seasonality and adjustments to the shipment data. See, e.g., [Certain Cold-Rolled Carbon Steel Flat Products from Australia, et al.](#) (the Department found that imports had been “massive” for companies from each of the named countries because imports had increased by more than 15 percent for Australia, China, India, Korea, the Netherlands, and Russia) (upheld in [Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Australia](#), 67 FR 47509 (July 19, 2002); [Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From the People's Republic of China](#), 67 FR 62107 (October 3, 2002) and accompanying [Issues and Decision Memorandum; Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from India](#), 67 FR 47518, July 19, 2002; [Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Korea](#), 67 FR 62124 (October 3, 2002) and accompanying [Issues and Decision Memorandum; Notice of Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products From The Netherlands](#), 67 FR 62112 (October 3, 2002) and accompanying [Issues and Decision Memorandum](#); and [Notice of the Final Determination Sales at Less Than Fair Value and Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products From the Russian Federation](#) 67 FR 62121 (October 3, 2002)). Also, in [Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China](#), 62 FR 61967 (November 20, 1997) the Department found that imports had increased 29 percent in the three months following the initiation of the investigation and had been “massive.”

i. Seasonality

The Department also analyzes seasonal trends regarding the subject imports. To do this, the Department has usually relied on an analysis of entries over a two year period prior to the comparison period to determine seasonal trends. If seasonality of entries existed prior to the filing of the case, then the Department may determine that the observed surge in the post-petition period was due to seasonal trends rather than an importer’s attempt to deliberately import large quantities of subject merchandise before suspension of liquidation took effect. For a discussion of seasonality, see, e.g., [Chlorinated Isocyanurates from the PRC; Notice of Final Determination of Sales at Less than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the People’s Republic of China](#), 69 FR 70997 (December 8, 2004) and the accompanying [Issues and Decision](#)

[Memorandum](#) at Comment 7A; [Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers from the People’s Republic of China](#), 69 FR 20594, April 16, 2004 ([Color Televisions from the PRC](#)); and accompanying [Issues and Decision Memorandum](#) at Comment 3 and [Notice of Final Determination of Sales at Less Than Fair Value: Refined Brown Aluminum Oxide \(Otherwise known as Refined Brown Artificial Corundum or Brown Fused Alumina\) from the People's Republic of China](#), 68 FR 55589 (September 26, 2003) and the accompanying [Issues and Decision Memorandum](#), at Comment 2.

ii. Adjustments to Data

The Department has also made “adjustments” to respondents’ shipment data for unusual circumstances that could effect the analysis of whether imports are “massive. Such instances could occur where all the shipments were made during the comparison period pursuant to long term contracts which were entered into before the filing of the petition or any advance knowledge of the petition. In extremely rare instances, the Department has removed months it found to be aberrational from the base or comparison period in the analysis of whether imports were “massive.” In the rare instances where this was done, the decision to do so was driven by the particular circumstances of the case. For a discussion of adjustments related to the removal of aberrational months from the base or comparison period [see, e.g., Chlorinated Isocyanurates from the PRC](#).

For a discussion of adjustments related to long-term contracts [see, e.g., Color Televisions from the PRC](#) and accompanying [Issues and Decision Memorandum](#) at Comment 3.

For a discussion of adjustments related to extraordinary circumstances [see, e.g., Color Televisions from the PRC](#) and accompanying [Issues and Decision Memorandum](#); [Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Korea](#), 67 FR 62124 (October 3, 2002) and accompanying [Issues and Decision Memorandum](#); [Notice of Final Determination of Sales at Less than Fair Value: Honey from the People’s Republic of China](#), 66 FR 50608 (October 4, 2001) and the accompanying [Issues and Decision Memorandum](#) at Comment 2;

c. Relatively Short Period:

As noted above, the “relatively short period” normally begins with the filing of the petition and extends at least three months. The regulations also provide that when importers, exporters, or producers had reason to believe, sometime prior to the petition, that a petition was likely, then the relatively short period of at least three months can begin on the earlier date. 19 CFR 351.206(h)(2)(I). Because the timing and issues involved in the two types of cases, *i.e.*, where the relatively short period begins with the petition and where it begins earlier, can vary the two situations are discussed separately below.

For a discussion of the use of more than three months' of data, see, e.g., [Notice of Final Determination of Sales at Less Than Fair Value: Certain Steel Concrete Reinforcing Bars from Turkey](#), 62 FR 9737, 9746 (March 4, 1997); [Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China](#), 69 FR 70997 (December 8, 2004) and the accompanying [Issues and Decision Memorandum](#) at Comment 7a.; [Notice of Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products from The Netherlands](#), 67 FR 62112 (October 3, 2002) and the accompanying [Issues and Decision Memorandum](#) at Comment 10.

i. Critical circumstances analyses based on a period starting at the petition-filing date:

As previously indicated, the Department determines the time frame of the “relatively short period” based on what part of the month the petition was filed. When a petition is filed in the first half of a month, that month is treated as part of the relatively short period (also referred to as the “comparison period” or the “post-petition period”). If the petition is filed in the latter half of a month, that month is treated as part of the “base” or “pre-petition” period. See e.g., [Final Determination of Sales at Less Than Fair Value; Stainless Steel Sheet and Strip in Coils from Germany](#), 64 FR 30710, 30729 (June 8, 1999); [Notice of Final Determination of Sales at Less Than Fair Value: Certain Steel Concrete Reinforcing Bars from Turkey](#), 62 FR 9737, 9746 (March 4, 1997); and [Color Televisions from the PRC](#) and accompanying [Issues and Decision Memorandum](#).

The Department must also determine the length of the “relatively short period”. When the preliminary determination of critical circumstances is made concurrently with the preliminary determination of sales at less than fair value, the comparison period should end before the preliminary determination. Often the Department will have received critical circumstances data from the respondents in response to an early questionnaire.

When such dates are available, the Department will normally include in our analysis data concerning the respondents' shipments of subject merchandise up to the date of the preliminary determination. See e.g., [Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Silicon Metal from the Russian Federation](#), 67 FR 59253, 59256 (September 20, 2002). See also [Color Televisions from the PRC](#) and accompanying [Issues and Decision Memorandum](#).

ii. Critical circumstances analyses with advance knowledge of the petition:

When the existence of an antidumping complaint is suspected, foreign producers, exporters or U.S. importers may respond by increasing their shipments prior to the filing of the petitions. If the Department determines that such advance knowledge existed, the date of the advance knowledge will serve as the starting point of the “relatively short period.”

When the Department finds advance knowledge of a petition, 19 CFR 351.206(c)(2)(iii) directs

that we make our preliminary critical circumstances finding early, *i.e.*, as promptly as possible after the filing of the petition but not until after the ITC's preliminary injury determination. According to the preamble to this regulation, "Recent experience highlights the importance of making preliminary critical circumstances findings as early as possible to ensure that import surges do not undermine the statutory remedies" See Regulation Concerning Preliminary Critical Circumstances Finding, 64 FR 48706 (September 8, 1999).

For a discussion of critical circumstances analyses with advance knowledge of the petition see, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Solid Agricultural Grade Ammonium Nitrate From Ukraine, 66 FR 13286, 13291-13292, March 5, 2001, (unchanged in Final Determination, 66 FR 38622, 38635 (July 25, 2001), and accompanying Issues and Decision Memorandum); and Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Germany, 67 FR 55802 (August 30, 2002) and the accompanying Issues and Decision Memorandum at Comment 6.

B. Treatment of "All Others"

Normally, the Department conducts its critical circumstances analysis for companies covered by the "all others" rate based on the experience of the investigated companies. For example, in Notice of Final Determination of Sales at Less Than Fair Value: Certain Steel Concrete Reinforcing Bars from Turkey, 62 FR 9737, 9741 (March 4, 1997), the Department found that critical circumstances existed for the majority of companies investigated and, on that basis concluded that critical circumstances existed for "all others." However, an affirmative finding of critical circumstances for investigated companies does not automatically extend to producer/exporters covered by the "all others" rate. For example, in Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled, Flat-Rolled, Carbon-Quality Steel Products from Japan, 64 FR 24329, 24338 (May 6, 1999), the Department explained that merely extending the results for the investigated companies to "all others" could lead to anomalous results. While the majority of investigated companies could have margins above 15/25 percent knowledge threshold, the "all others" rate might not reach that threshold. Also, where critical circumstances exist for the majority of respondents based on AFA, then it is not normally appropriate to extend that finding to "all others." See e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Japan, 64 FR 30574, 30585 (June 8, 1999). Instead, in determining whether critical circumstances exist for "all others," the Department will normally consider each of the individual critical circumstances criteria. The margin used to determine whether importers knew or should have known that these exporters were selling at less than fair value is the margin assigned to "all others." See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Certain Frozen and Canned Warmwater Shrimp from Thailand, 69 FR 47100, 47110 (August 4, 2004).

For a recent discussion of the treatment of "all others" see, e.g., Notice of Final Determination of

[Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil](#), 71 FR 2183, 2186, (January 13, 2006) and accompanying [Issues and Decision Memorandum](#).

C. Treatment of Non-Cooperative (AFA) Companies

In critical circumstances analysis for non-cooperative companies, the Department will make its findings using the same criteria that it uses for cooperative companies. The margin used to determine whether importers knew or should have known that these non-cooperative exporters were selling at less than fair value is the adverse facts available rate assigned to them. See, e.g., [Preliminary Determinations of Critical Circumstances: Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from Japan and South Africa](#), 65 FR 12509 (March 9, 2000), and [Notice of Final Determinations of Sales at Less Than Fair Value: Certain Large Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Japan; and Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Japan and the Republic of South Africa](#), 65 FR 25907 (May 4, 2000) and accompanying [Issues and Decision Memorandum](#). Note that AFA margins are typically high enough to impute knowledge of dumping.

In addition, because there was no information on the volume of imports of these non-cooperative respondents, in many instances imports from such companies were found to be “massive” as AFA without additional analysis. See, e.g., [Notice of Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails from Taiwan](#), 62 FR 51427, 51437 (October 1, 1997). However, in some cases the Department has also considered the import statistics from the ITC Dataweb as to make its analysis. See, e.g., [Preliminary Determination of Critical Circumstances: Certain Small Diameter Carbon and Alloy Seamless Standard Pipe and Pressure Pipe from the Czech Republic](#), 65 FR 33803 (May 25, 2000) and [Notice of Final Determination of Sales at Less Than Fair Value: Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from the Czech Republic](#), 65 FR 39363 (June 26, 2000) and accompanying [Issues and Decision Memorandum](#).

In some instances, the Department has preliminarily made the assumption that import volumes were “massive, but sought to corroborate the assumption using the ITC Dataweb import statistics for the final determination. See e.g., [Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Lined Paper Products from Indonesia](#), 71 FR 15162, 15167 (March 27, 2006). For a general discussion of the use of “facts available,” see Chapter 6 of this manual at section V.

For other examples where the Department applied facts available and made an adverse inference see, e.g., [Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Japan](#), 64 FR 30574, 30586 (June 8, 1999); [Notice of Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances: Wax and Wax/ Resin Thermal Transfer Ribbons from Japan](#), 68 FR 71072, 71076 (December 22, 2003) (unchanged in the [Final Determination](#), 69 FR 11834 (March

12, 2004) and accompanying [Issues and Decision Memorandum](#) (the Department based its finding on the fact that the AFA margin exceeded the 15 percent threshold only); [Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil](#), 71 FR 2183, 2186-87 (January 13, 2006) and the [Issues and Decision Memorandum](#) at Comment 4; [Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Prestressed Concrete Steel Wire Strand from Mexico](#), 68 FR 68350 (December 8, 2003) and the accompanying [Issues and Decision Memorandum](#) at Comment 8; [Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil](#), 67 FR 55792, 55797 (August 30, 2002); [Notice of Final Determination of Sales at Less Than Fair Value: Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from the Czech Republic](#), 65 FR 39363 (June 26, 2000) and accompanying [Issues and Decision Memorandum](#); [Notice of Final Determinations of Sales at Less Than Fair Value: Certain Large Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Japan; and Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Japan and the Republic of South Africa](#), 65 FR 25907 (May 4, 2000) and accompanying [Issues and Decision Memorandum](#); [Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Venezuela](#), 65 FR 18047 (April 6, 2000); [Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Plate Products from Japan](#), 64 FR 73215 (December 29, 1999); [Notice of Final Determination of Sales at Less Than Fair Value and Final Affirmative Finding of Critical Circumstances: Elastic Rubber Tape from India](#), 64 FR 19123, 19124 (April 19, 1999); and [Notice of Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails from Taiwan](#), 62 FR 51427, 51437 (October 1, 1997).

D. Treatment of Critical Circumstances in NME Cases

For purposes of critical circumstances determinations in NME cases, the Department analyzes separately three groups – the selected mandatory respondents, the non-selected (Section A) companies, and the “NME entity,” i.e., the rest of the country as a whole. The Department will make separate findings for each sub-set with respect to each of the criteria necessary for critical circumstances.

In investigations involving numerous foreign producers/exporters, the Department may not be able to investigate all the companies that request examination. In this situation, the Department selects the respondents to be investigated. In market economy cases, companies that are not selected for investigation will receive the “all others” rate. In NME cases, however, because of the separate rates policy, we create a pool of companies that respond to Section A of the questionnaire for separate rates purposes, but do not provide price and factors data. This group of so-called “Section A companies” are analyzed separately from the mandatory respondents and the NME entity for purposes of the critical circumstances determination. The Department will make findings with respect to each of the critical circumstances criteria. See Chapter 10 of this manual for a discussion for a discussion of the separate rates policy.

The margin used to determine whether importers knew or should have known that these non-selected (Section A) exporters were selling at less than fair value is the rate calculated for the Section A exporters. See e.g., [Chlorinated Isocyanurates from the PRC](#).

For a discussion of the treatment of non-selected (Section A) companies see, e.g., [Notice of Final Determination of Sales at Less Than Fair Value: Certain Non-frozen Apple Juice Concentrate from the People's Republic of China](#), 65 FR 19873 (April 13, 2000) Issues/Decision Memorandum at Comment 10; and [Chlorinated Isocyanurates from the PRC](#).

The margin used to determine whether importers knew or should have known that the NME entity was selling at less than fair value is the assessment rate calculated for each NME entity. See e.g., [Chlorinated Isocyanurates from the PRC](#).

When an NME entity does not respond to the Department's questionnaires, our analysis of the NME entity frequently parallels the analysis for non-cooperative (AFA) companies in the market economy context. See e.g., [Notice of Final Determination of Sales at Less Than Fair Value: Refined Brown Aluminum Oxide \(Otherwise known as Refined Brown Artificial Corundum or Brown Fused Alumina\) from the People's Republic of China](#), 68 FR 55589 (September 26, 2003) and the accompanying [Issues and Decision Memorandum](#) at Comment 1.

For a discussion of critical circumstances determinations in NME cases, see, e.g., [Affirmative Preliminary Determination of Critical Circumstances: Magnesium Metal from the People's Republic of China](#), 70 FR 5606 (February 3, 2005) (affirmed in [Final Determination](#), 70 FR 9037 (February 24, 2005)); and [Notice of Final Determination of Sales at Less Than Fair Value: Refined Brown Aluminum Oxide \(Otherwise known as Refined Brown Artificial Corundum or Brown Fused Alumina\) from the People's Republic of China](#), 68 FR 55589 (September 26, 2003) and the accompanying [Issues and Decision Memorandum](#).

IV. Separability of Critical Circumstances Findings from Dumping Determinations

Occasionally companies selected to respond to the AD questionnaire will elect not to provide sales and cost information, but will provide shipment data for use in making a critical circumstances determination separately and apart from the determination of sales at less than fair value. In such situations the Department may use information on shipments in such cases in order to make its critical circumstances determination. The Department's willingness to rely on the shipment data under such circumstances is, however, contingent upon the Department's ability to verify the shipment data. Thus for example, in [Thermal Transfer Ribbons from Japan](#), the Japanese company, DNP, argued that determinations of dumping and critical circumstances are separate and that a finding of non-cooperation with respect to the dumping inquiry could not carry over to the critical circumstances inquiry. While the Department conceded that these were, in fact, two separate determinations, the Department noted that DNP's withdrawal from the investigation precluded the Department's ability to analyze the data on the record and to make a determination

with respect to either allegation. See [Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Wax and Wax/ Resin Thermal Transfer Ribbons from Japan](#), 69 FR 11834 (March 12, 2004) ([Thermal Transfer Ribbons from Japan](#)) and the accompanying [Issues and Decision Memorandum](#) at Comment 2.

In contrast, under rather unusual circumstances, the Department relied upon the respondent's verified shipment data, while resorting to AFA in assigning the company a weighted-average margin. In [Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Prestressed Concrete Steel Wire Strand from Mexico](#), 68 FR 68350, 68351 (December 8, 2003) and accompanying [Issues and decision Memorandum](#), the Department applied AFA to Cablesa in the final determination because Cablesa's cost information could not be verified. However, the Department had already verified the shipment data Cablesa had provided for the critical circumstances inquiry. Because Cablesa's shipments did not increase by 15 percent between the base and comparison periods, as measured by the verified shipment data on the record, the Department found that critical circumstances did not exist.

V. Collection and Verification of Data

In general, the value and volume data used for determining whether imports have been "massive" over a relatively short period is obtained from respondents. Specifically, the Department asks the respondents to provide information on shipments during the relatively short period and during the period of equal length preceding the relatively short period. The Department also requests historical data on shipments to test for seasonality. It then checks the accuracy of the shipment data submitted by the respondents at verification. The Act also allows the Department to request CBP to provide data on the value and volume of imports of subject merchandise on an expedited basis. Before making such a request, the Department must have a reasonable basis to suspect a history of dumping of the subject merchandise, or that the importer knew or should have known that the merchandise was being dumped. See Section 732(e) of the Act and 19 CFR 351.206(g).

VI. Preliminary Findings

A. Issuance of Findings

In the event of a final affirmative determination of critical circumstances, one of the three following procedures must be applied:

- If there is advance knowledge that the petition will be filed, the Department will issue its preliminary determination of critical circumstances as early as possible after the initiation of the investigation, but not before day 45.
- If the critical circumstances allegation is filed 20 days or more before the deadline for the preliminary determination of SLFV, then the preliminary determination of critical circumstances must be made at the time of the preliminary determination of SLFV.

- If the critical circumstances allegation is filed later than 20 days before the deadline for the preliminary determination of SLFV, then the preliminary determination of critical circumstances must be made within 30 days of the submission of the critical circumstances allegation.

See section 351.206(c)(2) of the Department's regulations.

If the Department makes an early preliminary determination of critical circumstances (*i.e.*, prior to the preliminary determination of SLFV), the Department does not amend the preliminary critical circumstances determination to reflect findings made in the preliminary determination of SLFV. See e.g., [Preliminary Determination of Critical Circumstances: Certain Non-frozen Apple Juice Concentrate from the People's Republic of China](#), 64 FR 61835, November 15, 1999, and [Notice of Final Determination of Sales at Less Than Fair Value: Certain Non-frozen Apple Juice Concentrate from the People's Republic of China](#), 65 FR 19873 (April 13, 2000) and the accompanying Issues and Decision Memorandum at Comment 10.

B. Retroactive Suspension of Liquidation

As a result of a preliminary affirmative finding of Critical Circumstances, the Department instructs CBP to suspend liquidation retroactively for 90 days for any unliquidated entries and to require the posting of a bond or deposit of estimated duties on those entries. This retroactive suspension of liquidation is ordered at the time of the affirmative preliminary determination of sales at less than fair value. This is true whether the critical circumstances finding is made early in the proceeding or as part of the preliminary determination of sales at less than fair value. If the preliminary determination of critical circumstances is made after the preliminary determination of sales at less than fair value, the retroactive suspension is ordered at the time of the preliminary determination of critical circumstances.

VII. Final Findings

A. Affirmative Final Findings

In the event of a final affirmative determination of critical circumstances, one of the three following procedures must be applied:

- If the preliminary determinations of sales at less than fair value and critical circumstances were affirmative, direct CBP to continue the retroactive suspension of liquidation.
- If the preliminary determination of sales at less than fair value was affirmative, but the preliminary determination of critical circumstances was negative, direct CBP to suspend liquidation retroactively for un-liquidated entries up to 90 days prior to the preliminary determination of sales at less than fair value.

B. Negative Final Findings

In the event of a final negative determination of critical circumstances, one of the two following procedures must be applied:

- If the preliminary determination of critical circumstances was affirmative, terminate the retroactive suspension of liquidation ordered at the preliminary determination of sales at less than fair value, and instruct CBP to release any cash deposits or bonds on those entries.
- If the preliminary determination of critical circumstances was negative, no directions to CBP are needed.

VIII. Critical Circumstances Determinations by the ITC

Following a final affirmative determination of critical circumstances by the Department, the ITC will determine whether the imports subject to the Department's finding are likely to undermine seriously the remedial effect of the antidumping duty order. In the event of an affirmative determination of critical circumstances by the ITC, the Department must direct CBP to continue the previously ordered retroactive suspension of liquidation. The Department treats a tie vote at the ITC as an affirmative determination. See e.g., [Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Preserved Mushrooms from the People's Republic of China](#), 64 FR 8303, 8309 (February 19, 1999).

In the event of a negative determination of critical circumstances by the ITC, the Department should instruct CBP to liquidate the retroactively suspended entries and to release any bonds or any estimated duties deposited for them.

Note: At the first anniversary of the antidumping order, the retroactive period (going back 90 days from the suspension of liquidation) should be included in the period for which the review can be requested if there were affirmative critical circumstances determinations by both the Department and the ITC. If the review is, in fact, requested, the retroactive period is included in the period of review.