

## DEPARTMENT OF COMMERCE

## International Trade Administration

## 19 CFR Part 351

[Docket No. 101130598–2109–03]

RIN 0625–AA87

**Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Final rule; Final Modification.

**SUMMARY:** The Department of Commerce (“the Department”) is modifying its methodology regarding the calculation of the weighted-average dumping margins and antidumping duty assessment rate in certain segments of antidumping duty proceedings (*hereinafter*, “*Final Modification for Reviews*”). Currently, in a review of an antidumping duty order conducted under 19 CFR 351.213 (administrative review), 351.214 (new shipper review), and 351.215 (expedited antidumping review) (collectively “reviews”), the Department usually makes comparisons between transaction-specific export prices and average normal values and does not offset the amount of dumping that is found with the results of comparisons for which the transaction-specific export price, or constructed export price, exceeds normal value. Several World Trade Organization (“WTO”) dispute settlement reports have found that the United States’ application of these methodologies was inconsistent with its WTO obligations. Under this *Final Modification for Reviews*, the Department will calculate weighted-average margins of dumping and antidumping duty assessment rates in a manner which provides offsets for non-dumped comparisons while using monthly average-to-average (“A–A”) comparisons in reviews, paralleling the WTO-consistent methodology that the Department applies in original investigations. The Department is also modifying its practice in five-year (“sunset”) reviews, such that it will not rely on weighted-average dumping margins that were calculated using the methodology found to be WTO-inconsistent. The schedule for implementing these changes is set forth in the “Timetable” section in **SUPPLEMENTARY INFORMATION.**

**DATES:** This Final Rule and *Final Modification for Reviews* are effective

April 16, 2012. The modification in the methodology will apply to preliminary determinations issued after April 16, 2012.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****Background**

In antidumping duty proceedings, the Department determines margins of dumping by comparing normal value with the export price<sup>1</sup> of comparable merchandise. Prior to this Final Rule and *Final Modification for Reviews*, the Department typically has compared normal value and export price using the average-to-transaction (“A–T”) method, which involved a comparison of the weighted-average normal value<sup>2</sup> to the export price of individual transactions for comparable merchandise. When aggregating the results of these comparisons to determine the weighted-average margin of dumping in a review, the Department did not offset the results of the comparisons for which export price was less than normal value by the results of comparisons for which export price exceeded normal value.<sup>3</sup> When determining importer-specific assessment rates in a review, the Department similarly aggregated the results of importer-specific comparison results and did not offset the comparison results for which export price was less than normal value by the comparison results for which export price exceeded normal value.

This methodology was challenged as being inconsistent with the WTO General Agreement on Tariffs and Trade 1994 (“GATT 1994”) and the Agreement on Implementation of Article VI of the GATT 1994 (“Antidumping Agreement”) in several disputes.<sup>4</sup> The

WTO Appellate Body in *US—Zeroing (EC)*, *US—Zeroing (Japan)*, *US—Stainless Steel (Mexico)*, and *US—Continued Zeroing (EC)* found the denial of offsets for non-dumped comparisons in antidumping duty reviews to be inconsistent with Article 9.3 of the Antidumping Agreement and Article VI:2 of the GATT 1994, either “as such,” or “as applied” in certain reviews, or both.<sup>5</sup> The WTO Dispute Settlement Body has adopted the dispute settlement panel reports, as modified by the WTO Appellate Body, which found the denial of offsets for non-dumped comparisons in reviews to be inconsistent with the United States’ WTO obligations.

Additionally, in *US—Zeroing (EC)*, *US—Zeroing (Japan)*, and *US—Continued Zeroing (EC)*, the WTO Appellate Body found that the reliance on weighted-average margins of dumping calculated without granting offsets for non-dumped comparisons as the basis for determinations made in certain sunset reviews was inconsistent with Article 11.3 of the Antidumping Agreement.<sup>6</sup> In *US—Zeroing (Japan)*, the WTO Appellate Body also found that the denial of offsets for non-dumped comparisons in original antidumping duty investigations using transaction-to-transaction (“T–T”) comparisons<sup>7</sup> was inconsistent with

(“Zeroing”) (“*US—Zeroing (EC)*”), WT/DS294/R, WT/DS294/AB/R, adopted May 9, 2006; *United States—Measures Related to Zeroing and Sunset Reviews* (“*US—Zeroing (Japan)*”), WT/DS322/R, WT/DS322/AB/R, adopted Jan. 23, 2007; *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico* (“*US—Stainless Steel (Mexico)*”), WT/DS344/R, WT/DS344/AB/R, adopted May 20, 2008; *United States—Continued Existence and Application of Zeroing Methodology* (“*US—Continued Zeroing (EC)*”), WT/DS350/R, WT/DS350/AB/R, adopted Feb. 19, 2009.

<sup>5</sup> *US—Zeroing (EC)*, WT/DS294/R, WT/DS294/AB/R, para. 263(a)(i); *US—Zeroing (Japan)*, WT/DS322/R, WT/DS322/AB/R, para. 190(c) & 190(e); *US—Stainless Steel (Mexico)*, WT/DS344/R, WT/DS344/AB/R, paras. 165(a) & 165(b); *US—Continued Zeroing (EC)*, WT/DS350/R, para. 8.1(e), WT/DS350/AB/R, paras. 395(a)(v), 395(d) & 395(e)(ii).

<sup>6</sup> *US—Zeroing (EC)*, WT/DS294/AB/RW, para. 469(h)(iv) & (vi); *US—Zeroing (Japan)*, WT/DS322/AB/R, para. 190(f); *US—Continued Zeroing (EC)*, WT/DS350/R, para. 8.1(f), WT/DS350/AB/R, para. 395(f).

<sup>7</sup> Pursuant to section 777A(d)(1)(A) of the Act, in an investigation, the Department may determine whether the subject merchandise is being sold at less than fair value by comparing normal values of individual transactions to the export prices of individual transactions for comparable merchandise (the transaction-to-transaction comparison method). The Department’s regulations state that the Department will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made. 19 CFR 351.414(c)(1).

<sup>1</sup> The Department may also use constructed export prices, if appropriate. Because the use of export prices or constructed export prices is not relevant to the substance of this notice, the Department refers only to export prices hereafter.

<sup>2</sup> In addition to weighted-average comparison market prices, the Department may base normal value on constructed value or appropriately valued factors of production, where required by law or regulation.

<sup>3</sup> Section 771(35)(A) of the Tariff Act of 1930 (“the Act”) defines the dumping margin as the amount by which normal value “exceeds” export price (or constructed export price). Section 771(35)(B) defines the weighted-average dumping margin as the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export or constructed export price of that exporter or producer.

<sup>4</sup> *United States—Laws, Regulations and Methodology for Calculating Dumping Margins*

Articles 2.4 and 2.4.2 of the Antidumping Agreement.<sup>8</sup> The WTO Appellate Body, in *US—Zeroing (Japan)*, further found that the denial of offsets for non-dumped comparisons in antidumping duty new shipper reviews was inconsistent with Articles 2.4 and 9.5 of the Antidumping Agreement.<sup>9</sup>

Following these adverse findings, the United States Trade Representative (“USTR”), informed the WTO Dispute Settlement Body (DSB), that the United States intended to comply with its WTO obligations in these disputes.<sup>10</sup> Pursuant to section 123(f) of the Uruguay Round Agreements Act (“URAA”), the USTR notified the House Ways and Means and Senate Finance Committees of the adverse findings, and further consulted with these committees concerning implementation.

Pursuant to section 123(g)(1) of the URAA, on December 28, 2010, the Department published a notice in the **Federal Register** proposing to modify its methodology for calculating weighted-average margins of dumping and antidumping duty assessment rates to provide offsets for non-dumped comparisons while using monthly A–A comparisons in reviews, in a manner that parallels the WTO-consistent methodology the Department currently applies in original antidumping duty investigations. *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 75 FR 81533 (December 28, 2010) (“*Proposed Modification for Reviews*”). In that notice, the Department solicited comments on its proposal. On February 1, 2011, the Department extended the period of time for the submission of comments. *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 76 FR 5518 (Feb. 1, 2011).

In September, 2011, pursuant to section 123(g)(1)(D) of the URAA, the USTR submitted a report to the House Ways and Means and Senate Finance Committees describing the proposed modification, the reasons for the modification, and a summary of the advice USTR had sought and obtained from relevant private sector advisory

committees pursuant to section 123(g)(1)(B) of the URAA. Also in September, 2011, pursuant to section 123(g)(1)(E) of URAA, the USTR, working with the Department of Commerce, began consultations with both congressional committees concerning the proposed contents of the final rule and final modification. This notice is published pursuant to section 123(g)(1)(F) of the URAA.

*Final Modification for Calculating the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*

After considering all of the comments submitted, the Department is adopting the proposed changes to its methodology for calculating weighted-average margins of dumping and antidumping duty assessment rates to provide offsets for non-dumped comparisons when using monthly A–A comparisons in reviews, in a manner that parallels the WTO-consistent methodology the Department currently applies in original antidumping duty investigations. In reviews, except where the Department determines that application of a different comparison method is more appropriate, the Department will compare monthly weighted-average export prices with monthly weighted-average normal values, and will grant an offset for all such comparisons that show export price exceeds normal value in the calculation of the weighted-average margin of dumping and antidumping duty assessment rate. Where the weighted-average margin of dumping for the exporter is determined to be zero or *de minimis*, no antidumping duties will be assessed.

In adopting this *Final Modification for Reviews*, the Department’s intention is to apply a comparison methodology in reviews that parallels the WTO-consistent methodology the Department currently applies in original investigations,<sup>11</sup> which will necessarily include any exceptional or alternative comparison methods that are determined appropriate to address case-specific circumstances. Accordingly, similar to the conduct of original investigations, when conducting reviews under the modified methodology, the Department will determine on a case-by-case basis whether it is appropriate to use an alternative comparison methodology by examining the same criteria that the

Department examines in original investigations pursuant to section 777A(d)(1)(A) and (B) of the Act.

The Department has rarely applied the transaction-to-transaction method in original antidumping duty investigations. In the most recent original investigation in which the Department calculated the weighted-average margins of dumping using T-T comparisons, the Department did not grant offsets for non-dumped comparisons.<sup>12</sup> The WTO Appellate Body has found the denial of offsets for non-dumped comparisons in original investigations using T-T comparisons to be inconsistent with the WTO obligations of the United States. To the extent that any prior original antidumping duty investigations using T-T comparisons could be construed as establishing a practice of the Department with respect to the granting or denial of offsets for non-dumped comparisons when calculating the weighted-average margin of dumping, the Department hereby withdraws any such practice. Specifically, if the Department applies the T-T comparison methodology in a future antidumping duty proceeding, it will do so without reference to, or reliance on, any prior practice with regard to the issue of offsets because any such practice has been withdrawn.

In order to implement the revised methodology, it is necessary to modify certain provisions of the Department’s regulations. In particular, 19 CFR 351.414(a) and (c) indicate a preference for making A-T comparisons in reviews. These provisions will be modified to permit application of A-A comparisons in reviews in a manner that parallels the comparison methods used in original investigations. In addition, sections 351.414(d)(3) and (e) of the Department’s regulations set forth the time periods over which weighted averages are calculated. Section 351.414(d)(3) provides that when applying the A-A method, the weighted averages will normally be calculated over the entire period of investigation or review, unless another averaging period is deemed appropriate. Section 351.414 (e) provides that when applying the A-T method in a review, the Department will calculate weighted-average normal values on a monthly basis.<sup>13</sup> The

<sup>8</sup> *US—Zeroing (Japan)*, WT/DS322/AB/R, para. 190(b).

<sup>9</sup> *Id.*, para. 190(d).

<sup>10</sup> See WT/DSB/M/213 at para. 2 (minutes of U.S. statement at May 30, 2006 DSB meeting), WT/DSB/M/226 at para. 34 (minutes of U.S. statement at Feb. 20, 2007 DSB meeting), WT/DSB/M/251 at para. 9 (minutes of U.S. statement at June 2, 2008 DSB meeting), WT/DSB/M/266 at para. 57 (minutes of U.S. statement at March 20, 2009 DSB meeting).

<sup>11</sup> See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (Dec. 27, 2006) (“*Final Modification for Investigations*”).

<sup>12</sup> See *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act; Antidumping Measures Concerning Certain Softwood Lumber Products from Canada*, 70 FR 22, 636 (May 2, 2005).

<sup>13</sup> The Department recognizes that the Statement of Administrative Action (“SAA”) states that “the preferred methodology in reviews will be to compare average to individual export prices”

Department currently relies on monthly weighted-average normal values when calculating dumping margins in reviews, and departing from monthly averaging is not necessary to comply with the WTO findings. Accordingly, the Department is modifying section 351.414(d)(3) to permit weighted averages normally to be calculated on a monthly basis in reviews, regardless of the comparison method used. Conforming changes to section 351.414(e) will ensure sections 351.414(d)(3) and (e) do not contain redundant language. The language for the modified provisions is set forth at the end of this notice.

With respect to the findings of inconsistency in certain of the Department's sunset reviews,<sup>14</sup> the Department notes that the underlying issue is the methodology for calculating weighted-average dumping margins in original investigations and reviews, which is addressed by the modifications the Department has made with respect to investigations and is making herein with respect to reviews. When making a sunset determination, the statute requires administrative review margins to be "considered" but does not require that the Department rely on such margins exclusively or in a particular manner in making its determination whether dumping will continue or recur if the antidumping order were to be revoked.<sup>15</sup> Notwithstanding the Department's prior practice of relying on margins determined in the original investigation and subsequent reviews when determining whether dumping is likely to continue in the absence of an antidumping order,<sup>16</sup> the Department will modify its practice in five-year sunset reviews, such that it will not rely on weighted-average dumping margins that were calculated using the methodology determined by the Appellate Body to be WTO-inconsistent in *US—Zeroing (EC)*, *US—Zeroing*

(*Japan*), and *US—Continued Zeroing (EC)*. However, only in the most extraordinary circumstances will the Department rely on margins other than those calculated and published in prior determinations, pursuant to 19 CFR 351.218(e)(2).

The Department does not anticipate that it will need to recalculate the dumping margins in the vast majority of future sunset determinations to avoid WTO inconsistency, apart from the "most extraordinary circumstances" provided for in its regulations. Instead, the Department will limit its reliance to margins determined or applied during the five-year sunset period that were not determined in a manner found to be WTO-inconsistent in these disputes. Future dumping margins in reviews will be determined in accordance with this *Final Modification for Reviews*. The Department may also rely on past dumping margins that were not affected by the WTO-inconsistent methodology, such as dumping margins recalculated pursuant to Section 129 proceedings, dumping margins determined based on the use of adverse facts available, and dumping margins where no offsets were denied because all comparison results were positive. If the dumping margins determined in a manner not found to be WTO-inconsistent in these disputes indicate that dumping continued with the discipline of the order in place, those dumping margins alone can form the basis for a determination that dumping will continue or recur if the order were to be revoked. Additionally, if dumping margins decline over the five-year sunset period, or if there are no dumping margins during the five-year sunset period, decreased volumes may provide another basis to determine that dumping is likely to continue or recur if the discipline of the order is removed.

#### Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act, and 19 CFR 351.212(b), the Department will determine, and U.S. Customs and Border Protection (CBP) will assess, antidumping duties on all appropriate entries. When an administrative review is conducted, and where the weighted-average margin of dumping for the exporter or producer is determined to be greater than *de minimis*, the Department will calculate an importer-specific *ad valorem* assessment rate for each importer of subject merchandise covered by the review. 19 CFR 351.212(b)(1). Importer-specific assessment rates will be calculated in the same manner as the exporter's dumping margin, on the basis of average-to-average comparisons using only the transactions associated with

that importer with offsets being provided for non-dumped comparisons. Where the weighted-average margin of dumping for the exporter or producer is determined to be zero or *de minimis*, no assessment rates will be calculated and the Department will instruct CBP to liquidate all imports from the exporter or producer without regard to antidumping duties.

#### Analysis of Comments Received

Numerous comments and rebuttal comments were submitted in response to the *Proposed Modification for Reviews*. The Department has carefully considered each of the comments submitted. It has grouped and summarized the comments according to common themes and has responded accordingly.

#### Average-to-Average Comparison Methodology in Reviews

Several commentators argue that the proposal to move to an A-A comparison methodology in reviews is unnecessarily complex. These commentators suggest that compliance can be achieved by simply eliminating the use of zeroing in the A-T comparison methodology. They note that this would only require the elimination of one line of programming.

One commentator is concerned that the Department has not adequately explained why it is necessary to alter its current dumping calculation methodology in reviews from an A-T methodology to one using monthly weighted averages in both markets. Some request that the Department clarify whether it will grant offsets for negative dumping margins only against positive dumping margins found in the same month or apply negative dumping margins to offset positive dumping margins across the entire period of review (POR). Some argue that only a complete POR-wide offset will be consistent with the Department's current offset methodology applied in original antidumping duty investigations and with WTO obligations.

Many are not in favor of relying on the A-A comparison methodology as the preferred method for reviews because of its potential to mask dumping. Some commentators argue that using the A-A methodology in reviews would not be in compliance with the statute and the SAA, and thus would not withstand judicial scrutiny. Eliminating entry-specific antidumping duty assessments would violate sections 751(a)(2)(A) and (C) of the Act, which require the Department to make entry-specific assessments. The preference for a

(*Statement of Administrative Action*, p. 843, H. Doc. No. 103–316, vol. 1 (1994)); however, in order to implement the findings in the WTO dispute settlement reports, the Department will restrict the use of that preferred methodology to situations in which the Department, on the basis of the facts of the specific administrative review, determines that average-to-transaction comparisons are more appropriate than average-to-average comparisons.

<sup>14</sup> *US—Zeroing (EC)*, WT/DS294/AB/RW, para. 469(h)(iv) & (vi), *US—Zeroing (Japan)*, WT/DS322/AB/R, para. 190(f); *US—Continued Zeroing (EC)*, WT/DS350/R, para. 8.1(f), WT/DS350/AB/R, para. 395 (f).

<sup>15</sup> See section 752(c)(1) of the Act.

<sup>16</sup> See e.g., *Certain Circular Welded Carbon Steel Pipes and Tubes From India, Thailand, and Turkey: Final Results of Expedited Five-Year ("Sunset") Reviews of Antidumping Duty Orders*, 76 FR 66893 (Oct. 28, 2011), and accompanying Issues and Decision Memorandum, at Cmt. 1.

transaction-specific approach is confirmed by the SAA, and is supported by the statutory language, which indicates the Department will determine normal value and export price for “each entry.”

A few argue that nothing in the statute provides discretion for the Department to use either A-A or T-T in reviews, and that the statutory construction would make no sense if Congress intended for any of the three methods to be used in both investigations and reviews. Congress envisioned and required the Department to determine an individual margin of dumping for each U.S. entry, and nowhere indicated that margins should be calculated for averaging groups.

Several commentators note that nothing in the WTO Appellate Body (AB) rulings or the WTO Antidumping Agreement requires the Department to adopt an A-A approach in reviews. They argue that the Department should not confine itself to a single “one size-fits all” approach, but instead, leave open the option of selecting the comparison method (A-A, T-T, or A-T) on a case-specific basis to capture the maximum amount of dumping. Some commentators argue that given that the preferred method as cited in the SAA is A-T, the Department should keep this option open. Some commentators also argue that the T-T method would be a good option in many instances, asserting that advancements in computer technology have eliminated much of the administrative burden associated with the use of the T-T method.

**Department Position:** As previously indicated, the Department is adopting a methodology that parallels the WTO-consistent methodology it adopted earlier in connection with original antidumping duty investigations. The Department disagrees that adopting a methodology with which it is already familiar and experienced in administering is an unnecessarily complex approach. In addition, while the Department has previously adopted an interpretation of section 771(35) of the Act such that non-dumped A-A comparison results offset the aggregate amount of dumping in the numerator of the weighted-average dumping margin, the Department has not adopted such an interpretation for the results of A-T comparisons. The Department finds that this approach preserves the A-T comparison methodology as a distinct comparison method that is an alternative to the A-A comparison method.

Previous to this modification, the Department has generally used A-T

comparisons in reviews, with monthly average normal values as required by section 777A(d)(2) of the Act. The Department did not find that it was necessary to depart from the use of monthly average normal values to adopt the A-A comparison method in reviews. To facilitate contemporaneous comparisons, the Department will utilize monthly average export prices in making A-A comparisons in reviews. The monthly averages will be compared to monthly average normal values and the results will be aggregated with offsets being provided for non-dumped comparisons. Those offsets will be provided regardless of the month, model, level of trade, etc. for the other comparison(s) found to have been dumped.

With respect to the potential for masked dumping as a reason not to prefer the use of A-A comparisons in reviews, the Department does not agree that the potential for masked dumping means that A-A comparisons are unsuitable as the default basis for determining the weighted-average dumping margins and antidumping duty assessment rates in reviews. Similar to the conduct of original investigations, when conducting reviews under the modified methodology, the Department will determine, on a case-by-case basis, whether it is appropriate to use an alternative comparison methodology by examining the same criteria the Department examines in original investigations pursuant to sections 777A(d)(1)(A) and (B) of the Act.

With respect to the question of consistency with existing U.S. law, the Department does not interpret the Act to prohibit A-A comparisons from being utilized as a basis to determine weighted-average dumping margins and assessment rates in reviews. Nor does any provision of the Act articulate a mandate to use A-T comparisons in reviews. Section 777A(d)(2) simply directs how A-T comparisons should be made when such comparisons are used. This provision differs markedly from section 777A(d)(1), which specifically provides criteria for selecting a comparison methodology in original antidumping duty investigations. The Department interprets this statutory structure as mandating certain criteria for selecting a comparison methodology in original antidumping duty investigations, but leaving the Department considerable discretion in selecting an appropriate comparison methodology in reviews. It is, therefore, within the Department’s discretion to establish criteria for the selection of an appropriate comparison methodology in

reviews, including criteria that differ from, or are similar to, the criteria mandated for use in original antidumping duty investigations.

The Department disagrees with comments suggesting that sections 751(a)(2)(A) and (C) of the Act preclude the use of A-A comparisons in reviews. Section 777A(d) of the Act provides for three distinct comparison methodologies by which dumping margins may be determined. Section 751(a)(2), in contrast, does not make reference to any specific comparison methodology to be used in reviews. Accordingly, the Department considers that any of the three comparison methodologies satisfies the requirements of section 751(a)(2). Moreover, section 751(a)(2) does not make reference to either the weighted-average dumping margin or the importer-specific antidumping duty assessment rate that is the specific subject of this modification. These particular results of reviews are not specifically mandated by section 751(a)(2), but are instead features of the Department’s long-standing practice in reviews. Both the weighted-average dumping margin and the importer-specific antidumping duty assessment rate are the product of aggregating comparison results obtained using one of the three comparison methodologies. While calculation of these rates depends on transaction-specific data, and these rates are applied to entries at the time of entry or upon liquidation, they do not involve entry-by-entry determinations of dumping or antidumping duty assessment. The courts have affirmed these features of the Department’s practice, confirming that section 751(a)(2) does not mandate an entry-by-entry determination of dumping and antidumping duties.<sup>17</sup>

With respect to the language of the SAA<sup>18</sup>, this language does not clarify the meaning of any statutory provision to the effect that A-T comparisons are mandatory or that A-A comparisons are prohibited in reviews. Instead, the SAA makes the point that, in contrast to the situation with regard to original antidumping duty investigations, a

<sup>17</sup> See e.g., *Timken Co. v. United States*, 354 F.3d 1334, 1341–42 (Fed. Cir. 2004), cert. den’d 543 U.S. 976 (Nov. 1, 2004); *Corus Staal BV v. DOC*, 395 F.3d 1343, 1347 (Fed. Cir. 2005), cert. denied, 126 S.Ct. 1023 (Jan. 9, 2006).

<sup>18</sup> *Statement of Administrative Action*, at p. 843, H. Doc. No. 103–316, vol. 1 (1994) (“The Agreement reflects the express intent of the negotiators that the preference for the use of an average-to-average or transaction-to-transaction comparison be limited to the “investigation phase” of an antidumping proceeding. Therefore, as permitted by Article 2.4.2, the preferred methodology in reviews will be to compare average to individual export prices.”)

preference for A-T comparisons is not inconsistent with Article 2.4.2 of the AD Agreement. Whereas it has been the Department's long-standing practice to prefer A-T comparisons in reviews, this practice has not been codified in the statute and it remains within the Department's discretion to alter this practice upon providing a reasoned explanation. The Department finds adopting a methodology that parallels the WTO-consistent methodology it adopted earlier in original investigations using A-A comparisons will facilitate the administration of a change to comply with WTO dispute settlement findings on zeroing.

#### Continued Effectiveness of the Antidumping Remedy

Several commentators argue that allowing offsets for non-dumped comparisons will reduce the effectiveness of U.S. trade laws because it would reduce or eliminate the amount of dumping that would otherwise be fully captured in the absence of any offsets. In so doing, the proposal would go against the current law's mandate that 100 percent of the dumping be fully captured. To illustrate this point, some draw on the "speeding ticket" analogy, whereby a driver caught exceeding the speed limit could nevertheless avoid the fine by submitting evidence that he or she drove below the speed limit on another occasion. One commentator noted that the EU and Japan have acknowledged that dumping can be masked completely through the provision of offsets by asserting that dumping would not exist but for the denial of offsets. These commentators also argue that, if the Department decides to provide offsets, it should allow itself the greatest flexibility to account for the maximum amount of dumping.

Several commentators suggest that the Department should consider all three possible comparison methodologies when conducting reviews, and select whichever method captures the maximum amount of dumping. Some argue that the T-T method would capture the greatest amount of dumping, and that recent technology permits greater use of this comparison methodology. Several further suggest that the Department should indicate a willingness to use averaging for whichever time period captures the most dumping (e.g., daily, weekly, monthly, or period-wide). One commentator notes that because many agricultural products are perishable, and domestic producers can be harmed via short-term (i.e., daily or weekly) price

suppression, maximum flexibility should be maintained.

Some commentators suggest that, in addition to maintaining flexibility in comparison methodologies, the Department should also implement additional changes unrelated to the revised comparison methodology on zeroing, to antidumping policies and practices that preserve the full effectiveness of the antidumping laws. One commentator suggests the Department should give renewed focus to the use of provisions addressing fictitious markets and sales that are outside the ordinary course of trade, should consider shortening the range of months from which the contemporaneous month may be selected, and should revise its model match criteria. These commentators argue that despite their suggested alternatives, there is no way to come into compliance with the WTO findings without seriously compromising the effectiveness of the trade remedy laws.

One commentator argues that while it may be appropriate to invoke section 123(g) of the URAA for purposes of modifying the Department's regulations, the use of zeroing can be abandoned without the Department invoking its authority under section 123 because the Department can choose not to apply the zeroing method on a case-by-case basis. This party argues that Congress has purposefully imposed section 123 procedures only on amendments or modifications of regulations and written policy guidance. Because application of the zeroing method is not pursuant to written policy guidance, U.S. obligations with respect to adopted WTO reports, and changes pursuant thereto, have no bearing on domestic procedures. Because section 123 imposes certain procedural obligations that are not required in order for the Department to abandon zeroing, this party urges the Department to clarify that any changes undertaken are made pursuant to the agency's general legal authority to administer the antidumping laws, and that the Department did not rely upon or invoke the procedures called for under section 123.

**Department Position:** The Department has carefully considered all of the comments provided in this section 123 proceeding, particularly those comments addressing the need to maintain the effectiveness of the antidumping remedy, and has determined to adopt this *Final Modification for Reviews*. The Department is not taking this step lightly, and it stands to reason that the adoption of this *Final Modification for Reviews* will have some impact on the

weighted-average dumping margins determined in reviews. Nevertheless, the Department, after fully considering the issue, and consulting with USTR and the relevant congressional committees, has determined to adopt this *Final Modification for Reviews* in order to address the findings of several WTO dispute settlement reports and to bring its practice into conformity with the WTO obligations of the United States as determined in those reports. The Department considers, moreover, that it has adopted a reasoned and balanced approach to implementation that is consistent with existing U.S. law and administrable by the agency.

With respect to the *Final Modification for Reviews* being a reasoned and balanced approach, the Department is adopting a methodology that parallels the WTO-consistent methodology the Department previously adopted in response to WTO dispute settlement reports relating to investigations. This new methodology for reviews will be the default methodology in all reviews for which this *Final Modification for Reviews* is effective; however, the Department does retain the discretion, on a case-by-case basis, to apply an alternative methodology, when appropriate. The Department retained similar discretion in investigations and has only needed to exercise it in a limited number of investigations since the adoption of the *Final Modification for Investigations*.<sup>19</sup>

With respect to this *Final Modification for Reviews* being consistent with existing U.S. law, the courts have held, in more than thirty cases, that while zeroing is a reasonable interpretation of the statute, it is a reasonable interpretation of an ambiguous provision of the statute. The ambiguity recognized by the Court of Appeals for the Federal Circuit means that it is within the Department's discretion to alter or abandon its zeroing methodology upon providing a reasoned explanation.<sup>20</sup> The Department is hereby altering that methodology, by adopting an A-A comparison methodology in reviews that parallels the WTO-consistent methodology adopted in investigations, and providing offsets when it aggregates the results of

<sup>19</sup> See *Final Modification for Investigations*, 71 FR 77722 (Dec. 27, 2006).

<sup>20</sup> *Timken Company Ltd. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (" \* \* \* while the statutory definitions do not unambiguously preclude the existence of negative dumping margins, they do at a minimum allow for Commerce's constructions. Basically, one number 'exceeds' another if it is 'greater than' the other, meaning it falls to the right of it on the number line."); see also *Corus Staal BV v. Dept. of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005).

those comparisons. Consistent with this interpretation of the statute and application of this methodology, the Department disagrees with those comments that suggest it is not capturing 100 percent of the dumping. The Department will capture 100 percent of the dumping that is determined to exist pursuant to this methodology. Moreover, alternative methodologies will remain available when determined to be appropriate on a case-by-case basis.

With respect to this *Final Modification for Reviews* being administrable by the Department, as previously indicated, the Department is adopting a methodology that parallels the WTO-consistent methodology it adopted earlier in original antidumping duty investigations using A–A comparisons. In so doing, the Department has adopted a methodology with which it is already familiar and experienced in administering. This will facilitate the administration of a change impacting the 188 reviews the Department conducts in an average year. The Department is not adopting the comments suggesting that it calculate dumping margins on the basis of A–A, T–T, and A–T comparison methodologies, and rely on the methodology providing the highest weighted-average margin of dumping. Such a proposal would entail substantial additional work in every case which is not administratively feasible given the statutory time constraints present in every proceeding and the Department's limited resources. Moreover, while such alternative methodologies remain available to the Department on a case-by-case basis, the Department expects to use the A–A comparison methodology, with offsets, in most reviews.

With regard to comments suggesting that the Department alter other aspects of its methodology having nothing to do with the issue of zeroing, the Department notes that the purpose of this proposal is to bring the United States into conformity with its WTO obligations as articulated in the dispute settlement reports cited above. These suggestions are beyond the scope of this section 123 proceeding. When these issues arise in a particular review, parties are free to suggest that the Department reconsider them in the context of that particular proceeding, as appropriate.

With regard to comments suggesting that the Department need not utilize a section 123 proceeding in order to adopt changes to its methodologies to address the findings in the above-cited WTO dispute settlement reports, these

comments are inapposite. As is clear from the on-going proceeding in which the comments were submitted, the Department has determined to utilize the procedures of section 123 to adopt these changes. Whether the Department could have made these changes outside of section 123 is irrelevant. The Department has determined that, in this case, it was appropriate to undertake a section 123 proceeding, with all of its attendant comment and consultation processes, in order to complete the adoption of these significant changes in its practice.

#### Explicit Total Prohibition of Zeroing

A number of commentators argue that the Department should state explicitly that it will grant offsets when the export price exceeds the normal value, and specifically eliminate the zeroing methodology. Some of these commentators suggest that the Department should clearly state that it will grant offsets equal to the full difference between normal value and export price when calculating dumping margins using the A–A comparison methodology in reviews. These commentators note that the proposed regulations do not explicitly state that the Department will provide offsets when calculating the dumping margin. Some commentators suggest that the Department include explicit text in the *Final Modification for Reviews*, the regulations, or both, that unequivocally eliminates zeroing regardless of the comparison methodology employed, and regardless of any case-specific circumstances. Some assert that any elimination of a subset of comparisons (i.e., denial of offsets) is a violation of the United States' WTO obligations. In their view, an explicit prohibition of zeroing in all instances is necessary to ensure full compliance with WTO rulings and encourage other countries to comply with their commitments.

*Department Position:* With this *Final Modification for Reviews*, the Department is taking all steps necessary to address the findings of the WTO dispute settlement reports at issue and to come into compliance with its WTO obligations. As a result of this modification, the new, normal comparison methodology to be used in reviews will be the A–A comparison methodology (on a monthly basis) and offsets will be provided when the results of those comparisons are aggregated for purposes of determining the weighted-average dumping margin. This new methodology will parallel the WTO-consistent methodology the Department currently uses in original investigations.

It is not necessary, appropriate or desirable for the Department, in this *Final Modification for Reviews*, to go beyond the findings made in the WTO dispute settlement reports at issue by adopting a total prohibition of zeroing regardless of comparison method or case-specific circumstance. The dispute settlement reports at issue address only certain types of comparisons in particular circumstances, such that a total prohibition of zeroing is not necessary to come into compliance. With respect to the findings regarding the calculation of weighted-average dumping margins and antidumping duty assessment rates in reviews, the *Final Modification for Reviews* achieves compliance with the dispute settlement findings in that it adopts a methodology for these reviews that parallels the WTO-consistent methodology that is currently being applied in original investigations. The methodologies and interpretations set forth and adopted in the *Final Modification for Reviews* fully address the findings of WTO inconsistency.

#### Clarification on the Application of an Alternative Comparison Methodology

Several parties request clarification as to which circumstances would trigger the use of an alternative comparison methodology, and whether zeroing would be used in the alternative calculation methodology. These commentators also encourage the Department to narrowly tailor the circumstances under which an alternative comparison methodology is used. One commentator notes its concern that the reference to an alternative methodology in the *Proposed Modification for Reviews* is ambiguous, and will lead to parties manipulating the system for a certain preferred comparison methodology.

Some commentators remind the Department that if it is considering the use of the targeted dumping methodology as an alternative methodology, this methodology is to be employed as an exception, in very limited circumstances. One commentator suggests the Department should develop an overall final rule with regard to targeted dumping that is explicitly consistent with Article 2.4.2 of the Antidumping Agreement.

Some commentators state that the targeted dumping methodology was not intended to apply to reviews, and request that the Department explicitly state that it will not employ targeted dumping in this context.

*Department Position:* In its *Final Modification for Reviews*, the Department provides additional

clarification of the circumstances that could trigger the use of an alternative comparison methodology. The *Proposed Modification for Reviews* indicated that the Department would use monthly A–A comparisons, except where it determines that application of an alternative comparison method is more appropriate. The Department also indicated its intent to apply the methodology in a manner that parallels the WTO-consistent methodology the Department currently applies in investigations.<sup>21</sup>

In this *Final Modification for Reviews*, the Department clarifies that because the methodology being applied will parallel the WTO-consistent methodology that the Department currently applies in original investigations, it will necessarily include any exceptional or alternative comparison methods determined appropriate to address case-specific circumstances. The Department's regulations specifically describe three types of comparison methodologies that might be used to determine margins of dumping and antidumping duty assessment rates. Although the *Final Modification for Reviews* adopts the A–A method as the default method in reviews, the Department may determine to use any of the alternative comparison methodologies when deemed appropriate in a particular case.

The Department determines that it would be inappropriate to further speculate as to either the case-specific circumstances that would warrant the use of an alternative methodology in future reviews, or what type of alternative methodology might be employed. These determinations would be highly dependent on the facts of the individual proceeding. However, as is the case with all administrative proceedings, interested parties will have the opportunity to comment on whether an alternative comparison method is warranted during the normal course of the review.

#### Assessment Rate Calculations

Some commentators request clarification as to how the Department intends to calculate antidumping duty assessment rates. A few request that the Department specifically clarify that it will continue to calculate importer-specific antidumping duty assessment rates. Some commentators argue the *Proposed Modification for Reviews* raises the possibility that antidumping duty assessment rates could be impacted by the level of dumping on

other importers' entries, which contravenes the current statutory and regulatory requirements that the Department determine the level of dumping required for each entry during the review period and that it determine the assessment rate on an importer-specific basis. Some commentators suggest that the Department state that it will calculate antidumping duty assessment rates for individual importers without the zeroing method.

A few commentators suggest that before issuing a final section 123 determination, the Department should consider issuing a separate notice identifying any proposed changes in its calculation of importer-specific assessment rates necessitated by the proposed change in the Department's methodology to permit additional public comments. It is further suggested that the Department release for public comment the standard calculation program that it intends to use in reviews.

*Department position:* For purposes of this *Final Modification for Reviews*, the Department is providing additional explanation about the antidumping duty assessment methodology being adopted. The Department has determined that a further or separate comment period is not justified. The calculation program language, including any antidumping duty assessment determinations, particular to any specific review, will be available to parties through the Department's usual disclosure process and parties are free to comment on it during the course of the individual review.

With respect to the issue of assessment rates, when a review is conducted applying the A–A comparison methodology, and the weighted-average margin of dumping for the exporter or producer is determined to be zero or *de minimis*, no assessment rates will be calculated and the Department will instruct CBP to liquidate all imports from the exporter or producer without regard to antidumping duties, regardless of importer.

When the weighted-average margin of dumping for the exporter or producer is determined to be greater than *de minimis*, based on the A–A comparison methodology, the Department will perform an additional calculation to determine the assessment rate for each individual importer that purchases from the exporter or producer in question. This additional calculation will effectively repeat the first calculation performed at the exporter or producer level; however, in this case, the export transactions involved in the calculation

will be limited to those involving merchandise imported by the individual importer. The monthly, weighted-average export prices of those transactions will be compared to monthly normal values, and the results will be aggregated with offsets being provided for non-dumped comparisons. Those offsets will be provided on an importer-specific basis in the aggregation, regardless of the month, model, level of trade, etc. for the other comparison(s) found to have been dumped.

#### Comments on the Proposed Regulations

Several commentators note that the proposed rule at § 351.414(c)(1) does not provide sufficient clarification of what constitutes “a particular case.” The commentators argue that without further clarification of the term, the investigating authority would have excessive discretion in interpreting and implementing the regulation. Therefore, the commentators request the Department to specify, in the final regulations, the exceptional circumstances that would allow the use of an alternative comparison methodology. These commentators suggest that the language of § 351.414(c)(1) regarding choice of method should be clarified to indicate when and how the Secretary might choose an alternative comparison methodology by making clear the circumstances in which it may find it “more appropriate” to deviate from its proposed methodology and use a “different comparison method” to calculate dumping margins and antidumping duty assessment rates in a review. One commentator goes further and suggests that the Department specify not only the specific circumstances that make it appropriate to deviate from the preferred methodology, but also which alternative comparison methodology would be used in particular circumstances.

Several commentators note that the proposed rules do not specify that zeroing will not be used. Therefore, these commentators request that the final rule specifically include a provision for granting offsets for non-dumped sales in all comparison methodologies. One commentator suggests clarification of the language of § 351.414(d)(3), with respect to the comparison of weighted-average monthly export price or constructed export price to the weighted-average normal value for the contemporaneous month. Specifically, the commentator suggests that it be made clear that while aggregating the comparisons of different months covered in a review, the

<sup>21</sup> *Proposed Modification for Reviews*, 75 FR at 81534.



Secretary will provide offsets for those comparisons which result in negative dumping margins.

*Department Position:* The Department disagrees that additional clarification of the regulations is necessary or appropriate. The revised regulations describe three types of comparison methodologies that might be used to determine margins of dumping and antidumping duty assessment rates. The overarching purpose of 19 CFR 351.414 is to implement section 777A(d) of the Act and to set forth the three statutory methodologies for establishing and measuring dumping margins.<sup>22</sup> Section 351.414(c), as revised by this Final Rule and *Final Modification for Reviews*, sets forth the default comparison methodology to be used in different contexts, and § 351.414(d) describes generally how the A–A method will be applied. The revised regulation makes clear that the A–A comparison methodology will be the default methodology in all reviews for which the Final Rule and *Final Modification for Reviews* applies. The Department has also explained that because the methodology being adopted will parallel the WTO-consistent methodology the Department currently applies in original investigations, it will necessarily include any exceptional or alternative comparison methodologies determined appropriate to address case-specific circumstances. The Final Rule allows sufficient flexibility for the Department to apply alternative comparison methodologies when necessary.

The Department has always retained discretion under its regulations to apply any of the three comparison methodologies in any context, and has exercised this discretion only in a limited number of circumstances. It would be inappropriate to further speculate as to which case-specific circumstances might warrant the use of an alternative comparison methodology in future reviews as this determination would be highly dependent on the facts of the individual proceeding. Because any description of such circumstances would be speculative, at best, the revised regulations do not specify the exceptional circumstances that might trigger the use of an alternative comparison methodology. Such questions are best addressed in the context of individual proceedings. As is the case with all proceedings, interested parties would have the opportunity to comment on whether an alternative comparison methodology is warranted

during the normal course of the proceeding.

The Department further disagrees that the revised regulations must specifically indicate that offsets will be provided. The purpose of the regulation is to describe in general terms the comparison methodologies available, and the default methodology to be employed in different contexts. Greater specificity as to when offsets will be provided under each comparison methodology is beyond the intended purpose of the regulation, and is unnecessary for purposes of adopting a methodology that is WTO-consistent. The Department has already made clear that its revised methodology for reviews will parallel the WTO-consistent methodology the Department currently applies in original investigations, and that offsets will be provided when using this methodology. The Department has been granting offsets in original investigations since 2007 without specific regulatory language directing it to do so. The Department has further explained, above, how assessment rates will be determined for individual importers. The revised regulations coupled with the descriptions contained in this *Final Modification for Reviews* and the Department's responses to comments are sufficient. The Department does not consider that the revised regulations require further elaboration. Furthermore, as more fully explained in the Explicit Total Prohibition of Zeroing section of this notice, above, the Department disagrees that it is either necessary or appropriate to adopt a total prohibition—either explicit or implicit—of zeroing, regardless of the comparison methodology or case-specific circumstance. The methodologies and preferences set forth in this *Final Modification for Reviews* and the revised regulations, fully address the findings of WTO inconsistency.

#### Sunset Determinations

Many commentators welcome the United States' recognition that it should not rely on dumping margins based on the zeroing methodology when conducting sunset reviews. These commentators agree that international obligations prohibit the use of dumping margins calculated with zeroing for purposes of sunset determinations. One commentator argues that the Supreme Court's decision in *Murray v. Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118 (1804) (*Charming Betsy*), compels the Department to terminate its use of zeroing in sunset reviews immediately in order to avoid violating the United States' international obligations. See

*Fed.-Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (citing *Charming Betsy*, 6 U.S. (2 Cranch.) at 118). Several commentators argue that failure to recalculate dumping margins would result in costly and unnecessary litigation in light of the ruling in *US—Zeroing (Japan)*, in which the Appellate Body found that reliance on dumping margins based on the zeroing methodology in sunset reviews is inconsistent with U.S. WTO obligations.

Some commentators argue that the *Proposed Modification for Reviews* does not sufficiently account for the many sunset reviews currently pending where past dumping margins were based on zeroing. Many suggest that the Department should recalculate all dumping margins relied upon in sunset reviews using the new WTO-consistent methodology. These commentators point out that dumping margin calculations and, hence, zeroing are relevant to determining both whether revocation of an order would be likely to lead to a continuation or recurrence of dumping and the magnitude of the dumping margin likely to prevail if the antidumping order were revoked. Another commentator goes on to observe that the Department must evaluate the change in dumping margins over time to ascertain changes in the exporters' pricing behavior as part of its sunset determinations. To conduct a trends analysis of this sort, it is necessary that the dumping margins be calculated in a consistent manner over time, which can only be done by eliminating the zeroing methodology from all calculations.

Certain commentators argue that the Department correctly recognized in the *Proposed Modification for Reviews* that it is not precluded from recalculating dumping margins from prior proceedings to eliminate zeroing for sunset reviews. One commentator points out that sections 752(c)(1) & (3) of the Act direct the Department to consider the prior rates it has calculated, not simply to adopt them wholesale, and that the Department may consider such other price, cost, market, or economic factors it deems relevant (See § 752(c)(2) of the Act). Another commentator argues that, regardless of whether certain dumping margins form the basis for the sunset determination, the statute (section 751(c) of the Act) requires the Department to consider all dumping margins determined during the five-year period, and therefore, recalculation cannot be avoided. A few other commentators request that the Department add clarifying language to 19 CFR 351.414 to clearly state that it will not rely on dumping margins that

<sup>22</sup> See *Antidumping Duties Countervailing Duties*, 62 FR 27296, 27374 (May 19, 1997) (*Preamble, Final Rule*).



contain zeroing in future sunset reviews, that it will recalculate dumping margins that contain zeroing in future sunset reviews, or both.

Several commentators urge that the Department should stop relying on dumping margins that contain zeroing in sunset reviews immediately. One commentator argues that, for sunset reviews, there is no reason to delay implementation until 60 business days after the date of publication of the *Final Modification for Reviews* because the proposed change is only to the Department's practice, and no change is proposed to its regulation.

Other commentators make more specific proposals for implementing the new practice in sunset reviews. One such proposal is for the Department to recalculate dumping margins without zeroing upon a showing by a respondent company that its individual dumping margin or the "all others" dumping margin would be zero or *de minimis*. Another commentator proposes that the Department conduct a changed circumstances review to determine whether dumping would be likely to continue or recur if the order were revoked upon a showing that the dumping margins without zeroing in three reviews completed after January 23, 2007, are zero or *de minimis*. One other commentator requests that the Department both recalculate dumping margins in a sunset review to eliminate zeroing, effective immediately, and then transmit to the ITC the non-zeroed dumping margins that are likely to exist if an order were revoked effective for sunset reviews initiated after the publication of the proposed rules. One commentator concerned about sunset reviews contends that the Department only suggests it will use section 129 to implement the DSB's recommendations and rulings in *US—Continued Zeroing (EC)*, WT/DS350/R, para. 8.1(f), WT/DS350/AB/R (DS 350), but does not commit to do so. This commentator asks the Department to state clearly that it will implement DS 350 under section 129 when making its determination. This commentator also contends that there is no impediment to reopening prior sunset determinations under section 129.

**Department Position:** In response to comments from several parties, in the *Final Modification for Reviews*, the Department clarified that when making sunset determinations, it will modify its practice such that it will not rely on dumping margins determined in a manner found to be WTO-inconsistent in *US—Zeroing (EC)*, *US—Zeroing (Japan)*, *US—Stainless Steel (Mexico)*, and in *US—Continued Zeroing (EC)*.

While it is possible that in some instances, dumping margins will need to be recalculated to avoid reliance on such dumping margins, the Department finds that those situations can be addressed on a case-specific basis.

When determining whether revocation of an antidumping order would be likely to lead to continuation or recurrence of dumping, section 752(c)(1) of the Act directs the Department to consider dumping margins determined during the original investigation and in subsequent reviews, and import volumes of the subject merchandise. The Department's regulations further provide that only in the most extraordinary circumstances will the Department rely on dumping margins other than those calculated and published during prior determinations. 19 CFR 351.218(e)(2)(i). The Department expects that in the vast majority of cases, it will have a sufficient number of dumping margins, determined in a manner not found to be WTO-inconsistent in these disputes, and sufficient information pertaining to import volumes, upon which to base its sunset determinations. Future dumping margins in reviews will be calculated in accordance with this *Final Modification for Reviews*. Furthermore, the Department may also rely on past dumping margins determined in a manner not found to be WTO-inconsistent in these disputes, such as dumping margins recalculated pursuant to section 129 proceedings, dumping margins determined on the basis of adverse facts available and dumping margins where no offsets were denied because all comparison results were positive. Additionally, if dumping margins declined over the five-year period, or if there are no dumping margins, decreased volumes provide another basis that indicates whether dumping is likely to continue or recur if the discipline of the order is removed.

Although the Department will evaluate each sunset determination on a case-by-case basis to determine whether recalculations are needed, the Department does not anticipate that, apart from the "most extraordinary circumstances" already provided for in its regulations, it will need to rely on dumping margins other than those published in prior determinations in order to avoid reliance on margins determined in a manner found to be WTO-inconsistent in these disputes. For these reasons, the Department disagrees that it is necessary to adopt a practice or methodology which assumes that previously determined dumping margins will always need to be

recalculated in the context of sunset reviews.

The Department disagrees that it is required to recalculate dumping margins determined in a manner found to be WTO-inconsistent in these disputes that were calculated during the five-year period so that it may examine dumping margin trends over time. When determining whether dumping is likely to continue in the absence of an antidumping duty order during a five-year sunset review, the Department looks to whether dumping continued *at any level* after the issuance of the order.<sup>23</sup> While section 752(c)(1) of the Act directs the Department to "consider" previously determined dumping margins as the basis for its likelihood determination, there is no requirement that all dumping margins determined during that period form the basis for deciding whether the order should be continued. Accordingly, the Department does not agree that all dumping margins calculated during the five-year sunset period must be recalculated as a matter of course in order for the U.S. to be compliant with the statute.

The Department further disagrees with the suggestion that it should modify section 351.414(d) of its regulations to indicate that the Department will recalculate dumping margins in sunset determinations using the A–A comparison methodology. The Department has already indicated that it does not anticipate that it will need to recalculate dumping margins other than in the most extraordinary circumstances, and such circumstances are already provided for in its regulations. See 19 CFR 351.218(e)(2)(i). Accordingly, those instances where the Department may need to rely on dumping margins other than those previously determined can be addressed pursuant to 19 CFR 351.218(e)(2)(i) on a case-specific basis.

The Department has further clarified that this *Final Modification for Reviews* will apply to all sunset reviews pending before the Department for which either preliminary results of sunset review, or expedited final results of sunset review are issued more than 60 days after the date of publication of the Department's *Final Modification for Reviews*. The 60-day period will allow sufficient time

<sup>23</sup> See *Certain Circular Welded Carbon Steel Pipes and Tubes From India, Thailand, and Turkey: Final Results of Expedited Five-Year ("Sunset") Reviews of Antidumping Duty Orders*, 76 FR 66893 (Oct. 28, 2011), and accompanying Issues and Decision Memorandum, at Cmt. 1; see also *Statement of Administrative Action*, at 889 and 890, H. Doc. No. 103–316, vol. 1 (1994); the House Report, H. Rep. No. 103–826, pt. 1, at 63–64 (1994).

prior to issuance of a preliminary sunset determination, or a final expedited sunset determination, for parties to provide comments within the context of each individual proceeding. For reasons fully set forth in response to comments on the Effective Date of Implementation section of this notice, the Department finds this to be an adequate amount of time to permit parties and the Department to respond to novel and complex issues that arise as a result of implementing the modified regulations. The Department does not find that a separate notice and comment period is necessary.

The Department finds the commentator's request that it commit to implementing "as applied" findings of inconsistency through a section 129 proceeding in certain sunset reviews to be beyond the scope of this section 123 determination. See Implementation through Section 129 Proceedings and Application to Completed Reviews section of this notice. The purpose of this *Final Modification for Reviews* is not to address or fix how the *Final Modification for Reviews* is to be applied in the specific proceedings that were challenged, but rather is to address the broad elements of the prior practice that were found WTO-inconsistent. The Department has addressed the inconsistencies found with respect to sunset reviews by including a modification of the methodology that will be applied in future sunset reviews. Whether any particular section 129 proceeding will be requested by the Office of the USTR for certain sunset reviews is beyond the scope of this *Final Modification for Reviews*.

#### Transaction-to-Transaction Comparisons in Investigations

A few commentators requested clarification concerning the Department's use of the T-T comparison methodology in original antidumping duty investigations. One commentator interpreted the Department's statement to signify that the Department would provide offsets for non-dumped transactions when applying the T-T methodology. Others requested confirmation that it will provide offsets for non-dumped sales when using this comparison methodology.

Department Position: In its *Proposed Modification for Reviews*, the Department stated that "to the extent that any prior original antidumping duty investigations using T-T comparisons could be considered as establishing a practice of the Department with respect to the granting or denial of offsets for non-dumped comparisons when calculating the

weighted average margin of dumping \* \* \*, the Department proposes to withdraw any such practice." 76 FR 81534. In its *Final Modification for Reviews*, the Department has now clarified that to the extent that any prior original antidumping duty investigations using T-T comparisons could be considered an established practice of the Department with respect to the denial of offsets for non-dumped comparisons when calculating the weighted average margin of dumping, the Department withdraws any such practice. Specifically, when the Department applies the T-T comparison methodology in a future proceeding—regardless of whether offsets are provided—it will do so without reference to or reliance on any prior practice because, such practice has been withdrawn.

#### Effective Date of Implementation

A number of commentators propose that the Department implement the new methodology in reviews initiated 60 days or later after the date of the publication of the *Final Modification for Reviews*. Some of these parties explain that applying the new method to reviews that are pending as of the effective date would confuse interested parties in several different ways. These parties argue that, due to the complicated nature of this new policy, the Department is likely to face many complex and novel issues concerning its case-specific application.

Some commentators claim that implementing the new methodology in reviews that have already been initiated would be unfair to all parties who base decisions on whether to request and/or participate in reviews on the application of certain standard methodologies. Some commentators argue that because the date of the preliminary results of review for a proceeding can be subject to circumstances in the individual proceeding, the methodology applied could differ among proceedings that were initiated on the same day, which they claim would result in arbitrary treatment. One party argues that the arbitrariness of the effective date would provide an incentive for respondents to create complexity to slow the process or for domestic parties to neglect inadequacies to expedite the process. They contend that the statute intends for neither scenario and many of these concerns can be mitigated by applying the final rules to newly initiated reviews.

Other commentators argue that the Department's proposed effective date is too long and takes unnecessary time to implement the new policy. Some

commentators cite to the *Final Modification for Investigations* (71 FR 77722), as precedent, and note that in that instance, the Department applied the new methodology to all investigations that were pending before the Department. Other commentators suggest that the Department apply the new method to all reviews where the final results are scheduled to be issued more than 60 days after the date of publication.

Some commentators argue that, because it only takes a simple programming modification to implement the final rule, the 60-day implementation period is too long even for a review for which the preliminary results have been issued. Several of these commentators argue that faster implementation will pose less litigation risk to the United States and result in a reduced litigation burden for all parties. Some parties argue that because the provision of offsets is an entirely administrative practice, the modification can be applied immediately, and there is no need for further delay.

Several commentators suggest that the effective date should be the date of the publication of the notice of the final rule. Some commentators suggest that the Department implement the final rule and modification for all reviews where the final results are expected to be issued 30 business days or later after the publication date. Some other commentators contend that, in accordance with section 123(g)(2) of the URAA, the 60-day period should begin when the Department begins its consultation with Congress unless the President determines an earlier effective date. One commentator argues that the effective date should be either the date of the publication of the final rules or 60 days after the Department begins its consultation, whichever is later. Some other commentators request that the Department implement this new policy immediately but do not suggest any specific date as the effective date.

Some commentators in favor of an earlier effective date argue that an earlier date would not impose a greater administrative burden because applying the necessary changes would not require new factual information. These parties further argue that the Department's *Proposed Modification for Reviews* methodology has afforded adequate notice to the public that the methodology might change.

One commentator requests that the Department conduct all sunset reviews using dumping margins calculated without zeroing no later than the by the effective date adopted for reviews.

*Department Position:* After careful consideration of the arguments presented by the commentators and of the information needed to implement this change, and weighing the administrative burdens, the Department determines that it will apply the *Final Modification for Reviews* in reviews pending before the Department for which the preliminary results are issued more than 60 days after the date of publication of the Department's Final Rule and *Final Modification for Reviews*. Additionally, the *Final Modification for Reviews* will apply in all sunset reviews pending before the Department for which either the preliminary results of sunset review, or expedited final results of sunset review, are issued more than 60 days after the date of publication of the Department's Final Rule and *Final Modification for Reviews*. In the *Proposed Modification for Reviews*, the Department indicated that the new methodology would be effective in reviews pending before the Department for which the preliminary results are issued more than 60 business days after the date of publication of the Department's final rule and modification. As further explained below, the Department finds 60 days to be an adequate amount of time for implementation. Therefore, in this *Final Modification for Reviews*, the Department has eliminated the requirement that preliminary results be issued more than 60 business days after the *Final Modification for Reviews* in order for the new method to apply.

This timetable for applying the new methodology is legally permissible and appropriate. The Department is adopting this *Final Modification for Reviews* in response to several WTO dispute settlement findings, pursuant to section 123(g)(1) of the URAA. Section 123(g)(2) of the URAA provides that a final rule or modification may not go into effect before the end of the 60-day period after the consultations described in section 123(g)(1)(E) begin, unless the President determines that an earlier effective date is in the national interest. While the statute establishes the manner of determining the effective date of any final rule or modification adopted pursuant to section 123, the statute does not specify whether the final rule or modification must apply only to new segments of proceedings initiated after the effective date, or may apply to any segments pending as of the effective date.

Similarly, the SAA provides no more specific guidance regarding the application of any final rule or modification adopted pursuant to section 123. The SAA states that section

129 determinations will apply only with respect to entries occurring on or after the effective date.<sup>24</sup> However, the SAA makes no such statement with respect to section 123 modifications. The SAA merely states, "A final rule may not go into effect before the end of the 60-day consultation period unless the President determines that an earlier date is in the national interest."<sup>25</sup>

The applicable date for previous section 123 determinations has been determined by the Department on a case-by-case basis. In four prior section 123 proceedings, the Department has applied the final modification or final rule to segments initiated after the effective date.<sup>26</sup> On other occasions, the Department has adopted and applied a change in policy involving a statutory interpretation to all segments pending as of the date of the change.<sup>27</sup>

The Department disagrees with commentators that it is in a position to adopt a more expedient implementation date because this *Final Modification for Reviews* does not entail a statutory change. When considering changes or modifications to a longstanding methodology in an individual determination, the Department is required, at a minimum, to provide parties with adequate notice and opportunity to comment within the context of each proceeding, prior to making its final determination. Section 782(g) of the Tariff Act of 1930; *see also Koyo Seiko Co., Ltd v. United States*, 516 F. Supp. 2d 1323, 1333–34 (CIT 2007), *aff'd* 551 F.3d 1286 (Fed. Cir. 2008).

This *Final Modification for Reviews* entails a modification to the averaging

methodology applied in reviews that was longstanding. Therefore, in transitioning to the new methodology, the Department will need to ensure that sufficient time is provided within the context of individual proceedings to allow parties to submit any new data that may be necessary, if desired. The Department will then need time to examine and analyze any additional data, and will need to permit parties to provide comments on any new data that is submitted. Additionally, applying the new methodology prior to issuance of the preliminary results is appropriate because the Department will need to allow sufficient time for parties to comment on the application of the new methodology as it applies in the context of individual proceedings.

The Department is not persuaded that it should adopt a shorter timetable simply because it was able to do so when it modified its methodology to provide offsets in investigations. In that instance, the Department found it appropriate to apply the modification to all pending proceedings at the time of the effective date, but only after ensuring the feasibility of such an expedited implementation, and concluding that such a timeframe would not unfairly prejudice any of the parties to those proceedings.<sup>28</sup> With respect to this *Final Modification for Reviews*, the Department determines that the modified methodology must apply only in proceedings where the preliminary results have not yet been issued in order to ensure that all parties have ample time to submit any new data and provide comment, and that the Department has adequate time to consider any new data and comments. For all of these reasons, the Department is not persuaded by arguments that it could apply the new method more expeditiously without compromising principles of accuracy, fairness, and due process.

Conversely, the Department also disagrees with commentators who argue that a longer timetable is necessary. The Department agrees that the new policy represents a substantive shift in methodology, and the Department expects to encounter novel issues as it begins to apply this methodology. The timetable already allows parties the opportunity to submit any new data, and to provide comment prior to the preliminary results. Parties will then have an additional opportunity to comment on the methodology prior to the final results, after it is applied. The Department finds this to be an adequate

<sup>24</sup> See *Statement of Administrative Action*, p. 1026, H. Doc. No. 103–316, vol. 1 (1994).

<sup>25</sup> See *Statement of Administrative Action*, p. 1021, H. Doc. No. 103–316, vol. 1 (1994).

<sup>26</sup> See e.g., *Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders*, 70 FR 62062 (Oct. 28, 2005) (applying amended regulations to sunset reviews initiated after the effective date); *Notice of Final Modification for Reviews of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 FR 37125, 37138 (June 23, 2003) (applying new privatization methodology to investigations and reviews initiated on or after the effective date); *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186, 69197 (Nov. 15, 2002) ("Arms Length Test") (applying new methodology to investigations and reviews initiated on or after the effective date); *Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders*, 64 FR 51236 (Sept. 22, 1999).

<sup>27</sup> See *Basis for Normal Value When Foreign Market Sales Are Below Cost*, Policy Bulletin 98.1 (Feb. 23, 1998); *Treatment of Inventory Carrying Cost in Constructed Value*, Policy Bulletin 94.1 (Mar. 24, 1994); *Final Modification for Investigations*, 71 FR 77722 (Dec. 27, 2006) (eliminating zeroing in investigations pending before the Department as of the effective date of the Final Rule.)

<sup>28</sup> See *Final Modification for Investigations*, 71 FR at 77725.

amount of time that will permit parties and the Department to respond to any novel or complex issues that arise in any particular case as a result of the new method.

The Department does not agree that to maintain fairness and non-arbitrary application of methodology, it must only apply the new methodology to reviews initiated after the effective date. Uncertainty of methodology is an insufficient justification for prolonging the application of a new methodology. The United States uses a “retrospective” assessment system under which final liability for antidumping duties is determined after the merchandise is imported. 19 CFR 351.212(a). While the Department must abide by notice provisions of the statute, changes in methodology like all other antidumping review determinations, permissibly involve retroactive effect. *SKF USA Inc. v. United States*, 537 F.3d 1373, 1381 (Fed. Cir. 2008). Requiring changes to be applied only to future entries would hinder the Department’s ability to give timely effect to any changes in its own practices. *Koyo Seiko Co.*, 516 F. Supp. 2d at 1334, *aff’d* 551 F.3d at 1286. Moreover, the public has now been on notice of an impending change in methodology because the *Proposed Modification for Reviews* has been in the public realm since December 28, 2010, providing more than ample time for parties to consider their options with respect to upcoming review periods.

#### Implementation Through Section 129 Proceedings and Application to Completed Reviews

Many commentators agree that implementation of the adverse WTO dispute settlement findings listed in the *Proposed Modification for Reviews* should occur pursuant to section 129 of the URAA and many further agree that pursuant to section 129, any changes must be prospective only. Relying on section 129(c)(1), these commentators further argue that the changes should apply only to entries that remain unliquidated on or after the date USTR directs the Department to implement. Several commentators claim that the Department has consistently applied section 129 in this manner.

Numerous other commentators argue that the calculation and assessment of antidumping duties using zeroing should have ceased when the reasonable period of time (“RPT”) for compliance ended for the various WTO rulings. These commentators claim that dumping margins should be recalculated for the reviews involved in each of the WTO proceedings as well as any determinations or antidumping

duty assessments arrived at using zeroing after the end of the applicable RPT. According to some other commentators, this means that the United States must immediately cease to apply cash deposit or antidumping duty assessment rates calculated using zeroing and replace them with non-zeroed rates, must reliquidate any entries that were liquidated after the end of the RPT at assessment rates calculated with zeroing, must recalculate cash deposit rates relying on zeroing and release excess cash deposits made after the RPT, and must not use zeroing in any ongoing reviews. One commentator emphasizes that this must occur regardless of the dates of entry. Other commentators argue that any excess duties collected should be refunded with interest.

Some commentators urge the Department not to interpret section 129(c)(1) as precluding the agency from taking action that affects imports that entered before the date on which USTR directs the Department to implement. Instead, consistent with past representations to the WTO, the Department should find that section 129(c)(1) is ambiguous with respect to the treatment of such entries.

Some commentators argue that Commerce might use one or more of several alternatives to come into compliance with respect to past entries, including the use of a changed circumstances review, voluntary remands for any reviews subject to litigation, use of the Department’s broad authority under 19 U.S.C. 1617 to settle antidumping claims, or legislation requiring CBP to reliquidate entries that were liquidated after the end of the RPT at assessment rates using zeroing.

Other commentators urge the Department to apply the final rule to unliquidated entries in all pending reviews, *i.e.*, not just those subject to section 129 proceedings. They contend that treating imports from different countries and under different orders differently will prompt new and unnecessary litigation in the WTO. Other commentators argue that the final rule should be effective retrospectively to any entries in a completed review that remain unliquidated as of 60 days after the publication of the *Final Modification for Reviews*. Some commentators claim that the Department should apply the new methodology to entries that have not been liquidated due to pending litigation. One commentator contends implementing in this manner would be prospective to the future liquidation, and would not constitute retroactive implementation. Some other

commentators argue that any dumping margins with present effects should be revised and applied prospectively from the effective date.

Another commentator points out that when the *Proposed Modification for Reviews* speaks of applying the new methodology pursuant to section 129, it only references disputes brought by the European Union, Japan and Mexico. This commentator contends, however, the Appellate Body’s finding in *US-Zeroing (EC)* makes clear that the United States’ obligations to remedy zeroing extend to reviews even though a Member may only have challenged the Department’s use of zeroing in the antidumping investigation. Thus, the Department must recalculate dumping margins and antidumping duty assessment rates for subsequent reviews of those orders. Other commentators urge the Department to apply the new methodology to reviews subject to all ongoing and future WTO proceedings in which zeroing is an issue before a panel or the Appellate Body.

Other commentators argue that the statute prohibits the Department from implementing this new policy on entries covered by completed reviews because they all entered the United States before the effective date. The statute only permits the Department to abandon zeroing with respect to entries occurring on or after the date that USTR directs implementation, and which remain unliquidated at the time the Department implements its determination. Because entries covered by completed reviews entered prior to the effective date, the Department is prohibited from recalculating dumping margins for entries covered by those reviews. This commentator argues the Department should clarify that it will not recalculate dumping margins for completed reviews.

*Department Position:* The Department is adopting this *Final Modification for Reviews* pursuant to section 123 of the URAA to put in place for future reviews and certain pending reviews a methodology that responds to the WTO findings of inconsistency. The Department finds that comments addressing how the new methodology should apply to specific “as applied” findings of inconsistency are beyond the scope of this section 123 determination because section 129 determinations are separate from section 123 determinations under the URAA. The purpose of this *Final Modification for Reviews* is to address the broad elements of the prior practice that was found to be WTO-inconsistent. It is not intended to address how that practice was applied in the specific proceedings that

were challenged. The *Final Modification for Reviews* makes clear that the new WTO-consistent methodology will be applicable to any determinations made pursuant to section 129 of the URAA in connection with the relevant WTO disputes. Whether any particular section 129 proceeding will be requested by USTR is beyond the scope of this *Final Modification for Reviews*. Accordingly, the *Final Modification for Reviews* does not further specify the particular proceedings to which the new methodology will apply.

With regard to the various arguments that suggest the new methodology should apply prior to the announced effective date, such as to entries subject to reviews that were completed or ongoing prior to the effective date, for reasons fully set forth in the Effective Date of Implementation section of this notice, the Department disagrees. The WTO-consistent methodology adopted will be applied in all reviews that are pending before the Department for which the preliminary results are issued 60 days after the publication of the *Final Modification for Reviews*.

Adopting a Final Modification for Reviews During the Negotiation of the Doha Round

Some commentators suggest that the Department should delay this *Final Modification for Reviews* until the United States resolves this issue at the WTO through the Doha Development Agenda (Doha) negotiations. These commentators question whether these implementation efforts will weaken the U.S. negotiating position in the Doha Rules negotiations. They suggest the Department should hold off until the Doha negotiations are concluded, as this may obviate the need to implement at all. Nonetheless, if the Department chooses to implement, these commentators support U.S. efforts to seek correction, through the Doha Rules negotiations, of the Appellate Body decisions, which they view as “extraordinarily flawed.”

*Department Position:* The Department disagrees with commentators that it should wait until the Doha negotiations are concluded before adopting the *Final Modification for Reviews*. The Department is conducting this exercise pursuant to the procedures provided for in section 123 of the URAA. This modification is necessary to implement the DSB’s rulings and recommendations in the four, previously identified disputes—all of which necessarily dealt with the interpretation and application of existing WTO rules. Notwithstanding this *Final Modification for Reviews*, the Department will continue to work

closely and actively with USTR with a view towards clarifying that the AD Agreement should not be read to require WTO Members to provide offsets for non-dumped comparisons.

Application of the Final Modification for Reviews to Subject Merchandise From Non-Member Countries

Two commentators representing interests or products from the Russian Federation note that Russia is in the process of joining the WTO, but is not yet a Member. These commentators argue that notwithstanding Russia’s non-Member status, the Department’s new methodology adopted in the *Final Modification for Reviews* should apply equally to subject merchandise from Russia.

*Department Position:* As the Department has stated in its *Final Modification for Reviews*, the revised methodology will apply in reviews pending before the Department for which a preliminary results are issued more than 60 days after the date of publication of the Department’s Final Rule and *Final Modification for Reviews*. This includes reviews of antidumping orders without regard to whether the subject merchandise is from a WTO Member.

Comments Unrelated to the Final Modification for Reviews

One commentator argues that the 2008 rescission of the targeted dumping regulation violates the Administrative Procedures Act (“APA”) because it was repealed without notice and comment. The commentator requests that the targeted dumping regulation be restored in the final rule. Another commentator suggests that the Department should take this opportunity to address and clarify several aspects of the targeted dumping methodology it claims are deficient.

A few commentators request that the Department clarify that the new averaging groups will still be based on CONNUMs. One commentator points out that in stating that “an averaging group will consist of subject merchandise that is identical or virtually identical in all physical characteristics and that is sold to the US at the same level of trade,” the Department does not define the term “identical or virtually identical in all physical characteristics.” Based on this, the commenter argues, it is unclear whether the proposal refers to merchandise that comprises individual CONNUMs. Other commentators note that the *Proposed Modification for Reviews* does not state how the Department will distinguish price

averaging groups (e.g., by importer, manufacturer, level of trade, sale type, or CONNUM). A few commentators also seek clarification that the Department is not proposing to change how it identifies merchandise for the purposes of model match methodology.

*Department Position:* These comments are beyond the scope of this action. The Department reiterates that the purpose of this exercise is to bring the United States into conformity with its WTO obligations as articulated in the dispute settlement reports cited above. The Department has proposed no changes to these other aspects of its dumping calculations, and thus finds these suggestions to be beyond the scope of this section 123 proceeding. Parties are free to suggest that the Department consider these comments in the context of a particular proceeding, as appropriate.

Timetable

The Final Rule and *Final Modification for Reviews* will be effective and applicable to all reviews pending before the Department for which the preliminary results are issued after April 16, 2012. The Department will further apply the Final Rule and *Final Modification of Reviews* to all sunset reviews pending before the Department for which either the preliminary results or expedited final results of sunset review are issued after April 16, 2012. This methodology will be used in implementing the findings of the WTO panels in *US-Zeroing (EC)*, *US-Zeroing (Japan)*, *US-Stainless Steel (Mexico)*, and *US-Continued Zeroing (EC)*, with respect to any antidumping duty proceedings conducted pursuant to section 129 of the URAA. This methodology will also be applicable to any reviews currently discontinued by the Department if such reviews are continued after April 16, 2012 by reason of a final and conclusive judgment of a U.S. Court.

#### Classification

Executive Order 12866

The Final Rule has been determined to be not significant for purposes of Executive Order 12866.

#### Regulatory Flexibility Act

The Chief Counsel for Regulation has certified to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”), under the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this action would not have a significant economic impact on a substantial number of small entities. Parties for whom the

Department determines a weighted-average margin of dumping or antidumping duty assessment rate include foreign exporters and manufacturers, some of whom are affiliated with U.S. companies and U.S. importers. Some of these entities affected by the rule may be considered small entities under the SBA standard. The Department has determined that this action will not have a substantial economic impact on a significant number of small entities because the costs associated with antidumping duty liability generally will not increase as a result of the proposed rule. No comments were received regarding the economic impact of this rule. As a result, a final regulatory flexibility analysis is not required and one was not prepared.

#### Paperwork Reduction Act

This action does not contain a collection of information for purposes of the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3501 *et seq.*).

#### List of Subjects in 19 CFR Part 351

Administrative practice and procedure, Antidumping, Business and industry, Cheese, Confidential business information, Countervailing duties, Freedom of information, Investigations, Reporting and recordkeeping requirements.

Dated: February 7, 2012.

**Paul Piquado,**

*Assistant Secretary for Import Administration.*

For the reasons stated, 19 CFR part 351 is amended as follows:

### PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

■ 1. The authority citation for part 351 continues to read as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 *et seq.*; and 19 U.S.C. 3538.

#### Subpart B—Antidumping and Countervailing Duty Procedures

■ 2. Section 351.414 is revised to read as follows:

##### **§ 351.414 Comparison of normal value with export price (constructed export price).**

(a) *Introduction.* This section explains when and how the Secretary will average prices in making comparisons of export price or constructed export price with normal value. (See section 777A(d) of the Act.)

(b) *Description of methods of comparison—(1) Average-to-average method.* The “average-to-average”

method involves a comparison of the weighted average of the normal values with the weighted average of the export prices (and constructed export prices) for comparable merchandise.

(2) *Transaction-to-transaction method.* The “transaction-to-transaction” method involves a comparison of the normal values of individual transactions with the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(3) *Average-to-transaction method.* The “average-to-transaction” method involves a comparison of the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(c) *Choice of method.* (1) In an investigation or review, the Secretary will use the average-to-average method unless the Secretary determines another method is appropriate in a particular case.

(2) The Secretary will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made.

(d) *Application of the average-to-average method—(1) In general.* In applying the average-to-average method, the Secretary will identify those sales of the subject merchandise to the United States that are comparable, and will include such sales in an “averaging group.” The Secretary will calculate a weighted average of the export prices and the constructed export prices of the sales included in the averaging group, and will compare this weighted average to the weighted average of the normal values of such sales.

(2) *Identification of the averaging group.* An averaging group will consist of subject merchandise that is identical or virtually identical in all physical characteristics and that is sold to the United States at the same level of trade. In identifying sales to be included in an averaging group, the Secretary also will take into account, where appropriate, the region of the United States in which the merchandise is sold, and such other factors as the Secretary considers relevant.

(3) *Time period over which weighted average is calculated.* When applying the average-to-average method in an investigation, the Secretary normally will calculate weighted averages for the entire period of investigation. However, when normal values, export prices, or constructed export prices differ significantly over the course of the

period of investigation, the Secretary may calculate weighted averages for such shorter period as the Secretary deems appropriate. When applying the average-to-average method in a review, the Secretary normally will calculate weighted averages on a monthly basis and compare the weighted-average monthly export price or constructed export price to the weighted-average normal value for the contemporaneous month.

(e) *Application of the average-to-transaction method—*In applying the average-to-transaction method in a review, when normal value is based on the weighted average of sales of the foreign like product, the Secretary will limit the averaging of such prices to sales incurred during the contemporaneous month.

(f) *Contemporaneous Month.* Normally, the Secretary will select as the contemporaneous month the first of the following months which applies:

(1) The month during which the particular U.S. sales under consideration were made;

(2) If there are no sales of the foreign like product during this month, the most recent of the three months prior to the month of the U.S. sales in which there was a sale of the foreign like product.

(3) If there are no sales of the foreign like product during any of these months, the earlier of the two months following the month of the U.S. sales in which there was a sale of the foreign like product.

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### INTERNATIONAL TRADE COMMISSION

#### 19 CFR Chapter II

#### Plan for Retrospective Analysis of Existing Rules

**AGENCY:** International Trade Commission.

**ACTION:** Policy statement.

**SUMMARY:** The United States International Trade Commission (Commission) gives notice of the adoption of a plan for the retrospective analysis of its existing regulations.

**FOR FURTHER INFORMATION CONTACT:** Peter L. Sultan, Office of the General Counsel, United States International Trade Commission, telephone 202–205–3094. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal at 202–